

The Supreme Court Nomination of Judge Ketanji Brown Jackson: Initial Observations

February 28, 2022

On February 25, 2022, President Joe Biden [announced](#) the Supreme Court nomination of Judge Ketanji Brown Jackson of the U.S. Court of Appeals for the District of Columbia Circuit (D.C. Circuit). If confirmed, Judge Jackson would fill the vacancy left by the upcoming [retirement](#) of Associate Justice Stephen Breyer, whose jurisprudence is discussed in [another Legal Sidebar](#). This Sidebar provides initial observations about Judge Jackson based on decisions she issued while serving on the federal bench.

Who Is Judge Jackson?

Judge Jackson currently serves on the D.C. Circuit, having been appointed to that position in June 2021. Previously, she served on the U.S. District Court for the District of Columbia since 2013. If confirmed to the Supreme Court, Judge Jackson would be the [first Black woman](#), and the sixth woman overall, to serve on the High Court.

Judge Jackson [received](#) a B.A. from Harvard University and a J.D. from Harvard Law School. She clerked for three federal judges, including Justice Breyer on the Supreme Court, whom she described as an exemplary Justice during [remarks](#) on her nomination. Judge Jackson has [experience](#) in both private practice and public service. She worked at several law firms; most recently, from 2007 to 2010, she practiced appellate litigation with Morrison & Foerster LLP in Washington, D.C. From 2005 to 2007, she served as an Assistant Federal Public Defender in Washington, D.C. Her criminal defense experience is rare among recent Supreme Court nominees: if confirmed, she would be the first Justice since [Thurgood Marshall](#) to have spent significant time as a criminal defense attorney. Judge Jackson also served as Vice Chair and Commissioner of the U.S. Sentencing Commission from 2010 to 2014, and previously worked for the Commission as Assistant Special Counsel from 2003 to 2005. She would be the second Justice, after Justice Breyer, to have [served](#) as a Commissioner.

What Would Judge Jackson's Appointment to the Supreme Court Mean?

Although a Supreme Court nominee's prior judicial decisions, writings, and statements may provide some insight into how she will approach future cases, it is difficult to predict with certainty how a nominee might affect the Court's jurisprudence if confirmed. The Supreme Court often confronts novel legal

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questions that may differ substantially from any a nominee has previously considered. In addition, history provides [multiple examples](#) of Supreme Court Justices whose decisions on the High Court surprised observers familiar with their pre-confirmation reputations. Moreover, the political ideology of the President who nominates a Supreme Court Justice may be an unreliable indicator of how that nominee will approach future cases. A judge may adhere to a *judicial philosophy* that sometimes yields decisions that [differ](#) from the judge's perceived *political ideology*, and there are areas of law where the Court often [does not split](#) along perceived partisan lines.

This uncertainty is especially pronounced when evaluating Judge Jackson because she has spent most of her judicial tenure as a district court judge. There are several reasons why it may be difficult to distill a nominee's judicial philosophy from district court decisions. First, district courts are generally more constrained by precedent than the Supreme Court and the courts of appeals, which may lead district court judges to issue decisions that are different from those they might have reached if they were not so constrained. Judge Jackson [noted](#) during her district court confirmation process that, because of their different role, district court judges, unlike Supreme Court Justices, do not develop "broader legal principles to guide the lower courts," and thus may be less likely to "develop substantive judicial philosophies" to aid them in this task. Second, district courts, again unlike the Supreme Court, consider many cases that are legally straightforward, such as claims requiring the application of settled law as well as frivolous claims by unrepresented parties. Third, district courts confront many issues that—while important to litigants—may not be relevant to the work of a Supreme Court Justice. Trial court judges take an active role in case management throughout the life of a case, rendering procedural decisions and resolving factual disputes that are often not central to appeals.

How Does Judge Jackson Approach Legal Decisionmaking?

Judge Jackson has issued hundreds of judicial decisions during her time on the federal bench, including well over 500 opinions as a district court judge. As of the date of publication, Judge Jackson also authored two appellate court decisions, having served on the D.C. Circuit prior to her nomination for less than nine months. This body of judicial decisions may illuminate how Judge Jackson might approach cases on the Supreme Court if confirmed, subject to the caveats discussed above. The following sections provide initial observations on Judge Jackson's jurisprudence on selected legal issues.

Constitutional Interpretation

Judge Jackson has resolved relatively few cases involving open constitutional questions, offering somewhat limited insight into what [mode of constitutional interpretation](#) she might follow in future cases. During her D.C. Circuit confirmation hearing, the nominee [suggested](#) she would approach constitutional interpretation by looking to the text and its original meaning, following the Supreme Court's lead. Likewise, during her earlier district court confirmation, she [stated](#) she does not agree with a "living Constitution" approach, saying instead that, while "courts must apply established constitutional principles to new circumstances, . . . the meaning of the Constitution itself does not evolve."

The constitutional issues Judge Jackson confronted as a district court judge largely involved relatively settled precedent from the [Supreme Court](#) or [lower courts](#), and did not require her to engage in novel constitutional analysis. For example, in [a case](#) raising a First Amendment challenge, the nominee applied the Supreme Court's general rulings on laws regulating speech, and other federal courts' more fact-specific rulings on similar laws, to hold that the plaintiffs plausibly alleged that a panhandling ordinance was constitutionally invalid. In [another case](#), Judge Jackson relied on precedent from other federal courts to dismiss a civil rights claim arising from an allegedly wrongful arrest. As another example, in [Patterson v. United States](#), the nominee held that a person arrested by the U.S. Park Police for using profanity in a

public park sufficiently pled a violation of his constitutional rights, because the law clearly established that, under the circumstances, his arrest violated the First and Fourth Amendments.

A few cases required a more significant analysis of existing precedent. In *American Meat Institute v. U.S. Department of Agriculture (USDA)*, for instance, Judge Jackson rejected a free speech challenge to a USDA rule requiring “country-of-origin labeling” for certain commodities. The nominee had to determine which of two lines of Supreme Court precedent governed review of the [commercial disclosure requirement](#) at issue. Ultimately, she upheld the regulation after [concluding](#) that the more lenient standard applied. Judge Jackson’s district court ruling in this case was affirmed by a [three-judge panel](#) of the D.C. Circuit; the First Amendment ruling was later confirmed by the D.C. Circuit sitting [en banc](#).

Statutory Interpretation

Justice Jackson has [written](#) that “the North Star of any exercise of statutory interpretation is the intent of Congress, as expressed in the words it uses.” Interpreting statutes as a district court judge, Judge Jackson was often [bound](#) by prior Supreme Court and D.C. Circuit cases, but at times also engaged in original statutory construction. Like most modern judges, Judge Jackson has stressed the primacy of the law’s [text](#) and [structure](#) in statutory interpretation. She has, for example, relied on a statute’s “[plain language](#)” and engaged in close readings that, for example, [stressed](#) the significant differences between the words “assure” and “ensure,” or Congress’s [use](#) of a specific verb tense. She has also looked to established [canons of construction](#), such as the [principle](#) that no statutory language should be rendered superfluous.

The nominee has sometimes taken a [purposive](#) approach to statutory interpretation, asking what outcome a “[rational legislature](#)” would have sought and whether a particular interpretation [serves Congress’s purpose](#). Accordingly, in [one case](#), she enjoined portions of executive orders she decided reflected “*a decidedly different policy choice*” from the one Congress expressly adopted.

Where textual tools do not provide a complete or definitive answer, Judge Jackson has shown a willingness to consider other possible sources of statutory meaning. Like Justice Breyer, Judge Jackson has sometimes [looked](#) to [legislative history](#) to help determine the meaning of ambiguous language. In one of her few opinions for the D.C. Circuit, *Wye Oak Technology, Inc. v. Republic of Iraq*, Judge Jackson disagreed with a sister circuit’s interpretation of the Foreign Sovereign Immunities Act (FSIA). *Wye Oak* concerned the government of Iraq’s claim of sovereign immunity in a contract dispute with an American defense contractor. The case initially proceeded in Virginia federal court and before the U.S. Court of Appeals for the Fourth Circuit (Fourth Circuit), which denied the sovereign immunity claim, applying an FSIA exception for claims arising from certain commercial activities. Following transfer and a subsequent appeal to the D.C. Circuit, Judge Jackson authored a panel decision [concluding](#) the D.C. courts were not bound by the Fourth Circuit’s ruling. Looking to the FSIA’s text, judicial precedent, and legislative history, the court held the Fourth Circuit [improperly applied the FSIA exception](#). However, [concluding](#) that another clause of the commercial activity exception might apply, the D.C. Circuit remanded the case to the district court for further consideration.

Judge Jackson’s [first](#) of several opinions in *Alliance of Artists and Recording Companies (AARC) v. General Motors* also provides a useful illustration of her approach to statutory interpretation. There, Judge Jackson confronted a narrow but complex question of statutory interpretation arising from the [Audio Home Recording Act](#), which requires manufacturers and distributors of “digital audio recording devices” to [implement certain technologies](#) and [pay per-device royalties](#) to the AARC. At issue in the case was whether in-vehicle systems produced “digital audio copied recordings” by reproducing a “digital music recording.” Based on the nominee’s examination of the statute’s plain text, dictionary definitions, statutory context, and the statute’s legislative history, she [ruled](#) that a digital audio copied recording is a digital musical recording. After further proceedings in the case, she granted summary judgment in favor

of the auto manufacturers. On appeal, the D.C. Circuit [affirmed](#) the grant of summary judgment, [citing](#) Judge Jackson’s analysis [favorably](#) in several [instances](#).

Administrative Law

The D.C. federal courts have an “[outsized role](#)” in administrative law, with cases involving executive branch authority comprising a [significant portion](#) of their dockets. Judge Jackson’s district court opinions reflect that focus, with a number of opinions considering the application of the [Chevron doctrine](#)—under which courts review agencies’ interpretations of statutes they administer—and the Administrative Procedure Act (APA), which generally governs judicial review of agency action.

A threshold question in many cases reviewing agency action is [whether the action is subject to judicial review](#). This consideration, similar to *Chevron* deference, implicates the relative roles and expertise of the courts and the political branches. In [Center for Biological Diversity v. Zinke](#), Judge Jackson dismissed a lawsuit seeking to compel the Department of the Interior to complete an assessment of its environmental review policies. The nominee concluded the governing statutes did not authorize courts to grant such relief, [saying](#) that “courts do not, and cannot, police agency deliberations as a general matter.” In [her view](#), “meddling in an agency’s tentative, internal deliberations absent a clear-cut legal mandate to do so risks upsetting the balance between the judicial and administrative functions that Congress struck in the APA.”

Judge Jackson reached different conclusions in two cases that posed the question of how much discretion Congress had given to agencies. In [one case](#), she held that the Coast Guard’s decision to impose certain conditions on the release of a foreign-flagged vessel was nonjusticiable as an issue Congress intended to commit fully to agency discretion. In a different case, by contrast, the nominee [held](#) that the Department of Homeland Security violated procedural requirements when it announced it would expand the use of expedited removal—a streamlined immigration removal process typically employed against persons encountered at the border unlawfully entering the United States—to unlawful entrants in the interior of the United States who had been present in the country for less than two years. That decision was reversed on appeal when the D.C. Circuit [concluded](#) the matter had been “committed to the Secretary’s ‘sole and unreviewable discretion.’”

Administrative law cases often involve close questions of statutory interpretation that ask whether an agency has complied with governing law. In district court cases involving a variety of factual circumstances, Judge Jackson invalidated agency action as exceeding the authority Congress granted. In a 2014 case, for instance, she [ruled](#) that the U.S. Food and Drug Administration acted improperly when it refused to recognize that a drug was entitled to a marketing exclusivity period—a result that, in her view, the statute unambiguously required. In a more recent case, [Kiakombua v. Wolf](#), Judge Jackson vacated portions of 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 might be subject to further review. She [believed](#) that portions of the manual were “manifestly inconsistent with the two-stage asylum eligibility framework” established by the governing statute, and other portions were “unreasonable interpretations of the . . . statutory scheme.”

Judge Jackson’s first opinion for the D.C. Circuit, [American Federation of Government Employees, AFL-CIO v. Federal Labor Relations Authority \(FLRA\)](#), similarly invalidated an agency action. That case involved a challenge to an FLRA policy statement limiting the circumstances under which changes to working conditions would require covered federal employers to engage in collective bargaining with their employees’ representatives. In an opinion for a three-judge panel, Judge Jackson held that the FLRA’s decision to raise the threshold for collective bargaining violated the APA’s arbitrary-and-capricious standard, [concluding](#) the FLRA’s “cursory policy statement” was insufficient to “justify its choice to abandon thirty-five years of precedent” that was contrary to the newly adopted threshold.

In other cases, Judge Jackson upheld agency interpretations of their governing statutes when she concluded those interpretations were [reasonable](#). For instance, in *American Meat Institute v. USDA*, discussed above, the nominee held the plaintiffs likely could not show that the governing statute implicitly precluded the agency's interpretation of the relevant labeling laws.

Federal Court Jurisdiction and the Constitutional Separation of Powers

One issue that may be of particular interest to Congress is Judge Jackson's approach to cases implicating the constitutional separation of powers. In several cases, Judge Jackson considered whether a plaintiff's claim was [justiciable](#)—that is, capable of resolution in federal court. The doctrine of justiciability considers the proper role of courts in the United States' constitutional system. Perhaps the most significant of these cases is *Committee on the Judiciary v. McGahn*. In that case, the executive branch claimed that former White House Counsel Donald McGahn had absolute immunity from compelled congressional testimony, in part because the Constitution required that dispute to be resolved “[in the political arena](#)” rather than in courts. Judge Jackson rejected that contention, holding that issues such as the validity and enforceability of a congressional subpoena [presented](#) “straightforward, fully justiciable questions of law.” Although as a historical matter, courts rarely resolved interbranch information disputes, Judge Jackson [concluded](#) this history did not demonstrate courts' infirmity in these matters, but merely reflected the fact that the executive branch had “wisely picked its battles.” *McGahn* received extensive consideration in the D.C. Circuit, which ultimately [reached](#) the same conclusion as [Judge Jackson](#) concerning Article III standing, before dismissing the appeal at the request of the parties following McGahn's testimony.

Judge Jackson reached the opposite conclusion concerning justiciability in *Mobarez v. Kerry*. There, American citizens and lawful permanent residents sought to [compel](#) their evacuation from Yemen. Judge Jackson [stated](#) that their claims concerned a foreign affairs function the Constitution committed to the President's discretion; the President's exercise of that discretion was a non-justiciable political question.

Judge Jackson again confronted an interbranch information dispute in *Trump v. Thompson*, a D.C. Circuit case that has [received](#) particular [attention](#) from [commentators](#). In that case, Judge Jackson was a member of a three-judge panel that considered a request for certain presidential records made by the House Select Committee to Investigate the January 6th Attack on the United States Capitol. Former President Trump claimed that some of the records were subject to executive privilege; however, President Biden declined to invoke executive privilege to withhold the documents. Responding to former President Trump's request for an injunction barring disclosure, Judge Jackson joined an opinion denying the request and [holding](#) that “former President Trump has provided no basis for this court to override President Biden's judgment and the agreement and accommodations worked out between the Political Branches over these documents.” The Supreme Court [declined to pause](#) the D.C. Circuit's decision pending appeal and ultimately [denied the petition for a writ of certiorari](#), allowing the appeals court's decision to stand.

Judge Jackson's district court tenure also required her to decide whether Congress had by statute foreclosed district courts from considering particular claims. In addition to the administrative law decisions discussed above, another example is *American Federation of Government Employees, AFL-CIO v. Trump*, involving a challenge to certain executive orders relating to the federal civil service and collective bargaining rights. Judge Jackson [said](#) the case implicated fundamental separation-of-powers principles relating “to the power of the Judiciary to hear cases and controversies that pertain to federal labor-management relations; the power of the President to issue executive orders that regulate the conduct of federal employees in regard to collective bargaining; and the extent to which Congress has made policy choices about federal collective bargaining rights that supersede any presidential pronouncements or priorities.” In resolving the roles and powers of the three branches in this dispute, the nominee [held](#) that Congress had not precluded federal court jurisdiction over the claim. As one of several factors leading to this conclusion, Judge Jackson [noted](#) that if the claims were sent to administrative review, the plaintiffs

would have no meaningful judicial review of their claims in the D.C. Circuit. She also [observed](#) that while the President possesses some inherent authority to act in the field of federal labor-management relations, the exercise of that authority may be constrained where Congress has legislated pursuant to its own enumerated powers. Here, Judge Jackson held that portions of these particular executive orders were invalid [because](#) they conflicted with congressional intent, “eviscerat[ing] the right to bargain collectively” that Congress enshrined in statute. On review, the D.C. Circuit [disagreed](#) with Judge Jackson’s jurisdictional ruling, holding that the plaintiffs’ claims instead had to follow a statutory administrative review process.

Other Notable Cases

In addition to the cases discussed above, Judge Jackson authored a number of opinions that have garnered attention from some legal observers. For instance, in [Pierce v. District of Columbia](#), Judge Jackson considered disability discrimination and retaliation claims brought by a deaf man who was incarcerated without being offered accommodations such as an American Sign Language interpreter. Judge Jackson [ruled](#) in favor of the plaintiff on the discrimination claims, finding that prison staff engaged in intentional discrimination when they “did *nothing* to evaluate [the plaintiff’s] need for accommodation, despite their knowledge that he was disabled.”

Another example is an environmental law case Judge Jackson decided as a district court judge. In [Guam v. United States](#), the nominee addressed whether the Territory of Guam could recoup costs from the United States for the cleanup of a contaminated landfill under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). CERCLA provides [two different avenues](#) for parties to recover cleanup costs from other potentially responsible parties: [cost-recovery actions](#) and [contribution actions](#). These two avenues are mutually exclusive; if a party has “resolved” its liability to the United States for some or all of a response action, it [must proceed](#) with a contribution action and is barred from proceeding with a cost-recovery action. Judge Jackson [ruled](#) that Guam could pursue a cost-recovery claim against the United States. Analyzing the plain meaning of the relevant statutory terms and considering relevant caselaw and factual history, she held that an earlier consent decree addressing Clean Water Act violations at the landfill did not “resolve” Guam’s liability for purposes of triggering a contribution claim. On appeal, the D.C. Circuit acknowledged that Judge Jackson’s opinion was “[thorough](#),” but [reversed and remanded](#) the case, holding that Guam could not seek cost recovery, and that its contribution claim was time-barred. However, in a unanimous opinion, the Supreme Court [reversed](#) the D.C. Circuit’s judgment, agreeing with Judge Jackson that Guam’s cost-recovery claim could proceed.

Additional CRS Resources on Nominations

CRS is preparing additional products related to Judge Jackson’s nomination that will provide further discussion of her notable judicial rulings in these and other areas. For a discussion of Justice Breyer’s legacy, see [this post](#). Additional reports discuss the appointment process generally: in particular, the President’s [selection](#) of a nominee, [consideration](#) by the Senate Judiciary Committee, and [questioning](#) of judicial nominees.

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