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Invited **Review Article**

KETANJI BROWN JACKSON: LEGAL PHILOSOPHY OF A ROOKIE SUPREME COURT JUSTICE

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KETANJI BROWN JACKSON: LEGAL PHILOSOPHY OF A ROOKIE SUPREME COURT JUSTICE

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This article provides an overview of The Honorable Ketanji Brown Jackson's legal philosophy, as gleaned from her decisions on the district court and the court of appeals along with her other writings and public statements. After a 'brief as a breath' and 'slim as a Pop-Tart' section providing a biographical sketch of Justice Jackson, the article offers context, absent a fortune teller's crystal ball or a statistically reliable aphorism or prophecy tucked inside a crisp sugary wafer, for understanding how a judge's background might inform her analysis or enlighten predictions about her potential contributions to a Supreme Court of the United States split by sharp, Grand Canyon-sized ideological differences. It strives to objectively appraise her performance as a judge sitting on two lower courts and dispassionately review her decisions trusting that they present a snapshot of broad areas of judicial philosophy, such as constitutional interpretation, statutory interpretation, and stare decisis. Finally, the invited review article takes a deep dive and explores select legal topics of particular interest given the Supreme Court's docket concentrating primarily on the substance of Jackson's judicial decisions rather than reviewing materials she prepared while representing clients because when an attorney acts as an advocate for a party in litigation, her arguments on behalf of that party may provide limited insight into that attorney's own views and preferences.

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I. INTRODUCTION

There is only one Courtroom in the Supreme Court Building and it sits at its heart — a symbolic reminder of its importance. Inside the Marble Palace on the main floor, at the end of the Doric column-lined Great Hall populated in chronological order with the marble busts of all 16 former Chief Justices, the Courtroom is as magnificent a setting as exists in American government, a testament to the splendor of Italian and Spanish marble. The Oval Office at the White House is comparatively small, decorated with furniture arranged on a human scale. By contrast, the gold-trimmed Supreme Chamber is a tableau of grandiosity — 82 feet long by 91 feet wide, flanked by massive windows and 24 columns, crafted from Old Convent Quarry Siena marble imported from Liguria, Italy, with richly colored sunken panels, or coffers, tucked into the four-story-high ceiling. Its walls and friezes are of Ivory Vein marble quarried in the several-thousand-year-old port city of Alicante, Spain; its floor borders are imported Italian and Algerian marble. Above the columns are friezes — four sculpted marble panels each measuring 40 feet long by 7 feet 2 inches high — depicting historic lawgivers ranging from Confucius to Moses to the Prophet Muhammad.

On the first Monday in October 2022, after the Justices all shake hands in the small robing room across the hallway from the back of the Courtroom, they line up awaiting the distinctive sound of the Marshal's gavel. If there is an assembled throng, they would grow silent, then arise.

Preserving punctuality, as always, the Marshal chants *Oyez! Oyez! Oyez!* at the stroke of 10 a.m. displayed on a stately clock with Roman numerals that overlooks the bench.

The nine justices, including Ketanji Brown Jackson, emerge from behind tall crimson velvet drapes and somberly take their upholstered swivel chairs. A custom bench chair is crafted each time a new Justice joins the Court. Although each Justice receives their own chair, they are designed to appear uniform. When a Justice dies or retires, their chair is removed, leaving a vacant spot until a new Justice is confirmed. Justice Jackson will take her seat behind the elevated Honduran mahogany bench, altered in 1972 from a straight-line to a winged or crescent shape so that the justices can better see each other and to provide sound advantages over the original design.

The Chief Justice, John Glover Roberts Jr., calls balls and strikes from the center with the eight associate Justices alternating batting order by seniority. The most senior justice sits to the Chief's immediate right, the next most senior justice sits to the Chief's immediate left, and so on. The rookie, junior Justice Ketanji Brown Jackson, sits at the far left. Playing left field has its advantages because the lighting is more cheerful, and, on both extremes of the bench, there is an extra shelf to put briefs on. In a nod to tradition, each Justice gets a pewter mug of water and, with a wink to custom, a porcelain spittoon that serves as a wastebasket.

"*All persons having business before the Honorable, the Supreme Court of the United States, are admonished to draw near and give their attention, for the Court is now sitting*," the Marshal continues. As always, "*God save the United States and this Honorable Court!*"

It is a carefully choreographed opening worthy of *Hail to the Chief*, the introductory anthem for the leader of another branch of the federal government. The justices do not merely walk in, and they are not already seated when the Court session begins. From different curtains, they materialize

in unison, in three groups based on where they sit. As institutional stagecraft goes, it is quite the show.

At the corner of East Capitol and First in Washington, D.C., across the street and a world away from the workaday Congress, resides the Marble Palace. Its proximity to Congress serves as a reminder of the looming power of the government's third branch. Built on the site of a prison for captured Confederates — the prison held Mary Surratt, Samuel Mudd, and others arrested after President Abraham Lincoln's assassination — the Court is the closest thing we have to a secular shrine. When its cornerstone was laid in 1932, amid the Great Depression, Charles Evans Hughes, the Chief Justice, proclaimed, "*The Republic endures and this is the symbol of its faith*."

To the *Oyez! Oyez! Oyez*! chant of the Marshal on crisp autumn's first Monday in October 2022, The Honorable Justice Ketanji Brown Jackson emerges in black robes from behind tall crimson velvet drapes, ascends the bench for the first time, replacing Associate Justice Stephen G. Breyer, one of the many white men who preceded her, to sit in her custom bench chair for the first time. There will, for the first time, be four women on the Court. There will, for the first time, be two Black justices. And a Latina. The Supreme Court of the United States now looks more like the nation it serves. The rich traditions of the Court continue.

II. A BIOGRAPHY, BRIEFLY

Is there any value in judicial biographies?[2] By analogy, do we need to know about Frank Lloyd Wright's personal life to recognize that his prairie and Usonian houses are architectural masterpieces? Must one read Mozart's musical diary to enjoy the good humor, exuberant energy, melodic invention, emotional depth, and unusually grand scale of his Jupiter Symphony? Do we need to discover who really wrote Shakespeare's plays to ride *Hamlet's* emotional rollercoaster? Judicial opinions, like architecture, music, and theatre, are the product of a creative process.

Supreme Court opinions, like Justices, come in all shapes and sizes. A short, succinct opinion might convey the finding and supporting analysis while never outstaying its welcome, unlike a lengthy, meandering opinion that frustrates and confuses. Justices have distinct writing styles, brevity versus verbosity, for example, and habits — the good, the bad, and the ugly — acquired over the years.[3] Is the majority, concurring, or dissenting opinion author's background beside the

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[2] *See generally*, Melvin L. Urofsky, *Beyond the Bottom Line: The Value of Judicial Biography*, J, SUP. CT HIST. 143, 145-148 (1998).

[3] *See e.g.*, Transcript, *Justice Elena Kagan on Public Confidence in Supreme Court*, C-SPAN (July 21, 2022) (during an appearance at the U.S. Court of Appeals Ninth Circuit's judicial conference in Big Sky, Montana, on July 21, 2022, Justice Kagan spoke about, among other topics, her thought process on getting to an opinion and legal writing stating: "It's a very personal thing as to how we learn a case and how you decide a case and how you write an opinion if the opinion is yours to write.").

> [O]n the [U.S. Supreme] Court … the best judicial writers … have personal styles and … styles that differ from one another. I can pick up an opinion and know it was written by [Justice] Holmes[, for example]. I can read a [Justice] Robert Jackson opinion and know it was written by Robert Jackson. I could pick up a Nino [a fond nickname for Antonin] Scalia briefing and know it was Nino Scalia. They all have personal styles and they are different from one another. You cannot copy somebody else's style; it just doesn't work. … I think great judicial opinion writing … is having a great writing style which is your own. … How much you indulge that style … depends a lot on whether an opinion is a majority or dissent. … This is a small example but meant to illustrate

point? Perhaps. Even so, a judicial biography, especially of Supreme Court justices, enables us to better understand opinion generation and evolution and the judicial process of a Court shrouded in priestly secrecy and its role as one of the three branches of government.[4]

As more people fully realize that some Supreme Court opinions can profoundly and sometimes immediately impact their lives, they become curious about the Court and, especially, its nine justices.[5] The drama of cases deemed worthy of their attention traces to the "petition for certiorari" -- a request that the Supreme Court hear a case. The highest court in the land, simply by selecting a case, instantly lifts the lives and human situations it contains to prominence. Its rulings affect not only the two contesting parties, known as petitioner and respondent, but also may change life for all Americans for generations.[6]

> the larger point. … I circulated an opinion that had contractions in it, and one of my colleagues [that is, another Justice] called me and said he did not like contractions. I don't mean to make fun of this at all. He thought they were too informal. He thought that court opinions should have certain kinds of formality, should have a certain kind of salinity. I understand why he was saying that. If you look at my opinions, my majority opinions never have a contraction. My dissents have contractions all the time. … I think most of my favorite [Supreme Court] opinions are either concurrences or dissents.

Id.

See, e.g., John Nielson, *Writing Like Chief Justice Roberts*, APP. ADVOC. BLOG (July 27, 2022) (rhapsodizing that "Chief Justice John G. Roberts Jr. — along with Justice Elena Kagan — has long been reputed to be one of the best writers on the current court" and examining the Chief's writing style using his majority opinion in *Trump v. Vance*, 140 S. Ct. 2412 (2020), "which struck [Nielson] as a particularly 'Roberts-y' opinion"); Tony Mauro, *The Marble Palace Blog: Justice Barrett's 'Austere and Desert-Like' Writing Style*, NAT'L L.J. (July 27, 2022) ("think[ing] she is an equally attractive writer [as Justice Kagan], and she uses many of the same principles that Justice Kagan uses, but she uses it so differently," describing "[h]er style [a]s so much starker and direct," and referencing comments from John Nielsen's analysis of Barrett's style); John Nielson, *Writing Like Justice Barrett*, APP. ADVOC. BLOG (July 19, 2022) (picking apart Justice Barrett's writing style, showing that Barrett shares some techniques with Justice Elena Kagan, but executes them in a very different way and in very different style).

[4] *Urofsky*, *supra* note 1, at 148-154.

[5] *See, e.g. Dobbs v. Jackson Women's Health Org*., 587 U.S. ___ (2022) (overruling landmark case *Roe* ***v****. Wade*, 410 U.S. 113 (1973), and *Planned Parenthood v. Casey*, 505 U.S. 833 (1992), eliminating the constitutional right to abortion); *Obergefell v. Hodges*, 576 U.S. 644 (2015) (ruling in a landmark case that the fundamental right to marry is guaranteed to same-sex couples by both the Due Process Clause and the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution).

[6] The Supreme Court has issued dozens of landmark rulings during its 233-year history, and many shaped American government and the breadth of individual rights. While some did not endure, such as the 1857 "Dred Scott" ruling, all reflect the mood of the court and dilemmas facing the country at historic junctures. *See, e.g.,*

- ***Marbury v. Madison***, 5 U.S. 137 (1803). Asserting the court's power to review acts of Congress and invalidate those that conflict with the Constitution. When incoming President Thomas Jefferson refused to honor last-minute appointees of President John Adams, one of those appointees, William Marbury, sued the new secretary of state, James Madison, and asked the Supreme Court to order Madison to deliver his commission as a justice of the peace. The court said it lacked the power to do this because the law that Congress passed authorizing the court to issue such orders had gone further in granting power than the Constitution allowed. The case, while limiting the court's power in this instance, ultimately established its power to declare acts of Congress unconstitutional.
- ***McCulloch v. Maryland***, 17 U.S. 316 (1819). In ruling that Congress has authority to charter a national bank, the court said Congress had broad power to enact all laws that are "necessary and proper." The ruling became a benchmark for the court's approval over the decades of broad national involvement in economic and social programs.
- ***Scott v. Sandford***, 60 U.S. 393 (1857). Declaring that Congress had no authority to prohibit slavery in the territories. Dred Scott, a Missouri slave who had traveled to and worked in "free" states and territories, asserted that he should be entitled to his freedom under the legal principle, "once free, always free." But the court said Blacks could not achieve U.S. citizenship and therefore could not sue

Like Toto in the penultimate scene of the 1939 film classic *The Wizard of Oz*, we want to pull back the crimson curtain to reveal the Justices who author those consequential opinions. This section begins by excerpting Justice Ketanji Brown Jackson's official Supreme Court biography and then highlights aspects of her background likely to shape her actions on the Court.[7] It strives to avoid a formulaic presentation and veers from a stereotypic standard chronological recitation. Instead, it favors 'brief as a breath' and 'slim as a Pop-Tart' segments to inform and enlighten.

The official biographical sketch crafted by the Supreme Court of the United States about its rookie associate justice does not give readers a peek under the hood but does, in elevator pitch fashion, supply the basics for the rider. It reads:

> **Ketanji Brown Jackson, Associate Justice,** was born in Washington, D.C., on September 14, 1970. She married Patrick Jackson in 1996, and they have two daughters. She received an A.B., *magna cum laude,* from Harvard-Radcliffe College in 1992, and a J.D., *cum laude,* from Harvard Law School in 1996.[8] She served as a law clerk for Judge Patti B. Saris of

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in federal courts. Ruling that Congress could not abolish slavery in the territories, the court also declared the Missouri Compromise of 1820 unconstitutional. The ruling, which helped to precipitate the Civil War, has long been considered one of the court's great "self-inflicted" wounds.

- ***Brown v. Board of Education of Topeka***, 347 U.S.483 (1954). Striking down the "separate but equal" doctrine that the court established in *Plessy v. Ferguson*, 163 U.S. 537 (1896), which permitted racial segregation of public facilities. In a case consolidating several challenges to segregation of public schools, the court concluded "that in the field of public education the doctrine of 'separate but equal' has no place. Separate educational facilities are inherently unequal." The opinion spurred a social revolution and changes in race relations across America.
- ***New York Times Co. v. Sullivan***, 376 U.S. 254 (1964). Ruling for the first time that the First Amendment covers libelous statements. The court said public officials may not win damages for defamatory statements regarding their official conduct unless they can prove actual "malice," that is, that the statements were made knowing that they were false or with reckless disregard of whether they were true or false.
- ***Miranda v. Arizona***, 384 U.S. 436 (1966). Requiring police to inform suspects in custody of their right to remain silent, that anything they say may be used against them and that they have a right to representation by a lawyer before interrogation. At the time, the 5-4 decision distressed law enforcement and outraged then-President Richard M. Nixon and other politicians, but the decision endured.

[7] In addition to sources cited in the footnotes *infra*, the biographical material in this section is drawn from the following sources: *Current Members, Supreme Court of the United States*, SUPREME COURT OF THE UNITED STATES (June 30, 2022) (sharing professional biography); *U.S. Supreme Court Nomination: Ketanji Brown Jackson*, LIBR. OF CONGRESS (July 30, 2022) (same); *Ketanji Brown Jackson*, U.S. COURT OF APPEALS DISTRICT OF COLUMBIA CIRCUIT (July 30, 2022) (same); *Jackson, Ketanji Brown,* FEDERAL JUDICIARY CTR. (July 30, 2022) (same); Aspen Publishers Editorial Staff, *Almanac of the Federal Judiciary*, 2 ALMANAC FED. JUD. 5 (4th ed. 2021) (same); *Questionnaire for Nominee to the Supreme Court*, U.S. S. COMM. ON THE JUDICIARY (117th Cong. 2022) [hereinafter *Senate Judiciary Questionnaire*]; Amy Howe, *Profile of a Potential Nominee: Ketanji Brown Jackson*, SCOTUSBLOG (Feb. 1, 2022) (reviewing Jackson's early life and career, her federal district judgeship, time on the U.S. Court of Appeals for the District of Columbia Circuit, and personal life); Amy Howe, *Profile of a Potential Nominee: Ketanji Brown Jackson*, HOWE ON THE COURT (Feb. 1, 2022) (same).

[8] What law schools did the present Supreme Court Justices graduate from?

- Chief Justice John G. Roberts Jr.: Harvard (1979)
- Justice Clarence Thomas: Yale (1974)
- Justice Samuel A. Alito Jr.: Yale (1975)
- Justice Sonia Sotomayor: Yale (1979)

> the U.S. District Court for the District of Massachusetts from 1996 to 1997, Judge Bruce M. Selya of the U.S. Court of Appeals for the First Circuit from 1997 to 1998, and Justice Stephen G. Breyer of the Supreme Court of the United States during the 1999 Term. After three years in private practice, she worked as an attorney at the U.S. Sentencing Commission from 2003 to 2005. From 2005 to 2007, she served as an assistant federal public defender in Washington, D.C., and from 2007 to 2010, she was in private practice. She served as a Vice Chair and Commissioner on the U.S. Sentencing Commission from 2010 to 2014. In 2012, President Barack Obama nominated her to the U.S. District Court for the District of Columbia, where she served from 2013 to 2021. She was appointed to the Defender Services Committee of the Judicial Conference of the United States in 2017, and to the Supreme Court Fellows Commission in 2019. President Joseph R. Biden, Jr. appointed her to the United States Court of Appeals for the District of Columbia Circuit in 2021 and then nominated her as an Associate Justice of the Supreme Court in 2022. She took her seat on June 30, 2022.[9]

Jackson's undeniably formidable scholarly credentials, an avalanche of professional experience, and gold-plated résumé are remarkably similar to those of other Justices who have joined the Supreme Court in recent years.[10] Yet, it is fair to say that she has much more in common with the Associate Justice she is replacing — Stephen G. Breyer (who succeeded the liberal, eccentric Harry A. Blackmun). Like Breyer,

> [Jackson] was a star student at an excellent public high school. Her father, like [Breyer's], worked as a lawyer for a big-city school board (Miami in her case, San Francisco in his). Success at Harvard Law School propelled them both to a Supreme Court clerkship (in fact, she clerked for him). Justice Breyer is often referred to as the father of the federal sentencing guidelines and served on the original United States Sentencing Commission, where she later served as vice chair.[11]

In drawing parallels, the author purposefully avoids emphasizing race. Yes, her confirmation fulfills President Joe Biden's campaign promise to appoint a Black woman, the first to sit on the high tribunal. Yes, her confirmation is cause for celebration by most, but it should not obscure other kinds of diversity Associate Justice Jackson brings to the Supreme Court.

The dimensions of diversity include race as well as other components, with perspective among the most important. That she is the first former public defender to sit on the Supreme Court has received ample attention less so that as a public-school graduate she is a rarity among the Justices.

- Justice Elena Kagan: Harvard (1986)
- Justice Neil M. Gorsuch: Harvard (1991)
- Justice Brett M. Kavanaugh: Yale (1990)
- Justice Amy Coney Barrett: Notre Dame (1997)
- Justice Ketanji Brown Jackson: Harvard (1996)

[9] *Current Members*, SUPREME COURT OF THE UNITED STATES (June 30, 2022) (sharing professional biographical information).

[10] *See, e.g.*, Valerie C. Brannon et al., *Judge Amy Coney Barrett: Her Jurisprudence and Potential Impact on the Supreme Court*, CONG. RES. SERV. (Oct. 6, 2020); Andrew Nolan et al., *Judge Brett M. Kavanaugh: His Jurisprudence and Potential Impact on the Supreme Court*, CONG. RES. SERV. (Aug. 21, 2018); Andrew Nolan et al., *Judge Neil M. Gorsuch: His Jurisprudence and Potential Impact on the Supreme Court*, CONG. RES. SERV. (Mar. 8, 2017) [hereinafter *Gorsuch Jurisprudence*].

[11] Linda Greenhouse, *What Kind of Story Will Ketanji Brown Jackson Tell Her Fellow Justices?*, N.Y. TIMES (Mar. 4, 2022).

Associate Justice Breyer's graceful exit and well-timed retirement leaves just two others, Associate Justice Elena Kagan, who attended the choosy, hardly typical, highly selective Hunter College High School in Manhattan, the most densely populated and geographically smallest of the five boroughs of New York City. And Associate Justice Samuel A. Alito, Jr., who attended Steinert High School in Hamilton Township, New Jersey, near his hometown of Trenton, the site of George Washington's first military victory after a logistically challenging and dangerous crossing of the icy Delaware River during the American Revolutionary War on December 26, 1776. Every other member of the Supreme Court is a graduate of a Catholic high school, a striking, but little-observed or commented upon fact at a time when cases concerning public and religious schools and the relationship between the two are prominent on the Supreme Court docket.

A. *The Company They Keep*

Again, it is fair to recognize that Ketanji Brown Jackson has much in common with the 84-year-old justice she is replacing. Stephen G. Breyer's wife, Joanna, is a clinical psychologist who worked with children being treated for cancer at the Dana-Farber Cancer Institute in Boston, Massachusetts. Does having a medical professional in the family explain, in whole or part, the Proust-loving, French-fluent Breyer's emphasis on facts and evidence in his opinions involving medical issues?[12] With medical questions hardly likely to fade from the Supreme Court docket, it is worth mentioning that rookie Justice Jackson's husband and college sweetheart, Patrick, is a surgeon.[13] (Also of interest, Associate Justice Sonia Sotomayor's brother, Juan, is a doctor with an allergy practice in upstate New York.) Some conservative justices give the impression of thinking physicians do not act in the interest of their patients, whether performing abortions or administering vaccines. Perchance Justice Jackson, under the shadow of concerns about the legitimacy of the institution in the eyes of the public, will be able to persuade them otherwise. Or maybe not, but the point is that we cheat ourselves out of a full appreciation of what a new Justice brings to the Supreme Court if race is the sole focus. The company Justices keep is relevant.

B. *The Ear of a Counsellor: A Lost Perspective Regained?*

Ketanji Brown Jackson was born in Washington, D.C. in 1970, 62 years after Supreme Court Justice Thurgood Marshall was born into segregation in 1908. Figuratively, she walks through doors that he pried open, and literally, on the scenic route to her chambers, she walks up 44 broad majestic steps before passing through two 6½-ton sliding bronze doors behind columns of the front portico centered below an engraved façade reading *EQUAL JUSTICE UNDER LAW*.

Jackson's experience as a public defender, and a Black woman, undeniably has the potential to broaden the perspectives of fellow Justices which could, over time, shape case outcome outcomes. It may even nudge one or more of the Justices to approach an array of issues differently. It certainly

[12] *See, e.g.*, Nat'l Fed'n Indep. Bus. et al. v. Dep't Labor, Occupational Safety & Health Admin., 595 U.S. ___ (2022) (per curiam) (deciding if OSHA exceeded its authority in promulgating a rule mandating that employers with at least 100 employees require covered workers to receive a COVID-19 vaccine or else wear a mask and be subject to weekly testing).

[13] Emily Burack, *Everything to Know About Dr. Patrick Jackson, Husband of Judge Ketanji Brown Jackson*, TOWN & COUNTRY MAG. (June 30, 2022) ("joining the supportive spouse club in Washington, D.C.").

did for the colleagues of Justice Thurgood Marshall, one of the architects of the civil rights movement and the Supreme Court's first Black member.

Months after Thurgood Marshall stepped down from the bench, Associate Justice Sandra Day O'Connor, who served with the civil rights icon for a decade, penned a generous, appreciative, and an unusually personal essay[14] describing "***the special perspective***" her departed colleague brought to the highest court in the land. [15] Listening to heart-pounding stories recounted from his action-filled days of dismantling Jim Crow laws, the first woman to serve on the Supreme Court recalled sitting at the table with the older man during the Justices' private conference, "hoping to hear, just once more, another story that would, by and by, perhaps change the way [O'Connor] see[s] the world."[16] O'Connor wrote of the "profound[] influence[]" Marshall had on her, and on the Supreme Court more broadly, during his judicial career:

> Although all of us come to the [U.S. Supreme] Court with our own personal histories and experiences. Justice [Thurgood] Marshall['s] … was the eye of a lawyer who saw the deepest wounds in the social fabric and used the law to help heal them. His was ***the ear of a counselor*** who understood the vulnerabilities of the accused and established safeguards for their protection. His was the mouth of a man who knew the anguish of the silenced and gave them a voice.[17]

The influence of that perspective, O'Connor explained, was not merely atmospheric or ephemeral. Rather, during "oral arguments and [in] conference meetings, in opinions and dissents, Justice [Thurgood] Marshall imparted" to his colleagues "his life experiences," including, quite often, his experiences as a criminal defense attorney representing the indigent.[18] And through those experiences, he contextualized for the Justices what "legal briefs often obscure: the impact of legal rules on human lives,"[19] including lives directly affected by the daily administration of the criminal law.

When Justice Thurgood Marshall retired from the Supreme Court, the institution lost that "special perspective." No Justice, other than Marshall, "had ever visited a client in jail or, even more to the point perhaps, negotiated a guilty plea with an overbearing prosecutor."[20] Has the Court regained this perspective in the form of Ketanji Brown Jackson, someone who has stood in the well of a courtroom and represented an individual criminal defendant at trial? Will this Justice with an "ear of a Counsellor" inspire any of her new colleagues to see the world differently?

Justice Byron White wrote that "[w]hile every new Justice makes the Court a somewhat different institution," Thurgood Marshall told his colleagues, as Justice White reflected, "things that we

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[14] Sandra Day O'Connor, *Thurgood Marshall: The Influence of a Raconteur*, 44 STAN. L. REV. 1217-20 (1992).
[15] *Id*. at 1217 (emphasis added).
[16] *Id*.
[17] *Id*. (emphasis added)
[18] Indeed, in describing the influence of Marshall "the raconteur," *id.* at 1220, Justice O'Connor writes almost exclusively of experiences he shared from time spent representing criminal defendants. *Id*. at 1217–20.
[19] *Id*. at 1218.
[20] *Id*. at 1217.

knew but would rather forget; and he told us much that we did not know due to the limitations of our own experience."[21]

The author reminds readers that there is not a Sandra Day O'Connor lurking within today's conservative majority, and the heroic trajectory of Thurgood Marshall's life is not Justice Ketanji Brown Jackson's story. That said, at oral arguments and conferences, in opinions and dissents, Jackson, like Thurgood Marshall, can impart not only her legal acumen but also her life experiences. And like the civil rights icon, Jackson can push and prod other Justices to respond not only to the persuasiveness of her legal argument but also to the power of her moral truth.

C. *Experience as a Lawyer: Clerking at each Level of the Federal Judiciary*

At the outset of her career, Ketanji Brown Jackson clerked at each level of the federal judiciary. She clerked for three federal judges appointed by Presidents of both parties. She first served as a law clerk to the Honorable Patti B. Saris on the United States District Court for the District of Massachusetts (appointed by President William Jefferson Clinton), followed by a year with the Honorable Bruce M. Selya on the United States Court of Appeals for the First Circuit (appointed by President Ronald Wilson Reagan). After a year in private practice, she then clerked for President Bill-Clinton appointee Associate Justice Stephen G. Breyer[22] on the Supreme Court from 1999 to 2000. Jackson as a law clerk for Justice Breyer had a certain luxury because law clerks are many things, but ultimately the skirmishes are not theirs to fight. The battles are now Jackson's to win or lose.

Since the hiring of the first Supreme Court law clerk by Justice Horace Gray in the late 1880s, court observers and the general public have been fascinated with law clerks and (the real or imagined) influence they wield over judicial decisions. While initially, each Supreme Court justice hired a single clerk, today's justices can hire up to four clerks. In fact, Justice Jackson has hired her team — the Jackson Four[23] — for the October 2022 Term. The justices take full advantage of this resource, and in modern times law clerks have been given greater job duties and more responsibility. Changes in the Court drive changes in the clerkship institution. Any changes in the

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[21] Byron R. White, *A Tribute to Justice Thurgood Marshall*, 44 STAN. L. REV. 1215 (1991-1992).

[22] Digital Library Collection, *Judicial Nominations of Ruth Bader Ginsburg and Stephen Breyer*, **WILLIAM J. CLINTON PRESIDENTIAL LIBR. & MUSEUM** (2022).

> [C]onsist[ing] of material dealing with President Clinton's nomination of Ruth Bader Ginsburg in 1993 and Stephen Gerald Breyer in 1994 to the United States Supreme Court. The nuts and bolts of the nomination process can be seen in correspondence, memoranda, reports, lists, notes, and papers that highlight the contributions of the Counsel's Office to the easy manner in which the two nominees breezed through confirmation proceedings in the Senate. The writings of the two justices in the form of scholarly articles, speeches, interviews, decisions, and opinions are documented in extensive detail. A sizable portion of the records is devoted to Breyer's investment in Lloyd's of London — much of which has been closed for reasons of privacy.

Id; see also, Adam Sabes, *Bill Clinton's Influence on Supreme Court to End with Breyer Departure*, FOX NEWS (Jan. 26, 2022); NCC Staff, *Stephen Breyer's Path to the Supreme Court*, NAT'L CONST. CTR. (Aug. 3, 2017); Gwen Ifill, *The Supreme Court; President Chooses Breyer, An Appeals Judge in Boston, For Blackmun's Court Seat*, N.Y. TIMES (May 14, 1994); Paul Richter, *Clinton Picks Moderate Judge Breyer for Supreme Court Spot*, L.A. TIMES (May 14, 1994); John King, *Clinton Nominates Boston Judge Breyer To Supreme Court*, ASSOCIATED PRESS (May 13, 1994).

[23] David Lat, *Supreme Court Clerk Hiring Watch: The Jackson Four*, SUBSTACK'S ORIGINAL JURISDICTION (May 17, 2022) (offering a biographical sketch for each of Jackson's four clerks).

clerkship institution likewise transform the Court. Will the October 2022 Term inspire change for better or worse of the institution in its sickness and in its health?

Even though the identity of law clerks at the Supreme Court is a matter of public record, the nature and extent of their role is not. As an element in the judicial process, the clerkship institution at the Court — what Justice William Orville Douglas, known for his strong progressive and civil libertarian views, once referred to as the "***Junior Supreme Court***"[24] — has been largely unchartered territory. Unknowable in part because of the confidentiality that accompanies a clerkship.[25] When Ketanji Brown Jackson clerked for Justice Breyer, nearly every major contentious issue — including abortion, gay rights, school prayer, and 'Miranda' warnings — crowded the 1999-2000 docket.[26] There was a flurry of very close 5-to-4 decisions, most involving

[24] Bernard Schwartz, DECISION: HOW THE SUPREME COURT DECIDES CASES 48 (1996) (including an eye-opening discussion of the expanding role of the Justices' clerks, revealing that they are no longer merely a "staff of assistants." Instead, they have evolved into a sort of "***Junior Supreme Court***," which performs a major part of the judicial role — including the writing of opinions — delegated by the U.S. Constitution to the Justices themselves.) (emphasis added).

[25] *See generally*, IN CHAMBERS: STORIES OF SUPREME COURT LAW CLERKS AND THEIR JUSTICES (Todd C. Peppers & Artemus Ward eds., 2012) (telling the fascinating story of clerking at the Supreme Court; reflecting the personal experiences of the law clerks with their justices; revealing how clerks are chosen, what tasks are assigned to them, and how the institution of clerking has evolved over time, from the first clerks in the late 1800s; and incorporating essays about the first African American and first woman to hold clerkships); Bob Woodward & Scott Armstrong, THE BRETHERN (1997) (claiming Supreme Court law clerks wielded too much power within the Court, although not scholarly rigorous in their claims) [hereinafter *Woodward & Armstrong*]; Edward Lazarus, CLOSED CHAMBERS: THE RISE, FALL, AND FUTURE OF THE MODERN SUPREME COURT (1998) (combining memoir, history, and legal analysis, this book covers the role of law clerks and reveals in astonishing detail the realities of what takes place behind the closed doors of the U.S. Supreme Court); Todd C. Peppers, COURTIERS OF THE MARBLE PALACE: THE RISE AND INFLUENCE OF THE SUPREME COURT LAW CLERK (2006) (informing that since the hiring of the first Supreme Court law clerk by Associate Justice Horace Gray in the late 1880s, court observers and the general public have been fascinated with law clerks and the influence — real or imagined — that they wield over judicial decisions; educating that increased use of law clerks has spawned a controversy about the role they play; suggesting that liberal or conservative clerks influence their justices' decision making, and sharing that the influence debate is but one piece of a more important and largely unexamined puzzle regarding the hiring and utilization of Supreme Court law clerks); Artemus Ward & David L. Weiden, SORCERERS' APPRENTICES: 100 YEARS OF LAW CLERKS AT THE UNITED STATES SUPREME COURT (2006) (shedding light on the little-known role of the Supreme Court clerk; looking at the life of a law clerk and how it has evolved since its nineteenth-century beginnings; revealing that throughout history, clerks have not only written briefs, but made significant decisions about cases that are often unseen by those outside of justices' chambers; asking whether clerks should have this power, and, equally important, what does this tell us about the relationship between the Supreme Court's accountability to and relationship with the American public; and offering provocative suggestions for reforming the institution of the Supreme Court clerk); Bradley J. Best, LAW CLERKS, SUPPORT PERSONNEL, AND THE DECLINE OF CONSENSUAL NORMS ON THE UNITED STATES SUPREME COURT, 1935-1995 (2003) (highlighting the role of clerks in opinion-writing, the increase in the number of concurring and dissenting opinions, and the formation of voting coalitions within the Supreme Court); Doris Marie Provine, CASE SELECTION IN THE UNITED STATES SUPREME COURT (1980) (examining the certiorari-granting/denying process and demonstrating that clerks play a major role in the Supreme Court's case-selection process).

[26] A sampling of the 1999-2000 Term cases includes, but is not limited to:

- *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000) (ruling (5-4) organization had constitutional right to revoke membership of a gay assistant scoutmaster);
- *Santa Fe Independent School District v. Doe*, 530 U.S. 290 (2000) (ruling (6-3) that policy permitting student-led, student-initiated prayer at high school football games violates the Establishment Clause of the First Amendment);
- *Dickerson v. United States*, 530 U.S. 428 (2000) (reaffirming (7-2) constitutionality of *Miranda* warnings);
- *Stenberg v. Carhart*, 530 U.S. 914 (2000) (ruling (5-4) against ban on partial birth abortion), and

predictable camps.[27] Jackson's clerkship was instrumental in planting the intellectual seeds that would advance her career.

Justice Jackson now has the opportunity to pay it forward, sow intellectual seeds, while working with her four-clerk team. Former clerks populate white-shoe law firms, Congress, academia, and the federal court system, including the Supreme Court, where six current justices clerked.[28] Jackson could learn from Associate Justice Clarence Thomas, the longest-serving Justice currently sitting on the Supreme Court. Through his clerks and mentees, the 74-year-old may end up with an outsized voice in the legal system for years to come.[29] His greatest legacy "may be in the intellectual seeds he has planted in the generation of lawyers who came up studying his work."[30] Personnel is policy. Thomas has amassed more than 100 former clerks — whom he refers to as his "kids" — and some of these faithful followers have gone on to serve in the highest level of government and the judiciary. Thomas actively stays in touch with and cultivates the careers of a vast network of clerks he trained and mentored. Justice Thomas — to steal a word from the Gen Z culture — is now an influencer. Justice Ketanji Brown Jackson likely will be as well.

D. *Experience as a Lawyer: Working as a Public Defender*

In 2005, Ketanji Brown Jackson joined the Office of the Federal Public Defender in the District of Columbia, representing indigent criminal appellants in the United States Court of Appeals for the District of Columbia Circuit, filing briefs and motions in the court of appeals, arguing cases, and monitoring criminal law developments nationwide. Importantly, Jackson is the first Justice to have served as a federal public defender.[31] She also is the second Justice (after Associate Justice Stephen G. Breyer) to have served on the Sentencing Commission.[32]

- *FDA v. Brown & Williamson*, 529 U.S. 120 (2000) (ruling unanimously against U.S. Food and Drug Administration authority to regulate tobacco products).

[27] Marcia Coyle, *As SCOTUS Clerk, Ketanji Brown Jackson Known for Her 'Even Keel' in Hot-Button Term*, NAT'L L.J. (Mar. 3, 2022) (describing Jackson as "exactly what the happy stories claim — a fantastic human being, humble, always down to earth. ... Head and heart both on straight at the same time. That's a rare package.").

[28] Ten U.S. Supreme Court Justices served as law clerks. They include:

- Byron R. White clerked for Chief Justice Fred Vinson (1946 Term).
- William H. Rehnquist clerked for Justice Robert H. Jackson (1952 Term).
- John Paul Stevens clerked for Justice Wiley B. Rutledge (1947 Term).
- Stephen G. Breyer clerked for Justice Arthur J. Goldberg (1964 Term).
- John G. Roberts, Jr. clerked for Justice William H. Rehnquist (1980 Term).
- Elena Kagan clerked for Justice Thurgood Marshall (1987 Term).
- Neil M. Gorsuch clerked for Justice Byron R. White and Justice Anthony M. Kennedy (1993 Term). He is the *first* to have served as a member of the Supreme Court alongside a Justice for whom he clerked.
- Brett M. Kavanaugh clerked for Justice Anthony M. Kennedy (1993 Term).
- Amy Coney Barrett clerked for Justice Antonin Scalia (1998 Term).
- Ketanji Brown Jackson clerked for Justice Stephen G. Breyer (1999 Term).

[29] *See generally*, Brad Snyder, *The Judicial Genealogy (and Mythology) of John Roberts: Clerkships from Gray to Brandeis to Friendly to Roberts*, 71 OHIO ST. L.J. 1149, 1216 (2010) (reorienting clerkship scholarship away from clerks' influences on judges to judges' influences on clerks).

[30] Emma Green, *The Clarence Thomas Effect*, ATLANTIC MAG. (July 10, 2021). *See also* Ariane de Vogue, *Justice Clarence Thomas: The Supreme Court's Influencer*, CNN (Oct. 22, 2021).

[31] *See* Press Release, *President Biden Nominates Judge Ketanji Brown Jackson to Serve as Associate Justice of the U.S. Supreme Court*, THE WHITE HOUSE (Feb. 25, 2022).

[32] *Former Commissioner Information*, U.S. SENTENCING COMM'N (2022).

One aspect of Jackson's background that differs from most current Justices is her experience in criminal defense. This is "a sea change in the world of [Supreme Court justices], where presidents of both political parties have long shied away from defense attorneys because of their susceptibility to political attacks tied to the crimes attributed to their clients, instead selecting tough-on-crime prosecutors."[33] Jackson is the Court's only member with considerable experience as a defense lawyer.[34] Two of the Court's members — Associate Justices Samuel A. Alito Jr. and Sonia Sotomayor — were prosecutors.[35] The last justice to have represented a sizeable number of criminal defendants was the civil rights champion Thurgood Marshall, who left the bench in 1991.[36]

In Harper Lee's 1960 novel *To Kill a Mockingbird*, the "dogged defense" by fictional lawyer Atticus Finch "of a Black man against trumped-up rape charges embodies the highest aspirations of our justice system: fairness, equality, compassion." Jackson, like the classic hero of American literature, has "represented some of society's most disfavored people."[37] Bringing the lens of a defense attorney to deliberations can help reframe how other Justices view certain cases, especially, criminal ones in which legal disputes over unlawful searches and seizures, protections against self-incrimination, and other rights of the accused come into question.[38] Jackson supporters "rejoice that the Supreme Court's [rookie] justice has, at times, spoken for those who would otherwise have no voice."[39]

III. MAKING PREDICTIONS ABOUT SUPREME COURT JUSTICES

As some past Justices have demonstrated, it can be difficult to predict how an individual Justice will decide particular cases after joining the Supreme Court. Differences in legal philosophy can lead judges to different conclusions, even when Presidents of the same party (or even the same President) have appointed those justices. For example, textualism as a predominant mode of legal reasoning in recent decades may draw attention to a difference between Jackson's jurisprudence versus Breyer's. His legal philosophy developed in a period where other modes of legal thought held greater sway among judges and legal academics.[40]

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[33] Carl Hulse, *As Jackson Faces Senators, Her Criminal Defense Record Is a Target*, N.Y. TIMES (Mar. 16, 2022).

[34] *See* Charlie Savage, *As a Public Defender, Supreme Court Nominee Helped Clients Others Avoided*, N.Y. TIMES (Mar. 21, 2022), (highlighting "the modern court's first justice with experience as a public defender").

[35] *See generally*, Andrew Manuel Crespo, *Regaining Perspective: Constitutional Criminal Adjudication in the U.S. Supreme Court*, 100 MINN. L. REV. 1985 (2016) (noting sharp shift in composition of the Supreme Court toward Justices with prior professional experience as prosecutors).

[36] *Id*. (following Justice Thurgood Marshall's departure, there is no Justice with any depth of experience providing to "the accused . . . the assistance of counsel for his defense").

[37] Hernandez D. Stroud, *An Attack on Ketanji Brown Jackson's Criminal Defense Work Is an Attack on the Constitution*, BRENNAN CTR. FOR JUSTICE (Mar. 18, 2022).

[38] Brakkton Booker, *What Justice Ketanji Brown Jackson Means for the Country*, POLITICO (Apr. 7, 2022) (interviewing "legal scholars [who] believe [Jackson] can have a significant impact, even in the minority.").

[39] George Epps, *Ketanji Brown Jackson Was a Public Defender. Here's Why That's a Great Thing*, WASH. MONTHLY (Apr. 6, 2022).

[40] *See generally*, Valerie C. Brannon, *Statutory Interpretation: Theories, Tools, and Trends*, CONG. RES. SERV. (May 18, 2022); Brandon J. Murrill, *The Modes of Constitutional Analysis: Textualism* (Part 2), CONG. RES. SERV. (Dec. 29, 2021); Diarmuid F. O'Scannlain, "*We Are All Textualists Now*": *The Legacy of Justice Antonin Scalia*, 92 ST. JOHN'S L. REV. 303, 304 (2017) (noting Justice Elena Kagan's comment that "we're all textualists now").

While observers often look to a Justice's background, judicial decisions, non-judicial writings, and public statements in an attempt to determine how the new justice might approach cases, there are several reasons why it is difficult to predict with certainty how a new Justice might impact the Supreme Court.

First, a Justice's background and past statements may not be a reliable guide to how she will approach future cases. The Supreme Court often confronts novel or unusual legal questions that may differ substantially from those a Justice has previously considered, meaning the Justice may have no prior statements on some subjects. In addition, history provides multiple examples of Justices whose decisions on the Supreme Court surprised observers familiar with their pre-confirmation reputations.[41] For example, Justice Felix Frankfurter, who had a reputation as a "progressive" legal scholar before his appointment to the Court in 1939,[42] disappointed early supporters by subsequently becoming a voice for judicial restraint and caution when the Supreme Court reviewed laws that restricted civil liberties during World War II and the early Cold War era.[43] Justice Harry Blackmun served on the Eighth Circuit for a decade before his appointment to the Court in 1970 and was considered a "strict constructionist" by President Richard M. Nixon.[44] In 1973, however, he authored the majority opinion in the landmark abortion decision in *Roe v. Wade*,[45] and at the time of his retirement he generally was considered one of the more liberal voices on the high tribunal.[46] Justice Anthony Kennedy, appointed by President Ronald Reagan, was characterized often as the Court's "swing vote" in his later years on the bench,[47] frequently aligning

[41] *See, e.g.*, Christine Kexel Chabot & Benjamin Remy Chabot, *Mavericks, Moderates, or Drifters? Supreme Court Voting Alignments, 1838–2009*, 76 MO. L. REV. 999, 1021 (listing Justices William J. Brennan Jr., Tom C. Clark, Felix Frankfurter, Oliver Wendell Holmes Jr., John McLean, James Clark McReynolds, Stanley Forman Reed, David Souter, John Paul Stevens, Earl Warren, and James Moore Wayne as examples of jurists who "disappointed" the expectations of the President who appointed them to the Court).

[42] *See* Joseph L. Rauh Jr., *An Unabashed Liberal Looks at a Half-Century of the Supreme Court*, 69 N.C. L. REV. 213, 220 (1990) (informing that "[w]hen Frankfurter took his seat on the Supreme Court in January 1939, almost everyone assumed that he would become the dominant spirit and intellectual leader of the new liberal Court.") [hereinafter *Unabashed Liberal*]; James F. Simon, THE ANTAGONISTS: HUGO BLACK, FELIX FRANKFURTER AND CIVIL LIBERTIES IN MODERN AMERICA 13–16, 46–47 (1989) (noting fears in some political circles that Justice Frankfurter was a Communist or Communist sympathizer, "inspir[ing] American conservatives to label Frankfurter a dangerous radical").

[43] *See Unabashed Liberal* at 220 (advising that "a deep belief in judicial restraint in all matters overtook even [Justice Frankfurter's] lifelong dedication to civil liberties"); *see, e.g.*, Korematsu v. United States, 323 U.S. 214, 225 (1944) (Frankfurter, J., concurring) (contending validity of the Japanese-American civilian exclusion order was the "business" of Congress and the Executive, not the Court); W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 646 (1943) (Frankfurter, J., dissenting) (arguing for constitutionality of a World War II-era law requiring students to salute the flag); Dennis v. United States, 341 U.S. 494, 556 (1951) (Frankfurter, J., concurring) (upholding conviction of three defendants under the *Smith Act* for conspiracy to organize the Communist Party as a group advocating the overthrow of the U.S. government by force).

[44] *See* Woodward & Armstrong, *supra* note 25.

[45] 410 U.S. 113 (1973).

[46] *See* Linda Greenhouse, BECOMING JUSTICE BLACKMUN 235 (2005) (declaring that, by 1994, "Harry Blackmun was, by wide consensus, the most liberal member of the Supreme Court").

[47] *See generally,* Andrew Nolan et al., *Justice Anthony Kennedy: His Jurisprudence and the Future of the Court*, CONG. RES. SERV. (July 11, 2018).

with the more conservative wing of the Court, but sometimes joining the more liberal wing in closely divided cases.[48]

Even a Justice with a significant judicial record and a well-defined judicial philosophy may employ that philosophy to reach results that do not align with the Justice's perceived political alignment. One of President Donald J. Trump's appointments to the Supreme Court, Justice Neil M. Gorsuch, served on the Tenth Circuit for just over a decade before his nomination.[49] In 2020, commentators expressed surprise when Gorsuch — "widely considered one of the more conservative justices on the Supreme Court" — wrote the majority opinion in *Bostock v. Clayton County*, which held that a federal law prohibiting employment discrimination on the basis of sex also protected gay and transgender employees.[50] Some scholars, however, saw Gorsuch's opinion as driven by a textualist approach to statutory interpretation and were not surprised by the case outcome.[51]

Second, even if it were possible to predict how an individual Justice would vote in future matters, each Justice decides cases as part of a multi-member panel where her single vote generally does not determine how any given matter will be decided. The Supreme Court seems to consist of nine little law firms where each Justice is his or her own sovereign.[52] A single Justice's impact on the Court thus depends in part on its composition as a whole and her relationships with the other Justices. As Justice Byron White once noted, "every time a new justice comes to the Supreme Court, it's a different court."[53] Ketanji Brown Jackson joins a Court that has already undergone significant recent changes: Associate Justice Stephen G. Breyer's retirement created the fourth vacancy on the Court in the past five years.[54] Thus, even before Breyer's retirement, Court observers were engaged in analysis and debate over whether and how the Court as a whole has changed its approach to certain legal issues in recent years.[55]

Some describe Justice Jackson's effect on the Court's composition as "[n]ot much in terms of the overall ideological balance [because t]here will still be a 6-3 super-majority for conservatives because she's replacing Justice Breyer, a fellow liberal."[56] One pundit pointed out the obvious: "[t]here will still be

[48] *See, e.g.*, Roper v. Simmons, 543 U.S. 551 (2005); United States v. Windsor, 570 U.S. 744 (2013); *Obergefell v. Hodges*, 576 U.S. 644 (2015).
[49] *See Gorsuch Jurisprudence*, *supra* note 10.
[50] 140 S. Ct. 1731, 1737 (2020); *see* Jared P. Cole, *Supreme Court Rules Title VII Bars Discrimination Against Gay and Transgender Employees: Potential Implications*, CONG. RES. SERV. (June 17, 2020); Robert Barnes, *Neil Gorsuch? The Surprise Behind the Supreme Court's Surprising LGBTQ Decision*, WASH. POST (June 16, 2020); Harper Neidig & John Kruzel, *Gorsuch Draws Surprise, Anger With LGBT Decision*, THE HILL (June 15, 2020).
[51] Ezra Ishmael Young, *Bostock is a Textualist Triumph*, JURIST (June 25, 2020).
[52] Felix Frankfurter, *Chief Justices I Have Known*, Vol. 39, No. 7 VA. L. REV. 883, 901 (1953) (speaking informally with law students).
[53] David B. Rivkin Jr. & Andrew M. Grossman, *A Cautiously Conservative Supreme Court*, WALL ST. J. (July 1, 2021).
[54] *See Justices 1789 to Present*, SUPREME COURT OF THE UNITED STATES (June 30, 2022).
[55] *See, e.g.*, Aziz Huq, *The Roberts Court is Dying. Here's What Comes Next*, POLITICO (Sept. 15, 2021); Moira Donegan, *The US Supreme Court is Deciding More and More Cases in a Secretive 'Shadow Docket'*, THE GUARDIAN (Aug. 31, 2021); Erwin Chemerinsky, *Precedent Seems to Matter Little in the Roberts Court*, ABA J. (June 3, 2021); Jonathan Skrmetti, *The Triumph of Textualism: "Only the Written Word Is the Law"*, SCOTUSBLOG (June 15, 2020).
[56] *See, e.g.*, Nina Totenberg & Rachel Martin, *Biden Is Expected to Nominate Ketanji Brown Jackson to the Supreme Court*, NPR (Feb. 25, 2022).

only three liberals on the court, specializing in writing dissents."[57] However, history may paint a more nuanced picture. A Justice who frequently finds herself in the minority may nonetheless influence the Court.[58] In the short term, she may collaborate with colleagues to reach compromise decisions that garner support from a broader group of Justices. It was encouraging to hear Justice Jackson's description of her former boss, Justice Breyer:

> It's hard to even describe the degree of influence in terms of just his character. He is the ultimate consensus builder, the one who was always trying to forge consensus, build bridges, and talk to the justices who disagreed with him about issues. My memories of him are of him constantly coming out of his internal office saying, "I've got to go talk to Sandra, I've got to go talk to Tony" — Justice [Sandra Day] O'Connor, Anthony M. Kennedy — because he was always trying to come up with something that we could all agree on.[59]

Hopefully, Justice Jackson will take after Justice Breyer in forging consensus and building bridges — to the extent possible given the Grand Canyon-sized ideological differences separating the Court's conservative and liberal factions. Justice Breyer, Jackson's mentor, and predecessor spent his entire career on the Supreme Court on panels where Democratic appointees were in the minority, but he authored opinions or cast deciding votes in several high-profile cases.[60] In the long term, even if Justice Jackson is often in the minority, she may shape the development of the law by authoring separate opinions.[61] Concurrences or dissents in cases involving statutory interpretation may encourage Congress to enact legislative reforms.[62] Separate opinions also may persuade courts to adopt the author's preferred approach in future cases.[63]

IV. JUDICIAL EXPERIENCE

An academic standout, Ketanji Brown Jackson navigated between public service and the private sector before gaining judicial experience in the federal courts. The 44th President of the United States, Barack Obama, nominated Jackson for a seat on the United States District Court for the

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[57]. Robert Barnes, *Jackson's Nomination is Historic, but Her Impact on Supreme Court in Short Term Likely Will Be Minimal*, WASH. POST (Feb. 25, 2022); *see also* Adam Liptak, *A Groundbreaking Nomination Who's Unlikely to Reshape the Supreme Court*, N.Y. TIMES (Feb. 25, 2022).

[58] *See, e.g.*, Ruth Marcus, *I've Covered the Supreme Court for Years. Here's What to Know about Jackson's Nomination*, WASH. POST (Feb. 28, 2022), *13 Legal Experts on How Breyer's Replacement Will Change the Court*, POLITICO (Jan. 27, 2022).

[59] Roxanne Roberts, *Ketanji Brown Jackson on Being a 'First' and Why she Loves 'Survivor,'* WASH. POST (May 16, 2022).

[60] Brent Kendall et al., *Justice Breyer's Retirement Could Reshape Supreme Court's Liberal Wing*, WALL ST. J. (Jan. 27, 2022).

[61] *See, e.g.*, Henry Gass & Noah Robertson, *Minority Report: How Justices from Harlan to Breyer Shaped Legal Opinion*, CHRISTIAN SCI. MONITOR (Jan. 27, 2022).

[62] *See, e.g.*, Terry v. United States, 141 S. Ct. 1858, 1868 (Sotomayor, J., concurring in part and concurring in the judgment) (identifying adverse consequences of the Court's interpretation of the *First Step Act of 2018*, but asserting that "Congress has numerous tools to right this injustice").

[63] Gass & Robertson, *supra* note 61.

District of Columbia (hereinafter District of D.C.)[64] in 2012, and she was confirmed with bipartisan support in the Senate by a voice vote in March 2013.[65]

Eight years later, the 46th President, Joseph R. Biden Jr. nominated Jackson to the United States Court of Appeals for the United States District Court for the District of Columbia Circuit (hereinafter D.C. Circuit), and she was confirmed in June 2021 by a bipartisan vote of 53-44. Three Republicans – Susan Collins of Maine, Lindsey Graham of South Carolina, and Lisa Murkowski of Alaska – joined all Democrats in voting for her.

In total, Jackson brings *nine* years of judicial experience to her post on the Supreme Court. That represents, for comparative purposes, more years of experience on the bench than four sitting Justices: Chief Justice John G. Roberts Jr. (2 years); Associate Justice Clarence Thomas (1.5 years); Associate Justice Elena Kagan (0 years); and Associate Justice Amy Coney Barrett (3 years). Associate Justices Samuel A. Alito Jr., Sonia Sotomayor, Neil M. Gorsuch, and Brett M. Kavanaugh each served more than a decade before their confirmation to the Supreme Court.

A. *Judicial Experience: Jackson's Role as a U.S. District Judge*

Understanding the work of a district court judge — particularly in the District of D.C. — and how that work differs from the work of an appellate judge is important to evaluating Jackson's judicial experience. District courts, with limited exceptions, "have original jurisdiction of all civil actions arising under the [U.S.] Constitution, laws, or treaties."[66] Accordingly, federal civil cases typically begin with the filing of a complaint in the court of a relevant district.[67] Federal criminal cases likewise generally begin in the district court with jurisdiction over the place of arrest.[68] District courts, therefore, are the first to analyze most issues that may ultimately be reviewed by courts of appeals or the U.S. Supreme Court.

The District of D.C.'s location, however, has given rise to its special role (along with the D.C. Circuit) in "overseeing the coordinate branches — the executive and legislative branches."[69] Historically, the District of D.C. has decided many constitutional issues related to the separation of powers, executive privilege and accountability, and Congress's impeachment power.[70] The D.C. federal courts have also "reviewed countless actions of administrative agencies and have contributed significantly to the development of what we have come to call 'administrative law.'"[71]

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[64] The District of D.C. is not a court of general jurisdiction for the District of Columbia, nor is it the primary court for cases arising under the laws of the District of Columbia. The District of Columbia has a separate court system, analogous to state courts elsewhere, that considers cases under local law. *See generally*, D.C. Code §§ 11-701–11-947; *District of Columbia Court Reorganization Act of 1970*, Pub. L. No. 91-358, 84 Stat. 475 (1970); John G. Roberts, Jr., *Essay: What Makes the D.C. Circuit Different? A Historical View*, Vol. 92, No. 3 VA. L. REV. 375, 387-89 (May 2006) [hereinafter *Essay by Roberts*].

[65] Vol. 159, No. 1 CONG. REG. S24 (Jan. 3, 2013); Vol. 159, No. 43 CONG. REC. S2235, S2436 (daily ed. Mar. 22, 2013) (announcing yeas 53, nays 44).

[66] 28 U.S.C. § 1331; *but see id.* § 1251.

[67] FED. R. CIV. P. 3.

[68] FED. R. CRIM. P. 5(c).

[69] Susan Low Bloch & Ruth Bader Ginsburg, *Celebrating the 200th Anniversary of the Courts of the District of Columbia*, 90 GEO. L. J. 549, 565 (2002).

[70] *See id.* at 564-74

[71] *Id*. at 575.

Although the D.C. Circuit is perhaps most notable in this respect due to its exclusive jurisdiction over many types of agency cases,[72] Congress also provided that the District of D.C. either has exclusive jurisdiction or is an appropriate venue for a variety of civil actions involving government agencies, Congress, foreign governments, and private parties.[73]

While it is fair to take Jackson's statements at face value when she says her judicial philosophy lies mainly in her methods, this tells us less than we might want to know about how she will decide as a Supreme Court Justice. As a district court judge,[74] Jackson accepted what she saw as binding precedent, whether or not she agreed with those decisions, and her holdings were constrained by the possibility of reversal on appeal. Indeed, the latter likelihood may be one reason for the excruciating detail characteristic of her opinions. A meticulous writer, Jackson is known as an even-keeled judge who writes deeply researched, sometimes long-winded opinions. This required appellate judges to understand and deal with the close attention to law and language that guided Jackson's decision-making process. But as a Supreme Court Justice, she will be setting or reversing precedent, and no higher court will review her opinions like a Monday morning quarterback.

The role of a district court judge differs substantially from the role of a judge on a federal court of appeals. In contrast to appeals courts, which typically consider written arguments and may have limited contact with the parties and their attorneys, district courts "manage the daily rough and tumble of litigation."[75] The district courts act as finders of fact — that is, they take testimony, establish a record of evidence, and resolve disputed factual issues when it is necessary to decide a case — while the courts of appeals generally do not.[76] In some cases, a district court judge will take testimony in a bench trial and resolve disputed factual issues herself, while in other cases, the judge will empanel and instruct a jury.[77] The district court's fact-finding role drives a significant amount of litigation activity that is unique to trial practice, including document discovery and deposition discovery, which the judge oversees.[78]

In some ways, this role vests the district court judge with more independence than an appellate judge. The courts of appeals generally recognize that it is not their role to "second-guess[] conscientious district court judges," each of whom "must strive to manage his or her calendar

[72] *See Essay by Roberts*, *supra* note 64, at 389.
[73] *See, e.g.*, 2 U.S.C. § 922(a)(1) (providing that any Member of Congress may bring an action in the District of D.C. to challenge Presidential budget sequestration orders); 15 U.S.C. § 146a (providing that the District of D.C. has concurrent jurisdiction over suits involving a China Trade Act corporation); 28 U.S.C. § 1365(a) (providing that the District of D.C. has exclusive jurisdiction over actions brought by the Senate or its committees to enforce a subpoena); *id*. § 1391(f)(4) (providing jurisdiction in the District of D.C. for civil actions against a foreign state); 30 U.S.C. § 1276(a)(1) (providing for exclusive review in the District of D.C. over national regulations promulgated by the Department of the Interior related to surface coal mining); 52 U.S.C. § 10310(b) (providing that the District of D.C. has exclusive jurisdiction to issue certain declaratory judgments related to voting rights).
[74] Adam Feldman, *Ketanji Brown Jackson: A Dataset Of Over 500 Opinions*, ABOVE THE LAW (Feb. 18, 2022), (harvesting data from publicly available resources: COURTLISTENER, GOOGLE SCHOLAR, and GOVINFO; linking to each decision; coding dataset for variables like case name, decision date, case number or citation, and type of plaintiff and defendant; summarizing decisions; and highlighting case concentration).
[75] Simonoff v. Saghafi, 786 F. App'x 582, 584 (6th Cir. 2019).
[76] *Compare, e.g.*, FED. R. CIV. P. 39 (providing for jury trial or bench trial of issues of fact), *with* FED. R. APP. P. 10 (providing for court of appeals review based on the record).
[77] *See* FED. R. CIV. P. 38, 39.
[78] *See, e.g.*, FED. R. CIV. P. 37 (authorizing district court to sanction parties for violations of the discovery rules).

efficiently."[79] On a wide range of matters, including many procedural and case management questions, and even findings of fact, the courts of appeals focus not on how they might have resolved an issue in the first instance, but only on whether the district court abused its own discretion.[80] The district court judge also often sits alone; she has no need to tailor her opinions to win the support of a colleague. A necessary skill for a Supreme Court Justice seeking to get to five (votes).

There are other ways, however, in which a trial court judge is more constrained than an appellate judge. District court judges are solely responsible for a high volume of cases, many of which may be legally straightforward or frivolous.[81] A typical district court case also often results in more rulings and orders than a typical appeal, including rulings on motions to dismiss, discovery matters, summary judgment, and pretrial issues.[82] Some issues — for example, the admission of a piece of evidence or a particular jury instruction — may arise as one of many decisions to be made quickly during a trial; the importance of any particular decision may not be immediately evident.

In some cases, district court judges consider purely legal questions on written submissions, take time to consider their rulings, and issue detailed opinions deciding or dismissing cases on legal grounds. Those decisions, however, are subject to the binding precedent of both the U.S. Supreme Court and the relevant court of appeals, and therefore may not reflect the district court judge's own view of the law.[83] Jackson herself has noted that, unlike a Supreme Court Justice, a district court judge is not called upon to articulate "broader legal principles to guide the lower courts," and therefore is less likely to "develop substantive judicial philosophies to guide [herself] in this task."[84]

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[79] Mindek v. Rigatti, 964 F.2d 1369, 1374 (3d. Cir. 1992).

[80] *Id*. (citing *Nat'l Hockey League v. Metro. Hockey Club, Inc*., 427 U.S. 639, 642 (1976); Peugh v. United States, 569 U.S. 530, 537 (2013) (applying abuse-of-discretion standard to reasonableness of a criminal sentencing decision); Gen. Elec. Co. v. Joiner, 522 U.S. 136, 141–43 (1997) (applying abuse-of-discretion standard to the decision to exclude expert testimony); Pierce v. Underwood, 487 U.S. 552, 571 (1988) (applying an abuse-of discretion standard to the decision to deny attorneys' fees).

[81] In the federal district courts as a whole, 517 cases per active judge were terminated in 2021, and 1,115 cases per active judge remained pending at the end of the year. In the District of D.C., 276 cases per active judge were terminated in 2021, and 386 cases per active judge remained pending at the end of the year. *Statistics & Reports: United States District Courts — National Judicial Caseload Profile*, U.S. COURTS (2022).

[82] *See, e.g.*, FED. R. CIV. P. 12 (dismissal motions), 37 (discovery motions), 56 (summary judgment).

[83] Although an appeals court is bound by prior published opinions of other panels of the same circuit and Supreme Court decisions, there are also mechanisms for a court of appeals to reconsider and overrule its own past decisions or the decisions of a panel. *See* FED. R. APP. P. 35 (*en banc* determinations). The Supreme Court is influenced by *stare decisis*, the principle that applicable precedents should be respected, but is not bound to follow precedent.

[84] S. Comm. Judiciary, 117th Cong., *Committee Questionnaire Attachments* 499 (2022) (responding to questions by Sen. Ted Cruz (R.-Tex.)) [hereinafter *Senate Judiciary Attachments*]. The *Senate Judiciary Attachments* are a collection of documents that Jackson appended to her Committee questionnaire, including a wide variety of materials, some of which were previously submitted to the Committee or available from other sources. Notably, for purposes of this article, it also includes Jackson's responses to written questions posed by Members of the Senate Judiciary Committee during the confirmation process for Jackson's prior judicial nominations; citations herein to the *Senate Judiciary Attachments* identify those responses.

Significantly, district court decisions are also reviewed more frequently than appellate decisions,[85] which may encourage a district court judge facing a new legal issue to be more cautious or attempt to predict how an appeals court would decide the question. Indeed, some observers have discussed the rate at which Jackson's decisions have been reversed by the D.C. Circuit, although others, including Jackson herself,[86] believe reversal rates are not a very meaningful way to analyze a judge's record.[87] This article does not attempt to identify a quantitative method of calculating the results of appeals from Jackson's decisions. Instead, it delivers qualitative discussions of cases in which Jackson was reversed on appeal.

B. *Jackson's Experience on the "Second-Highest Court in the Land"*

Another element to consider when evaluating Ketanji Brown Jackson's judicial experience is the unique nature of the "second-highest court in the land." It entertains many of high-profile cases and launches careers for those seeking a spot on the Supreme Court of the United States. Among the current roster, Chief Justice John G. Roberts Jr. and Associate Justices Clarence Thomas and Brett M. Kavanaugh all served on the D.C. Circuit before being nominated to the Supreme Court, as did the late Associate Justices Antonin Scalia and Ruth Bader Ginsburg. Observers recognize that the D.C. Circuit has a different, unique kind of docket, providing a different, unique kind of judicial experience versus other federal courts of appeals.[88] While it is tempting to label the work glamorous, the author cautions that the court's docket also includes a steady and bland diet of lower-profile (undisputedly still important) cases.

V. JACKSON'S JUDICIAL PHILOSOPHY

Ketanji Brown Jackson has said she follows a specific methodology when deciding cases, "looking only at the arguments that the parties have made, at the facts in the record of the case, and at the law as [she] understand[s] it," including governing statutes and binding precedent.[89] By focusing

[85] A final district court decision, and some interlocutory decisions, may be appealed to the court of appeals, which must consider the appeal if certain requirements are met. *See* FED. R. APP. P. 3 (appeals as of right). In contrast, review beyond the initial appellate panel is discretionary and rare. A panel decision in the court of appeals may be reheard by the full court sitting *en banc*. *See* FED. R. APP. P. 35 (*en banc* determinations); *Statistics & Reports: Caseload Statistics & Data Tables, Table B-10*, U.S. COURTS (Sept. 28, 2022), (showing that 28,445 appeals were terminated by panel decision during the 12 months ending September 30, 2021, and only 40 cases were terminated by *en banc* decision). Decisions of the courts of appeals may also be reviewed by the Supreme Court on a discretionary basis. *See* SUP. CT. R. 10; *Supreme Court 2020 Term — The Statistics*, 135 HARV. L. REV. 491, 498 (2021) (calculating that the Court granted 1.4% of petitions for review during its 2020 Term).

[86] *See Senate Judiciary Attachments*, *supra* note 84, at 410-11 (responding to questions from Sen. Chuck Grassley (R.-Iowa): "Looking only at the number of reversals relative to the number of decisions that are 'actually appealed' merely assesses a losing party's odds of being successful if an appeal is sought; that computation does not account for the overall number of opinions that the judge has issued and the fact that a losing party may choose to forego an appeal for a number of reasons, including the recognition that the ruling is correct and would be sustained on appeal … Not all reversals are equivalent.").

[87] *See, e.g.*, Kimberly Strawbridge Robinson & Jordan S. Rubin, *Reversal Rates Imperfect Tool for Judging Supreme Court Nominees*, BLOOMBERG L. (Feb. 10, 2022.

[88] *See, e.g.*, *Essay by Roberts*, *supra* note 64, at 388-89; Eric M. Fraser, et al., *The Jurisdiction of the D.C. Circuit*, 23 CORNELL J. L. & PUB. POL'Y 131, 132 (2013).

[89] *Nominee to be U.S. Court of Appeals Judge of the District of Columbia Circuit: Hearing Before the Senate Judiciary Committee*, 117th Cong. (Apr. 28, 2021) (conveying Jackson testimony) [hereinafter *D.C. Circuit Confirmation Hearing*].

on these factors and "methodically and intentionally setting aside personal views," Jackson endeavors to achieve "fidelity to the rule of law" and "rule without fear or favor."[90] Citing the necessity of adhering to the rule of law, she underscores the importance of judicial independence from the political branches.[91] At the same time, Jackson acknowledges that her prior professional experiences have influenced her approach to judging.[92] As a public defender, for example, she was struck by how little her clients understood about the legal process, despite the obviously serious implications of criminal proceedings for their lives. Subsequently, as a district court judge, she took "extra care to communicate with the defendants" appearing in her courtroom, making sure that they were aware of what was happening to them and why making sure that they understood the process and reasons for their prosecution.[93] "I think that's really important for our entire justice system because it's only if people understand what they've done, why it's wrong, and what will happen to them if they do it again that they can really start to rehabilitate," she emphasizes.[94] At her 2021 confirmation hearing to the D.C. Circuit, Jackson drew "a direct line" between her work as a public defender and her later work as a trial judge.[95]

A. Remaining Faithful to Methodology

When pressed about her judicial philosophy, Ketanji Brown Jackson directs your attention not to a particular perspective on the law but rather to her perspective on legal analysis. Her judicial philosophy, she believes, is found in the way she approaches judging.[96] During both judicial confirmation hearings, 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 D.C. Circuit 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.[97]

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[90] *Id*.; *see also Senate Judiciary Attachments*, *supra* note 84, at 451 (responding to questions from Sen. Mike Lee (R-Utah): "empathy should not play a role in a judge's consideration of a case" because judges have "a duty to decide cases based solely on the law, without fear or favor, prejudice or passion"); *id*. at 502 (responding to questions from Sen. Jeff Flake (R-Ariz.): "[a] good judge has professional integrity, which includes reverence for the rule of law, total impartiality, and the ability to apply the law to the fairly determined facts of the case without bias or any preconceived notion of how the case will be resolved.").
[91] *See D.C. Circuit Confirmation Hearing*, *supra* note 89.
[92] *Id*.
[93] *Id*.
[94] *Id*.
[95] *Id*.
[96] Richard Lempert, *Justice Ketanji Brown Jackson — What Can We Expect?*, BROOKINGS INST. (Apr. 1, 2022).
[97] *See D.C. Circuit Confirmation Hearing*, *supra* note 89 (responding to Sen. Ted Cruz (R.Tex.)).

B. Judicial Philosophy and the Influence of Religion

All judges, Supreme Court Justices, and even lawyers for that matter are swayed by their backstory — that is, their personal beliefs and values. That influence or bias manifests in different ways. Political,[98] religious,[99] or other preferences might tempt a Justice to pursue a desired case outcome and search for reasons bolstering the preferred result. If not adroitly done, the decision "stinks of the lamp." This unflattering phrase refers to a time before artificial light in the 19th century when lawyers penned briefs deep into the dark of night by the light and smell of smoky oil lamps struggling to rationalize legally questionable outcomes favoring their clients. Pretending that religious influence, for example, does not exist distorts our understanding of the Supreme Court and the opinion creation process. Just as financial incentives can create conflicts of interest that influence scientific conclusions and legal findings, religious ideology debatably can do the same. There is a difference between religious identity and religious intensity, of course. One's religious identity can be largely independent of the degree to which one's religion guides daily thinking and decision-making. This is an important consideration, given the public interest in the Justices' religion swirling mainly around the impact of their faith on their judicial decision-making concerning, for example, abortion, contraception, and same-sex marriage.

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[98] *See, e.g.*, Howard Gillman, THE VOTES THAT COUNTED (Univ. Chicago Press 2001) (making the point that a majority of justices on the Supreme Court ruled the way they did in *Bush v. Gore*, 531 U.S. 98 (2000), because they had political cover: They knew the incoming regime would support their selection of Bush over Gore)

[99] *See generally*, Andrew L. Seidel & Erwin Chemerinsky, AMERICAN CRUSADE: HOW THE SUPREME COURT IS WEAPONIZING RELIGIOUS FREEDOM (Sept. 27, 2022); Brian H. Bornstein & Monica K. Miller, *Does a Judge's Religion Influence Decision Making?*, Vol. 45, No. 3 COURT REVIEW: J AMERICAN JUDGES ASS'N 112-115 (2009); Robert F. Cochran, *Catholic and Evangelical Supreme Court Justices: A Theological Analysis*, Vol. 4, No. 2 UNIV. ST. THOMAS L. REV. (Fall 2006); Gregory C. Sisk et al., *Searching for the Soul of Judicial Decisionmaking: An Empirical Study of Religious Freedom Decisions*, Vol. 65, No. 3 OHIO STATE L.J. 491 (Jan. 2004) (debating "whether religious beliefs influence court decisions, consciously or unconsciously"). *See, e.g.*, Thomas J. Reese, *Amy Coney Barrett's Religion is Important — but Irrelevant*, **AMERICA MAG.: THE JESUIT REVIEW OF FAITH & CULTURE** (Sept. 28, 2020); Thomas B. Griffin, *Amy Coney Barrett's Religion Won't Dictate Her Rulings*, **BLOOMBERG** (Oct. 12, 2022) (highlighting that "[a] person of faith can be an impartial judge"); Jazmine Ulloa, *Amy Coney Barrett's Nomination Highlights the Rise of Catholics on the Supreme Court*, **BOSTON GLOBE** (Oct. 10, 2020); Christa Case Bryant, *Are Amy Coney Barrett's Religious Views Fair Game?*, **CHRISTIAN SCIENCE MONITOR** (Sept. 28, 2020); Kate Shellnut, *Trump's Supreme Court Pick: Religious Freedom Defender Neil Gorsuch*, **CHRISTIANITY TODAY** (Jan. 31, 2017); Alan Levinovitz, *Argument: Let's Be Honest About Religion and the Courts*, **FOREIGN POL'Y** (Oct. 28, 2020) (writing by Amy Coney Barrett that religious convictions are real and influential on judges); Emilie Kao, *Religious Bigotry on Display in the Barrett Hearings . . . and Elsewhere*, **HERITAGE FOUND**. (Oct. 19, 2020); Joan Walsh, *Amy Coney Barrett's Extremist Religious Beliefs Merit Examination*, **THE NATION** (Sept. 26, 2020); Tom Gjelten, *Amy Coney Barrett's Catholicism Is Controversial But May Not Be Confirmation Issue*, **NPR** (Nov. 29, 2020); Kristin Kobes Du Mez, *Trump Pick Amy Coney Barrett's Christian 'Handmaid' History Matters*, **NBC NEWS** (Oct. 10, 2020); Michael D. Rips, *Opinion: How Amy Coney Barrett Fails the Religious Test: It's Not What You Think*, **N.Y. DAILY NEWS** (Oct. 26, 2020); Margaret Talbot, *Amy Coney Barrett's Long Game*, **NEW YORKER MAG**. (Feb. 7, 2022) (opining that the "newest Supreme Court Justice isn't just another conservative — she's the product of a Christian legal movement that is intent on remaking America"); Ruth Graham & Sharon LaFraniere, *Inside the People of Praise, the Tight-Knit Faith Community of Amy Coney Barrett*, **N.Y. TIMES** (Oct. 22, 2020); Massimo Faggioli, *Opinion: Why Amy Coney Barrett's Religious Beliefs Aren't Off Limits*, **POLITICO** (Sept. 24, 2020); Andrew Chung & Lawrence Hurley, *Potential Trump Supreme Court Pick Barrett Known for Conservative Religious Views*, **REUTERS** (Sept. 21, 2020); Emma Brown et al., *Amy Coney Barrett Served as a 'Handmaid' in Christian Group People of Praise*, **WASH. POST** (Oct. 6, 2020).

In her Senate Judiciary confirmation hearings in March 2022, then-Supreme Court nominee Ketanji Brown Jackson was asked by South Carolina Senator Lindsey Graham, "What faith are you, by the way?"[100] Jackson replied that she was a non-denominational Protestant.[101] Graham pressed,[102] asking "On a scale of 1 to 10, how faithful would you say you are in terms of religion?"[103] Emphasizing an unbiased judiciary, religiously and otherwise, to be sure, is important to a fair and independent judiciary rooted in the rule of law.

Jackson is only the second Protestant on the high court (along with Associate Justice Neil Gorsuch),[104] joining six Catholics — Associate Justices Samuel A. Alito Jr., Amy Coney Barrett, Brett M. Kavanaugh, Sonia Sotomayor, and Clarence Thomas and Chief Justice John G. Roberts Jr. — and one Jewish justice, Elena Kagan.[105] Five of the six Catholics on the Court (Roberts, Thomas, Alito, Kavanaugh, and Barrett) were nominated by Republican presidents, while Sotomayor is the only Catholic justice nominated by a Democrat (Barack Obama). This might suggest a relationship between Catholicism and Republicanism, if one is "willing to make an inference about the justices' political orientation based on the party of the president who nominated them."[106] But Gallup's 2021-2022 data "for the general population show that Catholics do not skew Republican; rather, they skew modestly Democratic, mirroring the political identity of the U.S. population as a whole."[107]

Yet, too many judicial opinions, including some by current Supreme Court Justices, are arguably characterized by convoluted reasoning, or are sufficiently inconsistent with how the Justice or the Court has handled prior claims, that it is reasonable to conclude that they "stink of the lamp."

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[100] Peter Smith, *Jackson Invokes Her Christian Faith, Stays Mum on Specifics*, U.S. NEWS & WORLD REP. (Mar. 23, 2022).

[101] Justin Collings & Hal Boyd, Essay: *The Constitutional Roots of Ketanji Brown Jackson's Public Faith*, RELIGION & POLITICS (Mar. 29, 2022).

> Some, of course, feel that any invocation of God in these settings runs afoul of Article VI, Clause 3 of the U.S. Constitution — the provision invoked by Jackson — which promises that "no religious test shall ever be required as a qualification" for public office in the United States. Alternatively, others argue that invoking God in official settings violates what Thomas Jefferson dubbed the "wall of separation between the church and state," ostensibly built by the establishment clause of the First Amendment.

Id.

[102] Matthew Dahl, *Why Did Sen. Graham Grill Ketanji Brown Jackson About Her Religious Faith?*, WASH. POST ("suggest[ing] that religion does not influence judges' decision-making, as many people fear it does").

[103] *Jackson Confirmation Hearings: Senator Graham Questions Judge Ketanji Brown Jackson About Her Faith*, C-SPAN (Mar. 20, 2022).

[104] Daniel Burke, *What is Neil Gorsuch's Religion? It's Complicated*, CNN (Mar. 22, 2017).

[105] Frank Newport, *The Religion of the Supreme Court Justices*, GALLUP (Apr. 8, 2022).

> Thus, the court will consist of six Catholics, two Protestants, and one Jew.
> . . .
> This is not reflective of the U.S. population, as has been widely discussed in recent years. Our latest estimate from over 15,000 Gallup interviews conducted from January 2021 through March of this year shows that about 22% of the adult population identifies as Catholic, as opposed to the 67% Catholic representation on the court. Two percent of the population identifies as Jewish (Kagan represents 11% of the nine justices). The biggest disproportionality comes in terms of Protestants. About 45% of Americans are non-Catholic Christian, or Protestant, compared with what will be 22% Protestant representation on the court.

Id.

[106] *Id*.

[107] *Id*.

C. Finding Constitutional Interpretation

One of the most critical jobs of a Supreme Court Justice is to assess the constitutionality of government action.[108] Where the constitutional text is ambiguous or silent, many Justices have developed certain "methods" or "modes" of interpretation to figure out the particular meaning of constitutional provisions.[109] For example, some constitutional scholars and Justices have espoused "originalism," an approach that focuses on the original public meaning of the constitutional text at the time of the Founding.[110] Other jurists have argued for more pragmatic approaches, looking to the likely practical consequences of constitutional construction and what an interpretation would mean for the functioning of the government.[111] Associate Justice Stephen G. Breyer, in particular, has described United States constitutional history as "a quest for … workable democratic government protective of individual personal liberty."[112] Reflecting his pragmatic attitude toward legal questions, Breyer emphasizes that "institutions and methods of interpretation must be designed in a way such that this form of liberty is sustainable over time and capable of translating the people's will into sound policies."[113]

As a judge Ketanji Brown Jackson resolved relatively few cases involving open constitutional questions, offering somewhat limited insight into what mode of constitutional interpretation she might follow while seated on the Supreme Court bench. Jackson's circuit court confirmation hearing sheds some light on her approach to constitutional interpretation. She would look to the text and its original meaning, following the Supreme Court's lead 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."[114] She stated that, because she [was] bound by those precedents, she has not "develop[ed] [her] own theory of constitutional interpretation."[115] When asked whether the Constitution "changes over time," Jackson said 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."[116] This differed somewhat from her response 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

[108] *See, e.g.*, *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 178 (1803) (stating "[t]he judicial power of the United States is extended to all cases arising under the constitution.").
[109] *See generally,* Brandon J. Murrill, *Modes of Constitutional Interpretation*, CONG. RES. SERV. (Mar. 15, 2018).
[110] *See, e.g.*, Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 856–57 (1989); Lucia v. SEC, 138 S. Ct. 2044, 2056 (2018) (Thomas, J., concurring); *see generally,* Brandon J. Murrill, *The Modes of Constitutional Analysis: Original Meaning (Part 3)*, CONG. RES. SERV. (Dec. 29, 2021).
[111] *See, e.g.*, Richard A. Posner, *What Has Pragmatism to Offer Law?*, 63 S. CAL. L. REV. 1653, 1657 (1990); Free Enter. Fund v. Pub. Co. Acct. Oversight Bd., 561 U.S. 477, 514 (Breyer, J., dissenting); *see generally*, Brandon J. Murrill, *The Modes of Constitutional Analysis: Pragmatism (Part 5)*, CONG. RES. SERV. (Dec. 30, 2021).
[112] Stephen Breyer, ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION 34 (2005).
[113] *Id*. at 16.
[114] *D.C. Circuit Confirmation Hearing*, *supra* note 89 (responding to question by Mike Lee (R.-Utah)).
[115] *Id*. (responding to question by Sen. Ted Cruz (R.-Tex.)).
[116] *Id*.

practices."[117] She asserted 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."[118]

The constitutional issues Jackson confronted as a district court judge largely involved relatively settled precedent from the U.S. Supreme Court or lower courts and did not call for her to engage in novel constitutional analysis.[119] Nonetheless, some of those cases, including the few that required a more rigorous analysis, are discussed in detail later in this article.

D. Approaches to Statutory Interpretation

A judge's approach to statutory interpretation presents significant insight into her jurisprudence, and examples of cases requiring statutory interpretation are much more common in the district court than constitutional cases. Many judges lean towards one of two schools of statutory interpretation.[120] Textualism focuses more on a statute's text, asking how a reasonable person might understand the law's words,[121] while purposivism emphasizes a statute's purpose, asking what problem Congress was trying to solve and how the law at issue achieves that goal.[122]

Jackson may differ from Associate Justice Stephen G. Breyer, whom she is replacing, in her approach to statutory interpretation. Breyer employs a purposivist approach, following the "Legal Process" school of thought that approached statutory interpretation with the assumption that Congress is "made up of reasonable persons pursuing reasonable purposes reasonably."[123] Therefore, Breyer approaches difficult statutory questions by considering Congress's purpose and "the practical consequences that are likely to follow from Congress' chosen scheme," and pursuing a construction that best serves that purpose.[124]

According to Jackson, "the North Star of any exercise of statutory interpretation is the intent of Congress, as expressed in the words it uses."[125] Interpreting statutes as a district court judge,

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[117] *District Court Questionnaire* (responding to Sen. Tom Coburn's (R.-Okla.) Questions 1 & 2).
[118] *Senate Judiciary Attachments*, *supra* note 84 (responding to questions by Sen. Tom Coburn (R.-Okla.).
[119] *See, e.g.*, Las Ams. Immigrant Advoc. Ctr. v. Wolf, 507 F. Supp. 3d 1, 19 (D.D.C. 2020) (rejecting due process challenge to agency policy under "binding" Supreme Court precedent); *see generally*, Brandon J. Murrill, *The Modes of Constitutional Analysis: Judicial Precedent* (Part 4), CONG. RES. SERV. (Dec. 30, 2021).
[120] *See generally*, Valerie C. Brannon, *Statutory Interpretation: Theories, Tools, and Trends*, CONG. RES. SERV (May 18, 2022).
[121] *See, e.g.*, Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, in A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 22 (Amy Gutmann ed., 1997).
[122] *See, e.g.*, Henry M. Hart Jr. & Albert M. Sacks, *The Legal Process: Basic Problems in* the MAKING AND APPLICATION OF LAW 1148 (William N. Eskridge Jr. & Phillip P. Frickey eds., 1994).
[123] John F. Manning, *Chevron and the Reasonable Legislator*, 128 HARV. L. REV. 457, 457 (2014) (quoting Hart & Sacks, *supra* note 122, at 1378); *see also* Stephen Breyer, *On the Uses of Legislative History in Interpreting Statutes*, 65 S. CAL. L. REV. 845, 853–54 (1992) (informing that "[s]ometimes [a court] can simply look to the surrounding language in the statute or to the entire statutory scheme and ask, 'Given this statutory background, what would a reasonable human being intend this specific language to accomplish?'").
[124] United States v. Arthrex, Inc., 141 S. Ct. 1970, 1988 (2021) (Breyer, J., concurring in part and dissenting in part).
[125] 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).

Jackson was regularly bound by prior Supreme Court and D.C. Circuit cases,[126] but at times employed original statutory construction. Like most modern judges, Jackson has stressed the primacy of law text and structure in statutory interpretation.[127] A number of her opinions rely on the "plain language"[128] of a statute and engage in close readings that, for example, highlight Congress's use of a specific verb tense[129] or a singular pronoun.[130] She has also relied upon established canons of construction,[131] such as the principle that no statutory language should be rendered superfluous.[132]

When the statutory text does not provide a complete or definitive answer, however, Jackson deploys the tools of purposive interpretation,[133] asking what outcome a "rational legislature" would

[126] *See, e.g.*, Campaign for Accountability v. U.S. Dep't of Justice, 278 F. Supp. 3d 303, 321 (D.D.C. 2017) (applying Supreme Court and D.C. Circuit precedent to resolve a dispute over the scope of FOIA), *aff'd sub nom*. Citizens for Responsibility & Ethics in Wash. v. U.S. Dep't of Just., 846 F.3d 1235 (D.C. Cir. 2017).

[127] *See, e.g.*, Am. Meat Inst., 968 F. Supp. 2d at 62 (stating that "even if Plaintiffs are correct that Congress secretly wished to preserve commingling and infused [a specific provision] with that intention, the most plausible reading of what Congress actually wrote is that the statute" does not expressly address commingling); *id.* at 63–64 (looking to statutory context and rejecting a reading that contravened an earlier requirement and adopting a reading that was consistent with subsequent provisions). *See also, e.g.*, AFL-CIO v. NLRB, 466 F. Supp. 3d 68, 84 (D.D.C. 2020) (concluding it was unlikely "that Congress intended to place" a provision "in the heart of a section solely governing unfair labor practices, and yet somehow meant for this particular provision alone to apply more broadly").

[128] *See e.g.*, Depomed, Inc. v. U.S. Dep't of Health & Human Servs., 66 F. Supp. 3d 217, 233 (D.D.C. 2014) (concluding "the plain language" of the relevant statute "means precisely what it says" and was unambiguous). *See also, e.g.*, Equal Rights Ctr. v. Uber Techs., Inc., 525 F. Supp. 3d 62, 83–84 (D.D.C. 2021) (looking to the dictionary definition of "provide" to conclude that Uber plausibly "provided" a public transportation service within the Americans with Disabilities Act's meaning)

[129] Kiakombua v. Wolf, 498 F. Supp. 3d 1, 41 (D.D.C. 2021) (holding an agency's "requirement of certainty, as conveyed by the use of the present tense 'is,' is in tension with Congress's deliberate employment of the verb phrase 'could' — for the latter conveys . . . a possibility, rather than certainty"); *see also AFL-CIO*, 471 F. Supp. 3d at 244 (holding that use of "taken" in a statute "speaks solely to actions that have been 'taken'" and not necessarily actions that individuals "have not yet taken (but will take)").

[130] *Am. Meat Inst*., 968 F. Supp. 2d at 60–61 (noting that statute "expressly refers to . . . 'an' animal or 'the animal,'" suggesting Congress did not address the issue of commingling cuts derived from multiple animals).

[131] *See generally*, Valerie C. Brannon, *Statutory Interpretation: Theories, Tools, and Trends*, CONG. RES. SERV. (May 18, 2022).

[132] Watervale Marine Co. v. U.S. Dep't of Homeland Sec., 55 F. Supp. 3d 124, 145 (D.D.C. 2014), *aff'd on other grounds*, 807 F.3d 325 (D.C. Cir. 2015) (rejecting reading of statute that would render one of its words superfluous to another provision). *See also, e.g*., Osvatics v. Lyft, Inc., 535 F. Supp. 3d 1, 13 (D.D.C. 2021) (applying *ejusdem generis* canon which counsels that a general term following more specific terms should be construed to cover only concepts similar to the more specific terms, to interpret a statute's residual clause); Clarian Health W., LLC v. Burwell, 206 F. Supp. 3d 393, 414–15 (D.D.C. 2016) (applying *expressio unius* canon which suggests that Congress's expression of one thing implies the exclusion of other associated items, to hold that a law did not incorporate a certain exemption, where it expressly included other related exemptions taken from another statute), *rev'd*, 878 F.3d 346 (D.C. Cir. 2017).

[133] *See generally*, Jacob Weinrib, *What is Purposive Interpretation?*, UNIV. TORONTO L.J. (forthcoming 2023); Aharon Barak, PURPOSIVE INTERPRETATION IN LAW (Princeton Univ. Press 2005); Daniel Mark, *Review Essay: Legislative Intent and Purposive Interpretation*, Vol. 60, No. 2 AMERICAN J. JURISPRUDENCE 227-245 (Dec. 2015).

have sought[134] and whether a particular interpretation serves Congress's purpose.[135] In one case, for example, she enjoined portions of executive orders she concluded reflected "a decidedly different policy choice" from the one Congress expressly adopted.[136] Further, like Associate Justice Breyer,[137] Jackson sometimes reviews legislative history to ascertain the meaning of statutory language.[138]

Two relatively narrow and complex statutory interpretation disputes reflect Jackson's holistic approach to statutory interpretation.

(1) The first, *R.J. Reynolds Tobacco Company v. United States Department of Agriculture*,[139] involved a statutory provision requiring tobacco manufacturers and importers to make subsidy payments to tobacco growers.[140] The statute required the Commodity Credit Corporation (CCC) to base those payments on all "relevant information," and the legal question was whether that phrase permitted the CCC to consider only information that was "precise and verified by another federal agency."[141] Jackson agreed that it did.[142] Jackson scrutinized the statute's "plain text," citing canons of construction and a legal dictionary to hold that the term "other relevant information" should incorporate only information similar to the categories of agency-substantiated information specifically enumerated earlier in the statute.[143] She then concluded that the law's purpose confirmed this textual interpretation, noting that Congress had not given the CCC authority to engage in independent substantiation, and it would "make[] eminent sense" for Congress to intend the agency "to rely only on information that other federal law enforcement agencies . . . have already verified."[144]

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[134] *Am. Meat Inst.*, 968 F. Supp. 2d at 55 n.18 (stating that "the fact that a rational legislature probably would not have wanted" an outcome that the plaintiffs claimed would follow from a particular statutory construction "merely underscore[d] the likelihood" that the particular provision was "not really addressing" the issue).

[135] *See, e.g*., *Kiakombua*, 498 F. Supp. 3d at 45 (deciding whether an agency's interpretation of a law governing credible-fear interviews was reasonable "necessarily requires the Court to focus on the purpose of credible-fear interviews as Congress envisioned them").

[136] Am. Fed'n of Gov't Emps. v. Trump, 318 F. Supp. 3d 370, 381 (D.D.C. 2018), *rev'd and vacated*, 929 F.3d 748 (D.C. Cir. 2019).

[137] *See, e.g.*, Breyer, *supra* note 123, at 847 (defending "careful use" of legislative history).

[138] *See, e.g*., Wye Oak Tech., Inc. v. Republic of Iraq, 24 F.4th 686, 702 (D.C. Cir. 2022) (observing that "[t]o the extent that one might think that the second clause is ambiguous . . . , the legislative history . . . leaves no doubt."); *Kiakombua*, 498 F. Supp. 3d at 46 (stating a law's legislative history "provides one lens through which to view Congress' intent"); A Love of Food I, LLC v. Maoz Vegetarian USA, Inc., 70 F. Supp. 3d 376, 408 (D.D.C. 2014) ("Finding the case law less than illuminating, this Court reviewed the [Act's] legislative history and finds that it sheds some light on the meaning and purpose of the statutory language . . . ."). *Cf., e.g*., Ctr. for Biological Diversity v. McAleenan, 404 F. Supp. 3d 218, 238–39 (D.D.C. 2019) (concluding that "[g]iven the abundantly clear and specific language that Congress used . . . , it is not necessary for the Court to delve into the . . . legislative history to determine Congress's intent."), *cert. denied*, 141 S. Ct. 158 (2020); Gov't Accountability Project v. Food & Drug Admin., 206 F. Supp. 3d 420, 436 (D.D.C. 2016) (similar), *rev'd*, 878 F.3d 346 (D.C. Cir. 2017); Note, *Prevention Versus Punishment: Toward a Principled Distinction in the Restraint of Released Sex Offenders*, 109 HARV. L. REV. 1711, 1720 (1996) (expressing concern about potential manipulability or indeterminacy of legislative history).

[139] 130 F. Supp. 3d 356 (D.D.C. 2015).

[140] *Id*. at 358.

[141] *Id*. at 370.

[142] *Id*. at 371.

[143] *Id*. at 373.

[144] *Id*. at 373-74.

(2) The second example is the first of Jackson's several opinions in *Alliance of Artists & Recording Companies. v. General Motors*.[145] This case involved the *Audio Home Recording Act*, a federal law requiring manufacturers and distributors of "digital audio recording devices" to implement certain technologies and pay per-device royalties.[146] At issue was whether in-vehicle systems produced "digital audio copied recordings," a question that turned on whether a digital audio copied recording also had to be a "digital music recording."[147] The defendant car manufacturers maintained their in-vehicle systems were not covered because they did not generate output that met the statutory definition of "digital music recording."[148] Jackson agreed, pointing to language in the statutory definition and other sections of the law that seemed to assume that digital audio copied recordings were themselves digital music recordings.[149] She noted, for example, that a remedial provision authorized courts to order the destruction of any non-compliant digital audio recording device or digital musical recordings, without specifically referencing digital audio copied recordings.[150] In her view, it made "little sense that Congress would only authorize a court to seize or destroy the [device] and its input (the [digital music recordings] while leaving the illegal copies . . . unscathed."[151] Instead, the more natural reading was that a digital audio copied recording was a type of digital music recording that could also be destroyed under the remedial provision.[152] Jackson also said this reading was consistent with the law's purpose; the legislative history confirmed that the text was "the carefully calibrated result of extensive legislative negotiations."[153] After further proceedings, Jackson granted summary judgment favoring the auto manufacturers.[154] On appeal, the D.C. Circuit affirmed the grant of summary judgment, favorably citing Jackson's analysis.[155]

E. Stare Decisis: Today's Court Should Stand by Yesterday's Decisions

In addition to general theories about constitutional and statutory interpretation, past Supreme Court decisions play a key role in a judge's legal reasoning. District courts and courts of appeals are bound by the controlling decisions of the superior federal courts: the appeals courts must follow Supreme Court precedent, and district courts must follow decisions of the U.S. Supreme Court and the U.S. Court of Appeals for the circuit in which they sit.[156] In contrast, the Supreme Court is not so bound. In its place, the Justices generally follow prior decisions of the Supreme Court under the nonbinding doctrine of *stare decisis* — "in English, the idea that today's Court should stand by yesterday's decisions."[157] The Court generally adheres to its prior decisions absent "a 'special justification' — over and above the belief 'that the precedent was wrongly decided.'"[158] But the

[145] All. of Artists & Recording Cos., Inc. v. Gen. Motors Co., 162 F. Supp. 3d 8 (D.D.C. 2016).
[146] *Id*. at 8-9.
[147] *Id*. at 17.
[148] *Id*.
[149] *Id*. at 18-19.
[150] *Id*. at 19.
[151] *Id*.
[152] *Id*.
[153] *Id*.
[154] All. of Artists & Recording Cos., Inc. v. Gen. Motors Co., 306 F. Supp. 3d 422, 425 (D.D.C. 2018).
[155] All. of Artists & Recording Cos., Inc. v. DENSO Int'l Am., Inc., 947 F.3d 849, 862, 865, 867 (D.C. Cir. 2020).
[156] *See, e.g.*, Patterson v. U.S., 999 F. Supp. 2d 300, 310 (D.D.C. 2013) (quoting *Owens-Ill., Inc. v. Aetna Cas. & Sur. Co*., 597 F. Supp. 1515, 1520 (D.D.C. 1984)).
[157] Kimble v. Marvel Ent. LLC, 576 U.S. 446, 455 (2015).
[158] *Id*. at 455-56 (quoting *Halliburton Co. v. Erica P. John Fund, Inc.*, 573 U.S. 258, 266 (2014)).

Court has also emphasized *stare decisis* is not "an inexorable command."[159] The principle is at its weakest in constitutional cases, because Congress cannot "abrogate" an erroneous constitutional interpretation as it could a decision involving a statute.[160]

A Justice's views on the doctrine of *stare decisis* are potentially relevant across all areas of the Court's 'pu pu platter' of jurisprudence. A Justice's prior statements about *stare decisis* (if any), for example, could illuminate how she would approach prior decisions she considers to be wrongly decided and whether she believes the strength of precedent might be different for statutory and constitutional cases.[161]

Jackson's prior decisions and public statements offer limited guidance on these questions, but generally reflect the thorough consideration of applicable precedent.[162] With respect to her position on *stare decisis*, Jackson has 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."[163]

During her confirmation to the D.C. Circuit when asked how she would define "judicial activism," Jackson responded in part:

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[159] *See* Janus v. AFSCME, Council 31, 138 S. Ct. 2448, 2478 (2018) (quoting, *inter alia*, *Pearson v. Callahan*, 555 U.S. 223, 233 (2009); Lawrence v. Texas, 539 U.S. 558, 577 (2003); State Oil Co. v. Khan, 522 U.S. 3, 20 (1997)).

[160] *See* Vieth v. Jubelirer, 541 U.S. 267, 305 (2004) (plurality opinion) (reasoning the precedent under consideration "involved an interpretation of the Constitution, and the claims of stare decisis are at their weakest in that field, where our mistakes cannot be corrected by Congress").

[161] In past hearings, U.S. Senators have asked Supreme Court nominees, including Jackson, whether there are particular cases they believe were wrongly decided. Jackson generally followed the practice established by other nominees of declining to answer such questions, except with respect to the seminal cases of *Marbury v. Madison*, *Brown v. Board of Education* and *Loving v. Virginia*. *See Senate Judiciary Attachments*, *supra* note 84, at 460 (responding to questions from Sen. Ben Sasse (R.Neb.)). Jackson's decision in *Maryland v. U.S. Dep't Educ.*, No. 17-cv-2139, 2020 WL 777 (D.D.C. Dec. 29, 2020) shows her adherence to binding authority coupled with a willingness to express her concerns with such precedent. In *Maryland*, the D.C. Circuit vacated a district court decision by Jackson and remanded the case with instructions to dismiss as moot. *See id*. at *1 (citing *Maryland v. U.S. Dep't of Educ*., No. 20-5268, 2020 WL 7773390 (D.C. Cir. Dec. 22, 2020)). Jackson heeded appellate court directions on remand and dismissed the case as moot but wrote an opinion objecting to the *vacatur*. *See id*. at *5–7.

[162] *See, e.g.*, *Senate Judiciary Attachments*, *supra* note 84, at 454 (responding to questions from Sen. Mike Lee (R-Utah).

> It is the duty of a judge to apply Supreme Court and circuit precedent that governs the resolution of the issue at hand faithfully, regardless of that judge's personal opinion about either the matter at issue or the correctness of the holdings in those cases. However, if a particular Supreme Court or D.C. Circuit precedent is not applicable to an issue before me, I would look for analogous precedents to glean principles that could be applied to the circumstances of the case at hand. It might also be necessary to distinguish the instant circumstances from other seemingly applicable precedents and to explain why the principles articulated in such other cases do not control the outcome of the case.

Id.

[163] *Senate Judiciary Attachments*, *supra* note 84, at 488 (responding to questions from Sen. Amy Klobuchar (D.-Minn.)).

> While [a] judge may acknowledge the force of contrary positions regarding the legal issues in dispute, the result that a judge reaches must be consistent with the requirements of the law, as set forth in the binding precedents of the Circuit and the Supreme Court. Judicial activism occurs when a judge is unwilling or unable to rule as the law requires and instead resolves cases consistent with his or her personal views.[164]

Tackling a question about when it is appropriate for a federal circuit court to overrule its own precedents, she explained: "D.C. Circuit precedents make clear that it is appropriate for that court, sitting *en banc*, to overturn its own precedents only in a narrow set of circumstances," including when required by intervening developments in the law when a prior holding on an important question of law was fundamentally flawed, or "where the precedent may be a positive detriment to coherence and consistency in the law, either because of inherent confusion created by an unworkable decision or because the decision poses a direct obstacle to the realization of important objectives embodied in other laws."[165]

One of her district court decisions includes a significant discussion of *stare decisis*. In *Committee on the Judiciary v. McGahn*, Jackson looked to a prior D.C. district court decision she viewed as "compelling (albeit, admittedly, not controlling)," and applied that precedent in a manner she deemed "consistent with *stare decisis* principles" to help resolve a high-stakes separation of powers dispute.[166] Quoting the Supreme Court, she recognized that *stare decisis* "promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions and contributes to the actual and perceived integrity of the judicial process."[167] She further opined that the doctrine "performs a limiting function" supporting the constitutional separation of powers, because "deciding a legal issue anew each time that same question is presented, without any reference to what has been done before, nudges a court outside of its established domain of 'say[ing] what the law is[,]' and into the realm of legislating what the law should be."[168]

Two additional decisions by Jackson contain a more limited discussion of *stare decisis*. In *Patterson v. United States*,[169] Jackson held that the United States Park Police who arrested an individual for using profanity in a public park violated clearly established law under the First and Fourth Amendments.[170] Rejecting the government's argument that the plaintiff could not pursue a First Amendment claim, Jackson explained, "the D.C. Circuit has expressly recognized that there

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[164] *Id*. at 413 (responding to questions from Sen. Chuck Grassley (R.-Iowa)).

> A circuit judge might properly encourage the Supreme Court to reconsider holdings that are confusing or otherwise problematic in application, by pointing out a problem with the interpretation or application of a precedent, in either a concurrence or a dissent. But it would not be proper for a circuit court judge to depart from Supreme Court precedent when ruling in a case.

Id. at 13.

[165] *Id*. at 462 (responding to questions from Sen. Ben Sasse (R.-Neb.)) (quoting *U.S. v. Burwell*, 690 F.3d 500, 504 (D.C. Cir. 2012)) (internal quotations omitted).

[166] Comm. on Judiciary, U.S. House of Representatives v. McGahn, 415 F. Supp. 3d 148, 173 (D.D.C. 2019), *rev'd*, 973 F.3d 121 (D.C. Cir. 2020), *rev'd en banc*, 968 F.3d 755 (D.C. Cir. 2020) (italics added).

[167] *McGahn*, 415 F. Supp. 3d at 173 (quoting Payne v. Tenn., 501 U.S. 808, 827–28 (1991)).

[168] *Id*. at 165–66 (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803)).

[169] 999 F. Supp. 2d 300 (D.D.C. 2013).

[170] Id. at 315.

is a First Amendment right not to be arrested in retaliation for one's speech where there is otherwise no probable cause for the arrest, . . . and this Court cannot ignore the D.C. Circuit's binding precedent."[171]

In *Morgan v. United States Parole Commission*,[172] Jackson dismissed a prisoner's civil suit in part on the grounds of *res judicata* — the legal doctrine "bar[ring] re[-]litigation of claims or issues that were or could have been litigated in a prior action."[173] Finding prior litigation in a West Virginia federal court barred the plaintiff's claim under the Ex Post Facto Clause, Jackson observed, "this Court sees nothing inherently unfair or untoward about the application of past precedent to address a constitutional question; after all, adherence to precedent is venerated practice of the state and federal courts."[174]

VI. SELECT CASE ANALYSIS BY TOPIC

Subsequent article sections,[175] arranged alphabetically, from *Administrative Law* to *Separation of Powers* offer short not shallow treatment from a buffet of Judge Ketanji Brown Jackson's nearly 600 written opinions from her time as a judge on the United States District Court for the District of Columbia and the United States Court of Appeals for the District of Columbia Circuit.

A. Administrative Law

Judge Ketanji Brown Jackson's administrative law record demonstrates an inclination toward deference to administrative expertise that is tempered by close attention to whether agency decision-makers have followed proper procedures and adhered to congressional intent.

Administrative law is a delicate balance of power between Congress, agencies, and the courts.[176] The statutes Congress enacts represent the agencies' sole source of authority but often leave

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[171] *Patterson*, 999 F. Supp. 2d at 310 (internal citation omitted). *See also id*. at 310-11 (quoting *Owens-Ill., Inc. v. Aetna Cas. & Sur. Co*., 597 F. Supp. 1515, 1520 (D.D.C. 1984) (relating that "[t]he doctrine of *stare decisis* compels district courts to adhere to a decision of the Court of Appeals of their Circuit until such time as the Court of Appeals or the Supreme Court of the United States sees fit to overrule the decision.").

[172] 304 F. Supp. 3d 240 (D.D.C. 2016).

[173] *Id*. at 246.

[174] *Id*. at 251.

[175] This section features decisions identified in the LEXIS and WESTLAW commercial databases as written by Ketanji Brown Jackson alongside cases harvested from publicly available resources (e.g., COURTLISTENER and GOOGLE SCHOLAR). It also draws from assorted reports prepared by the CONGRESSIONAL RESEARCH SERVICE (CRS), a legislative branch agency within the LIBRARY OF CONGRESS. As works of the United States Government, the CRS materials are not subject to copyright protection in the United States and may be reproduced and distributed in whole or in part (excepting copyrighted images or material from a third party) without permission from CRS should readers (especially teachers) wish to do so. The author is grateful for the depth and breadth of the objective, authoritative, and non-partisan legal research and analysis shared by CRS and extends a hat tip, principally to the law librarians, as a cultural expression of recognition, respect, and acknowledgement.

[176] BLACK'S LAW DICTIONARY 48 (8th ed. 2004) (defining administrative law).

> Administrative law is divided into three parts:
> (1) The statutes endowing agencies with powers and establishing rules of substantive law relating to those powers;
> (2) the body of agency-made law, consisting of administrative rules, regulations, reports, opinions containing findings of fact, and orders; and

substantial gaps. The tasks of identifying the scope of those gaps and defining the powers agencies have to fill them, or not, are left to the courts[177] and the agencies themselves. Businesses and individuals that need help understanding and complying with complex rules often request guidance. Every federal agency's guidance, variously called memorandums, circulars, bulletins, or letters, expands on its regulations. These documents are sometimes criticized as "stealth regulations" because they allow agencies, according to detractors, to effectively impose new requirements without submitting to formal rulemaking procedures.

This conservative Supreme Court feels compelled to assert itself as a crucial check on the balance of power, reining in the executive and legislative branches as they attempt to make large-scale changes to environmental, health care, and other laws.[178] The emboldened Court is fodder for folks who want to challenge agency determinations they assert go beyond what is in the statute and regulations. It is easier in the current Court's climate to make arguments that an agency is overstepping its regulatory authority. A lower court that reflexively defers to an agency without memorializing its analysis of the regulatory or statutory language — which a fair number have done in the past — is more likely to get struck down on appeal.

Today's Supreme Court is taking baby steps toward rolling back the administrative state, shifting its center of power to the courts, but it could well take a giant leap over the next couple of years. The shift has been incremental, yet the impacts on virtually every agency — and therefore every business, industry, and individual subject to regulation — are already substantial.[179] And the pace of change could rapidly increase in the October 2022 Supreme Court Term and beyond.

> (3) the legal principles governing the acts of public agents when those acts conflict with private rights.

Id. *See generally*, Felix Frankfurter, *The Task of Administrative Law*, 75 U. PA. L. REV. 614, 615 (1927) (informing that "[a]dministrative law deals with the field of legal control exercised by law-administering agencies other than courts, and the field of control exercised by courts over such agencies").

> [A]dministrative law is to labor law, securities regulation, and tax what civil procedure is to contracts, torts, and commercial law. Administrative law studies the way government institutions do things. It is therefore the procedural component to any practice that affects or is affected by government decision-makers other than just the courts. Its study goes beyond traditional questions; it explores a variety of procedures and it develops ideas about decision-making and decisionmakers.

Charles H. Koch, ADMINISTRATIVE LAW & PRACTICE § 1.2, at 2 (2d ed. 1997).

[177] Jonathan M. Gaffney, *Judicial Review Under the Administrative Procedure Act (APA)*, CONG. RES. SERV. (Dec. 8, 2020) (summarizing APA's judicial review requirements before exploring scope of that review, but does not address other issues affecting judicial review of agency actions, such as subject-matter jurisdiction or the case-or-controversy requirement).

[178] See. e.g., Elliot Ganz, *Recent Supreme Court Rulings on Administrative Law: What Do They Mean for the Loan Market?*, LOAN SYNDICATIONS & TRADING ASS'N (Aug. 1, 2022); Shay Dvoretzky & Emily Kennedy, *Administrative Law and Arbitration to Take Center Stage at Supreme Court*, REUTERS (Jan. 10, 2022).

[179] Five trends gleaned from decisions relating to administrative law and the separation of powers handed down during the immediate past Supreme Court term:

> (1) The "major questions doctrine," and how it can limit executive-branch authority;
> (2) How spending can be used to shape behavior in situations where executive-branch authority might otherwise be limited;
> (3) The fate of "*Chevron* deference" – i.e., the judiciary's willingness to defer to the executive branch's interpretations of statutes agencies are tasked to administer;
> (4) [How and when agencies can change preexisting policies] What discretion do executive agencies have to change policies, and what steps do they need to defend such changes; and

As the power and reach of the administrative state are pruned back, its relationship with business and industry is bound to change. The shape of that relationship is still being worked out. Beyond the symbolic (and political) importance of a Black woman on the high court, how Ketanji Brown Jackson approaches administrative law cases will help shape how both majority and minority opinions will be framed.

The D.C. federal courts play an "outsized role" in administrative law,[180] with cases involving executive branch authority comprising a hefty portion of their sizeable dockets.[181] Judge Jackson's district court opinions reflect that focus. A number of her decisions consider the application of the *Administrative Procedure Act* (APA), perhaps the most prominent modern vehicle for challenging the actions of a federal agency. The APA generally governs judicial review of agency action[182] and various judicially created doctrines that apply to the review of agency actions.[183]

The APA, originally enacted in 1946,[184] establishes the procedures that federal agencies use for rulemaking[185] and adjudications.[186] It also includes procedures for how courts may review those agency actions. These judicial review procedures are default rules that apply unless another law supersedes them. A person[187] — an individual, business, or other organization — seeking review under the APA must have suffered a legal wrong or been otherwise harmed by agency action.

This article's discussion focuses primarily on issues relating to justiciability and substantive review of agency decisions undertaken by Judge Jackson but understand that Jackson has faced a wide variety of administrative law issues, including cases challenging agency procedures.[188] She has

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(5) [An increase in procedurally irregular case resolutions] When the Supreme Court will intervene in cases that are moot or which otherwise lower court decision-making might simplify the Court's resolution of involved issues.

J. Michael Showalter, *Five Administrative Law Takeaways from Recent Supreme Court Decisions*, NAT'L L. REV. (July 7, 2022).

[180] Aaron L. Nielson, *D.C. Circuit Review – Reviewed: The Second Most Important Court?*, YALE J. REG.: NOTICE & COMMENT (Sept. 4, 2015).

[181] *Essay by Roberts, supra* note 64, at 376-77; Brett M. Kavanaugh, *Lecture: The Courts and the Administrative State*, 64 CASE W. RES. L. REV. 711, 715 (2014) (advising that "the bread and butter of [the D.C. Circuit docket is its] . . . administrative law docket.").

[182] 5 U.S.C. §§ 701-706; *see generally* Jared P. Cole, *An Introduction to Judicial Review of Federal Agency Action*, CONG. RES. SERV. (Dec. 7, 2016) (offering brief overview of important considerations when individuals bring a lawsuit in federal court to challenge agency actions, with a particular focus on type of review authorized by the *Administrative Procedure Act*).

[183] *See, e.g.*, Valerie C. Brannon & Jared P. Cole, *Chevron Deference: A Primer*, CONG. RES. SERV. (Sept. 19, 2017).

[184] Pub. L. No. 79-404, 60 Stat. 237 (June 11, 1946).

[185] 5 U.S.C. § 553; *see generally*, Todd Garvey, *A Brief Overview of Rulemaking and Judicial Review*, CONG. RES. SERV. (Mar. 27, 2017) (providing a brief legal overview of the methods by which agencies may promulgate rules, which include formal rulemaking, informal (notice-and-comment or § 553) rulemaking, hybrid rulemaking, direct final rulemaking, and negotiated rulemaking; addressing the legal standards applicable to the repeal or amendment of existing rules; reviewing briefly the requirements of presidential review of agency rulemaking).

[186] 5 U.S.C. § 554.

[187] 5 U.S.C. § 551(2).

[188] *See, e.g.*, AFL-CIO v. NLRB, 466 F. Supp. 3d 68, 92 (D.D.C. 2020) (holding that an agency rule should have gone through notice-and-comment rulemaking because it was not merely a procedural rule); Clarian Health W., LLC v. Burwell, 206 F. Supp. 3d 393, 397 (D.D.C. 2016) (holding that agency statements in an instruction manual were

also resolved cases involving broader oversight issues and a large number of disputes involving *Freedom of Information Act* (FOIA) interpretation and application.[189]

Associate Justice Stephen G. Breyer was generally deferential to federal agencies' exercises of their statutorily delegated authority.[190] Some legal commentators suggest the record of his former law clerk Ketanji Brown Jackson is less deferential given her willingness both to extend the judicial review to agency actions and to enforce procedural and substantive limitations on agency authority.[191]

1. Justiciability and Agency Discretion

A threshold question in many cases challenging agency action is whether Congress has chosen to delegate authority to an agency in a way that is effectively unreviewable in court.[192] The APA does not apply to, and thus does not provide a cause of action for judicial review of, "agency action" that "is committed to agency discretion by law."[193] However, as the Supreme Court has stated, the APA "embodies the basic presumption of judicial review to one 'suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute.'"[194] The high tribunal in recent years has explained that it reads the APA's statutory exception "quite narrowly," so that agency actions are reviewable except in the "rare" case of

substantive rules that should have gone through notice-and-comment rulemaking), *rev'd*, 878 F.3d 346 (D.C. Cir. 2017).

[189] For example, Jackson issued two opinions rejecting claims that the U.S. Department of Justice's Office of Legal Counsel's written legal opinions were either all covered by or all exempt from the reading room provisions of the *Freedom of Information Act*. *See* Campaign for Accountability v. U.S. Dep't of Just., 486 F. Supp. 3d 424, 426 (D.D.C. 2020); Campaign for Accountability v. U.S. Dep't of Just., 278 F. Supp. 3d 303, 305–06 (D.D.C. 2017). *See also, e.g.*, Brick v. U.S. Dep't of Just., 293 F. Supp. 3d 9, 10, 12 (D.D.C. 2017) (noting an agency's repeated failures to submit sufficient information to allow meaningful judicial review of its FOIA redactions, and stating that if the agency failed again, the court would require production of the documents); Sheridan v. U.S. Off. of Pers. Mgmt., 278 F. Supp. 3d 11, 22–23 (D.D.C. 2017) (noting, but avoiding resolving, an open legal question relating to the application of the FOIA exemption for records compiled for law enforcement purposes).

[190] Valerie C. Brannon et al., *Justice Breyer Retires: Initial Considerations*, CONG. RES. SERV. (Jan. 28, 2022).

[191] Jimmy Hoover, *Ketanji Brown Jackson No 'Rubber Stamp' For Gov't Agencies*, LAW360 (Mar. 3, 2022).

[192] *See generally*, Jared P. Cole, *An Introduction to Judicial Review of Federal Agency Action*, CONG. RES. SERV. (Dec. 7, 2016). A somewhat related issue is administrative exhaustion: a judicially enforced doctrine requiring parties to exhaust any available administrative procedures provided by statute or regulation before they may challenge an agency decision in court. *See, e.g.*, Mackinac Tribe v. Jewell, 87 F. Supp. 3d 127, 130–31 (D.D.C. 2015) (dismissing lawsuit seeking tribal recognition because the Mackinac Tribe had not exhausted administrative remedies), *aff'd*, 829 F.3d 754 (D.C. Cir. 2016).

[193] 5 U.S.C. § 701(a)(2). *But see*, 5 U.S.C. § 701(a)(1) (emphasizing APA does not apply "to the extent that statutes preclude judicial review").

[194] Abbott Lab'ys v. Gardner, 387 U.S. 136, 140 (1967) (quoting 5 U.S.C. § 702).

administrative decisions "traditionally left" to agency discretion.[195] This is true even when an agency acts according to a "broad" grant of authority that entails significant discretion.[196]

Judge Jackson's opinions considering whether an action is committed to agency discretion by law, and therefore unreviewable in court, reflect a case-by-case assessment of APA applicability. In *Policy & Research, LLC v. United States. Department of Health & Human Services* (HHS), when grantees challenged HHS's termination of their grants, Jackson recognized that an agency's decision of how best to use appropriated funds can be an example of an action committed to agency discretion by law.[197] Though HHS had promulgated regulations limiting its discretion to terminate grants, providing "meaningful standards" on which to base judicial review under the APA,[198] Jackson went on to hold that HHS had not provided the "reasoned analysis" of its decision that the APA demands.[199]

In another case, *Make the Road New York v. McAleenan*,[200] Jackson held that though a statute gave the Secretary of the United States Department of Homeland Security (DHS) the "sole and unreviewable discretion" to designate categories of aliens subject to expedited removal, this provision did not grant "sole discretion to determine how that decision will be made."[201] According to Jackson, this meant that although plaintiffs could not challenge which categories of persons DHS had chosen to designate as subject to expedited removal, they could maintain claims that the agency designation violated APA procedural requirements.[202] On appeal, the D.C. Circuit rejected that conclusion, holding instead that Congress's broad delegation "confine[d] the judgment to the [DHS] Secretary's hands and, in so doing, inescapably [sought] to withdraw the decision from APA review" — not only barring review of the decision's substance but also making APA procedural requirements inapplicable to such cases.[203]

Jackson also has concluded that some cases presented the "rare" instance of an action that was committed to an agency's discretion by law. For example, *Otay Mesa Property, L.P. v. United States*

[195] Dep't of Homeland Sec. v. Regents of the Univ. of Cal., 140 S. Ct. 1891, 1905 (2020) (internal quotation marks omitted) (concluding Deferred Action for Childhood Arrivals (DACA) program was more than a non-enforcement policy of the type traditionally held to be committed to agency discretion by law and rescission of DACA was therefore subject to APA review); *see also, e.g*., Weyerhaeuser Co. v. U.S. Fish & Wildlife Serv., 139 S. Ct. 361, 370–72 (2018) (explaining that the Court has found an issue to be committed to agency discretion in "few cases"); Daniel J. Sheffner, *Judicial Review of Actions Legally Committed to an Agency's Discretion*, CONG. RES. SERV. (Sept. 17, 2020),

[196] Dep't of Com. v. N.Y., 139 S. Ct. 2551, 2568 (2019) (stating that, though the Census Act "confers broad authority on the Secretary" for census matters, the Act did not provide unbounded discretion, and the taking of the census was not an area "traditionally committed to agency discretion"); *see also* Citizens to Pres. Overton Park, Inc. v. Volpe, 401 U.S. 402, 410 (1971) (explaining that an action is committed to agency discretion where relevant statutes are "drawn in such broad terms that in a given case there is no law to apply" (internal quotation marks omitted)).

[197] Pol'y & Rsch., LLC v. U.S. Dep't of Health & Hum. Servs., 313 F. Supp. 3d 62, 76 (D.D.C. 2018) (stating such funding decisions are "presumptively unreviewable").

[198] *Id*. at 83.

[199] *Id*. at 84.

[200] Make the Rd. N.Y. v. McAleenan, 405 F. Supp. 3d 1, 39 (D.D.C. 2019), *rev'd and remanded sub nom*. Make the Rd. N.Y. v. Wolf, 962 F.3d 612 (D.C. Cir. 2020). *See generally, Make the Road New York v. McAlleenan — Challenge to Trump Administration Expansion of "Expedited Removal" for Immigrants*, ACLU DISTRICT OF COLUMBIA (Aug. 6, 2019).

[201] 405 F. Supp. 3d 1, 39 (emphasis added).

[202] *Id*. at 43.

[203] 962 F.3d at 632, 634.

Department of the Interior[204] challenged the Interior Department's refusal to exclude an area from a critical habitat designation under the *Endangered Species Act*. Jackson reasoned that the statute did not "'provide a standard by which to judge" the exclusion decision.[205] Examining a statute in *Watervale Marine Company v. United States Department of Homeland Security*[206] providing that the United States Coast Guard "may" grant departure clearance to a vessel suspected of violating certain environmental laws "upon the filing of a bond or other surety satisfactory to the [Interior] Secretary,"[207] Jackson likewise found no APA cause of action for plaintiffs challenging the decision to impose additional, non-financial conditions for departure clearance.[208] She concluded statute text and structure gave her no standards by which to assess the clearance decision because even when the vessel owner posted a satisfactory "bond or other surety," the agency was not required to grant clearance.[209] On appeal, the D.C. Circuit disagreed with Jackson, holding the APA committed-to agency discretion exception did not foreclose a claim premised on the theory that non-financial conditions exceeded Coast Guard authority.[210]

Considering a distinct but related issue in *Center for Biological Diversity v. Zinke*,[211] Judge Jackson concluded the APA did not authorize relief in a lawsuit seeking to compel the United States Department of the Interior to complete an assessment of its environmental review policies.[212] Although the APA authorizes courts to "compel agency action unlawfully withheld or unreasonably delayed,"[213] she noted that Supreme Court precedent allowed judicial review only of "a discrete agency action that it is required to take."[214] Jackson found the claim before her did not meet this standard, holding that while the governing statute required agencies to revise their environmental review policies as necessary, it did not prescribe "any discrete agency action," and set "no fixed endpoint."[215] Discussing the respective roles of courts and administrative agencies, Jackson said that "courts do not, and cannot, police agency deliberations as a general matter."[216] In her perspective, "meddling in an agency's tentative, internal deliberations absent a clear-cut

[204] Otay Mesa Prop., L.P. v. U.S. Dep't of the Interior, 144 F. Supp. 3d 35 (D.D.C. 2015) (quoting *Cape Hatteras Access Pres. All. v. U.S. Dep't of the Interior*, 731 F. Supp. 2d 15, 29 (D.D.C. 2010)). At the time, Jackson's conclusion was consistent with decisions reached in another judicial circuit. *See* Bear Valley Mut. Water Co. v. Jewell, 790 F.3d 977, 990 (9th Cir. 2015). In 2018, however, the Supreme Court reached the opposite conclusion. *See* Weyerhaeuser Co. v. U.S. Fish & Wildlife Serv., 139 S. Ct. 361, 370–72 (2018).
[205] *Id*. at 64.
[206] Watervale Marine Co. v. U.S. Dep't of Homeland Sec., 55 F. Supp. 3d 124 (D.D.C. 2014), *aff'd on other grounds*, 807 F.3d 325 (D.C. Cir. 2015).
[207] 33 U.S.C. § 1908(e).
[208] *Watervale Marine Co.*, 55 F. Supp. 3d at 133.
[209] *Id.* at 142 (stating even if, as plaintiffs contended, the statute authorized the imposition of financial conditions only, the "Achilles heel" of plaintiffs' reviewability argument was that the "statute nevertheless appears to permit the Coast Guard to deny departure clearance altogether, or to require some additional conditions before making the clearance decision").
[210] *Watervale Marine Co.*, 807 F.3d at 330.
[211] 260 F. Supp. 3d 11 (D.D.C. 2017).
[212] *Id*. at 16.
[213] 5 U.S.C. § 706(1).
[214] *Ctr. for Biological Diversity*, 260 F. Supp. 3d at 20 (quoting *Norton v. S. Utah Wilderness All.*, 542 U.S. 55, 64 (2004)).
[215] *Id*. at 27.
[216] *Id*. at 29.

legal mandate to do so risks upsetting the balance between the judicial and administrative functions that Congress struck in the APA."[217]

2. Agency Statutory Interpretations and *Chevron* Deference

Decided by the Supreme Court in 1984, the *Chevron U.S.A., Inc. v. Natural Resources Defense Council* decision[218] has stood for nearly 40 years as the central case concerning judicial review of administrative agencies' interpretations of statutes.[219] *Chevron* has been on the highest of legal pedestals for so long because it crystallized a central question in administrative law — when courts would defer to agency interpretations of statutes, replacing fuzzy, multi-factor standards with rule-like clarity, in a broad swath of cases. Its contours have long been debated, but now the case is facing backlash from constitutional scholars and increasing scrutiny, from Supreme Court justices who insist that courts, not administrative agencies, have the authority to say what the law is. Some rail for its overturn while others praise *Chevron* calling deference necessary or even inevitable.

To conduct tasks delegated by Congress, federal agencies must interpret the statutes authorizing their actions. In a period of congressional deadlock, federal agencies often have to take the lead in responding to urgent social problems. Courts reviewing agency actions sometimes give special deference to agencies' interpretations of the statutes they administer, rather than adopting a different judicial interpretation. Specifically, under a framework outlined in *Chevron*, courts engage in a two-step analysis to determine whether to defer to an agency interpretation in an area where Congress delegated administrative authority.[220] First, courts ask whether the statute is clear, in which case "the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress."[221] This first step requires the court to engage in an ordinary statutory interpretation inquiry, using the "traditional tools of statutory construction."[222] If the statute is ambiguous, however, courts proceed to step two, in which they will defer to the agency's interpretation so long as it is reasonable.[223] If a court reaches the second step, *Chevron* instructs it to defer even if the court does not believe agency interpretation is the best construction of the statute[224] — it merely needs to be "permissible."[225]

Chevron deference is premised on the idea that when Congress delegates authority to agencies, it intends for agencies to fill in any "gap[s]" in the statute through reasonable interpretation.[226] The Supreme Court instructed in *Chevron* that judges should leave these open policy choices to the

[217] *Id*.
[218] 467 U.S. 837 (1984).
[219] *See generally*, Thomas W. Merrill, THE CHEVRON DOCTRINE: ITS RISE AND FALL, AND THE FUTURE OF THE ADMINISTRATIVE STATE (2022) (reviewing the history and immense consequences of the *Chevron* doctrine and suggesting a way forward); Cass R. Sunstein, *Who Should Regulate?*, N.Y. REV. OF BOOKS (May 26, 2022) (reviewing Merrill's book).
[220] *Chevron*, 467 U.S. 837 at 842-43.
[221] *Id*. at 842.
[222] *Id*. at 843 n.9.
[223] *Id*. at 843.
[224] *See, e.g.*, Entergy Corp. v. Riverkeeper, Inc., 556 U.S. 208, 218 (2009).
[225] *Chevron*, 467 U.S. 837 at 843.
[226] *Id*. at 843-44.

political branches, which are more politically accountable and have greater institutional competence to weigh policy considerations.[227]

Chevron now lacks the sexiness of power and predictability it once possessed, its decline dating to at least the 1990s but accelerating over recent Court terms. A number of jurists, including some sitting Supreme Court Justices, have criticized *Chevron* deference and the presumption that Congress intended agencies, rather than courts, to resolve statutory ambiguity.[228] Arguably, some judges have narrowed the application of *Chevron* deference over the past decade or so, in part by finding more readily that a statute is unambiguous at *Chevron's* first step.[229] In addition, the Court has recently considered cases raising the "major questions doctrine,"[230] which narrows the circumstances in which *Chevron* applies by demanding a clear statement from Congress when it delegates to agencies the authority to resolve questions of major economic and political significance.[231]

As a district court judge, Jackson was bound by governing precedent to apply *Chevron's* two-step framework to evaluate agency interpretations of statutes they administer. Accordingly, in a number of cases, Jackson concluded that a statute failed to address the precise question before the court and deferred to the agency's reasonable construction of that statute.[232]

In *American Meat Institute v. United States Department of Agriculture* (USDA),[233] a case also discussed later in this article, Jackson rejected a challenge to an agency regulation requiring "country-of-origin labeling" for certain commodities.[234] The plaintiffs argued that the regulation went beyond the governing statute by requiring additional information and by banning the commingling of animal cuts from different countries of origin.[235] On both issues, Jackson concluded, at *Chevron's* first step, that Congress had not expressly spoken to the precise question and, at *Chevron's* second step, held the statutory text likely supported the agency's reading.[236]

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[227] *Id*. at 865-66.
[228] Valerie C. Brannon & Jared P. Cole, *Deference and its Discontents: Will the Supreme Court Overrule Chevron*, CONG. RES. SERV. (Oct. 11, 2018).
[229] *Id*.
[230] *See generally*, Kate R. Bowers & Daniel J. Sheffner, *The Supreme Court's "Major Questions" Doctrine: Background and Recent Developments*, CONG. RES. SERV. (May 17, 2022); Daniel J. Sheffner, *The Major Questions Doctrine*, CONG. RES. SERV. (Apr. 6, 2022).
[231] *See* Brannon & Cole, *supra* note 228; *see also, e.g.*, *Nat'l Fed'n of Indep. Bus. v. OSHA*, 142 S. Ct. 661, 667–68 (2022) (Gorsuch, J., concurring).
[232] *See, e.g.*, Las Ams. Immigrant Advoc. Ctr. v. Wolf, 507 F. Supp. 3d 1, 30 (D.D.C. 2020) (concluding agency interpretation authorizing the placement of asylum seekers subject to expedited removal in Customs and Border Protection facilities was reasonable in light of Congress's clear intent as demonstrated in text and Supreme Court precedent); Otsuka Pharm. Co. v. Burwell, 302 F. Supp. 3d 375, 394, 399 (D.D.C. 2016) (concluding statute governing exclusivity periods for new drugs did not unambiguously bar agency's reading, looking to law's text, structure, and legislative history, and upholding agency interpretation as reasonable), *aff'd*, 869 F.3d 987 (D.C. Cir. 2017).
[233] 968 F. Supp. 2d 38 (D.D.C. 2013) (finding plaintiffs were unlikely to succeed on their statutory challenges and denying preliminary injunction), *aff'd*, 746 F.3d 1065 (D.C. Cir. 2014).
[234] *Id*. at 68.
[235] *Id*. at 52.
[236] *Id*. at 53–68. In evaluating the second statutory issue, Jackson also noted that the law's legislative history "amply support[ed]" a reading concluding that Congress did not address commingling. *Id.* at 65.

In a couple of other cases, Jackson expressly concluded deference was appropriate because Congress delegated broad authority to the agency, and the agency previously exercised that authority in such a way as to develop expertise on the debated issue — making *Chevron's* underlying presumption explicit.[237]

In a few cases, Judge Jackson found agency interpretations were not entitled to deference under the *Chevron* framework. In *Depomed, Inc. v. United States Department of Health and Human Services*,[238] for example, she ruled that the United States Food and Drug Administration acted improperly by refusing to recognize that a drug was entitled to a marketing exclusivity period — a result that, in Jackson's view, the statute unambiguously required under *Chevron's* first step.[239]

In *Kiakombua v. Wolf*,[240] for example, Jackson vacated a 2019 United States Citizenship and Immigration Services handbook governing "credible[-]fear" determinations used by immigration authorities to evaluate whether asylum claims of persons placed in expedited removal would receive further review[241] finding (1) portions of the manual that were "manifestly inconsistent with the two-stage asylum eligibility framework" established by the unambiguous governing statute did not pass *Chevron's* first step, and (2) other portions were "unreasonable interpretations of the . . . statutory scheme," failing *Chevron's* second step.[242]

3. Review of Agency Decisions as Arbitrary or Capricious

In cases where an agency's statutory interpretation is not subject to *Chevron* review, the APA provides standards for courts to review agency action. Notably, the APA instructs courts to hold unlawful any agency action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law."[243] Such "arbitrary and capricious" review can overlap with a *Chevron* step-two analysis because both evaluate the substance of agency reasoning and its compliance with governing law.[244] But review also contemplates whether the agency decision is bolstered by the administrative record and whether the agency has satisfactorily supported its reasoning.[245]

The scope of arbitrary-and-capricious review "is narrow;" hence, the court will not "substitute its judgment for that of the agency."[246] Accordingly, in *American Federation of Labor and Congress*

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[237] *See Las Ams. Immigrant Advoc. Ctr*., 507 F. Supp. 3d at 31; Am. Fed'n of Gov't Emps. v. Trump, 318 F. Supp. 3d 370, 386 (D.D.C. 2018), *rev'd and vacated*, 929 F.3d 748 (D.C. Cir. 2019).
[238] Depomed, Inc. v. U.S. Dep't Health & Hum. Servs., 66 F. Supp. 3d 217 (D.D.C. 2014).
[239] *Id*. at 233.
[240] 498 F. Supp. 3d 1 (D.D.C. 2021).
[241] *Id*. at 11.
[242] *Id*. at 38; *see also id.* at 43 (stating that the manifestly inconsistent portions contradicted the law's "unambiguous text"); *id*. at 44 (saying that "in *Chevron* . . . parlance," the unreasonable provisions "exceeded the reasonable boundaries of any ambiguity to be found in the statute and related regulations").
[243] 5 U.S.C. § 706(2)(A).
[244] *See, e.g.*, Judulang v. Holder, 565 U.S. 42, 52 n.7 (2011). *See also, e.g*., Otay Mesa Prop., L.P. v. U.S. Dep't of the Interior, 344 F. Supp. 3d 355, 366 (D.D.C. 2018) ("determin[ing] that, even after granting the [Fish and Wildlife Service] the deference that it is due under *Chevron*, the agency's identification of the geographical area occupied by the Riverside fairy shrimp was unreasonable and therefore arbitrary and capricious, which means that the resulting occupied critical habitat determination violated the APA")
[245] *See* Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 42–43 (1983).
[246] *Id*. at 43.

of Industrial Organizations (AFL-CIO) v. National Labor Relations Board (NLRB),[247] Judge Jackson rejected an arbitrary-and-capricious challenge to an agency rule prescribing procedures electing employee representatives for collective bargaining since she believed the agency had sufficiently elucidated its reasoning and demonstrated its consideration of relevant factors.[248]

For comparative purposes, in *Policy and Research LLC v. United States Department of Health and Human Services*[249] Jackson concluded an agency violates the APA arbitrary-and-capricious standard when it "changes course abruptly without a well-reasoned explanation for its decision" or acts "contrary to its own regulations."[250]In *American Federation of Government Employees v. Federal Labor Relations Authority* (FLRA), [251] Judge Jackson's **first** opinion for the United States Court of Appeals for the District of Columbia Circuit, public-sector labor unions filed a petition seeking review of a policy statement issued by the FLRA raising the threshold at which management-initiated changes to conditions of employment in certain public-sector workplaces trigger a bargaining obligation under the Federal Service Labor-Management Relations Statute.[252] Jackson, wrote for a unanimous panel, granting the petition for review and vacating the challenged policy statement, holding that the FLRA decision to abandon a longstanding policy in favor of the new threshold was insufficiently reasoned and thus arbitrary and capricious in violation of the APA.[253] The FLRA did not sufficiently justify its decision to raise the threshold for collective bargaining for certain federal employees.[254] Jackson described the FLRA statement heralding the new policy as "cursory," finding it failed to acknowledge or justify its departure from "thirty-five years of precedent."[255] The agency unsuccessfully defended "the purported flaws" of its prior standard.[256] In Jackson's view, FLRA's attempted explanations were inconsistent, lacked merit, and seemed to "simply . . . demonstrate how" the prior standard worked rather than demonstrating why it was "unworkable."[257] Nor did the FLRA clarify why the new standard was "better."[258]

B. Business and Employment Law

While serving on the district court, Judge Jackson adjudicated numerous business-related claims, including litigation between businesses and disputes between employers and employees. Jackson's decisions largely involved motions to dismiss and motions for summary judgment filed by employer defendants. Many cases were resolved in the employer's favor, particularly those decided

[247] 25 F.4th 1 (D.C, Cir. 2022).
[248] *Id*. at 234.
[249] Pol'y & Rsch., LLC v. U.S. Dep't Health & Hum. Servs., 313 F. Supp. 3d 62 (D.D.C. 2018).
[250] *Id*. at 67; *see also id.* at 74–75 (holding that shortening project periods for HHS grants "without explanation and in contravention of the regulations was an arbitrary and capricious act in violation of the APA"). *See also, e.g.,* XP Vehicles, Inc. v. Dep't of Energy, 118 F. Supp. 3d 38, 79 (D.D.C. 2015) (allowing arbitrary-and-capricious challenge to proceed where the plaintiffs alleged that, in evaluating a grant application, the agency "relied on impermissible considerations," such as political connections, "that ran counter to the evidence before it and the applicable regulations").
[251] 25 F.4th 1 (D.D.C. 2022).
[252] 5 U.S.C. 7101-7135.
[253] 25 F.4th at 2-3.
[254] *Id*.
[255] *Id*. at 11-12.
[256] *Id*. at 5.
[257] *Id*. at 5-7.
[258] *Id*. at 10.

at summary judgment.[259] Though both dismissal and summary judgment may conclude a case, their ramifications often are different: a court may dismiss claims without prejudice thereby allowing a plaintiff to refile the claims,[260] whereas summary judgment fully and finally resolves claims.[261] On several occasions Jackson exhibited a reluctance to dispose entirely of employee claims at the motion to dismiss stage, preferring to allow discovery before arriving at a final decision.[262] By way of illustration, explore Jackson's analysis in *Ross v. United States Capitol Police*,[263] an employment discrimination case.

Judge Jackson's analysis in *Ross*[264] concerns a motion to dismiss asked to be treated in the alternative as a motion for summary judgment.[265] Jackson initially reflected that binding precedent counsels district court judges to adjudicate summary judgment motions "after the plaintiff has been given adequate time for discovery."[266] That general principle is especially valuable in employment discrimination cases where plaintiff's success often pivots on the fact-intensive question of whether a defendant's proffered reasons for taking an employment action are pretextual.[267] Without the benefit of discovery, Jackson reflected:

> it is hard to fathom that the plaintiff would be able to present any evidence related to the employer's reasons for the adverse employment action at all, much less evidence that would be a sufficient basis upon which a rational jury could conclude that "the defendant intentionally discriminated [or retaliated] against the plaintiff."[268]

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[259] *See, e.g.*, *Keister v. AARP Benefits Comm*., 410 F. Supp. 3d 244 (D.D.C. 2019) (granting summary judgment for defendant employer in disability benefits litigation based on language of release signed by employee), *aff'd*, 839 F. App'x 559 (D.C. Cir. 2021); Crawford v. Johnson, 166 F. Supp. 3d 1, 9 (D.D.C. 2016), *rev'd in part sub nom.* Crawford v. Duke, 867 F.3d 103 (D.C. Cir. 2017) (granting summary judgment for defendant employer in discrimination litigation based on failure to exhaust administrative remedies); Manus v. Hayden, No. 18-1146, 2020 WL 2615539, at *1 (D.D.C. May 23, 2020) (granting summary judgment for defendant employer in discrimination litigation because defendant did not take adverse employment action in response to employee protected activity).

[260] *See generally*, FED. R. CIV. P. 41 (describing certain dismissals as "adjudication[s] on the merits" while others function as dismissals "without prejudice").

[261] *See generally*, FED. R. CIV. P. 56 (describing circumstances in which summary judgment shall be granted), 54 (describing effects of judgment on a claim).

[262] *See, e.g.*, Lawson v. Sessions, 271 F. Supp. 3d 119, 136 (D.D.C. 2017) (dismissing Title VII claims but denying motion to dismiss claims under the *Age Discrimination in Employment Act*); Barber v. D.C. Gov't, 394 F. Supp. 3d 49, 57 (D.D.C. 2019) (denying in part motion to dismiss employment discrimination claims); Alma v. Bowser, 159 F. Supp. 3d 1, 3 (D.D.C. 2016) (denying motion to dismiss Title VII employment discrimination claims); Nagi v. Chao, No. 16-2152, 2018 WL 4680272, at *4 (D.D.C. Sept. 28, 2018) (denying motion to dismiss for discrimination and retaliation claims, and granting motion to dismiss for hostile work environment claims). *But see* Crawford v. Johnson, 166 F. Supp. 3d 1, 4 (D.D.C. 2016) (granting motion to dismiss converted into motion for summary judgment in Title VII case), *rev'd in part sub nom.* Crawford v. Duke, 867 F.3d 103 (D.C. Cir. 2017).

[263] 195 F. Supp. 3d 180 (D.D.C. 2016).

[264] *Id*.

[265] *Id*. at 188.

[266] *Id*. at 192 (quoting *Americable Int'l, Inc. v. Dep't of Navy*, 129 F.3d 1271, 1274 (D.C. Cir. 1997)).

[267] *Id*. *See generally* McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973) (setting forth "burden-shifting"" framework applied in employment discrimination claims brought under Title VII).

[268] *Ross*, 195 F. Supp. 3d at 194 (quoting *Brady v. Office of Sgt. at Arms*, 520 F.3d 490, 494 (D.C. Cir. 2008) (alteration in original)).

The motion for summary judgment was premature according to Jackson who denied the motion to dismiss with respect to the plaintiff's discrimination and retaliation claims.[269]

For comparative purposes, Judge Jackson arrived at a different result in *Crawford v. Johnson*[270] where the United States Department of Homeland Security (DHS) filed a motion to dismiss, or in the alternative for summary judgment, with respect to employment discrimination claims brought under Title VII of the Civil Rights Act by the plaintiff, James Crawford, based on three incidents.[271]

The motion hinged on whether Crawford had exhausted his administrative remedies by including the three incidents in the attachments to his formal Equal Employment Opportunity (EEO) complaint, rather than in the body of the complaint itself.[272] Jackson determined information confined in the exhibits was not incorporated into the complaint.[273] To get to this conclusion, Jackson first looked to the language of the statute's exhaustion requirement, requiring an EEO complaint "contain such information and be in such form as the [EEO Commission] requires."[274] Turning next to EEO Commission regulations, Jackson noted that an EEO complaint must "describe generally the action(s) or practice(s) that form the basis of the complaint."[275] After considering relevant court decisions, Jackson finally held that information about these incidents contained only in exhibits was insufficient for Crawford to have exhausted his administrative remedies.[276] Fittingly, she granted DHS's motion for summary judgment.[277]

On appeal, the D.C. Circuit reversed, in part, Jackson's decision holding Crawford's claims on two of the three instances could advance.[278] Relying on D.C. Circuit case law and authority from other federal courts of appeals, the D.C. Circuit ascertained that exhibits are "part of the complaint itself" for exhaustion purposes.[279]

At first blush, the outcomes in *Ross* and *Crawford* appear to be in tension with each other. Jackson's approach in both, however, reflects a common theme that centers on the value of a consistent judicial and administrative process. In *Ross*, her decision to deny summary judgment and allow discovery on some claims was based on what she characterized as the court's "ordinary practice" in adjudicating employment discrimination claims.[280] Jackson dismissed other claims in *Ross* based on a failure to adhere to a statutorily prescribed process.[281] In *Crawford*, Jackson granted

[269] *Id*. at 194, 201.
[270] 166 F. Supp. 3d 1 (D.D.C. 2016), *rev'd in part sub nom.* Crawford v. Duke, 867 F.3d 103 (D.C. Cir. 2017).
[271] *Id*. at 4; *see* 42 U.S.C. § 2000e-16(c) (providing that an employee may only file a civil action once the employee has undertaken necessary administrative steps).
[272] *Crawford*, 166 F. Supp. 3d at 4.
[273] *Id*. at 9.
[274] *Id*. (quoting 42 U.S.C. § 2000e-5(b)).
[275] *Id*. (quoting 29 C.F.R. § 1614.106(c)).
[276] *Id*. at 9-10 (citing *Dick v. Holder*, 80 F. Supp. 3d 103, 112–13 (D.D.C. 2015)).
[277] *Id*. at 4.
[278] Crawford v. Duke, 867 F.3d 103, 116 (D.C. Cir. 2017).
[279] *Id*.
[280] Ross v. U.S. Capitol Police, 195 F. Supp. 3d 180, 194 (D.D.C. 2016).
[281] *Id*. at 196 (holding plaintiff failed to satisfy procedural prerequisites for two of his three claims).

summary judgment before discovery, but that outcome was based solely on Crawford's alleged failure to comply with the required process, rather than the substance of his claims.[282]

1. Employment Discrimination

Find another illustration of Jackson's approach in a case involving employment discrimination claims brought under Title VII of the *Civil Rights Act* and 42 U.S.C. § 1981, a federal statute prohibiting racial discrimination. At issue in *Njang v. Whitestone Group, Inc*.[283] was whether six months was a "reasonable" period in which to bring an action under either Title VII or Section 1981.[284] On a motion for summary judgment, Jackson held that six months was a reasonable period in which to bring Section 1981 claims because the statute, silent on the question, lacked "features that would make filing a claim within six months impracticable, such as an administrative exhaustion requirement."[285] Conversely, "the procedure for bringing a Title VII claim is far more involved and time-consuming than the procedure for bringing a Section 1981 claim," and requiring that process to be completed in six months would have "the practical effect of waiving employees' substantive rights under Title VII."[286]

Another case, *Ross v. Lockheed Martin Corporation*,[287] involved a proposed class action alleging employment discrimination under Title VII.[288] Judge Jackson, on a case that received significant public attention, ruled that employee plaintiffs had not satisfied the commonality requirement for preliminary class certification.[289] Jackson emphasized that she was bound to apply the Supreme Court's decision in *Wal-Mart v. Dukes*,[290] but did so "reluctantly," recognizing that her ruling could impact plaintiffs' ability to combat potential employment discrimination.[291] Putative class plaintiffs sued their employer, Lockheed Martin, for allegedly engaging in race-based discrimination through a performance appraisal system, which plaintiffs claimed relied on subjective indicators and failed to adequately guard against racial bias. Faithfully and reluctantly 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."[292] Judge Jackson found that the plaintiffs failed to make that showing.

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[282] *See Crawford*, 166 F. Supp. at 9; *see also, e.g*., Lawson v. Sessions, 271 F. Supp. 3d 119, 130 (D.D.C. 2017) (dismissing Title VII claims for failure to exhaust); *contra* Nagi v. Chao, No. 16-2152, 2018 WL 4680272, at *3 (D.D.C. Sept. 28, 2018) (dismissing hostile work environment claims because "complaint's allegations . . . fail to state a plausible claim for relief under a hostile work environment theory").
[283] 187 F. Supp. 3d 172 (D.D.C. 2016).
[284] *See id*. (citing *Order of United Com. Travelers of Am. v. Wolfe*, 331 U.S. 586, 608 (1947) (finding that a contractual term shortening time for bringing an action is only enforceable "if the shorter period itself [is] a reasonable period")).
[285] *Id*. at 178 (citing *Taylor v. W. & S. Life Ins. Co.*, 966 F.2d 1188, 1205 (7th Cir. 1992)).
[286] *Id*. at 180.
[287] 267 F. Supp. 3d 174 (D.D.C. 2017).
[288] *Id*. at 178.
[289] *Id*. at 174; *see also* FED. R. CIV. P. 23.
[290] 271 F. Supp. 3d 119 (D.D.C. 2017).
[291] *Ross*, 267 F. Supp. 3d at 179, 204.
[292] *Id*. at 198.

Judge Jackson declined to certify the class preliminarily or approve a settlement, finding the agreement unfair to class members because, in her judgment, it did not adequately protect those harmed by Lockheed's policies.[293] Two plaintiffs had negotiated a $22.8 million settlement on behalf of a proposed class of African American employees who received negative performance ratings from their defendant employer.[294] Jackson was particularly troubled by 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.[295] Jackson highlighted 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.[296] Her focus: the settlement agreement's requirement that class members release the defendant from "all types of racial discrimination claims" including those unrelated to the class action claims.[297] Jackson unequivocally condemned the scope of this release:

> [I]t is shocking to this Court that counsel for the putative class members would contend that a release this broad and consequential is a "fair" bargain as it relates to the absent individuals whose potential legal claims are effectively extinguished by it.[298]

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.'"[299]

2. Pattern in Employment Law Decisions

Judge Jackson's decision in *Ross v. Lockheed Martin Corporation* was adverse to the named plaintiffs, but her analysis in refusing to approve the proposed settlement was rooted in concerns about case impacts on unnamed class members. This fits within an overall pattern in Jackson's employment-law decisions, which includes decisions favorable to employers and employees that frequently turn on procedural grounds.[300]

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[293] *Id*. at 201.
[294] *Id*.
[295] *Id*. at 179-80.
[296] Id. at 180.
[297] *Id*. at 202.
[298] *Id*.
[299] *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. 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).
[300] *See, e.g.*, Keister v. AARP Benefits Comm., 410 F. Supp. 3d 244, 247 (D.D.C. 2019) (granting summary judgment for defendant employer in disability benefits litigation based on language of release signed by employee); Crawford v. Johnson, 166 F. Supp. 3d 1, 9 (D.D.C. 2016) (granting summary judgment for defendant employer in discrimination litigation based on failure to exhaust administrative remedies), *rev'd in part sub nom.*, Crawford v. Duke, 867 F.3d 103 (D.C. Cir. 2017); Sickle v. Torres Advanced Enter. Sols., 17 F. Supp. 3d 10, 26–27 (D.D.C. 2013) (dismissing discrimination claims based on failure to exhaust administrative remedies), aff'd in part, 884 F. 3d 338 (D.C. Cir. 2018). *See also* Willis v. Gray, No. 14-1746, 2020 WL 805659, at *2 (D.D.C. Feb. 18, 2020) (dismissing certain employment discrimination claims, but not others, based on whether the claims were resolved in prior litigation brought by plaintiff's union or whether the claims were barred by a statute of limitations).

3. Disputes Between Businesses

Judge Jackson has authored few decisions involving disputes between businesses making patterns harder to divine. In a trademark infringement and unfair competition case, *Yah Kai World Enterprises, Inc. v. Napper,* Jackson ruled in favor of the plaintiff following a full bench trial.[301] In another case, *A Love of Food I, LLC v. Maoz Vegetarian USA*,[302] involving a conflict between a restaurant and its franchisee, Judge Jackson ruled a restaurant had violated certain state laws regarding disclosure and registration of its franchise agreement with state authorities but determined such violations had not harmed the franchisee.[303]

C. *Civil Procedure and Jurisdiction*

The Supreme Court routinely hears cases involving questions of federal court jurisdiction (the power of federal courts to decide cases) and civil procedure (the statutes and rules governing how cases are litigated in federal court). While many decisions on those subjects have been unanimous or near unanimous in recent years,[304] the Court has closely divided on certain procedural questions,[305] including in ways that conceivably do not align with a conventional view of the Court's 5-4 decisions.[306]

Particularly in her role as a district court judge, Ketanji Brown Jackson has resolved many cases on procedural grounds. Those offering limited insight into how Jackson would approach cases while on the Supreme Court bench are discussed herein. The lower federal courts consider a significant volume of claims that are legally straightforward or even frivolous. Jackson dismissed dozens of cases for failure to state a valid claim for relief or satisfy minimum pleading requirements.[307] A number of Jackson's procedural rulings, however, implicate important questions about the role and authority of the federal courts and may offer guidance on how she might rule on procedural matters while on the Supreme Court bench.

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[301] Yah Kai World Enters., Inc. v. Napper, 195 F. Supp. 3d 287 (D.D.C. 2016).
[302] A Love of Food I, LLC v. Maoz Vegetarian USA, Inc.,70 F. Supp. 3d 376 (D.D.C. 2014).
[303] *Id*. at 405.
[304] *See, e.g.*, Ford Motor Co. v. Mont. Eighth Jud. Dist. Ct., 141 S. Ct. 1017, 1022 (2021) (unanimous; Barrett, J., not participating) (addressing personal jurisdiction); Fort Bend Cnty., Texas v. Davis, 139 S. Ct. 1843, 1846 (2019) (unanimous) (addressing the forfeiture of arguments); Frank v. Gaos, 139 S. Ct. 1041, 1046 (2019) (per curiam) (remanding by eight Justice majority to court of appeals to address constitutional standing questions); is, 139 S. Ct. 710, 715 (2019) (unanimous) (addressing whether a deadline is subject to equitable tolling); New Prime Inc. v. Oliveira, 139 S. Ct. 532, 537, 539 (2019) (ruling by seven-Justice majority; Kavanaugh, J., not participating) (addressing which issues are appropriate for courts and arbitrators to decide); Henry Schein, Inc. v. Archer & White Sales, Inc., 139 S. Ct. 524, 529 (2019) (unanimous) (same).
[305] *See, e.g.*, Lamps Plus, Inc. v. Varela, 139 S. Ct. 1407, 1419 (2019) (majority opinion of Roberts, C.J., joined by Thomas, Alito, Gorsuch, and Kavanaugh, JJ.) (stating that "[c]ourts may not infer from an ambiguous agreement that parties have consented to arbitrate on a class[-]wide basis.")
[306] *See* Home Depot U.S.A., Inc. v. Jackson, 139 S. Ct. 1743, 1747–51 (2019) (majority opinion of Thomas, J., joined by Ginsburg, Breyer, Sotomayor, and Kagan, JJ.) (holding that third-party counterclaim defendant may not remove a case to federal court under either the general removal statute or the Class Action Fairness Act).
[307] *See e.g.*, Shaw v. Ocwen Loan Servicing, LLC, No. 14-cv-2203, 2015 WL 4932204, at *1 (D.D.C. Aug. 18, 2015) (dismissing complaint *sua sponte* under Federal Rules of Civil Procedure 8(a) and 12(b)(6)); Pencheng Si v. Laogai Rsch. Found., 71 F. Supp. 3d 73, 79 (D.D.C. 2014) (granting in part motion to dismiss False Claims Act claims for failure to comply with the pleading requirements of Federal Rule of Civil Procedure 9(b)).

This section delves into to a selection of Judge Jackson's decisions on general procedural issues before peering into two specific areas of interest: standing and sovereign immunity. Opinions on the subject of *vacatur* offer a glimpse into Jackson's views not only on a narrow issue of appellate procedure but also on the respective roles of district and appellate courts and the value of precedent as part of an ever-growing body of case law.

1. Scope of Injunctive Relief

One procedural issue generating significant debate is the appropriate scope of injunctive relief in challenges to government action. Much of this discussion centers on nationwide injunctions, court orders barring the government from enforcing a challenged law or policy with respect to all persons, regardless of whether they are parties to the litigation.[308] Nationwide injunctions — sometimes called universal injunctions, non-party injunctions, or even cosmic injunctions — are defined not by their geographic scope but by the entities to which they apply. The Supreme Court has considered multiple cases involving nationwide injunctions recently, and several Justices have opined on the practice in separate opinions, but a majority of the Supreme Court has yet to issue clear guidance on the overall legal status of nationwide injunctions.[309]

Judge Jackson considered the scope of an injunction in *Make the Road New York v. McAleenan*[310] finding a United States Department of Homeland Security policy designating certain persons who unlawfully entered the country for expedited removal was issued in violation of the *Administrative Procedures Act* and, therefore, must be enjoined.[311] Having determined an injunction was warranted, Jackson found unpersuasive the government's argument the injunction should be limited to barring enforcement against the plaintiffs before the court.[312] "Ordinarily, in the wake of an unfavorable judgment from a federal court regarding procedural claims brought under the APA, agency actors willingly refrain from imposing on anyone the rule that a federal court has found to be unlawful."[313] The government's request to continue enforcing the policy against non-parties thought Jackson, was:

> a terrible proposal that is patently inconsistent with the dictates of the law. It reeks of bad faith, demonstrates contempt for the authority that the Constitution's Framers have vested in the judicial branch, and, ultimately, deprives successful plaintiffs of the full measure of the remedy to which they are entitled.[314]

On appeal, the D.C. Circuit reversed Jackson's decision holding agency action was not subject to judicial review. Having done so, the appeals court did not address the scope of injunctive relief available.[315]

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[308] *See generally*, Joanna R. Lamp, *Nationwide Injunctions: Law, History, and Proposals for Reform*, CONG. RES. SERV. (Sept. 8, 2021).
[309] *See id*. at 10,
[310] 405 F. Supp. 3d 1 (D.D.C. 2019), *rev'd sub nom.* Make the Road N.Y. v. Wolf, 962 F.3d 612 (D.C. Cir. 2020).
[311] *Id*. at 44-66.
[312] *Id*. at 66.
[313] *Id*.
[314] *Id*.
[315] *Make the Road N.Y.*, 962 F.3d at 618. *But see id*. at 647 & n.16 (Rao, J., dissenting) (finding "especially problematic" the district court's entry of a nationwide injunction).

2. *Vacatur*

Ketanji Brown Jackson's tenure on the district court instilled in her a keen understanding of the practical impact of appellate court procedural rulings. In district court and D.C. Circuit decisions, she expressed strong views on appeals court rulings that vacate district court decisions. These opinions on the subject of *vacatur* offer a glimpse into Jackson's views not only on a narrow issue of appellate procedure, but also on the respective roles of district and appellate courts and the value of precedents as part of an ever-growing body of case law.

As one example, in *Maryland v. United States Department of Education*,[316] Jackson dismissed for lack of standing a challenge by state attorneys general to the Education Department's failure to implement certain regulations concerning deceptive marketing undertaken by for-profit colleges.[317] While an appeal was pending, a new rule rescinding the regulations took effect, and the states requested that the D.C. Circuit vacate the district court's order for mootness. In a summary order, the D.C. Circuit granted the motion for *vacatur*, remanding the case to the district court with instructions to dismiss as moot.[318] *Vacatur* meant that the district court opinion on standing had no legal effect, including as precedent, even though the court of appeals had not reviewed opinion substance or determined whether it was erroneous.

Jackson heeded appellate court directions on remand, but "from the standpoint of the district court," objected to the *vacatur*.[319] She asserted the D.C. Circuit's willingness to grant *vacatur* in such cases "appears to have resulted in the seemingly unnecessary nullification of a district court's contribution to the body of common law reasoning concerning Article III standing."[320] The opinion, stylistically more like a dissent than a typical trial court opinion, warned that the practice of *vacatur* "rewards gamesmanship concerning complex mootness questions, raises the specter of [an] end-run around established norms of appellate procedure, . . . and has significant downstream consequences."[321]

Judge Jackson remained interested in the issue of *vacatur* while on the United States Court of Appeals for the District of Columbia Circuit (D.C. Circuit). A motions panel of the D.C. Circuit issued an order in *I.A. v. Garland*[322] dismissing an appeal as moot, but denying a request to vacate the underlying district court judgment.[323] Jackson concurred in the disposition emphasizing *vacatur* of a district court decision that has become moot is an extraordinary remedy to be granted only when required out of fairness to the parties.[324] She declared: "rote *vacatur* of district court opinions, without merits review and simply because the dispute is subsequently mooted, is

[316] 474 F. Supp. 3d 13 (D.D.C. 2020), *vacated*, No. 20-5268, 2020 WL 7868112 (D.C. Cir. Dec. 22, 2020).
[317] *Id*. at 20.
[318] Maryland v. U.S. Dep't of Ed., No. 20-5268, 2020 WL 7868112 (D.C. Cir. Dec. 22, 2020).
[319] Maryland v. U.S. Dep't of Ed., No. 17-cv-2139, 2020 WL 7773390, at *1 (D.D.C. Dec. 29, 2020).
[320] *Id*.
[321] *Id*.
[322] I.A. v. Garland, No. 20-5271, 2022 WL 696459 (D.C. Cir. Feb. 24, 2022).
[323] *Id*. at *1.
[324] *Id*. at *3 (statement of Jackson, J.).

inconsistent with well-established principles of appellate procedure and practice."[325] According to Jackson:

> [T]he dispute-and-decision bell cannot be unrung — there was a dispute and someone was declared the winner. Written opinions are the most accurate historical record of what the supervising court thought of those events. And in a common law system of case-by-case adjudication, that history need not, and should not, be cavalierly discarded.[326]

3. *Procedural Decisions*

More generally, Jackson's procedural decisions evince care, mindfulness, and attention to detail. In *Raja v. Federal Deposit Insurance Corporation*,[327] for example, Jackson considered claims by unrepresented individuals challenging home foreclosure.[328] A magistrate judge determined the plaintiffs failed to serve the defendants properly and recommended dismissal. Jackson reviewed the findings and agreed service had been defective.[329] However, she concluded the plaintiffs, who were not represented by counsel, "were never given a clear explanation of why their prior attempts at service were deemed deficient, and they were not provided the customary notice of the consequences of their failure to effect proper service upon Defendants."[330] She declined to dismiss the case and granted the plaintiffs "one more opportunity to effect proper service."[331]

In another case, *Willis v. Gray*,[332] Jackson granted in part and denied in part a motion to dismiss employment discrimination and retaliation claims advanced by a former public-school teacher.[333] Although the complaint was "not a model of clarity," Jackson parsed each claim to determine which were precluded by past litigation, which were time-barred, and which could proceed.[334]

In an environmental case, *Watersheds Project v. Tidwell*,[335] Jackson granted a motion to transfer litigation involving elk feeding sites in Wyoming to the Wyoming District Court, holding such matters were "plainly local in character and were best left to Wyoming's courts."[336] Jackson declined to criticize prior District of D.C. decisions emphasizing the "iconic" nature and national significance of the Jackson elk, but stressed the narrow question before her was only whether the litigation was "necessarily national in scope."[337]

In another case, *Coal River Mountain Watch v. U.S. Department of the Interior*,[338] Jackson denied a motion to dismiss as duplicative despite similar claims pending in the District of D.C. and the

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[325] *Id*. (italics added).
[326] *Id*. at 3-4.
[327] Raja v. Fed. Deposit Ins. Corp., No. 16-cv-0511, 2018 WL 818393 (D.D.C. Feb 12, 2018).
[328] *Id*. at *1.
[329] *Id*.
[330] *Id*.
[331] *Id*.
[332] Willis v. Gray, No. 14-cv-1746, 2020 WL 805659 (D.D.C. 2020).
[333] *Id*. at *1.
[334] *Id*. at *5.
[335] W. Watersheds Project v. Tidwell, 306 F. Supp. 3d 350 (D.D.C. 2017).
[336] *Id*. at 363.
[337] *Id*.
[338] Coal River Mountain Watch v. U.S. Dep't of the Interior, 146 F. Supp. 3d 17 (D.D.C. 2015).

District of West Virginia.[339] She critiqued the motion to dismiss as "a calculated attempt to force [the plaintiff] to pursue its [*Administrative Procedure Act*] claims in federal court in West Virginia, despite the fact that [the plaintiff] has selected the instant forum and without due regard to the most pertinent equitable considerations" she declined to endorse either party's position in full.[340]

In a tort case, *Washington Metropolitan Area Transit Authority (WMATA) v. Ark Union Station, Inc*.,[341] Judge Jackson declined to dismiss a claim in which the WMATA alleged defendant's negligence caused a water leak that damaged Metro facilities.[342] Jackson held that, under a provision of the D.C. Code based on the *nullum tempus* doctrine,[343] the statute of limitations did not run against the WMATA because the agency's negligence suit sought to vindicate public rights.[344] While Jackson was "extending the benefit of *nullum tempus* to WMATA" she underlined that her holding was rooted in authoritative interpretations of D.C. law from the D.C. Court of Appeals and limited to the tort claims before her.[345]

4. Standing: A Gatekeeper that Opens or Closes the Courthouse Doors

A key procedural issue in a number of Ketanji Brown Jackson's cases is standing — the constitutional requirement that any plaintiff who sues in federal court must have a concrete, personal interest in the litigation, rather than simply raising a generalized policy objection or other grievance.[346] To establish standing, a plaintiff must show that she has suffered (or will imminently suffer) an injury in fact that is caused by the defendant and can be redressed by a favorable court decision.[347] If the plaintiff cannot demonstrate standing, the federal courts lack jurisdiction to consider the claim.[348] The doctrine of standing, although procedural on its face, implicates broader questions about public access to the courts and the constitutional limits of judicial review.

(a) *Standing: Origin and Purpose*

Recognizing those broader questions, Jackson has at times authored decisions discussing the standing doctrine's origin and purpose. In *Food & Water Watch, Inc. v. Vilsack*,[349] Jackson cited constitutional text, judicial precedent, and a law review article by the late Supreme Court Associate Justice Antonin Scalia explaining that the "standing doctrine is primarily rooted in the concern for maintaining the separation of powers."[350] Jackson further opined that constitutional standing "acts as a gatekeeper, opening the courthouse doors to narrow disputes that can be resolved merely by

[339] *Id*. at 19-20.
[340] *Id*. at 20.
[341] 268 F. Supp. 3d 196 (D.D.C. 2017).
[342] *Id*. at 200.
[343] *See generally*, *Nullum Tempus Occurrit Regi*, Vol. 22, No. 31 AMERICAN L. REGISTER 469-470 (Aug. 1874) (discussing the English common-law rule).
[344] 268 F. Supp. 3d at 200; *see also id.* at 201 (explaining under the *nullum tempus* doctrine, a sovereign is immune from statutes of limitations).
[345] *Id*. at 211.
[346] Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992).
[347] *Id*. at 560–61.
[348] *Id*. at 561
[349] Food & Water Watch, Inc. v. Vilsack, 79 F. Supp. 3d 174 (D.D.C. 2015), *aff'd*, 808 F.3d 905 (D.C. Cir. 2015).
[350] *Id*. at 185.

reference to facts and laws, but barring entry to the broad disquiets that can be resolved only by an appeal to politics and policy."[351]

(b) *Standing: Boiled to Bare Essence*

In another case, *California Clinical Laboratory Association*, Jackson wrote: "Boiled to bare essence, then, 'the standing question is whether the plaintiff has alleged such a personal stake in the outcome of the controversy as to warrant [her] invocation of federal-court jurisdiction and to justify exercise of the court's remedial powers on [her] behalf.'"[352]

(c) *Standing: Personal Stake*

Under this rationale, Judge Jackson has held that plaintiffs without a sufficiently personal stake in a case did not have standing. In *New England Anti-Vivisection Society v. United States Fish & Wildlife Service*,[353] for example, Jackson ruled that an animal welfare organization lacked standing to challenge the grant of a wildlife export permit to transfer chimpanzees to a zoo in the United Kingdom.[354] While she acknowledged "persuasive" arguments on the merits, Jackson held that plaintiffs "themselves must have a concrete and particularized injury in fact that is actual or imminent, that is fairly traceable to Defendants' actions, and that a federal court's decision can redress."[355]

(d) *Standing: A Narrow Exception*

In *Feldman v. Bowser*,[356] Jackson rejected a D.C. taxpayer's challenge to the D.C. *Local Budget Autonomy Amendment Act of 2012* and large portions of the D.C. budget enacted pursuant to the Act.[357] Finding that the plaintiff sought broadly "to challenge the method by which the District enacts its budget,"[358] she wrote that "this Court is not persuaded that it should expand the reach of the narrow standing exception available to municipal taxpayers" without more precedential support.[359]

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[351] *Id.* at 186. Jackson cited this language in a number of subsequent decisions. *See, e.g.*, Fed. Forest Res. Coal. v. Vilsack, 100 F. Supp. 3d 21, 34 (D.D.C. 2015); Cal. Clinical Lab. Ass'n v. Sec. of Health & Human Servs., 104 F. Supp. 3d 66, 74 (D.D.C. 2015).
[352] *Cal. Clinical Lab. Ass'n*, 104 F. Supp. 3d at 74 (quoting *Warth v. Seldin*, 422 U.S. 490, 498–99 (1975)) (alteration in original).
[353] 208 F. Supp. 3d 142 (D.D.C. 2016).
[354] *Id*. at 148.
[355] *Id*.
[356] 315 F. Supp. 3d 299 (D.D.C. 2018).
[357] *Id*. at 302.
[358] *Id*. at 309.
[359] *Id*. at 312.

(e) *Standing: Associational Standing*

The doctrine of standing also governs access to courts by establishing when an association may sue to protect the rights of their members. *Equal Rights Center v. Uber Technologies, Inc*.[360] concerns claims that Uber discriminated against wheelchair users in violation of the *Americans with Disabilities Act* and the *District of Columbia Human Rights Act.*[361] Judge Jackson held that a non-profit organization dedicated to combating disability discrimination had associational standing to challenge Uber's policies. This was in part because one of the non-profit's members alleged she was "plausibly deterred from attempting to use Uber's service" believing the transportation provider would not accommodate her disability, and thus had incurred "a sufficient injury in fact to support a finding that she has standing to sue in her own right."[362]

(f) *Standing: Enforcing a Congressional Subpoena*

During her years as a district judge, Jackson issued several high-profile rulings on topics ranging from federal environmental law to the *Americans with Disabilities Act*. But none had a higher profile than *Committee on the Judiciary v. McGahn*.[363] The newsworthy case raised a substantial standing question and Jackson held that a congressional committee had standing to sue in federal court to enforce a subpoena issued to an executive branch official.[364] In response to a claim that the Committee had not suffered an injury giving rise to standing, Jackson wrote: "no federal judge has ever held that defiance of a valid subpoena does not amount to a concrete and particularized injury in fact."[365] She added that this was "perhaps for good reason: if defiance of duly issued subpoenas does not create Article III standing and does not open the doors of the court for enforcement purposes, it is hard to see how the wheels of our system of civil and criminal justice could keep turning."[366]

5. Sovereign Immunity and Foreign Defendants

In multiple cases, Ketanji Brown Jackson confronted two distinct but related procedural issues involving questions of when sovereign entities are immune from suit and when U.S. federal courts can hear claims involving foreign parties. These overlap when a U.S. court considers whether to exercise its authority over a foreign sovereign.[367]

One of Jackson's opinions raised procedural issues implicating the relationship between different federal courts as well as questions linked to foreign sovereign immunity. In *Wye Oak Technology, Inc. v. Republic of Iraq*, a D.C. Circuit panel including Jackson considered a sovereign immunity claim raised by the Iraqi government in a contract dispute involving an American defense

[360] 525 F. Supp. 3d 62 (D.D.C. 2021).
[361] *Id*. at 66.
[362] *Id*. at 79.
[363] 415 F. Supp. 3d 148 (D.D.C. 2019).
[364] *Id*. at 154.
[365] *Id*. at 189.
[366] *Id*.
[367] In addition to the cases herein, *see, e.g., Mohammad Hilmi Nassif & Partners v. Republic of Iraq*, No. 17- cv-2193, 2020 WL 1444918 (D.D.C. Mar. 25, 2020).

contractor.[368] The case initially launched in a Virginia federal court and landed before the Fourth Circuit which allowed the claim against Iraq to proceed, applying an exception to the *Foreign Sovereign Immunities Act* (FSIA) for claims arising from a foreign sovereign's commercial activities.[369] Following transfer to the District of D.C., the district court concluded that the "law of the case" doctrine required D.C. federal courts to follow the Fourth Circuit's ruling.[370] The district court also agreed with the Fourth Circuit's substantive holding that FSIA's commercial activity exception applied.[371] On appeal, the D.C. Circuit reversed. An opinion authored by Judge Jackson held that the law of the case doctrine did not control the D.C. Circuit's FSIA analysis, in part, because the Fourth Circuit and the D.C. federal courts addressed the sovereign immunity claim at different stages in the litigation.[372] Examining the FSIA text, judicial precedent, and legislative history, the D.C. Circuit further demonstrated that the Fourth Circuit improperly applied the FSIA exception.[373] *Wye Oak* provides one example, among many, of Jackson's willingness to use a variety of tools in statutory interpretation. The panel remanded the case to the district court for further consideration after concluding another clause of the commercial activity exception might apply.[374]

In an earlier district court case, *SACE S.p.A. v. Republic of Paraguay*,[375] Judge Jackson considered a *Foreign Sovereign Immunities Act* dispute described as an issue of *first impression* in the D.C. federal courts.[376] The case involved a purported waiver of sovereign immunity by a government official who lacked authority to effect such waiver. Finding persuasive authority from other circuits, Jackson held that the suit must be dismissed because "the waiver provision of the FSIA requires actual authority to waive the foreign state's sovereign immunity."[377]

(a) *Federal Enclave Doctrine*

In *Youssef v. Embassy of United Arab Emirates*, Judge Jackson considered an age discrimination claim advanced by a former employee of the United Arab Emirates' (UAE's) Embassy in Washington, D.C.[378] The UAE as well as the Embassy claimed sovereign immunity under *Foreign Sovereign Immunities Act* (FSIA) and also argued that the claim must be dismissed under the federal enclave doctrine,[379] which provides that when the federal government acquires land from

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[368] 24 F.4th 686 (D.C. Cir. 2022).
[369] Wye Oak Tech., Inc. v. Republic of Iraq, 666 F.3d 205, 207 (4th Cir. 2011).
[370] Wye Oak Tech., Inc. v. Republic of Iraq, No. 10-cv-1182, 2019 WL 4044046, at *23 (D.D.C. Aug. 27, 2019).
[371] *Id*.
[372] *Wye Oak*, 24 F.4th at 697.
[373] *Id*. at 700.
[374] *Id*. at 703.
[375] 243 F. Supp. 3d 21 (D.D.C. 2017).
[376] *Id*. at 35-36.
[377] *Id*. at 24.
[378] No. 17-cv-2638, 2021 WL 3722742 (D.D.C. Aug. 23, 2021).
[379] U.S. Const. art. I, § 8, cl. 17. The federal enclave doctrine provides that:

> Congress shall have power . . . to exercise exclusive Legislation in all Cases whatsoever over such District[s] . . . as may, by Cession of particular States . . . become the Seat of the government of the United States, and to exercise like authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, Dock-Yards, and other needful Buildings.

Id. *See generally*, Emily S. Miller, *The Strongest Defense You've Never Heard of: The Constitution's Federal Enclave Doctrine and its Effect on Litigants, States, and Congress*, Vol. 29, No. 1 HOFSTRA LAB. & EMP. L.J. 73-97 (2011).

a state, "any state law that is enacted after the federal government acquires the property is generally inapplicable on that property."[380] Jackson rejected both claims, finding the case landed within FSIA's commercial activity exception, and that the federal enclave doctrine does not apply to D.C. laws.[381]

(b) *Foreign Sovereign Immunities Act Commercial Activity Exception*

In *Azima v. RAK Investment Authority*,[382] Judge Jackson denied a motion to dismiss *Computer Fraud and Abuse Act* claims on the grounds of sovereign immunity.[383] The parties disagreed as a factual matter about the location of the alleged computer hacking in this quarrel over whether the *Foreign Sovereign Immunities Act* (FSIA) exception for commercial activity applied. Jackson declined to resolve the factual dispute, holding that:

> the text, structure, and purpose of the FSIA's commercial activity exception all point to the conclusion that, rather than mandating identification of the location of the foreign sovereign's allegedly tortious act, Congress's primary concern is ensuring that a lawsuit can be maintained if the foreign sovereign acts in a commercial capacity and undertakes a harmful act that occurs in, or impacts, the United States.[384]

(c) *Forum non conveniens*

The *forum non conveniens* doctrine "allows a federal court to dismiss a case from the U.S. legal system in favor of a more convenient foreign jurisdiction."[385] In an aviation case, *In re Air Crash Over Southern Indian Ocean*,[386] Judge Jackson disposed of claims against foreign defendants without answering the sovereign immunity question.[387] The Judicial Panel on Multidistrict Litigation[388] consolidated forty individual lawsuits filed in federal courts across the country and

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[380] *Youssef*, 2021 WL 3722742 at *10.
[381] *Id*. at *1.
[382] 305 F. Supp. 3d 149 (D.D.C. 2018), *rev'd*, 926 F.3d 870 (D.C. Cir. 2019).
[383] *Id*. at 154.
[384] *Id.* at 171. *Azima* also raised the question of whether the suit against the foreign sovereign should take place in the United Kingdom pursuant to the forum-selection clause in an agreement between the parties. Jackson held that the forum-selection clause did not apply. *Id*. at 172–76. On that issue, however, Jackson was later reversed by the D.C. Circuit. *See* Azima v. RAK Inv. Auth., 926 F.3d 870 (D.C. Cir. 2019).
[385] Matthew J. Eible, *Making Forum Non Conveniens Convenient Again: Finality and Convenience for Transnational Litigation in U.S. Federal Courts*, 68 Duke L.J. 1193, 1193 (2019). *See also*, *Forum non conveniens*, CORNELL L. SCH. LEGAL INFO. INST. (2022) (defining and providing overview).
[386] In re Air Crash Over Southern Indian Ocean, 352 F. Supp. 3d 19 (D.D.C. 2018) (holding existence of sovereign immunity questions was one factor weighing against U.S. courts considering the case), *aff'd*, 946 F. 3d 607 (D.C. Cir. 2020) *cert. denied sub nom.* Wood v. Boeing Co., 141 S. Ct. 451 (2020).
[387] *Id*. at 52–53.
[388] The United States Judicial Panel on Multidistrict Litigation is a special body within the United States federal court system which manages multidistrict litigation.

> The United States Judicial Panel on Multidistrict Litigation, known informally as the MDL Panel, was created by an Act of Congress in 1968 – 28 U.S.C. §1407.
>
> The job of the Panel is to (1) determine whether civil actions pending in different federal districts involve one or more common questions of fact such that the actions should be transferred to one federal district for coordinated or consolidated pretrial proceedings; and (2) select the judge or judges and court assigned to conduct such proceedings.

assigned them to Jackson for coordinated resolution of pre-trial proceedings. The actions arose from the disappearance of Malaysia Airlines Flight MH3 70 over the Indian Ocean in March 2014.[389] The plaintiffs sought damages from the airline company; Boeing, the airplane manufacturer; and various insurance companies under tort law and the Montreal Convention asserting wrongful death and products liability claims. The Montreal Convention establishes airline liability in the case of death or injury to passengers. It unifies all of the different international treaty regimes covering airline liability that had developed haphazardly since 1929. It is designed to be a single, universal treaty to govern airline liability around the world. Judge Jackson granted defendants' threshold motion to dismiss the plaintiff's complaints on the ground of *forum non conveniens* determining Malaysia provided an alternative, available, and adequate forum for litigation.[390] After weighing multiple factors for and against dismissal, she concluded none of the claims at issue were "ultimately more conveniently litigated in the United States than in Malaysia."[391] The D.C. Circuit affirmed her judgment, and the plaintiffs' petition for certiorari to the Supreme Court of the United States was denied.[392]

(d) *Sovereign Immunity: Domestic State Actors*

Other Judge Ketanji Brown Jackson opinions involved claims of sovereign immunity by ***domestic*** state actors. In *Mackinac Tribe v. Jewell*,[393] for example, the Secretary of the Interior raised a sovereign immunity defense in a suit seeking federal recognition of an Indian tribe.[394] Jackson held the United States had waived sovereign immunity with respect to the suit, but ultimately dismissed on other grounds.[395] In another case, *Doe v. Washington Metropolitan Area Transit Authority (WMATA)*,[396] a passenger who was sexually assaulted on a Metro train sued the WMATA alleging the agency was negligent in failing to prevent the assault.[397] Judge Jackson granted a motion to dismiss, finding "WMATA has sovereign immunity . . . under well-established precedents that demarcate the boundaries of governmental and proprietary agency functions."[398]

> The purposes of this transfer or "centralization" process are to avoid duplication of discovery, to prevent inconsistent pretrial rulings, and to conserve the resources of the parties, their counsel and the judiciary. Transferred actions not terminated in the transferee district are remanded to their originating transferor districts by the Panel at or before the conclusion of centralized pretrial proceedings.

About the Panel: Origins & Purposes, U.S. PANEL ON MULTIDISTRICT LITIGATION (2022).

[389] *See generally*, William Langewiesche, *What Really Happened to Malaysia's Missing Airplane*, ATLANTIC MAG. (July 2019).

[390] *In re Air Crash Over Southern Indian Ocean*, 352 F. Supp. 3d at 37.

[391] *Id*.

[392] Wood v. Boeing Co., 141 S. Ct. 451 (2020).

[393] 87 F. Supp. 3d 127 (D.D.C. 2015).

[394] *Id*. at 130.

[395] *Id*.

[396] 453 F. Supp. 3d 354 (D.D.C. 2020).

[397] *Id*. at 359.

[398] *Id*. at 364.

D. *Civil Rights and Qualified Immunity*

Judge Ketanji Brown Jackson has considered a number of civil rights cases, including claims against private entities and state actors. Her decisions in this area demonstrate her review of the facts in each case and highlight her analysis of applicable legal precedents. It is difficult to discern broader trends given the highly fact-dependent nature of these cases.

Judge Jackson's 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."[399] In *Pierce v. District of Columbia*, Jackson considered disability discrimination and retaliation claims brought by a profoundly deaf man incarcerated in the District of Columbia Correctional Treatment Facility with no accommodations for deaf inmates such as qualified American Sign Language (ASL) interpreters for intake, classes, and medical visits; video interpretation services when live interpreters are not available; adequate access to videophones; and visible alarms for emergencies.[400] Judge Jackson ruled in favor of the plaintiff on his discrimination claims, finding dispositive the fact that prison staff "did nothing to evaluate [the plaintiff's] need for accommodation, despite their knowledge that he was disabled."[401] Officials "figuratively shrugged and effectively sat on their hands with respect to this plainly hearing-disabled person in their custody," Jackson concluded. The facility acted with "deliberate indifference" (1) by refusing to grant William Pierce accommodations that would ensure that he could communicate effectively and (2) 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*.[402] The facility unsuccessfully maintained it had no obligation to accommodate the inmate because Pierce had not requested accommodation — an unpersuasive argument Jackson found "truly baffling as a matter of law and logic" in a situation involving an individual with communications-related difficulties.[403] Rejecting as "preposterous" the government's claim that the plaintiff had not requested accommodations for his disability, Jackson held that "the failure of prison staff to conduct an informed assessment of the abilities and accommodation needs of a new inmate who is obviously disabled is intentional discrimination in the form of deliberate indifference . . . as a matter of law."[404] In any event, Jackson determined that no reasonable jury could conclude that he did not request such an accommodation. Jackson did not resolve, however, Pierce's claim that prison officials had retaliated against him for his requests for an interpreter by placing him in solitary confinement, explaining that Pierce and the city disagreed on the underlying facts of the dispute.

In litigation against the government, Judge Jackson often determined whether defendants could benefit from qualified immunity. The *Patterson v. United States*[405] opinion is representative of the qualified immunity cases Jackson ruled on, consisting of a detailed, fact-based analysis under existing precedent to determine whether circumstances warrant a grant of qualified immunity. In

[399] Pierce v. District of Columbia, 128 F. Supp. 3d 250, 253 (D.D.C. 2015).
[400] *Id*. at 253.
[401] *Id*. at 254.
[402] *Id*. at 268.
[403] *Id*. at 269.
[404] *Id*. at 268.
[405] 999 F. Supp. 2d 300 (D.D.C. 2013).

Patterson, Jackson rejected an attempt by the government to use protected speech as a justification for arrest.[406] The United States Park Police arrested an Occupy Wall Street protester for using profanity in a public park charging him with disorderly conduct. The arrestee alleged his First and Fourth Amendment rights were violated[407] and was seeking damages under *Bivens*. Judge Jackson denied the officers' motion to dismiss finding the First Amendment retaliatory arrest claims cognizable under *Bivens*. 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."[408] There was "no dispute about the 'clearly established' nature of the basic rights at issue."[409] The police officers were not entitled to qualified immunity, Jackson explained, because "no reasonable officer could conclude that [the arrestee's use of profanity] was likely to produce violence or otherwise cause a breach of the peace, as required to justify either punishing plaintiff's speech under the First Amendment or arresting him for disorderly conduct" under District of Columbia law.[410]

In *Robinson v. Farley*,[411] Judge Jackson denied a motion to dismiss an array of statutory, constitutional, and common law claims arising from the arrest of an intellectually disabled man[412] rejecting defendants' argument that the complaint must specify which law enforcement officers engaged in what alleged misconduct stating that such a requirement could not "possibly be the state of the law."[413] On a motion to dismiss, before the plaintiffs could develop their factual claims through discovery, Jackson explained that "it is impossible to imagine that a complaint involving the allegedly wrongful conduct of a number of police officers could ever contain the specificity that Defendants here say is required. And, indeed, existing precedent clearly indicates that no such pleading standard exists."[414] Jackson too rejected defendants' attempt to raise "a fleeting 'qualified immunity' reference that is entirely devoid of any relevant substance," which she characterized as duplicating their specificity argument rather than properly addressing the requirements of qualified immunity.[415]

In other cases, Judge Jackson has accepted claims of qualified immunity. In *Pollard v. District of Columbia*,[416] for example, she dismissed on qualified immunity grounds claims arising from the arrest of an intellectually disabled man on drug charges.[417] Jackson found the arresting officers entitled to qualified immunity on several claims because the plaintiffs identified no infringement of the arrestee's rights, let alone one that violated clearly established law.[418]

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[406] *Id*.
[407] *Id*. at 303.
[408] *Id*. at 312.
[409] *Id*. at 312.
[410] *Id*. at 315.
[411] 264 F. Supp. 3d 154 (D.D.C. 2017).
[412] *Id*. at 156.
[413] *Id*. at 160.
[414] *Id*.
[415] *Id*. at 162.
[416] 191 F. Supp. 3d 58 (D.D.C. 2016), *aff'd*, 698 F. App'x 616 (D.C. Cir. 2017).
[417] *Id*. at 63.
[418] *Id*. at 68.

Similarly, in *Kyle v. Bedlion*,[419] Judge Jackson granted summary judgment in favor of the government on claims of false arrest and use of excessive force in violation of the Fourth and Fifth Amendments.[420] She determined that the Fifth Amendment did not apply to the plaintiff's claims and, even if the Fourth Amendment could apply to the claims, defendant officers were entitled to qualified immunity because they did not violate a "clearly established" Fourth Amendment right."[421]

In *Jackson v. Bowser*,[422] outside the qualified immunity context, Ketanji Brown Jackson has entertained constitutional and common law claims against public and private actors involved in redevelopment projects in the District of Columbia that allegedly displaced low-income residents, minorities, and seniors.[423] Jackson dismissed the case, finding that the private defendants were not state actors subject to suit for constitutional violations and, with respect to the government defendants, the plaintiff "failed to plead sufficient facts to support a plausible inference that a District [of Columbia] policy or custom caused him to suffer a constitutional injury."[424]

The penultimate case of this section, *Rothe Development, Inc. v. Department of Defense*,[425] concerns an equal protection challenge brought under the Fifth Amendment's Due Process Clause to a *Small Business Act* provision establishing a business development program for socially and economically disadvantaged small business concerns.[426] Judge Ketanji Brown Jackson rejected the challenge, finding plaintiff's facial challenge required showing that "no set of circumstances" existed under which the challenged provision would be valid, or that the provision lacked "any plainly legitimate sweep," and plaintiff failed to meet that high bar.[427] The D.C. Circuit affirmed albeit on different grounds and the Supreme Court denied review.[428]

Finally, in a discrimination case against a private defendant, Judge Jackson in *Equal Rights Center v. Uber Technologies, Inc*.,[429] considered claims that Uber discriminated against wheelchair users in violation of Title III of the *Americans with Disabilities Act*,[430] which requires companies like Uber to provide "full and equal enjoyment" of Uber's services, and the *District of Columbia Human Rights Act*,[431] which requires companies like Uber to provide "full and equal enjoyment" of Uber's services. The lawsuit alleged the popular ridesharing company adopted and maintained policies that either excluded wheelchair users entirely from Uber services or relegated wheelchair users to inferior services with excessive wait times, up to eight times longer, and fares that were almost twice as high. Thus, wheelchair users were deprived of the substantial benefits that Uber provides

[419] 177 F. Supp. 3d 380 (D.D.C. 2016).
[420] *Id*. at 384.
[421] *Id.* at 389. Having dismissed plaintiff's federal claims, Jackson declined to exercise pendent jurisdiction over the remaining D.C. law tort claims. *Id*. at 399-400.
[422] No. 1:18-cv-1378, 2019 WL 1981041, at *1 (D.D.C. 2019).
[423] *Id*. at *1.
[424] *Id.* at *6. Having dismissed plaintiff's federal claims, Jackson declined to exercise pendent jurisdiction over the remaining D.C. common law claims. *Id*. at *11.
[425] 107 F. Supp. 3d 183 (D.D.C. 2015), *aff'd*, 836 F.3d 57 (D.C. Cir. 2016).
[426] *Id*. at 187.
[427] *Id*. at 207.
[428] Rothe Dev., Inc. v. U.S. Dep't of Defense, 836 F.3d 57, 63 (D.C. Cir. 2016), *cert denied* 138 S. CT. 354 (2017).
[429] Equal Rights Ctr. v. Uber Techs., Inc., 525 F. Supp. 3d 62 (D.D.C. 2021).
[430] 42 U.S.C. § 12181 et seq.
[431] D.C. Code § 2-1401.01 et seq.

to its other customers, thereby making it harder for them to travel to work, school, medical appointments, and community events, among other transportation destinations. After establishing that the plaintiff civil rights organization, the Equal Rights Center (ERC), had standing to sue,[432] Judge Jackson rejected Uber's arguments that relevant anti-discrimination statutes did not apply to the company, finding the ERC made sufficiently plausible claims of discrimination to survive a motion to dismiss.[433]

E. *Criminal Law and Procedure*

Ketanji Brown Jackson has worked on criminal law and procedure issues from assorted perspectives throughout her diverse academic[434] and legal career.[435] From 2005 to 2007, for example, Jackson served as an assistant federal public defender in the appellate division of the office of the D.C. Federal Public Defender[436] representing indigent clients in appeals stemming from, among other things, alleged firearms, tax evasion, and fraud offenses.[437] As an assistant federal public defender, 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."[438] In private practice, Jackson worked on criminal appeals[439] and authored amicus briefs[440] for cases being heard before the Supreme Court of the United States on

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[432] *Uber*, 525 F. Supp. 3d at 79.

[433] *Id*. at 81-89.

[434] Ketanji Brown Jackson authored scholarly articles as a law student with a criminal law focus. *See, e.g*., *Prevention Versus Punishment*, *supra* note 138 (exploring the boundary between regulation and punishment in the context of sex offender legislation and concluding that in determining how to classify a given statute, a court should look to the effect of a sanction and whether it implicates constitutional provisions); *Racketeer Influenced and Corrupt Organizations Act (Rico) — Scope of Liability After Reves v. Ernst & Young — Second Circuit Holds Liable Only Those Who Operate or Manage the Enterprise; First Circuit Extends Liability to All in Chain of Command*, 108 HARV. L. REV. 1405 (1995) (evaluating two federal circuit court opinions regarding the extent of RICO liability for low-level employees and critiquing a First Circuit opinion holding that RICO prosecution is permissible for "every enterprise employee who is within the 'chain of command'"). Jackson's interest in criminal law issues was evident even as an undergraduate. *See Senate Judiciary Attachments*, *supra* note 84, at 104 (educating that Jackson's undergraduate senior thesis addressed the plea bargain process).

[435] Jackson has been a panelist and presenter on assorted criminal law and procedure topics. *See generally*, *Senate Judiciary Questionnaire*, *supra* note 7, at 9-22.

[436] Juria L. Jones & Laura Deal, *Judge Ketanji Brown Jackson: Selected Primary Material*, CONG. RES. SERV. (Mar. 3, 2022).

[437] *Senate Judiciary Questionnaire*, *supra* note 7, at 140-43.

[438] *Id*. at 141.

[439] *Id*. at 127. Please note, Ketanji Brown Jackson's participation as counsel does not necessarily indicate that Jackson was the sole or principal author of the brief. *See, e.g.*,

- Brief of Appellant Jeffrey Edwards, *United States v. Edwards*, 496 F.3d 677 (D.C. Cir. 2007).
- Reply Brief for Appellant Jeffrey Edwards, *United States v. Edwards*, 496 F.3d 677 (D.C. Cir. 2007).
- Brief for Appellant Andrew Littlejohn, *United States v. Littlejohn*, 489 F.3d 1335 (D.C. Cir. 2007).
- Reply Brief for Appellant Andrew Littlejohn, *United States v. Littlejohn*, 489 F.3d 1335 (D.C. Cir. 2007).
- Brief for Appellant, *United States v. Ponds*, 454 F.3d 313 (D.C. Cir. 2006).
- Reply Brief for Appellant, *United States v. Ponds*, 454 F.3d 313 (D.C. Cir. 2006).
- 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).

[440] Please note, Ketanji Brown Jackson's participation as counsel does not necessarily indicate that Jackson was the sole or principal author of the brief. *See, e.g.*,

issues such as permissible exclusions under the *Speedy Trial Act*[441] and whether automatic vehicle searches subsequent to the arrest of the vehicle's occupant are compatible with the Fourth Amendment.[442] This section is devoted primarily to Jackson's work for the United States Sentencing Commission and as a district court judge.[443]

1. *Substantive Criminal Law*

Ketanji Brown Jackson's written opinions in criminal law cases provide limited, and therefore inadequate, insight into how she might treat particular substantive issues as a Supreme Court Justice. As previously expounded, district courts are constrained by Supreme Court and appellate precedent and often are charged with the resolution of factual disputes or the application of settled legal rules that may not suggest a particular judicial philosophy or approach. These aspects of district court work are reflected in Jackson's criminal case decisions. Due to the nature of federal district court work, Jackson has presided over a number of criminal cases that did not result in substantial written opinions, including several cases she identified as "significant" on the Senate Judiciary Committee's questionnaires submitted in conjunction with her judicial nominations.[444]

(a) *Pizzagate*

In *United States v. Welch*,[445] the so-called "Pizzagate" case,[446] defendant Edgar Welch, driven by unsubstantiated rumors of a child sex-trafficking ring operating out of the Comet Ping Pong

- Brief for the National Association of Criminal Defense Lawyers as Amicus Curiae in Support of Petitioner, *Bloate v. United States*, 559 U.S. 196 (2010).
- Brief of the National Association of Federal Defenders as Amicus Curiae in Support of Respondent, *Arizona v. Gant*, 556 U.S. 332 (2009)..
- Brief on Behalf of Former Federal Judges as Amici Curiae in Support of Petitioners, *Boumediene v. Bush*, 553 U.S. 723 (2008).
- Brief for Respondent, *Hall Street Associates v. Mattel, Inc.*, 552 U.S. 576 (2008).
- Supplemental Brief for Respondent, *Hall Street Associates v. Mattel, Inc*., 552 U.S. 576 (2008).
- Supplemental Reply Brief for Respondent, *Hall Street Associates v. Mattel, Inc*., 552 U.S. 576 (2008).
- Brief of the Cato Institute, the Constitution Project, and the Rutherford Institute, as Amici Curiae in Support of Reversal, *Al-Marri v. Spagone*, 555 U.S. 1220 (2009).
- Brief of the Constitutional Project and the Rutherford Institute as Amici Curiae in Support of Petitioner, *Al-Marri v. Pucciarelli*, 555 U.S. 1220 (2009).

[441] *The Speedy Trial Act of 1974*, Pub. L. No. 93-619, 88 Stat. 2076 (1974); Brief of the National Association of Criminal Defense Lawyers as Amicus Curiae in Support of Petitioner, *Bloate v. United States*, 559 U.S. 196 (2010),.

[442] Brief of the National Association of Federal Defenders as Amicus Curiae in Support of Respondent, *Arizona v. Gant*, 556 U.S. 332 (2009).

[443] Although Jackson was confirmed to the D.C. Circuit on June 14, 2021, she has not authored a criminal law opinion in that capacity.

[444] *Senate Judiciary Questionnaire*, *supra* note 7, at 92-102; S. Comm. Judiciary, 117th Cong., Questionnaire for Judicial Nominees, at 70-79 [hereinafter *D.C. Circuit Questionnaire*].

[445] U.S. v. Welch, No. 16-CR-232 (D.D.C. 2017).

[446] *See generally*, BBC Trending, *The Saga of 'Pizzagate': The Fake Story that Shows How Conspiracy Theories Spread*, **BBC NEWS** (Dec. 2, 2016); Camila Domonoske, *Man Fires Rifle Inside D.C. Pizzeria, Cites Fictitious Conspiracy Theories*, **NPR** (Dec. 5, 2016); Cecilia Kang, *Fake News Onslaught Targets Pizzeria as Nest of Child-Trafficking*, **N.Y. TIMES** (Nov. 21, 2016); Jessica Gresko, *'Pizzagate' Gunman in D.C. Sentenced to Four Years in Prison*, **PBS NEWS HOUR** (June 22, 2017); Amanda Robb, *Anatomy of a Fake News Scandal*, **ROLLING STONE MAG**. (Nov. 16, 2017) (delving "[i]nside the web of conspiracy theorists, Russian operatives, Trump campaigners and Twitter bots who manufactured the 'news' that Hillary Clinton ran a pizza-restaurant child-sex ring"); Kate Samuelson,

restaurant in Washington, D.C., walked into the crowded pizzeria openly carrying an assault rifle, firing several rounds while patrons fled, and pointing the weapon at a frightened employee.[447] Welch ultimately pled guilty to interstate transportation of a firearm and ammunition[448] and assault with a dangerous weapon.[449] Based primarily on the psychological and financial impacts of the offenses on the victims and the need to deter others from committing similar crimes, Judge Jackson sentenced Welch to 24 months in prison for the federal offense and 48 months in prison for the D.C. offense, to run concurrently, both within applicable federal and D.C. sentencing guidelines ranges.[450]

(b) ***Newsgathering versus National Security***

In *United States v. Wolfe*,[451] Judge Jackson presided over the prosecution of James A. Wolfe, former Director of Security for the U.S. Senate Select Committee on Intelligence,[452] who was indicted on three charges of making false statements about his contacts with reporters to the Federal Bureau of Investigation (FBI) during a probe into his unlawful disclosure of information. Wolfe eventually pled guilty to the felony offense of willfully and knowingly making a material false statement[453] to the FBI when he lied to agents by denying that he had disclosed to a reporter non-public unclassified information.[454] Judge Jackson rejected the government's argument that Wolfe's relationship with a reporter dating back three years prior was "relevant conduct" to be considered at sentencing.[455] While she found Wolfe's reporter contacts to be "certainly potentially harmful and entirely inappropriate," Jackson stated that those actions themselves were not criminal, reasoning that "maintaining relationships with reporters is not a crime.[456] Even giving a reporter non[-]classified but sensitive nonpublic information is not a crime."[457] In the end, she held

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What to Know About Pizzagate, the Fake News Story With Real Consequences, **TIME MAG**. (Dec. 5, 2016); German Lopez, *Pizzagate, The Fake News Conspiracy Theory that Led a Gunman to DC's Comet Ping Pong, Explained*, **VOX** (Dec. 8, 2016).

[447] *Senate Judiciary Questionnaire*, *supra* note 7, at 100-01.

[448] 18 U.S.C. § 924(b) (violating).

[449] D.C. Code § 22-402 (violating).

[450] *Senate Judiciary Questionnaire*, *supra* note 7. at 100-01. U.S. Sentencing Guidelines, promulgated by the U.S. Sentencing Commission, establish sentencing policies and practices for federal courts. *See Guidelines Manual*, U.S SENT'G COMM'N (Nov. 2021).

[451] No. 18-CR-170, 2018 WL 10705448 (D.D.C. Dec. 26, 2018).

[452] The U.S. Senate Select Committee on Intelligence (SSCI) is dedicated to overseeing the U.S. Intelligence Community — that is, the agencies and bureaus of the federal government that provide information and analysis for leaders of the executive and legislative branches. Committee membership consists of 15 Senators: eight from the majority party and seven from the minority. The one-seat majority is dictated by Senate resolution and, unlike most other committees, does not change in proportion with the overall Senate ratio of majority to minority membership. The Committee structure is intended to reflect the nonpartisan nature of intelligence and encourage the Committee to work in a bipartisan manner. By resolution, the 15 SSCI members include two members (one per side) from the Appropriations, Armed Services, Foreign Relations, and Judiciary Committees to ensure appropriate coordination with those Committees. The Senate Majority and Minority Leaders and the Chair and Ranking Member of the Armed Services Committee serve as *ex officio* SSCI members.

[453] 18 U.S.C. § 1001(a)(2) (violating).

[454] *D.C. Circuit Questionnaire*, *supra* note 444, at 78.

[455] *Wolfe*, 2018 WL 10705448.

[456] *Id*.

[457] *Id*.

that "the risks associated with [Wolfe's reporter contacts] should not drive the sentence,"[458] rejecting the government's request for an upward departure under the sentencing guidelines.[459] In the course of pretrial proceedings, Judge Jackson denied the defendant's motion seeking an order that the President and others refrain from commenting publicly on the case.[460] Following the guilty plea, Jackson sentenced the defendant to a within-Guidelines term of two months of imprisonment, rejecting the government's request for an upward departure.[461]

(c) *Improvised Explosive Devices*

In *United States v. Johnson*,[462] for example, the defendant filed a motion for a new trial after being convicted by a jury of various federal and District of Columbia weapons charges based on his possession of improvised explosive devices (IEDs), among other things.[463] The defendant argued that the government failed to adduce evidence at trial that the IEDs at issue met the relevant legal definitions of "weapon of mass destruction" and "destructive device."[464] Judge Jackson walked through various segments of the trial transcript with the aim of showing that "the government did, in fact, introduce uncontradicted evidence during trial that both IEDs" had the requisite characteristics for the jury to deduce they met those definitions.[465] Jackson arrived at the conclusion that the defendant's motion failed to meet the "heavy burden" of demonstrating the jury's verdict should be overturned, as doing so would "require the Court to ignore or discount the bulk of the government's evidence at trial."[466]

(d) *Production and Possession of Child Pornography*

In *United States v. Hillie*,[467] Judge Jackson was asked to address an unsettled legal question concerned the scope of federal prohibitions on the production and possession of child pornography.[468] Not surprisingly, the defendant in *Hillie* moved to dismiss the charges on several federal child-pornography counts; the motion turned on the meaning of the statutory phrase "lascivious exhibition."[469]

To interpret that phrase, Jackson relied on a set of six non-dispositive, guiding factors known as the "*Dost* factors,"[470] which include, among other criteria, consideration of "whether the visual

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[458] *Id*.
[459] U.S. v. Wolfe, No. 18-CR-170, Government's Sentencing Memorandum and Motion for Upward Departure and/or Variance (D.D.C. Dec. 11, 2018).
[460] *D.C. Circuit Questionnaire*, *supra* note 444, at 78.
[461] *Id*.
[462] No. 15-CR-125, 2019 WL 3842082 (D.D.C. Aug. 15, 2019), *aff'd in part and vacated in part*, 4 F.4th 116 (D.C. Cir. 2021).
[463] *Id*. at *1.
[464] *Id*.
[465] *Id*. at *3.
[466] *Id*. at *4.
[467] *U.S. v. Hillie*, 289 F. Supp. 3d 188 (D.D.C. 2018), *vacated in part*, 14 F.4th 677 (D.C. Cir. 2021).
[468] *Id*. at 190.
[469] 18 U.S.C. § 2256(2)(A)(v).
[470] *United States v. Dost*, 636 F. Supp. 828 (S.D. Cal. 1986) (involving 22 nude or semi-nude photographs of females aged 10–14 years old). Although never considered by the Supreme Court, the *Dost* test, developed by a California district court, has become a key feature of child pornography law, adopted by virtually all state and lower federal

depiction is intended or designed to elicit a sexual response in the viewer."[471] Jackson acknowledged that the courts of appeals had different opinions about the usefulness of the *Dost* factors, and recognized that the D.C. Circuit had not yet taken a position on the question.[472]

Jackson decided to rely on the *Dost* factors reasoning they captured relevant contextual information that could be helpful in evaluating the "elusive concept" of lasciviousness, at least in some cases.[473] Accordingly, Jackson, after referencing the factors, concluded that a reasonable jury could find the videos at issue to constitute "lascivious exhibition," emphasizing the need to account for the defendant's intent to gain sexual gratification from what was filmed, rather than the victim's actions or state of mind.[474]

The defendant was subsequently convicted of seven federal child-pornography counts, but a divided panel of the D.C. Circuit vacated those convictions on appeal citing insufficient evidence.[475] Although the panel majority disavowed reliance on the *Dost* factors and rejected the view that "lascivious exhibition" could be grounded on the defendant's intended sexual gratification,[476] one judge on the panel "vigorously" dissented, pointing out that "most circuits" view the *Dost* factors as appropriate and several other circuits had read the relevant statute "not to require that lasciviousness be exhibited by the minor."[477]

2. *Pretrial, Post-Conviction, and Compassionate Release*

Judge Jackson has authored a number of detailed opinions tackling whether alleged or convicted federal offenders should be released at various stages of the criminal justice process. These opinions reflect careful attention to the particular factual and defendant-specific circumstances weighing for and against release, as well as the differing burdens and presumptions that apply depending on when release is sought, as required by the relevant federal statutes.

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courts as part of the definition of child pornography. The six-factor test guides court analysis of what constitutes "lascivious exhibition of the genitals or pubic area" per 18 U.S.C. § 2256(2)(A)(v).

1. Whether the focal point of the visual depiction is on the child's genitalia or pubic area.
2. Whether the setting of the visual depiction is sexually suggestive, i.e., in a place or pose generally associated with sexual activity.
3. Whether the child is depicted in an unnatural pose, or in inappropriate attire, considering the age of the child.
4. Whether the child is fully or partially clothed, or nude.
5. Whether the visual depiction suggests sexual coyness or a willingness to engage in sexual activity.
6. Whether the visual depiction is intended or designed to elicit a sexual response in the viewer.

Id. at 832. *But see*, Amy M. Adler, *The 'Dost Test' in Child Pornography Law: 'Trial by Rorschach Test,'* NYU SCH. L. (Aug. 2016).

[471] *Hillie*, 289 F. Supp. 3d at 195.
[472] *Id*. at 195-96.
[473] *Id*. at 197.
[474] *Id*. at 200-01.
[475] *U.S. v. Hillie*, 14 F.4th 677, 680 (D.C. Cir. 2021).
[476] *Id*. at 687-93.
[477] *Id*. at 696, 699, 702 (Henderson, J., dissenting).

(a) *Compassionate Release and the COVID-19 Pandemic*

Many of Judge Jackson's release decisions were couched in the context of COVID-19; although she addressed the implications of the coronavirus pandemic in the course of her opinions, she did not rely on it to grant release automatically. For example, in *United States v. Lee*,[478] an inmate in pretrial detention on federal weapons charges sought emergency release in March 2020 under legal provisions that:[479]

- permit a reopening of a detention determination if new information surfaces that has a "material bearing" on "whether there are conditions of release that will reasonably assure the appearance of such person as required and the safety of any other person and the community," and

- authorize temporary release when "necessary for preparation of [one's] defense or for another compelling reason."

There was no doubt the spread of COVID-19 was new information according to Jackson who acknowledged that the infectious disease potentially could be a "compelling reason" for release of "certain defendants" with, for example, "underlying medical conditions that make them especially vulnerable to the [novel] virus."[480] The opinion concluded, however, that the pandemic did not have a "material impact" on any of the factors that led the inmate to be confined initially, and the danger posed by release would still be "substantial."[481] Jackson also held that the pandemic was an insufficiently compelling reason at the time to release an "otherwise healthy and potentially violent" defendant "based solely on the generalized risks that COVID-19 admittedly creates for all members of our society."[482]

In contrast, two weeks after her opinion in *Lee*, Judge Jackson in *United States v. Dabney*[483] granted pretrial release to an inmate detained on drug charges under the "material bearing" authority[484] described *supra*. Applying again the factors weighing on the propriety of pretrial detention, Jackson's opinion recognized, among other things: [485]

- several weapons charges against the inmate had subsequently been dropped;

- there was little record evidence the inmate posed a threat to the community; and

[478] 451 F. Supp. 3d 1, 5 (D.D.C. 2020).
[479] *Id*. quoting 18 U.S.C. § 3142(f), (i).
[480] *Id*. at 8–9.
[481] *Id*. at 9.
[482] *Id.* at 9; *see also* U.S. v. Wiggins, No. 19-CR-258, 2020 WL 1868891, at *6 (D.D.C. Apr. 10, 2020) (recognizing grave risk of harm to inmates from COVID-19 and district court authority to grant release pending sentencing for "exceptional reasons," but concluding assessment of danger from release and other factors warranted continued confinement); U.S. v. Leake, No. 19-CR-194, 2020 WL 2331918, at *1 (D.D.C. May 10, 2020) (reopening pretrial detention determination based on COVID-19 pandemic and substantiation of an asthma condition, but concluding statutory factors weighed in favor of detention and compelling reason for temporary release had not been shown).
[483] U.S. v. Dabney, No. 20-CR-027, 2020 WL 1867750 (D.D.C. Apr. 13, 2020).
[484] *Id*. at *1.
[485] *Id*. at *2–3.

- the inmate had an underlying medical condition (asthma) heightening his risk of harm from COVID-19 while in pretrial detention.

As such, Jackson ordered the inmate's pretrial release on high-intensity supervision.[486]

Ketanji Brown Jackson's compassionate release decisions reflect similar consideration to case-specific circumstances. The federal compassionate release statute authorizes a federal court to reduce a term of imprisonment if consistent with United States Sentencing Commission policy statements and statutory sentencing factors when "extraordinary and compelling reasons warrant such a reduction,"[487] among other things. In at least two decisions in 2020, Judge Jackson granted compassionate release to federal offenders based in part on the COVID-19 pandemic after carefully examining factors specific to each offender. She wrote in *United States v. Johnson*,[488] for example, that "the prevalence of a novel and potentially deadly strain of coronavirus" in the inmate's prison facility, coupled with a preexisting medical condition that put him at higher risk of harm, qualified as an extraordinary and compelling reason for sentence reduction; she also decided that "none of the considerations concerning the purposes of punishment" in the statutory sentencing factors she was required to consider called for maintenance of the original prison term.[489] In so doing, Jackson also agreed with other District of D.C. decisions (but in opposition to some decisions in other jurisdictions) that a statutory exhaustion requirement for compassionate release motions could be waived.[490]

Conversely, in *United States v. Sears*,[491] Judge Jackson denied compassionate release of an inmate with medical conditions (diabetes mellitus and asthma) he claimed placed him at greater risk of serious complications from COVID-19.[492] Jackson's opinion once more recognized that an inmate's "serious underlying medical conditions," in "conjunction with the COVID-19 pandemic and the prevalence of that disease in the facility where he is housed," qualified as extraordinary and compelling reasons under the compassionate release statute justifying release.[493] On the other hand, however, Jackson believed reducing this inmate's sentence would not comport with statutory sentencing factors concerning the purposes of punishment, highlighting the "extremely serious" nature of the inmate's crime (distribution of child pornography); his high risk of reoffending; the lack of sex offender treatment while in federal custody; and the risk to the community if released.[494]

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[486] *Id*. at *4.
[487] 18 U.S.C. § 3582(c).
[488] 464 F. Supp. 3d 22 (D.D.C. 2020).
[489] *Id*. at 27; *see also* U.S. v. Dunlap, 485 F. Supp. 3d 129 (D.D.C. 2020) (reducing sentence after concluding COVID-19 pandemic and underlying health conditions were extraordinary and compelling reasons, and that statutory factors did not call for continued incarceration).
[490] *Id*. at 28.
[491] No. 19-CR-021, 2020 WL 3250717 (D.D.C. June 16, 2020).
[492] *Id*. at *1.
[493] *Id*. at *2.
[494] *Id*. at *2-3.

(b) *Compassionate Release: Advanced Age, Deteriorating Health, and Lengthy Incarceration*

In a compassionate release decision unrelated to the coronavirus pandemic, Judge Jackson in *United States v. Greene*[495] granted release to a 72-year-old prisoner with serious medical conditions who fatally shot a United States Marshal in 1971, but had since been deemed "completely reformed" by numerous federal corrections officers.[496] Because the offender in the case was serving time in federal prison for District of Columbia (D.C.) Code offenses, Jackson had to determine whether the federal or D.C. Code's compassionate release provision governed.[497] Based on "foundational principles of federal-court jurisdiction,"[498] Jackson answered that the federal provision applied and, in light of the offender's advanced age, long period of incarceration, and deterioration in health, he should be released.[499]

3. Asset Forfeiture

Ketanji Brown Jackson's judicial writing in asset forfeiture cases is limited, making it difficult, nigh impossible, to draw broad conclusions as to how she might appraise legal issues in this arena as a U.S. Supreme Court Justice. That said, in one notable written opinion, *United States v. Young*,[500] Jackson rejected what she deemed a "novel" government effort to use the criminal forfeiture statutes to obtain a money judgment that, in her view, would constitute "improper double counting."[501] In *Young*, a case involving prosecutorial overreach, the government seized over two kilograms of heroin from the defendant.[502] After the defendant was convicted of possession with intent to distribute that heroin, the government sought a forfeiture order encompassing a money judgment in the amount of $180,000 — "an amount equal to the estimated value of the two kilograms of heroin that had been seized" — on the theory that the defendant had used that amount of money "to facilitate the commission of his crime" within the meaning of the relevant forfeiture statute.[503]

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).[504] 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."[505] Forcefully rejecting the government's theory, Jackson wrote that there was "no statutory or common-sense justification for the government's suggestion that it is authorized both to seize contraband drugs and also to obtain a money judgment for the amount that the defendant allegedly used to purchase

[495] U.S. v. Greene, 516 F. Supp. 3d 1 (D.D.C. 2021).
[496] *Id*. at 4.
[497] *Id*. at 5.
[498] *Id*. at 15.
[499] *Id*. at 28.
[500] 330 F. Supp. 3d 424 (D.D.C. 2018).
[501] *Id*. at 426.
[502] *Id*.
[503] *Id*. at 427 (citing 21 U.S.C. § 853(a)(2)).
[504] 330 F. Supp. 3d at 426.
[505] *Id*. at 434-37.

those very same drugs."[506] The request bore "no relationship to the usual purpose of money judgments in the criminal forfeiture context, which is to prevent the dissipation of illegal proceeds by an offender who might otherwise profit from his ill-gotten gains," and had "absolutely no support in the text of the applicable criminal forfeiture statute."[507]

In arriving at these conclusions, Jackson scrutinized the underlying "concerns that Congress sought to address" via the relevant forfeiture provisions, observing that legislative history of the provisions reflected congressional interest in preventing criminal defendants from "evad[ing] the economic impact of criminal forfeiture by rendering . . . forfeitable property unavailable."[508] But, according to Jackson, the amount of money the government sought in the present case was not unavailable or "missing in any meaningful sense," as the government alleged that the defendant used it to purchase the heroin that had already been seized.[509] As such, in Jackson's view, the government's effort ran into a "significant double-counting problem" that is "considered especially taboo in the context of criminal punishment," and "[n]othing in the statute even remotely" suggested "that Congress intended this result."[510]

4. Sentencing

In 2010, Congress passed the *Fair Sentencing Act* (FSA),[511] a decade-long bipartisan effort aimed at reducing the sentencing disparity between offenses for crack and powder cocaine from 100:1 to 18:1. The 100:1 ratio meant that people faced longer sentences for offenses involving crack cocaine than for offenses involving the same amount of powder cocaine — two forms of the same drug. In other words, the FSA increased the quantities of crack cocaine required to trigger mandatory minimum sentences. "For sentencing reformers who have seen little progress at the federal level in loosening the one size-fits-all mandatory punishments, the *Fair Sentencing Act* was an important victory."[512] In 1984, Congress created the United States Sentencing Commission, an independent agency in the judicial branch tasked with the mission of providing certainty, consistency, and fairness in sentencing[513] that would, among other goals, reduce unwarranted sentencing disparity. Under the *Fair Sentencing Act*, the Commission was instructed to promulgate conforming changes to the sentencing guidelines.[514] Before ascending to the federal bench, Ketanji Brown Jackson served for six years on the Sentencing Commission, including one term as Vice

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[506] *Id*. at 430.
[507] *Id*.
[508] *Id*. at 431-32.
[509] *Id*. at 433.
[510] *Id*. at 435-36.
[511] Pub. L. No. 111-220, 124 Stat. 2372 (Aug. 3, 2010). *See generally*, Memorandum for all Federal Prosecutors, *The Fair Sentencing Act of 2010*, U.S. DEP'T OF JUSTICE (Aug. 5, 2010); Press Release, *U.S. Sentencing Commission Reports on Impact of Fair Sentencing Act of 2010*, U.S. SENTENCING COMM'N (Aug. 3, 2015); Policy Profile, *Sensible Sentencing Reform: The Fair Sentencing Act*, U.S. SENTENCING COMM'N (Aug. 3, 2015), *Report to the Congress: Impact of the Fair Sentencing Act of 2010*, U.S. SENTENCING COMM'N (Aug. 2015).
[512] *Federal Crack Cocaine Sentencing*, THE SENTENCING PROJECT 1, 9 (Oct. 2010).
[513] 28 U.S.C. § 991. *See generally* Charles Doyle, *How the Federal Sentencing Guidelines Work: An Overview*, CONG. RES. SERV. (July 2, 2015) (supplying overview of U.S. Sentencing Commission and its Sentencing Guidelines).
[514] *Id*. at 8.

Chair. While on the Commission, Jackson played a role in considering and implementing federal sentencing policy on a number of noteworthy issues.[515]

For example, the Sentencing Commission evaluated whether to make retroactive the reductions to recommended crack cocaine sentences.[516] Jackson voted in favor of retroactivity.[517] In a Commission hearing on the issue, Jackson explained that her decision rested on several bases, including hearing testimony; "thousands of letters and pieces of written public comment" the Commission received; an "analysis of the relevant data;" and "a thorough evaluation of the guideline amendment in light of the established criteria by which the Commission makes retroactivity determinations."[518] Jackson emphasized the Sentencing Commission's statutory duty[519] to consider retroactivity when it reduces the term of recommended imprisonment[520] and "Congress's clear purpose in enacting" the statute was to require the Commission to make "immediate conforming reductions in the guidelines" to address the fair sentencing issue of the disparity in sentences between crimes involving crack versus powder cocaine.[521] Jackson explained her belief that federal judges were well positioned to make case-specific judgments about a particular offender's dangerousness, and to reserve sentence adjustments for a particular defendant where it was "warranted and . . . the risk to public safety is minimal."[522]

In 2014, the United States Sentencing Commission again faced a question involving retroactivity in the crack cocaine context: whether to make retroactive a Sentencing Guideline provision offering a sentence reduction for those who offered substantial assistance to the government.[523] Jackson voted against the amendment, noting her belief that it was inconsistent with statutes, the Sentencing Guidelines, and congressional intent, and would create unwarranted sentencing disparities between those already sentenced and those sentenced in the future.[524]

Ketanji Brown Jackson also considered issues relating to the Sentencing Guidelines while a federal judge. In *United States v. Terry*,[525] for example, the matter at issue concerned an inmate's challenge to a sentencing enhancement received under the Guidelines' career offender provision.[526] The inmate argued that the Supreme Court's opinion in *Johnson v. United States*[527] — which

[515] *See, e.g.*, U.S. SENTENCING COMM'N, PUBLIC MEETING MINUTES (Apr. 6, 2011) (supporting changing Guidelines thresholds for crack cocaine and expressing the view that the issue of whether baseline should be higher than mandatory minimums is a discussion that implicates offenses involving other controlled substances); *Public Meeting Transcript of Record*, U.S. SENTENCING COMM'N 59-60 (Apr. 10, 2014) (discussing a proposed amendment to Drug Quantity Table in Guidelines and explaining Jackson's "strong belief that lowering the Base Offense Levels for drug penalties is necessary in order for the guideline system to work properly").
[516] U.S. SENTENCING COMM'N, PUBLIC MEETING MINUTES (June 30, 2011).
[517] *Id*.
[518] Transcript of Record, at 12-13, U.S. SENTENCING COMM'N (June 30, 2011).
[519] 28 U.S.C. § 994(u) (outlining duties of U.S. Sentencing Commission).
[520] Transcript of Record (June 30, 2011), at 10-11.
[521] Id. at 13.
[522] *Id*. at 14-15.
[523] Transcript of Record at 18-26, U.S. SENTENCING COMM'N (Apr. 10, 2010).
[524] *Id*.
[525] No. 14-CR-00009, 2020 WL 7773389 (D.D.C. Dec. 29, 2020) (citing U.S. Sent'g Guidelines Manual § 4B1.1(a) (U.S. Sent'g Comm'n 2013)).
[526] *Id*. at *1.
[527] 576 U.S. 591, 597 (2015).

invalidated a provision of a federal statute on vagueness grounds — rendered his sentence pursuant to a similar provision in the Sentencing Guidelines unlawful.[528] Jackson disagreed based on subsequent Supreme Court precedent clarifying that the *Johnson* holding does not apply to the Guidelines.[529]

In *United States v. Crummy*,[530] Jackson examined how certain Sentencing Guidelines provisions apply to a defendant convicted of wire fraud conspiracy in connection with his role in wrongfully procuring government contracts reserved for "small, disadvantaged businesses" through the Small Business Administration's Section 8(a) program.[531] *Crummy* involved a question on which federal circuits had split: whether Section 8(a) contracts count as government benefits when adjusting a sentence to reflect the amount of loss to the government.[532] The Guidelines specify that in the context of government benefits the relevant loss is, at a minimum, the value of the benefits obtained.[533] Judge Jackson determined Section 8(a) contracts are not government benefits for sentencing purposes, observing that Section 8(a) contracts are dissimilar to grants, loans, and other items listed as benefits by the Guidelines.[534] Instead, Jackson found a separate provision of the Guidelines applied to the calculation of loss for Section 8(a) contracts.[535]

In addition to Sentencing Guidelines issues, Judge Jackson's sentencing-related opinions include matters such as restitution. In *United States v. Fields*,[536] for example, Jackson rejected a defendant's claim for post-sentence relief from a judgment of restitution.[537] Jackson concluded that the defendant failed to meet her statutory burden of establishing a material change in economic

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> The Supreme Court held that the imposition of an increased sentence under the residual clause of the definition of "violent felony" in 18 U.S.C. § 924(e) (commonly referred to as the "Armed Career Criminal Act" or the "ACCA") violates the Constitution's guarantee of due process. The residual clause defined a "violent felony" as a crime that "involves conduct that presents a serious potential risk of physical injury to another." The Court found that two features of the residual clause "conspire to make it unconstitutionally vague," in violation of the Due Process Clause. First, "the residual clause leaves grave uncertainty about how to estimate the risk posed by a crime" by tying "the judicial assessment of risk to a judicially imagined 'ordinary case' of a crime, not to real-world facts or statutory elements." Second, "the residual clause leaves uncertainty about how much risk it takes for a crime to qualify as a violent felony." Combining these two features together, the Court concluded that "the residual clause produces more unpredictability and arbitrariness than the Due Process Clause tolerates."
>
> The Court further rejected the argument that the residual clause can be "void for vagueness only if it is vague in all its applications," explaining that its precedent "squarely contradict[s] the theory that a vague provision is constitutional merely because there is some conduct that clearly falls within the provision's grasp." Finally, the Court overruled its contrary holdings in *James v. United States*, 550 U.S. 192 (2007), and *Sykes v. United States*, 564 U.S. 1 (2011) . . . explaining that "[s]tanding by *James* and *Sykes* would undermine, rather than promote, the goals that stare decisis is meant to serve."

Select Supreme Court Cases on Sentencing Issues, U.S. SENT'G COMM'N 9-10 (Aug. 2022) (italics in original).

[528] *Terry*, 2020 WL 7773389, at *1.
[529] *Id*. at *3/
[530] 249 F. Supp. 3d 475 (D.D.C. 2017).
[531] *Id*. at 476-77.
[532] *Id*. at 487.
[533] *Id*. at 481 (citing U.S. Sent'g Guidelines Manual § 2B1.1 cmt. n.3(F)(ii) (U.S. Sent'g Comm'n 2013)).
[534] Id. at 482.
[535] *Id*. at 481 (citing U.S. Sent'g Guidelines Manual § 2B1.1 cmt. n.3(E) (U.S. Sent'g Comm'n 2013)).
[536] No. 99-CR-0286, 2020 WL 32990 (D.D.C. Jan. 2, 2020).
[537] *Id*. at *3.

circumstance for an adjustment to restitution or inability to pay interest on the restitution, as required for a waiver of interest.[538]

5. Rights of the Accused

Judge Jackson authored several opinions in cases addressing the rights of suspected or accused criminal offenders, including on charging issues and under the Constitution's Fourth and Fifth Amendments. In these cases, she expected the government to satisfy its threshold obligations, but ruled in the government's favor when, in her view, circumstances warranted.

(a) *Child Pornography*

In *United States v. Hillie*,[539] Judge Jackson dismissed several child-pornography counts of an indictment that "fail[ed] to provide minimally required factual information."[540] Jackson emphasized that a facially valid indictment is essential (1) to guarantee "core constitutional protections" of notice under the Sixth Amendment and (2) to guard against "abusive criminal charging practices" under the Fifth Amendment.[541] According to Jackson, the indictment "clearly fail[ed] to satisfy these basic constitutionally mandated principles" by omitting factual allegations that would apprise the defendant of the nature of the charges against him.[542] The counts simply repeated the "generic words" of the child pornography statutes at issue, which she viewed as insufficient given the broad framing of those statutes.[543] This lack of specificity rendered the charging document "deficient with respect to the Fifth Amendment's right to be tried only upon charges found by a grand jury" and risked subjecting the defendant to multiple punishments for the same offense or "future prosecution for conduct arising out of these same charges" in violation of the Fifth Amendment's Double Jeopardy Clause.[544]

(b) *Two Words, One Powerful Message: Miranda Warning*

"Miranda warning" refers to the constitutional requirement that once police detain an individual there are certain warnings a police officer is required to give to the detainee. The requirement derives from the Supreme Court landmark decision, *Miranda v. Arizona*.[545] The Court held that a defendant cannot be questioned by police in the context of a custodial interrogation until the defendant is made aware of the right to remain silent, the right to consult with an attorney and have the attorney present during questioning, and the right to have an attorney appointed if indigent. These warnings stem from the Fifth Amendment privilege against self-incrimination and the Sixth Amendment right to counsel.

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[538] *Id*.
[539] 227 F. Supp. 3d 57 (D.D.C. 2017).
[540] *Id*. at 62.
[541] *Id*. at 69-70.
[542] *Id*. at 72.
[543] *Id*. at 73, 76.
[544] *Id.* at 78-79. Jackson dismissed the relevant counts without prejudice. *Id.* at 82. The government obtained a superseding indictment and the defendant was eventually convicted of violating the child-pornography statutes at issue, among other things, although those convictions were recently vacated on appeal as described previously.
[545] 384 U.S. 486 (1966).

In *United States v. Richardson*,[546] a case tackling different Fifth Amendment protections, Judge Jackson denied a motion to suppress statements the defendant claimed were the product of custodial interrogation by law enforcement absent constitutionally required Miranda warnings.[547] The defendant was detained in the living room of the apartment she occupied with her boyfriend while law enforcement officers searched for drugs and guns.[548] An officer discovered a handgun hidden in a laundry basket, and the defendant repeatedly stated the handgun was hers.[549] Jackson determined that it was "abundantly clear" that the defendant was in custody when she made the incriminating statements.[550] However, Jackson ultimately concluded that Miranda warnings were not required because the defendant "was not being subjected to police interrogation at the time she made the statements,"[551] based on testimony indicating the defendant volunteered the statements in an atmosphere that was neither "inherently coercive" nor designed "to elicit an incriminating response" from her.[552]

(c) *Electronic Records and Surveillance*

Although the Fourth Amendment is commonly considered the principal constitutional safeguard of the right to privacy,[553] "it does not do so explicitly."[554] Privacy is nowhere mentioned in amendment text.[555] Importantly, the Fourth Amendment prohibits unreasonable searches and seizures without a warrant. Generally, law enforcement must obtain a warrant when a search would violate a person's reasonable expectation of privacy.[556] The Fourth Amendment requires that warrants be supported by probable cause and describe with particularity the places to be searched and persons to be seized. The advent of the Internet and other digital technologies like cell phones, smart cars, and wearable devices has ushered in new questions about when law enforcement agencies must obtain a warrant, about what constitutes probable cause to support a warrant, and about the scope of the search permitted under a warrant.

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[546] 36 F. Supp. 3d 120 (D.D.C. 2014).
[547] *Id*. at 122.
[548] *Id*. at 123-26.
[549] *Id*.
[550] *Id*. at 129.
[551] *Id*. at 131.
[552] *Id*.
[553] U.S. CONST. amend. IV.
[554] Steven C. Douse, *The Concept of Privacy and the Fourth Amendment* 6 U. MICH. J. L. REFORM 154, 156 (1972).
[555] U.S. CONST. amend. IV.

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Id.
[556] *Katz v. United States*, 389 U.S. 347 (1967). Why should we care about the history of *Katz v. United States*? The 1967 U.S. Supreme Court case formulated the "reasonable expectation of privacy" test used to decide when a governmental intrusion constitutes a "search" under the Fourth Amendment. But the test extends beyond the confines of the Constitution; it has found its way into common law and statutes, and even the laws of other countries. In short, *Katz* represents a great touchstone in the law of privacy. Peter Winn, *Katz and the Origins of the Reasonable Expectation of Privacy Test*, Vol. 40, No. 1 MCGEORGE L. REV. 1 (2009). *See generally*, Richard G. Wilkins, *Defining the Reasonable Expectation of Privacy: An Emerging Tripartite Analysis*, Vol. 40, No. 5 VAND. L. REV. 1077 (Oct. 1987).

> Today, we are at a jurisprudential inflection point as courts grapple with when and how the Fourth Amendment should apply to the data generated by [new] technologies[.] . . . . These technologies — which we rely on for enhanced communication, transportation, and entertainment — create detailed records about our private lives, potentially revealing not only where we have been but also our political viewpoints, consumer preferences, people with whom we have interacted, and more.[557]

Judge Jackson handed down a number of opinions on Fourth Amendment issues. In a criminal case, *United States v. Fajardo Campos*,[558] alleging participation in a drug distribution conspiracy, Jackson denied a defendant's motion to suppress electronic communications collected from the defendant's mobile device[559] pursuant to a wiretap authorized under Title III of the *Omnibus Crime Control and Safe Streets Act of 1968*, also known as the *Wiretap Act*.[560] "The defendant argued that given the success of the government's traditional investigative techniques, it should have waited for the fruits of those tactics to "ripen" before seeking the defendant's phone communications records."[561] While traditional investigative techniques had yielded some evidence they were unable to determine the full nature and scope of the defendant's alleged drug trafficking conspiracy and, according to Judge Jackson, insufficient to foreclose a Title III authorization where the affidavit supporting the Title III application establishes such avenues had failed — and would likely continue to fail.

Fajardo Campos raised a matter of ***first impression***: whether a court with jurisdiction to approve the interception of wire communications (like telephone calls) may also have jurisdiction to approve the interception of electronic communications (like texts and emails).[562] Judge Jackson held that the federal court had "listening post" jurisdiction to authorize surveillance of the defendant's cell phone.[563] Jackson concluded that such "listening post" jurisdiction encompassed electronic communications, finding no "principled basis for distinguishing electronic communications from wire communications in this respect."[564] Jackson also held that the government could establish the statutory requirement that interception was necessary merely by showing that traditional investigative techniques had failed and would fail "'to disclose the full nature and extent of the conspiracy' of which the target is alleged to be a part."[565]

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[557] Laura Hecht-Felella, *The Fourth Amendment in the Digital Age*, BRENNAN CTR. FOR JUSTICE (Mar. 18, 2022) ("describ[ing] how the U.S. Supreme Court's 2018 decision in *Carpenter v. United States* [138 S. Ct. 2206 (2018).] has the potential to usher in a new era of Fourth Amendment law. In *Carpenter*, the Court considered how the Fourth Amendment applies to location data generated when cell phones connect to nearby cell towers.").
[558] No. 1:16-CR-00154, 2018 WL 6448633 (D.D.C. Dec. 10, 2018).
[559] *Id*. at *1.
[560] Pub. L. No. 90-351; 82 Stat. 197 (June 19, 1968).
[561] *Reporters Committee reviews Judge Ketanji Brown Jackson's record on First Amendment, Freedom of Information Act cases*, REPORTERS COMM. FOR FREEDOM OF THE PRESS (Mar. 21, 2022).
[562] *Fajardo Campos*, 2018 WL 6448633 at *1.
[563] Sara Geoghegan, *Judge Ketanji Brown Jackson on Privacy and Transparency*, ELEC. PRIVACY INFO. CTR. (Mar. 22, 2022).
[564] *Fajardo Campos*, 2018 WL 6448633 at *1
[565] Id. (quoting *United States. v. Brown*, 823 F.2d 591, 598 (D.C. Cir. 1987)).

(d) *Motions to Suppress Physical Evidence*

Several of Judge Ketanji Brown Jackson's other Fourth Amendment opinions involved motions to suppress physical evidence. This section covers a trio of cases where Jackson denied motions to suppress.

In *United States v. Miller*,[566] for example, Jackson denied a defendant's motion to suppress a firearm he claimed was the product of an unlawful seizure.[567] The defendant argued it had been unlawfully seized when police officers "approached him in an unmarked vehicle while he was walking down the sidewalk and repeatedly asked him whether or not he was carrying a gun."[568] Jackson disagreed, concluding that under binding precedent, the "Fourth Amendment seizure occurred only when [the officer] physically restrained and arrested [the defendant] following [the defendant's] admission that he had a gun, and at that point, [the officer] plainly had probable cause to justify Miller's arrest."[569]

In *United States v. Leake*,[570] Judge Jackson denied the suppression motion of a defendant claiming that police officers violated his Fourth Amendment rights when they entered his apartment building's laundry room, arrested him without sufficient cause, and used excessive force.[571] Jackson found that the defendant lacked standing to challenge the officers' entry to the apartment building's laundry room because it was a space in which he lacked a common law property interest, the right to exclude individuals, or a reasonable expectation of privacy.[572] Jackson also determined that when one of the officers grabbed the defendant's arm, it amounted to an investigatory stop justified by reasonable suspicion of criminal activity given that the defendant was standing in a suspicious position holding a "small clear plastic baggie in his hand."[573] Jackson also determined that the officers did not use excessive force by tackling the defendant when he tried to flee (and then fight) the officers.[574]

In *United States v. Turner*,[575] Judge Jackson likewise denied a defendant's motion to suppress evidence as the fruit of a defective search warrant.[576] Jackson concluded that the information in the warrant — a confidential informant's reports of drug activity by the defendant in the place to be searched — sufficiently supported probable cause.[577]

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[566] No. 16-CR-0072, 2016 WL 8416761 (D.D.C. Nov. 11, 2016), *aff'd*, 739 F. App'x 6 (D.C. Cir. 2018).
[567] *Id*. at *1.
[568] *Id*.
[569] *Id*.
[570] No. 19-CR-194, 2020 WL 3489523 (D.D.C. June 26, 2020).
[571] *Id*. at *1.
[572] *Id*. at *7-8.
[573] *Id*. at *10.
[574] *Id*. at *12.
[575] 73 F. Supp. 3d 122 (D.D.C. 2014).
[576] *Id*. at 124.
[577] *Id*. at 126.

F. *Environmental Law*

During her tenure as a district court judge, Jackson presided over numerous environmental cases addressing a wide range of issues. Many addressed the scope of agency authority under an environmental statute or the legality of a specific agency action, and implicated broader questions of administrative law, such as standing to sue and standards for judicial review. Judge Jackson ruled in favor of environmental causes about as often as she has ruled against them. The line of cases discussed in this section exemplifies the broader trend that 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. As with other areas of law discussed herein, Jackson's rulings are focused on the specific facts at issue in a given case, making it difficult to draw generalizations about her approach to substantive environmental law or review of federal agency action more broadly. For this reason, it is difficult to predict the impact she would have on the Supreme Court's environmental law jurisprudence. Jackson's analysis tends to focus closely on consideration of applicable statutory and regulatory text, as well as evaluation of whether the litigants have satisfied relevant procedural requirements. Her environmental law opinions do not appear to show a clear orientation in favor of environmental groups, business interests, or the government.

1. *Comprehensive Environmental Response, Compensation, and Liability Act*

In one of Judge Jackson's most significant cases on the district court, *Guam v. United States*,[578] she ruled in favor of Guam in its $160 million lawsuit against the U.S. Navy for failing to clean up and close a "280-foot mountain of trash" near the center of the island[579] where the Navy disposed of DDT, Agent Orange, munitions, and other toxic military waste for decades. The tiny and remote island in the western Pacific Ocean became a key base for the Navy during World War II after the United States regained control of it from Japan in the Battle of Guam (1944). As part of establishing ports and bases on the island, the Navy constructed the Ordot Dump in the 1940s without any environmental safeguards and later ceded control of the site to the Territory of Guam, which itself used the dump as a public landfill.

In a long-running dispute that travelled all the way to the U.S. Supreme Court, Judge Jackson contemplated whether the Guam could recoup costs associated with the cleanup of a contaminated landfill under the Comprehensive Environmental Response, Compensation, and Liability Act of 1990,[580] commonly known as CERCLA.[581] The Act birthed a complex statutory scheme for responding to certain environmental hazards. Several of its provisions speak to what is often the crucial question in a remedial action: Who pays?

In the late 20th century, the Environmental Protection Agency (EPA) determined that the Ordot Dump posed an ecological hazard. After Guam allegedly failed to comply with agency directives to remediate the site, the EPA sued under the Clean Water Act, asserting that Guam was

[578] 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*. 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).
[579] 950 F. 3d at 109.
[580] 341 F. Supp. 3d at 76-77.
[581] 94 Stat. 2767, *as amended*, 42 U. S. C. §9601 *et seq*.

discharging pollutants (untreated waste from the landfill) into the waters of the United States. The contaminants seeped into Lonfit River which carried them into the Pacific Ocean. That litigation ended in 2004 when Guam and the EPA entered into a consent decree requiring Guam, among other things, to pay a civil penalty, shutter the site, and design and install a dump cover system.

Thirteen years later it was Guam's turn to sue — this time under CERCLA which provides two different avenues for parties to recover cleanup costs from other potentially responsible parties: (1) cost-recovery actions and (2) contribution actions.[582] These two routes 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.[583] The U.S. government argued that the prior consent decree eliminated Guam's right to direct cost recovery and that 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.[584]

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.[585] After analyzing the natural or plain meaning of relevant statutory terms, examining applicable caselaw, and considering factual history, Jackson believed that the earlier consent decree did not "resolve" Guam's liability for purposes of triggering a contribution claim.[586] 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. 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.'"[587] Reasoning that 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), Jackson determined that Guam should be allowed to pursue its claim against the U.S. Navy for direct cleanup costs.

On appeal, the D.C. Circuit acknowledged Jackson's opinion as "thorough," but reversed and left Guam with no CERCLA remedy, holding that the island territory could not seek cost recovery, and that its contribution claim was stale (that is, time-barred).[588] Siding with the Ninth Circuit's interpretation, the D.C. Circuit dismissed Guam's complaint. Guam sought certiorari; the U.S. Supreme Court obliged. The high court, reversing the D.C. Circuit's judgment, issued a unanimous

[582] 42 U.S.C. §§ 9607(a)(4)(B), 9613(f).
[583] *See* Whittaker Corp. v. U.S., 825 F.3d 1002, 1007 (9th Cir. 2016) (stating that "every federal court of appeals to consider the question . . . has said that a party who may bring a contribution action for certain expenses must use the contribution action, even if a cost recovery action would otherwise be available.").
[584] *Guam*, 341 F. Supp. 3d at 85.
[585] *Id*. at 85-92.
[586] *Id*. at 92-97.
[587] *Id*. at 90.
[588] Guam v. United States, 950 F.3d 104 (D.C. Cir. 2021).

opinion aligning with Judge Jackson's original ruling[589] and agreeing with Jackson that Guam's cost-recovery claim could proceed.[590]

2. *Environmental Assessment and Trump's Border Wall Construction*

In another case, Judge Jackson ruled in favor of the government. A number of Jackson's decisions are unexpected if filtered through a liberal lens rather than eyeing the focus of her reasoning: the law. In *Center for Biological Diversity v. McAleenan*,[591] for example, Judge Jackson sided with the Trump-Pence Administration in a challenge to the waiver of environmental laws in connection with the construction of a stretch of border wall in New Mexico.

Assorted animal rights organizations and environmental advocacy groups challenged the United States Department of Homeland Security's (DHS) waiver of 25 statutes, including the *National Environmental Policy Act of 1969* (NEPA)[592] and the *Endangered Species Act of 1973* (ESA),[593] pursuant to Section 102 of the *Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) of 1996*.[594] The IIRIRA requires DHS to construct miles and miles, and, yes, hundreds of miles, of new border fencing and authorizes the agency to waive "all legal requirements" necessary for speedy construction of these physical barriers.[595] Section 102(c) also corrals federal court jurisdiction to claims alleging that DHS violated the Constitution in acting pursuant to IIRIRA and hogties all other claims.[596] The scope of the IIRIRA's waiver authorization and the Court's ability to consider legal actions that contest the government's waiver of environmental laws to speed the construction of border walls are the core legal issues in the instant case.

The barriers, according to plaintiffs, would "have numerous negative impacts on the wildlife, plants and sensitive biological habitats on or near the proposed" project site.[597] They alleged that the waiver of various environmental statutes was *ultra vires*[598] — that is, beyond, outside of, or in excess of the powers authorized by law — because it exceeded the authority awarded to the DHS Secretary in the legislation authorizing wall construction.

In granting the government's motion for summary judgment, Judge Jackson found that the plaintiffs failed to state plausible constitutional claims regarding the waiver's permissibility, particularly in light of a persuasive prior District of D.C. ruling.[599] Additionally, and with analysis

[589] Guam v. United States, 141 S. Ct. 1608 (2021).
[590] *Id*. at 1611.
[591] 404 F. Supp. 3d 218 (D.D.C. 2019).
[592] 42 U.S.C. §§ 4321-4370m-12.
[593] 16 U.S.C. §§ 14531-44.
[594] *Id*. at 223-224; *Illegal Immigration Reform & Immigrant Responsibility Act* (IIRIRA), Pub. L. No. 104-208, div. C, § 102(b), as amended by the REAL ID Act of 2005, Pub. L. No. 109-13, div. B, § 102; the *Secure Fence Act of 2006*, Pub. L. No. 109-367, § 3; and the *Consolidated Appropriations Act of 2008*, Pub. L. No. 110-161, div. E, § 564(a) (codified at 8 U.S.C. § 1103e note).
[595] *IIRIRA*, § 102(c)(1).
[596] *Id*.
[597] *Center for Biological Diversity*, 404 F. Supp. 3d at 218.
[598] BLACK'S LAW DICTIONARY 1559 (8th ed. 2004) (defining *ultra vires* as "beyond the scope of power allowed or granted … by law.)/
[599] *Ctr. for Biological Diversity*, 404 F. Supp. 3d at 244-50 (discussing *Defenders of Wildlife v. Chertoff*, 527 F. Supp. 2d 119, 120–21 (D.D.C. 2007)).

focusing on the text of IIRIRA Section 102(c)(2), Jackson determined that Congress unambiguously precluded all non-constitutional legal challenges to the exercise of the DHS Secretary's waiver authority, including *ultra vires* claims. Adding a belt to these suspenders, Congress in no uncertain terms has further removed this Court's subject-matter jurisdiction over any non-constitutional waiver challenges; therefore, this Court is without power to address the merits of plaintiffs' *ultra vires* contentions because such claims were barred under the statute.[600]

The plaintiffs' petition for certiorari to the Supreme Court was denied.

Markedly, this decision reflects Jackson's respect for and reliance on precedent. Notably, the opinion voices a limitation on judicial power in that 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.[601] 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 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."[602] Jackson found such an intelligible principle in the IIRIRA: Congress directed the DHS Secretary "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 awarded the Secretary "authority to waive all legal requirements" as "necessary to ensure expeditious construction of the barriers and roads under this section."[603]

3. *Environmental Law: Standing and Procedural Issues*

Environmental cases, like other cases, often turn on whether a plaintiff has the right to bring a lawsuit in the first place. Judge Jackson has rendered opinions in various district court cases that addressed whether a plaintiff had standing to bring a lawsuit challenging an environmental regulation or federal agency action. Jackson's standing cases appropriately concentrate on the existence of a concrete, particularized, and imminent injury sufficient to confer Article III standing. Where there is record evidence of concrete harm, Judge Jackson does not hesitate to find Article III standing. As elsewhere, her path to a decision thoughtfully applies the facts of each case to the law to arrive at her destination.

In *New England Anti-Vivisection Society v. United States Fish and Wildlife Service* (FWS),[604] for example, Judge Jackson ruled that an animal welfare organization lacked standing to challenge a wildlife export permit to export chimpanzees to a zoo in the United Kingdom in exchange for a financial donation.[605] Although skeptical of the U.S. Fish & Wildlife Service's "broad interpretation" of its authority to export endangered species and its ability to "'sell' its permits in this fashion," Judge Jackson, bound by precedent, decided that the "constraints of Article III

[600] *Id*. at 237-42.
[601] *Id*. at 225.
[602] *Id*. at 244 (quotation omitted).
[603] *Id*. at 246 (quoting IIRIRA § 102(a), 102(c)(1)).
[604] 208 F. Supp. 3d 142 (D.D.C. 2016).
[605] *Id*. at 148.

standing prevent [the court] from reaching the merits of the important questions of statutory interpretation and administrative law" presented by the case.[606] 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."[607] 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.[608]

Similarly, in *Federal Forest Resource Coalition v. Vilsack*,[609] Judge Jackson held that a coalition of associations and industry groups lacked standing to challenge a United States Forest Service rule addressing management planning for national forests.[610] Jackson held that the plaintiffs failed to demonstrate the rule would actually cause a harmful reduction in timber harvest and land use, and thus failed to identify an injury in fact.[611]

By way of contrast, where there is record evidence of concrete harm, Judge Jackson does not hesitate to find Article III standing. In *Nucor Steel-Arkansas v. Pruitt*,[612] for example, Judge Jackson found that a steel manufacturing company in a *Clean Air Act*-related dispute did have standing to sue the Administrator of the Environmental Protection Agency (EPA) challenging issuance of a permit to its competitor, a neighboring steel manufacturing plant, authorizing construction and operation of a nearby facility.[613] Such authorization would have a domino effect elsewhere. Nucor's planned project would to be subject to more stringent emissions standards. Granting the permit would increase area-wide emissions in a way that would require Nucor to reduce their own emissions to comply with applicable statutory requirements.[614] Under agency guidelines, according to Jackson's review, "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."[615] Accordingly, Judge Jackson found that plaintiff suffered a a concrete, particularized, and imminent injury, and that the suit could proceed.[616]

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[606] *Id*. at 177.
[607] *Id*. at 165, 176.
[608] *Id*. at 169.
[609] 100 F. Supp. 3d 21 (D.D.C. 2015).
[610] *Id*. at 26.
[611] *Id*. at 38.
[612] 246 F. Supp. 3d 288 (D.D.C. 2017).
[613] *Id*.
[614] *Id*.
[615] Id. at 303.
[616] *Id*. at 303. *See also* Otay Mesa Prop., L.P. v. U.S. Dep't of the Interior, 144 F. Supp. 3d 35, 56-58 (D.D.C. 2015) (finding developer had standing to challenge rule including its property in the designation of critical habitat pursuant to the *Endangered Species Act*).

4. *Environmental Law: Scope of Agency Authority and Obligations*

Some of Judge Jackson's rulings in environmental cases relate to the prescribed scope of agency authority and obligations as prescribed by statute and regulation. By way of illustration, in *Center for Biological Diversity v. Zinke*,[617] Jackson dismissed a lawsuit seeking to compel the United States Department of the Interior to review its procedures for implementing the *National Environmental Policy Act* (NEPA).[618] NEPA requires agencies to assess the environmental impacts of proposed "major federal actions" before making decisions.[619] After the Deepwater Horizon oil spill, environmental groups sued to force the Interior Department to review its procedures statute implementation. Specifically, agency practice of issuing offshore oil and gas drilling permits without first conducting a site-specific NEPA review. Judge Jackson held that while the agency had an "ongoing obligation" to review its NEPA policies, the regulations governing that review did not require the agency to complete its review, broadcast the results, or actually revise its policies.[620] Jackson also found that an agency's obligation to review its NEPA policies did not constitute a "discrete" agency action that a federal court could supervise in performing its judicial-review function under the *Administrative Procedures Act* (APA).[621]

In another example, Judge Jackson denied a motion for a preliminary injunction in *Sierra Club v. United States Army Corps of Engineers*,[622] a case challenging whether the government had adequately assessed the environmental impacts of a domestic oil pipeline crossing mostly privately-owned land.[623] While her decision examined the factors used to assess whether a preliminary injunction is warranted, Jackson focused on the likelihood of success on the merits. She concluded that the plaintiffs failed to show that either the *National Environmental Policy Act* (NEPA) or the *Clean Water Act* required further environmental review of the project.[624] "While the Court is aware of the potential negative environmental consequences that can accrue from the construction and operation of a large oil pipeline, it is also hesitant to weigh these possibilities too heavily without more evidence linking them to this particular pipeline project."[625]

In a later decision in the same case, *Sierra Club v. United States Army Corps of Engineers*,[626] Jackson found 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 domestic oil pipeline that traversed mostly privately-owned land. Jackson's ruling favored the government finding no federal agency obligation to review the project's environmental impact, in part, because there had been no triggering "major federal action."[627] NEPA mandates that certain agencies evaluate the environmental consequences of any "major Federal action [ ] significantly

[617] 260 F. Supp. 3d 11 (D.D.C. 2017).
[618] *Id*. at 16.
[619] 42 U.S.C. § 4332(2)(C).
[620] *Ctr. for Biological Diversity*, 260 F. Supp. 3d at 22–27.
[621] *Id*. at 16.
[622] 990 F. Supp. 2d 9 (D.D.C. 2013).
[623] *Id*. at 13.
[624] *Id*. at 25-38.
[625] *Id*. at 43.
[626] 64 F. Supp. 3d 128 (D.D.C. 2014), *aff'd*, 803 F.3d 31 (D.C. Cir. 2015).
[627] *Id*. at 144-50.

affecting the quality of the human environment."[628] NEPA regulations define "major Federal actions" as "projects and programs entirely or partly financed, assisted, conducted, regulated, or approved by federal agencies."[629] Because the pipeline would operate over roughly 27 miles of federal land and waterways, the private company constructing the pipeline sought, and secured, approvals from several federal agencies with jurisdiction over those particular areas. Judge Jackson described NEPA "as an appropriate means of informing agency officials about the environmental consequences of major actions that the federal government is poised to take" and, in light of the text of the governing statute and regulations, the record evidence, and controlling precedent, Jackson found that the plaintiffs "mistakenly view[ed] 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."[630] Jackson 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."[631]

Judge Jackson's analysis in cases considering the validity of agency action often involved a close reading of statutory and regulatory text. For example, Jackson issued two decisions in *Otay Mesa Property, L.P. v. United States Department of the Interior* reviewing a Fish and Wildlife Service (FWS) rule designating part of a developer's property as a critical habitat essential to the conservation of the endangered Riverside Fairy shrimp species under the Endangered Species Act (ESA).[632] First, in 2015, Judge Jackson upheld FWS's economic analysis and its decision not to conduct an analysis of the challenged designation under the *National Environmental Policy Act* (NEPA),[633] but she also recognized that additional fact-finding was needed to discover whether all of the land FWS identified as watershed was properly designated.[634] In a subsequent decision in 2018, the question of whether or not the FWS employed an appropriate methodology to reach the critical habitat determination at issue turns on the meaning of the term "occupied" as it appears in the ESA, and also turns on the distinction that statute makes between the standards for designating occupied and unoccupied critical habitats. Judge Jackson found that the FWS's critical habitat designation, which included both a pool occupied by the shrimp and upland watershed areas for the pool, was improper.[635] Concluding that FWS unreasonably determined that "occupied" critical habitat included areas where the shrimp were not located, Jackson wrote that "[t]here is nothing about the ESA's use of 'occupied,' or the plain meaning of that term, or, quite frankly, common sense, that permits this result."[636] Jackson further concluded that FWS failed to make the statutorily required findings necessary for designating the land as "unoccupied" critical habitat.[637]

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[628] 42 U.S.C. § 4332(C).
[629] 40 C.F.R. § 1508.18(a).
[630] *Sierra Club*, 64 F. Supp. 3d at 157.
[631] *Id*. at 140.
[632] 16 U.S.C. §§ 1531-1544.
[633] 42 U.S.C. §§ 4321-4347.
[634] *Otay Mesa Prop., L.P. v. U.S. Dep't of the Interior*, 144 F. Supp. 3d 35, 55-56 (D.D.C. 2015).
[635] *Otay Mesa Prop., L.P. v. U.S. Dep't of the Interior*, 344 F. Supp. 3d 355, 359 (D.D.C. 2018).
[636] *Id*. at 370.
[637] *Id*. at 374-78. As another example, Judge Jackson granted summary judgment in favor of the government in a challenge to the National Oceanic and Atmospheric Administration's assessment of a $127,000 civil penalty for violating the *Marine Mammal Protection Act* (MMPA). *Pac. Ranger, LLC v. Pritzker*, 211 F. Supp. 3d 196, 201–02 (D.D.C. 2016). Jackson concluded that the plain text of a safe-harbor provision in the MMPA applied only to accidental or non-intentional takings (defined as harassing, hunting, capturing, or killing) of any marine mammal in

G. *First Amendment*

Judge Ketanji Brown Jackson resolved a few cases dealing with the First Amendment's Free Speech Clause but does not appear to have issued any opinions interpreting other provisions of the First Amendment.[638] In her confirmation hearing to the United States Court of Appeals for the District of Columbia Circuit, she expressed that "religious liberty . . . is a foundational tenet of our entire government," citing Supreme Court precedent interpreting the Constitution.[639]

Perhaps Judge Jackson's most notable First Amendment case is *American Meat Institute v. United States Department of Agriculture* (USDA)[640] in which she rejected a free speech challenge to a USDA rule requiring "country-of-origin labeling" for certain commodities.[641] In general, commercial disclosure requirements are subject either to (1) an intermediate level of constitutional review, or to (2) a more lenient standard known as *Zauderer* review.[642] The latter applies only to a subset of commercial disclosure requirements and derives from a U.S. Supreme Court case that upheld an advertising regulation compelling only "factual and uncontroversial information about the terms under which . . . services [were] available."[643] Judge Jackson had to (1) decide which of these two standards governed review of the USDA labeling requirement and (2) interpret ambiguous D.C. Circuit precedents further limiting *Zauderer* review only to disclosure requirements targeting deceptive or possibly deceptive speech.[644] In the end, Jackson settled upon the more lenient standard, choosing a broader application of *Zauderer*, and found the regulation at issue likely constitutional.[645] Judge Jackson declined to enjoin the USDA regulation that required country-of-origin labeling finding that the plaintiffs failed to demonstrate a likelihood of success on the merits of their claims that the USDA's labeling requirements violated their rights under the First Amendment, the Agricultural Marketing Act, and the Administrative Procedure Act, and that the plaintiffs also failed to establish irreparable harm. A unanimous panel of the D.C. Circuit affirmed Judge Jackson's district court decision in *American Meat Institute*,[646] after which the full court ordered rehearing *en banc*. The First Amendment ruling was later confirmed by the D.C. Circuit sitting *en banc* in an opinion holding *Zauderer* "reache[s] beyond problems of deception."[647]

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the course of commercial fishing operations, and did not apply when a commercial fisher knowingly set purse seine fishing gear on whales. *Id.* at 219.

[638] *Cf.* Tyson v. Brennan, 306 F. Supp. 3d 365, 366 (D.D.C. 2017) (denying motion to dismiss a religious discrimination claim brought under Title VII of the Civil Rights Act of 1964).

[639] *D.C. Circuit Confirmation Hearing*, *supra* note 89.

[640] 968 F. Supp. 2d 38 (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); *see generally*, *American Meat Institute v. USDA: D.C. Circuit Applies Less Stringent Test to Compelled Disclosures*, 128 HARV. L. REV. 1526 (Mar. 10, 2015).

[641] *Id*. at 42 (D.D.C. 2013).

[642] Zauderer v. Off. of Disciplinary Couns., 471 U.S. 626 (1985); *see generally*, Valerie C. Brannon, *Assessing Commercial Disclosure Requirements under the First Amendment*, CONG. RES. SERV. (Apr. 23, 2019).

[643] *Id*. at 651.

[644] *Am. Meat Inst*., 968 F. Supp. 2d at 49.

[645] *Id*. at 50.

[646] Am. Meat Inst. v. U.S. Dep't of Agric., 746 F.3d 1065, 1068 (D.C. Cir. 2014).

[647] Am. Meat Inst. v. U.S. Dep't of Agric., 760 F.3d 18, 20 (D.C. Cir. 2014) (en banc).

The *American Meat Institute* ruling appears consistent with the views of the Justice Ketanji Brown Jackson replaced. Associate Justice Stephen G. Breyer has expressed concern about subjecting "ordinary" disclosure requirements to heightened scrutiny, cautioning against an approach that would "create serious problems" by "threaten[ing] considerable litigation over the constitutional validity of much, perhaps most, government regulation."[648]

One can characterize other First Amendment claims Judge Jackson has resolved by more straightforward applications of existing precedent. In *Brown v. Government of the District of Columbia*,[649] for example, Jackson relied on Supreme Court opinions and other federal court rulings to hold that a panhandling ordinance might be an unconstitutional content-based regulation of speech.[650]

In another case, *Patterson v. United States*,[651] Judge Jackson held that a person arrested for using profanity in a public park sufficiently pled a violation of his constitutional rights because an arrest for speech that did not "implicate a substantial likelihood of violence, provocation, or disruption" violated the First Amendment.[652]

Last, but not least, one issue attracting increased attention is First Amendment limitations on defamation liability.[653] Broadly, while the First Amendment allows liability for defamatory statements, the Constitution sets a higher standard for public officials attempting to prove that a statement about their official conduct was defamatory.[654] According to the U.S. Supreme Court, this higher standard is necessary to safeguard "debate on public issues" and the right to criticize government action.[655] The Court subsequently extended this heightened standard from government officials to all "public figures."[656] Two sitting Supreme Court Justices — Associate Justice Neil M. Gorsuch and Clarence Thomas — have criticized this public-figure doctrine, suggesting it is inconsistent with original understandings of the First Amendment.[657]

Judge Jackson applied this heightened standard in *Zimmerman v. Al Jazeera America*[658] involving two Major League Baseball players who claimed that a documentary on "doping" in professional sports featured false and defamatory statements about their alleged use of performance-enhancing

[648] Nat'l Inst. of Fam. & Life Advocs. v. Becerra, 138 S. Ct. 2361, 2380 (2018) (Breyer, J., dissenting).
[649] 390 F. Supp. 3d 114 (D.D.C. 2019) (denying motion to dismiss).
[650] *Id*. at 117.
[651] 999 F. Supp. 2d 300 (D.D.C. 2013) (denying motion to dismiss civil constitutional claims on the basis of qualified immunity).
[652] *Id*. at 313.
[653] *See, e.g.*, James Freeman, *Sarah Palin, the New York Times and the Oops Defense*, WALL ST. J. (Feb. 9, 2022); Genevieve Lakier, *Is the Legal Standard for Libel Outdated? Sarah Palin Could Help Answer*, WASH. POST (Feb. 11, 2022).
[654] N.Y. Times Co. v. Sullivan, 376 U.S. 254 (1964) (requiring that public officials must show that an allegedly defamatory statement "was made with 'actual malice' — that is, with knowledge that it was false or with reckless disregard of whether it was false or not").
[655] *Id*. at 270, 279–80.
[656] *See* Gertz v. Robert Welch, 418 U.S. 323, 335 (1974).
[657] *See* Berisha v. Lawson, 141 S. Ct. 2424, 2425 (2021) (Thomas, J., dissenting from denial of certiorari); *id*. at 2429-30 (Gorsuch, J., dissenting from denial of certiorari). *Cf.* Elena Kagan, *A Libel Story: Sullivan Then and Now*, 18 L. & SOC. INQUIRY 197, 205 (1993) (asking whether "the Court . . . has extended the Sullivan principle too far").
[658] 246 F. Supp. 3d 257 (D.D.C. 2017).

drugs.[659] There was no disputing the players were public figures who had to meet the heightened standard for defamation.[660] Judge Jackson allowed the players' defamation claim against the film's producers to proceed, concluding the players met the heightened pleading standard.[661] She dismissed other claims, including a claim against the producers for a news article and claims against the film's narrator.[662] These dismissals did not rely on the heightened standards for public figures; instead, Jackson, calling balls and strikes, determined the claims did not satisfy the requirements for an ordinary defamation claim.[663] Jackson's opinion applied binding precedent without raising questions about its validity, as is common for district court judges, particularly if the parties do not challenge the governing standard.[664]

H. *Immigration and Asylum*

There are few Judge Ketanji Brown Jackson opinions addressing immigration law topics. This relative dearth of material is perhaps not surprising, given how Congress has structured judicial review of immigration matters. Federal district courts do not review orders of removal entered in particular immigration proceedings; such review occurs, instead, in the court of appeals for the judicial circuit in which the immigration judge completed proceedings.[665] For nearly all of her judicial tenure, Jackson served as a federal district court judge, a capacity in which she was not likely to consider individual immigration matters. Certain general, facial attacks to processes used by agencies involved in the administration of immigration laws are not channeled to the courts of appeals, however, and may be raised in district court.

A trio of opinions by Judge Jackson consider challenges to implementation of United States Department of Homeland Security's (DHS) expedited removal authority.[666]

> 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.[667]

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[659] *Id*. at 63. The complaint also alleged false light invasion of privacy claims, which were subject to similar First Amendment considerations. *Id.* at 274.
[660] *Id*. at 263.
[661] *Id*. at 283.
[662] *Id*. at 264.
[663] *See id*. at 275–76.
[664] Quoting D.C. Circuit precedent, Jackson did note that "the 'standard of actual malice is a daunting one,' as it should be because defamation claims necessarily implicate a defendant's ***First Amendment rights***." *Id.* at 284 (emphasis added) (quoting *Jankovic v. Int'l Crisis Grp*., 822 F.3d 576, 590 (D.C. Cir. 2016)).
[665] 8 U.S.C. § 1252(b)(2); *see also id.* § 1252(b)(9) (relating that "[j]udicial review of all questions of law and fact . . . arising from any action taken or proceeding brought to remove an alien from the United States . . . shall be available only in judicial review of a final order under this section.").
[666] *See* 8 U.S.C. § 1252(e)(3) (permitting judicial review in the District of D.C. of determinations under expedited removal authority "and its implementation," but limited to whether, among other things, various agency actions to implement the expedited removal authority are "in violation of law").
[667] *Report on the Nomination of Judge Ketanji Brown Jackson as an Associate Justice of the Supreme Court of the United States*, LAWYERS' COMM. FOR CIVIL RIGHTS UNDER LAW 1, 21 (Mar. 15, 2022) [hereinafter *Lawyers' Comm.*].

In two of three cases, Jackson's rulings favored the challenges to the agency's authority brought by non-U.S. nationals or associations suing on their behalf. This sample size is too small to support firm predictions about how Jackson might approach immigration law matters more generally, but the cases nonetheless bear on an area of law of perennial interest to Congress and the general public.

A person who is subject to a removal proceeding receives notice of the proceedings[668] and a hearing before an immigration judge, during which the person may be represented by counsel and is permitted to challenge the government's basis for removal.[669] A person designated by DHS as subject to expedited proceedings, by contrast, may be ordered removed "without further hearing or review" if an immigration officer determines the person "is inadmissible because [she] does not have a valid entry document or other suitable travel document, or because [she] has obtained a visa through misrepresentation."[670]

Prior to 2019, DHS designated as subject to expedited removal only a subset of the statutory category of persons potentially removable under expedited procedures — generally those arriving at a port of entry or apprehended near the border shortly after surreptitiously entering the United States.[671] In 2019, DHS expanded its designations to include all persons in the statutory category, to include generally all non-U.S. nationals who had been present in the country for less than two years and either did not obtain valid entry documents or procured their admission through fraud or misrepresentation.[672]

1. *Immigration and Asylum: Picking a Policy Out of a Hat*

Perhaps most significantly, in *Make the Road New York v. McAleenan*,[673] Judge Jackson issued a nationwide preliminary injunction enjoining the United States 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.[674] "This case, perhaps more than any other, characterizes [Justice Ketanji Brown] Jackson's approach to judging and the fine distinctions that inform her analyses."[675] A careful reading of the decision reveals how Jackson navigates the complex issues of immigration and administrative procedure laws. Jackson's opinion in this case also traverses the scope of judicial power.

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[668] 8 U.S.C. § 1229(a).
[669] *Id*. § 1229a(a), (b)(4).
[670] Make the Rd. N.Y. v. Wolf, 962 F.3d 612, 619 (D.C. Cir. 2020) (internal quotation marks omitted).
[671] *See, e.g., Designating Aliens for Expedited Removal*, 69 Fed. Reg. 48,877, 48,878 (Aug. 11, 2004) (designating, for expedited removal purposes, an alien who is inadmissible and who, not being admitted or paroled, is encountered by an immigration officer within 100 miles of the U.S. international land border who fails to satisfy an immigration officer that he or she has been physically present in the United States continuously for 14 days prior to the encounter).
[672] *Designating Aliens for Expedited Removal*, 84 Fed. Reg. 35,409, 35,409 (July 23, 2019).
[673] Make the Rd. New York v. McAleenan, 405 F. Supp. 3d 1 (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).
[674] *Id*. at 44.
[675] *Lempert*, *supra* note 96.

Judge Jackson carefully reviewed the claims asserted by the plaintiffs and meticulously examined each of the federal government's arguments. She parsed the language of the relevant statutes even consulting *Black's Law Dictionary* — the most widely used law dictionary in the United States, the most widely cited law book in the world, and for more than a century, the gold standard for the language of law — for the precise definition of a term. She painstakingly investigated relevant precedent, explaining why certain precedent was not on point and clarifying why other precedent demanded respect. She made fine distinctions rooted in law and precedent. Although she found for the plaintiffs, Judge Jackson laid out her reasoning rejecting many of their arguments, intimating she did not believe that the *Immigration and Naturalization Act* (INA) provided any basis for jurisdiction and barely nodded at their constitutional objections.

Judge Jackson's thoughtful opinion in *Make the Road* shares much, including its length, with many of her other judicial opinions. One is struck by the intelligence, care, and clarity she employs when exploring the complex issues of jurisdiction and procedure, matters that are uncommonly common in cases that reach the federal courts for the District of Columbia. Her important opinions are helpfully lengthy since she lays out in greater detail than most judges the logic and reasoning underpinning her legal conclusions. She confronts and resolves virtually every issue raised by claimants as well as defendants, giving their arguments her earnest attention.

Make the Road concerned a change in administrative rules identifying which undocumented immigrants could be subject to expedited, or fast-track, removal under the INA. When enacted, Congress intended to give the Executive (originally the Attorney General; later the Secretary of the United States Department of Homeland Security (DHS)) almost unreviewable discretion over the law's implementation, so long as its statutory limitations are honored. It provided, with one exception, that no court has jurisdiction to review the procedures and policies adopted to implement the legislation. Judicial review is allowed only if a party asserts that adopted regulations are (1) unconstitutional, (2) inconsistent with the overall statute, or (3) otherwise in violation of the law. Soon after the revised rules were published, three immigrant-rights organizations sued DHS seeking a preliminary injunction challenging the agency's decision to expand the categories of non-citizens subject to expedited removal procedures.

Expedited removal eliminates procedural protections and appeal rights that undocumented immigrants experience in regular removal hearings. In a typical expedited case, deportation occurs less than two weeks after apprehension. Although the INA allows DHS to provide for the expedited removal of any undocumented immigrant who has been in America for less than two years, until 2019, when the rules implementing the Act were amended, most immigrants could not be subject to expedited removal unless they were apprehended within 14 days of their entry at a place that was no more than 100 miles from the nearest land border. Expedited removal from our country was thus reserved for non-stakeholders. The revised rules allow the government to use expedited proceedings regardless of where an undocumented immigrant is apprehended, provided the immigrant has not lived continuously in the United States for more than two years.[676]

The plaintiffs in *Make the Road* had serious hurdles to overcome after successfully demonstrating they had standing to represent immigrant interests. The INA is clear; so long as the DHS Secretary

[676] *Id*. (footnotes omitted).

acts within statutory limits and does not violate the constitution or existing law, no court has jurisdiction to hear challenges to the Secretary's judgment. As a result, Judge Jackson assumed that her jurisdiction did not extend to reviewing the substance of the rules enacted. However, Jackson's analysis found that existing law, namely the *Administrative Procedure Act* (APA), applied to DHS rulemaking, and that the agency had failed to comply with the APA's strictures when enacting the amended rules.

Although Judge Jackson's decision blocked then President Donald J. Trump's actions, it was relatively narrow in scope. She did not find that the President lacked the authority to expand fast-track deportations but, rather, only that the administration had violated procedural requirements by failing to seek public comment for its immigration policy and that it must provide a more detailed explanation for the change before it could take effect. Jackson did not read the INA as withdrawing jurisdiction when it was the method of rulemaking that was challenged.

The government strenuously argued that the APA does not govern actions "committed to agency discretion by law." Judge Jackson agreed that the APA could not be used to question what the enacted rules provided, but concluded the methods employed to enact the rules could be questioned as the INA did not say that they were committed to agency discretion. With this understanding, she found the rules invalid because in enacting them DHS failed to follow APA-mandated notice-and-comment procedures. 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."[677] Judge Jackson is candid about her views: "[A]n administrative agency that just plows ahead and announces a new rule, without taking the reasonably foreseeable potential negative impacts of the policy determination into account (as DHS appears to have done) might as well have ***picked its policy out of a hat***."[678] These views may have affected Jackson's reading of what Congress intended, but, most notably, it is her reading of Congressional intent that best explains her decision to preliminarily enjoin the agency from enforcing its expedited removal expansion.[679] Jackson found that the:[680]

- *Illegal Immigration Reform and Immigrant Responsibility Act* (IIRIRA) of 1996 likely did not preclude the Court from exercising jurisdiction over the plaintiffs' APA claims;

- APA likely provided a cause of action for the plaintiffs' claims concerning the procedural defectiveness of DHS's expansion decision; and

[677] 405 F. Supp. 3d at 44.
[678] *Lempert*, *supra* note 96 (emphasis added).
[679] 405 F. Supp. 3d 1, 59 (D.D.C. 2019), *rev'd and remanded sub nom*. Make the Rd. N.Y. v. Wolf, 962 F.3d 612 (D.C. Cir. 2020). The D.C. Circuit reversed Jackson's entry of a preliminary injunction in favor of plaintiffs, concluding, in part, that DHS's 2019 designation was not subject to review under the APA. *See Make the Rd. N.Y.*, 962 F.3d at 635.
[680] *Id.* at 56.

- plaintiff immigrant rights associations would likely prevail on, among other arguments, their claim that DHS's designation was arbitrary and capricious, because in arriving at its designation DHS considered "only the perceived shiny bright spots" of an expanded designation.

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.[681] "Ordinarily, in the wake of an unfavorable judgment from a federal court regarding procedural claims brought under the APA, agency actors willingly refrain from imposing on anyone the rule that a federal court has found to be unlawful."[682] The government's request to continue to enforce the policy against non-parties, she reasoned, was

> a terrible proposal that is patently inconsistent with the dictates of the law. Additionally, it reeks of bad faith, demonstrates contempt for the authority that the Constitution's Framers have vested in the judicial branch, and, ultimately, deprives successful plaintiffs of the full measure of the remedy to which they are entitled.[683]

DHS made no attempt to "forecast the storm clouds" the new designation might spawn.[684] Judge Jackson wrote that "an agency cannot possibly conduct reasoned, non-arbitrary decision making concerning policies that might impact real people and not take such *real-life circumstances* into account."[685] These unexamined circumstances included alleged flaws with the existing expedited removal process,[686] the "real-world consequences" of the designation for those potentially subject to the proceedings,[687] and the prospect that removal would "cause trauma" to both persons removed — "who may have been living and working in the United States for a significant period of time" — and to their "households, neighborhoods, communities, workplaces, cities, counties, and States."[688]

In *Make the Road*, Jackson ruled on a motion for a preliminary injunction. She did not render a final decision, and, ostensibly, might have ruled differently after hearing all the evidence or ruminating further on the competing arguments. But a change of mind would have been unlikely. Her decision to grant the preliminary injunction can be explained by her belief that the United States would suffer no great harm if the legality of the rules were upheld but their implementation delayed, while immigrants affected by the rule would suffer irreparable harm if invalid rules were implemented.

Notably, the decision reversing her ruling mostly approved of Jackson's analysis. A divided panel of the D.C. Circuit agreed that the lower court properly exercised jurisdiction over the plaintiffs'

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[681] *Id*. at 66.
[682] *Id*.
[683] *Id*.
[684] *Id*.
[685] *Id*. at 55 (emphasis added).
[686] *Id*. at 53.
[687] *Id*. at 56-57 (listing burdens DHS's expanded designations would impose on noncitizens as including having to "avoid immigration officials entirely" and "carry around documents establishing one's continuous presence or lawful status at all times in perpetuity").
[688] *Id*. at 58-59.

claims, [689] but reversed the injunction, finding that plaintiffs had no cause of action under the APA because Congress committed the judgment of whether to expand expedited removal to the Secretary's "sole and unreviewable discretion."[690] Judge Jackson was reversed on the grounds that the expedited removal designation is committed to agency discretion by law, and thus not reviewable for arbitrary and capricious decision making under the APA or subject to the APA's notice-and-comment rulemaking requirements.[691] The APA's notice and comment process had no work to do, thus applying it would be a meaningless formality. 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. Although the D.C. Circuit reversed Judge Jackson's decision, ruling that the DHS was allowed to make these changes to immigration policy without judicial oversight, nowhere did the panel suggest that Jackson overreached or was result oriented.

Judge Jackson's opinion also includes an argument about the scope of judicial power. Jackson blocked the policy nationwide (as opposed to applying it only to the groups that sued). Conservative legal advocates have criticized[692] judges who enter nationwide injunctions, but Jackson wrote (and the D.C. Circuit agreed) that judges are not limited in the reach of their decisions, as long as they first find that an agency's actions were improper.

Personal beliefs need not drive outcomes, even if they affect how a judge views the facts of a case or the legal interpretations she favors. It is conceivable that in *Make the Road,* Judge Jackson's reading of how the APA and the INA intermingled was influenced by her desire to safeguard immigrants from expedited deportation or motivated by a hostility toward President Donald J. Trump and his policies, but nothing about her opinion supports assumptions by critics that only a

[689] Make the Rd. New York v. Wolf, 962 F.3d 612 (D.C. Cir. 2020).
[690] *Id*. at 619.
[691] *Id*. at 612.
[692] Press Release, *Attorney General [Jeff] Sessions Releases Memorandum on Litigation Guidelines for Nationwide Injunctions Cases,* U.S. Dep't of Justice (Sept. 13, 2018).

> Issu[ing] litigation guidelines to aid Department of Justice attorneys involved in litigation challenging a federal government program, regulation, order, or law. The litigation guidelines will arm Department litigators handling these cases to present strong and consistent arguments in court ***against the issuance of nationwide injunctions*** and to reaffirm the existing constitutional and practical limitations on the authority of judges. The Department ***opposes the issuance of nationwide injunctions***, consistent with the longstanding position of the Executive Branch under previous Administrations from both parties.
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> …
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> Increasingly, we are seeing individual federal district judges go beyond the parties before the court to give injunctions or orders that block the entire federal government from enforcing a law or policy throughout the country. This kind of judicial activism did not happen a single time in our first 175 years as a nation, but it has become common in recent years. It has happened to the Trump administration 25 times in less than two years. This trend must stop. We have a government to run. The Constitution does not grant to a single district judge the power to veto executive branch actions with respect to parties not before the court. Nor does it provide the judiciary with authority to conduct oversight of or review the policy of the executive branch. These abuses of judicial power are contrary to law, and with these new guidelines, this Department is going to continue to fight them.

Id. (emphasis added). *See Nationwide Injunction Memo,* U.S. DEP'T JUSTICE (Sept. 13, 2018).

"liberal bias" justifies her ruling. Such an interpretation overlooks how close the case was. Not only did two of the three appellate court judges concur with Judge Jackson's understanding of relevant law and precedent, but also their reason for reversal was novel. If personal values influenced Jackson's legal analysis, a likely candidate is her belief that people should not be harmed by arbitrary administrative rulemaking, as captured by the phrase about picking "policy out of a hat." Jackson's decision favored neither party nor President.

2. *Asylum Claims and Credible-Fear Interviews*

In a second case, *Kiakombua v. Wolf*,[693] Judge Jackson considered the United States Department of Homeland Security's (DHS) processing of asylum claims from persons subjected to expedited removal.[694] If a non-citizen facing expedited removal expresses an intent to apply for asylum or a fear of persecution, the person is referred to an asylum officer for a credible-fear interview designed to screen for potentially meritorious asylum claims.[695] In *Kiakombua*, the plaintiffs challenged a United States Citizenship and Immigration Services 2019 training manual "*Lesson Plan on Credible Fear of Persecution or Torture*" that instructs screening officers on how to conduct so-called "credible-fear" interviews. Assessing the challenged manual under *Chevron*, Judge Jackson found that some measures — for example, 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."[696] Judge Jackson found this required that asylum-seekers satisfy an unreasonable standard for establishing the "credible fear" necessary to verify eligibility for asylum. Agreeing with the plaintiffs, Jackson explained that the manual's flaws included importing into the credible-fear interview requirements that properly applied only in the second step of the asylum process, a "full hearing before an immigration judge."[697] The appropriate remedy was a contested issue. The government argued unsuccessfully that the only available recourse was the issuance of a declaratory judgment. Judge Jackson was not persuaded and invoked 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."[698]

3. *Consulting with Counsel Prior to "Credible-Fear" Interview*

In a third case, *Las Americas Immigrant Advocacy Center v. Wolf*,[699] issued shortly after *Kiakombua*, Judge Jackson upheld the DHS's policy of placing asylum-seekers subject to

[693] 498 F. Supp. 3d 1 (D.D.C. 2020), *appeal dismissed sub nom*. Kiakombua v. Mayorkas, No. 20-5372, 2021 WL 3716392 (D.C. Cir. July 19, 2021).
[694] *Id*. at 41-49.
[695] 8 U.S.C. § 1225(b)(1)(A)(ii).
[696] *Kiakombua*, 498 F. Supp 3d at 38.
[697] *Id*. 40, 45 (stating that manual's directive requiring a noncitizen to establish "facts" that "satisfy every element" of an asylum claim during the initial credible-fear interview was "tantamount to making asylum applicants prove that they are a refugee during their credible fear interviews, even though Congress has made abundantly clear that a noncitizen need only carry that burden after she has shown a credible fear of persecution and has been placed in full removal proceedings" (internal quotation marks omitted)).
[698] *Id*. at 24, 50.
[699] 507 F. Supp. 3d 1 (D.D.C. 2020).

expedited removal proceedings in the custody of United States Customs and Border Protection (CBP) as opposed to the United States Immigration and Customs Enforcement (ICE).[700] Jackson dismissed the challenge to programs established in 2019 to speed up the processing of asylum claims in expedited proceedings.[701] Plaintiffs claimed that placing asylum-seekers in CBP rather than ICE custody significantly restricted their ability to consult with advocates, thus violating their statutory and regulatory right to consult with a person of their choosing prior to their credible-fear interview. Asylum-seekers in ICE custody have the benefit of in-person visitation areas and listing 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. Under the challenged programs, detained asylum seekers received one full calendar day to prepare for credible-fear interviews and were held in CPB facilities offering fewer opportunities for asylum seekers to consult with persons of their choosing about the asylum process[702] — including an attorney — versus ICE facilities where they were held before DHS instituted new programs.[703]

Judge Jackson, after resolving all justiciability issues in plaintiffs' favor, sided with the government on the merits, applying *Chevron* and *Auer* deference in her analysis. Though Jackson had "no doubt" that detainees facing these conditions "are severely limited in their ability to locate and communicate with counsel,"[704] she concluded the statute made the consultation right "subordinate" to Congress's goal of holding prompt removal proceedings and that the scope of the consultation right was determined by the facility holding the noncitizen.[705] Jackson decided that Congress had not plainly spoken to the question of where "noncitizens subject to expedited removal are to be detained," whether CBP or ICE facilities.[706] Given this silence, DHS could reasonably conclude that CBP facilities provided "legally sufficient" consultation opportunities prior to a "credible-fear" interview, particularly because Congress clearly intended that expedited removal processes would be "highly truncated and subject to fewer procedural guarantees than formal removal proceedings."[707] Largely because the contested policy applied only to asylum-seekers designated for expedited removal, Judge Jackson concluded it 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.[708] 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.

[700] *Id*.
[701] *Id*. at 40.
[702] *Id*. at 9.
[703] *Id*. at 12-14.
[704] *Id*. at 18.
[705] *Id*. at 25.
[706] Id. at 26.
[707] *Id*. at 29-30.
[708] *Id*.

I. *Labor Law*

Ketanji Brown Jackson has authored a number of decisions involving labor law, including her ***first*** decision as an appeals court judge.[709] As with her employment cases, her labor decisions frequently turn on matters of procedure. In particular, several decisions address whether the parties have attempted to resolve their dispute using agreed-upon mechanisms, such as arbitration, prior to filing suit.

1. *Labor Law: Jackson's First Decision as an Appeals Court Judge*

By statute, certain federal employers are required to engage in collective bargaining with their employees' representatives whenever there is a management-initiated change to the "conditions of employment affecting such employees."[710]. Congress has defined "conditions of employment" to include "personnel policies, practices, and matters . . . affecting working conditions," with certain enumerated exceptions.[711] And from the mid-1980s until the policy statement challenged in *American Federation of Government Employees, AFL-CIO v. Federal Labor Relation Authority* (FLRA),[712] the agency interpreted these statutory provisions to require collective bargaining over any workplace changes that have more than a *de minimis*[713] effect on such working conditions.

In 2020, the FLRA adopted a new threshold for when collective bargaining is required.[714] Under the new standard, the duty to bargain is triggered only if a workplace change has "a substantial impact on a condition of employment."[715] The petitioners, public-sector labor unions, challenged the FLRA's decision to alter the bargaining threshold; they maintained that the FLRA's new standard is both inconsistent with the governing statute and insufficiently explained, and is therefore arbitrary, capricious, and contrary to law.

The United States Court of Appeals for the District of Columbia (D.C. Circuit) ruled that the FLRA's decision to abandon its *de minimis* exception in favor of a substantial-impact threshold was not sufficiently reasoned, and thus arbitrary and capricious in violation of the *Administrative Procedure Act* (APA).[716] Therefore, Judge Jackson granted the unions' petitions for review and

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[709] Am. Fed'n of Gov't Emps., AFL-CIO v. FLRA, 25 F.4th 1 (D.C. Cir. 2022).
[710] Federal Service Labor-Management Relations Statute, 5 U.S.C. § 7103(a)(12); *see also i*d. §§ 7102(2), 7103(a)(14).
[711] *Id*. at § 7103(a)(14).
[712] Am. Fed'n of Gov't Emps., AFL-CIO v. FLRA, 25 F.4th 1 (D.C. Cir. 2022).
[713] The term *de minimis* "derive[s] from the Latin phrase *'De minimis non curat lex*,' which . . . mean[s] that the law does not care for, or take notice of, very small or trifling matters[.]" Dep't of Health & Human Servs. Soc. Sec. Admin, 24 F.L.R.A. at 407 & n.2 (quoting *De Minimis Non Curat Lex*, BLACK'S LAW DICTIONARY (5th ed. 1979))
[714] 71 FLRA No. 190 (Sept. 30, 2020).
[715] *U.S. Dep't of Educ*., 71 F.L.R.A. 968, 971 (Sept. 30, 2020).
[716] 5 U.S.C. § 706(2)(A). The *Administrative Procedures Act* (APA) is a federal statute that requires administrative agencies to satisfy procedural requirements (referred to as notice-and-comment rulemaking) in developing and issuing regulations. 5 U.S.C. § 553. Under the APA, an administrative agency must (subject to limited exceptions):

- Publish a general notice of proposed rulemaking in the *Federal Register*, the official journal of the federal government of the United States that contains government agency rules, proposed rules, and public notices.
- Allow interested parties to be involved in the rulemaking process by submitting written data, views, or arguments.

vacated the FLRA's policy decision[717] to abandon its *de minimis* standard and adopt the previously rejected substantial-impact threshold on federal agencies' duty to bargain over employment terms and conditions

According to Judge Jackson, the new policy statement failed to account for the FLRA's long history of requiring bargaining when the changes have more than a *de minimis* effect on working conditions, failed to adequately explain the purported flaws of the *de minimis* standard, and violated the APA because it was arbitrary and capricious. The D.C. Circuit noted that:

- Certain federal employers are required to engage in collective bargaining with their employees' representatives whenever there is a management-initiated change to the "conditions of employment affecting such employees"[718].

- "Conditions of employment" include "personnel policies, practices, and matters affecting working conditions" with certain exceptions.[719]. Since the mid-1980s, the FLRA has interpreted these statutory provisions to require collective bargaining over any workplace changes that have more than a de minimis effect on such working conditions.

- In September 2020, the FLRA adopted a new standard that the duty to bargain is triggered only if a workplace change has "a substantial impact on a condition of employment."[720]

The D.C. Circuit found that:

- The FLRA falls short on explaining the purported flaws of the de minimis standard.[721]

- The FLRA's condemnation of the *de minimis* standard fails to account for the FLRA's own past policy choices and the D.C. Circuit's decisions upholding them.[722]

2. *Labor Law: Arbitration*

Judge Jackson's decisions in these cases demonstrate a respect for prior agreements to resolve disputes outside of court. In *Marine Engineers' Beneficial Association v. American Maritime*

After considering the relevant matter presented, an agency must include in its regulations a concise general statement of the regulations' basis and purpose. Notice-and-comment rulemaking under the APA is intended to:

- Provide the public a chance to participate in the rulemaking process.
- Help an agency educate itself before promulgating regulations and procedures that have a substantial effect on the regulated community.

If an agency fails to follow the APA in rulemaking, the resulting regulations can be subject to legal challenge in the courts. *See* Glossary, *Administrative Procedures Act*, THOMSON REUTERS PRACTICAL LAW (2022).

[717] *Am. Fed'n of Gov't Emps.*, 25 F.4th at 2, 18.
[718] 5 U.S.C. § 7103(a)(12).
[719] 5 U.S.C. § 7103(a)(14).
[720] U.S. Dep't of Educ., 71 F.L.R.A. 968, 971 (2020).
[721] *Am. Fed'n of Gov't Emps.*, 25 F.4th at 6.
[722] *Id.* at 9.

Officers,[723] a squabble arising out of a collective bargaining relationship gone bad between two rival AFL-CIO affiliated labor unions who represent maritime industry employees stationed at ports throughout the United States and on oceangoing vessels, Judge Jackson granted summary judgment for the union defendant after determining that both unions were bound by an article in the AFL-CIO constitution requiring arbitration in conflicts between affiliates.[724]

Similarly, in *Unite Here Local 23 v. I.L. Creations of Maryland, Inc*.,[725] Judge Jackson rejected an employer's motion to vacate an award granted at arbitration.[726] She took the additional step of awarding the union attorneys' fees, determining that by requiring the union to obtain a court order to enforce the arbitration award, the employer's position "would completely undermine the purposes of arbitration."[727]

Judge Jackson's decision in *Marine Engineers' Beneficial Association v. Liberty Maritime Corporation* provides additional insight.[728] Both the plaintiff union and defendant employer filed cross-motions for summary judgment in claims arising from the parties' collective bargaining negotiations. The central question at issue was whether the parties were required to arbitrate their claims under the parties' collective bargaining agreement (CBA).[729] This question, in turn, depended on whether the CBA expired during the pendency of the parties' negotiations.[730] Rather than resolve this question, Jackson determined that questions of interpretation, including whether the CBA had expired, were themselves questions for arbitration, in accordance with the CBA's "broad" arbitration clause.[731]

A key takeaway: Ketanji Brown Jackson's decisions signal a reluctance to involve federal courts in matters that the parties have previously committed to resolve in arbitration.

3. *Collective Bargaining: The Federal Service Labor Management Relations Act*

The history of federal public employment in the United States evidences two competing visions of the relationship between the President and the individuals who are employed to work for the federal government within the Executive Branch.[732] The first of these visions emphasizes "broad deference to the executive in matters of public employment[,]" and is based on the belief that such deference "is essential both to efficient public administration and [to] the realization of the popular will."[733] Through the lens of this perspective, the President must have free reign to discharge federal employees, and to regulate labor relations between the government and its employees,

[723] 75 F. Supp. 3d 294 (D.D.C. 2014).
[724] *Id*. at 308.
[725] 148 F. Supp. 3d 12 (D.D.C. 2015).
[726] *Id*. at 20-21.
[727] *Id*. at 24.
[728] 70 F. Supp. 3d 327 (D.D.C. 2014), *aff'd*, 815 F.3d 834 (D.C. Cir. 2016).
[729] *Id*. at 338-39.
[730] *Id*. at 345.
[731] *Id*. Jackson acknowledged that her conclusions were in tension with those of an earlier district court decision in the same matter by a different judge, but she held this previous decision was not "law-of-the-case." *Id.* at 349–50
[732] *See The Civil Service and the Statutory Law of Public Employment*, 97 HARV. L. REV. 1619, 1619 (1984).
[733] *Id*.

because such authority is necessary to run a capable and efficient federal government.[734] This belief also maintains that such power is necessary to ensure that the President can promote the will of the people by installing federal bureaucrats who actually seek to achieve the political platform that undergirds the President's election.[735]

The second vision of public employment worries that unfettered "executive discretion" to hire and fire civil servants can damage "the integrity of public administration in general," especially if an unchecked administration arbitrarily discharges career employees who hold contrary political views or who seek to blow the whistle on abusive employment practices within the Executive Branch.[736] This second vision of public employment also often asserts that a public employee has acquired a "property interest of sorts in his office[,]"[737] and expresses concerns not only about the impact that an abrupt dismissal might have on the administration of the federal government as a whole, but also on that employee's future employment prospects.[738] Based on such concerns, the second vision of the civil service system "fosters the view that the public executive ought to be extensively constrained in employment decisions" regarding apolitical civil service employees.[739]

These two contrasting visions of the role of the President in managing the civil service have proven ascendant at different inflection points American history. "[I]nitially presidents had broad powers to fill the civil service with their [own] appointees[,]"[740] throughout the nineteenth century so newly inaugurated presidents regularly purged the ranks of the civil service.[741] The exercise of presidential power to manage the federal workforce in this way waned significantly in the mid-twentieth century, as Presidents John F. Kennedy and Richard M. Nixon expressly curtailed the purging practice by issuing executive orders that afforded significant procedural protections to civil servants.[742] The Kennedy and Nixon orders also authorized the creation of labor unions representing federal government employees, and expressly granted federal employees "limited collective bargaining rights[,]" thus "provid[ing] the initial authorization for federal experimentation with unionization."[743]

With the 1970s, the view that slothful federal employees enjoyed too much protection against discharge became increasingly popular, amidst mounting concern over government integrity in the wake of the Watergate scandal. It was against this backdrop that Congress enacted the *Civil Service Reform Act of 1978* (CSRA)[744] which was codified (as amended) in scattered sections of Title 5 of

[734] *See id.* at 1620.
[735] *See id.*
[736] *Id.*
[737] *Id.*
[738] *See id.* at 1621.
[739] *Id.* at 1619; *see also, e.g.*, Harrison v. Bowen, 815 F.2d 1505, 1518 (D.C. Cir. 1987) (discussing how certain statutes constrain executive discretion to remove employees).
[740] Jacob Marisam, *The President's Agency Selection Powers*, 65 ADMIN. L. REV. 821, 863 (2013).
[741] *See id.*; *see also* U.S. Civil Serv. Comm'r v. Nat'l Ass'n of Letter Carriers, 413 U.S. 548, 557–58, 93 S.Ct. 2880, 37 L.Ed.2d 796 (1973) (describing these practices).
[742] *See, e.g.*, Exec. Order No. 11,491, 34 Fed. Reg. 17605 (Oct. 29, 1969); Exec. Order No. 10,988, 27 Fed. Reg. 551 (Jan. 17, 1962).
[743] *See* Scott L. Novak, *Collective Bargaining*, 63 GEO. WASH. L. REV. 693, 695-96 (1995); *see also* Bureau of Alcohol, Tobacco & Firearms v. Fed. Labor Relations Auth., 464 U.S. 89, 91-92, 104 S.Ct. 439, 78 L.Ed.2d 195 (1983).
[744] Pub. L. No. 95-454, 92 Stat. 1111 (1978).

the United States Code. This legislation was expressly billed as an effort to memorialize the previous array of executive orders and rules regulating the relationships between the federal government and its civil service employees.[745] And the CSRA "comprehensively overhauled the civil service system,"[746] by replacing the "outdated patchwork of statutes and rules built up" during the previous hundred years through executive orders and federal statutes.[747]

Significantly for present purposes, Congress crafted the CSRA with the express goal of "balanc[ing] the legitimate interests of the various categories of federal employees with the needs of sound and efficient administration."[748] To that end, "[t]he CSRA protects covered federal employees against a broad range of personnel practices, and it supplies a variety of causes of action and remedies to employees when their rights under the statute are violated."[749] At the same time, the CSRA also streamlined the lengthy and laborious appeals processes that pre-dated the CSRA, making it easier for employers to take successful disciplinary or performance-based actions against federal employees.[750]

The Federal Service Labor Management Relations Act (FSLMRS), which addresses collective bargaining and labor unions exclusively, is Title VII of the CSRA, and is "the first statutory scheme governing labor relations between federal agencies and their employees."[751] This section discusses a case where federal employee unions challenged executive orders issued by then President Donald J. Trump regarding collective bargaining for federal employees under the FSLMRS.

In *American Federation of Government Employees, AFL-CIO v. Trump*,[752] another case where Judge Jackson was later reversed on a jurisdictional issue, her substantive judgments were mixed. She upheld some claims that the unions had brought against President Donald J. Trump directives that allegedly interfered with Congressionally authorized collective bargaining and rejected others.

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[745] *See The Civil Service and the Statutory Law of Public Employment*, 97 HARV. L. REV. at 1631-33.
[746] Lindahl v. Off. of Pers. Mgmt., 470 U.S. 768, 773, 105 S.Ct. 1620, 84 L.Ed.2d 674 (1985).
[747] United States v. Fausto, 484 U.S. 439, 444, 108 S.Ct. 668, 98 L.Ed.2d 830 (1988) (quoting S. Rep. No. 95-969, p.3 (1978), with "an elaborate new framework for evaluating adverse personnel actions against federal employees[.]" *id*. at 443, 108 S.Ct. 668 (internal quotation marks, citation, and alteration omitted).
[748] *Id*. at 445, 108 S.Ct. 668.
[749] Grosdidier v. Chairman, Broad. Bd. of Governors, 560 F.3d 495, 497 (D.C. Cir. 2009).
[750] *See Fausto*, 484 U.S. at 445, 108 S.Ct. 668.
[751] *Bureau of Alcohol, Tobacco & Firearms (BATF) v. Fed. Labor Relations Auth*., 464 U.S. at 91, 104 S.Ct. 439.
[752] 318 F. Supp. 3d 370 (D.D.C. 2018).

This case involved a challenge[753] to certain executive orders[754] relating to the administration of the federal civil service and the rights of federal employees under the *Federal Service Labor Management Relations Act* (FSLMRS)[755] to engage in collective bargaining, Judge Jackson rendered a decision somewhat less approving of alternate dispute procedures, albeit in the unique context of a substantial separation of powers issue.[756] In resolving the roles and powers of the three branches in this dispute, Judge Jackson held that Congress had not precluded federal court jurisdiction over the challenge to the executive orders.[757] As one of several factors leading to this conclusion, Judge Jackson observed that while past precedents and pertinent statutory language indicate that the President possesses some inherent authority to act in the field of federal labor-management relations,[758] the exercise of that authority may be constrained where Congress has legislated pursuant to its own enumerated powers.[759] 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.[760]

On review, the D.C. Circuit disagreed with Jackson's jurisdictional ruling, finding that the plaintiffs' claims instead had to follow a statutory administrative review process.[761] Though this decision may stand in contrast to Jackson's other decisions that look more favorably on

[753] The lead plaintiff unions are the

- American Federation of Government Employees, AFL-CIO (AFGE);
- National Treasury Employees Union (NTEU);
- National Federation of Federal Employees, FD1, IAMAW, AFL-CIO (NFFE); and
- American Federation of State, County and Municipal Employees, AFL-CIO (AFSCME).

Joining those Plaintiffs are the

- International Association of Machinists and Aerospace Workers, AFL-CIO;
- Seafarers International Union of North America, AFL-CIO;
- National Association of Government Employees, Inc.;
- International Brotherhood of Teamsters, the Federal Education Association, Inc.;
- Metal Trades Department, AFLCIO;
- International Federation of Professional and Technical Engineers, AFL-CIO & CLC;
- National Weather Service Employees Organization;
- Patent Office Professional Association;
- \National Labor Relations Board Union;
- National Labor Relations Board Professional Association;
- Marine Engineers' Beneficial Association, District No. 1 PCD, AFL-CIO; and
- American Federation of Teachers, AFL-CIO.

[754] These Executive Orders issued on May 25, 2018, by President Donald J. Trump, among other things, seek to regulate both the collective bargaining negotiations that federal agencies enter into with public-sector unions and the matters that these parties negotiate. The Orders place limits on the activities that federal employees may engage in when acting as labor representatives; guide agencies toward particular negotiating positions during the collective bargaining process and address the approaches agencies shall follow when disciplining or evaluating employees working within the civil service. *See* Exec. Order No. 13,836, 83 Fed. Reg. 25329 (May 25, 2018); Exec. Order No. 13,837, 83 Fed. Reg. 25335 (May 25, 2018); Exec. Order No. 13,839, 83 Fed. Reg. 25343 (May 25, 2018).

[755] 5 U.S.C. §§ 7101 - 7135.

[756] 318 F. Supp. 3d 370 (D.D.C. 2018).

[757] *Am. Fed. of Gov't Emps.*, 318 F. Supp. 3d at 380–81.

[758] *Id*. at 412.

[759] *Id*. at 417.

[760] *Id*. at 381.

[761] Am. Fed. of Gov't Emps., AFL-CIO v. Trump, 929 F.3d 748, 752 (D.C. Cir. 2019).

administrative review processes, this may be due to the unusual separation of powers concerns, which are not typically present in labor cases.

Fascinatingly, the judge who wrote the opinion reversing Judge Jackson's decision in this case was Thomas Griffith, the Bush-appointed judge, who introduced Ketanji Brown Jackson at her Supreme Court confirmation hearing, telling the assembled U.S. Senators "Judge Jackson is an independent jurist who adjudicates based on the facts and the law and not as a partisan."

J. Second Amendment

Firearms are "deeply ingrained in American society and the nation's political debates.[762] It is unclear whether rookie Justice Ketanji Brown Jackson's views on the Second Amendment[763] would align with those of Associate Justice she replaced, Stephen G. Breyer. The even-keeled, level-headed, sensible Jackson clerked for Breyer from 1999 to 2000. In written responses to questions from several United States senators in relation to her nomination to the United States Court of Appeals for the District of Columbia Circuit, Ketanji Brown Jackson stated that, as a federal judge, the Supreme Court's Second Amendment precedents were "binding" on her and she "would be required to apply them in any case" implicating "a restriction or limitation on a person's individual right to own a firearm."[764] Jackson's nomination records do not appear to reveal her personal views on the Second Amendment or the permissible scope of firearms regulation, however,[765] and it does not appear that she has authored judicial opinions addressing the Second Amendment's substance.

1. ***Background: Select Supreme Court Cases***

Some U.S. Supreme Court decisions in Second Amendment cases have been closely divided, with Justice Stephen G. Breyer authoring and joining dissents in 5-4 decisions in *District of Columbia v. Heller* (which recognized that the Second Amendment protects an individual right to keep and

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[762] Katherine Schaeffer, *Key Facts about Americans and Guns*, PEW RES. CTR. (May 11, 2021)

[763] U.S. Const. Amend. II. The Second Amendment provides in full: "A well-regulated Militia, being necessary to the security of a free state, the right of the people to keep and bear Arms, shall not be infringed." Such language has created considerable debate regarding the Amendment's intended scope. On the one hand, some believe that the phrase "the right of the people to keep and bear Arms" creates an individual constitutional right to possess firearms. Under this "**individual right theory**," the Constitution restricts legislative bodies from prohibiting firearm possession, or at the very least, the Amendment renders prohibitory and restrictive regulation presumptively unconstitutional. On the other hand, some scholars point to the prefatory language "a well-regulated Militia" to argue that the Framers intended only to restrict Congress from legislating away a state's right to self-defense. Scholars call this theory the "**collective rights theory**" which asserts that citizens do not have an individual right to possess guns and that local, state, and federal legislative bodies, therefore, possess the authority to regulate firearms without implicating a constitutional right.

[764] *Senate Judiciary Attachments*, *supra* note 84, at 434 (responding to questions from Sen. Ted Cruz (R.-Tex.)); *see also id*. at 475 (responding to a question from Sen. Thom Tillis: "As a sitting federal judge, I am bound to apply faithfully all binding precedents of the D.C. Circuit and the Supreme Court, including all precedents that pertain to the ***Second Amendment*** individual right to keep and bear arms.") (emphasis added).

[765] *See id*. at 427 (responding to a question from Sen. Tom Cotton (R.-Ark.): "I have not expressed any personal views of the scope and contours of the fundamental rights protected by the First and ***Second Amendment***s, and it would not be appropriate for me to do so under Canon 3 of the Code of Conduct for Judges, given that the Supreme Court and other courts are actively considering such issues as applied to various government regulations.") (emphasis added).

bear arms for certain purposes)[766] and *McDonald v. City of Chicago* (which recognized that the Second Amendment applies to state and local gun laws by way of the Fourteenth Amendment).[767]

Against this backdrop, on June 23, 2022, the Supreme Court issued its controversial opinion in *New York State Rifle & Pistol Association v. Bruen*,[768] a case challenging the constitutionality of a portion of New York's firearms licensing scheme that restricts the carrying of certain licensed firearms outside the home under the Second and Fourteenth Amendments. In a 6-3 decision authored by Justice Clarence Thomas, the Court struck down New York's requirement that an applicant for an unrestricted license to carry a handgun outside the home for self-defense must establish "proper cause," ruling that the requirement is at odds with the Second Amendment (as made applicable to the states through the Fourteenth Amendment). In doing so, the Court recognized that the Second Amendment protects a right that extends beyond the home and also clarified that the proper test for evaluating Second Amendment challenges to firearms laws is an approach rooted in text and the "historical tradition" of firearms regulation, rejecting a "two-step" methodology employed by many of the lower courts."

Justice Stephen G. Breyer authored a dissent,[769] joined by Justices Elena Kagan and Sonia Sotomayor. The dissent objected to deciding the case on the pleadings without an evidentiary record as to how New York's standard was actually being applied. More fundamentally, Justice Breyer disagreed[770] with the majority of the Court's "rigid history-only approach," which he argued unnecessarily disrupted consensus in federal circuit courts, misread *Heller*, and put the Second Amendment on a different footing than other constitutional rights. The dissent also viewed[771] the history-focused approach as "deeply impractical" because it imposed on judges without historical expertise — and courts without needed resources — the task of parsing history, raised numerous intractable questions about what history to consider and how to weigh it, and would "often fail to provide clear answers to difficult questions" while giving judges "ample tools to pick their friends out of history's crowd." The dissent viewed[772] the majority's historical analysis regarding public carry as an embodiment of these impracticalities, as the majority found reasons to discount the persuasive force of numerous historical regulations similar to New York's that, in Justice Breyer's view, appeared to meet the court's "analogical reasoning" test.

2. *Future Second Amendment Challenges*

It is likely that Justice Jackson will, during her lifetime tenure on the Supreme Court bench, review a Second Amendment challenge. Most immediately, it appears that the *Bruen* decision casts substantial constitutional doubt on other state public carry laws that, similar to New York, require

[766] 554 U.S. 570, 626-27 (2008); *id.* at 636 (Stevens, J., dissenting); *id.* at 681 (Breyer, J., dissenting).
[767] 561 U.S. 742, 912 (2010) (Breyer, J., dissenting).
[768] *N.Y. State Rifle & Pistol Ass'n v. Bruen* 597 U.S. ___ (2022). *See generally*, Michael A. Foster, *The Second Amendment at the Supreme Court: New York State Rifle & Pistol Ass'n v. Bruen*, CONG. RES. SERV. (June 29, 2022) ("provid[ing] an overview of Supreme Court and lower court Second Amendment precedent, describ[ing] the underlying litigation and issues in *Bruen*, summariz[ing] the Supreme Court's decision, and briefly discuss[ing] some possible implications of the decision").
[769] *Bruen*, 597 U.S. at 84 (Breyer, J., dissenting).
[770] *Id*. at 104.
[771] *Id*. at 108.
[772] *Id*. at 132.

a showing of cause or a special need to carry in public. According to the majority opinion, at least five states have discretionary public carry licensing regimes analogous to New York's "proper cause" standard. [773] In a footnote,[774] the majority opinion emphasized that its decision with respect to New York's regime did not suggest that licensing regimes in other states imposing objective requirements such as a background check or completion of a firearms safety course would be unconstitutional, though the majority would not rule out constitutional challenges to more narrow regimes if circumstances such as "lengthy wait times" or "exorbitant fees deny ordinary citizens their right to public carry."

Bruen also could have significant implications for other existing firearm laws and for the kinds of new laws Congress and state and local governments may consider enacting. Many firearm laws at the federal, state, and local levels have been upheld under[775] the "two-step" methodology, and decisions upholding firearm regulations that apply in public have sometimes relied on the proposition that firearm restrictions beyond the home do not strike at the "core" of the Second Amendment right. Following *Bruen*, a number of provisions previously upheld could be subject to renewed constitutional challenge, though the majority in *Bruen* did indicate that the approach it endorsed is "neither a regulatory [straitjacket] nor a regulatory blank check."[776]

Some states and localities, for instance, have restrictions or prohibitions on certain so-called "semiautomatic assault weapons," and multiple federal Courts of Appeals have upheld such laws using the two-step approach. The Supreme Court may ultimately take up this issue or a Second Amendment challenge to a state prohibition on "assault long guns."

The Supreme Court's express holdings that the Second Amendment applies outside the home and that the proper test under *Bruen* for analyzing the constitutionality of gun regulations is historical analogism that guide legislators in considering future gun legislation that may wind its way to the high tribunal and Justice Jackson. Would such regulation meet the *Bruen* standard? The majority opinion acknowledged, "[h]istorical analysis can be difficult" and can call for "nuanced judgments about which evidence to consult and how to interpret it."[777]

3. *Firearm Possession by Convicted Felons*

In *Baisden v. Barr*,[778] Judge Jackson presided over a lawsuit brought by a man convicted of federal tax evasion who sought relief from the federal prohibition on firearm possession by convicted felons.[779] The plaintiff cited a statutory exemption for certain "offenses relating to the regulation of business practices," and alleged that the federal prohibition violated his "***Second Amendment***

[773] *Id*. at 12.
[774] *Id* at 36, n. 9.
[775] *See generally, Michael A. Foster, Federal Firearms Law: Selected Developments in the Executive, Legislative, and Judicial Branches*, CONG. RES. SERV. (Nov. 3, 2021) (reviewing briefly relevant aspects of the current federal statutory regime governing firearms, before surveying the recent developments from the executive, legislative, and judicial branches and how those developments may affect existing federal firearms laws).
[776] *Bruen*, 597 U.S at 27.
[777] *Id*. at 22.
[778] No. 19-CV-3105, 2020 WL 6118181 (D.D.C. Oct. 16, 2020) (referring to 18 U.S.C. § 921(a)(20)(A)).
[779] *Id*. at *1.

right to keep and bear arms."[780] Jackson granted the government defendants' motion to dismiss the case based on the threshold, jurisdictional determination that the plaintiff's allegations were insufficient to establish standing to bring his claims.[781] Jackson wrote that "in the abstract, [the plaintiff's] inability to possess a firearm lawfully might qualify as a cognizable injury in fact" for standing purposes, but the plaintiff failed to allege "any specific facts concerning whether he ever owned a firearm or possessed a permit, ever used a firearm or intended to use one, or ever wished or desired to possess one in the future."[782]

K. *Separation of Powers*

"In a number of cases, Judge Ketanji Brown Jackson was called upon to consider a cornerstone of democracy: the proper role that each branch of government plays in ensuring a free and just society."[783] According to Jackson, "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."[784] Judge Jackson explained that "[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."[785] Her 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 and a forum to address their grievances if they meet established standing requirements.

As part of her prior confirmation proceedings, Ketanji Brown Jackson described the Constitution's separation and allocation of powers among the three branches of the federal government as playing an "essential role in our constitutional scheme."[786] Referring to Supreme Court case law and Founding-era writings, she characterized this division of power as having two purposes.[787] Jackson said that the Constitution's separation of national powers establishes a system of "checks and balances" to prevent the "autocracy" that would result from an overconcentration of power in any one branch.[788] She also noted that this separation of powers was intended to promote "a workable

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[780] *Id*. at *2 (quoting Compl. ¶ 1) (emphasis added).
[781] *Id*. at *1.
[782] *Id*. at *4. Jackson dismissed the plaintiff's complaint without prejudice. The plaintiff subsequently filed an amended complaint, which the defendants again moved to dismiss, but Jackson was appointed to the D.C. Circuit before she could rule on the sufficiency of the allegations in the amended complaint. *See* First Amended Complaint, *Baisden v. Barr*, No. 19-CV-3105 (D.D.C. Nov. 6, 2020); Motion to Dismiss for Lack of Jurisdiction, *Baisden v. Barr*, No. 19-CV-3105 (D.D.C. Dec. 2, 2020).
[783] *Lawyers' Comm. supra* note 666 at 17.
[784] Comm. on the Judiciary v. McGahn, 415 F. Supp. 3d 148, 214-15 (D.D.C. 2019), *vacated and remanded*, 951 F.3d 510 (D.C. Cir. 2020), *reh'g en bane 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*, 968 F.3d 755 (D.C. Cir. 2020), and *aff'd in part, remanded in part*, 968 F.3d 755 (D.C. Cir. 2020), and *rev'd and remanded*, 973 F.3d 121 (D.C. Cir. 2020), *reh'g en bane granted, opinion vacated* (Oct. 15, 2020).
[785] 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)
[786] *See Senate Judiciary Attachments, supra* note 84, at 450 (responding to questions from Sen. Mike Lee (R.-Utah)).
[787] *See id.*
[788] *Id.*; *see also id.* at 503 (responding to questions from Sen. Jeff Flake (R.-Ariz) characterizing the Constitution's separation of national powers as ensuring "that the functions of each branch are distinct and constrained and that no one branch can consolidate all power in itself").

government."[789] Since being confirmed to the federal bench, Jackson has considered separation of powers questions in a handful of cases, which offer examples of how she might approach such issues while on the bench.

1. *Separation of Powers: Interbranch Disputes*

One of Judge Ketanji Brown Jackson's most noteworthy cases involved the judiciary's role in adjudicating a dispute between the other two branches of government. Perhaps the most significant case that Jackson decided while serving on the district court is *Committee on the Judiciary v. McGahn* [790] because of its implications for Congress's ability to obtain information concerning executive branch activities. The case arose from a subpoena issued by the United States House of Representatives Committee on the Judiciary to former White House Counsel Donald F. McGahn, seeking the production of documents and testimony.[791] Then President Donald J. Trump instructed McGahn not to appear and testify before the Committee in connection with its investigation of foreign interference during the 2016 presidential election and Trump's possible obstruction of justice, because, as a former senior advisor, McGahn allegedly had absolute testimonial immunity.[792]

The Judiciary Committee filed suit asking Judge Jackson to declare that McGahn's refusal to testify was "without legal justification" and to compel his testimony.[793] 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."[794] The President's view that Congress and the federal courts were powerless to do anything was "exactly backwards," according to Jackson.[795] In an exhaustively reasoned opinion, Jackson concluded that McGahn did not have absolute testimonial immunity and would have to appear before the Judiciary Committee and either answer questions or invoke an applicable privilege.[796]

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

[789] *Id*. at 450 (responding to questions from Sen. Mike Lee (R.-Utah)) (quoting *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring)).
[790] *McGahn*, 415 F. Supp. 3d at 148.
[791] *Id*. at 157.
[792] *Id*. at 158 (asserting this alleged immunity as to McGahn's "official duties" (internal quotation marks omitted)).
[793] *Id.* at 162–63. The Judiciary Committee and the executive branch reached an agreement regarding McGahn's production of subpoenaed documents. *See id*. at 159–60.
[794] *Id*. at 214.
[795] *Id*. at 154.
[796] *Id*. at 154-55, 215 ("Notably, whether or not the law requires the recalcitrant official to release the testimonial information that the congressional committee requests is a separate question, and one that will depend in large part on whether the requested information is itself subject to withholding consistent with the law on the basis of a recognized privilege."); *see also* Todd Garvey, *Congressional Subpoenas of Presidential Advisers: The Impact of Committee on the Judiciary v. McGahn*, CONG. RES. SERV. (Dec. 3, 2019).

> 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.[797]

First, the executive branch contended that the district court lacked subject matter jurisdiction to consider the Judiciary Committee's subpoena enforcement action. In part, the executive branch argued that interbranch information disputes were of a type not "traditionally thought capable of resolution through the judicial process."[798] The Supreme Court has refused to "resolve disputes that are not justiciable" so as to maintain the Judiciary's proper place in the constitutional system — ensuring "the independence of the Judicial Branch by precluding debilitating entanglements between the Judiciary and the two political Branches" while also preventing the "Judiciary from encroaching into areas reserved for the other Branches."[799] The executive branch contended that this was such a dispute.

Judge Jackson rejected the executive branch's justiciability argument reasoning that a subpoena enforcement dispute was "not a political battle at all," but instead raised "garden variety legal questions" — such as the validity and enforceability of a subpoena and its recipient's "legal duty to respond" — "that the federal courts address routinely and are well-equipped to handle."[800] Jackson also concluded that under D.C. Circuit precedent, a dispute between the executive branch and Congress over a subpoena's enforceability was "a fully justiciable one."[801]

Although, as a historical matter, courts rarely resolved interbranch information disputes, Judge Jackson concluded this history did not demonstrate the federal courts' inability to resolve such disputes, but rather that the executive branch had "wisely picked its battles."[802] In other contexts, the federal courts had "adjudicated disputes" that impacted "the divergent interests of the other branches," and the U.S. Supreme Court had "never suggested that the Judiciary has the power to perform its constitutionally assigned function only when it speaks to private citizens."[803]

Jackson also concluded that adjudicating the Judiciary Committee's claim would be consistent with the Constitution's system of checks and balances.[804] The political branches could function better if the court resolved the particular legal dispute — McGahn's obligation, if any, to appear for testimony — that had them at loggerheads.[805]

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[797] *McGahn*, 415 F. Supp. 3d at 154-155.
[798] *Id*. at 176.
[799] Mistretta v. United States, 488 U.S. 361, 385 (1989).
[800] *McGahn*, 415 F. Supp. 3d at 177.
[801] *Id*. at 178-79 (discussing *United States v. Am. Tel. & Tel. Co*., 551 F.2d 384, 391 (D.C. Cir. 1976) (action brought by executive branch to enjoin telephone company's compliance with a congressional subpoena issued by a House subcommittee that intervened in the case to defend its subpoena)).
[802] *Id*. at 181.
[803] *Id*. at 184.
[804] *Id*.
[805] *Id*.; *see also id.* at 185 ("DOJ's artificial limit on the federal courts' jurisdiction to consider disputes between the branches seemingly decreases the incentive for the Legislature or the Executive branch to behave lawfully, rather than

Second, the executive branch argued that the Judiciary Committee lacked standing and a cause of action to enforce the subpoena because no statute expressly authorized the lawsuit and no such authorization could be implied in the Judiciary Committee's favor.[806] Citing separation of powers concerns, the executive branch asserted that a court should be particularly reluctant to "imply a cause of action" arising under the Constitution "for the benefit of one political Branch against the other."[807]

Jackson disagreed, writing that defiance of a valid subpoena was an injury in fact[808] and that "Article I of the Constitution is all the cause that a committee of Congress needs to seek a judicial declaration from the court regarding the validity and enforceability of a subpoena that it has allegedly issued in furtherance of its constitutional power of inquiry."[809] Jackson found no separation of powers impediment to this conclusion. Jackson wrote that there was no reason why "the Constitution should be construed to command" that a committee of Congress should have less of an opportunity to have its subpoenas enforced than a private litigant.[810] The possibility that Congress could exert other powers to win compliance with its subpoena (e.g., withholding appropriations) was likely impractical and, in any event, "irrelevant" to the cause-of-action question.[811] Reaching the merits, Jackson concluded that McGahn lacked absolute testimonial immunity.[812]

Predictably, the Trump administration appealed the *McGahn* decision, and the case bounced around the D.C. Circuit on jurisdictional grounds without reaching the merits.[813] On appellate review, over the course of two opinions, a divided three-judge panel of the D.C. Circuit disagreed with Jackson's rulings on standing and cause of action, but the entire D.C. Circuit sitting *en banc* granted review twice and vacated both panel reversals. The *en banc* D.C. Circuit affirmed Jackson's conclusion that the Judiciary Committee has standing to adjudicate its subpoena enforcement claims in federal court notwithstanding the dispute's inter-branch nature. Before the *en banc* court was able to hear the appeal related to whether there is a cause of action, the parties settled the case. McGahn eventually testified in a closed-door session before the Committee in June 2021, after the United States Department of Justice (now under the Biden-Harris administration) and the Committee reached an agreement for him to do so.

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bolsters it, by dramatically reducing the potential that a federal court will have occasion to declare conduct that violates the Constitution unlawful.").

[806] *See id.* at 193-94.

[807] Comb. Memo. of Points & Authorities in Supp. of Defs.' Mot. for Summ. J. & in Opp'n. to Pls.' Mot. for Summ. J., Comm. on Judiciary, at 40, U.S. House of Representatives v. McGahn, No. 1:19-cv-02379-FYP (D.D.C. filed Oct. 1, 2019).

[808] *McGahn*, 415 F. Supp. 3d at 188.

[809] *Id.* at 193. Jackson also concluded that if "Congress does somehow need a statute to authorize" its suit, the Declaratory Judgment Act "serves that purpose." *Id.* at 195 (citing Comm. on Judiciary, U.S. House of Representatives v. Miers, 558 F. Supp. 2d 53, 78–88 (D.D.C. 2008); Comm. on Oversight & Gov't Reform v. Holder, 979 F. Supp. 2d 1, 22 (D.D.C. 2013)).

[810] *See id.* at 196.

[811] *Id.* at 196-97 (stating that an "appropriations sanction" could not be implemented "swiftly enough").

[812] *Id*. at 199-214.

[813] *See* Todd Garvey, *Resolving Subpoena Disputes Between the Branches: Potential Impacts of Restricting the Judicial Role*, CONG. RES. SERV. (Mar. 25, 2020).

Throughout her opinion in *McGahn*, Judge Jackson reasoned that when a federal court is presented with a legal question — even one involving relations among the political branches — separation of powers principles generally do not stand as an impediment to the court resolving that dispute;[814] rather, the court's exercise of jurisdiction "advances" the system of checks and balances.[815]

"[T]he primary takeaway from the past 250 years of recorded American history is that ***Presidents are not king***," Jackson wrote.[816] "[H]owever busy or essential a presidential aide might be," and "whatever their proximity to sensitive domestic and national-security projects,"[817] White House employees, she continued, "work for the People of the United States," and "take an oath to protect and defend the Constitution of the United States;"[818] the President cannot block them from appearing to testify. While Jackson was clear that "absolute immunity from compelled congressional process simply does not exist"[819] for a president's top aides, she did qualify that the requirement that McGahn testifying did not mean he must answer all questions asked by Judiciary Committee — he could still refuse to answer questions by asserting executive privilege.[820] But he had to show up.

Throughout the *McGahn* opinion, Judge Jackson reasoned that when a federal court is presented with a legal question — even one concerning relations among the political branches — separation of powers principles generally do not stand as an impediment to the court resolving that dispute;[821] rather, the court's exercise of jurisdiction "advances" the system of checks and balances.[822] In other cases, however, Judge Jackson recognized that the inverse is true — that when a case does not present a legal question, a federal court could encroach on powers vested in another branch if it were to adjudicate the suit. As the Supreme Court has explained, the political question doctrine is a "function of the separation of powers"[823] and serves to exclude from "judicial review those controversies which revolve around policy choices and value determinations constitutionally committed for resolution to the halls of Congress or the confines of the Executive Branch."[824] In *Mobarez v. Kerry*,[825] American citizens and lawful permanent residents sued the United States to compel their evacuation from war-torn Yemen. Judge Jackson viewed that suit as raising

[814] *See McGahn*, 415 F. Supp. 3d at 154 (noting that "[j]urisdiction exists because the Judiciary Committee's claim presents a legal question, and it is 'emphatically' the role of the Judiciary to say what the law is." (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803)).
[815] *Id*.
[816] *Id*. at 213; (citing *The Federalist No. 51* (James Madison); *The Federalist No. 69* (Alexander Hamilton); Alexis de Tocqueville, DEMOCRACY IN AMERICA 115–18 (Harvey C. Mansfield & Delba Winthrop eds. & trans., Univ. of Chicago Press 2000) (1835)).
[817] *Id*. at 215.
[818] *Id*. at 213.
[819] *Id*. at 214.
[820] Alexander Herkert et al., *Judge Ketanji Brown Jackson on National Security Law: A Reader's Guide*, LAWFARE (Mar. 21, 2022) (discussing Jackson's opinions on executive power, immigration, and the Foreign Sovereign Immunities Act (FISA).
[821] *See McGahn*, 415 F. Supp. 3d at 154 (noting that "[J]urisdiction exists because the Judiciary Committee's claim presents a legal question, and it is 'emphatically' the role of the Judiciary to say what the law is." (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803)).
[822] *Id*.
[823] Baker v. Carr, 369 U.S. 186, 210 (1962).
[824] Japan Whaling Ass'n v. Am. Cetacean Soc., 478 U.S. 221, 230 (1986).
[825] 187 F. Supp. 3d 85 (D.D.C. 2016).

"quintessential" political questions.[826] In their substance, the claims concerned a foreign affairs function that the Constitution committed to the president's discretion and that the president's exercise of that discretion was a nonjusticiable political question. The claims questioned "the Executive Branch's discretionary decision to refrain from using military force to implement an evacuation."[827] Jackson held that a district court lacks jurisdiction to review such discretionary decisions, given the Constitution's commitment of national security and foreign affairs decisions to the political branches.[828] Evaluating the plaintiffs' claims in this case "could not be accomplished without this Court making and imposing policy judgments of its own about the wisdom and/or reasonableness of the agencies' determination that the requested evacuation should not proceed," which Jackson declined to do.

2. *Presidential Authority*

Judge Jackson also has considered claims attacking a President's authority to take particular actions. In May 2018, President Donald J. Trump asserted that he had "both the statutory and constitutional authority to direct the manner of executive agencies' collective bargaining negotiations" and, consequently, issued three companion executive orders related to collective bargaining procedures, official time issues, and employee discipline.[829] *In American Federation of Government Employeess, AFL-CIO v. Trump*, federal employee unions challenged the trio of executive orders alleging they interfered with the statutorily protected rights of federal employees to engage in collective bargaining.[830] The unions sued, claiming in part that the executive orders exceeded presidential authority because they conflicted with statute.[831] In a 62-page opinion, Judge Jackson wrote that the relative powers of all branches of federal government played a role in the case, including:

> [T]he 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.[832]

Jackson granted in part and denied in part both the unions' and the defendants' cross-motions for summary judgment, holding that the Court had subject-matter jurisdiction over the case and that most, but not all, of the provisions in the executive orders conflicted with the collective bargaining rights of federal workers under the *Federal Service Labor-Management Relations Act.*

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[826] *Id*. at 92.
[827] *Id*. at 93.
[828] *See id*. at 94 ("Evaluating Plaintiffs' claims would involve calling into question the prudence of the political branches in matters of foreign policy or national security constitutionally committed to their discretion." (internal quotation marks omitted)); *see also id.* at 91 (explaining that "the President has plenary and exclusive power in the international arena and acts as the sole organ of the federal government in the field of international relations" (internal quotation marks omitted)).
[829] Am. Fed'n of Gov't Emps., AFL-CIO v. Trump, 318 F. Supp. 3d 370 (D.D.C. 2018), *rev'd and vacated*, 929 F.3d 748 (D.C. Cir. 2019)/
[830] *Id*.
[831] *Id*. at 391.
[832] *Id*. at 379.

After concluding that she had jurisdiction over the unions' claims,[833] Jackson proceeded to consider their merits. To gauge a President's statutory authority, Jackson explained that

> a court must analyze the organic statute that supposedly confers statutory authority upon the President, assess the scope of a given executive order, and check for inconsistencies between the statute and the executive order."[834]

A President's claims of "inherent constitutional authority," on the other hand, were to be analyzed under the "well-known tripartite framework" set forth in Supreme Court Justice Robert Jackson's 1952 concurrence in *Youngstown Sheet & Tube Company v. Sawyer*.[835] Under the *Youngstown* framework, a court assesses a President's authority by asking whether the President acted pursuant to express or implied authority from Congress, in the absence of "either a congressional grant or denial of authority," or in conflict with Congress's express or implied will.[836]

On the merits, Jackson concluded that the President had authority to "issue executive orders regarding federal labor-management relationships" prior to the 1978 enactment of the Federal Service Labor-Management Relations Statute (FSLMRS).[837] She further determined that the FSLMRS did not purport to divest the President of this preexisting authority.[838] The core merits issue, then, was whether the President's executive orders conflicted with the statute, in which case the executive orders would be *ultra vires* — that is, in excess of legal authority. For a range of reasons, Jackson found that aspects of the executive order conflicted with FSLMRS, and thus were *ultra vires*.[839]

On appeal, a panel of the D.C. Circuit determined that the Act required that unions' legal claims be channeled through administrative processes instead of being brought into federal district court, vacating Jackson's judgment for lack of subject matter jurisdiction. Jackson lacked jurisdiction over the unions' claims because Congress had established an "exclusive statutory scheme" providing for administrative review; thus, the "district court had no power to address the merits of the executive orders."[840]

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[833] *Id*. at 397–409.
[834] *Id*. at 393.
[835] *Id*. (citing *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 634 (1952) (Jackson, J., concurring).
[836] *Id*. (internal quotation marks omitted).
[837] *Id*. at 413.
[838] *Id.* at 416 ("[G]iven the widely known sweeping exercise of presidential prerogative to regulate federal labor-management relations that preceded the FSLMRS, Congress' silence on the issue of the President's authority to continue to act in this arena speaks volumes about whether it actually intended to oust the President entirely from this sphere.").
[839] *See, e.g., id*. at 425-26 (concluding executive order provisions that removed from negotiation topics that were placed "on the bargaining table in the FSLMRS" as mandatory or permissive subjects of bargaining "reduces the scope of the protected right to bargain in an impermissible manner").
[840] Am. Fed'n of Gov't Emps., AFL-CIO v. Trump, 929 F.3d 748, 761 (D.C. Cir. 2019)/

3. *Executive Privilege, the National Archives and Trump Document Production*

Judge Jackson also has served on appellate panels that contemplated separation of powers questions. In *Trump v. Thompson*,[841] for example, Jackson joined an opinion by Judge Patricia Millett allowing the Archivist of the United States to disclose to Congress documents generated during the Trump-Pence Administration, and as to which President Joseph R. Biden Jr. had determined executive privilege was not justified.[842] The *Thompson* panel recognized that an implied executive privilege was "'inextricably rooted in the separation of powers,'" and that "former Presidents retain for some period of time a right to assert executive privilege over documents generated during their administrations."[843] The panel concluded, though, that significant factors likely favored disclosure of these documents[844] related to the January 6, 2021, attack on the U.S. Capitol, and that former President Donald J. Trump had not carried his burden "of at least showing some weighty interest in continued confidentiality that could be capable of tipping the scales back in his favor."[845] The U.S. Supreme Court upheld this decision.

VII. CONCLUSION

Does the flap of a butterfly's wings in Brazil set off a tornado in Iowa? Does the flutter of fragile butterfly forewings over a flower in China trigger a hurricane in the Caribbean? The ter*m butterfly effect* was coined half a century ago by mild-manned meteorologist Edward Lorenz who discovered in the 1960's that tiny, butterfly-scale changes to the starting point of his computer weather models resulted in anything from sunny skies to violent storms — with no way to predict in advance what the outcome might be. Unexpected small changes can have large consequences. Many Supreme Court decisions are predictable, but there are always a few surprises. And it is often the surprising rulings that have the broadest impact. While the public normally notices only the final outcome in a case, much skirmishing occurs before that, most of it behind the scenes in private debate, votes, and negotiations among the justices. The highest court in the land, through its rulings, holds the power to affect the life of every American. And it has a new butterfly. The Honorable Ketanji Brown Jackson is the first Black woman Justice, third Black Justice, and sixth woman Justice to have served on the Court in its 233-year history. For too long, the Marble Palace did not reflect the makeup of the society its opinions govern. Diversity on the Supreme Court — be it race, gender or professional background — is valuable in itself. A mix of backgrounds,

[841] Trump v. Thompson, 20 F.4th 10 (D.C. Cir. 2021), *stay denied*, 142 S. Ct. 680 (2022), *cert. denied*, No. 21-932, 2022 WL 516395 (U.S. Feb. 22, 2022).
[842] *Id*. at 17.
[843] *Id*. at 25-26 (quoting *United States v. Nixon*, 418 U.S. 683, 708 (1974)).
[844] *Id*. at 33 (citing President Biden's determination that an assertion of privilege "is not in the best interests of the United States," Congress's showing that the information sought was "vital to its legislative interests," and the ongoing accommodation process between the political branches).
[845] *Id*. at 38. Following an adverse D.C. Circuit ruling, former President Trump asked the Supreme Court to prevent disclosure of the contested records pending the Court's review. In a brief unsigned order, the Court declined the former President's request. Trump v. Thompson, 142 Sc.D. 680 (2022). The Court also stated that because the D.C. Circuit ruled that former President Trump's assertion of privilege would have failed even if he were the incumbent, the circuit court's discussion of when executive privilege claims could properly be asserted by former presidents was non-binding dicta. The Court later denied a petition of certiorari to review the D.C. Circuit decision. No. 21-932, 2022 WL 516395 (Mem) (U.S. Feb. 22, 2022).

perspectives, and professional expertise lends credibility to the Court's deliberations on important legal questions and inspires confidence in the American people. The newcomer, Associate Justice Ketanji Brown Jackson is 52 years young. She will probably serve for decades on the highest court in the land, gaining experience and stature. The Court's membership will change over those years — four of the justices she joins are near 70 or older — and its direction may, too. That could make the rookie not only a pathbreaking Justice, but an influential and consequential one at that. As Associate Justice Byron Raymond "Whizzer" White once observed, "every time a new justice comes to the Supreme Court, it's a different court."

VIII. TABLE OF SELECT CASES

In preparing this article, the author reviewed all decisions identified in the LEXIS and Westlaw commercial databases as written by Ketanji Brown Jackson and advises that not all of those opinions contain legal reasoning that may provide insight into Supreme Court Justice Jackson's jurisprudence. The tables below identify all of Jackson's United States Court of Appeals for the District of Columbia Circuit opinions, and those selected district court opinions analyzed in this article. Decisions appear in reverse chronological order, with the most recent decisions listed first. Note, some district court cases appear on the list twice if they resulted in multiple opinions that were selected for inclusion in this article. The "Section(s)" column directs the reader to discussions or citations of the case in this article.

CASE	HOLDING	SUBSEQUENT HISTORY	SECTION(S)
Youssef v. Embassy of United Arab Emirates, 2021 WL 3722742 (2021).	Age discrimination claim by embassy employee fell within the FSIA's commercial activity exception, and federal enclave doctrine did not preclude the plaintiff's claim under the *District of Columbia Human Rights Act*.		Civil Procedure and Jurisdiction
Osvatics v. Lyft, Inc., 535 F. Supp. 3d 1 (2021).	Lyft was entitled to arbitration of claims alleging that the company violated District of Columbia law by failing to provide paid sick leave to rideshare drivers.		Approaches to Statutory Interpretation
Equal Rights Ctr. v. Uber Techs., Inc., 525 F. Supp. 3d 62 (2021).	Plaintiff organization had standing to sue rideshare provider over failure to accommodate wheelchair users, and the plaintiff made sufficiently plausible claims of discrimination to survive a motion to dismiss.		Approaches to Statutory Interpretation; Civil Procedure and Jurisdiction; Civil Rights and Qualified Immunity
United States v. Greene, 516 F. Supp. 3d 1 (2021).	Prisoner's motion for compassionate release was granted; the motion must be construed as a motion under federal law (rather than D.C. Code) because the sentence was imposed in federal court.		Criminal Law and Procedure
Maryland v. U.S. Dep't of Educ., 2020 WL 7773390 (2020).	Claims would be dismissed on mootness grounds, as directed by the D.C. Circuit, in an opinion expressing concerns about the D.C. Circuit's *vacatur* practice.		*Stare decisis*; Civil Procedure and Jurisdiction

CASE	HOLDING	SUBSEQUENT HISTORY	SECTION(S)
United States v. Terry, 2020 WL 7773389 (2020).	Motion to vacate sentence was untimely because the new right recognized in *United States v. Johnson*, 576 U.S. 591 (2015), did not apply to the residual clause of the career offender guideline.		Criminal Law and Procedure
Las Ams. Immigrant Advoc. Ctr. v. Wolf, 507 F. Supp. 3d 1 (2020).	Plaintiff failed to show that new DHS programs for processing asylum claims, which allegedly interfered with the right to consult with an attorney concerning credible-fear interviews, violated statute or the Due Process Clause.	Appeal filed, No. 20-5386 (D.C. Cir. Dec. 30, 2020).	Approaches to Constitutional Interpretation; Administrative Law; Immigration
Kiakombua v. Wolf, 498 F. Supp. 3d 1 (2020).	Portions of a DHS manual governing credible-fear determinations were either inconsistent with unambiguous governing law or unreasonable interpretations of the law.	Appeal dismissed *sub nom. Kiakombua v. Mayorkas*, No. 20-5372, 2021 WL 3716392 (D.C. Cir. July 19, 2021).	Approaches to Statutory Interpretation; Administrative Law; Immigration
Baisden v. Barr, 2020 WL 6118181 (2020).	*Pro se* plaintiff, seeking declaratory and injunctive relief allowing him to possess a firearm, failed to demonstrate standing because he did not allege that he ever owned or used a firearm or wished to possess one in the future.		Second Amendment
Campaign for Accountability v. U.S. Dep't of Just., 486 F. Supp. 3d 424 (2020).	Plaintiffs plausibly alleged that DOJ Office of Legal Counsel (OLC) opinions relating to inter-agency disputes must be affirmatively disclosed under the *Freedom of Information Act* (FOIA), but other types of OLC opinions included in their complaint did not qualify for affirmative disclosure.		Administrative Law
United States v. Dunlap, 485 F. Supp. 3d 129 (2020).	Prisoner was entitled to compassionate release based on COVID-19 pandemic, coupled with serious preexisting underlying medical conditions.		Criminal Law and Procedure

CASE	HOLDING	SUBSEQUENT HISTORY	SECTION(S)
Maryland v. U.S. Dep't of Educ., 474 F. Supp. 3d 13 (2020).	States lacked standing to challenge Department of Education regulation at issue in the case.	Vacated, No. 20- 5268, 2020 WL 7868112 (D.C. Cir. Dec. 22, 2020).	Civil Procedure and Jurisdiction
AFL-CIO v. Nat'l Labor Relat. Bd. (NLRB), 471 F. Supp. 3d 228 (2020).	NLRB rule prescribing procedures for the election of employee representatives for collective bargaining was not arbitrary and capricious and satisfied the APA's reasoned-decision-making requirement.	Appeal filed, No. 20-5226 (D.C. Cir. July 29, 2020). appeal filed, No. 20-5226 (D.C. Cir. July 29, 2020).	Approaches to Statutory Interpretation; Administrative Law
United States v. Leake, 2020 WL 3489523 (2020).	Officers' actions were reasonable for Fourth Amendment purposes and the defendant lacked Fourth Amendment standing to challenge the officers' presence in the building.		Criminal Law and Procedure
United States v. Sears, 2020 WL 3250717 (2020).	Defendant was not entitled to compassionate release due to risk of reoffending and to the community.		Criminal Law and Procedure
AFL-CIO v. NLRB, 466 F. Supp. 3d 68 (2020).	NLRB violated the APA by failing to follow notice-and-comment procedures to adopt rule prescribing procedures for the election of employee representatives for collective bargaining. *National Labor Relations Act* did not bar district court jurisdiction over the claim.	Appeal filed, No. 20-5223 (D.C. Cir. July 24, 2020).	Approaches to Statutory Interpretation; Administrative Law
Manus v. Hayden, 2020 WL 2615539 (2020).	Record in employment discrimination case was insufficient to show that plaintiff engaged in protected activity or was constructively discharged.		Business and Employment Law
United States v. Johnson, 464 F. Supp. 3d 22 (2020)	Defendant was entitled to compassionate release based on COVID-19 pandemic and preexisting medical conditions.		Criminal Law and Procedure

CASE	HOLDING	SUBSEQUENT HISTORY	SECTION(S)
United States v. Leake, 2020 WL 2331918 (2020)	Defendant had failed to establish compelling reasons and weight of statutory factors in motion for emergency relief.		Criminal Law and Procedure
United States v. Dabney, 2020 WL 1867750 (2020).	Defendant was entitled to pretrial release, based on COVID-19 pandemic and underlying medical condition.		Criminal Law and Procedure
United States v. Wiggins, 2020 WL 1868891 (2020).	Defendant was not entitled to release to home confinement pending sentencing, notwithstanding COVID-19 pandemic.		Criminal Law and Procedure
United States v. Lee, 451 F. Supp. 3d 1 (2020).	Pandemic alone was not sufficient to warrant release of an otherwise healthy and potentially violent defendant.		Criminal Law and Procedure
Mohammad Hilmi Nassif & Partners v. Republic of Iraq, 2020 WL 1444918 (2020).	The court lacked jurisdiction to enforce a Jordanian judgment because the defendants had not been properly served.		Civil Procedure and Jurisdiction
Doe v. Wash. Metro. Area Transit Auth. (WMATA), 453 F. Supp. 3d 354 (2020).	WMATA was entitled to governmental function sovereign immunity in claims alleging negligence in failing to prevent a sexual assault on a Metro train.		Civil Procedure and Jurisdiction
Willis v. Gray, 2020 WL 805659 (2020).	Plaintiff's claims regarding a D.C.-wide reduction in force were precluded by prior litigation and other claims were barred by statute of limitations, but discriminatory termination claims could proceed.		Business and Employment Law; Civil Procedure and Jurisdiction
United States v. Fields, 2020 WL 32990 (2020).	Defendant failed to establish material change in economic circumstances sufficient to justify modifying restitution sentence.		Criminal Law and Procedure

CASE	HOLDING	SUBSEQUENT HISTORY	SECTION(S)
Comm. on Judiciary, U.S. House of Representatives v. McGahn, 415 F. Supp. 3d 148 (2019).	The court had jurisdiction over subpoena enforcement action brought by the House Committee on the Judiciary against former White House Counsel Don McGahn, and McGahn had no absolute testimonial immunity based on his status as a senior advisor to the President.	Please see "Separation of Powers" *supra* for discussion of multiple stages of review on appeal.	*Stare decisis*; Civil Procedure and Jurisdiction; Separation of Powers
Keister v. AARP Benefits Comm., 410 F. Supp. 3d 244 (2019).	By signing a separation agreement, plaintiff waived rights to bring claims for disability benefits.	Aff'd, 839 F. App'x 559 (D.C. Cir. 2021).	Business and Employment Law
Make the Road N.Y. v. McAleenan, 405 F. Supp. 3d 1 (2019).	The court had jurisdiction over challenge to DHS's notice expanding eligibility for expedited removal, and the plaintiffs were likely to succeed on merits of their claim that the policy violated the APA.	Rev'd and remanded *sub nom. Make the Rd. N.Y. v. Wolf*, 962 F.3d 612 (D.C. Cir. 2020).	Administrative Law; Civil Procedure and Jurisdiction; Immigration
Ctr. for Biological Diversity v. McAleenan, 404 F. Supp. 3d 218 (2019).	Environmental group plaintiff could not bring, and district court lacked jurisdiction over, statutory claims challenging the waiver of environmental laws to construct border barriers. Plaintiff failed to state constitutional claims.	Cert. denied, 141 S. Ct. 158 (2020).	Approaches to Statutory Interpretation; Environmental Law
United States v. Johnson, 2019 WL 3842082 (2019).	The government adduced evidence that explosive devices met requisite legal definitions in charged criminal offenses.	Aff'd in part and vacated in part, 4 F.4th 116 (D.C. Cir. 2021).	Criminal Law and Procedure
Barber v. D.C. Gov't, 394 F. Supp. 3d 49 (2019).	Plaintiff had not sufficiently pled constitutional or tort claims against employer but could proceed on employment discrimination claims.		Business and Employment Law
Brown v. Gov't of D.C., 390 F. Supp. 3d 114 (2019).	Plaintiff plausibly claimed that a D.C. panhandling ordinance was an unconstitutional content-based regulation of speech.		First Amendment
Jackson v. Bowser, 2019 WL 1981041 (2019).	Private defendants were not state actors subject to suit for constitutional violations, and the plaintiff		Civil Rights and Qualified Immunity

CASE	HOLDING	SUBSEQUENT HISTORY	SECTION(S)
	failed to plead sufficient facts to support a claim against the government defendants.		
United States v. Fajardo Campos, 2018 WL 6448633 (2018).	Wiretap results could be admitted because the wiretaps were "necessary" given the failure of other traditional methods for determining the scope of a drug trafficking organization; the issuing judge in Arizona had jurisdiction over the request made under Title III of the *Omnibus Crime Control and Safe Streets Act of 1968*, and the Title III request was sufficiently particular for Fourth Amendment purposes.		Criminal Law and Procedure
In re Air Crash Over Southern Indian Ocean, 352 F. Supp. 3d 19 (2018).	Malaysia provided an available and adequate forum for the claims arising from the disappearance of Malaysia Airlines Flight MH370.	Aff'd, 946 F.3d 607 (D.C. Cir. 2020).	Civil Procedure and Jurisdiction
Guam v. United States, 341 F. Supp. 3d 74 (2018).	Guam could proceed with cost-recovery claim against the United States under CERCLA for the cleanup of a contaminated landfill, because a 2004 consent decree did not "resolve" Guam's liability to the United States for some or all of a response action.	Rev'd, 950 F.3d 104 (D.C. Cir. 2020), rev'd, 141 S. Ct. 1608 (2021).	Environmental Law
Nagi v. Chao, 2018 WL 4680272 (2018).	Plaintiff's complaint did not state a claim for hostile work environment, but discriminatory and retaliatory non-selection claims could proceed.		Business and Employment Law
Otay Mesa Prop., L.P. v. U.S. Dep't of the Interior, 344 F. Supp. 3d 355 (2018).	In challenge to ESA rule designating critical habitat of endangered shrimp, FWS improperly included as "occupied" critical habitat areas where shrimp were not located and failed to support designation of those areas as "unoccupied" critical habitat.		Administrative Law; Environmental Law

CASE	HOLDING	SUBSEQUENT HISTORY	SECTION(S)
United States v. Young, 330 F. Supp. 3d 424 (2018).	Government was not entitled to a money judgment of $180,000, because the government had already obtained as contraband the heroin that this sum was used to acquire.		Criminal Law and Procedure
Am. Fed'n of Gov't Emps. v. Trump, 318 F. Supp. 3d 370 (2018).	The court had subject matter jurisdiction over dispute concerning executive orders related to federal labor-management relations. The executive orders exceeded the President's authority because they conflicted with statutory provisions concerning labor issues.	Rev'd and vacated, 929 F.3d 748 (D.C. Cir. 2019).	Approaches to Statutory Interpretation; Administrative Law; Labor Law; Separation of Powers
Feldman v. Bowser, 315 F. Supp. 3d 299 (2018).	Taxpayer lacked standing to challenge the D.C. *Local Budget Autonomy Amendment Act of 2012* and large portions of a budget enacted pursuant to the Act because she sought to challenge the budgeting process as a whole rather than alleging discrete expenditures were unlawful.		Civil Procedure and Jurisdiction
Pol'y & Rsch., LLC v. U.S. Dep't of Health & Human Servs. (HHS), 313 F. Supp. 3d 62 (2018).	HHS's termination of Teen Pregnancy Prevention Program grants was both judicially reviewable and arbitrary and capricious given the standards set for termination of grants in HHS regulations.	Appeal dismissed, No. 18-5190, 2018 WL 6167378 (D.C. Cir. Oct. 29, 2018).	Administrative Law
Azima v. RAK Inv. Auth., 305 F. Supp. 3d 149 (2018).	FSIA's commercial activity exception applied to UAE investment authority that allegedly hacked plaintiff's computer, regardless of where the hacking took place; *forum non conveniens* did not require the case to proceed in the United Kingdom.	Rev'd, 926 F.3d 870 (D.C. Cir. 2019).	Civil Procedure and Jurisdiction
Raja v. Fed. Dep. Ins. Co., 2018 WL 818393 (2018).	Unrepresented individuals challenging the foreclosure on their home failed to serve the defendants properly but would be given one more chance to effect service.		Civil Procedure and Jurisdiction

CASE	HOLDING	SUBSEQUENT HISTORY	SECTION(S)
Case: *United States v. Hillie*, 289 F. Supp. 3d 188 (2018).	A reasonable jury could find charged offenses involved child pornography.	Vacated in part, 14 F.4th 677 (D.C. Cir. 2021).	Criminal Law and Procedure
Case: *W. Watersheds Project v. Tidwell*, 306 F. Supp. 3d 350 (2017).	Litigation involving elk feeding sites in Wyoming must be transferred to the Wyoming District Court because such matters were "plainly local in character and were best left to Wyoming's courts."		Civil Procedure and Jurisdiction
Brick v. Dep't of Just., 293 F. Supp. 3d 9 (2017).	FBI's explanation for FOIA redactions was insufficient to allow meaningful judicial review.		Administrative Law
Tyson v. Brennan, 306 F. Supp. 3d 365 (2017).	Religious discrimination claims under Title VII of the *Civil Rights Act of 1964*.	Survived motion to dismiss.	First Amendment
Campaign for Accountability v. U.S. Dep't of Just., 278 F. Supp. 3d 303 (2017).	FOIA permitted broad, prospective injunctive relief not limited to production of individual documents, but plaintiffs failed to identify an ascertainable set of records that were plausibly subject to FOIA's reading-room requirement.	Aff'd *sub nom. Citizens for Resp. & Ethics in Wash. v. U.S. Dep't of Just.*, 846 F.3d 1235 (D.C. Cir. 2017).	Approaches to Statutory Interpretation; Administrative Law
Sheridan v. U.S. Off. of Pers. Mgmt. (OPM), 278 F. Supp. 3d 11 (2017).	OPM correctly concluded source code for software used to conduct background checks was exempt from FOIA and adequately complied with FOIA production requirements.		Administrative Law
Lawson v. Sessions, 271 F. Supp. 3d 119 (2017).	Plaintiff had not exhausted her administrative remedies with respect to Title VII failure to hire claims but could proceed on *Age Discrimination in Employment Act* (ADEA) claims and retaliatory interference claims.		Business and Employment Law
Robinson v. Farley, 264 F. Supp. 3d 154 (2017).	Complaint raising statutory, constitutional, and common law claims against law enforcement officers arising from the arrest of an intellectually disabled man need not specify which officers		Civil Rights and Qualified Immunity

CASE	HOLDING	SUBSEQUENT HISTORY	SECTION(S)
	engaged in what alleged misconduct in order to survive a motion to dismiss.		
WMATA v. Ark Union Station, Inc., 268 F. Supp. 3d 196 (2017).	Under provision of the D.C. Code based on the common law *nullum tempus* doctrine, the statute of limitations did not run against WMATA because the agency's negligence suit sought to vindicate public rights.		Civil Procedure and Jurisdiction
Ross v. Lockheed Martin Corp., 267 F. Supp. 3d 174 (2017).	Employees failed to demonstrate requisite commonality for class certification in proposed class action and failed to preliminarily show that terms of proposed settlement were fair, reasonable, and adequate.		Business and Employment Law
Ctr. for Biological Diversity v. Zinke, 260 F. Supp. 3d 11 (2017)	Department of the Interior had an ongoing obligation to review its NEPA policies, but was not required to complete its review, announce the results, or actually revise its policies; the agency's review obligation was not the type of discrete agency action supervisable by a federal court.		Administrative Law; Environmental Law
United States v. Crummy, 249 F. Supp. 3d 475 (2017).	The government benefits rule under criminal sentencing guidelines did not apply to procurement frauds involving contracts awarded under the Section 8(a) program, and the loss amount should have been reduced by the fair market value of the services rendered.		Criminal Law and Procedure
Zimmerman v. Al Jazeera Am., LLC, 246 F. Supp. 3d 257 (2017).	Only some of Major League Baseball players' defamation and false light of privacy claims against the makers of a documentary contained sufficient allegations to survive motion for summary judgment.		First Amendment

CASE	HOLDING	SUBSEQUENT HISTORY	SECTION(S)
Nucor Steel–Ark. v. Pruitt, 246 F. Supp. 3d 288 (2017).	Plaintiffs had standing in suit seeking to compel Environmental Protection Agency to object to a *Clean Air Act* permit for a nearby steel manufacturing plant, where issuance of permit would effectively require plaintiffs to reduce emissions at their own manufacturing plant.		Environmental Law
SACE S.p.A. v. Republic of Paraguay, 243 F. Supp. 3d 21 (2017).	Actual authority was required for an agent of a foreign state to waive foreign sovereign immunity under the FSIA.		Civil Procedure and Jurisdiction
United States v. Hillie, 227 F. Supp. 3d 57 (2017).	Criminal indictment for child pornography charges lacked adequate factual detail as to charged offenses.		Criminal Law and Procedure
United States v. Miller, 2016 WL 8416761 (2016).	Evidence in criminal prosecution based on unlawful firearm, possession was admissible.	Aff'd, 739 F. App'x 6 (D.C. Cir. 2018).	Criminal Law and Procedure
Pac. Ranger, LLC v. Pritzker, 211 F. Supp. 3d 196 (2016).	*Marine Mammal Protection Act* safe-harbor provision applied only to accidental or nonintentional taking of marine mammals in the course of commercial fishing operations and did not apply to knowing takes of whales.		Environmental Law
New England Anti[-]Vivisection Soc'y v. U.S. Fish & Wildlife Serv., 208 F. Supp. 3d 142 (2016).	Animal welfare organization lacked standing to challenge FWS's failure to collect information in connection with export permit to transfer chimpanzees to a zoo in the United Kingdom.		Civil Procedure and Jurisdiction; Environmental Law
Gov't Accountability Project v. Food & Drug Admin. (FDA), 206 F. Supp. 3d 420 (2016).	Summary judgment was not warranted for either party in dispute over FDA's compliance with a FOIA request.		Approaches to Statutory Interpretation

CASE	HOLDING	SUBSEQUENT HISTORY	SECTION(S)
Clarian Health W., LLC v. Burwell, 206 F. Supp. 3d 393 (2016).	Qualifying criteria for outlier-payment reconciliation were substantive rules that should have gone through notice-and-comment rulemaking proceedings.	Rev'd, 878 F.3d 346 (D.C. Cir. 2017).	Approaches to Statutory Interpretation; Administrative Law
Otsuka Pharm. Co., Ltd. v. Burwell, 302 F. Supp. 3d 375 (2016).	FDA reasonably interpreted the scope of a drug's exclusivity benefit as limited and approved a drug with a different active moiety.	Aff'd, 869 F.3d 987 (D.C. Cir. 2017).	Administrative Law
Yah Kai World Wide Enters., Inc. v. Napper, 195 F. Supp. 3d 287 (2016).	Food market operator's use of Everlasting Life service mark was likely to cause consumer confusion.		Business and Employment Law
Ross v. U.S. Capitol Police, 195 F. Supp. 3d 180 (2016).	Employer's motion to dismiss would not be treated as a motion for summary judgment, and employee's complaint was sufficient to allow discrimination and retaliation claims to proceed.		Business and Employment Law
Pollard v. District of Columbia, 191 F. Supp. 3d 58 (2016).	Arresting officers were entitled to qualified immunity on several claims because the plaintiffs identified no infringement of the arrestee's rights, let alone one that violated clearly established law.	Aff'd, 698 F. App'x 616 (D.C. Cir. 2017).	Civil Rights and Qualified Immunity
Njang v. Whitestone Grp., Inc., 187 F. Supp. 3d 172 (2016).	Six-month limitations period contained in employment contract was not reasonable for plaintiff's Title VII discrimination claim but was reasonable for claims under 42 U.S.C. § 1981.		Business and Employment Law
Mobarez v. Kerry, 187 F. Supp. 3d 85 (2016).	The court lacked jurisdiction over claim that sought to compel evacuation of U.S. citizens and others from Yemen because the claims involved political questions.		Separation of Powers
Morgan v. U.S. Parole Comm., 304 F. Supp. 3d 240 (2016).	Prisoner's suit alleging his parole revocation violated the Ex Post Facto Clause was barred by		*Stare decisis*

CASE	HOLDING	SUBSEQUENT HISTORY	SECTION(S)
	sovereign immunity and *res judicata*. appeal dismissed, No. 16-5081 (D.C. Cir. June 23, 2016).		
Kyle v. Bedlion, 177 F. Supp. 3d 380 (2016).	Fifth Amendment did not apply to plaintiff's claims of false arrest and use of excessive force, and plaintiff failed to plead a violation of clearly established law under the Fourth Amendment.	Appeal dismissed, No.16-7040, 2016 WL 6915562 (D.C. Cir. Oct. 26, 2016).	Civil Rights and Qualified Immunity
Crawford v. Johnson, 166 F. Supp. 3d 1 (2016).	Employee failed to establish that he exhausted administrative remedies with respect to alleged Title VII violations.	Rev'd in part *sub nom*. *Crawford v. Duke*, 867 F.3d 103 (D.C. Cir. 2017).	Business and Employment Law
All. of Artists & Recording Cos. v. Gen. Motors Co., 162 F. Supp. 3d 8 (2016).	A digital audio copied recording must itself be a digital music recording to be covered by the *Audio Home Recording Act*.		Approaches to Statutory Interpretation
Alma v. Bowser, 159 F. Supp. 3d 1 (2016).	Plaintiff's mistakenly naming incorrect party would be remedied by substituting correct party, rather than dismissing action.		Business and Employment Law
Unite Here Local 23 v. I.L. Creations of Md. Inc., 148 F. Supp. 3d 12 (2015).	Arbitrator ruling for a union in a dispute over a collective bargaining agreement was entitled to deference, and union was entitled to attorneys' fees.		Labor Law
Coal River Mountain Watch v. U.S. Dep't of the Interior, 146 F. Supp. 3d 17 (2015).	Equities weighted against dismissal of claims, even though similar claims were pending in both the District of D.C. and the District of West Virginia.		Civil Procedure and Jurisdiction
Otay Mesa Prop., L.P. v. U.S. Dep't of the Interior, 144 F. Supp. 3d 35 (2015).	U.S. Fish and Wildlife performed adequate economic analysis associated with designation of critical habitat for endangered shrimp and was not required to conduct NEPA analysis for designation. Additional fact-finding was necessary, however, to evaluate whether the FWS had properly designated land identified as watershed.		Administrative Law; Environmental Law

CASE	HOLDING	SUBSEQUENT HISTORY	SECTION(S)
R.J. Reynolds Tobacco Co. v. U.S. Dep't of Agric., 130 F. Supp. 3d 356 (2015).	Federal agency correctly excluded certain evidence in calculating subsidy payments under the *Fair and Equitable Tobacco Reform Act of 2004*.		Approaches to Statutory Interpretation
Pierce v. District of Columbia, 128 F. Supp. 3d 250 (2015).	Incarceration of deaf man without accommodations, such as access to an American Sign Language interpreter, and without attempt to evaluate his need for accommodation, constituted discrimination.		Civil Rights and Qualified Immunity
Shaw v. Ocwen Loan Servicing, LLC, 2015 WL 4932204 (2015).	Complaint dismissed *sua sponte* under Federal Rules of Civil Procedure 8(a) and 12(b)(6).		Civil Procedure and Jurisdiction
XP Vehicles, Inc. v. Dep't of Energy, 118 F. Supp. 3d 38 (2015).	Plaintiffs plausibly claimed that the Department of Energy acted arbitrarily and capriciously by using certain loan programs to reward political patrons. No cause of action was available for constitutional claims alleging due process and equal protection violations.		Administrative Law
Rothe Dev., Inc. v. Dep't of Def., 107 F. Supp. 3d 183 (2015).	Equal protection challenge to a provision of the *Small Business Act* that established a business development program for socially and economically disadvantaged small business concerns failed to meet the high bar for a facial constitutional challenge.	Aff'd, 836 F.3d 57 (D.C. Cir. 2016).	Civil Rights and Qualified Immunity
Cal. Clinical Lab. Ass'n v. Sec'y of HHS., 104 F. Supp. 3d 66 (2015).	Plaintiffs lacked standing to bring certain challenges to Medicare coverage determinations made by private entities, and the court lacked subject matter jurisdiction over the remaining claims.	Appeal dismissed, No. 15–5206, 2015 WL 9009746 (D.C. Cir. Oct. 30, 2015).	Civil Procedure and Jurisdiction

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Fed. Forest Res. Coal. v. Vilsack, 100 F. Supp. 3d 21 (2015).	Coalition of associations and industry groups failed to identify an injury in fact and lacked standing to challenge U.S. Forest Service rule addressing management planning for national forests.		Civil Procedure and Jurisdiction; Environmental Law
Mackinac Tribe v. Jewell, 87 F. Supp. 3d 127 (2015).	United States' waiver of sovereign immunity under APA extended to claim against Secretary of Department of the Interior seeking tribal recognition, but the tribe failed to exhaust administrative remedies.	Aff'd, 829 F.3d 754 (D.C. Cir. 2016) (*per curiam*).	Administrative Law; Civil Procedure and Jurisdiction
Food & Water Watch, Inc. v. Vilsack, 79 F. Supp. 3d 174 (2015).	Plaintiffs lacked standing to challenge poultry processing regulations.	Aff'd, 808 F.3d 905 (D.C. Cir. 2015).	Civil Procedure and Jurisdiction
Dist. No. 1, Pac. Coast Dist., Marine Eng'rs' Beneficial Ass'n, AFL-CIO v. Am. Mar. Officers, 75 F. Supp. 3d 294 (2014).	Plaintiff union had not reasonably attempted to exhaust contractually required arbitration procedures prior to filing suit.	Appeal dismissed, No. 15–7001, 2015 WL 4075840 (D.C. Cir. May 28, 2015).	Labor Law
United States v. Turner, 73 F. Supp. 3d 122 (2014).	Information in warrant was sufficient to support probable cause to search.		Criminal Law and Procedure
Kyle v. Bedlion, 2014 WL 12539324 (2014).	Denied motion for partial summary judgment in wrongful arrest case.		Criminal Law and Procedure
Pencheng Si v. Laogai Rsch. Found., 71 F. Supp. 3d 73 (2014).	*False Claims Act* claim failed to comply with the pleading requirements of Federal Rule of Civil Procedure 9(b).		Civil Procedure and Jurisdiction
A Love of Food I, LLC v. Maoz Vegetarian USA, Inc., 70 F. Supp. 3d 376 (2014).	Franchisee was entitled to summary judgment on failure-to-register and failure-to-disclose claims but could not show damages. Franchisor was entitled to summary judgment on claim related to unlawful representations. Material factual issues prevented summary judgment on other false representation claims.		Approaches to Statutory Interpretation; Business and Employment Law

CASE	HOLDING	SUBSEQUENT HISTORY	SECTION(S)
Dist. No. 1, Pac. Coast Dist., Marine Eng'rs' Beneficial Ass'n, AFL-CIO v. Liberty Maritime Corp., 70 F. Supp. 3d 327 (2014).	Whether a collective bargaining agreement had expired was a matter the parties had agreed to arbitrate.	Aff'd, 815 F.3d 834 (D.C. Cir. 2016).	Labor Law
Depomed, Inc. v. HHS., 66 F. Supp. 3d 217 (2014).	Governing statute unambiguously required FDA to grant marketing exclusivity to a drug that FDA had cleared for sale and designated an orphan drug.	Appeal dismissed, No. 14–5271, 2014 WL 5838247 (D.C. Cir. Nov. 7, 2014).	Approaches to Statutory Interpretation; Administrative Law
Sierra Club v. U.S. Army Corps of Eng'rs, 64 F. Supp. 3d 128 (2014).	Federal agencies were not obligated to review the environmental impact of a domestic oil pipeline to be constructed on mostly privately owned land, in part because there had been no "major federal action" that would trigger NEPA review.	Aff'd, 803 F.3d 31 (D.C. Cir. 2015)	Environmental Law
Watervale Marine Co., Ltd. v. U.S. Dep't of Homeland Sec., 55 F. Supp. 3d 124 (2014).	U.S. Coast Guard's determination of the conditions upon which foreign vessels would be released from custody after violating certain pollution rules was nonjusticiable as committed to agency discretion by law.	Aff'd on other grounds *sub-nom. Watervale Marine Co. v. U.S. Dep't of Homeland Sec.*, 807 F.3d 325 (D.C. Cir. 2015).	Approaches to Statutory Interpretation; Administrative Law
United States v. Richardson, 36 F. Supp. 3d 120 (2014).	Defendant's statements made during the execution of a search warrant, while the defendant was in custody, were not the product of police interrogation.		Criminal Law and Procedure
Sickle v. Torres Advanced Enter. Sols., LLC, 17 F. Supp. 3d 10 (2013).	Plaintiffs could not bring retaliatory termination claims without first exhausting administrative remedies under the *Longshore and Harbor Workers' Compensation Act.*	Aff'd in part and rev'd in part, 884 F.3d 338 (D.C. Cir. 2018).	Business and Employment Law
Patterson v. United States, 999 F. Supp. 2d 300 (2013).	Police officers were not entitled to qualified immunity on First and Fourth Amendment claims and false arrest claims arising out of arrest for using profanity in a public park.		*Stare decisis*; Civil Rights and Qualified Immunity; First Amendment

CASE	HOLDING	SUBSEQUENT HISTORY	SECTION(S)
Sierra Club v. U.S. Army Corps of Eng'rs, 990 F. Supp. 2d 9 (2013).	Plaintiffs failed to establish that federal law required further environmental review of the environmental impacts of a domestic oil pipeline and failed to demonstrate imminent irreparable harm from the construction of the pipeline.		Environmental Law
Am. Meat Inst. v. U.S. Dep't of Agric. (USDA), 968 F. Supp. 2d 38 (2013).	First Amendment, statutory, and APA claims challenging a USDA country-of-origin labeling requirement were unlikely to succeed on their merits.	Aff'd, 746 F.3d 1065 (D.C. Cir. 2014).	Approaches to Statutory Interpretation; Administrative Law; First Amendment