

S. HRG. 117-422, PART 1 OF 3

**CONFIRMATION HEARING
ON THE NOMINATION OF
HON. KETANJI BROWN JACKSON
TO BE AN ASSOCIATE JUSTICE OF THE
SUPREME COURT OF THE UNITED STATES**

HEARING
BEFORE THE
COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE
ONE HUNDRED SEVENTEENTH CONGRESS

SECOND SESSION

MARCH 21, 22, 23, and 24, 2022

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CONTENTS

**March 21, 11:02 a.m.; March 22, 9:07 a.m.; March 23, 9:06 a.m.;
and March 24, 2022, 9:03 a.m.**

STATEMENTS OF COMMITTEE MEMBERS

	Page
Blackburn, Hon. Marsha, a U.S. Senator from the State of Tennessee	56
Blumenthal, Hon. Richard, a U.S. Senator from the State of Connecticut	34
Booker, Hon. Cory A., a U.S. Senator from the State of New Jersey	45
Coons, Hon. Christopher A., a U.S. Senator from the State of Delaware	28
Cornyn, Hon. John, a U.S. Senator from the State of Texas	15
Cotton, Hon. Tom, a U.S. Senator from the State of Arkansas	42
Cruz, Hon. Ted, a U.S. Senator from the State of Texas	25
Durbin, Hon. Richard J., a U.S. Senator from the State of Illinois:	
March 21, 2022, opening statement	1
March 22, 2022, opening statement	67
March 23, 2022, opening statement	231
March 24, 2022, opening statement	371
Feinstein, Hon. Dianne, a U.S. Senator from the State of California	13
Graham, Hon. Lindsey O., a U.S. Senator from the State of South Carolina	11
Grassley, Hon. Charles E., a U.S. Senator from the State of Iowa:	
March 21, 2022, opening statement	5
March 23, 2022, opening statement	235
Hawley, Hon. Josh, a U.S. Senator from the State of Missouri	37
Hirono, Hon. Mazie K., a U.S. Senator from the State of Hawaii	39
Kennedy, Hon. John, a U.S. Senator from the State of Louisiana	48
Klobuchar, Hon. Amy, a U.S. Senator from the State of Minnesota	22
Leahy, Hon. Patrick J., a U.S. Senator from the State of Vermont	8
Lee, Hon. Michael S., a U.S. Senator from the State of Utah	19
Ossoff, Hon. Jon, a U.S. Senator from the State of Georgia	55
Padilla, Hon. Alex, a U.S. Senator from the State of California	50
Sasse, Hon. Ben, a U.S. Senator from the State of Nebraska	31
Tillis, Hon. Thom, a U.S. Senator from the State of North Carolina	52
Whitehouse, Hon. Sheldon, a U.S. Senator from the State of Rhode Island	17

INTRODUCERS

Fairfax, Hon. Lisa M., Presidential Professor and Co-Director, Institute for Law & Economics, University of Pennsylvania Carey Law School, Philadel- phia, Pennsylvania	61
Griffith, Hon. Thomas B., Judge, retired, U.S. Court of Appeals for the Dis- trict of Columbia Circuit, Washington, DC	59

STATEMENTS OF THE NOMINEE

Witness List	441
Jackson, Hon. Ketanji Brown, Nominee to serve as an Associate Justice of the Supreme Court of the United States:	
March 21, 2022, statement	62
questionnaire and biographical information	443

IV

	Page
Jackson, Hon. Ketanji Brown, Nominee to serve as an Associate Justice of the Supreme Court of the United States—Continued	
attachment: question 12(a)	592
attachment: question 12(b)	857
attachment: question 12(c)	991
attachment: question 12(d)	1137
attachment: question 12(e)	2046
attachment: question 13(b)	2087
attachment: question 13(g)	2563
attachment: question 16(e)	2585
attachment: question 19	2630

STATEMENTS OF THE WITNESSES

Beatty, Hon. Joyce, a Representative in Congress from the State of Ohio and Chair, Congressional Black Caucus	392
prepared statement	2670
Drayton, Joseph M., American Bar Association, Standing Committee on the Federal Judiciary, Washington, DC	376
Goluboff, Risa, dean, Arnold H. Leon Professor of Law, and professor of history, University of Virginia, Charlottesville, Virginia	395
prepared statement	2673
Henderson, Wade, president and chief executive officer, The Leadership Conference on Civil and Human Rights, Washington, DC	399
prepared statement	2677
Marshall, Hon. Steve, Attorney General, State of Alabama, Montgomery, Alabama	393
prepared statement	2709
Mascott, Jennifer, assistant professor of law and co-executive director, C. Boyden Gray Center, Antonin Scalia Law School, George Mason University, Arlington, Virginia	397
prepared statement	2685
McCullen, Eleanor, Massachusetts resident and sidewalk counselor	400
prepared statement	2706
Rosenthal, Richard B., solo appellate lawyer, Miami, Florida, and San Francisco, California	403
prepared statement	2696
Russell, Keisha, counsel, First Liberty Institute, Plano, Texas	405
prepared statement	2699
Serano, Alessandra Parisi, chief legal officer, International Operations, Operation Underground Railroad, Anaheim, California	408
prepared statement	2704
Thomas, Frederick L., Captain, East Baton Rouge Parish Sheriff's Office, Baton Rouge, Louisiana, and national president, National Organization of Black Law Enforcement Executives	407
prepared statement	2717
Veta, D. Jean, American Bar Association, Standing Committee on the Federal Judiciary, Washington, DC	375
Williams, Hon. Ann Claire, Judge, retired, and American Bar Association, Standing Committee on the Federal Judiciary, Washington, DC	373
prepared statement	2647

QUESTIONS

Questions submitted to Hon. Ketanji Brown Jackson by:	
Senator Blackburn	2891
Senator Cornyn	2740
Senator Cotton	2816
Senator Cruz	2750
Senator Graham	2737
Senator Grassley	2722
Senator Hawley	2794
Senator Kennedy	2823
Senator Lee	2744
Senator Sasse	2791
Senator Tillis	2827

ANSWERS

Responses of Hon. Ketanji Brown Jackson to questions submitted by:	
Senator Blackburn	3218
Senator Cornyn	2940
Senator Cotton	3095
Senator Cruz	2967
attachment: Probation Office chart	3035
Senator Graham	2935
Senator Grassley	2893
Senator Hawley	3042
Senator Kennedy	3112
Senator Lee	2949
Senator Sasse	3036
Senator Tillis	3126

LETTERS RECEIVED BY THE COMMITTEE REGARDING THE NOMINATION
OF HON. KETANJI BROWN JACKSON TO BE AN ASSOCIATE JUSTICE OF
THE SUPREME COURT OF THE UNITED STATES

3M Indivisible—Monroe, McMinn, Meigs Counties, Tennessee, et al., 233	
Indivisible groups across the United States; April 6, 2022	3223
9to5, National Association of Working Women, Georgia Chapter, Atlanta, Georgia, et al., organizations committed to democratic and economic em- powerment of the people of Georgia; March 29, 2022	3230
Aagard, Sarah, assistant public advocate, Kentucky Department of Public Advocacy, Frankfort, Kentucky, et al., current and former public defenders; April 1, 2022	3232
Abbott, Ross, Richland County, South Carolina, et al., current and former U.S. public defenders; March 22, 2022	3245
Abdallah, Nabila, California, et al., law students from across the United States; March 31, 2022	3280
Abely, Christine, faculty fellow, New England Law, Boston, Massachusetts, et al., women law professors from across the United States; March 8, 2022	3284
A Better Balance, New York, New York; March 17, 2022	3328
Abraham, David, professor of law emeritus, University of Miami School of Law, Coral Gables, Florida, et al., professors who teach at law schools in the State of Florida; March 23, 2022	3330
Abrams, Hon. Robert, former Attorney General of the State of New York, et al., former State Attorneys General, former U.S. Senators, a current State Governor, and current State Attorneys General from across the United States; March 10, 2022	3338
Abratt, Daniela B., Thomas & LoCicero, Ft. Lauderdale, Florida, et al., lead- ers in the legal communities of the State of Florida; March 23, 2022	3346
Access Ready Inc., Pinellas Park, Florida, et al., organizations and individuals representing the interests of individuals with disabilities; March 18, 2022 ...	3360
Access Ready Inc., Pinellas Park, Florida, et al., organizations and individuals representing the interests of individuals with disabilities; April 6, 2022	3365
Adams, Aileen, former director, U.S. Department of Justice, Office for Victims of Crime, Los Angeles, California, et al., victims and survivors of crime, their advocates, and providers of critical assistance services to crime victims and survivors; March 9, 2022	3371
Adams, Faith, University of Mississippi School of Law, Class of 2024, Univer- sity, Mississippi, et al., current law school students and law school grad- uates from across the United States; March 11, 2022	3374
Adams-Seaton, Briana, Howard University School of Law, Class of 2021, et al., graduates of the six law schools at Historically Black Colleges and Universities (HBCU); March 7, 2022	3408
Alexander, Anne, professor of law and director of legal research and writing, University of Missouri School of Law, et al., lawyers and legal academics who work and teach in the State of Missouri; March 23, 2022	3422
Allen, Alena M., interim dean and professor of law, University of Arkansas School of Law, Fayetteville, Arkansas, et al., Black deans of law schools in the United States; March 18, 2022	3427
American Association for Access, Equity and Diversity (AAAED), Washington, DC; March 22, 2022	3435

VI

	Page
American Association for Justice (AAJ), Navan Ward, Jr., president, Washington, DC; March 21, 2022	3439
American Federation of Government Employees (AFGE) Local 704, Chicago, Illinois, et al., environmental groups and coalition partners; March 17, 2022	3441
American Federation of Labor and Congress of Industrial Organizations (AFL-CIO), Elizabeth H. Shuler, president; April 1, 2022	3446
American Federation of Teachers (AFT), Randi Weingarten, president, Washington, DC; March 21, 2022	3447
Association of Village Council Presidents (AVCP), Tribal consortium with 56 federally recognized Tribes as members, Vivian Korthuis, chief executive officer, Bethel, Alaska; March 23, 2022	3449
Ayer, Hon. Donald B., former Deputy Attorney General of the United States, et al., lawyers and others who served in Republican administrations; March 3, 2022	3451
Beatty, Hon. Joyce, a Representative in Congress from the State of Ohio and Chair, Congressional Black Caucus, et al., Members of Congress of the Congressional Black Caucus and Members of Congress of the Democratic Women's Caucus; March 19, 2022	3454
Bellinger, John B., III, former legal adviser, National Security Council and Department of State, et al., attorneys who served on both sides of litigation for detainees at Guantanamo Bay detention camp, Cuba; March 28, 2022	3456
Bennett, James, former law clerk to Justice Anthony M. Kennedy, et al., law clerks during the Supreme Court's October Term 1999 who worked with Judge Jackson when she served as a law clerk to Justice Stephen Breyer; March 3, 2022	3460
Black Men Lawyers' Association (BMLA), Chicago, Illinois; March 21, 2022	3463
Breyer, Julia M., et al., former law clerks to Judge Ketanji Brown Jackson; March 17, 2022	3464
Burck, William A., former law clerk to Justice Anthony M. Kennedy; February 28, 2022	3467
Butler, Rev. Jennifer, chief executive officer, Faith in Public Life, Washington, DC, et al., faith leaders from across the United States; March 30, 2022	3469
Catholics for Choice, Jamie L. Manson, president, Washington, DC; March 21, 2022	3520
Center for Disability Rights (CDR), L. Dara Baldwin, MPA, director of national policy, Rochester, New York; March 17, 2022	3522
Center for Law and Social Policy (CLASP), Olivia A. Golden, executive director, Washington, DC; March 23, 2022	3524
Coffey, Kendall, former U.S. Attorney, Southern District of Florida, et al., former federal prosecutors who served throughout the State of Florida; March 22, 2022	3525
Coffey, Kendall, former U.S. Attorney, Southern District of Florida, et al., former federal prosecutors who served the State of Florida and who served South Florida; March 22, 2022	3530
Common Cause, Karen Hobert Flynn, president, Washington, DC; March 17, 2022	3535
Constitutional Accountability Center (CAC), Elizabeth B. Wydra, president, Washington, DC; March 15, 2022	3538
Council on American-Islamic Relations (CAIR), Robert S. McCaw, director, government affairs department, Washington, DC; March 16, 2022	3548
Davis, Kenya K., professor, American University, and former Assistant U.S. Attorney for the District of Columbia and frontline prosecutor in the Sex Offense Domestic Violence section, Cyber Crime, and the Child Exploitation and Human Trafficking sections, Washington, DC; March 28, 2022	3551
Everytown for Gun Safety, John Feinblatt, president, and Eric Tirschwell, executive director and chief litigation counsel, Everytown Law, New York, New York; March 22, 2022	3553
Finney, Kathryn, managing general partner and founder, Genius Guild, Chicago, Illinois, et al., Black women business owners, entrepreneurs, and job creators; March 21, 2022	3555
Ford, Hon. Aaron, Attorney General of the State of Nevada, Carson City, Nevada, et al., State Attorneys General from across the United States; March 15, 2022	3560
Futures Without Violence, San Francisco, California, et al., organizations from across the United States working to ensure the safety and well-being of individuals; March 20, 2022	3564

VII

	Page
Futures Without Violence, San Francisco, California, et al., victim service providers and victims and survivors of domestic violence and sexual assault; March 20, 2022	3567
Griffith, Hon. Thomas B., Judge, retired, U.S. Court of Appeals for the District of Columbia Circuit, Washington, DC; February 26, 2022	3569
Herbert, Lenese, professor of law, Howard University School of Law, Washington, DC, et al., professors of law from across the United States; March 14, 2022	3571
Hodge, Jamila, former Assistant U.S. Attorney, et al., former federal prosecutors and alumni of the United States Attorney's Office for the District of Columbia; March 30, 2022	3613
Human Rights Campaign (HRC), Joni Madison, interim president, Washington, DC; March 21, 2022	3618
Indivisible, Leah Greenberg, co-executive director, Washington, DC; March 18, 2022	3620
Innocence Project, Christina Swarns, executive director, New York, New York; March 24, 2022	3621
International Association of Chiefs of Police (IACP), Dwight E. Henninger, chief and president, Alexandria, Virginia; March 14, 2022	3624
International Federation of Professional and Technical Engineers (IFPTE), Matthew S. Biggs, president, and Gay Henson, Secretary-Treasurer, Washington, DC; March 29, 2022	3625
Intersections of Our Lives, a Reproductive Justice collaborative of organizations, led by National Asian Pacific American Women's Forum (NAPAWF), Sung Yeon Choimorrow, executive director, Chicago, Illinois; National Latina Institute for Reproductive Justice, Lupe M. Rodríguez, executive director, New York, New York; and In Our Own Voice: National Black Women's Reproductive Justice Agenda, Marcela Howell, president and chief executive officer, Washington, DC; March 18, 2022	3626
Jackson Lee, Hon. Sheila, a Representative in Congress from the State of Texas and senior Member of the U.S. House of Representatives Judiciary Committee; March 31, 2022	3628
Japanese American Citizens League (JACL), David Inoue, executive director, San Francisco, California; March 21, 2022	3632
Johnson, Hon. Jeh Charles, former Secretary, U.S. Department of Homeland Security, Hon. Loretta E. Lynch, former U.S. Attorney General, and J.W. Crawford, III, Vice Admiral, Judge Advocate General Corps, USN, retired, et al., national security lawyers' perspectives on Judge Jackson's representation of several detainees from Guantanamo Bay detention camp, Guantanamo Bay Naval Base, in the period 2005–2009; March 16, 2022	3634
Jones, Joshua Aaron, law professor, California Western School of Law, San Diego, California, et al., LGBTQ+ law professors and allies; March 4, 2022 ...	3637
Lawyers' Committee for Civil Rights Under Law, Damon Hewitt, president and executive director, Washington, DC, et al.; March 30, 2022	3646
Leadership Conference on Civil and Human Rights, The, Washington, DC, et al.; March 17, 2022	3652
League of Conservation Voters (LCV), Gene Karpinski, president, Washington, DC; March 17, 2022	3662
League of United Latin American Citizens (LULAC), Sindy M. Benavides, chief executive officer, Washington, DC; April 4, 2022	3664
Levi, David F., president, American Law Institute (ALI), and director, Bolch Judicial Institute at Duke Law School, Durham, North Carolina; March 2, 2022	3665
Lynch, Hon. Loretta E., former Attorney General of the United States and former U.S. Attorney, Eastern District of New York, et al., former senior lawyers in the U.S. Department of Justice; March 9, 2022	3667
Martin, Areva, civil rights attorney, nonprofit leader, and working mother, and Ginger McKnight-Chavers, attorney, author, and working mother, et al., African-American women representing a cross-section of ages and socioeconomic, familial, national, and professional backgrounds; March 10, 2022 ..	3671
Menefee, Hon. Christian D., Harris County Attorney, Houston, Texas, et al., Black attorneys licensed to practice law in Texas; March 18, 2022	3678
Motley, Joel, son of Constance Baker Motley, former NAACP Legal Defense and Educational Fund attorney and lead strategist on <i>Brown v. Board of Education</i> litigation, New York, New York; March 31, 2022	3681
NARAL Pro-Choice America, Mini Timmaraju, president, Washington, DC; March 18, 2022	3682

VIII

	Page
National Asian Pacific American Bar Association (NAPABA), Priya Purandare; Asian Americans Advancing Justice (AAJC), John C. Yang; and National Council of Asian Pacific Americans (NCAPA), Gregg Orton; Washington, DC, et al.; March 18, 2022	3686
National Association for the Advancement of Colored People (NAACP), Derrick Johnson, president and chief executive officer, Baltimore, Maryland; March 18, 2022	3688
National Association for the Advancement of Colored People (NAACP), Derrick Johnson, president and chief executive officer, Baltimore, Maryland; April 5, 2022	3704
National Association of Women Lawyers (NAWL), Karen M. Richardson, executive director, Chicago, Illinois, letter and statement; March 19, 2022	3720
National Bar Association (NBA), Hon. Carlos Moore, president and chairman, Washington, DC; March 31, 2022	3724
National Black Law Students Association (NBLSA), Simone Yhap, national chair and chief executive officer, Washington, DC; February 25, 2022	3731
National Coalition Against Domestic Violence (NCADV), Denver, Colorado; March 18, 2022	3733
National Coalition on Black Civic Participation (NCBCP) and Black Women's Roundtable, Melanie L. Campbell, president and chief executive officer, NCBCP, and national convener, Black Women's Roundtable, Washington, DC; April 2, 2022	3735
National Congress of American Indians (NCAI), Fawn Sharp, president, Washington, DC, and Native American Rights Fund (NARF), John E. Echohawk, executive director, Boulder, Colorado; March 28, 2022	3738
National Congress of Black Women (NCBW), Judge Doris Smith-Ribner, retired, chairperson emeritus, Philadelphia, Pennsylvania, et al.; March 29, 2022	3740
National Council of Jewish Women (NCJW), Jody Rabhan, chief policy officer, Washington, DC; March 11, 2022	3741
National Education Association (NEA), Rebecca S. Pringle, president, Washington, DC; March 25, 2022	3743
National Employment Lawyers Association (NELA), Laura M. Flegel, legislative and public policy director, and Jeffrey A. Mittman, executive director, Concord, California; March 27, 2022	3745
National Hispanic Leadership Agenda (NHLE), Kenneth Romero, chair and executive director, National Hispanic Caucus of State Legislators (NHCSL), et al., Washington, DC; April 6, 2022	3748
National Organization for Women (NOW), Christian F. Nunes, president, Washington, DC; March 24, 2022	3750
National Organization of Black Law Enforcement Executives (NOBLE), Alexandria, Virginia; February 28, 2022	3751
National Organization of Concerned Black Men (CBM), Dr. Karen McRae, national president and chief executive officer, Washington, DC; March 21, 2022	3752
National Partnership for Women & Families, Jocelyn Frye, president, Washington, DC; March 18, 2022	3754
National Urban League (NUL), Marc H. Morial, president and chief executive officer, New York, New York, and Joi O. Chaney, executive director, Washington Bureau, and senior vice president, policy & advocacy, Washington, DC; March 17, 2022	3758
National Women's Law Center, Fatima Goss Graves, president and chief executive officer, Washington, DC; March 31, 2022	3760
National Women's Law Center, Washington, DC, et al., advocates for gender justice in the courts, in public policy, and in society; March 31, 2022	3764
National Women's Law Center, Washington, DC; Women's Bar Association of the District of Columbia, Washington, DC; and California Women Lawyers, Sacramento, California; March 31, 2022	3769
NETWORK Lobby for Catholic Social Justice, Mary J. Novak, executive director, Washington, DC; March 29, 2022	3792
Oglala Sioux Tribe, Kevin Killer, president, Pine Ridge, South Dakota; March 11, 2022	3793
Onwuachi-Willig, Angela, dean, and Ryan Roth Gallo & Ernest J. Gallo Professor of Law, Boston University School of Law, Boston, Massachusetts, et al., Black women law professors; March 18, 2022	3795
Organized Village of Saxman (OVS), a federally recognized sovereign Tribe, Joe Williams, Jr., president, Saxman and Ketchikan, Alaska; April 4, 2022 ..	3812

IX

	Page
Pass Her the Gavel, a network of Black law students and Black professionals; March 26, 2022	3813
People For the American Way (PFAW), Marge Baker, executive vice presi- dent, Washington, DC; March 30, 2022	3814
People's Parity Project (PPP), Molly Coleman, executive director, and Tristin Brown, policy and program director; March 21, 2022	3822
Physicians for Reproductive Health (PRH), Dr. Kristyn Brandi, MD, MPH, board chair, Hartsdale, New York; March 21, 2022	3824
Racicot, Marc, former Governor and former Attorney General, Missoula, Mon- tana, et al., lawyers from the State of Montana; March 30, 2022	3826
Racine, Karl A., Attorney General, Office of the Attorney General for the District of Columbia (OAG), Washington, DC; March 31, 2022	3829
Resources Legacy Fund, Avi Garbow, president, Sacramento, California; March 21, 2022	3830
Schwartz, Paul H., Boulder, Colorado, October 1994 Term of Court, et al., former law clerks to Justice Stephen G. Breyer; March 16, 2022	3832
Service Employees International Union (SEIU), Mary Kay Henry, inter- national president, Washington, DC; March 18, 2022	3838
Sigma Pi Phi Fraternity, Dwayne M. Murray, Esq., Grand Sire Archon, Atlanta, Georgia; letter and a 2022 Resolution; March 25, 2022	3840
Southern Christian Leadership Conference (SCLC), Dr. Bernard LaFayette, Jr., chairman, Board of Directors, and Dr. Charles Steele, Jr., president and chief executive officer, Atlanta, Georgia; March 31, 2022	3843
Thomson, J. Scott, former Camden County Police Chief, Camden, New Jersey, et al., members of the law enforcement community; March 7, 2022	3844
Toussaint, Etienne C., assistant professor of law, University of South Caro- lina School of Law, Columbia, South Carolina, et al., Black male law deans and law professors of United States law schools; March 14, 2022	3849
United States Black Chambers (USBC), Ron Busby, president and chief exec- utive officer, Washington, DC; March 2, 2022	3861
United States Hispanic Chamber of Commerce (USHCC), Ramiro A. Cavazos, president and chief executive officer, Washington, DC; March 8, 2022	3862
Unite for Reproductive & Gender Equity (URGE), Desirée S. Luckey, Esq., Director of Policy, Washington, DC; March 31, 2022	3864
Women's Rights and Empowerment Network (WREN), Columbia, South Caro- lina, et al.; March 30, 2022	3866
Young Black Lawyers' Organizing Coalition (YBLOC), Abdul Dosunmu, founder and chief strategist, New York, New York; March 17, 2022	3869
YWCA USA, Margaret Mitchell, chief executive officer, Washington, DC; March 23, 2022	3871

MISCELLANEOUS SUBMISSIONS FOR THE RECORD

African American Mayors Association (AAMA), Hon. Sylvester Turner, Mayor, City of Houston, Texas, and AAMA president, Washington, DC, statement ..	3873
Blackburn, Hon. Marsha, a U.S. Senator from the State of Tennessee, and Tommy Tuberville, a U.S. Senator from the State of Alabama; a letter to Rebecca S. Pringle, president, National Education Association (NEA), with regard to New Business Item 2 and New Business Item 39, considered and adopted during the NEA's 2021 Representative Assembly; July 19, 2021, letter	3875
Cato Institute, Clark M. Neily, III, senior vice president for legal studies, Washington, DC, statement	3876
Coe, Aebra, and Chris Villani, "1st Circ. Judge Selya Says Jackson Will Be 'Balanced'," <i>Law360</i> , February 25, 2022, article	3880
Doiron, Sarah, "'A Terrific Addition': Biden's Supreme Court Nominee Worked Alongside RI Judge," <i>WPRI.com</i> , posted February 25, 2022, and updated March 22, 2022, article	3882
Family Equality, Shelbi Day, chief policy officer, New York, New York, email correspondence statement	3885
Fitzpatrick, Edward, "Supreme Court Nominee Judge Ketanji Brown Jackson Reminds Others of Ruth Bader Ginsburg," <i>The Boston Globe</i> , March 22, 2022, article	3887
Fraternal Order of Police (FOP), Patrick Yoes, president, National Fraternal Order of Police, Washington, DC, statement	3891

	Page
Gertner, Hon. Nancy, Judge, retired, U.S. District Court of Massachusetts, and senior lecturer of law, Harvard Law School, Cambridge, Massachusetts, et al., former U.S. district and appellate judges address criticisms leveled at Judge Ketanji Brown Jackson's record on child pornography sentencing, March 21, 2022, letter	3892
Gertner, Hon. Nancy, Judge, retired, U.S. District Court of Massachusetts, and senior lecturer of law, Harvard Law School, Cambridge, Massachusetts, et al., former U.S. district and appellate judges address the release of pre-sentence reports relating to defendants sentenced by Judge Ketanji Brown Jackson for the crime of possession of images of child pornography, March 28, 2022, letter	3894
<i>Harvard Law Review</i> , "Prevention Versus Punishment: Toward a Principled Distinction in the Restraint of Released Sex Offenders," Vol. 109, No. 7 (May 1996), pp. 1711–1728, article	3896
Henry, Mary Kay, international president, Service Employees International Union (SEIU), Washington, DC, et al., a coalition of elected labor leaders of 27 unions and worker organizations representing working people providing essential services, statement	3914
Hispanic National Bar Association (HNBA), Washington, DC, statement	3916
Immigration Hub, Sergio Gonzales, executive director, Washington, DC, statement	3918
Jones, Hon. Doug, a former U.S. Senator from the State of Alabama, "Vivian Malone Jones: Alabama Women's Hall of Fame" recognizes Vivian Malone Jones at the time of her posthumous induction into the State of Alabama Women's Hall of Fame Class of 2021, tribute speech	3921
Luttig, J. Michael, former Judge, U.S. Court of Appeals for the Fourth Circuit, statement	3933
Mulvaney, Katie, "Here's What RI's Legal Community Says About Supreme Court Nominee Ketanji Brown Jackson," <i>The Providence Journal</i> , February 25, 2022, article	3934
National Association for the Advancement of Colored People (NAACP) Legal Defense and Educational Fund (LDF), Janai S. Nelson, president and director-counsel, et al., New York, New York, statement	3938
National Association for the Advancement of Colored People (NAACP) Legal Defense and Educational Fund (LDF), "The Civil Rights Record of Judge Ketanji Brown Jackson," report	3940
Planned Parenthood Federation of America (PPFA), Karen Stone, vice president, public policy and government relations, Washington, DC, statement ...	3979
Tushnet, Mark, "Parents Involved and the Struggle for Historical Memory," <i>Indiana Law Journal</i> , Vol. 91, No. 2 (April 2016), pp. 493–503, article	3981
United States Senate Committee on the Judiciary, Hon. Charles E. Grassley, a U.S. Senator from the State of Iowa and Ranking Member, U.S. Senate Judiciary Committee; Hon. Lamar Smith, a Representative in Congress from the State of Texas and Chairman, U.S. House of Representatives Judiciary Committee; and Hon. F. James Sensenbrenner, Jr., a Representative in Congress from the State of Wisconsin and Chairman, U.S. House Judiciary Subcommittee on Crime, Terrorism and Homeland Security; a letter to Hon. Patti B. Saris, Chairwoman, U.S. Sentencing Commission, with regard to a Public Hearing on Federal Child Pornography Crimes on February 15, 2012; February 14, 2012, letter	3992
United States Senate Committee on the Judiciary, Hon. Charles E. Grassley, a U.S. Senator from the State of Iowa and Ranking Member, U.S. Senate Judiciary Committee, et al.; a letter to Hon. Richard J. Durbin, a U.S. Senator from the State of Illinois and Chair, U.S. Senate Judiciary Committee, with regard to providing documents to the Republican Members of the Senate Judiciary Committee in connection with President Biden's nomination of Judge Ketanji Brown Jackson to be an Associate Justice of the Supreme Court of the United States; March 22, 2022, letter	3996
United States Sentencing Commission, "Recidivism and Federal Sentencing Policy: Overall; Offender Characteristics; Crime Types; and Sentence Length," research report data chart	3999

**CONFIRMATION HEARING
ON THE NOMINATION OF
HON. KETANJI BROWN JACKSON
TO BE AN ASSOCIATE JUSTICE OF THE
SUPREME COURT OF THE UNITED STATES**

MONDAY, MARCH 21, 2022

UNITED STATES SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Committee met, pursuant to notice, at 11:02 a.m., in Room 216 of the Hart Senate Office Building, Hon. Richard J. Durbin, Chair of the Committee, presiding.

Present: Senators Durbin [presiding], Leahy, Feinstein, Whitehouse, Klobuchar, Coons, Blumenthal, Hirono, Booker, Padilla, Ossoff, Grassley, Graham, Cornyn, Lee, Cruz, Sasse, Hawley, Cotton, Kennedy, Tillis, and Blackburn.

**OPENING STATEMENT OF HON. RICHARD J. DURBIN,
A U.S. SENATOR FROM THE STATE OF ILLINOIS**

Chair DURBIN. This hearing of the Senate Judiciary Committee will come to order.

Today, the Committee will begin its consideration of the nomination of Judge Ketanji Brown Jackson to be the 116th Justice of the United States Supreme Court. Welcome, Judge Jackson, and congratulations to you and your family.

Judge JACKSON. Thank you, Senator.

Chair DURBIN. This is a momentous occasion, and you have much to be proud of. I know you have many family members and friends who want to—you want to introduce, and we all look forward to hearing those introductions when you make your opening statement later.

At the outset, I want to note that I was sorry to hear that Justice Clarence Thomas was hospitalized yesterday. I am sure I speak for all the Members of the Committee in wishing him a speedy recovery.

Before I turn to my own opening statement, I want to briefly discuss today's order of events and the ground rules for the hearing.

Today, each Member of the Committee has 10 minutes to make an opening statement. We'll go in seniority order, switching between Democratic and Republican Senators. After all Members have made their opening statements, we'll hear from Judge Thomas Griffith and Professor Lisa Fairfax, who are here today to introduce Judge Jackson. Each introducer will have 5 minutes to make

an opening statement. Finally, we'll administer the oath to Judge Jackson and she will make her opening statement, and that will conclude today's events. Tomorrow, we'll begin rounds of questions.

For those sitting in the audience, welcome. We are glad you could be here to witness this historic occasion. I ask all of our guests to be respectful and quiet during the hearing. Please do not stand up unless you're entering or exiting the room, and if you stand up, you will be asked by one of our distinguished members of the Capitol Police to sit down. If you refuse, you'll be escorted out of the room. Let me clear: we will not tolerate any disruptions from the audience. Any disruption will result in immediate removal. I also ask that our audience be respectful of the members of the Capitol Police who are here today to ensure everyone's safety.

With that, we'll proceed to opening statements. Judge Jackson, as I said, thank you, again, for being here today with your family and friends.

The Supreme Court has a long and storied history. Its ranks have been filled by many superb Justices, whose contributions to the rule of law have stood the test of time. But the reality—the reality—is that the Court's members in one respect have never really reflected the Nation they served. When the Supreme Court met for the very first time in February of 1790, in the Exchange Building in New York, there were nearly 700,000 slaves without the right of citizenship in this new Nation of nearly 4 million people. Neither African Americans nor women had the right to vote. There was no equal justice under the law for a majority of people living in America.

In its more than 230 years, the Supreme Court has had 115 Justices. A hundred and eight have been white men. Just two Justices have been men of color. Only 5 women have served on the Court, and just one a woman of color. Not a single Justice has been a Black woman. You, Judge Jackson, can be the first. It's not easy being first. Often, you have to be the best, and, in some ways, the brightest. Many are not prepared to face that kind of heat, that kind of scrutiny, that ordeal in the glare of the national spotlight. But your presence here today, your willingness to brave this process will give inspiration to millions of Americans who see themselves in you. As I mentioned to you, I was at the steps of the Supreme Court this morning to see the rally in support of you. There were so many young African-American women and law students there seeing your pursuit as part of their dream.

In other important ways, though, you are no different than many nominees who have become before us. President Biden nominated you because he knew your qualifications are outstanding. This Committee knows you. You've appeared three previous times, and each time you've been confirmed with bipartisan support. And your professional record and life experience tell us what kind of lawyer, what kind of judge, and what kind of person you really are. Your guiding principles can be found in your life and in your work: that the Constitution must work for all Americans, not just the wealthy and powerful, that judges must show no favoritism, and that the judiciary must live up to the words emblazoned above the entrance, "Equal Justice Under Law."

So today is a proud day for America. We've come a long way since 1790, and we know that we still have a long way to go to form a more perfect Union. It's a moment that brings to mind something that the late Senator from Illinois, Paul Simon, my friend, said to Judge Ruth Bader Ginsburg at her nomination hearing. He said, "You face a much harsher judge than this Committee, and that is the judgment of history, and that judgment is likely to revolve around the question, did she restrict freedom or did she expand it?" I return to this statement time and again because it asks a vital question: how will history judge us? Judge Jackson, I have no doubt that history will remember you as a Justice who never stopped working to defend the Constitution, but I also ask the Members of this Committee, as we begin this landmark confirmation process, to consider how history will judge each Senator as we face our constitutional responsibility to advise and consent.

This moment also brings to mind something President Barack Obama, another trailblazer said, of a fellow Illinoisian when the late Justice John Paul Stevens announced his retirement. President Obama said, "While we cannot replace Justice Stevens' experience or wisdom, I will seek someone with similar qualities: an independent mind, a record of excellence and integrity, a fierce dedication to the rule of law, and a keen understanding of how the law affects the daily lives of America." Much like Justice Stephens, we cannot replace Justice Breyer, but with you, Judge Jackson, we have a nominee who embodies the same qualities as both of these outstanding Justices. You're independent minded and understand the critical importance of judicial independence.

Your record is one of excellence and integrity from the championship debate team at Miami Palmetto Senior High School, to Harvard and Harvard Law School, to your three judicial clerkships, your work as a Federal public defender, a lawyer in private practice, a member of the Sentencing Commission, a Federal district judge, and circuit court judge. Throughout your career, you've been a champion for the rule of law, determined to get it right, even at the risk of public criticism. As a member of the United States Sentencing Commission, a bipartisan group which reflected the spectrum of American thinking on law enforcement, you set out to make policy that truly represented congressional intent when it came to making Federal criminal sentencing fairer, and you did it by finding bipartisan common ground.

During your tenure on that Commission, 95 percent of the Commission's votes were either unanimous or consensus. For example, the Commission implemented the Fair Sentencing Act, a law that I negotiated with then-Senator Jeff Sessions, that reduced the infamous 100-to-1 crack-powder sentencing disparity, and you joined every one of your colleagues to make that change to the sentencing guidelines retroactive. You gave a powerful speech, and I'm going to quote it. You said, "There is no excuse for insisting that those who are serving excessive sentences under the long-disputed and now discredited prior guideline must carry on as though none of this has happened." The vote in favor of retroactivity was unanimous on the Commission. Republicans and Democrats shared your view.

And you've gone to great lengths to explain how the law affects real people. Indeed, with your nomination, we can be confident that the Court, its role, and its decisions will be more understandable to the American public. In your time on the bench, you've taken the time to explain your decisions and their consequences. When you were before this Committee just last year for your D.C. Circuit hearing, you described how you "take extra care to communicate with parties." You added, and I quote, "I speak to them directly and not just to their lawyers. I use their names. I explain every stage of the proceeding because I want them to know what's going on." As a result of that approach, you've made the law more approachable to litigants and American people.

The cameras and the lights here today can make it easy to forget that, at its core, the responsibility you seek is one of service, and I am fully confident you'll serve Americans from all walks of life and all backgrounds fairly and faithfully. Now, there may be some who claim, without a shred of evidence, that you'll be a rubber stamp for this President. For these would-be critics, I have four words: look at the record.

Your complete record has been scoured by this Committee on four different occasions: all of your nearly 600 written opinions read and reread; 12,000 pages of transcripts, meeting minutes, and other materials from the Sentencing Commission; your sworn testimony before the Committee less than a year ago; every published and reported word you've written or spoken; your detailed answers to lengthy questions. For those who say they need more, I would answer that you have sat down personally with every Member on this dais of the Committee, Democrats and Republicans. A fair review of all this makes clear your values and your guiding principles. You have ruled for and against Presidents and administrations of both parties. You've ruled for prosecutors and for defendants. You've ruled for workers and for their employers, and you've been faithful to the law and not to any person or political cause.

Now, there may be others who allege that you are before us today as a product of a campaign of dark money groups. Once again, your record and the process that led to this nomination belie that claim. To suggest that you're here merely because an organization supports you ignores your qualifications and the broad range of support you bring to this. In selecting you as his nominee, President Biden undertook a transparent selection process. He sought the input of Senators from both parties. Senator Grassley and I met in the Oval Room with the President. He invited us to proffer any nominees that we cared to do. At the end of the day, the President alone chose you. He's put his faith in you to deliver justice at the level of the Court. I share that faith.

In announcing your nomination, the President spoke to many reasons that you deserve to sit on the High Court. He noted the perspective you'll bring as a former member of the Sentencing Commission, as the first Justice since Thurgood Marshall with considerable criminal defense experience, as the second current Justice—only the second—to serve as a Federal trial court judge. He also noted your upbringing and the fact that you come from a law enforcement family. Yet despite that shared family experience, despite your record, we've heard claims that you are "soft on crime."

These baseless charges are unfair. A conservative National Review columnist called claims brought by one of my colleagues, “meritless to the point of demagoguery.” They fly in the face of pledges my colleagues made that they would approach your nomination with civility and respect. And fact checkers, including The Washington Post, ABC News, and CNN have exposed some of these charges as falsehoods.

Critics have even stooped to accusing you of sharing the views of the clients you represented, even though they know that your work as an attorney was in service to the Bill of Rights and the Constitution’s promise of effective assistance of counsel. Would law enforcement officials and organizations, including the International Association of Chiefs of Police, the National Organization of Black Law Enforcement Executives, and the Fraternal Order of Police, have endorsed your nomination if you were soft on crime? Of course not. I’m confident the American people will see through these attacks and any other last-minute attempts to derail your confirmation.

In closing, I want to share the words of one more Illinoisian, if you would bear with me, a rather famous one named Abraham Lincoln. In August 1864, at the height of the Civil War, President Lincoln addressed the 166th Ohio Regiment. Lincoln said to the soldiers, and I quote, “I happen temporarily to occupy this big White House. I am living witness that one of your children may look to come here as my father’s child has.” Judge Jackson, we are all just temporary occupants of the Senate, the House, even the lifetime appointment to the highest court in the land. You, Judge Jackson, are one of Mr. Lincoln’s living witnesses of an America that is unafraid of challenge, willing to risk change, confident of the basic goodness of our citizens. And you are a living witness to the fact that in America, all is possible.

I now recognize my colleague and friend, the Ranking Member, Senator Grassley.

**OPENING STATEMENT OF HON. CHARLES E. GRASSLEY,
A U.S. SENATOR FROM THE STATE OF IOWA**

Senator GRASSLEY. Judge Jackson, congratulations. Welcome to you and your family. I thank you for taking time to visit with me in my office after the President nominated you. Since President Biden announced his nominee for the Supreme Court, I have been encouraging my colleagues to schedule meetings with you, Judge Jackson, and they have come off. In addition, I’ve continually emphasized the need for a thorough, respectful process by the Committee.

Now, I want to talk a bit about what everyone watching should expect from this hearing and what they shouldn’t expect at the hearing. We will conduct a thorough, exhaustive examination of Judge Jackson’s record and views. We won’t try to turn this into a spectacle based upon alleged process fouls. Good news on that front, we’re off to a very good start. Unlike the start to the Kavanaugh hearings, we didn’t have repeated choreographed interruptions of Senator Durbin during his opening statements like Democrats interrupted me for more than an hour during my opening statement on the Kavanaugh hearings.

What we will do, however, is ask tough questions about Judge Jackson's judicial philosophy. In any Supreme Court nomination, the most important thing that I look for is the nominee's view of the law, judicial philosophy, and view on the role of a judge in our constitutional system. I'll be looking to see whether Judge Jackson is committed to the Constitution as originally understood.

We all know there's a difference of opinion about the role judges should play. Some of us believe that judges are supposed to interpret the law as it was understood when written, not make new law or simply fill in a vacuum. Those of us who share that view think that, under our Constitution, Congress and not the Federal courts are given the authority to make law and to set policy. Now, there are others who believe that the courts should make policy. They believe in a so-called living Constitution. They think that the Constitution's text and structure don't limit what a judge can do. To them, deciding what the Constitution means is really a "value judgment." Under that approach, judges can exercise their own independent value judgments.

One of the leading advocates for this approach explained that as a judge, you "reach the answer that essentially your values tell you to reach." In other words, those who ascribe to this philosophy think that the founders really meant to hide elephants in mouse holes. Then, with a bit of creativity, these judges can always find that elephant. That sounds like a good job description instead for legislators and not for judges. But, for at least 4 years, Democrats have systemically voted against many well-credentialed nominees that were diverse professionally, diverse geographically, diverse religiously, and diverse ethnically. Was it racist or anti-women for them to do so? I don't believe that it was. Democrats did it because the nominees didn't agree with living constitutionalism, just as Republicans have opposed nominees based upon their judicial philosophy.

There are lots of problems with living constitutionalists. In the Senate, we spend a lot of time writing legislation. We argue over the language. We negotiate over how broad or narrow certain provisions of law should be. If we can't convince our colleagues to adopt all of our ideas, we have been known to compromise every once in a while. We depend on judges to interpret the laws as we write them. If judges impose their own policy preferences from the bench and, essentially, revise the laws we pass, it makes it harder for us to write good laws. Sometimes we need to include a provision that's very broad to get a colleague's support. If a judge rewrites the law later because of vague notions about fairness, or equity, or common good, that unravels all of our work here in the Congress. More importantly, the American people should be able to read a law and know what it means. They shouldn't have to ask how a Federal judge who disagrees with the law could reinterpret the words on that page. All of this leads to the conclusion as to why we must carefully examine Federal judges' records, especially Supreme Court nominees.

Judge Jackson has served as an assistant public defender, worked in private practice, and served on the United States Sentencing Commission. She also served as a Federal district court judge from 2013 to 2021. She's served on the D.C. Circuit since

June last year. I'm sure Senators will have a few questions for Judge Jackson about the two opinions she's authored since joining the D.C. Circuit. As for her district court record, there have been some accusations that we cherry-picked some of Judge Jackson's criminal cases. Well, don't worry. We're going to talk about other cases as well.

I was disappointed that we weren't able to get bipartisan agreement to ask for Judge Jackson's documents from her time as vice chair of the Sentencing Commission. "The Commission is an independent agency created to advise and assist Congress and the executive branch in the development of effective and efficient crime policy," and that's a quote. Unfortunately, it sounds like we'll have to wait until those documents are required to be released, and that will be about 20 years from now.

Democrats have argued that Judge Jackson's time on the Commission is an important part of her experience that she'll draw on as a judge. The Democrats are right on that point. That's why it would've been good to see what her views were as the head of the Commission. Explained in a letter to Senator Durbin, the public documents turned over to this Committee represent the consensus views of the Commission and not necessarily Judge Jackson's own views.

The Obama White House sent us roughly 68,000 pages of material, but more than 38,000 of the 68,000 pages are repeated copies of email threads that—keeping track of the tweets about the Garland nomination. Those emails contained just one tweet about Judge Jackson. More than 13,000 of the 68,000 pages are just lists of previous nominations, so that leaves only 16,000 of 68,000 that we received from the White House that aren't obviously—useless like all the other documents received. But for comparison, the White House has still withheld 48,000 pages under the Presidential Records and FOIA exemptions. Now that's a lot of hiding, but the limited number of useful records that we received from the Obama White House show exactly why the Sentencing Commission documents would've been important.

There are a number of dark money groups on the left that argue Federal judges should make policy decisions based on judges' own values. I've talked about the troubling role of far-left dark money groups, like Demand Justice, have played in this administration's judicial selection process. When Demand Justice isn't creating short lists for President Biden to pick judicial nominees from or putting out new litmus tests, they're running ads—campaigns attacking the independence of the judiciary. They've strongly supported the so-called progressive prosecutors who are soft on violent crime in the face of rising crime waves in cities like San Francisco, Philadelphia, Boston, and Los Angeles.

Now, what does that have to do with the nominee before us? The Obama White House records indicate that a co-founder of the Demand Justice played an important role in Judge Jackson's nomination to the Sentencing Commission and the district court. The Demand Justice co-founder even interviewed Judge Jackson about the nomination to the Sentencing Commission. It would be helpful to know what the Demand Justice co-founder learned from that process and why they strongly support Judge Jackson.

However, it hasn't all been bad on the document front, I want to make clear. We'd ask for briefs that aren't available online for D.C. Circuit cases Judge Jackson worked on as an attorney. At first, we were told they might not be available for a few weeks, but to our pleasant surprise, we received them early, apparently because the White House had asked for the documents as well. Judging by the timetable we were originally given to get the briefs, that request was made after she was announced. Now, those documents concern Judge Jackson's time as Assistant Federal Public Defender.

Democrats have accused Republicans of vilifying nominees who have represented criminal defendants. That's just not the case, and I think that's a very unfair accusation. Previous Supreme Court nominees have also represented criminal defendants on appeals. Chief Justice Roberts was appointed by the Supreme Court to represent a defendant in an important criminal law case, and he also helped represent an inmate in a Florida death row. And Justice Barrett represented a criminal defendant appealing their conviction while she was in private practice. Now, I've distinguished between two types of nominees who have worked in criminal cases. There are Bill of Rights attorneys who want to protect defendants' constitutional rights, then there are what I've called criminal defense lawyers, who disagree with our criminal laws. They want to undermine laws that they have policy disagreements with, and, of course, that's a very important difference. Just a year ago—no, maybe it's now 2 years ago—Democrats had no trouble opposing nominees based on arguments these nominees made on behalf of clients. I can read off quotes of Democrats doing that to Trump nominees, but we only have a few minutes for these opening statements, and I'd run out of time.

On a final note, during Justice Barrett's confirmation hearing, Democrats said that she would be a "judicial torpedo aiming at protecting—protections for pre-existing conditions." We heard that argument repeatedly. Conservatives and anyone who actually looked at her record and laws said that that was strictly nonsense, but Democrats were sure otherwise. Well, when that case was finally decided, Democrats were proven wrong. I'm sure that won't deter any of my Democrat colleagues for making some confident predictions this time around as well, but the public record should remember their track record and perhaps take those claims with a grain of salt. They were wrong in their strong declarations how Justice Barrett would rule.

Judge Jackson, congratulations on your nomination. I look forward to hearing from you about your record, your views on the law, and your judicial philosophy. Thank you.

Chair DURBIN. Thank you, Senator Grassley.

Next is the President Pro Tem of the Senate and former Chairman of the Committee, Patrick Leahy.

**OPENING STATEMENT OF HON. PATRICK J. LEAHY,
A U.S. SENATOR FROM THE STATE OF VERMONT**

Senator LEAHY. Well, thank you, Mr. Chair. Judge Jackson, welcome. It's really good to see you again.

You know, today and actually throughout this week, the Committee and the country are going to hear from Judge Jackson. She's been nominated to be the next Associate Justice of the United States Supreme Court. Any nomination—any nomination—to the Court is historic. There have only been 115 Justices in our Nation's history. Judge Jackson's nomination, of course, is historic in more ways than one. Her nomination, pending a confirmation by the Senate, will bring us one step closer to having a Supreme Court that is more reflective of our Nation, one where diversity, race, and gender, background, education, and experience allow all Americans to look to their Court and see in its Justices a reflection of the American people.

Judge Jackson, you know, with your presence here today, you are writing a new page in the history of America, a good page. Who the President nominates and the Senate decides to confirm to our Federal judiciary, and especially our Nation's highest court, that's extremely important. The American people, our constituents, and their faith—and their faith in the courts, that's central to our democracy. If they lose their faith, then democracy loses.

The decisions made in our courts and, ultimately, in the Supreme Court affect the daily lives of each one of us. Fundamental questions about, for example, access to healthcare, the integrity of our elections, the fairness of our criminal justice system, the preservation of bedrock environmental laws, protections for workers, these issues and many more are routinely decided by the Court. Every American must believe that the Court is going to be impartial. They must believe that our courts are not a mere political arm of the Executive or the Congress but faithful only to the rule of law. The stakes in democracy are simply too high.

Let's make a few things clear. Judge Jackson is no judicial activist. She is not a puppet of the so-called radical left. She's been praised by Republican-appointed judges for jurisprudence. Lawyers from the right and the left who appeared before her in court have called her judicious and even-handed. Before I was in the Senate, I tried a lot of cases in trial court and then courts of appeal. That's what I wanted, somebody who was judicious and even-handed. I didn't care what their politics were. Judge Jackson is not anti-law enforcement. She hails from a law enforcement family. She's also won the support of preeminent national law enforcement organizations, including the National Fraternal Order of Police.

And, no, she's not soft on crime. Her background as a Federal public defender would bring an informed perspective of our criminal justice system to the Supreme Court. I'm proud of being a former prosecutor, but confidence in my prosecution of a case was strongest when I knew the defendant had the best possible representation. When both sides and the presiding judge have real grasp of our criminal justice system, that's when justice is most likely to be done. So I would say that Judge Jackson's background is not a liability to the Court. It's a much-needed asset to the Court.

And since her nomination, again, here today, we've heard about the long, distinguished record of Judge Jackson: graduate of Harvard, Harvard Law School; a judicial clerk at the district, circuit, and Supreme Court level; a Federal appellate judge; a Federal dis-

strict court judge; a member of the U.S. Sentencing Commission; an attorney in private practice; and a Federal public defender. What a résumé. All these experiences and perspectives have provided her a mastery of our justice system, and that's, in particular, the criminal justice system. If she is confirmed, she would become the first-ever Justice to have served as a Federal public defender. That's an important experience given how much the Court shapes our criminal justice system. I say that from my experience as a Senator but also my experience for nearly a decade as a prosecutor.

And perhaps most of all, it is Judge Jackson's nearly 10 years as an appellate and trial judge that underscore the experience she would bring to the Supreme Court. She was confirmed unanimously by the Senate in 2013 to the D.C. Circuit Court. She served with distinction for 8 years, she issued more than 500 opinions, she presided over a dozen trials, and a bipartisan majority of the Senate confirmed her to the D.C. Circuit Court of Appeals last year. Let's be honest. She's a fair and impartial jurist with a fidelity to the law above all else. That's what Americans want to see in a Supreme Court Justice.

Years of so-called judicial wars have left Americans feeling like our courts have become increasingly partisan. The extreme interests of pressure groups on both sides of the political spectrum have left the American people wondering if they can get a fair shake in our courts. And yet, in this moment, we have before us a unique opportunity to change that narrative. I'm under no illusion that we can mend this process overnight, but we have before us a nominee who has brought us together across party lines before and one I hope who could bring us back together again. The Senate can change course, return to how we fairly and objectively evaluate nominees. We can do that with the highly qualified nominee we have in Judge Jackson.

Now, as Chair Durbin said, I'm the President Pro Tempore of the Senate. I'm a former Chairman of this Committee. I have participated in 20 prior Supreme Court nomination processes, mostly into confirmation, a small handful. In fact, the first Justice I voted on was from your State, Senator Durbin, John Paul Stevens. I've supported nominees from both Democratic and Republican Presidents. And in Judge Jackson, I've found a distinguished nominee with an unassailable record and who merits our respect regardless of party.

I believe the American people will see in her what I've come to learn in my review of her career and her life story. Her nomination is reflection of the arc of our democracy, the arc that bends toward justice, as Dr. King once said. Although in fits and starts with every generation, we have sought to become more inclusive, more representative. We've looked to civic leaders, elected representatives, and, yes, to judges to strengthen our democracy and to recognize that our strength comes from our diversity. Judge Jackson's story, her nomination today, is part of the evolving story of America.

So, Judge Jackson, I want to congratulate you on this nomination. Despite all the darkness in the world and the political brinkmanship that has unfortunately become a hallmark of Congress in recent years, your nomination actually fills me with hope, hope for the Court, hope for the rule of law, hope for the country. One need

look no further than the chaos, the devastation, and the inhumanity halfway around the world in Ukraine to know how precious our democracy is and how precious is the legacy we have in our independent Federal judiciary.

I need look no further than my own grandchildren, all of them, to know how necessary our fight for freedom, fairness, and equality is. The independence and impartiality of our courts, including the Supreme Court, are a cornerstone in the great experiment as the United States. And you, the American people, have a nominee in whom they can be proud. We have before us an historic moment, and I hope we can meet it as Senators, so I look forward to your testimony. Thank you.

Chair DURBIN. Thank you, Senator Leahy.

Next is another former Chair of the Committee, the Senator from South Carolina, Lindsey Graham.

**OPENING STATEMENT OF HON. LINDSEY O. GRAHAM,
A U.S. SENATOR FROM THE STATE OF SOUTH CAROLINA**

Senator GRAHAM. Thank you, Mr. Chairman. Again, congratulations, a well-deserved honor here. You have worked hard all your life, and you have much to be proud of.

I have said in the past that I think it's good for the Court to look like America, so count me in on the idea of making the Court more diverse. And in the history of our country, we've never had an African-American woman serve on the Court, but I also said—that didn't get much coverage—I want—I want—I want the Court to play a particular role in America. One is make it more look like the country but also make it operate in the confines of the Constitution. That didn't get a lot of coverage.

So the hearings are going to be challenging for you, informative for the public, and respectful by us. I hope we can meet that—those criteria. It won't be a circus. We're off to a good start. Chairman Grassley couldn't get the first word out of his mouth before they shut down the place, so that's off to a good start. Most of us couldn't go back to our offices during Kavanaugh without getting spit on. I hope that doesn't happen to y'all. I don't think it will.

As to the historic nature of your appointment, I understand, but when I get lectured about this from my Democratic colleagues, I remember Janice Rogers Brown, an African-American woman. It was filibustered by the same people praising you. I remember Miguel Estrada, one of the finest people I've ever met, completely wiped out, didn't make it through the gang of 14, whatever gang I was in—I've been in so many, I can't remember. He didn't make the cut; well-lived life, just completely ruined. So if you're a Hispanic or African-American conservative, it's about your philosophy. Now it's going to be about the historic nature of the pick. No, it's going to be about the philosophy.

The bottom line here is when—it is about philosophy. When it's somebody of color on our side, it's about we're all racists if we ask hard questions. It's not going to fly with us. We're used to it by now, at least I am, so it's not going to matter a bit to any of us. We're going to ask you what we think you need to be asked. And, Senator Hawley, you need to ask her about her record as a district

court judge. You should. I hope you do, and we'll see what she says. Very fair game.

Now, President Biden had a choice here, and he has every right to make it. Elections have consequences. He had many qualified African-American women to choose from. He chose you. Michelle Childs, a district court judge from South Carolina supported by Jim Clyburn that was in the mix. I think it came down to about 2, 3, 4 people. I don't know for sure, but that's what the press was reporting. And when it came to Judge Childs, this Arabella Group—Senator Whitehouse, you talk about dark money. You may be on to something. This Arabella Group is funded by Soros and some other liberal billionaire. They got so many groups within their group, I can't name them all now, but they basically said if you—if you pick Childs, you may have a primary opponent. The AFL-CIO said Justice—Judge Childs was a union buster. The attacks from the left against Judge Childs was really pretty vicious, to be honest with you. So you say, Judge Jackson, you don't have any judicial philosophy per se. Well, somebody on the left believes you do or they wouldn't have spent the money they spent to have you in this chair, so we're going to find out how that statement holds up over time.

A viewer's guide to this hearing, she will be asked about her sentencing practices as a district court judge, and she'll have a chance to explain her reasoning. And you can make up for yourself what this means, but it's good to be asked about her legal views. I'll ask her about the law of armed conflict and her view of the law of armed conflict. The fact that you represented Gitmo detainees is not a problem with me. Everybody deserves a lawyer. You're doing the country a great service when you defend the most unpopular people. But I do want to know about your amicus briefs after you're no longer a defense counsel weighing in to the Supreme Court about how they decide law of war issues. That matters a lot to me.

I think it does matter that the groups that came to your aid at the expense of Judge Childs, how did that happen and why were they doing what they were doing. What is it about your nomination that the most liberal people under the umbrella of Arabella threw their money, their time, their support to you, and threatened Joe Biden if he picked Judge Childs? I want to know more about that. I want to know about your judicial philosophy because people on the left, the far extreme part of the left, believe that you were the best bet, and I want to know why they reached that conclusion. Maybe there's no explanation you can give us, but let—we'll talk about that.

Now when we say this is not Kavanaugh, what do we mean? It means that Democratic Senators are not going to have their windows busted by groups. That's what it means. It means that no Republican Senator is going to unleash on you an attack about your character when the hearing is virtually over. None of us, I hope, have been sitting on information about you as a person for weeks or months, you come into our offices, and we never share it with you to allow you to give your side of the story. We wait to the very last minute when the hearing's about to be gavelled, concluded, and say, oh, by the way, I've got this letter. And it so happened that every media outlet in the country had the letter, too, so the next

morning, there were headlines all over the country, really, accusing Judge Kavanaugh being basically Bill Cosby. None of us are going to do that to you, and if any of us does that to you, all hell will break out, and it should.

The media will be your biggest cheerleader. They're in your camp. They have every right to pick who they want to pick. There won't be this constant attack on you like Judge Kavanaugh and other conservative judicial appointments. There won't be any questioning of where you go to church, what kind of groups you're in in church, how you decide to raise your kids, what you believe and how you believe in God. Nobody's going to do that to you, and that's a good thing. So you're the beneficiary of a lot. You're the beneficiary of Republican nominees having their lives turned upside down, and it didn't work. So I'm hoping that we can have a hearing that's respectful, that's informative, that's challenging.

And President Biden has every right to pick who he'd like to pick. That comes with winning the White House, and I've been very inclined to support the picks of people that I would not have chosen. But this is a new game for the Supreme Court, and this game is particularly disturbing to me because there's been a wholesale effort of the left to take down a nominee from my State, and I don't like it very much. And if that's the way the game is going to be played, then I'll have a response, and I don't expect it to be—reward that way of playing the game. Justice Childs—Judge Childs would've gotten 60-plus votes. There have been people in my caucus that would've voted for her, even though we knew she would be a reliable liberal vote, because I and Senator Scott would've stepped up. Now we're pick—now we're facing a choice sponsored by the most radical elements of the Democratic Party when it comes to how to be a judge. They have the most radical view of what a judge should do, and you were their choice.

And you will be asked do you support expanding the Supreme Court. I hope you can give us an answer because it shouldn't be hard. Either you do or you don't. Justice Ginsburg said no. She thought if you just change the number of the Court every time somebody new came in power, it would ruin the Court in the eyes of the public and make it a joke over time. I agree with that. So I hope you can give us an answer to that question because I think the Court would be better off if the judges stood up for the Court, if the judges told politicians don't play this game with the Court because over time, nobody wins.

So congratulations. It's going to be a couple interesting days, and we're off to a better start than we have been in the past. And the one thing I can promise you, you will not be vilified. You won't—you will not be attacked for your religious views. You will not be accused of something that you could not defend yourself against until it was too late. Thank you.

Chair DURBIN. Thank you, Senator Graham.
Senator Feinstein.

**OPENING STATEMENT OF HON. DIANNE FEINSTEIN,
A U.S. SENATOR FROM THE STATE OF CALIFORNIA**

Senator FEINSTEIN. Thanks very much, Mr. Chairman. I want to begin by congratulating you, Judge Jackson, on this appointment.

I've reviewed the records of a number of judicial nominees during my service on this Committee. This is actually the 10th set of confirmation hearings for a Supreme Court nominee that I've participated in during my time in the Senate. In looking at your record, it's clear that you have the qualifications, and the experience, and the knowledge needed to serve on the Supreme Court, and as a woman, it makes me very proud of that.

As we begin these hearings, we as Senators take seriously our constitutional duty to advise the President on his appointment of a new Supreme Court Justice. In the current term alone, the Supreme Court is addressing cases on issues that are foundational to who we are as a country. Let me just give you three examples: The Court is considering a woman's fundamental right to control her own body and make her own healthcare decisions, it is considering the legal authority of the Environmental Protection Agency to fight climate change, and it's considering whether States have the power to enact commonsense gun safety protections. As a former mayor, I saw how these official—how these problems affect people, everyday people on everyday streets throughout my city and then, subsequently, the State of California.

This is not your first time at this. In fact, it's your fourth time in front of this Committee. The full Senate has already confirmed you on a bipartisan basis three times to serve as vice chair of the U.S. Sentencing Commission in 2010, as a Federal district court judge, 2013, and as a Federal appellate court judge in 2021, and you have done us proud. Each of the three times, the Senate has considered your record, your experience, and your ability. Senators on both sides of the aisle have determined that you have the qualifications and the temperament it takes to uphold the values of our judicial branch. As I see it, those values are knowledge, even-handedness, impartiality, integrity, respect for the rule of law, and fundamental fairness to all, and your record actually shows that you exemplify these values.

The Supreme Court is not a political institution. Rather, the Court stands above politics and above partisanship, and we look at Federal judges to be independent and unbiased. Judge Jackson, in reviewing your record, one thing in particular stands out to me, and that's your commitment to uphold justice under the law. This is one of the ultimate responsibilities of the Supreme Court, and your record suggests to me that you understand the weight of that responsibility. You've had several mentors early in your career who understand—who I understand were important in instilling these values in you as a young lawyer. One of these—those mentors was Justice Stephen Breyer, who you served as a law clerk, and to whose seat on the Supreme Court you have now been nominated. What a treat for you to see that happen and I know for him as well. Justice Breyer has been a thoughtful and even-handed judge throughout his career, so you have learned from the best, and you have brought those lessons and that dedication to equal justice with you throughout your career in the law.

You have strong credentials. You're a graduate of both Harvard University and Harvard Law School, a former Supreme Court clerk, and you have served as a Federal judge for 9 years, most recently on the U.S. Court of Appeals for the District Circuit. These

are impressive credentials, and they are also familiar to those of us who have received—excuse me—who have reviewed numerous nominees to the Court. But you also bring experiences that are less common, especially at the Supreme Court. The first is your service as a Federal public defender earlier in your career. If you are confirmed, you would be the first ever Federal public defender to sit on the Court and the first Justice since Thurgood Marshall with significant experience representing low-income defendants in criminal cases.

I believe this is very significant and important because, as a former public defender, you understand the power of our constitutional rights, including the Sixth Amendment right to counsel and the Fifth Amendment right to due process. You also understand the effect of law and the law enforcement system on the most vulnerable, and I believe your 8 years of expertise as a trial judge on the D.C. District Court is very valuable. So if confirmed, you would be one of only two former Federal district court judges serving on the Court, the other being Justice Sotomayor.

I believe your perspective as a former trial judge will serve you well on the Court. You've been responsible for implementing the precedents set by higher courts, and, because of that, you understand the need for clarity in legal opinions, for achieving consensus wherever consensus is possible, and that has been your record. It's important to have Justices with a broad set of views and experiences on the Supreme Court, and I believe your background and your experience will only serve to strengthen the Supreme Court.

I trust that my colleagues on this Committee will recognize that you are unquestionably qualified for this position. I wish you well. I look forward to learning more about you over the course of the coming days. Thank you, Mr. Chairman.

Chair DURBIN. Thanks, Senator Feinstein.
Senator Cornyn of Texas.

**OPENING STATEMENT OF HON. JOHN CORNYN,
A U.S. SENATOR FROM THE STATE OF TEXAS**

Senator CORNYN. Thank you, Mr. Chairman. Judge Jackson, let me join my colleagues in extending a warm welcome to you and your family. Congratulations on your nomination.

I enjoyed sitting down with you recently and talking about your experience as both a lawyer and a judge and how that's molded your views of our judicial system. In the coming days, I hope we can have a candid conversation about your record and your judicial philosophy. As I told you the other—the other day, these proceedings will be thorough but civil. As a Member of this Committee I've had the opportunity to provide advice and consent on seven previous Supreme Court nominations. This is number eight. I've seen the good, the bad, and the ugly when it comes to the way the Senate conducts these proceedings, and so have the American people.

One of the best things I think comes from this process is—I think this is a teachable moment that will remind all of us about the wisdom of the founders who wrote a Constitution that made sure that our rights would be fixed and certain so that these rights, whether they are the right to keep and bear arms or the right to practice

one's faith, would be preserved from generation to generation. As you know, the founders established three separate branches of our Government, a system of checks and balances, if you will. This was done for the purpose of preserving individual freedom and avoiding tyranny, and ensure that our Government was ultimately accountable to the people from whom all political power derives.

Article III, as you know, vests the Supreme Court and inferior courts with the judicial power, but the framers were very clear the Courts are not vested with a policymaking authority. According to our Constitution, courts hear cases and controversies and decide them, nothing more, nothing less. That's an important distinction to remember in the days that lie ahead. Indeed, the framers envisioned that the Courts would be—would have a modest, but very important, role in our three branches of Government. You'll recall Federalist 78 where Alexander Hamilton said the courts would have “no influence over either the sword or the purse,” and that, “It may truly be said to have neither force nor will but merely judgment.” Part of that judgment requires a judge to go where the law commands, whether or not you personally approve or not, and it starts with deciding cases as presented and not cherry-picking the facts or the law, and starting with the decision and then justifying it by the way—by cherry-picked facts and provisions of the law.

While the framers provided that the President would nominate judges, the framers also set up a framework that allowed judges, once you are confirmed, to exercise independent judgment, free from elections and politics. And so these Supreme Court confirmation hearings are really the only chance we have as representatives of the people to vet somebody who will serve the remainder of their life. Unfortunately, there are some driven by their ideology that want the Supreme Court to do more than what I've just described. These are some of the same people who tried to bully Justice Breyer into an early retirement. These activists demand that the Court make policy and deliver results they can't achieve through the deliberation, compromise, and rough and tumble of legislative politics. And when the Court does not deliver the results they want, they attack its institutional integrity and legitimacy.

In recent years, these radical views have made their way into the mainstream. On the campaign trail, President Biden refused to disavow court packing. Two years ago, the Democratic Leader of the Senate went to the Supreme Court steps and threatened two sitting Supreme Court Justices by name if they did not rule in a particular way. Dark money groups, like Demand Justice, have paid millions of dollars to promote court packing and sow public distrust in the legitimacy of the Supreme Court. Justice Breyer, as you know, recently warned of the crippling effect this politicization of the Court in its decisionmaking can have. He said, “Without the public's trust, the Court would no longer be able to act as a check on the other branches of Government and a guarantee—guarantor of the rule of law, threatening the foundations of our constitutional system.”

Judge, I know you know that the courts are not designed to deliver particular policy outcomes or to invent new rights out of whole cloth. That's why it's imperative that we explore your judicial philosophy during this hearing. I will say I was a bit troubled

when you—that you have not so far provided us with much clarity on that matter. Someone as accomplished as you are, who spent years engaging and thinking about our Constitution and laws, has surely formed a judicial philosophy. This is not your first rodeo. You’ve had an impressive career, Judge, as a Supreme Court clerk, appellate advocate, and trial court judge. I like the fact that you’ve had such broad experience in our judicial and legal system, but there are still unanswered questions that remain.

I’m a bit troubled by some of the positions you’ve taken and arguments that you’ve made representing people who have committed terrorist acts against the United States and other dangerous criminals. As someone who has deep respect for the adversarial system of justice, I understand the importance of zealous advocacy, but it appears that sometimes this zealous advocacy has gone beyond the pale, and, in some instances, it appears that your advocacy has bled over into your decision-making process as a judge.

You’ve had some cases reversed, like all judges do, but some of them were particularly high profile when you ruled against a Republican administration. I’m eager to understand why, in some instances, you found that you could not decide a particular issue while, in other instances, you enjoined a Republican administration from implementing its policies. I’m also interested, as others have mentioned, in your opinion why pro-abortion dark money groups, like Demand Justice, and anti-religious liberty groups are pouring millions of dollars into a public campaign in support of your nomination.

Judge Jackson, these are some of the questions and concerns I have. I assure you that you will have every opportunity to address these concerns as the Committee evaluates your ability to fairly and impartially deliver justice, should you be confirmed. So I welcome your testimony at these hearings, and I look forward to our give and take. Thank you very much.

Chair DURBIN. Thanks, Senator Cornyn.
Senator Whitehouse, Rhode Island.

**OPENING STATEMENT OF HON. SHELDON WHITEHOUSE,
A U.S. SENATOR FROM THE STATE OF RHODE ISLAND**

Senator WHITEHOUSE. Thank you very much, Chairman.

Welcome, Judge Jackson. I could not be more delighted to have you here.

This is a refreshing moment. We are holding a hearing for an accomplished, experienced, highly qualified nominee to the Supreme Court, who came to us not through a dark money-funded turnstile, but through a fair and honest selection process.

Judge Jackson has unparalleled breadth of experience, both on and off the bench. She has already been confirmed by the Senate three times. She serves on what is often called the second-highest court in the land. The D.C. Circuit handles some of the most difficult and consequential cases in the Nation, often taking up questions that later come before the Supreme Court. Judge Jackson, that will enable you to jump right in once confirmed.

Before the D.C. Circuit, Judge Jackson was a trial judge in the District Court in the District of Columbia, ruling on hundreds of

cases and presiding over trials, including many jury trials. Judge Jackson, you have presided over virtually every kind of case a Federal trial judge can hear across criminal and civil law. You have more experience actually trying cases in your courtroom than any other member of the Court.

As a member of the U.S. Sentencing Commission, you helped establish the policies and practices for Federal courts when deciding criminal punishments. With commissioners from both parties, you helped implement our bipartisan Fair Sentencing Act, complicated and consequential work, and we thank you.

It matters to me, Mr. Chairman, that Judge Jackson was also a civil litigator and public defender. She wasn't groomed in partisan petri dishes. She learned practical courtroom experience in both civil and criminal law, how the judicial system works, and how it serves or doesn't serve different litigants.

And I must say that in Rhode Island, we love that before you clerked for Justice Stephen Breyer, you clerked for Rhode Islander Bruce Selya on the First Circuit. Judge Selya was nominated by Ronald Reagan. He is well regarded by bench and bar, and he thinks the world of Judge Jackson.

"She is absolutely everything you would want in a Supreme Court Justice," he told the Boston Globe in February. "She has all the tickets in terms of her intelligence, her education, her work experience, and her demonstrated judicial temperament."

He actually said that waiting for the Supreme Court selection process to take place made him feel like a father waiting to hear his daughter's college admissions results. We very much appreciate that Rhode Island touch to this nomination.

Judge Jackson is steadfastly committed to the Constitution and the rule of law, and her record reflects the type of even-handedness and independence that will make her such a good Supreme Court Justice. Her guiding principle, she has said, is to "consistently apply the same level of analytical rigor to a case, no matter who or what is involved in the legal action." She says this means you can—quoting again—"be consistent in the way you are analyzing the issues, and you can set aside any thoughts about who is making the arguments and what advantages any side might take away from your opinions."

"If you have fidelity to the rule of law that is grounded in looking at only those inputs," she said, "then I think you can rule without fear or favor."

Mr. Chairman, Judge Jackson will be an exemplary Justice, both because of the qualities that she possesses and because she did not undergo a secret preselection process to get here. She is before us on the basis of her own merit, not on the recommendation of a secretive right-wing donor operation hiding behind anonymous multi-million dollar donations and aimed at capturing the United States Supreme Court as if it were some 19th century railroad commission.

The unpleasant fact is that the present Court is the Court that dark money built. Anonymous donations funded the Federalist Society while it housed the selection turnstile run by the dark money donors. Anonymous money funded the dark money group down the

same hallway as the Federalist Society that ran the dark money political campaigns for the selected Justices.

And because of all that secrecy, Americans are denied any real understanding of the overlap of all that dark money with the political dark money funding the Republican Party, which could well explain the wreckage of Senate norms, rules, and procedures that accompanied the confirmation process of recent nominees.

Judge Jackson's nomination and the process by which she was selected stand in sharp contrast. President Biden undertook a thorough and independent review of her record, and she will proceed through a thorough and fair process here in the Senate. We will abide by the new precedents set by Republicans in recent years, but we will not be fabricating new ones.

We've already seen dark money groups use dark money to run ads charging that dark money swayed this selection. We are hearing that again today. Ironical, when hundreds of millions of dollars in right-wing dark money built the current Court majority and still signals its wishes through flotillas of dark money front groups posing as amici curiae. I welcome the debate on these points, and I look forward to hearing more from the excellent nominee before us.

Judge Selya counted the late Justice Ruth Bader Ginsburg an old friend. "I see some of the same qualities in Ketanji that I saw in Ruth," he said, "humility, the ability to inspire others in a quiet way, not at the top of her voice."

"Some people," he said, "have the capacity to inspire by example and the force of their reason." Judge Jackson, I'm certain your capacity to inspire through force of reason will be on display here this week.

Thank you, Chairman Durbin, for your leadership of the hearing, and thank you, Judge Jackson, for being with us today.

Chair DURBIN. Thanks, Senator Whitehouse.

Senator Lee of Utah.

**OPENING STATEMENT OF HON. MICHAEL S. LEE,
A U.S. SENATOR FROM THE STATE OF UTAH**

Senator LEE. Thank you, Mr. Chairman.

Thank you, Judge Jackson, for joining us today.

I appreciated the conversation you and I had in my office a few days ago and your willingness to engage in a lively and interesting conversation during that and look forward to more of that this week.

I've enjoyed also meeting your husband and your two lovely daughters. They're wonderful people.

I'm grateful to you for your service, your service to the Federal judiciary and as a member of the bar. You bring to the Court, as I mentioned to you last week, a unique set of experiences. If you're confirmed, you will be someone who has served at all three levels of the Federal judiciary, and as a result of that, you'll have a perspective that's different than that of most who have served on that Court during the modern era. And I appreciate your willingness to be considered and to be here to talk to us about our questions.

I echo what many of my colleagues have said today in that I am dedicated, as I always have been, to making sure that these hearings are respectful. Engaging in the politics of personal destruction

is not something we should ever aspire to. It is something that has occurred on this Committee in the context of Supreme Court nominations.

I'm pleased to say that it has never been under Republican leadership that such attacks have occurred, and I intend to make sure that this hearing is no exception to that. Here are a few reasons for that.

First and foremost, the most obvious is that respect to human beings requires it. Second, it's important because we focus on personal effects. That means we will be betraying our duty under the Constitution and to our constituents to make sure that we do our jobs fairly and properly. When we're focused on things that we have no business doing, like bringing forward spurious, last-minute, uncorroborated accusations of a personal nature, we neglect the importance of talking about the jurisprudential role, the philosophy that guides individual jurists, and the document that we're all sworn to uphold and protect, the Constitution of the United States.

It's also important for an additional reason, a third reason, that has to do with the fact that having been nominated to this position, we know that you stand a very decent likelihood of ultimately being confirmed to this position, in which case you'll serve as a member of the Supreme Court of the United States. And I think it's important that even when, especially when we've disagreed with decisions issued by that tribunal, we as a Committee, as the Senate Judiciary Committee, not engage in speech or behavior that would undermine the legitimacy of the Supreme Court of the United States.

You see, it's the legitimacy of the courts that gives them their potency, their power, their significance in our system of Government. We all have a duty to make sure that we don't undermine that very thing that we purport to be protecting.

Let me tell you some of the things that I look for when reviewing a nominee and a few things that I intend to focus on in these hearings with you. One of them will involve any nominee's commitment to judicial self-restraint, to understanding the judicial role, what it is and what it is not.

Any judicial nominee these days will acknowledge that he or she understands that the role of the judge is to interpret the law based on what it says, rather than on the basis of the judge's personal opinion. This is all very true. It raises questions as to how exactly that goes about and what steps, what tools, what rhetorical linguistic devices the jurist in question might follow in order to do that.

I'm looking for someone who is ideally going to echo something that Justice Amy Coney Barrett said in her confirmation proceedings, in which she likened the Constitution—this document written by wise men nearly 2½ centuries ago, wise men who I believe were raised up by almighty God to that very purpose. To the extent we've followed that document, it's helped foster the development of the greatest civilization the world has ever known.

But she likened this and our commitment to it as a little like what Odysseus told his crew. She said the Constitution is like how Odysseus ties himself to the mast to resist the song of the sirens.

She then goes on to explain that he told the crew, “Do not untie me. No matter how much I beg or plead, don’t untie me from the mast.” He wanted to avoid the tempting call of the sirens.

The tempting call of the sirens is inherent in Government itself. It’s understandable, and that’s why we tie ourselves to it. Critical to that is the Federal judiciary, the ultimate backstop, the backstop that’s there to resolve disputes.

Now the Constitution isn’t just something for the courts. It’s not something that’s owned exclusively and independently by the Federal judiciary or the Supreme Court itself. But it does play an important role because the Court is there to resolve disputes that arise within the Court’s jurisdiction as to the meaning of a particular provision of Federal law, whether in the Constitution itself or as enacted into law by Congress.

So we need a jurist who’s willing to respect that role and demonstrate judicial humility. What I mean by that is an ability to acknowledge that there are a lot of things not within the province of the courts that entail policy. The job of a court of the judiciary is never to exert will or force. It is only judgment. It’s discerning what the law says.

A nominee also, I believe, needs to show a steadfast commitment to the principle of separation of powers. There are a couple of forms of separation of powers required by the Constitution along two axes. One operates along the vertical axis that we call federalism. It says most of the power of Government within the United States, most powers that Government might exercise, are to be exercised at the State and local level. Power that’s Federal is the exception, not the norm, in our constitutional system of government.

The other form of separation of powers operates along the horizontal axis. It’s one that recognizes within the Federal Government, which is limited, we have one branch, our branch, Congress, that makes the laws; another branch headed by the President, the executive branch, that enforces them; and the third branch, which interprets them, resolving disputes between parties coming before the Court’s jurisdiction.

Third, I think it’s important that a jurist within our system of government acknowledge the importance of interpreting the law as it was written, as it was understood by the public at the time of its enactment, if a statute, or, if a provision of the Constitution, at the time of its ratification. This is part of how we tie ourselves to the mast, making sure that we undertake efforts to make sure that we’re interpreting it based on how the public understood those words, regardless of the subjective intent of any particular lawmaker or group thereof, the public meaning at the time it became law.

This is how we maintain the rule of law. This is part of how we’ve given force to this greatest civilization that human history has ever recorded. It’s through the rule of law and tying ourselves to that mast.

There are increasing threats to this. We’ve seen those threats arise with efforts to delegitimize the Court, and I’m sickened every time I see or hear or experience one of those efforts to delegitimize it. We’ve heard some today, in fact. Comments that I think by their very nature delegitimize the Court.

Another thing that can delegitimize the Court are arguments made in favor of packing the Supreme Court. This was attempted by President Franklin D. Roosevelt in 1937. It did lasting damage to the Court. It didn't succeed as a legislative matter, but it's arguable that it left a mark and not a pretty one.

There is nothing in the Constitution that requires us to have nine and only nine Justices. That is under the Constitution left to Congress' determination. But nine is a number that works. It's worked now for 152 years. It's not one that we ought to revisit, and it's one that Supreme Court Justices of various ideologies, including your former boss Justice Breyer whom I really enjoyed getting to know when serving as a law clerk on the Supreme Court. I enjoyed our conversations with him. He, Justice Ginsburg, Justice Thomas, and so many others have been against that.

We must protect the Court. We may not protect the Court. We lose ability to protect the Court if we allow arguments to take root that are focused on expanding that and turning the Court into a political body.

Thank you, Mr. Chairman.

Chair DURBIN. Thanks, Senator Lee.

Senator Klobuchar of Minnesota.

**OPENING STATEMENT OF HON. AMY KLOBUCHAR,
A U.S. SENATOR FROM THE STATE OF MINNESOTA**

Senator KLOBUCHAR. Thank you very much, Chairman Durbin, and thank you, Ranking Member Grassley.

Judge Jackson, welcome. We met recently in my office, and we have seen you in this Committee before, and we are so happy to have you back. If Senator Whitehouse is pleased that you once clerked for a Rhode Island judge, we in Minnesota are equally happy that you are wearing bold purple today, winning over both Prince and Minnesota Vikings fans the world over.

I'd like to welcome your husband, Patrick, and your two daughters and your other family members and friends. It is clear that your family, starting with your parents, who I got to meet—who are sitting there in the front row, who once worked as teachers—that your family has been a constant source of inspiration and support for you.

My mom taught second grade until she was 70 years old. So I know firsthand it's pretty great to have a parent who was also a teacher, and they never stop checking your spelling.

As a lawyer who also balanced work with parenthood myself, I particularly enjoyed your story, Judge, about sitting with your dad. You had a coloring book, and he was studying his law books.

While these hearings are truly an opportunity, as my colleagues have pointed out, for Americans to get to know your legal acumen, we also learn about your background, your experiences, your values. And for so many of us, including people watching this hearing across the country, our values start with our family.

There is something else particularly special about this hearing, of course. You've been nominated by President Biden as the first Black woman to serve on the Supreme Court. That's historic. With 115 Justices having served so far in our history, you're the first Black woman, and it's long past time.

In fact, this entire hearing is about opening things up. The hearing room, we've opened it up with actual guests for the first time in a while, and you're opening up the Senate and the Court by virtue of your very presence. You, Judge, are opening a door that's long been shut to so many, and by virtue of your strong presence, your skills, your experience, you are showing so many little girls and little boys across the country that anything and everything is possible.

We're here to carry out one of this Committee's most solemn constitutional obligations, to advise and consent on President Biden's nomination to the Supreme Court. But this is also a time for us to consider the Supreme Court's place in our democracy and how it impacts people.

You've been nominated to Justice Breyer's seat. You clerked for him, and I know he's been and is a wonderful mentor to you. So I'd like to start with some of his words.

Justice Breyer once wrote that the Supreme Court must help maintain public acceptance of its own legitimacy. He said, "It can do this best by helping ensure that the Constitution remains workable in a broad sense of the term. Specifically, it can and should interpret the Constitution in a way that works for the people of today."

Making it work for the people of today, those words—his words—are highly relevant to the Court. And Justice Breyer didn't just write about those values. In his 27 years on the Court, he lived them. He approached cases with a pragmatic view of the law, and he understood that reference to the Constitution requires not just a respect for the past—although it does that—but also an eye toward the future.

As we are here to confirm a new Justice for his seat, I urge my colleagues to remember his words about how the Court must consider the effect of its actions on people's lives, how it must be able to see the real people at the other end of its rulings.

Like Americans who are one Supreme Court decision away from losing their health insurance, or one Court decision away from the ability to make their own healthcare choices, or the Dreamers who could lose the only country they've ever known, or the people who waited for hours in the rain one recent Election Day in Wisconsin wearing garbage bags and homemade masks in the middle of what would soon become a global pandemic just to cast a ballot, just to exercise their constitutional right to vote.

The Court decides cases with life-changing consequences for people. It makes decisions that dictate health and safety standards for workers, protections for seniors, whether we can have clean air and clean water. The Supreme Court issues rulings that can determine who can make their voices heard in our democracy and how they can do it.

So, Judge Jackson, this week I look forward to hearing more on your views about the real world implications of the law and about how you will respect the Constitution and legal precedent, all the while striving to ensure we have a Court that works for the American people.

Judge, I believe you have exactly the sort of understanding of what the law means in people's lives that Americans would want

in a Justice. You're from a family that knows something about making it work. Both of your parents attended segregated primary schools and later became teachers. And when your dad set his sights on becoming a lawyer, your mom figured out how to support the family while he attended law school.

After being a star debater in high school, you went on to graduate magna cum laude in college and went on to graduate with honors from law school. After law school, you clerked for Federal judges nominated by both Democratic and Republican Presidents. And, of course, you had the honor of serving as a clerk to Justice Breyer.

These aren't just lines on your résumé. They show that you have worked to apply the law at every level of the Federal system. And beyond those credentials, you have the perspectives of someone who has seen the law through the eyes of those closest to it. Your brother worked as a police officer in Baltimore. One of your uncles was a detective, and another was a chief of police of the City of Miami.

You know what it means for a person to put their life on the line to defend the rule of law. It is no surprise to me that you received the letter that Chairman Durbin mentioned, the letter of support from the Fraternal Order of Police. And as a former Federal public defender, you also understand that for our justice system to be truly workable, it must account for those who lack the resources to defend themselves, and you would be the first Justice to bring that experience to the Court.

Judge, I believe it is because of your experience and respect for the law that the Senate has confirmed you three times with bipartisan support, as vice chair and commissioner of the U.S. Sentencing Commission, judge on the D.C. District Court, and most recently, the D.C. Circuit Court of Appeals. In each of these roles, you've lived up to that bipartisan support.

As a commissioner, over 90 percent of the votes you participated in were either unanimous or voice votes. As a district court judge, you wrote nearly 600 opinions, applying the law and precedent to the facts fairly and impartially without regard to your personal views.

I will note that if you are confirmed, you will join Justice Sotomayor as the only other Justice on the Bench with experience as a trial court judge. As a circuit court judge, you have written decisions joined by judges appointed by Presidents of both parties. And let's not forget you have 9 years of judicial experience, more than 4 other Justices currently on the Court prior to their confirmations. Not that we're counting.

Judge Jackson—and I expect this to come through loud and clear during these hearings—you have the experience and record of a jurist who is dedicated to the fair application of the law, committed to consensus, and determined to make sure that the Court and the Constitution work for the people of today.

And one last point, Judge, your confirmation hearing comes at a moment in our history when the people of this country are once again seeing—this time in Ukraine—that democracy can never be taken for granted. Eternal vigilance, it's been said, is the price of liberty.

Last week, I was at the Ukrainian-Polish border with refugees streaming through checkpoints, leaving everything they had behind, with only a suitcase and a backpack walking into the loving arms of their neighbors in Poland, a country with a long, hard history of having been invaded by Nazis and Russians and Prussians and Hapsburgs.

As our Ambassador there told me, at this moment in history, the people of Poland are achieving the dreams that their grandparents could never realize. They are saying to their Ukrainian neighbors, we value freedom and respect your democracy. We value you so much that we will take you into our homes and into our hearts. We will open our doors and not shut you out.

And this horrendous war against evil—and the courageous of the Ukrainian people—is happening at the very same time our country is opening our minds after being separated through a 2-year pandemic from our neighbors not only around the world, but in our own country, in our own towns. This moment bestows upon us a new opportunity to see one another again and to be part of our own democracy, to respect each other's rights and views, to see that we are not a nation of 300-plus million silos. Instead, we are a nation that must re-embrace the simple principle that unites us as Americans, and that is that our country is so much bigger in what unites us than what divides us.

That's the pivotal moment we are in. That's your moment. It's a time for us to consider what the courts mean to our democracy, to recall how the Framers envisioned the Court to work as a ballast in our system of government and to rededicate ourselves to the sacred protection of our rights and the upholding of our Constitution.

So as we move forward with these hearings, let us be grounded in the central role of the Court and the Constitution in our democracy, of what it means to our system of government that we can never take for granted, and how we must always be vigilant that it is serving the people.

Judge Jackson, I'm confident you will come to the Bench as a Justice with a bedrock appreciation of what the Constitution and the law means to America, with the real world perspective we need. Thank you for your willingness to serve at this important time.

Chair DURBIN. Thanks, Senator Klobuchar.
Senator Cruz of Texas.

**OPENING STATEMENT OF HON. TED CRUZ,
A U.S. SENATOR FROM THE STATE OF TEXAS**

Senator CRUZ. Thank you, Mr. Chairman.

Judge Jackson, congratulations on your nomination.

Eleven thousand one hundred and seven men and women have served as Members of the House of Representatives. One thousand nine hundred and ninety-four men and women have served as Members of the United States Senate. Only 115 men and women have served as Supreme Court Justices.

The position to which you have been nominated is extraordinarily important, and that is why the Senate is given the responsibility for advice and consent under the Constitution because the job matters immensely. Supreme Court confirmations were not al-

ways controversial. In fact, Bushrod Washington, when nominated to the Supreme Court in 1798, was confirmed the very next day.

So what changed? Well, what changed is starting in the 1960s and the 1970s, the Supreme Court's role in our society changed dramatically. The Supreme Court became a policymaking body rather than a merely judicial body.

Just a moment ago, my colleague Senator Klobuchar said we should consider the Supreme Court's place in our democracy. Well, starting in the 1960s and 1970s, the Supreme Court decided its place in our democracy, at least to many Justices, was to set aside the democratic decisions of the people and instead to mandate the policy outcomes they themselves supported.

Our Democratic colleagues want the Supreme Court to be anti-democratic. Our Democratic colleagues get frustrated with the democratic process. When they can't pass gun control laws because the American people don't support them, they want unelected judges to mandate those same laws instead.

Law after law after law that they can't get through the democratic process, the Democrats have decided it's much simpler to convince five lawyers in black robes than to try to convince 330 million Americans. That is why Supreme Court confirmation hearings have become so contentious is because the Supreme Court has arrogated to itself a responsibility the Constitution doesn't give it, which is to make contested policy decisions and take them away from the American people.

Now what should this hearing be, and what should it not be? Well, you've heard a number of Members on the Republican side of the aisle quite clear on what it should not be. This will not be a political circus. This will not be the kind of character smear that, sadly, our Democratic colleagues have gotten very good at.

And it's important to note, you know, a couple of years ago, I was doing my weekly podcast, and I was on with a noted liberal intellectual who made a comment something to the effect of, well, both sides do this. Both sides smear Supreme Court Justices. And I was forced to laugh out loud and say, look, I understand that's a pretty good talking point. It just happens not to be true.

It is only one side of the aisle, the Democratic aisle that went so into the gutter with Judge Robert Bork that they invented a new verb, "to bork" someone.

It is only one side of the aisle that with Justice Clarence Thomas was so reprehensible that as the President who nominated him, President George Herbert Walker Bush, wrote at the time, "What's happening to Clarence Thomas is just plain horrible. All the groups that tried to beat him up on abortion or affirmative action have now come out of the woodwork. They are trying to destroy a decent man. This is an ugly process, and one can see clearly why so many good people elect to stay out of public life."

As Justice Thomas observed in that hearing, what happened there was, to use his words, "a high-tech lynching." And I would note the Chairman who presided over that disgrace was Joe Biden.

And then most of the Members of this Committee remember the confirmation hearing of Brett Kavanaugh, one of the lowest moments in the history of this Committee. Where Democrats on this Committee sat on allegations, didn't refer them to the FBI, didn't

ask for investigations, hid them and then leaked them against the wishes of the complainant.

And we began a circus that featured Spartacus moments, featured such nuts as Michael Avenatti, whom CNN breathlessly for some months described as “a possible Democratic Presidential candidate.” That’s before, presumably, he became a felon in recent months.

Judge Jackson, I can assure you that your hearing will feature none of that disgraceful behavior. No one is going to inquire into your teenage dating habits. No one is going to ask you with mock severity, “Do you like beer?”

But that’s not to say this hearing should be non-substantive and non-vigorous. In this hearing, this Committee has a responsibility to focus on issues, to focus on your record, to focus on substance, to do our very best to ascertain what kind of Justice you would be.

And a couple of straw men, it is no longer the case that Supreme Court confirmation hearings are merely about qualifications. There are some who say, well, if the Justice is qualified, the Senate should confirm. There was a time that was the case. Our Democratic colleagues have abandoned that standard long ago.

Our Democratic colleagues, then-Senator Joe Biden was perfectly happy to vote against John Roberts, someone who was unquestionably qualified for the Court. He was perfectly happy to vote against Sam Alito, someone who was unquestionably qualified for the Court. And indeed, every Member of our Democratic colleagues who was here at the time participated in the first-ever filibuster of a Supreme Court Justice on partisan lines with Justice Neil Gorsuch. They did so for someone unquestionably qualified, but they had a political agenda, and so every one of them happily filibustered Justice Gorsuch.

Likewise, it’s not about race. We will see Democrats and the media suggest that any Senator that is skeptical of your nomination, that questions you vigorously, or that dares to vote against you must somehow harbor racial animus. If that were the standard, I would note we are sitting on a Committee where multiple Members of this Committee, the senior Democrats in the Committee, happily filibustered Judge Janice Rodgers Brown, a very qualified African-American woman nominated to the D.C. Circuit, and they did so precisely because they wanted to prevent Judge Brown from becoming Justice Brown, the first African-American woman. Joe Biden was among the Democrats filibustering the first African-American woman nominated to D.C. Circuit.

The senior Democrats on this Committee also filibustered Miguel Estrada. As the staff for Senator Ted Kennedy said in writing at the time, the Democrats filibustered Miguel Estrada, quote, “because he is Hispanic.” They were explicitly racial. If you dare, if you are Hispanic or African American and you dare depart from their political orthodoxy, they will crush you. They will attack you. They will slander you. They will filibuster you. So this is not about race.

It is, however, about issues and substance. And I’ve got to say I agree with Chairman Durbin. Chairman Durbin quoted Paul Simon, and he said history will judge, quote, “Did she restrict freedom, or did she expand it?” I agree with that.

The reason the American people care about the Supreme Court is it is integral to protecting or taking away our constitutional rights. When it comes to free speech, this Committee should inquire: Will you protect the rights of Americans to speak, to say unpopular ideas, to say ideas that the Government doesn't want you to say that you, nonetheless, have a right to say? Will you protect freedom or restrict it?

When it comes to religious liberty, will a Justice vote to protect your right to live according to your faith and according to your conscience, or will a Justice vote to crush religious liberty and strip those rights away?

The Second Amendment. Will a Justice vote to defend your Second Amendment rights to keep and bear arms, to defend your family, to defend your children, or will a Justice roll over to the Democrats that want to disarm citizens?

The right to life. Will a Justice protect the rights of the people, the rights of State legislatures to enact laws protecting innocent life, protecting unborn life, stopping abominations like partial-birth abortion, or will a Justice view her job as a super-legislator, striking down all such rights?

School choice. Will a Justice protect the rights of kids to get a quality education, or will a Justice legislate from the Bench and shut down school choice programs across this country?

And crime. We are seeing murder rates, carjacking rates, crime rates skyrocketing across the country in significant part because political Soros-backed district attorneys, because of Democratic efforts to abolish the police. And part of the Democratic effort to abolish the police is nominating Justices that consistently side with violent criminals, release violent criminals, refuse to enforce the law, and that results in jeopardizing innocent citizens.

So all of those questions are fair game. Will you follow the law? What does your record indicate? Will you protect the rights of every American citizen, regardless of race, regardless of party, regardless of views? That's what the focus of this hearing should be.

Chair DURBIN. Thanks, Senator.

Senator Coons from Delaware.

**OPENING STATEMENT OF HON. CHRISTOPHER A. COONS,
A U.S. SENATOR FROM THE STATE OF DELAWARE**

Senator COONS. Thank you, Chairman Durbin, Ranking Member Grassley.

Judge Jackson, congratulations on your nomination. It is a joy and a blessing to welcome you and your family and your supporters here this morning.

As both Senators Klobuchar and Cruz have laid out in great and forceful detail, the decisions of the United States Supreme Court have daily impact, regular bearing on the lived experience of Americans, and that is in part why hearings for this important role are so contentious. I have been looking forward to this day since President Biden announced your nomination in February. And over the next several days, Members of this Committee will have the privilege of helping introduce you to the American people so that they can gain the sense of confidence that I have in your values, your

skills, your competence, and the necessity of confirming you to the Supreme Court.

We'll be inviting you to speak directly to the American public and share the lived experiences, the strong qualifications, the judicial temperament, and the strength of character that made you not only an historic nominee to the Supreme Court, but an outstanding one as well.

I want to acknowledge up front that President Biden selected you to fill the seat on the Court being vacated by Justice Breyer, a Justice whom I admire and in the work he's done as a jurist over decades has shown us a model of a Supreme Court Justice. In his 42 years on the Federal bench, 30 years on the Supreme Court, he's lived up to the highest ideals of American jurisprudence.

He has served with wisdom, with fairness, and respect for the Constitution, the laws of our Nation, and its people. He has a keen legal mind and a love of the law that are obvious to anyone who's heard him ask questions or read his decisions and certainly to someone who clerked for him on the Supreme Court and who has had the benefit of his mentorship over many, many years.

You've had broad experience in your stellar legal career that will make you a unique contributor to the Supreme Court. You've worked as a lawyer or as a judge in just about every level of our legal system, engaging in just about every area of Federal law. Your experiences as a private practice attorney with large law firms, as a Federal public defender, as vice chair of the U.S. Sentencing Commission, and your near decade of service as a Federal judge have given you insights into the ways that our Constitution, our statutes, our sentencing guidelines, and judicial decisions all come together to directly impact individuals, families, and our communities.

You're able to perceive the full sweep of our law without losing sight of the human beings, the individuals and families impacted by it, caught up in it, and it is critically important, in my view, that we have Justices on the Supreme Court with this practical and proximate view.

You began your legal career with the invaluable experience of clerking for judges at the Federal District Court, at the Circuit Court, and for Justice Breyer on the Supreme Court, judges appointed by Presidents of both parties. You developed your career as a legal advocate in private practice and in the Federal Public Defenders Service.

As part of this work, you took on complex cases involving challenging and unsettled areas of the law. You worked pro bono on behalf of clients without regard to their political views or the political consequences of those cases, and you helped ensure bedrock constitutional guarantees in our legal system held strong even in times of great stress and crisis. The work you did in these roles distinguished you as a talented appellate litigator with a formidable legal mind.

You helped to craft policy as counsel to the U.S. Sentencing Commission, the independent agency within the judicial branch that establishes sentencing guidelines followed by all Federal judges. And then years later, you served again on the Commission as its vice chair. While on the U.S. Sentencing Commission, you partnered

with colleagues whose perspectives on the law span the ideological spectrum, and together, you enacted meaningful reforms designed to reduce unjust disparities and increase fairness in sentencing.

In the days ahead, I expect to discuss your Sentencing Commission experience with you in some detail. Nearly all the decisions you were part of while serving on the Commission were unanimous, and they grew out of a careful consideration of highly complex numerous factors that involved commissioners working hard to achieve common ground. In at least one notable instance, you ended up joining two conservative commissioners to oppose an amendment because you thought the law required a different result, and you followed the law.

Something that often gets lost in our debates and discussions about the Supreme Court is that many, in some terms a majority of Supreme Court decisions are unanimous or decided by very broad majorities. These decisions are every bit as critical to the rule of law and the functioning and legitimacy of the Court as the handful that are very contentious and widely discussed publicly.

Your service on the Sentencing Commission and your time on the Circuit Court have prepared you to be a positive force for consensus among the Justices in this challenging chapter in American history.

I also think we will have some extended discussions this week about your record of service on the Federal bench. You were confirmed to the Federal District Court for the District of Columbia in 2013 and have written more than 500 published opinions. You were confirmed to the D.C. Circuit Court of Appeals last year. And in your near decade as a judge, you've authored opinions in cases spanning a myriad of complicated issues from administrative law to civil rights, from criminal, environmental matters, labor and employment law, national security and sovereign immunity, immigration law, and many more.

Your rich, complex, and deep decisional record gives us the best possible evidence of what kind of Justice you will be. And I've concluded you are judicious and impartial, great qualities for a Justice.

In every case, you methodically consider the parties' arguments, the relevant facts, and the law—including, of course, the foundation of the Constitution—the text of applicable statutes, and the precedents that apply. And ultimately, from what I've seen, you've come to a decision based on that methodology, not on any particular policy preferences or activism.

This Committee has also received a striking outpouring of support for your nomination from a very broad range of sources. I'm certain we'll be hearing about some of the more enthusiastic statements in detail over the coming days, but in several of the letters I've had a chance to review personally, I've been struck. These were letters from lawyers that held appointed positions in Republican administrations, letters from prominent law enforcement organizations, Federal judges appointed by Republican Presidents. They praise your qualifications, your character, your experience, and your commitment to even-handed and impartial judging and the rule of law.

This is the fourth Supreme Court nomination process in which I'm participating as a Senator, and I know our role in confirming

a Justice to the highest court is among the most solemn obligations we have as Senators. As we begin this week's hearings, I remain hopeful that we can come together as a Committee and engage in respectful, good faith, bipartisan consideration of your nomination.

I look forward to your testimony this week. I'm excited so many of my colleagues have had a chance to get to know you a bit, to meet with you, to talk with you one on one and get a sense of your character, your experiences, and your background, and then we'll have the opportunity to question you to bring that out in more detail.

I have every expectation that at the end of this week's hearings, it will be clear to all that you are impeccably qualified in the law. And I think will be plain to any American watching you have a demonstrated record of excellence as a jurist, you will decide cases as a Justice on the basis of the facts and the law, and that you will be faithful to the Constitution.

It's also my hope folks will get a chance to meet the family that shaped you. It was delightful to have a few moments to get to talk with your parents and your brother before we began today and to reflect on how having parents, graduates of HBCUs, public school teachers who then went on to great careers of accomplishment.

Johnny Brown, Esq., and Dr. Ellery Brown set a great standard. But frankly, to me, one of the most memorable sentences before this was in talking to your brother, Ketajh, who said, "Oh, I'm not surprised to be here at all. This was the sort of thing for which my sister was destined from the very start."

Destined perhaps, but today you are beginning a process of walking through this door because of courage, humility, determination, and a commitment to excellence. Just as another person in American history, Ruby Bridges, walked through a critical door in our history with her chin held high, her back held straight, and a fierce determination to make a difference, so you, too, today begin the process of walking through this next open door with the sort of sparkling wit, brilliant mind, and commitment to excellence that will make its mark in American history.

I look forward to your opening and to this week. Thank you, Your Honor.

Chair DURBIN. Thank you, Senator Coons.
Senator Sasse of Nebraska.

**OPENING STATEMENT OF HON. BEN SASSE,
A U.S. SENATOR FROM THE STATE OF NEBRASKA**

Senator SASSE. Thank you, Chairman.

And Chris is tough to follow. That was a good flourish at the end.

Judge, congratulations on your nomination. Thanks for spending time in my office with me.

Congratulations to your daughters and your family more broadly. This is a big day for lots of folks in your family.

Today, the Senate takes up our constitutional duty to advise the President on his nominee to the Supreme Court. The Senate's Advice and Consent Clause and our role is especially important these days when we all, Republicans and Democrats, agree that the nine Justices of the Court exercise a lot of power over policy decisions.

Surely much, much more power than our Constitution's Framers ever anticipated.

So let's talk about how we got into this mess. We're here in part because of decades and decades of recklessness by all three branches. Not just one, but by all three. Congress, the Article I branch, fails to carry out our tasks responsibly and regularly. Rather than make tough policy choices, we pass incredibly vague laws and then just push the details on down Pennsylvania Avenue to unelected bureaucrats in the Article II branch.

Then the head of the executive branch, meanwhile, whichever party he or she comes from, grabs more and more power with their pens and their phones. And finally, the Supreme Court at the top of Article III, tends to overstep the bounds that the Constitution sets on judicial power. The Court has ignored restrictions on its authority, inserting itself into policy debates that are supposed to be entrusted exclusively to the two political branches.

And what do we mean by that? What do we mean when we say Articles I and II are political? It means that the people are in power over Articles I and II, but not, in the long term, over Article III. The men and women in Article I and Article II are supposed to be answering directly to the American people, and importantly, the American are going to hire us or get to fire us every 2, 4, or 6 years.

But rather than honor the roles given to each branch, activist judges usurp the powers given to Articles I and II, which Articles I and II were complicit in this overreach. Many years of corroding our constitutional order have contributed to the polarization and the viciousness that are poisoning our politics more broadly. We all know that our civic health and our civic life is not healthy. And as was mentioned at the beginning of the hearing, it's at least good that this one got kicked off without a bunch of yokels having to be arrested and carried from the room.

When Chairman Grassley tried to speak a couple years ago at one of these, it took like an hour to get started. That kind of nonsense, the theatrics that happen at these hearings are because of a broader problem.

As textualists and originalists have sought to return the Court to its historic role, the Supreme Court nomination process has been increasingly punctuated with not just those theatrics, but also with lots of personal attacks. That's not what this process is supposed to be. This process is supposed to be a careful, thorough investigation of a nominee's record to help the Senate make an informed decision on a nominee's fitness for a lifetime appointment.

That's why these hearings are supposed to be different, not just people act like jackwagons, but because the people before us nominated by the President are potentially going to serve for a lifetime. That office, as Supreme Court Justice, is incredibly important, and it's also carefully circumscribed precisely because it's a lifetime responsibility.

But we know that it's been a long time since this process has worked like that. Instead, this is often a staging ground for nasty, evidence-free personal attacks.

We started down this road of character assassination in the 1980s with Judge Bork's hearings, and Senators have been engaged

in disgusting theatrics ever since. The most recent Supreme Court nominee was subjected to repeated accusations that were nothing more than unfiltered religious bigotry against her. The nominee before her was accused of serial rape, aided by Members of this Committee.

If this process were conducted in good faith, Miguel Estrada and Janice Rogers Brown might well be on the Supreme Court today. But their opponents lied and bullied rather than accepted principled minority judges.

We've gotten so used to this kind of bullying that 2 years ago, the current Senate Majority Leader stood on the steps of the United States Capitol and screamed threats against two sitting Justices of the Supreme Court that they would "reap the whirlwind" if they ruled in a way that didn't align with Chuck Schumer's political preferences.

That's weird. We should all be able to pause and say that's weird. That kind of behavior shouldn't happen.

This process is broken, but it's a product of a broader brokenness in the erosion of our constitutional structure. A lot of people are willing to take a sledgehammer to the structure if it offers them a quick political win, and it's no coincidence that as more of us embrace an "end justifies the means" philosophy of our jobs, which are supposed to be jobs of public trust, our politics becomes uglier, more brutal, and more pathological.

Well, we have an opportunity today to do something different, and we can demonstrate that the Congress can carry out its constitutional duty responsibly without a lot of that past ugliness. Judge Jackson has served for the last 9 months on the prestigious U.S. Circuit Court of Appeals for the D.C. Circuit, and before that, you spent 8 years on the D.C. District Court. She has a long record of public service and a long roster of colleagues and friends who will testify to her professionalism.

The President believes that she should have a lifetime seat on the Supreme Court, and it's the job of this body to evaluate that recommendation on its merits. So what should we be looking for? We should start with judicial philosophy.

The Senate should have a good sense of the principles that will guide a nominee's decisionmaking on the Bench. A robust and thorough judicial philosophy can help us understand how, when faced with difficult or unprecedented decisions, as the Court occasionally is—and I would just like to compliment Senator Coons a minute ago mentioning that a huge, huge share of decisions that come out of the Supreme Court are actually 9–0. They just tend to not be the ones that make the headlines, but they're incredibly important, and the public trust that we need to restore in all three branches of Government would be well served by us paying more attention to some of those 9–0 decisions.

But the ones that tend to be most contentious and the ones that tend to generate the most headlines are the occasions where judges have to figure out what they do in areas which are gray and ambiguous, where the law might not be clear. And so it's incredibly important for a judge to tell us how she or he works out those principles in times that are new and confusing. This will make their

rulings more durable and sound, and it will help rebuild public trust in the Court and in the Government more generally.

Unfortunately, too many of the Court's decisions do not rest on solid constitutional foundations and reliable legal reasoning. Justices have too often written decisions to claim partisan policy victories and then retrofit bad legal reasoning or political decision-making to justify that ruling. Some of the most divisive cases in the Court's recent history fit that bill.

It's for that reason that while we should all respect the Ginsburg rule, the idea that judges sitting before this panel should not weigh in on hypothetical cases that are likely to come before the Court, nominees do, nonetheless, have a duty to be very clear about their judicial philosophy, their legal views, and their interpretive principles. The American people should not be asked to consent to any nominee who operates on principles that are obscure, confused, or concealed.

That means that each of us has a job to do in these hearings. It is our job on the Senate Judiciary Committee to ask questions that help give the American people a clear view of the nominee. It's Judge Jackson's job to make her philosophy clear and well understood.

And at the end of a constructive hearing, a nominee will have given us a good sense of how she thinks about the constitutional structure, what it does and doesn't do, and the key pillars that support it. Most fundamentally, the separation of powers and our carefully calibrated system of checks and balances.

Throughout this process, we should all remember that a Supreme Court Justice is not a lawmaker by another name. A Supreme Court Justice performs a crucial, but limited function in our political system, namely, to interpret and fairly apply the text of the law as written and as understood at the time it was adopted.

A forthcoming nominee will make clear a commitment to uphold that purpose, which is the Court's true purpose, not the purpose concocted for it by decades of political use, abuse, and overreach. A good nominee will show a commitment to the strict protection of enumerated rights, not the fabrication of unenumerated rights through contorted readings.

An excellent nominee will offer a robust judicial philosophy that makes sound decisions more likely and more trusted by the public.

Chairman, I look forward to hearing from Judge Jackson this coming week.

Chair DURBIN. Thanks, Senator Sasse.

Senator Blumenthal of Connecticut.

**OPENING STATEMENT OF HON. RICHARD BLUMENTHAL,
A U.S. SENATOR FROM THE STATE OF CONNECTICUT**

Senator BLUMENTHAL. Thanks, Mr. Chairman.

Good afternoon, Judge. Thank you for being here, thank you to your family, and thank you to President Biden for his vision and wisdom and courage in nominating you.

First, on a personal note, for all of your extraordinary accomplishments and your immense distinction you have shown two qualities that are rare among powerful, accomplished people—kind-

ness and humor—and you’re, obviously, a good listener because you’re doing a lot of listening here today.

As you’ve seen, we’re likely to hear more than a few straw men today, worn talking points, imagined grievances. But this hearing, really, should be about you, not about us.

Historic is a word often overused in this place where a lot of history is made but today seems, truly, to merit it. Certainly, it is an inflection point—an inflection pinnacle—for our Nation.

The appointment of a Black woman to the United States Supreme Court, let’s be very blunt, should have happened years ago. This day is a giant leap into the present for our country and for the Court.

The appointment of a Black woman to the Court means that your service will make the Court look more like America. Hopefully, too, it will make the Court think more like America.

We will never know in detail all of the challenges and obstacles that you’ve overcome to be here today. But we know for sure that you will bring an important perspective, in fact, a unique perspective, to a court that deeply needs it.

Representation matters with the legitimacy and credibility of our judicial system. Judges are the face and voice of justice. People walking into your courtroom or any other in this country look to the human being, not just to the robe.

Too often, our courts are isolated, seemingly sterile marble halls, lacking emotional intelligence or a sensitivity to the impact they have on people, a fact that you clearly and dramatically understand.

What really knocked me over in our meeting was the fact that you discussed your job as a judge in terms of the people who are affected by your ruling, the people whose lives are touched by the justice system, whether as victims, as criminal defendants, or as people dealing with a personal or professional conflict.

You will be the first public defender on the Court. You understand our justice system uniquely through the eyes of people who couldn’t afford a lawyer—they couldn’t afford their own lawyer—and you advocated for them.

You will also bring to the Court extraordinary intellect and character as well as diverse personal and, indeed, professional experience. Your presence will ensure the Court more fully and deeply understands the lives and experiences of everyday Americans.

You grew up as the daughter of two public servants, public school teachers and administrators. You’re the niece of uncles who have impressive law enforcement careers, including one as Miami’s chief of police, and you also have family members who have struggled, as do every American, and you’ve advocated for defendants standing accused of serious crimes as well as sentencing defendants who have been convicted of such crimes.

You are an immensely devoted parent who has achieved eye-popping professional distinction. You’ve had a long career already as a distinguished jurist. In fact, you would bring more experience as a trial judge than any current Justice on the Supreme Court.

Now, I’d like to address directly the importance of your work as a public defender. I was a prosecutor and in law enforcement for a while, 4 years as U.S. Attorney and 20 years as Connecticut’s At-

torney General, and as a prosecutor I know the system works best when there are good lawyers on both sides. My worst nightmare as a prosecutor was a defendant representing himself.

My second worst nightmare was an incompetent counsel representing a defendant because I know effective representation on the other side means more likely an error-free trial.

I'd also like to address an issue that's been raised, first by Senator Durbin and then by Senator Graham. I'm likely to be followed by one or more colleagues who have raised allegations about your record that are simply unfounded in fact and, indeed, irresponsible. They're unproven and unprovable. They're, simply, false.

One of the first lessons that you learn as a prosecutor is never to promise a jury evidence that you don't have. There is simply no evidence to support these unfounded attacks.

In fact, a commentary in the *National Review* cited by Senator Durbin said about those allegations they are meritless to the point of demagoguery.

Importantly, your record as a jurist also reveals impartiality. You're a proven unifier and a consensus builder, someone who can build bridges among colleagues, even adversaries.

Not surprisingly, you've been confirmed on a bipartisan basis three times by the Senate. You've received glowing endorsements from former judges who are stalwarts of the conservative movement.

The Court needs a bridge builder now more than ever. It has become more polarized, more politicized, more divided than at any point in our history and it faces a crisis of legitimacy as a result.

Dark money special interest groups have sought to radically reshape the Court. Their recent selection of Justices was, to a remarkable degree, outsourced to ideological groups with the express aim of remaking the Court in the image of the far-right conservative movement.

This Court has signaled that it will continue to overthrow well-established precedents after disingenuously promising us, Members of this Committee, that it would respect those precedents and, instead, it threatens to adopt preferred policy views.

I revere the United States Supreme Court. I clerked for a Justice myself, Harry Blackmun. I've argued four times before the Court.

I'm deeply concerned that this court is careening toward a precipice that will gravely threaten its role in our history, that it is out of step with America and that it is losing the trust and respect of the American people that are essential to its authority.

Trust in the United States Supreme Court is at a new low. The Supreme Court has no armies, no police force, to enforce its decisions.

Its authority depends on its credibility and the respect and trust of the American people. My hope is that you will help to restore that trust, that you will reinspire the confidence of the American people in the Court.

I traveled, as did my colleague, Senator Klobuchar, to Poland just a week ago and I saw people fleeing bombs and destruction, people—mostly women and children—who wanted nothing more than the kinds of freedom that we have in this country.

We have an obligation to preserve them and my hope is that your nomination will help us do so.

Thank you. I look forward to your testimony.

Chair DUBIN. Thank you, Senator Blumenthal.

Senator Grassley just asked me what the plan is. The plan is to recognize two more Senators and then take a 30-minute break for lunch. Is that okay, Judge?

All right. We have Senator Hawley of Missouri.

**OPENING STATEMENT OF HON. JOSH HAWLEY,
A U.S. SENATOR FROM THE STATE OF MISSOURI**

Senator HAWLEY. Thank you very much, Mr. Chairman.

Judge, congratulations on your nomination. It's nice to see you again. Congratulations to all of your family. I know that this is a big moment for you and for them, and rightly so. I enjoyed our meeting a couple of weeks ago.

You know, as I've said to folks who've asked about it, one of the things I particularly appreciated about our meeting, besides how much time you gave me, was how candid and forthcoming you were, which I really respected, and I look forward to a candid conversation again in the days that come. And, by the way, I'm admiring how you're sitting so stoically through all of this Senator talk. But I'm looking forward to visiting with you again.

You did me the honor when we sat down of being very candid and I hope I was candid with you. I've been candid since. I want to be candid with you today so you know exactly what it is I want to talk about and so you know exactly where my head is at.

So let me say a few things that I'm concerned about, aspects of your record that trouble me. This will come as no surprise. I've said it in public already. But I want to be, again, very candid in the interest of an open and honest discussion and specific.

So here are, I hope, in the next couple of days some of the cases from your time on the court—the district court, the Federal district court—that I hope that we can talk about. Let me just run through a few of them so you know exactly which ones I mean.

United States v. Hawkins. This was a child pornography case where the defendant distributed multiple images of child porn, possessed dozens more, including videos.

The Federal sentencing guidelines recommended a sentence of 97 to 121 months in prison. Prosecutors recommended 24 months in prison. Judge Jackson gave the defendant 3 months in prison.

United States v. Chazin. That case the defendant possessed 48 files of child pornography. The Federal guidelines recommended 78 to 97 months in prison. The prosecutor recommended the same. Judge Jackson sentenced him to 28 months.

United States v. Cooper. There, the defendant possessed dozens of images of child pornography and distributed—I should say, distributed dozens of images of child pornography, possessed over 600.

The Federal guidelines recommended 151 to 188 months in prison. That's a long time. The prosecutor recommended 72 months. Judge Jackson gave the defendant 60 months, which was the lowest sentence permitted by the law.

United States v. Downs. That's a case where the defendant distributed 33 graphic images and videos of child sexual assault to an

anonymous messaging app, unfortunately, a practice that's becoming more common.

The Federal guidelines recommended 70 to 87 months in prison. The prosecutor recommended 70 months in prison. Judge Jackson sentenced him to only 60 months. Again, that's the lowest level that was permitted by law in that case.

United States v. Stewart. The defendant there distributed scores of images of children suffering sexual abuse. The guidelines recommended 97 to 121 months in prison. The prosecutor recommended 97 months in prison. Judge Jackson gave him 57 months.

In *United States v. Sears*, the defendant distributed over 100 videos of child pornography. The guidelines recommended 97 to 121 months in prison. The prosecutor recommended 97 months in prison. Judge Jackson gave him 71 months.

In *United States v. Savage*, the defendant was convicted of traveling across State lines to engage in sexual intercourse with a child and also possessed six separate thumb drives of child pornography.

The guidelines recommended 46 to 57 months in prison. The prosecutor recommended 49 months in prison. Judge Jackson sentenced him to 37 months in prison.

Now, those are seven cases that represent, as near as we can tell, all of Judge Jackson's cases dealing with child pornography from her time on the District Court in which she had some discretion to hand down a sentence. There are some other cases in which the law—she didn't have any discretion. The law bound the sentences she had to give.

And what concerns me, and I've been very candid about this, is that in every case, in each of these seven, Judge Jackson handed down a lenient sentence that was below what the Federal guidelines recommended and below what the prosecutors requested. And so I think there's a lot to talk about there and I look forward to talking about it.

Now, I will note that some have said that the Federal sentencing guidelines are too harsh on child sex crimes, especially child pornography. I've heard that argument a lot in recent days. The Chairman quoted someone earlier today who takes that point of view.

I'll just be honest, I can't say that I agree with that. I mean, the amount of child pornography in circulation has absolutely exploded in recent years. Here's a New York Times report from 2019.

I'm quoting now: "Last year, tech companies reported over 45 million online photos and videos of children being sexually abused, more than double what they found the previous year."

The report goes on to say this: "Twenty years ago, these online images were a problem. Ten years ago they were an epidemic. Now the crisis is at a breaking point."

Unfortunately, it's even worse than that. Just last week, the National Center for Missing and Exploited Children reported finding 85 million files of child pornography in 2021 and, of course, this Committee has heard testimony from prosecutors and others who are grappling with the problem of how to get at this porn and those who distribute it, how to prosecute them and hold them accountable.

Here's my point. I think it's difficult against this backdrop to argue that the sentencing guidelines are too harsh or outmoded, or that we should be somehow treating child porn offenders more leniently than the guidelines recommend.

But I want to be clear about this, that those arguments that I've just been rehearsing, those who say that, those aren't—that's not what Judge Jackson has said. She hasn't had the chance yet to respond to this and she deserves that chance.

So others have made these arguments. I don't agree with them. But I think it's important we hear from Judge Jackson and we'll have the chance to in coming days. And I think, again, the candor that Judge Jackson has shown previously I look forward to and she deserves the ability to speak for herself on this issue.

So I will just say in closing, Mr. Chairman, some have asked why did I raise these questions ahead of the hearing; why not wait until the hearing and spring them on Judge Jackson, as it were.

And my answer to that is very simple. I'm not interested in trapping Judge Jackson. I'm not interested in trying to play gotcha. I'm interested in her answers, because I found in our time together that she was enormously thoughtful, enormously accomplished, and, I suspect, has a coherent view and explanation and a set of thinking—way of thinking about this that I look forward to hearing and I think she deserves the chance to talk about it and I think the American people deserve the chance to hear her answers.

So there are my concerns, Judge. They're the cases I—I imagine there will be others that we can talk about on other subjects but I'd like to talk about those so you know exactly where I'm coming from.

Thanks again for giving me the time a few weeks ago. Congratulations again. I look forward to finally hearing from you tomorrow.

Thank you, Mr. Chairman.

Chair DUBIN. Thank you, Senator Hawley.

Certainly, the Judge deserves to be heard on that type of a charge.

Senator Hirono.

**OPENING STATEMENT OF HON. MAZIE K. HIRONO,
A U.S. SENATOR FROM THE STATE OF HAWAII**

Senator HIRONO. Thank you, Mr. Chairman.

Judge Jackson, aloha to you and your family and all of your friends. I also note that there are Members of the U.S. House here to support you as well as members of the public. So aloha to all of you.

Congratulations, Judge Jackson, on all that you have accomplished throughout your life and career. I realize that a lot of your background and experiences have already been cited. But there are things that are worth repeating so I'm going to repeat some of them.

You were the national champion in speech and debate as a high schooler. You have undergraduate and law degrees from Harvard, each with honors; three clerkships in Federal court, including one at the Supreme Court for Justice Breyer, whom you have been nominated to replace.

You have an accomplished career as a lawyer at the trial and appellate levels both in private practice and as a public defender; two stints at the U.S. Sentencing Commission, including as vice chair; 9 years as a Federal judge, first, in the D.C. District Court and currently in the D.C. Circuit Court.

And now you've been nominated to the United States Supreme Court. I have enjoyed reviewing your record and getting to know you over the past few weeks and now the American people will get to know you over the course of this week.

Beyond your impressive credentials there are a few other things I want the American people to know. You were born in Washington, DC, to two public school teachers. You moved to Miami, Florida, at a young age so your dad could go to law school, and you were inspired to pursue a career in law by watching your dad study for his law classes at the kitchen table.

You first considered attending Harvard—a thought that hadn't previously entered your mind—after attending a speech and debate competition on the Harvard campus during high school, and then you thought this is possible.

You've been confirmed three times by the Senate, all on a bipartisan basis, first, to the Sentencing Commission, and later to be judge on the D.C. District Court and the D.C. Circuit Court.

You're the second generation in your family to go to college and worked extremely hard to get to where you are today. You are a wife and mother of two children. Clearly, your life and your career have more than prepared you to serve on our Nation's highest court, which is why it is no surprise that there is broad consensus across the political spectrum that you are an eminently qualified and fair person to serve on the Supreme Court.

As former Fourth Circuit Judge Michael Luttig, a George H.W. Bush appointee, said, you are, quote, "as highly credentialed and experienced in the law as any nominee in history," end quote. In history. That's over 200 years.

Twenty-three Attorneys General said, "Judge Jackson is a highly qualified legal mind who has been at the forefront of the legal field for decades and will serve our Nation well as the first Black woman to serve on the U.S. Supreme Court."

A group of law enforcement officers from across the country said, quote, "Judge Jackson brings a depth of character, public service, and judicial service that leads to but one conclusion. She is eminently qualified to serve on the Supreme Court of the United States," end quote.

You are an accomplished jurist, having issued nearly 600 opinions that demonstrate a clear, even-handed approach to the law. You have sided with workers, with employers, for and against the Government, for prosecutors and for criminal defendants.

Former D.C. Circuit Judge Thomas Griffith, a George W. Bush appointee, summed it up best when he said you, Judge Jackson, quote, "will adjudicate based on the facts and the law and not as a partisan," end quote.

Having reviewed your record, I strongly agree with the statement. But you are not just extremely qualified to serve as a Supreme Court. Your nomination is, of course, an historic one.

The Supreme Court has existed for over 233 years and over the 115 Justices in the history of the Supreme Court only five of them have been women, only two have been Black, and not a single one has been a Black woman.

This is a court that has decided cases that have had sweeping effects on everyday life, as a number of my colleagues have pointed out, including decisions that have solidified rights for the LGBTQ+ community, decisions that have empowered women that have strengthened unions, and more.

But this is also the same court that has throughout the course of history upheld slavery, Jim Crow laws, and the unlawful internment of Japanese Americans.

For over 233 years, the individual making decisions that have altered the course of this country have almost exclusively been white men. It's pretty remarkable when you consider the power that this Court has and the historical lack of diversity of the people who exercise that power—the Justices.

But instead of celebrating the long-overdue diversity Judge Jackson would bring to the Court, some of my Republican colleagues and public figures have attempted to undermine your qualifications through their pejorative use of the term affirmative action and they have implied you were solely nominated due to your race and not for other factors.

Apparently, some have even claimed that you need to show your LSAT scores to determine whether you are a top legal mind. This is incredibly offensive and condescending.

Let me be clear. Your nomination is about—not about filling a quota. It is about time. It's about time that we have a highly qualified, highly accomplished Black woman on the Supreme Court.

It's about time our highest court better reflects the country it serves. It's about time that Black women and girls across the country can finally see themselves who look like them sitting on the highest court making decisions that will impact their lives, and they will know that it is possible for them to do the same.

One cannot overstate the importance of representation. Your experiences and your background as a trial judge, public defender, a mother, a Black woman, and so much more provides you with a uniquely different perspective than any of the eight other Justices on the Court.

Like your mentor, Justice Breyer, I know you will incur—you will engage with the other Justices, both liberal and conservative. You are a consensus builder, to share their perspectives, challenge their views, and shape the Court's direction for the better.

With the personal and professional diversity you bring, you will expand the experience and knowledge of the Supreme Court and the decisions the Court makes will be better as a result.

Before I end, I also wanted to mention I was so glad to hear you reference Constance Baker Motley during your introductory press conference at the White House.

Constance Baker Motley was an icon of the civil rights movement as a lawyer for the NAACP Legal Defense Fund. She helped craft the argument in *Brown v. Board of Education* that finally put an end to separate but equal.

She was the first Black woman to argue before the Supreme Court, ultimately, arguing 10 cases before the Court and winning nine, including the case that allowed James Meredith to enroll at the University of Mississippi.

She became the first Black woman appointed as a Federal judge, serving on the Southern District of New York for 20 years, and in a world free from discrimination she may have been the first Black woman to sit on the Supreme Court some 50 years ago.

As you said at your press conference, you stand on Judge Motley's shoulders. I have no doubt there will be a generation of young girls who will stand on yours. I also have no doubt that you will respond forcefully to some of the allegations that have been lodged against you, Judge Jackson.

I congratulate you and your family on this historic nomination. I look forward to hearing from you this week. Mahalo and aloha.

Chair DURBIN. Thank you, Senator Hirono.

Now we're going to break and return at 2:05 when you will hear this and we're back in business.

In the meantime, I thank my colleagues, and I particularly, thank the Judge for her patience.

[Whereupon the hearing was recessed and reconvened.]

Chair DURBIN. The Senate Judiciary Committee will resume, and next up is the Senator from Arkansas, Senator Cotton, for opening statement.

**OPENING STATEMENT OF HON. TOM COTTON,
A U.S. SENATOR FROM THE STATE OF ARKANSAS**

Senator COTTON. I welcome Judge Jackson and her family, and I congratulate her on her nomination.

This important occasion, the Biden administration is waging a war on the rule of law, the separation of powers, and the Constitution. The lawlessness of the administration highlights the importance of judges who faithfully apply the law. To understand the on-going power grab, let's consider President Biden's failed nominee to lead the Department of Justice's ATF. The man he nominated can only be described as an anti-gun zealot. Thanks to the courage of some of my Democratic colleagues, that nominee was withdrawn. But it is disturbing that the President was ever willing to nominate someone who planned to shred the Second Amendment and ban virtually every modern hunting rifle in America.

Just a few weeks ago, the Biden administration tried to twist the authority of the Occupational Safety and Health Administration, a relatively obscure agency designed to regulate things like ladder safety on construction sites, and use it as a weapon to force virtually every American to choose between getting vaccinated or losing their livelihood. Thankfully, the Supreme Court struck down that unlawful power grab.

Or look at the southern border, where Joe Biden and his Secretary of Homeland Security steadfastly refuse to enforce our laws. As a result, 2 million illegal aliens streamed across our borders just last year.

And less than 6 months ago, the Attorney General of the United States, himself a former judge, ordered that Federal prosecutors, the FBI, and even the National Security Division of the Depart-

ment of Justice be mobilized against parents who dared question the entrenched teachers' unions for poisoning their children with racist vitriol, known as Critical Race Theory.

As Justice Scalia was fond of saying, every banana republic has a bill of rights, but it is nothing more than a parchment barrier without free and fair elections, without separate powers, without the rule of law, and without an independent judiciary to uphold it all. Perhaps recognizing what Justice Scalia meant, the progressive left is not just threatening the rights of Americans but our very system of constitutional government.

Those on the left, including some of my colleagues here in the Senate, including on this Committee, want to pack the Supreme Court. I would hope that anyone nominated to the Court would have no problem echoing the words of Justice Ginsberg and Justice Breyer. Both of these liberal lions have said that expanding the Supreme Court to achieve favored legal and political outcomes is a dangerous idea, and that the Court should have nine Justices and no more. But for some, political outcomes on the Court are exactly their goal.

The Democratic Leader, Senator Schumer, stood on the steps of the Supreme Court almost exactly 2 years ago and yelled at specific Justices, quote, "You have unleashed the whirlwind and you will pay the price," and added, quote, "You won't know what hit you if you go forward with these awful decisions," end quote.

The Chief Justice rightly condemned these words. Again, I hope any nominee to the Court would be comfortable condemning these words from Senator Schumer as well.

The Supreme Court is not the only constitutional limit on power that the left would like to destroy. The Associate Attorney General of the United States has said that she believes that every single American—every single American—and every single institution in this country are inherently racist, and that the very concepts of the rule of law and equal justice for all are actually, quote, "code words"—that is what she said, "code words"—for some kind of twisted, secret racism.

These threats to the rule of law are not merely theoretical. We are witnessing a breakdown of society. There are many Americans who no longer feel safe today. Parents are scared to walk down the streets that used to be free from crime. In 2020, anarchists, rioters, and left-wing street militias raged across the country, and murders increased at the fastest rate in history. And in the first year of the Biden administration, violent crime got even worse. It is no coincidence that this violence came as localities and States pushed to defund the police and reduce the punishment for criminals. Career criminals are committing violent crimes and going free, under the guise of a supposedly more equitable justice system, and liberal judges who have more sympathy for the victimizers than for the victims are a big part of the problem.

The Biden administration has committed to these soft-on-crime policies, like ending cash bail to create a catch-and-release system for violent criminals. Progressive Soros prosecutors, who are supported by the Biden administration, have nullified entire sections of law to destroy our criminal justice system from within. The consequences are obvious. Skyrocketing violent crime, emboldened

gangs, and drug overdoses reaching numbers never before seen in American history.

If Judge Jackson is confirmed, her decisions will have a direct impact on the safety of the American people. So we are going to look at her past decisions and her statements, because the best predictor of future performance is past performance.

That brings us to today. We are asked to determine whether the President's nominee to the Supreme Court is able and willing to meet these vital challenges. I enjoyed meeting with Judge Jackson last week in my office. We had a good conversation, and over the next few days I will have many more questions. Let's be clear about this. The confirmation hearing is not a test of how well nominees can filibuster or how many questions they can avoid answering. It is true that there is a tradition of avoiding any stances on how one might rule in specific cases, if confirmed, and there is good reason for that. But that is not a license to refuse to discuss one's views of the law, how one would go about conducting legal interpretation, or one's philosophy as a judge.

Judge Jackson is not nominated to be a district judge or a circuit judge this time around, so it is not enough to say that she will approach things with integrity and fairness and faithfully apply precedents set by higher courts. Just as you would not hire a teacher who refused to say anything about their teaching philosophy other than that they would look at the curriculum and appropriately teach the students, it is not enough to say only that one would look at the facts and arguments in the case and fairly apply the law. That would not tell us anything about how one plans to do the job, how one interprets the law, how one understands our Constitution.

It is no secret that I voted against Judge Jackson's nomination to the circuit court last year, but I want to give her the opportunity to show why I should vote for her this time. So I want to be clear about what would convince me to support any Supreme Court nominee.

I am looking for a Justice who will uphold the Constitution, not use it to invent new so-called rights.

I am looking for a Justice who understands that the Constitution means what it says and does not mean what it does not say. Someone who understands that it is not up to nine unaccountable, unelected politicians in black robes to decide some new, evolving meaning of the Constitution based on public opinion polling or views of the legal elite.

I am looking for a Justice who realizes that a so-called living Constitution really means that the Constitution is dead. Instead, we should have an enduring Constitution, as Justice Scalia contended.

I am looking for a Justice who understands that there is a process for updating the Constitution, and that process is by amending the Constitution. I will not support anyone who seeks to rewrite the Constitution from the Bench, rather than through our constitutional amendment process.

I am looking for a Justice who understands that nobody is above the law and will not coddle criminals or put illegal aliens ahead of American citizens.

I am looking for a Justice who will protect the right to life of innocent infants, instead of caving to the abortion lobby, creating whole new swaths of law out of whole cloth.

I am looking for a Justice who will make decisions based on the law, not based on their personal experiences or preferences, not on empathy, not on desired political outcomes, but on the law and the Constitution.

If Judge Jackson is confirmed, her job will be simple—leave the legislating to Congress and to elected, accountable office-holders in our States and our municipalities, to zealously protect the separation of powers, and do not overturn laws unless they violate the Constitution.

I look forward to these hearings. Thank you very much.

Chair DURBIN. Thank you, Senator Cotton.

Senator Booker of New Jersey.

**OPENING STATEMENT OF HON. CORY A. BOOKER,
A U.S. SENATOR FROM THE STATE OF NEW JERSEY**

Senator BOOKER. Thank you very much, Mr. Chairman. Judge, Your Honor, it is very good to see you. Forgive me. When you were in my office you were focused on the hearings and a lot of the stuff, since I had such great questions. I could not stop being just joyous that you were sitting in my office, and I could not stop bringing up to you the historical nature of this.

Forgive me. I grew up in a small Black church where I was taught to make a joyous noise unto the Lord. And this is not a normal day for America. We have never had this moment before, and I just want to talk about the joy. I know tomorrow, in the coming hearings, we are going to have tough, hard questions, but please, let me just acknowledge the fact that this is not normal. It has never happened before.

The Senate is poised right now to break another barrier. We are on the precipice of shattering another ceiling, another glass ceiling. It is a sign that we, as a country, are continuing to rise to our collective cherished highest ideals. I just feel this sense of overwhelming joy as I see you sitting there, as I see your family sitting behind you.

You know, the greatness of America is that these imperfect geniuses at our founding founded a nation different than any before in human history. It was not because we all prayed the same or looked the same. They put forth, in a Constitution, the best hopes for humanity, and the story of America, I think, is a testimony to this world of what diverse people can achieve.

It has been said by so many of my colleagues about the fact that we have had 115 Supreme Court Justices, and we should not diminish the accomplishments of mostly these 108 white men. They were extraordinary patriots who helped shape this country. But now we are seeing, to the highest court in our land, a hopeful day like this, that so many of the people, so much of the rich talent of our Nation, who could not scarcely ever dream of sitting on the Supreme Court, now we are showing that we will indeed go deep into the waters of our Nation and pull forth the best talent. Extraordinary legal talent comes from all backgrounds.

I know that in our Nation, for the 200-plus years of our history, there have been extraordinarily talented Black people, men and women, Muslim men and women, from the founding of our Nation. We have seen extraordinary indigenous men and women, all who probably could have added to the greatness of our courts but they were denied that opportunity.

I believe we say these words, “justice for all,” but there are many people who feel those words have been diminished by the lack of representation, the lack of avenues for talented people to ascend to our courts. But fortunately, thanks to the sacrifices of all Americans, people on both sides of the political aisle, we have begun to see more and more diverse Americans slowly get onto our Federal courts. My family celebrated that.

I was born in 1969, the year that President Johnson nominated Thurgood Marshall, the first African American to serve on the Supreme Court. It shook the wonderful foundations of our Nation, and he became a symbol to all of us, Black and white, of what a Supreme Court Justice can be. And then Ronald Reagan, in 1981, roughly 200-plus years since the founding of our Nation, put Justice Sandra Day O’Connor. That was not a normal moment. It was a moment to rejoice. And now we have seen President Obama put Justice Sonia Sotomayor, the first Hispanic, on the Court. And what I am seeing in this Congress, my colleagues and I, doing, is we are opening the doors of diverse talent to our Federal courts in ways we have never seen before.

Think about this. President Biden has nominated the first-ever Article III Muslim judge to our Federal courts. He nominated the first openly LGBTQ woman to serve on our Federal court. He nominated Native-American and Asian-American candidates who have appeared before this Committee. Incredibly talented individuals, worthy of their positions, now act in roles to the benefit of our whole Nation. They herald the truth of who we are as a country, an inclusive, multicultural nation that shows the world the promise of a true democracy.

In all, over two-thirds of the confirmed judges under the Biden administration have come from groups who historically have not been represented on our Federal courts.

So for those reasons, and more, today, to me, is a day of joy. I cannot tell you how happy I am. Today we should rejoice, because President Biden nominated someone that we have heard to be the 116th Associate Judge of the Supreme Court, who is extraordinarily talented, and who also happens to be a Black woman, something we have never seen before.

Judge Jackson’s nomination breaks an artificially confining mold of our past and opens up a more promising potential-filled future for us all as Americans. It signals that this Nation will draw more deeply from all of our talent and genius, it will benefit all Americans. This is the America that most of our families speak of, from all our diverse backgrounds, an America where anybody can achieve anything, not because of the color of their skin but because of the content of their character. And God, I cannot wait for America to find out more about your character.

When the next generation behind us looks at the highest courts in the land, this ideal will be made more real in even just the faces

of the nine. You bring this wealth of experience that is exciting to me. You have seen so many parts of our legal system. But I just want to talk about your role as a public defender, because that too is unprecedented.

I have a friend that just was at the prayer breakfast here in Congress, Bryan Stevenson. He has a saying. He says, “We have a justice system that treats you better if you are rich and guilty than if you are poor and innocent.” I am not sure if most Americans know that 80 percent of those who go before our Nation’s criminal courts cannot afford an attorney. To this end, a public defender should be looked at as one of the most honorable roles within our judicial system, and yet we have never had a public defender, or anyone who has served as a public defender, on our highest court. And it, unfortunately, is very lacking amongst all Federal judges.

You wrote, Judge, that the role of the public defender made you a better judge. You said it gave you a chance to, quote, “help people in need and to promote core constitutional values.” Well, the Sixth Amendment, right to the assistance of counsel, is guaranteed regardless of wealth and despite the nature of the accusations. I honor that more than you know, as someone who started in legal clinics at Yale. I had my empathy expanded. I had my understanding of the struggles of my fellow Americans in ways that shaped my entire professional career.

I love the fact that you have been a bridge-builder in so many ways. You have the support of Republican-appointed judges and Democratic-appointed judges. Heck, you were confirmed by the Senate, in a bipartisan manner, three times. I love the fact that you have the support of civil rights lawyers and our largest police organizations, like the FOP. It is a testimony to what this Nation needs more of—people that will find ways not to accentuate the lives that divide but try to find more ties that bind us together.

Let me go one note more personal, back to you sitting in my office. I cannot tell you how, before our meeting, how many people reached out to me with very emotional moments. You know, my mom’s Deltas? I heard from many Link Sisters. I cannot tell you what it meant to me. So when you came to my office I was a little kind of nervous, even.

And then you started talking about your family and your parents. I want to tell your parents you and I have something in common. We are both around the same age. Both of our parents graduated from HBCUs. My dad, Dr. Brown, is also an Eagle. He went to North Carolina Central, just like you. And they came to DC. My mom worked in the DC public schools, Ms. Brown, just like you.

And your story, the more you talked, Americans from all backgrounds know what it is to be underestimated and looked down upon, when they told you you were too ambitious for wanting to go to Harvard. You were a mom that faced career challenges at your private law firm. How many women can relate to that? The more you spoke about your personal story, the more I know it is an American story that folks from all backgrounds can relate to.

But there is something that really moved me. Behind you, in your family, is your daughter, Leila. And when she was 11 years old—I love this—she wrote a letter to President Obama, urging him to nominate her mother, you, to the United States Supreme

Court. Wow. And in that letter her recommendation put forward that you, Judge Jackson, would be, quote, “a great Supreme Court Justice.”

I suspect after these proceedings, and please, God, after your confirmation to the Supreme Court, something new will happen in America, that that letter from your daughter will not be exceptional. Generations of little, young girls and generations of little, young boys, no matter who their parents are, will have the audacity to write the President of the United States, whether they are daughters of white parents or Black parents or biracial parents or Muslim and Jewish parents, Sikh or Hindu parents. We are going to see a new generation of children talking about their mamas, and daring to write to the President of the United States of America, that my mom should be on the Supreme Court.

Well, I want to tell your daughter right now that that dream of hers is so close to being a reality. Some tough days ahead, but I think it could happen. And your grandparents’ generation, literally this week back in 1965, when my parents were in Washington, DC, in that week there was a man named Martin Luther King who began, on this day, a march from Selma to Montgomery. And when he finally made it, on the 25th of March, he talked to people who were losing faith in America, that we can be who we say we are. And he says for those folks, how long will we have to wait? Not long, because “the arc of the moral universe is long and it bends toward justice.”

Well today America is witnessing the literal bending of the arc and the conducting of one of the most sacred ideals of this country, justice for all. I think more people, at the end of these hearings, and after a Senate vote, more people will believe that we can be the Nation we say we are when we put our hand on our heart. Indeed, I think you and your family are giving a lot more people faith that we will achieve a nation of liberty and justice for all. Thank you.

Chair DURBIN. Thank you, Senator Booker.
Senator Kennedy of Louisiana.

**OPENING STATEMENT OF HON. JOHN KENNEDY,
A U.S. SENATOR FROM THE STATE OF LOUISIANA**

Senator KENNEDY. Hello, Judge. If you are a lawyer or an American I guess it does not get any bigger or better than this. Congratulations.

In addition to honoring the wonderful State of Minnesota, and unless you correct me, I am going to assume that your purple attire is also meant to honor LSU in my State. And if I squint real hard I might call it Marian blue, the colors of my Southern University in Louisiana.

I want to compliment you and the Biden White House for selecting Senator Doug Jones to advise you. Senator Jones knows the Senate, and the Senate knows Senator Jones, and we know him to be quite the intellect, but more important, we know him to be a person of good judgment and goodwill, and I am glad that you have been listening to him.

I hope we will be able to use this hearing today to talk about, if not implicitly, at least implicitly, two subjects. The first is the le-

gitimacy of the United States Supreme Court. Where does the Court get its legitimacy? What can we do to enhance it?

Judicial legitimacy is important. I do not need to tell you that. I am rather fond of the Constitution. I know you are too. When members of the United States Supreme Court interpret it, I want the American people to believe them. I want the American people to say, "Well, I may not agree but the men and women who made that decision are intellectually honest and people of good faith."

One of the primary roles of the United States Supreme Court is to uphold the rule of law, and sometimes Justices have to uphold the rule of law when it is not popular. Sometimes Justices have to uphold the rule of law when it is not popular with the majority of Americans. Boy, that is tough. It is also important. Sometimes—not generally, but sometimes—the majority can mean that just all the fools are on the same side, and that is what the courts are for.

And I am rather fond of the Bill of Rights too, and I know you are as well. I have never believed that the Bill of Rights was there for the high school quarterback or the prom queen. They are covered by it, but the Bill of Rights is there to protect the rights of people who do not see the world exactly like everybody else, or who do not look exactly like everybody else.

Now unfortunately, through history we have had people, some well intentioned, who tried to delegitimize the Supreme Court. We had a President, way back when, who tried to impeach a Supreme Court Justice. We had another President who wanted to pack the Court. I remember the "Impeach Earl Warren" signs. And most of the people who want to delegitimize the Supreme Court believe that unlike our founders, in my judgment, believe that members of the Supreme Court ought to be, and are, politicians in robes. They believe that the United States Supreme Court ought to be a mini-Congress. They believe that the law is not the law. The law is supposed to just be politics, practiced in a different way. And they believe in court packing, and they are wrong.

Number two. I hope today that we can use this as an opportunity to talk about, if not explicitly, at least implicitly—that is what I am going to try to do—the appropriate balance between representative government and declarative government. Now in representative government, as you well know, people, through their elected representatives, make policy. In declarative government, policy is made by the unelected, the administrative state and the Federal judiciary.

Now both are important. Both are important. I am not saying this is a zero-sum game or either-or. But what is just as important is we have the appropriate balance between representative government and what I will call declarative government. I mean, we have an administrative state. Did any of us ever think it would get this big? Is that healthy? We need to ask ourselves that.

Is it really healthy to arrive at a circumstance where the administrative state passes 35 laws a year to our 1? Is it really healthy to have an administrative state that makes its own laws, interprets its own laws, and forces its own laws before courts, with the respect to which the administrative state appoints the judges? I think that is a fair question to ask.

In terms of with respect to declarative government and the Supreme Court and the Federal judiciary, Federal judges have enormous power. They have to. But they do. They have enormous power. You are appointed for life. You cannot be un-elected. Your salary cannot even be reduced. And you have to have that power. Judicial power is important. So is judicial restraint.

I believe that the appropriate role of the Federal judiciary is the following: Federal judges do not make law. They do not tell us what the law ought to be. They tell us what the law is.

Now I said "primarily" because, of course, sometimes Federal judges make law. I mean make the law on the case. You decide a case. You have to tell us what "reasonable" means in terms of searches and seizures. You have to help us define restraint of trade, after we pass a statute. So, of course, judges make law. But I am talking about the proper balance.

I will leave you with these last thoughts, and then I will yield back my time. I want you to hear the words of, what in my opinion, is one of our most distinguished Supreme Court Justices. I am going to read his words. "The American people love democracy, and the American people are not fools. The people know their value judgments are quite as good as those taught in any law school, maybe better. Value judgments, after all, should be voted on, not dictated."

I look forward, Judge, to getting to know you better, and congratulations, Mom and Dad.

Chair DURBIN. Thank you, Senator Kennedy.
Senator Padilla.

**OPENING STATEMENT OF HON. ALEX PADILLA,
A U.S. SENATOR FROM THE STATE OF CALIFORNIA**

Senator PADILLA. Thank you, Mr. Chair.

Judge Jackson, welcome back to the Senate Judiciary Committee. Now the last time you were before us, just less than a year ago, I recall that you mentioned that every once in a while you make it a point to walk a few blocks from your courthouse to the National Archives. As we all know, the National Archives is where the Declaration of Independence, the Constitution, and the Bill of Rights are housed. You shared that you go there and reflect on the momentousness of the office that you hold, and it is a fitting place, these Archives, to be reminded of our Nation's highest ideals, our pursuit of a Union that is more fair, that is more free, and that is striving to be more perfect.

It is also a place to see how, for two and a half centuries, our democracy has remained a work in progress, and that it is incumbent upon all of us, yes, as a nation, but each of us, as individuals, to continue making that progress.

The men who wrote our founding documents could never have imagined that you would one day be here. A former public defender, a proud graduate of a public high school, a working mom, and yes, the first Black woman nominated to serve on the Nation's highest court. Colleagues, our Founding Fathers also could never have imagined that the Senators sitting before Judge Jackson would include the first women to represent California, Hawaii, and Tennessee; the first Jewish man to represent Georgia; the first His-

panic man to represent Texas; the first Black man to represent New Jersey; nor could they have imagined that the list would include me.

I am here as a proud son of immigrants from Mexico, who came to this country with little formal education but with big dreams and a tremendous work ethic. And it is because of the decades of hard work and sacrifice by Santos and Lupe Padilla, my dad as a short-order cook, my mom as a housekeeper, that I would enjoy tremendous opportunities in my life, and that includes the honor of representing the State of California in the United States Senate and being the first Latino to do so. So like so many of us in this room, I am blessed to live the American dream.

Now looking around you can see the strides that our democracy has made toward strengthening our institutions by including more voices and more perspectives. Judge Jackson if you are confirmed we will take another step toward making our Government better reflect the America that it serves, toward making the promise of America more real.

And we know that progress does not come easily. Breaking barriers and being the first means not just significant opportunity but tremendous responsibility. But Judge Jackson, I also know you are equipped with a tremendous record of experience and accomplishment and you are ready to blaze this trail, a trail that your grandparents may have found unfathomable, but one that your daughters and my sons and future generations will now see as a natural part of the American story.

Judge Jackson, even before your next opinion or dissent, your appearance before us today already begins a new chapter in our Nation's history. And I can say for certain that by the end of these hearings those watching across the country will know of your outstanding qualifications, your experience, and your accomplishments, which bear repeating over and over again.

A public education, including graduating from Miami Palmetto High School—I see that smile—followed by degrees from Harvard College and Harvard Law School, clerkships at the Federal district court, the Federal court of appeals, and the United States Supreme Court. Two years as a Federal public defender. Two years as a staff member of the United States Sentencing Commission, and 4 years as its Vice-Chair. You have been confirmed by this Senate not once, not twice, three times, each on a bipartisan basis, including two lifetime judicial appointments. And you bring nearly a decade of judicial experience, which, by the way, is more than the combined total of four of the currently sitting Justices at the time they were nominated.

So yes, you are clearly more than qualified to serve as a Justice of the Supreme Court of the United States. And yes, you bring a wealth of other important experiences and perspective to the Court, including as a working mother and as a Black woman.

Now in these hearings I look forward to speaking further about your background, your experiences, both on and off the bench, and your approach to the law. But based on our conversations already and my review of your record, I believe you have the expertise, the insights, and the heart to elevate the weighty deliberations of the Supreme Court.

Every year the Supreme Court decides dozens of cases that shape the fundamental rights and lives of the American people. Only a small percentage of those cases will ever be highlighted in history books, make the front page of newspapers, or go viral on social media. But the choices of the Supreme Court will certainly shape the future of labor rights, voting rights, women's rights, criminal justice, immigration, technology, environmental protection, and so much more.

And I also want to be clear about something important. If you are confirmed, I do not expect to agree with every detail of every decision that you make. That is not my test. That is not our test. Our job on this Committee is to make sure that the next Justice will honor the rule of law and the principle of equal justice for all. We must ensure that the next Justice will help the Supreme Court live up to its responsibility to the American people. And yes, America is watching. America is watching these hearings to see what the future holds, not just for themselves but for the Court as well.

Judge Jackson, like you I believe in the greatness and the promise of this Nation. I believe that we can continue building on our dream of a more perfect Union, and that includes building a government that better reflects and represents the people that it serves. It is a dream that we have spent 2½ centuries struggling to realize. And while this hearing may not be the last step on that journey, it is a momentous step forward indeed.

Judge Jackson, you are an outstanding nominee for our Nation's highest court, and I thank you for your service, and I thank you for sharing your faith in America's promise, a faith that is stronger because you know how far our Nation has come.

And, Mr. Chair, before closing, and with your indulgence, I would like to share a few words in Spanish, on the importance of this nomination.

La Corte Suprema decide docenas de casos cada año que afectan nuestras vidas y nuestros derechos fundamentales. Y esas decisiones afectaran el futuro de nuestro país atreves de temas como el derecho al voto, inmigración, protección ambiental, derechos laborales, y mucho mas.

Esta semana, el Senado y el país verán lo preparada y calificada que está la jueza Jackson para la Corte Suprema.

Espero escuchar mas sobre la jueza y las perspectivas importantes y necesarias que traería a la Corte Suprema.

Judge Jackson, I look forward to your testimony over the next few days, and I thank you, Mr. Chairman.

Chair DURBIN. Muchas gracias, Senator Padilla.

Senator PADILLA. De nada.

Chair DURBIN. Senator Tillis of North Carolina.

**OPENING STATEMENT OF HON. THOM TILLIS,
A U.S. SENATOR FROM THE STATE OF NORTH CAROLINA**

Senator TILLIS. Thank you, Mr. Chairman and Ranking Member. It is real honor to now participate in my fourth Supreme Court nomination and confirmation process, and Judge Jackson, congratulations on your nomination. I do feel like you and your family have every reason to be very proud, and your daughter, apparently, has pretty weighty letter-writing skills.

When we met together I wanted to thank you for the time that we spent together. I asked about your family. You beamed with pride, and can understand why. You have parents, brothers, siblings, family members who are public servants themselves, and now you have gone on to do that, continue that legacy, in your public defender role and as a judge. And you should be very proud of that.

And we should also recognize the historic nature of this event. The first African American female to be put forth for confirmation for the Supreme Court is quite extraordinary.

I also want to recognize that when we had the meeting in my office I asked you, "Why on Earth are you doing this?" because this week is not going to be particularly fun, every moment of it. Why on Earth are you doing this? You are brilliant. You are well educated. You are studied in the law. There are so many other things that you could do. And you said that it really is the pinnacle of your profession, and I guess in many respects this is the realization of a dream of yours. But I also think that it is probably putting within reach, for many young boys and girls, young men and women, the reality that they too someday could be here before the Senate, being considered for confirmation to the highest court in the land. So you are not only fulfilling your dreams, you are making the dreams of others appear to be within reach.

I think as we go through this hearing this week we are also going to get an opportunity to see the content of your character demonstrated. I, for one, think you have a strong track record of ethical values—honesty, integrity, respecting others, and endeavoring to be fair, just, and compassionate.

You know, confirming a Supreme Court Justice is one of the most important responsibilities I think I have as a U.S. Senator. The outcome of our decision will impact millions of lives, and the very structure in the future of our constitutional republic. Supreme Court Justices must find answers to some of the most pressing constitutional and legal questions of our time. They are confronted with complex questions; many of them do not have good answers, or at least easy ones. That is why it is critical whenever we confirm a Supreme Court Justice we understand the nominee's judicial philosophy and then reconcile it with our conception of the best mindset to bring to the Bench.

In my opinion, a Justice's job is to interpret the text and words of the Constitution as written, and give them their original meaning. I reject the notion that the Constitution is a living, evolutionary document that changes based on the impulses of five unelected Justices.

A good judge must understand that his or her job is not to legislate from the bench and read in their preferred policy outcomes into statutes. If the words of a statute are clear, a good judge will reach a decision based on those words, and those words alone, even if it creates an outcome they may disagree with personally.

In other words, in the words of Chief Justice Roberts, a good Justice has one job—calling balls and strikes. Nothing more and nothing less. Sometimes that leads to rulings that Republicans like and Democrats hate. Other times it leads to rulings that Democrats like and Republicans hate. And sometimes it leads to rulings that ev-

everybody hates. But that is okay. That is really your job as a Supreme Court Justice.

I had the opportunity to meet Judge Jackson, I said earlier, and I also wanted to thank you for your indulgence. I may have done my interviews a little bit differently than other ones. I asked some questions and then I had all my staff ask a number of questions. I was quite impressed with how engaged you were with some of the former Members of the Judiciary Committee and other staff, and I even scared one person, who was just on the job a week and a half. I said, "Have you got a question for the Supreme Court Justice?" and he had a question. It was a good question and you were very indulgent in your answer.

I just thought you were honest and forthcoming. I wanted you to know that. I have said that in the press. I think that you have the right temperament, just based on how I have seen you react to the questions—not the questions, but the statements today. I also appreciate how your unique perspective, your upbringing, your family, and your experience as a former public defender have shaped your views.

As I noted during your confirmation to the circuit court, I do have some additional questions and concerns that I want to ask about to kind of weave together or reconcile my conception of the right mindset for a judge going to the Supreme Court. I am concerned, and will look into, questions over the next couple of days, and I will be here for the majority of the hearing, to kind of put together the foundation that I need to ultimately make a decision on your confirmation.

So as I proceed with the hearing this week I will be in attendance most of the time, except for breaks, and I will focus on better understanding your writings—I am in the middle of your thesis right now; I should be finished by tomorrow morning—your political activities, and opinions with the goal of determining your philosophy, and whether or not it fits with my conception of the right philosophy for somebody that I would vote to confirm.

I will listen thoroughly. I will keep an open mind, as I do with every nominee before this Committee. But at the end of the week I will ultimately have to conclude whether or not I am comfortable with putting someone in a lifetime position and whether that person is likely to have the kind of philosophy that I want.

I have told Justice Gorsuch, Justice Kavanaugh, and Justice Barrett that I hope, and I expect it, that they would take opinions that would make me mad, and that is okay. I just want to know that they do it for the right reason. I do not want an activist at either end of the spectrum, although I think some folks are okay with one end of the spectrum and not the other. If we are talking about preserving the integrity of the Court, there is no place on the Supreme Court for judicial activism. And the best thing that we can do here is make sure that we have Justices that are going to be stewards of the Constitution, respectful of the measures that we pass out of here, and call those balls and strikes.

So I look forward to the hearing tomorrow. You are going to get a lot of questions asked. I do thank all of my colleagues in advance for being respectful, thoughtful, and open-minded, and I look forward to hearing your opening statement.

Thank you, Mr. Chairman.
 Chair DURBIN. Thank you, Senator Tillis.
 Senator Ossoff of Georgia.

**OPENING STATEMENT OF HON. JON OSSOFF,
 A U.S. SENATOR FROM THE STATE OF GEORGIA**

Senator OSSOFF. Thank you, Mr. Chairman and Ranking Member Grassley.

Judge Jackson, good afternoon. Good afternoon to your family. Congratulations to your family. Congratulations to you for your nomination, and welcome back to the Judiciary Committee.

I engage in these proceedings with deep respect for the responsibility that the Senate has to advise and consent on the lifetime appointment of a Supreme Court Justice, who would be responsible for interpreting and applying constitutional and statutory law in the most complex and contested and nationally significant cases.

The Constitution was a ground-breaking document when written, and still, by today's standards, as amended, considering the tyranny that prevails in much of the world. Its guarantees of liberty and privacy and due process are exceptional as a governing document.

Often in our history it has fallen to the Court, through its decisions, to ensure the enforcement of those guarantees. Yet our Constitution's guarantees of individual rights and equal protection under the law remain too often, and for too many, unfulfilled. For any colleagues who doubt this, I remind them of Ahmaud Arbery's murder in Glynn County, Georgia, just 2 years ago, when a young Black man was shot dead in cold blood, on camera, in the street, and the local authorities buried the case and looked the other way. Only a massive civil rights mobilization pressured State and eventually Federal prosecutors to act.

For any colleagues who doubt that those promises remain unfulfilled to too many, I remind them that in my State you can predict how long someone must wait to vote by where they live and the color of their skin.

In practice the promises made in the plain text of our Constitution are still too often broken, for too many of our fellow Americans, and so the Court remains essential to that national process of becoming, in real life, what America is in text.

Today's hearing, Judge Jackson, is evidence that this process continues, and above all, a testament to you personally, that in a nation still striving to transcend the legacies of slavery and segregation and institutionalized racism, through your brilliance and resilience and hard work you have already rendered great service to the Nation as a Federal judge. And as a Black woman you have overcome deeply rooted obstacles to earn nomination to our Nation's highest court for the first time in history.

Alongside our Constitution's exceptional guarantees of individual rights and equal protection is its exception system of checks and balances. Restraints on political power imposed by the diffusion of authority across three co-equal branches, between Federal and State governments, with the President and a Federal legislature directly accountable to voters and an independent Federal judiciary, whose judges must be confirmed by elected Senators.

This constitutional system has endured and developed for nearly a quarter of a millennium. It is resilient. But democracy remains the exception, not the norm, in history and around the world, and we cannot take the survival of our republic for granted. And so I look forward to engaging with you, Judge Jackson, to discuss your perspective on the separation of powers and the resilience of our Constitution, when threatened by political actors who would ignore the rule of law or seek to seize power by illegal or extraordinary means.

Among the Court's most challenging tasks are to grapple with unsettled law when the stakes are highest, or even existential, for individuals and for the country, and to apply the Constitution faithfully over the long arc of history as the world changes in profound ways and the text of faithful constitutional interpretation meets new facts, new contexts, and new technologies.

Judge Jackson, should you be confirmed you may serve as a Supreme Court Justice well into the middle of this century. You will rule on cases whose contours and complexity we cannot yet imagine. And so among several areas of interest I look forward to learning how you will consider protections against unreasonable search and seizure in an age of ubiquitous surveillance; how you might approach disputes over war powers, where law remains unsettled, between executive and legislative claims; how you will approach questions pertaining to freedoms of speech and of the press; and seek that confirmation that you will apply the law faithfully, without regard for your own opinions, as my review of your extensive work to date demonstrates that I believe you will.

This constitutional process of advice and consent is vital to the integrity and legitimacy of the Court. And Judge Jackson, on behalf of my constituents in Georgia, I look forward to engaging in this process with you and my colleagues.

Mr. Chairman, I yield.

Chair DUBIN. Thank you, Senator Ossoff.

Senator Blackburn of Tennessee.

**OPENING STATEMENT OF HON. MARSHA BLACKBURN,
A U.S. SENATOR FROM THE STATE OF TENNESSEE**

Senator BLACKBURN. Thank you, Mr. Chairman. Judge Jackson, welcome. You are indeed to be congratulated, and your entire family with you, and thank you for your time to visit. I appreciated so much that. And to your daughters, her best job is being mama. She likes that one.

But we have talked today a little bit about the momentous occasion that this is in bringing you forward, and indeed it is, because unlike any other Federal office this is a lifetime appointment, and the decisions that you are going to make are going to impact rights and freedoms of every single American citizen.

And, you know, President Biden thinks you are the right person for the job, but it does not end there. We do have that role of advice and consent, and it is up to us to carry that job out. So as you have heard repeatedly, this is going to be a fair and very thorough and very respectful hearing, and we are going to work through this process with some tough questions, but do it in a manner, the respect that you deserve.

And we have talked some today about the treatment of Justice Thomas and Justice Kavanaugh, Justice Barrett, who was questioned about her faith and whether that made her suitable for the Court. And I know your faith is important to you. We have also talked some about Janice Rogers Brown and the treatment that she endured here.

So we are going to be pleased to move forward and focus on the issues that the American people want to focus on, because they want to know about you and how you are going to approach your job, and the decisions that you have made in the past, what you have written, what you have said.

And I have got a few areas that I am going to want to delve a little bit further with you, and we touched on some of these as we talked. Right now, when I talk to Tennesseans, one of the most important things that they bring up is the issue of parental rights and wanting to be able to rear their children as they see fit. And moms and dads are very concerned about this progressive agenda that is being pushed in some of our public schools. Educators are allowing biological males to steal opportunities from female athletes, in the name of progressivism.

Just last week, an entire generation of young girls watched as those charged with protecting them allowed a biological male to compete and beat a biological woman at the highest level of collegiate sports. Some girls have been forced to share locker rooms with biological males. Rather than defending our girls, those in power are teaching them that their voices do not matter. They are being treated like second-class citizens. And Americans need a Supreme Court Justice who will protect our children and will defend parents' constitutional right to decide what is best for their own kids.

And here we need a little clarity. At a time when these parental rights appear to be under assault by the radical left, your public comments about, and I am going to quote you, "the transformative power of progressive education," end quote. These are deeply concerning. You serve on the board of a school that teaches kindergarteners, 5-year-old children, that they can choose their gender, and teaches them about so-called white privilege. This school has hosted an organization called "Woke Kindergarten," and pushes an anti-racist education program for white families. Your public endorsement of this type of progressive indoctrination of our children causes one great concern when it comes to how you may rule on cases involving parental rights.

Parents also know that it is only a matter of time before we have the next pandemic, and they are concerned about more mask mandates or lockdowns from unelected bureaucrats that would harm their children's mental health and stunt their development. The American people want a Supreme Court Justice who will protect their families' freedoms, not allow government overreach into private family decisions.

Now moms that I am speaking with raised the issue of crime, and you have consistently called for greater freedom for hardened criminals. At the start of the COVID-19 pandemic, you advocated, and again I quote, "for each and every criminal defendant in the DC Department of Corrections custody should be released." That

would have been 1,500 criminals back on the street if you had had your way.

And you used the COVID-19 pandemic as justification to release a fentanyl drug dealer, a bank robber addicted to heroin, and a convict who murdered a U.S. Marshal into our communities. But your effort to protect convicts began long before the pandemic. You used your time and talent not to serve our Nation's veterans or other vulnerable groups but to provide free legal services to help terrorists get out of Gitmo and go back to the fight.

You also have a consistent pattern of giving child porn offenders lighter sentences. On average, you sentenced child porn defendants to over 5 years below the minimum sentence recommended by the sentencing guidelines. And you have stated publicly that it is a mistake to assume that child pornography offenders are pedophiles. Your philosophy, it appears, is backward on these issues, restrictions on children and families and freedom for criminals.

In fact, your philosophy, or lack thereof, may be the root of the problem here. I was concerned during our conversation earlier this month when you told me that you really did not have a judicial philosophy. The American people deserve a Supreme Court Justice with a documented commitment to the text of the Constitution and the rule of law, not a judicial activist who will attempt to make policy from the Bench. Without a judicial philosophy, a judge is legally adrift and will be inclined to consider policy rather than law.

You once wrote that every judge has, and I quote, "personal hidden agendas," end quote, that influence how they decide cases. So I can only wonder, what is your hidden agenda? Is it to let violent criminals, cop killers, and child predators back to the streets? Is it to restrict parental rights and expand Government's reach into our schools and our private family decisions? Is it to support the radical left's attempt to pack the Supreme Court?

You have praised the 1619 Project, which argues the U.S. is a fundamentally racist country, and you have made clear that you believe judges must consider Critical Race Theory when deciding how to sentence criminal defendants. Is your personal hidden agenda to incorporate Critical Race Theory into our legal system? These are answers that the American people need to know.

So we are going to look at past statements and decisions and seek clarification from this Committee before we make our decision.

So let me close again by congratulating you on your impressive career and your nomination to the Nation's highest court. Regardless of the outcome of the confirmation process, you and your family should be incredibly proud of all that you have achieved. Your story is a wonderful example of the American dream fulfilled. You are able to sit here today because you were reared and built your career in a free country, whose laws protect equal justice and opportunity for all. To ensure that future generations can expect the same blessings and opportunities you received, we need Justices who will be dedicated to justice and the rule of law.

Our questions to you over the coming days are going to be tough, but they are tough by necessity, because it is our duty to determine whether you will, first and foremost, uphold the Constitution and our Nation's founding principles.

Thank you so much for joining us.

Chair DURBIN. Thank you, Senator Blackburn.

All Committee Members have now completed their opening statements. At this point in time we are going to have a little shuffle of logistics, and I will ask that the two introducers please come forward to the witnesses table.

Judge Jackson, you can take a brief rest from the glare of the spotlight.

We are fortunate today to have two distinguished guests introducing Judge Jackson. We will hear from Judge Thomas Griffith, who served as a judge on the U.S. Circuit Court of Appeals for the District of—D.C. Circuit from 2005 to 2020, and Professor Lisa Fairfax, who serves as a presidential professor and co-director of the Institute for Law and Economics at the University of Pennsylvania Carey Law School.

Judge Griffith, we will start with you. Make sure your microphone is turned on; there is a red button.

Judge GRIFFITH. How is that?

Chair DURBIN. It has been a while since you have been here.

Judge GRIFFITH. Okay.

INTRODUCTION OF HON. KETANJI BROWN JACKSON, NOMINEE TO BE AN ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES, BY HON. THOMAS B. GRIFFITH, JUDGE, RETIRED, U.S. COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT, WASHINGTON, DC

Judge GRIFFITH. Chairman Durbin, Ranking Member Grassley, and Members of the Senate Judiciary Committee, I come here today as a retired Federal appeals court judge with 15 years of experience on the United States Court of Appeals for the D.C. Circuit. I come here as a jurist appointed by Republican President George W. Bush.

And I come here as someone who understands that there are few greater responsibilities under the Constitution than serving as a Justice on the United States Supreme Court. It takes a jurist of high character, keen intellect, deep legal knowledge, and broad experience to ensure that the judiciary plays its unique role under the Constitution: to uphold the rule of law impartially, and not to be, in the words of Justice Stephen Breyer, “partisans in robes.”

Today, I have the high honor to introduce Judge Ketanji Brown Jackson, a jurist who has all of those qualities. When President Biden introduced her to the Nation a little over 3 weeks ago, the American people caught their first glimpse of Judge Jackson’s character.

You may recall that she began her remarks with an expression of her faith in God and her gratitude for this Nation, which she rightly observed, “is the greatest beacon of hope and democracy the world has ever known.”

I first met Judge Jackson in 2013 after the Senate had confirmed her nomination to the Federal district court as a trial judge. Eight years later, she joined the D.C. Circuit as an appellate judge after another Senate confirmation.

I have had many opportunities to review her work and observe her work over the years as a judge and on several occasions, I reviewed her decisions on appeal. Although, we did not always agree

on the outcome the law required, I respected her diligent and careful approach, her deep understanding, and her collegial manner; indispensable traits for success as a Justice on the Supreme Court.

About her collegial manner, that important feature of the Justice's work is often overlooked. Although appointed by different Presidents, the Justices have genuine fondness and respect for one another. We saw some of that in their expressions of admiration and love for Justice Breyer when he announced his retirement.

The civil manner in which the Justices debate the large and vexing issues before them is vital not only to the success of the Supreme Court, but to the success of our Nation. The Constitution requires that of all of us. It goes without saying that civility of debate and respect for the differing views of others are sorely lacking from our public life.

Judge Jackson's life has modeled these qualities. Perhaps most important, Judge Jackson is an independent jurist who adjudicates based on the facts and the law and not as a partisan. Time and again, she has demonstrated that impartiality on the bench; sometimes ruling in favor of the Government, sometimes ruling against the Government, sometimes ruling in favor of the individual, sometimes ruling in favor of the corporation. Her rule is simple: follow the law.

As some think it noteworthy that a former judge appointed by a Republican President would enthusiastically endorse a nomination to the Supreme Court by a Democratic President, that reaction is a measure of the dangerous hyperpartisanship that has seeped into every nook and cranny of our Nation's life and against which, the framers of the Constitution warned us. There should be nothing unusual about my support for a highly qualified nominee who has demonstrated through her life's work, her commitment to the rule of law, and an impartial judiciary.

Former colleagues in the Federal judiciary, Michael Luttig, Michael Chertoff, David Levi, and Andrew Gilford, each appointed by Republican Presidents and all highly respected judicial conservatives, have also voiced their strong support for Judge Jackson's confirmation.

There was a time not so long ago when bipartisan support of the President's nomination of a highly qualified jurist was regular order: Anthony Scalia was confirmed by the Senate 98-0; Ruth Bader Ginsburg, by a vote of 96-3.

The rule of law is a fragile possibility in the best of times. Today, it is literally under attack in Ukraine and is threatened around the world and in our own country by autocrats and their sympathizers who give lip service to the rule of law, but then work to undermine it at every turn.

As Justice Scalia taught us so well for so long, an indispensable feature of the republic the Constitution created is an independent judiciary of judges who have taken an oath not to a President or a party, but to the American people and to God, that they will be impartial.

Judge Ketanji Brown Jackson has demonstrated her unwavering commitment to that oath. I applaud this exceptional nomination, which I encourage the Senate to confirm. Thank you.

Chair DURBIN. Thank you, Judge.

Professor Lisa Fairfax.

INTRODUCTION OF HON. KETANJI BROWN JACKSON, NOMINEE TO BE AN ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES, BY LISA M. FAIRFAX, PRESIDENTIAL PROFESSOR AND CO-DIRECTOR, INSTITUTE FOR LAW AND ECONOMICS, UNIVERSITY OF PENNSYLVANIA CAREY LAW SCHOOL, PHILADELPHIA, PENNSYLVANIA

Professor FAIRFAX. Chairman Durbin, Ranking Member Grassley, and Members of the Senate Judiciary Committee, my name is Lisa Fairfax. I am a presidential professor of law at the University of Pennsylvania School of Law and co-director of its Institute for Law and Economics.

Prior to my academic career, I worked at corporate and securities law at a large law firm. But before that, I was roommate and a very dear friend at Harvard College and Harvard Law School of Judge Ketanji Brown Jackson, who I am so very honored to introduce to you today and to the American people.

Ketanji and I met during our first days of college, nearly 35 years ago. Those first moments when you wonder if you belong, she is the friend that made sure we all did. A woman of deep faith in God and unyielding love for family, Ketanji defines friendship. She is the friend who you are immediately drawn to for their outgoing and friendly nature.

As our circle of friends grew, she is the one who became the rock for us all. Even though we are the same age, she is the role model who makes you believe in what she says: you can do it and here is how. And she showed us how by the power of her example of hard work, preparation, and excellence at transforming the seemingly impossible into the achievable.

Together, we poured our souls into our studies, graduating college with honors, and then doing it all over again when we enrolled and graduated law school with honors. We became sisters and saw each other's families as our own. We both met our husbands when we were students and we were there for each other as we walked down the aisle, started our legal careers, and eventually, our lives as working mothers.

My husband, Roger Fairfax, now dean of American University's Washington College of Law, has described Ketanji's impeccable credentials that has distinguished her at every level of her professional career. He also knows her as one of our children's most favorite people in the world.

Our college roommate Nina Simmons, a top corporate lawyer, has described Ketanji's unwavering work ethic. She puts her head down and gets it done, even, and perhaps especially, when no one is watching.

Our other college roommate, Antoinette Coakley, a distinguished business law professor, has described Ketanji as a coalition builder. We knew early on that she could be anything she chose to be, but also, that she seemed destined to be a judge because of her ability to see all sides and render fair and level-headed decisions.

But our tight new group of girlfriends also knows that there is so much more to Ketanji beyond her brilliant mind. There is her wonderful sense of humor, her gift of storytelling, her heart of gold

that always shows up from the first call you make for advice about your career to the first knock you hear on the door after learning you are diagnosed with cancer. You never have to ask; she is always there.

Above all, Ketanji is humble enough not to pretend she knows how to have it all, but she does know how to give it her all. And what she gives to her family, her friends, she also gives to the law and to this country. A testament of her character is all the people of different backgrounds and beliefs who understand that essence of Ketanji.

We have seen that in her endorsements from bipartisan colleagues from the bench and the bar, and from both, civil rights leaders and members of law enforcement, and we will see it in the history she will make. I know she is honored and humbled by the significance of this moment, not for what it means for her, but what it means for our amazing country; confirmation of the idea that America is a place in which all of us can feel a sense of belonging and all of us can reach our fullest potential.

While challenging, I would summarize nearly 35 years of friendship in this way: by highlighting Ketanji's faith in God and country, her intellectual brilliance, her goodness and grace, and a work ethic that makes her perfectly suited for the serious task of serving on the Supreme Court. It is with tremendous pride, love, and gratitude for her willingness to serve that I introduce to you my dear friend and an exemplar of the best of America's promise, Judge Ketanji Brown Jackson. Thank you.

Chair DURBIN. Thank you both.

Professor Fairfax and Judge Griffith, I am sure that Judge Jackson and her family deeply appreciate your being here today and your kind words.

I want to add to the list of introducers, the man sitting behind you, Senator Doug Jones, who has introduced Judge Jackson to many of us, not for the first time, maybe reintroduced her, but Doug, thank you for serving in this cause and for helping the President and Judge Jackson.

Thank you, all three, for being with us today.

We are now going to move to the next phase of the program, and that is to hear from Judge Jackson. So, if we could set up a table.

Before you sit down, Judge, I am going to ask that you take the oath.

Please raise your right hand.

[Nominee is sworn in.]

Judge JACKSON. I do.

Chair DURBIN. Let the record reflect that the Judge has answered in the affirmative.

And having met that requirement, you may now proceed with your remarks.

**STATEMENT OF HON. KETANJI BROWN JACKSON, NOMINEE
TO SERVE AS AN ASSOCIATE JUSTICE OF THE SUPREME
COURT OF THE UNITED STATES**

Judge JACKSON. Chairman Durbin, Ranking Member Grassley, and distinguished Members of the Judiciary Committee, thank you

for convening this hearing and for considering my nomination as Associate Justice of the Supreme Court of the United States.

I am humbled and honored to be here, and I am also truly grateful for the generous introductions that my former judicial colleague Judge Tom Griffith, and my close friend, Professor Lisa Fairfax, have so graciously provided.

I am also very thankful for the confidence that President Biden has placed in me and for the kindness that he and the First Lady and the Vice President and the Second Gentleman have extended to me and my family.

Today will be the fourth time that I have had the honor of appearing before this Committee to be considered for confirmation. Over the past 3 weeks, I have also had the honor of meeting each Member of this Committee separately and I have met with 45 Senators in total.

Your careful attention to my nomination demonstrates your dedication to the crucial role that the Senate plays in this constitutional process and I thank you.

And while I am on the subject of gratitude, I must also pause to reaffirm my thanks to God, for it is faith that sustains me at this moment. Even prior to today, I can honestly say that my life has been blessed beyond measure. The first of my many blessings is the fact that I was born in this great Nation a little over 50 years ago in September 1970.

Congress had enacted two Civil Rights Acts in the decade before, and like so many who had experienced lawful, racial segregation firsthand, my parents Johnny and Ellery Brown, left their hometown of Miami, Florida, and moved to Washington, DC, to experience new freedom.

When I was born here in Washington, my parents were public school teachers. And to express both, pride in their heritage and hope for the future, they gave me an African name, Ketanji Onyika, which they were told means "lovely one."

My parents taught me that unlike the many barriers that they had had to face growing up, my path was clearer, so that if I worked hard and I believed in myself and America, I could do anything or be anything I wanted to be. Like so many families in this country, they worked long hours and sacrificed to provide their children every opportunity to reach their God-given potential.

My parents have been married for almost 54 years and they are here with me today. I cannot possibly thank them enough for everything they have done for me. I love you, Mom and Dad.

My father, in particular, bears responsibility for my interest in the law. When I was 4, we moved back to Miami so that he could be a full-time law student, and we lived on the campus of the University of Miami Law School. During those years, my mother pulled double-duty, working as the sole breadwinner of our family, while also guiding and inspiring 4-year-old me.

My very earliest memories are of watching my father study. He had his stack of law books on the kitchen table, while I sat across from him with my stack of coloring books.

My parents also instilled in me and my younger brother, Ketajh, the importance of public service. After graduating from Howard University, Ketajh started out as a police officer, following two of

our uncles. After the September 11 attacks on our country, Ketajh volunteered for the Army and eventually became an infantry officer, serving two tours of duty in the Mideast. Ketajh is here today, providing his love and support, as always.

And speaking of unconditional love, I would like to introduce you to my husband of 25 years, Dr. Patrick Jackson. I have no doubt that without him by my side from the very beginning of this incredible professional journey, none of this would have been possible.

We met in college more than 3 decades ago, and since then, he has been the best husband, father, and friend I could ever imagine. Patrick, I love you.

William, Patrick's identical twin brother, is here as well, along with his wonderful wife Dana. Also here from Park City, Utah, are Patrick's older brother Gardie and his wife Natalie. And last, but certainly not least, my very dear in-laws, the matriarch and patriarch of the Jackson Family, Pamela and Gardner Jackson, have traveled here from Boston to be with me today.

I am saving a special moment in this introduction for my daughters, Talia and Leila. Girls, I know it has not been easy, as I have tried to navigate the challenges of juggling my career and motherhood and I fully admit that I did not always get the balance right. But I hope that you have seen that with hard work, determination, and love, it can be done. I am so looking forward to see what each of you chooses to do with your amazing lives in this incredible country. I love you so much.

There are so many others who are not here today, but whom I need to acknowledge. I have a large, extended family on both sides. They are watching from Florida, North Carolina, New Jersey, Connecticut, New York, Massachusetts, Colorado, and beyond.

I also have incredible friends. Three of my college roommates came here today to support me and I have so many other boosters from Miami Palmetto Senior High School, Harvard undergrad, Harvard Law School, and all throughout my personal and professional life.

I have also had extraordinary mentors like my high school debate coach Fran Berger; may she rest in peace. She invested fully in me, including taking me to Harvard, the first I had ever really thought of it, to enter a speech competition. Mrs. Berger believed in me and, in turn, I believed in myself.

In the category of great mentors, it was also my great good fortune to have had the chance to clerk for three brilliant jurists: U.S. District Judge Patty Saris, U.S. Court of Appeals Judge Bruce Selya, and Supreme Court Justice Stephen Breyer. These extraordinary people were exceptional role models.

Justice Breyer, in particular, not only gave me the greatest job that any young lawyer could ever hope to have, but he also exemplifies what it means to be a Supreme Court Justice of the highest level of skill and integrity, civility, and grace.

It is extremely humbling to be considered for Justice Breyer's seat, and I know that I could never fill his shoes, but if confirmed, I would hope to carry on his spirit.

On the day of his Supreme Court nomination, Justice Breyer said, "What is law supposed to do, seen as a whole? It is supposed to allow all people—all people—to live together in a society, where

they have so many different views, so many different needs, to live together in a way that is more harmonious, that is better, so that they can work productively together.”

I could not have said it better myself.

Members of this Committee, if I am confirmed, I commit to you that I will work productively to support and defend the Constitution and this grand experiment of American democracy that has endured of these past 246 years. I have been a judge for nearly a decade now and I take that responsibility and my duty to be independent very seriously. I decide cases from a neutral posture. I evaluate the facts and I interpret and apply the law to the facts of the case before me, without fear or favor, consistent with my judicial oath.

I know that my role as a judge is a limited one, but the Constitution empowers me only to decide cases and controversies that are properly presented. And I know that my judicial role is further constrained by careful adherence to precedent.

Now in preparing for these hearings, you may have read some of my more than 570 written decisions and you may have also noticed that my opinions tend to be on the long side. That is because I also believe in transparency, that people should know precisely what I think and the basis for my decision. And all of my professional experiences, including my work as a public defender and as a trial judge, have instilled in me the importance of having each litigant know that the judge in their case has heard them, whether or not their arguments prevail in court.

During this hearing, I hope that you will see how much I love our country and the Constitution and the rights that make us free. I stand on the shoulders of so many who have come before me, including Judge Constance Baker Motley, who was the first African-American woman to be appointed to the Federal bench, and with whom I share a birthday. And like Judge Motley, I have dedicated my career to ensuring that the words engraved on the front of the Supreme Court Building “Equal Justice Under Law” are a reality and not just an ideal.

Thank you for this historic chance to join the highest court, to work with brilliant colleagues, to inspire future generations, and to ensure liberty and justice for all.

Chair DURBIN. Thank you, Judge Jackson.

Well, this is the end of the first day of the first 3 days, which are involving more personal—on a personal level, the Senators on the Judiciary Committee. In a way, it is the easiest day because 10 minutes is merely a throat-clearing warm-up for most Senators on this Committee.

[Laughter.]

Chair DURBIN. Starting tomorrow will be some serious exchange in questions for 30 minutes and then the following day, 20 minutes for each Senator to participate in this. We are looking forward to this opportunity to finally, really give you a fulsome opportunity to respond to many of the things that you have heard and to answer direct questions.

Members have until Thursday at 5 p.m. to submit questions for the record.

We are going to reconvene tomorrow morning at 9 a.m. to begin the 30-minute rounds of questions.

We thank all the participants and members of our audience for keeping this dignified, respectful, and civilized, and we hope to continue that tradition tomorrow.

With this, the Committee stands adjourned.

[Whereupon, at 3:37 p.m., the hearing was recessed.]

[Additional material submitted for the record for Day 1 follows Day 4 of the hearing.]

**CONTINUATION OF THE
CONFIRMATION HEARING
ON THE NOMINATION OF
HON. KETANJI BROWN JACKSON
TO BE AN ASSOCIATE JUSTICE OF THE
SUPREME COURT OF THE UNITED STATES**

TUESDAY, MARCH 22, 2022

UNITED STATES SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Committee met, pursuant to notice, at 9:07 a.m., in Room SH-216, Hart Senate Office Building, Hon. Richard J. Durbin, Chair of the Committee, presiding.

Present: Senators Durbin [presiding], Leahy, Feinstein, Whitehouse, Klobuchar, Coons, Blumenthal, Hirono, Booker, Padilla, Ossoff, Grassley, Graham, Cornyn, Lee, Cruz, Sasse, Hawley, Cotton, Kennedy, Tillis, and Blackburn.

**OPENING STATEMENT OF HON. RICHARD J. DURBIN,
A U.S. SENATOR FROM THE STATE OF ILLINOIS**

Chair DURBIN. This meeting of the Senate Judiciary Committee will come to order.

Good morning, Judge Jackson. Welcome back to you and your family.

Judge JACKSON. Good morning, Mr. Chairman.

Chair DURBIN. This second day is known affectionately by a term of medieval justice known as the “trial by ordeal.”

[Laughter.]

Chair DURBIN. This will be your opportunity to speak, but each Member of the Committee has 30 minutes to ask, and I know that they’re going to be careful to stay within time limits of those 30 minutes. I do want to remind my colleagues that history has proven that speeches don’t have to be eternal to be immortal.

[Laughter.]

Chair DURBIN. President Lincoln learned at Gettysburg that 275 words were enough, so I hope my colleagues and friends will stick to the 30-minute guideline. I will tap on the gavel if you’re getting perilously close to extending beyond.

We’ll take a few breaks throughout the day. A number of them are scheduled: one for lunch, one for dinner, and several perhaps shorter ones in the meantime. If votes are called on the Senate floor, which is a possibility, we’ll do our best to keep the hearing

going as Members go back and forth. As I mentioned yesterday, we welcome all of our friends in the audience and ask that they be quiet and respectful during the hearing.

So let's get started with the questioning, and I'll begin at this point.

Judge Jackson, there are two issues that came up repeatedly yesterday from the other side of the aisle that I want to address at the outset. One of them was a question of judicial philosophy. No one questions either your academic, law school credentials or your service as clerk and as Federal judge, but time and again you have been asked what is your judicial philosophy. Does it fit into Scalia's originalism, Kavanaugh's textualism? Is it strict construction? Is it liberal? Is it conservative? Lo and behold, I have discovered the answer. It turns out that during the course of your time as a judge, you actually have written opinions, 573 to be exact, I think. Maybe I'm off by one or two. And they more or less express your view of the law as the facts are presented to you in each one of those cases, and then some 12,000 pages from the Sentencing Commission, transcripts of deliberations on important issues. For most of us as elected Senators, if people asked what's your philosophy, we'd point to our voting record. You have a record when it comes to court decisions, and this Committee for the 4th time is delving into everything that you've published as a judge and even before.

So would you like to comment at the outset, of those who are looking for a label, what your position is on judicial philosophy?

Judge JACKSON. Yes, thank you, Mr. Chairman. Over the course of my almost decade on the bench, I have developed a methodology that I use in order to ensure that I am ruling impartially and that I am adhering to the limits on my judicial authority. I am acutely aware that as a judge in our system, I have limited power, and I am trying in every case to stay in my lane. And so what I do is I essentially follow three steps.

The first step is when I get a case, I ensure that I am proceeding from a position of neutrality. This means that, you know, I get a case, and it's about something, and it's submitted by certain parties. I am clearing my mind of any preconceived notions about how the case might come out. I'm setting aside any personal views. It's very important that judges rule without fear or favor. The second step is once I've cleared the decks, so to speak, in this way, I am able to receive all of the appropriate inputs for the case, that is, the parties' arguments. They've written briefs. Sometimes we have a hearing. Sometimes we hear from other parties, an amici in a case, and then there's the factual record. I am evaluating all of the facts from various perspectives. I think my experience—all of the various experiences that I've had really helps me at this stage to see the perspectives of all of the parties and to understand their arguments.

And then the third step is the interpretation and application of the law to the facts in the case, and this is where I'm really observing the constraints on my judicial authority. There are many constraints in our system, importantly, because judges have limited authority. And so I am, first of all, looking at my jurisdiction, the threshold matter in every Federal case, to make sure that you even have the power to hear the case. In evaluating jurisdiction, you're

looking at all sorts of things, the text of a jurisdictional provision, for example, precedent related to it.

If I can get to the merits of the case if I have jurisdiction, then I am observing the limits on my authority concerning the question. So if it is a statute, for example, or a provision of the Constitution, I'm looking at the text. The adherence to text is a constraint on my authority. I'm trying to figure out what those words mean as they were intended by the people who wrote them. So at this point, I'm looking at original documents. I am focusing on the original public meaning because I'm constrained to interpret the text. Sometimes that's enough to resolve the issue in terms of the merits. Judges also look at history and practice at the time of the document was created. If it's a statute, I'm looking at Congress' purposes because, again, I am not importing my personal views or policy preferences. The entire exercise is about trying to understand what those who created this policy or this law intended.

I'm also looking at precedent, which is another constraint on judicial authority. I am looking at prior cases and trying to understand what other judges have said. As a lower court judge, I'm bound by the precedent, and even in the Supreme Court, if I was fortunate to be confirmed, there is *stare decisis*, which is a binding kind of principle that the Justices look at when they're considering precedents. So all of these things come into play in terms of my judicial philosophy.

Chair DURBIN. Another issue which has come up, to my surprise, and I've spoken to my Republican colleagues about their fascination with it, is the notion of the composition of the Supreme Court, which euphemistically is referred to as court packing. I have said on the floor and I will repeat here, there is exactly one living Senator who has effectively changed the size of the Supreme Court. That was the Republican Leader, Senator McConnell, who shrank the Court to eight seats for nearly a year in 2016 when he blocked President Obama's nomination of Merrick Garland.

Now, that question on court packing was posed to Amy Coney Barrett, a Justice on the Court, when she appeared before this Committee. She was asked about it. She said, and I quote, "could not opine on it." And on many other policy issues, then Judge Barrett said repeatedly she could not share her views, stating, and I quote, "I will not express a view on a matter of public policy, especially one that is politically controversial, because that is inconsistent with the judicial role." I do believe we should have rules, and traditions, and precedents, but we shouldn't have a separate set of rules for Republican nominees than Democratic nominees.

So, Judge Jackson, if a Senator were to ask you today about proposals about changing the current size of the Supreme Court, what would your response be?

Judge JACKSON. Senator, I agree with Justice Barrett in her response to that question when she was asked before this Committee. Again, my North Star is the consideration of the proper role of a judge in our constitutional scheme. And in my view, judges should not be speaking in—to political issues and certainly not a nominee for a position on the Supreme Court. So I agree with Justice Barrett.

Chair DURBIN. Let me address another issue that came up yesterday in the opening phase of this nomination hearing, and it's the issue involving child pornography. I want to turn to that issue because it was raised multiple times primarily by the Senator from Missouri. And it was—he was questioning your sentencing record in child pornography cases that do not involve the production of pornographic material. They're known as non-production cases. I wanted to put some context here. The Senator from Missouri has in his tweets said of your position on this issue, "Judge Jackson has a pattern of letting child porn offenders off the hook for their appalling crimes, both as a judge and a policymaker. She's been advocating it since law school. This goes beyond soft on crime," the Senator said. "I'm concerned this is a record that endangers our children."

I thought about his charges as I watched you and your family listening carefully yesterday and what impact it might've had on you personally to know that your daughters, husband, parents, family, and friends were hearing the charges that your implementation of this law at sentencing endangered children. Could you tell us what was going through your mind at that point?

Judge JACKSON. Thank you, Senator. As a mother and a judge who has had to deal with these cases, I was thinking that nothing could be further from the truth. These are some of the most difficult cases that a judge has to deal with because we're talking about pictures of sex abuse of children. We're talking about graphic descriptions that judges have to read and consider when they decide how to sentence in these cases, and there's a statute that tells judges what they're supposed to do. Congress has decided what it is that a judge has to do in this and any other case when they sentence, and that statute—that statute doesn't say look only at the guidelines and stop. The statute doesn't say impose the highest possible penalty for something this sickening and egregious a crime. The statute says calculate the guidelines, but also look at various aspects of this offense and impose a sentence that is "sufficient but not greater than necessary to promote the purposes of punishment."

And in every case, when I am dealing with something like this, it is important to me to make sure that the children's perspective, the children's voices are represented in my sentencings. And what that means is that for every defendant who comes before me and who suggests, as they often do, that they're just a looker, that these crimes don't really matter, they've collected these things on the internet and it's fine, I tell them about the victim statements that have come into me as a judge. I tell them about the adults who are former child sex abused victims who tell me that they will never have a normal adult relationship because of this abuse. I tell them about the ones who say, I went into prostitution, I fell into drugs because I was trying to suppress the hurt that was done to me as an—as an infant.

And the one that was the most telling to me that I describe at almost every one of these sentencings when I look in the eyes of a defendant who is weeping because I'm giving him a significant sentence, what I say to him is, do you know that there is someone who has written to me and who has told me that she has developed

agoraphobia. She cannot leave her house because she thinks that everyone she meets will have seen her—will have seen her pictures on the internet—they're out there forever—at the most vulnerable time of her life, and so she's paralyzed. I tell that story to every child porn defendant as a part of my sentencings so that they understand what they have done.

I say to them that there's only a market for this kind of material because there are lookers that you are contributing to child sex abuse. And then I impose a significant sentence and all of the additional restraints that are available in the law. These people are looking at 20, 30, 40 years of supervision. They can't use their computers in a normal way for decades. I am imposing all of those constraints because I understand how significant, how damaging, how horrible this crime is.

Chair DURBIN. It is—it should be noticed as well that the cases which the Senator from Missouri referred to yesterday all resulted in incarceration of some magnitude. In one case, the *Hillie* case, I want to quote what you said on the record: "This family has been torn apart"—speaking to the defendant—"by your criminal actions. You saw it on the faces of those women. You heard it in their voices. And the impact of your acts on those very real victims who are still struggling to recover this day makes your crime among the most serious criminal offense this court has ever sentenced." And you imposed a sentence of 29-and-a-half years on that defendant, so the notion that you look at this casually or with leniency, as the Senator said, your record belies that.

And, in fact, what we're dealing with here is an issue which even this Committee and Members on the Committee have been loath to address again. The original law was written at least 9 or 10—maybe longer—years ago, and the quantity of material was relevant to the sentencing. And now that we have computer access to voluminous amounts of material, it has raised questions, has it not, within the judiciary as to the appropriate sentencing in today's circumstances. This was a question that was raised before the Sentencing Commission, was it not?

Judge JACKSON. It was, Senator. The Sentencing Commission has written at least one report—it did when I was there—looking at the operation of this guideline. As you said, the guideline was based originally on a statutory scheme and on directives—specific directives by Congress at a time in which more serious child pornography offenders were identified based on the volume, based on the number of photographs that they received in the mail. And that made totally—total sense before when we didn't have the internet, when we didn't have distribution. But the way that the guideline is now structured, based on that set of circumstances, is leading to extreme disparities in the system because it's so easy for people to get volumes of this kind of material now by computers. So it's not doing the work of differentiating who is a more serious offender in the way that it used to.

So the Commission has taken that into account, and, perhaps even more importantly, courts are adjusting their sentences in order to account for the changed circumstances. But it says nothing about the court's view of the seriousness of this event.

Chair DURBIN. Judge, the—there have been several news organizations that have taken a look at the Senator from Missouri's charges. ABC News, CNN News, The Washington Post, and others have concluded that they are inaccurate and unfair to you in their conclusions. In fact, one writer has said they are meritless to the point of unacceptable levels.

Nationally, in 2019, only 30 percent of non-production child pornography offenders received a sentence within the guideline's range. Fewer than 30 percent. Between 2015 and 2020, in the D.C. District Court where you served, judges imposed below guideline sentences in non-production cases 80 percent of the time for the reason you've just explained. Judges in Missouri, the home State of the Senator who's criticized your record, did so 77 percent of the time. One particular judge, whom the Senator supported to become a Federal judge by appointment of President Trump, unfortunately has a 77 percent record if—I'm sorry. I want to make sure that this accurate.

Here it is. In *United States v. Klotz*, Trump-appointed judge, Sarah Pitlyk, the Senator's choice for the Eastern District of Missouri, sentenced an individual convicted of possession of child pornography to 60 months, well below the 135- to 168-month sentence recommended by the guidelines. She appears to have run into the issue, the same challenge that you have described here. So going forward in terms of this issue, it seems that we at least share the burden, by your interpretation, as to define this statute in modern terms and in terms of technology as it exists today. Is that the way you see it?

Judge JACKSON. Senator, Congress is tasked with the responsibility of setting penalties. Congress tells judges what we're supposed to do when we sentence, and what I'd say is that Congress has to determine how it wishes for judges to handle these cases. But as it currently stands, the way that the law is written, the way that Congress has directed the Sentencing Commission appears to be not consistent with how these crimes are committed, and, therefore, there is extreme disparity, as you pointed out. There are judges who are varying because our ultimate charge from this body is to sentence in a way that is sufficient but not greater than necessary to promote the purposes of punishment.

Chair DURBIN. Judge Jackson, we've heard criticism from some of your previous work representing detainees at Guantanamo Bay. In fact, for years we've heard criticisms leveled against lawyers who have provided Guantanamo detainees with legal representation. This criticism misses one critical point. The right to counsel is a fundamental part of our constitutional system, even for the most unpopular defendants.

I want to thank Senator Graham, who served as an Air Force lawyer for decades, for offering his perspective yesterday. He said, and I quote, "The fact that you're representing Gitmo detainees is not a problem with me," Senator Graham said. "Everyone deserves a lawyer. You're doing the country a great service when you defend the most unpopular people." And then Judge Roberts said during his confirmation hearing, "It is a tradition of the American Bar that goes back before the founding of the country that lawyers are not identified with the positions of their clients. The most famous

example probably was John Adams,” the Chief Justice said, “who represented the British soldiers charged in the Boston Massacre. This sentiment is shared by lawyers across the political spectrum.”

I want to give you an opportunity to address this issue because it applies not just to Gitmo detainees but to your work as a public defender in terms of the wisdom, acceptability of providing counsel in those cases, and what impact it’s had on you personally in terms of your rulings on the bench.

Judge JACKSON. Thank you, Senator. September 11th was a tragic attack on this country. We all lived through it. We saw what happened, and there were many defenses, important defenses, that Americans undertook. There were Americans whose service came in the form of military action. My brother was one of those Americans—those brave Americans who decided to join the military to defend our country. There are others of you in this body who have military service, and I honor that, to protect our country. After 9/11, there were also lawyers who recognized that our Nation’s values were under attack, that we couldn’t let the terrorists win by changing who we were fundamentally. And what that meant was that the people who were being accused by our Government of having engaged in actions related to this, under our constitutional scheme were entitled to representation, were entitled to be treated fairly. That’s what makes our system the best in the world. That’s what makes us exemplary.

I was in the Federal Public Defender’s Office when the Supreme Court—excuse me—right after the Supreme Court decided that individuals who were detained at Guantanamo Bay by the President could seek review of their detention. And those cases started coming in, and Federal public defenders don’t get to pick their clients. They have to represent whoever comes in, and it’s a service. That’s what you do as a Federal public defender. You are standing up for the constitutional value of representation.

And so I represented, as an appellate defender, some of those detainees. In the early days, the legal landscape was very uncertain. This had never happened before, not only the attack, but also the use of Executive authority to detain people in this way, and there were a lot of questions that the Court was asking. The Supreme Court had taken a series of cases to try to understand what are the limits of Executive authority, which is important. All of our liberty is at stake if we don’t get it right in terms of what the Executive can do. The Supreme Court has recently reaffirmed that the Constitution does not get suspended in times of emergency, and so lawyers were trying to help the Court to figure out—figure out what the Executive’s power was in this circumstance. And as an appellate defender, I worked on the habeas petitions of some of these detainees.

My petitions were virtually identical because we had very little information. Part of the issue at the very beginning of these cases was that most of the factual information was classified, so defense counsel were appointed to represent these defendants. We had no facts, and I was making legal arguments about the circumstances. That is what gave rise to my representation, and I would just emphasize that that’s the role of a criminal defense lawyer. Criminal

defense lawyers make arguments on behalf of their clients in defense of the Constitution and in service of the court.

Chair DURBIN. Judge Jackson, those of us who read about the workings of the Supreme Court realize it's a close relationship among the Justices. You've seen it personally as a clerk and as an attorney yourself. I'm going to close with one question here that comes to my mind. I was in the House of Representatives when the War on Drugs measure was passed 30 years ago or so. It was at the advent of crack cocaine. It scared the hell out of us. The notion of a cheap narcotic, highly addictive, destructive to mothers and their fetus, led us to impose a sentencing disparity between crack and powder cocaine that was unprecedented: 100-to-1. Our notion was to come down hard, make it clear that it was a Federal standard, impose that standard, and stop the advance of crack cocaine.

We failed from the outset. The price of cocaine—crack cocaine on the street went down—up instead of down. I'm sorry, I did that wrong—down instead of up, and the number of users went up instead of down. And we found ourselves in a position where we were filling the Federal prisons with violations primarily for possession of crack cocaine, hundreds of thousands being incarcerated at the time.

I came here to this Committee in an effort to try to change it. I negotiated a revision of that measure from 100-to-1 to 18-to-1 with Senator Jeff Sessions. It was passed by the Committee, by the Senate, and by the House of Representatives, and signed into law by President Obama. Then you on the Sentencing Commission had to consider what to do with these new guidelines coming from Congress, and you achieved a consensus. I think most people don't realize the Sentencing Commission is a pretty diverse group and very transparent. Could you close in the last minute or so and tell me about that effort to find consensus on an issue that controversial?

Judge JACKSON. Yes, Senator. As you mentioned, the Sentencing Commission is a very diverse group of people who've been appointed by Presidents of different parties by law. And at the time that I was on the Commission, we had a range of people, judges from different backgrounds who had different views about the criminal justice system. But we had a directive from Congress insofar as Congress had changed the penalties, as you mentioned, related to crack cocaine. And so we worked together to make a determination about whether or not the guidelines needed to change, and, if so, whether or not to impose those changes retroactively in light of all of the evidence that you point out, all of the Congress' changes and the need to avoid unwarranted sentencing disparities, which is exactly the charge that this body has given to the Commission.

And we worked together. We reached unanimous agreement that the change in the guidelines that was necessitated by the change in the statute should apply retroactively to people who had been convicted and sentenced under the prior regime. And then Congress followed shortly thereafter by making it a statutory change to apply those changes retroactively.

Chair DURBIN. Thank you, Judge Jackson.
Senator Grassley.

Senator GRASSLEY. Thank you, Mr. Chairman. Welcome again to our Committee. I got home last night about 8 o'clock. The first thing I heard was my wife's opinion that you did very good in your opening statement.

[Laughter.]

Judge JACKSON. Thank you.

Senator GRASSLEY. She didn't have anything to say about my statement.

[Laughter.]

Senator GRASSLEY. Also, besides the fact that we might have some votes on the United States Senate, just so you know, I'm not being rude to you. I may have to go across the hall to the Finance Committee on some issues with tariffs and down to the Agriculture Committee for some issues on rural healthcare.

Do you believe—well, let me ask it this way. Do the First Amendment free speech protections apply equally to conservative and liberal protesters?

Judge JACKSON. Yes, Senator.

Senator GRASSLEY. Okay. Do you believe the individual right to keep and bear arms is a fundamental right?

Judge JACKSON. Senator, the Supreme Court has established that the individual right to keep and bear arms is a fundamental right.

Senator GRASSLEY. Could you tell me how you might go about deciding what a fundamental right is under the Constitution?

Judge JACKSON. Well, Senator, I don't know that I can tell you that in the abstract in the sort of way that you may have posed the question. There is precedent in the Supreme Court related to various rights that the Court has recognized as fundamental. The Court has some precedents about the standards for determining whether or not something is fundamental. The Court has said that the Fourteenth Amendment Substantive Due Process Clause does support some fundamental rights, but only things that are implicit in the ordered concept of liberty or deeply rooted in the history and traditions of this country. They're the kinds of rights that relate to personal, individual autonomy, and they've recognized a few things in that category. And that's the tradition of the Court for determining whether something is fundamental in that way.

Senator GRASSLEY. Okay. On another subject kind of personal to me over a long period of time, about half on this Committee, but it's a controversial issue with—even within this Committee. I favor allowing Supreme Court hearings to be televised. What's your view on this? How would you feel about cameras in the courtroom, which about 40—50 or 40 or 45 of our States allow?

Judge JACKSON. Well, Senator, I would want to discuss with the other Justices their views and understand all of the various potential issues related to cameras in the courtroom before I took a position on it.

Senator GRASSLEY. I think that's a fair answer at this point. I'm going to ask you about a bill that I got passed a long, long time ago, and it's something that, at some level of the courts—sometimes the district court, sometimes the circuit court, and even if—once or twice at the Supreme Court—they tend—these courts tend to do damage to a bill called the False Claims Act. This bill has

brought \$70 billion of fraudulently taking money back into the Federal Treasury since it's been passed. And courts have weakened it, and then Senator Leahy and I usually find ourselves having to pass legislation to say to the courts, you got it wrong. In fact, there's a very controversial bill right now before the United States Senate on that very subject. It's fought fraud in the Department of Defense, healthcare industry, the pharmaceutical industry. Seventy billion dollars is pretty important. So when you get—if you're approved to be on the Supreme Court and the issue of false claims comes up, I hope you think of Chuck Grassley.

[Laughter.]

Senator LEAHY. You may reword that.

[Laughter.]

Senator GRASSLEY. Well, and Leahy.

[Laughter.]

Senator GRASSLEY. The False Claims Act is one of the best tools that we have to fight against Government fraud and to recover taxpayers' money. I've worked for decades to protect whistleblowers who shine a light on fraud, waste, and abuse in the Government. So I'd like to ask you a couple questions, and I'm going to start with a former Attorney General, unnamed, who once suggested that qui tam suits were, in his words, patently unconstitutional, and another word he used was "dangerous." He argued that it violated the Appointments Clause. So understanding that you may get a case before you on the False Claims Act, but maybe if this Appointments Clause is sound enough, you could answer. Do qui tam suits violate the Appointments Clause?

Judge JACKSON. So, Senator, I am not familiar with that representation—

Senator GRASSLEY. Could you answer in writing then?

Judge JACKSON. Well, I'd be happy to do whatever. I'm just trying to assess the—

Senator GRASSLEY. I'm sorry. I shouldn't have interrupted you.

Judge JACKSON. No, that's all right. Sorry. I am trying to—I'm not familiar with the quotation or what the attorney may have said about them. I know that the Supreme Court has considered various qui tam actions and has issued opinions in the area, and has not, at least to date, found them to be unconstitutional. But I don't know if that issue has been squarely presented to the Court, and I would be loath to comment on it just because if it's being litigated, it's something I wouldn't be able to address.

Senator GRASSLEY. Yes. Let me on the same subject, also this former Attorney General also argued that qui tam suits also violate our broader separation of power principles. Are the—can you tell me whether you think the President's constitutional powers are violated when private citizens are allowed to sue in the name of the United States? And that's what qui tam suits are all about, private citizens going to court.

Judge JACKSON. Well, Senator, it's a—it is an important concern. There are statutes that do allow for the kinds of lawsuits that you are articulating. I am not aware of impediments to those, but, again, you know, this is the kind of thing that may be litigated, and I would have to look, as I do, consistent with my methodology,

at any arguments that are raised about the constitutionality or lawfulness of those actions.

Senator GRASSLEY. Remember, in about all of these suits that involve the courts in making interpretations of the False Claims Act, most of them are brought by whistleblowers. And remember, the Government would not even know about these fraudulent uses of taxpayers' dollars without whistleblowers coming forth. And they ought to be given some credit for wanting the Government to do what the laws say it ought to do, and spend the money the way the Constitution or the Congress implies that that money be spent.

I want to move on. At an event at the University of Chicago School of Law in 2020, you quoted Martin Luther King, Jr., who dreamt of a time when, "the sons of former slaves and the sons of former slave owners would be able to sit down together at the table of brotherhood." You talked about how quickly things in the country then changed, including the civil rights laws over the next few years, because of the Civil Rights Movement. You added that, "less than a decade after Dr. King's words that was the world that you inhabited. Dr. King hoped for a country where we would all be judged by the content of our character rather than our race." Do these quotes still reflect your views on this very important topic today?

Judge JACKSON. Yes, Senator. In that speech, I talked about my background, my upbringing, the fact that my parents, when they were growing up in Miami, Florida, attended and had to attend racially segregated schools because, by law, when they were young, white children and Black children were not allowed to go to school together. And my reality, when I was born in 1970 and went to school in Miami, Florida, was completely different. I went to a diverse public junior high school, high school, elementary school, and the fact that we had come that far was, to me, a testament to the hope and the promise of this country, the greatness of America, that in one generation—one generation—we could go from racially segregated schools in Florida to have me sitting here as the first Floridian ever to be nominated to the Supreme Court of the United States. So, yes, Senator, that is my—that is my belief.

Senator GRASSLEY. And I think that it's good that the country had an opportunity to hear what you just told us about your experience.

I'm going to go to something that the Chairman brought up, and I have written down the three point—three steps you go through.

Now, another question but also one that he brought up was on court packing and your opinion. I heard what you said, and you said it should be a policy question, but I want to go to something in 2013 during your hearing to be a district court judge. Senator Coburn asked you whether you believed in the theory that the Constitution is a living document whose meaning evolves over time. You said "no" in 2021. However, during your circuit court nomination hearing, you declined to answer the same question. When asked why, the answer—when asked why the answer to your question of 2013 and not in 2021, and in written questions, you noted that you weren't a sitting judge. So please explain to me or describe for us the difference between ethical rules for sitting judges versus judicial nominees who are not already judges.

Judge JACKSON. Senator, I don't know that there are ethical rules that are different. What I'll say is, with respect to my approach to judging, there is not a label, I think, that fits what it is that I do and how I've approached my role. As I mentioned to the Chairman, I'm very acutely aware of the limitations on the exercise of my judicial power, and those limitations come in the form of adherence to the text when you—assuming you even get to that stage of the process, that you have—you have subject matter jurisdiction, you can reach the merits. Then you are looking at the text.

And I do not believe that there is a living Constitution in the sense that it's changing and it's infused with my own policy perspective or, you know, the policy perspective of the day. Instead, the Supreme Court has made clear that when you're interpreting the Constitution, you're looking at the text at the time of the founding and what the meaning was then as a constraint on my own authority. And so I apply that constraint. I look at the text to determine what it meant to those who drafted it.

Senator GRASSLEY. On the same subject, I want to point out a difference between you and a couple people that have sat on the Supreme Court. Justice Breyer said that, "A structural alteration of the Supreme Court, motivated by a perception of political influence, can only feed the perception of political influence"—that's my parenthetical—"further eroding that trust." Justice Ginsburg also cited court packing as being "a bad idea." court packing is creating new seats for political purposes for a President to appoint more judges. Do you agree with Justice Breyer and Justice Ginsburg that court packing is a bad idea? Before you respond, I'd like to say that you say this question should be left to Congress as a policy issue. I reiterate that sitting Supreme Court Justices have spoken on that matter, so I don't think it'd be inappropriate for you to do if other people sitting there have said that it's a bad idea.

Judge JACKSON. Well, respectfully, Senator, other nominees to the Supreme Court have responded as I will—

Senator GRASSLEY. Okay.

Judge JACKSON [continuing]. Which is that it is a policy question for Congress. And I am particularly mindful of not speaking to policy issues because I am so committed to staying in my lane of the system, because I'm just not willing to speak to issues that are properly in the province of this body.

Senator GRASSLEY. Okay. Then I would interpret your answer, and you don't have to respond to this, but I think you're saying Breyer and Ginsburg should not have stated their views on that issue. During his opening statement yesterday, one Member of this Committee suggested that the Supreme Court has been bought by dark money groups. Do you agree that the Supreme Court has been bought by dark money groups?

Judge JACKSON. Senator, I don't have any reason to believe that that's the case. I have only the highest esteem for the members of the Supreme Court, whom I hope to be able to join if I'm confirmed, and for all of the members of the judiciary.

Senator GRASSLEY. Thank you for that answer. I'm going go to international law. During an ABA panel on international law last year, Justice Breyer said that as a Federal judge, "You can't do your job properly" without considering international law "in some

cases, and it's a growing number," and I assume a growing number of opportunities to use international law. In a 2018 op-ed, Justice Breyer said that, "The best way to preserve American values may well be to take account of what happens abroad." Under what circumstances is it appropriate to consider international law when interpreting our Constitution?

Judge JACKSON. Thank you, Senator. I have nothing but the highest esteem and respect for my former boss, who I've spent the better part—the better part of the past couple decades calling, "my Justice," having clerked for him, but I do think that the use of international law is very limited in our scheme and in our judging. There are certain cases in which it is relied upon where Congress directs or where the standards are such, the case involves a treaty, for example, and you have to interpret international law in order to be able to address it. But there are very, very few cases, I think, in which international law plays any role, and certainly not in interpreting the Constitution.

Senator GRASSLEY. I think you probably have answered my next two questions, but if you say you have nothing to add, I would still want to ask the questions. Do you think it's appropriate to look to international law when interpreting enumerated and unenumerated constitutional rights?

Judge JACKSON. No, Senator.

Senator GRASSLEY. What specific—again, I think you've answered this, but I want to ask it anyway. What specific constitutional clauses or rights has the Supreme Court held that can be interpreted by looking to international law?

Judge JACKSON. I'm not aware of any that are properly illuminated by reference to international law.

Senator GRASSLEY. Yes. Now, I want to go to a question that Senator Durbin asked. I'll probably go a little more. But I remember when—this is about your judicial philosophy, and you made three points, three steps you take to go through a case and apply the law, and you say your methodology is limited power and stay within your lane. I'd like to ask you, well, you've served on the district court for several years and spent 8 months on the D.C. Circuit. During yesterday's opening statement, we heard a lot about the importance of judicial philosophy. In your own words, you've described that, so you don't have to go through that again with me. But if Congress writes a law that does not explicitly allow private parties to sue, do you believe that the Federal courts have the authority to create implied causes of action? And I'd like to have you elaborate if you say "yes" to that.

Judge JACKSON. I would say that, as a general matter, no, Senator. I mean, our obligation as judges is not to create policy, and if Congress has enacted a statute that establishes a cause of action or restricts causes of action, then, as a general matter, I don't think that courts can impose one. Now, you know, I'm saying "generally" because there may be circumstances that I'm not thinking of. I know that the Supreme Court has, in very narrow circumstances, at times discussed implied causes of action, but I think the charge of the judge is to impose the law as written.

Senator GRASSLEY. There's 115 Justices that served before you. If you are approved by the Senate, is there any of them now or in

the past that has a judicial philosophy that most closely resembles your own?

Judge JACKSON. You know, I haven't studied the judicial philosophies of all of the prior Justices. I will say that I come to this position, to this moment as a judge who comes from practice, that I was a trial judge and my methodology has developed in that context. I don't know how many other Justices, other than Justice Sotomayor, have that same perspective, but it informs me with respect to what I understand to be my proper judicial role.

Senator GRASSLEY. What aspect of your record as a judge do you believe has been the most important for the good of the country?

Judge JACKSON. Well, I think that all of my record is important to some degree because I think it clearly demonstrates that I'm an independent jurist, that I am ruling in every case consistent with the methodology that I've described, that I'm impartial. I don't think that anyone can look at my record and say that it is pointing in one direction or another, that it is supporting one viewpoint or another. I am doing the work and have done the work for the past 10 years that judges do to rule impartially and to stay within the boundaries of our proper judicial role.

Senator GRASSLEY. Let's go to immigration. Congress gave the Attorney General "sole and unreviewable discretion" to decide whether expedited removal would apply to "an alien who has not been paroled or admitted to the United States." You decided a case called *Make the Road New York* where you seem to agree that Congress gave the Department of Homeland Security sole and unreviewable discretion to decide which illegal immigrants would be subject to expedited removal, but you still went on to review the Department's decision. In fact, you issued a nationwide injunction blocking the Department of Homeland Security from removing illegal immigrants who had been in the country for less than 2 years. In that hearing, you told us that if the text was clear, that ended the question. The law specifically says that Homeland Security, not the courts, was responsible for making the decision. Could you please explain why you believed a Federal court could review something Congress called unreviewable?

Judge JACKSON. Thank you, Senator, for allowing me to address that opinion and my analysis with respect to it. As you said, *Make the Road* was a case involving a challenge to expedited removal, which was a way in which Congress had given the authority to Homeland—to the Department of Homeland Security to make a decision about how to deport people who are non-citizens. Prior to the challenge that I heard, the Department of Homeland Security, since it received that authority several decades ago, had decided that people who are in this country for up to 14 days and are found within 100 miles of the border are subject to expedited removal. The challenge that I heard involved the Department's sudden shift to a determination that expedited removal would be applied to anyone who is found anywhere in the country and who had been here up to 2 years.

Importantly, the challenge was not about the actual determination. The challenge was about the procedures that the Agency undertook to make that determination. And so the statute said, as you rightly pointed out, that the Agency had sole and unreviewable

discretion to decide. And in interpreting that, I took into account the language of that statute and the language of another statute that Congress has enacted to direct agencies with respect to the manner in which they exercise their discretion. So I said and I believed that “sole” meant that the Department of Homeland Security was the only agency who got to make this determination as to how many months a person should be in the United States, and “unreviewable” meant it was final. Once the Agency decided, then there was no ability to review substantively their determination.

And I should say that, importantly, the statute that Congress enacted gave the Agency the discretion to make this determination between zero and 24 months. There’s a limit in the statute. It says Congress, you—I mean, excuse me—Department of Homeland Security, you get to decide where between zero and 24 months a person who’s been in this country can be subject to expedited removal. So I read the statute. DHS gets the sole ability to make that decision. DHS makes that decision and it’s final. What wasn’t clear to me based on that language was whether Congress intended to preclude its procedural requirements for the exercise of Agency discretion.

And in the D.C. Circuit, there was precedent that indicated that even when Congress gives a great deal of discretion to an agency, procedural requirements may still apply. It is presumptive that the APA applies, meaning that an agency can’t act arbitrarily and capriciously when it undertakes to exercise discretion. It has to do certain things in order to make the determination that Congress has given it.

Senator GRASSLEY. Well—

Judge JACKSON. I looked at those statutes—oh, I’m sorry.

Senator GRASSLEY. No, no.

Judge JACKSON. I looked at those statutes, and I considered the canons of construction that say that statutes should be read harmoniously, that you’re—that as a court, you’re supposed to understand that Congress has directed, sometimes in more than one statute, what is supposed to happen. And so I read them together to mean that the court could still do what it almost always does in a case involving a challenge to the manner in which an agency makes its decision. And, in fact, I thought, as I say in my opinion, that Congress intended for the APA to apply because it had not excluded it, which it had done expressly in other parts of the—of the INA. It had not excluded it here, and it made sense to require the Agency to use its expertise.

If Congress wanted the Agency to act arbitrarily in picking a number, Congress could’ve done that. Congress said you can do it up to 24 months. It could’ve randomly picked a number, but it was giving it to the Agency, I thought and reasoned, precisely because it wanted the Agency to use its expertise, to do its research, and to figure out what amount of time is sufficient. And so it was important, I thought, to lay that out in the statute, and I determined that both of those statutory directives of Congress should apply.

Chair DURBIN. Thank you, Senator Grassley.

Senator Leahy.

Senator LEAHY. Thank you, Chair Durbin.

Judge, congratulations again on your nomination to our Nation's highest court. You're an impressive jurist. I hope the broader public sees that, and I've enjoyed the opportunity to meet your family here yesterday.

But I thought before I begin my questions, I was going to respond to something the junior Senator from Texas said yesterday. He suggested Democrats exacted a political agenda by opposing the nomination of then Judge Gorsuch to the Supreme Court. I kind of chuckle at that because, along with others, I and others repeatedly and clearly stated substantive concerns with Justice Gorsuch's nomination.

I explained my votes on the record. There was no political agenda. I contrast that with Republicans' treatment of then Judge Merrick Garland. We're still waiting today for Republicans to explain on the record what kind of substantive concerns they had with Merrick Garland that they blocked him for over a year and would not allow—even allow a vote on his nomination apparently because of a politically driven agenda. All I'm saying is let's make history this week, but let's not rewrite it. This is a historical time.

Judge Jackson, one of the topics we discussed in our meeting was our respective experiences, you as a former Federal public defender, myself as a prosecutor. As a Federal public defender here in Washington, you were assigned to and then represented clients who couldn't otherwise afford a lawyer.

One of the valuable lessons I learned as a prosecutor was this. For our criminal justice system to function properly, you have to have skilled, dedicated lawyers on both sides of the issue, both the prosecutor and the defense attorney. It's equally essential for judges to have a nuanced and balanced understanding of our criminal justice system if we're going to have justice done.

Now it's really concerning and it's confusing that some view your background as a Federal public defender as some kind of a liability. Those of us who have spent time in courtrooms know you have to have both a skilled prosecutor and a skilled defender. I believe that—in fact, I don't think of it as a liability. I think it's going to be a major asset to you, and I think it should be welcomed on the Supreme Court.

In fact, if you're confirmed to the Court, as I look back over, you're going to be the first former Federal public defender on the Court. You're going to be the first nominee since Justice Thurgood Marshall with a significant background in criminal defense. That's pretty impressive. So all of us should want that represented on the Supreme Court because decisions on the Supreme Court can have a lasting impact on our criminal justice system.

My question is this. I believe that your experience as a Federal public defender has made you a better judge, helped you maintain impartial and balanced perspective in criminal and other cases. And I assume you would agree with that?

Judge JACKSON. Yes, Senator.

I think that experience in the criminal justice system, whether, as you say, on the prosecution side or the defense side, having actual experience is an asset as a judge. You understand the way the system works. And as a defense counselor, you have interacted

with defendants in a way that, as a judge—at least as a trial judge—I thought was very beneficial.

One of those ways is it helped me to develop a sense of the need to communicate directly with defendants, and you know, it didn't change, I think, in any way the outcomes of the cases when I was a trial judge. But I understood from my time as an appellate defender that a lot of defendants go through the system and don't really understand it.

And the problem with that from our society's standpoint is that when people go through the criminal justice system and don't have a good understanding, they tend to not take responsibility for their own actions. They tend to be bitter and feel as though the justice system has wronged them. And so while they're doing their time, rather than reflecting on the fact that this is the consequence that they have to face for actually committing a crime, instead of doing the work to rehabilitate themselves, they're, you know, focusing on how wronged they are, how victimized they feel.

And so what I decided as a trial judge was that I was going to make sure that everyone who was in my courtroom, and especially the defendant, understood all of the procedures that we were going through, all of the steps. I spoke directly to them. I asked them, "Do you understand what's happening?" because I wanted them to know.

And then, even perhaps more importantly, as I said about my child pornography cases, I focused on the harms of the behavior that was at issue. When I sentenced a defendant, I made clear in every case here is the problem. This is what you've done. Here is the damage to our society. And I don't know that I would have done that if I had not been a criminal defense lawyer.

Senator LEAHY. Well, that's sort of what I was getting to, the fact that you have that experience. Also it's obvious you don't get—as a public defender, you don't get the right to—you don't get to choose your clients. It's not like you're going out there picking and choosing. You're told you're going to defend this person.

But they're given that right under the Sixth Amendment, and we all—if you're a member of the bar or a judge or a public defender, you take an oath to uphold the Constitution, and the Sixth Amendment is a pretty important part of it, wouldn't you say?

Judge JACKSON. Absolutely, Senator.

Senator LEAHY. And it's also a pretty important part for indigent defendants. Is that not correct?

Judge JACKSON. That is correct, especially for indigent defendants because they are determined to not be able to afford counsel. And as you said, Senator, for a judge, it is crucial that you have arguments that are being made and presented on both sides of the issue. That is what allows for judges to reach just results in cases, and it's what makes our system so exemplary.

Senator LEAHY. And it also guarantees that our Constitution is going to be followed.

I think it's important you went around with Senator Doug Jones, who is highly respected in the Senate on both sides of the aisle, but you got to meet other Senators. I was delighted you came to spend time in my office, and you noted in your public remarks at the White House when you were nominated that you have been—your

parents are married for 54 years and both public servants in their own right, and they were proudly watching you being announced by the President. And I must admit to watching them the last couple of days, they're proudly watching you here, as are other members of your family.

Your younger brother became a police officer, a detective in Baltimore, before serving in the Army. Two tours of duty in the Middle East. Two uncles have served as police officers.

So I'm not really surprised that you understand law enforcement. The National Fraternal Order of Police has expressed strong support for your nomination. In fact, in their letter dated February 25, 2022, they said you have "considered the facts and applied the law consistently and fairly on a range of issues." And they went on to say there is little doubt that you have "the temperament, intellect, legal experience, and family background to earn this appointment."

And they added, "We are reassured that, should she be confirmed, she would approach her future cases with an open mind and treat issues related to law enforcement fairly and justly."

Chair Durbin, I'd ask consent that the letter from the Fraternal Order of Police be included in the record at this point.

Chair DURBIN. Without objection.

[The information appears as a submission for the record.]

Senator LEAHY. Now that's a statement from the largest law enforcement labor organization in the United States. What do you say to people who say you're soft on crime or even anti-law enforcement because you accepted your duties as a public defender?

Judge JACKSON. Thank you, Senator.

I would make—I'd make three observations in response to those critiques. The first is that as someone who has had family members on patrol and in the line of fire, I care deeply about public safety. I know what it's like to have loved ones who go off to protect and to serve and the fear of not knowing whether or not they're going to come home again because of crime in the community.

As you said, my brother—my brother patrolled the streets of Baltimore, and I had two uncles who were career law enforcement, including one who became the chief of police of the City of Miami Police Department in the 1990s. So crime and the effects on the community and the need for law enforcement, those are not abstract concepts or political slogans to me.

The second observation that I would make is that as a lawyer and as a citizen, I care deeply about our Constitution and about the rights that make us free. As you say, criminal defense lawyers perform a service, and our system is exemplary throughout the world precisely because we ensure that people who are accused of crimes are treated fairly. It's very important to me in that capacity, as a lawyer and as a citizen.

Senator LEAHY. And I—

Judge JACKSON. Oh, I'm sorry. I was just going to say the third thing I would say is, is as a judge. As a judge, I care deeply about the rule of law, and I know that in order for us to have a functioning society, we have to have people being held accountable for committing crimes, but we have to do so fairly under our Constitution.

As a judge who has to decide how to handle these cases, I know it's important to have arguments from both sides, to have competent counsel. And it doesn't mean that lawyers condone the behavior of their clients. They're making arguments on behalf of their clients in defense of the Constitution and in service of the court. And it is a service.

Senator LEAHY. I know in our conversation, I mentioned my own experience as a prosecutor. I wanted the best defense attorney on the other side because you want to make sure that as the trial went on, everything was done properly.

And let's talk about Guantanamo Bay. Controversial. And we've had two Presidents, one Republican and one Democrat, who said they wish it could be closed. But the fact is individuals were detained there. The whole world was watching this.

We—I know I heard from people I respect throughout the world, asking questions about Guantanamo, and that's precisely the situation we want our best and our brightest lawyers to step into the fray. However politically controversial, we have to make sure that we do not become unmoored from our core commitments to the rule of law, but that also both in our own country and outside our country, people can see that we're following that.

So you were in private practice when you took on these cases. Uncharted legal waters, war. What principles drove you to get involved with cases in such a difficult time in Guantanamo Bay?

Judge JACKSON. Well, thank you, Senator.

And I do want to clarify, when I first started working on these cases, I was an Assistant Federal Public Defender. The Supreme Court in 2004 issued two opinions that began this group of cases and these issues, and this was in the wake of the tragic and terrible attack on this country in 9/11 and the Executive's use of authority to detain enemy combatants at Guantanamo Bay.

In 2004, the Supreme Court ruled that the Executive did have the authority to make those detentions in one case, and then in another case, the Supreme Court ruled that anyone so detained could file a legal challenge. They had habeas rights. And as you know, habeas is in the Constitution.

In 2005, I joined the Federal Public Defender's Office, and those cases started coming in, the requests from detainees asking for legal representation, consistent with our constitutional scheme, to have help to file their habeas petitions. This was very early in the days of these kinds of legal actions. There was a lot unknown about what these petitions could look like, what arguments could be made and considered by the Court, and perhaps most importantly, what the facts were related to any of these individuals because almost everything was classified. So defense counsel was getting these people in with no information.

I was in the appellate division of my office, and as an appellate defender, I worked on legal issues. I was paired with my—I was assigned by the Federal Public Defender, I was an Assistant Federal Public Defender, and I was paired with a trial defender who attempted to do the fact gathering, who traveled to Guantanamo Bay. I never traveled there or anything like that. I worked on the law.

And as you noted, the law was very uncertain. This was brand new, and people were trying to figure out what are the limits of Executive authority in this context. We knew that the Constitution was not suspended even though we had this emergency. So what did that mean with respect to these individuals?

I filed—as a Federal public defender, I was assigned to work on four cases, and I filed almost identical petitions because what you’re doing, especially when you have no facts, is just preserving legal arguments for your clients. That is consistent with what lawyers do.

And then you mentioned private practice. So I went into private practice in I believe it was 2007, and by that time, lots of private practices around the country had started taking on these cases because there were lots of people who needed representation. And so pro bono practices were receiving requests, usually through nonprofits. And one of the individuals that I had represented as a defender ended up being assigned to my firm, unbeknownst to me.

So I arrive at my firm, and the partners realized that this same person was someone that, according to the docket, I had previously represented, and they asked if I would review some of his materials and continue the representation. That was the only person that I represented in the context of my private firm who was a detainee.

I worked on a couple of habeas briefs for judges and for a variety of nonprofits, including the Rutherford Institute, the Cato Institute, and the Constitution Project, who were all interested in making arguments to the Supreme Court that was considering these very novel legal issues.

Senator LEAHY. You know, I sit here and I think of the 20 Supreme Court nominees that I’ve gotten to vote on over my years here, and I think of the remarkable praise you got from former Republican House Speaker Paul Ryan, who most of us know well. He did mention his politics may be different than yours, but his praise for your intellect, for your character, for your integrity, is unequivocal.

That’s powerful praise, and I think it goes to a really fundamental point, and that’s this. One doesn’t have to have the same political beliefs or ideologies as a judicial nominee to recognize their integrity and intellect.

When I voted to confirm Chief Justice John Roberts to the Supreme Court, I cast that vote knowing very well that he and I would disagree on many policy and political issues. But I voted yes because I believed that he had what it takes to serve as an impartial, fair Chief Justice who would uphold the rule of law, and I wanted to take it out of partisan politics.

Now what would you say to people whose politics may be different than yours, like Speaker Ryan, who has endorsed you? What would you say to those people about your readiness to serve as an even-handed, unbiased Supreme Court Justice?

Judge JACKSON. Thank you, Senator.

I would say that I am committed to serving as an even-handed Supreme Court Justice, if I am confirmed by this body. And I have a record over the past decade that’s precisely how I’ve treated all of my cases, and I’ve been serving in the District of Columbia both as a trial judge and as an appellate judge, and we see some of the

most politically contentious issues. My record demonstrates my impartiality.

Senator LEAHY. Well, I'd go along with that because I've watched this court. I used to go there as a young law student, sit in the back, and just watch it. I have continued to watch it. I see the chief judge of the Federal district court, Judge Beryl Howell, who I was privileged to have her serve as my chief counsel on this Committee, and learned from her then. I learn from her now.

But I also, as a lawyer, I hear a lot of talk about reversal rates. Now no judge goes without being reversed somewhere. If they're never reversed, they haven't heard many cases. But your time in the D.C. District Court, less than 2 percent of your more than 550 cases were reversed.

Considering the fact that the D.C. Circuit reverses an average of 13 percent of the cases it hears, you've got a pretty good record. But what does a judge who's been reversed, what do they take from that reversal? What do they—what do they or what should they think about it?

Judge JACKSON. Well, you obviously look at it very carefully. What it means is that a panel of judges who've reviewed what you determined for some reason has decided differently. And there are times when panels of judges decide differently because they are making a new statement about the law or they're establishing a standard that had not previously been the case in the area, and so you learn, oh, this is a new standard now that I need to apply.

There are times when you disagree, that people can disagree about the way in which the law works, and that's why we have panels. Because people have different—judges can have different perspectives and in good faith reach different results.

And so, obviously, when you're on the trial court, the court of appeals is binding, and they tell you in this case, no, we're going—the result is something different, and so you learn.

Senator LEAHY. You know, any time I had an opportunity to argue a case at an appellate level, I don't think I ever thought about who nominated or appointed the judges I was before. I'd just want to know—I would think about their experience, and I would think about that when I made the argument.

Now I don't think I've ever had the opportunity to argue before anybody who had your breadth of legal experience. You served as a Federal trial court, a Federal appellate court judge for almost 10 years. You clerked at all three levels of the Federal judiciary. You practiced law as a Federal public defender, in private practice, and I know we confirmed you as a member of the U.S. Sentencing Commission.

This may seem like an easy question, but I just ask you that you've had such broad experience, but they're all different in a way. How does that shape your approach when deciding a case?

Judge JACKSON. Well, thank you, Senator.

As I mentioned at the beginning, I have a methodology that I apply when I'm deciding cases, and maybe my various experiences helped me to get to the point of understanding the importance of impartiality, staying in my lane as a judge because the prior experiences were different roles in the system. Because I saw the dif-

ferent roles, I think I have a good appreciation of what it means to be a judge and the limitations on my own authority.

The Sentencing Commission was a policymaking branch of the judicial branch. The Commission and the commissioners developed sentencing policy. Congress delegated that authority to create the Commission, and so they're doing the policy work, gathering data, making recommendations. That is totally different than the work that I do as a judge.

Advocacy on behalf of your clients, making critical arguments, the best arguments you can come up with is a service to the court, but it's a totally different thing than operating as a judge. And so I think that having had those various experiences, I'm now really mindful of my role and limitations in the judicial branch.

Senator LEAHY. Well, and the President referred to you as a proven consensus builder, and I think he was also thinking of your predecessor, Justice Breyer, in that regard. And I think over the years how important that is, even in a body like the U.S. Senate. I see Senator Tillis here. He and I have worked together on IP issues. Senator Cornyn and I on freedom of information issues. Senator Grassley and I on other issues. Senator Graham and I on various issues.

And usually, in the Senate at least, if you work across the ideological spectrum, you get better results. So let me ask you. How would you describe your approach to building consensus on cases related to issues like intellectual property that are less likely to break along traditional ideological lines?

Judge JACKSON. Thank you. Thank you, Senator.

One of the things that I was able to do when I worked on the Sentencing Commission was work with people who had very different perspectives than I did about the criminal justice system and come to consensus. It's very important, as you said, to try to find common ground. And Justice Breyer was such a wonderful model, a role model, for that kind of ability as a Supreme Court Justice. It's something I learned from him and something I tried to model in my work on the Commission, that I try to model in my work as an appellate judge, and that I would model or do if I were confirmed to the Supreme Court.

Senator LEAHY. Thank you, Chair Durbin.

Chair DURBIN. Thank you, Senator Leahy.

And now Senator Graham.

Senator GRAHAM. Thank you.

Judge, again, congratulations. I want to talk to you a little bit about family and faith because in your opening statement and the people who introduced you to the Committee, there was very glowing praise of you as a person, a good friend. You have a wonderful family. You should be proud. And your faith matters to you.

What faith are you, by the way?

Judge JACKSON. Senator, I am Protestant.

Senator GRAHAM. Okay.

Judge JACKSON. Nondenominational.

Senator GRAHAM. Okay. Could you fairly judge a Catholic?

Judge JACKSON. Senator, I have a record of fairly——

Senator GRAHAM. I think the answer would be yes.

Judge JACKSON [continuing]. Judging everyone.

Senator GRAHAM. I believe you can. I'm just asking this question because how important is your faith to you?

Judge JACKSON. Senator, personally, my faith is very important. But as you know, there's no religious test in the Constitution under Article VI and——

Senator GRAHAM. There will be none with me.

Judge JACKSON. And it's very important to set aside one's personal views——

Senator GRAHAM. Yes.

Judge JACKSON [continuing]. About things in the role of a judge.

Senator GRAHAM. I couldn't agree with you more, and I believe you can. So on a scale of 1 to 10, how faithful would you say you are in terms of religion? You know, I go to church probably three times a year. So that speaks poorly of me. Or do you attend church regularly?

Judge JACKSON. Well, Senator, I am reluctant to talk about my faith in this way just because I want to be mindful of the need for the public to have confidence in my ability to separate out my personal views.

Senator GRAHAM. Well, how would you feel if a Senator up here said your faith, the dogma lives loudly within you, and that's of concern? How would you feel if somebody up here on our side said, you know, you attend church too much for me, or your faith is a little bit different to me, and they would suggest that it would affect your decisions? Would you find that offensive?

Judge JACKSON. Senator, I'm—I'm——

Senator GRAHAM. I would, if I were you. I found it offensive when they said it about Judge Barrett.

The reason I ask these questions is I have no doubt that your faith is important to you, and I have zero doubt that you can adjudicate people's cases fairly if they're an atheist. If I had any doubt, I would say so.

But the only reason I mention this, Judge, you're reluctant to talk about it because it's uncomfortable. Just imagine what would happen if people on late-night television called you an "effing nut speaking in tongues" because you've practiced the Catholic faith in a way they couldn't relate to or found uncomfortable.

So, Judge, you should be proud of your faith. I am convinced that whatever faith you have and how often you go to church, it will not affect your ability to be fair. And I just hope going in the future that we all can accept that and that Judge Barrett, I thought, was treated very, very poorly. So I just wanted to get that out.

Let's talk about family. Do you know Janice Rogers Brown?

Judge JACKSON. Yes, I do know her.

Senator GRAHAM. How do you know her?

Judge JACKSON. She was a judge on the court that I now serve. We didn't overlap, and I'm struggling to remember whether I ever met her. But she was a judge on the circuit court.

Senator GRAHAM. Right. And you were a district court judge. Is that right?

Judge JACKSON. I was, but I don't know whether she had retired——

Senator GRAHAM. I think you were. Are they in the same building?

Judge JACKSON. They are in the same building.

Senator GRAHAM. Okay.

Judge JACKSON. They are in the same building.

Senator GRAHAM. So you really don't know her?

Judge JACKSON. I know of her, yes.

Senator GRAHAM. Okay. What do you know of her? What's her reputation?

Judge JACKSON. I know that she's a very well-respected judge on my circuit.

Senator GRAHAM. Okay. And in terms of family, she is the daughter and granddaughter of sharecroppers. She was raised in Alabama under Jim Crow. Despite this adversity, she put herself through law school as a single working mother. That's pretty impressive, isn't it?

Judge JACKSON. Yes, Senator.

Senator GRAHAM. Your background is very impressive. You seem to have a great family. If family mattered, we would not have done to her what was done to her here in the United States Senate. Do you realize that she was filibustered for 2 years when she was appointed to the D.C. Circuit?

Judge JACKSON. I didn't know that.

Senator GRAHAM. Did you know that Joe Biden actively filibustered Janice Rogers Brown?

Judge JACKSON. I did not know that.

Senator GRAHAM. Did you know that he told Face the Nation if Bush nominates her for the Supreme Court, "I can assure you that would be a very, very, very difficult fight, and she probably would be filibustered." Is that news to you, too?

Judge JACKSON. Yes.

Senator GRAHAM. Okay. Now that you know that, how do you feel about it?

Judge JACKSON. Senator, I can't speak to something that I just learned 2 seconds ago in your conversation with me.

Senator GRAHAM. Okay, fair enough. Fair enough.

You were in the Black Law School Society, right?

Judge JACKSON. The Black Law Students Association.

Senator GRAHAM. Okay, okay. Black Law Students Association.

Judge JACKSON. Yes.

Senator GRAHAM. You were a member at Harvard?

Judge JACKSON. Yes.

Senator GRAHAM. And sometime, the Mr. Jeffries thing, do you remember that whole dust-up? He got—

Judge JACKSON. Only in preparation for this, and I think I was in college at the time. It was my senior year of college.

Senator GRAHAM. Okay. So you weren't actually in the group when he was invited to speak?

Judge JACKSON. I don't know which group invited him to speak. I was a Black student at Harvard, both in the Harvard undergraduate Black Students Association and the Harvard Law School Black Students Association.

Senator GRAHAM. Right. Do you remember going to a speech given by Mr. Jeffries? I think he's the uncle of Hakeem Jeffries.

Judge JACKSON. I did not go to a speech given by Mr. Jeffries.

Senator GRAHAM. Okay. Are you now familiar with the press reports about what Mr. Jeffries' views are?

Judge JACKSON. Just in preparation for this.

Senator GRAHAM. Okay. And do you associate yourself with those views?

Judge JACKSON. I do not, Senator.

Senator GRAHAM. As a matter of fact, he's been called by many as very anti-Semitic. He called Jews, "skunks who stink up the place." You don't agree with that, do you?

Judge JACKSON. I do not, Senator.

Senator GRAHAM. And it would be wrong for me or anybody else to hold his statement against you because he spoke at some group you're a member of, right?

Judge JACKSON. Senator, I don't have—yes, it would.

Senator GRAHAM. It would be. Yes, that's right. That's the right answer. I thought that was the right answer with Judge Alito, when they made a big deal about some group he was in that had views that he didn't agree with and tried to call him basically a racist and found out that Senator Kennedy, God rest his soul, would beat the crap out of a guy for being part of some supper club that was actually in some organization called the Owl that didn't admit women.

So I guess the reason I'm bringing all this up is it gives me a chance to remind this Committee and America there are two standards going on here. If you're an African-American conservative woman, you're fair game to have your life turned upside down, to be filibustered, no matter how qualified you are. And if you express your faith as a conservative, all of a sudden, you're an "effing nut." And we're tired of it, and it's not going to happen to you.

But it just appalls me that we can have such a system in America that if a conservative woman wants to stand out and say I love my family just as much as you love yours, and my faith means just as much to me as it does you, then all of a sudden, they're some kind of weirdo.

And a guy like Justice Alito, who was in the same type situation you're in, being in a group, doesn't agree with everything they do or what people may say at a meeting he didn't go to, all of a sudden, they're on it. This stuff needs to stop. Our people deserve better respect, and I hope when this is over, people will say you were at least well treated, even if we don't agree with you.

So now let's talk about Gitmo. Being a public defender, did you consider that rewarding?

Judge JACKSON. Senator, yes, I did. Because public service is very important to me. It is an important family value. It is something that now I've dedicated my career to.

Senator GRAHAM. Yes. And do you think it's important to the system that everybody be represented?

Judge JACKSON. Absolutely. It's a core constitutional value.

Senator GRAHAM. You'll get no complaint from me. That was my job in the Air Force. I was an area defense counsel. I represented anybody that came in the door. Whether I liked them or not, I did my best. Is that what you did?

Judge JACKSON. Yes, sir.

Senator GRAHAM. Okay, good. Now, so the American people deserve a system where everybody is represented whether you like them or not, and anybody who takes up that cause, no problem with me. You're just doing your job, and I think you make our country stronger.

But there's the other side of the story that never gets mentioned when I talk about Gitmo. The American people deserve a system that can keep terrorists off the battlefield. They deserve a system that understands the difference between being at war and a crime.

Do you consider 9/11—you said "a terrible, tragic event." Would you consider it an act of war?

Judge JACKSON. Yes, Senator.

Senator GRAHAM. Okay, I would, too. I think that it was an act of war by al-Qaeda and associated groups against the people of the United States. So as you rightfully are proud of your service as a public defender and you represented Gitmo detainees, which is part of our system, I want you to understand and the Nation to understand what's been happening at Gitmo.

What's the recidivism rate at Gitmo?

Judge JACKSON. Senator, I'm not aware.

Senator GRAHAM. It's 31 percent. How does that strike you? Is that high, low, about right?

Judge JACKSON. Any—I don't—I don't know how it strikes me. Overall—

Senator GRAHAM. You know how it strikes me? It strikes me as terrible.

Judge JACKSON. Yes, that's what I was going to say.

Senator GRAHAM. Okay, good. We found common ground. Of the 229 detainees released from Gitmo—729 released, 229 have gone back to the fight. Here are some of the notables.

Former Gitmo detainee Zakir was named the Interim Defense Minister of Afghanistan. I don't know exactly what his job is today, but during the transition, they made him the defense minister, and he was in Gitmo.

Of the five men we released from Gitmo as part of the prisoner swap for Sergeant Bergdahl, here's where they're at. Mohammed Fazl was appointed Deputy Minister of Defense. Noori was appointed Acting Minister of Borders and Tribal Affairs. Wasiq was appointed as Acting Intelligence Director. Khairkhwa, Acting Minister of Information and Culture Defense. Omari was appointed as the new Governor of the southeastern province of Khost.

These were five people that we had in our control that are now helping the Taliban run the country. Would you say that our system in terms of releasing people needs to be relooked at?

Judge JACKSON. Senator, what I'd say is that that's not a job for the courts in this way. That—

Senator GRAHAM. As an American, does that bother you?

Judge JACKSON. Well, obviously, Senator, any repeated criminal behavior or repeated attacks, acts of war, bother me as an American.

Senator GRAHAM. Well, it bothers me. While I will not hold it against you, nor should I, the fact that you represented Gitmo detainees, I think it's time to look at this system anew, folks. When 31 percent of the people are going back to fight, to kill Americans,

and are now running the Taliban government, we have gone wrong somewhere.

Are we still at war?

Judge JACKSON. So the AUMF, the authorization for military force, is still in effect. Congress has authorized the use of force against people in this way.

Senator GRAHAM. But do you personally believe that al-Qaeda, ISIS-type groups are still at war with us?

Judge JACKSON. I think—yes. I mean, I think we—

Senator GRAHAM. So we're still in a state of war with certain elements of radical Islam to this very day?

Judge JACKSON. I believe that's documented, yes.

Senator GRAHAM. Okay. Now what's the process to determine whether one is an enemy combatant under our law?

Judge JACKSON. Well, I believe that the executive branch makes an assessment of whether or not someone has taken up arms against the United States somewhere in the world related to all of this.

Senator GRAHAM. Okay. So it's an executive branch function to determine whether or not this person qualifies as an enemy combatant?

Judge JACKSON. Well, I believe that they make a—

Senator GRAHAM. Under current law?

Judge JACKSON. Under current law, I believe that determination is made by the executive branch, and the person is put into—is detained. And then the question becomes whether they are able to bring some sort of legal challenge to that determination.

Senator GRAHAM. They have a habeas right?

Judge JACKSON. Yes.

Senator GRAHAM. Okay. So the law is that the executive branch determines if you're an enemy combatant, and under our law, you can appeal that decision to a Federal court through habeas. Is that correct?

Judge JACKSON. I believe that's correct.

Senator GRAHAM. Okay. Is it your view that we can hold enemy combatants as long as they're a threat to the United States?

Judge JACKSON. I believe that's what the Supreme Court has determined.

Senator GRAHAM. Okay. Did you argue that that should not be the case before in an amicus brief?

Judge JACKSON. I'm trying to think—I had two amicus briefs that I worked on, or three, technically, but two different cases.

Senator GRAHAM. We'll have another visit tomorrow.

Judge JACKSON. Yes.

Senator GRAHAM. Go back and check.

Judge JACKSON. Yes.

Senator GRAHAM. I'm pretty sure that in your brief, you argued that the executive branch should not have the ability to hold an enemy combatant indefinitely. You need to try them through some process or release them.

Judge JACKSON. Yes, Senator. As you were talking, my clients—the Cato Institute, the Rutherford Institute, and the Constitution Project—made that argument and asked me to draft their brief.

Senator GRAHAM. Yes. Well, do you agree with that argument?

Judge JACKSON. Senator, my responsibility was to make my clients' arguments. And as a nominee to the Supreme Court, that's the kind of issue the Supreme Court did not address that issue. They, in fact—the case became moot. So——

Senator GRAHAM. Did you organize an effort to get 20 judges to file a brief to the Supreme Court on this issue?

Judge JACKSON. Not on that issue. No, Senator.

Senator GRAHAM. On another issue?

Judge JACKSON. Yes, Senator.

Senator GRAHAM. Okay. Did you actively go out and recruit 20 judges to help you file a brief on another issue regarding law of war detention?

Judge JACKSON. Not technically.

Senator GRAHAM. What do you mean by that?

Judge JACKSON. What I mean is that I was at Morrison & Foerster, which was my law firm, in the Supreme Court and appellate group. One of the partners at Morrison & Foerster was a former Federal judge who wanted to make this argument and who said we—I have former Federal judges who are friends of mine who would like to join with me to make this argument. So I worked with her, the partner at my firm who was a former Federal judge, to make——

Senator GRAHAM. So it was her idea to get former judges to write this, not yours?

Judge JACKSON. Yes. Yes.

Senator GRAHAM. And you just helped in the implementation of that idea?

Judge JACKSON. So, Senator, as a member of the Supreme Court and appellate group in a law firm that is the practice.

Senator GRAHAM. Right. No, I'm asking——

Judge JACKSON. Amicus practice, yes.

Senator GRAHAM [continuing]. It wasn't your idea. It was somebody else's?

Judge JACKSON. Yes.

Senator GRAHAM. Okay. So now there are people still held at Gitmo today. Do you understand that?

Judge JACKSON. Yes.

Senator GRAHAM. Okay. What system is in place regarding their future?

Judge JACKSON. I am not aware of the system right now. I'm not sure exactly what you mean.

Senator GRAHAM. Well, let me tell you what it is.

Judge JACKSON. Yes.

Senator GRAHAM. There is a periodic review process made up of an interagency, where they go through the files of these folks and they determine whether or not they still present a threat to the United States or the world at large. And I think it's 6 months, maybe a year. But that goes on at least on an annual basis.

And if there's a determination that this person still represents a threat to the United States, they're continued to be confined. That's the way the system works.

Are you okay with that?

Judge JACKSON. As a policy matter, Senator, I'm not speaking to my views, that that's my understanding is that the periodic review—

Senator GRAHAM. Yes.

Judge JACKSON [continuing]. System is an executive branch determination of whether or not they are going to continue to hold people that they—

Senator GRAHAM. Does that make sense to you as a way to deal with these detainees?

Judge JACKSON. Senator, I'm not in a position to speak to the policy or the discretion of the executive branch regarding how they're going to handle detainees.

Senator GRAHAM. The reason I mention it is because in one of the briefs, you argued that the executive branch doesn't have that option. That if you had had your way, the executive branch could not do periodic reviews about the danger the detainee presents to the United States. They would have to make a decision of trying them or releasing them.

Is that not accurate?

Judge JACKSON. Respectfully, Senator, it was not my argument. I was filing an amicus brief on behalf of clients, including the Rutherford Institute, the Cato Institute, and the Constitution Project, who—

Senator GRAHAM. When you sign on to a brief, does it not become your argument?

Judge JACKSON. It does not, Senator.

Senator GRAHAM. All right.

Judge JACKSON. If you are—if you are an attorney and you are representing a client, in amicus—

Senator GRAHAM. But was that your position when you were in private practice? I mean, you sign on to this brief making this argument that you say is not your position. I mean, why would you do that if it's not your position? Why would you take a client that has a position like that, and this is voluntary. Nobody is making you do this.

Judge JACKSON. Oh, Senator, I would refer you to the same sorts of statements that Chief Justice Roberts made when he came before the Committee, which is that lawyers represent clients, and they may—

Senator GRAHAM. I get that. I'm not holding the clients' views against you. Like the people you represented at Gitmo, they deserve representation. But this is an amicus brief where you and other people tried to persuade the Court to change policy. The policy I described is a periodic review.

If the Court had taken the position argued in the brief that you signed upon, we would have to release these people or try them, and some of them, the evidence we can't disclose because it's classified. You're putting America in an untenable position.

This is not the way you fight a war. If you tried to do this in World War II, they'd run you out of town. We hold enemy combatants as long as they're a threat. There is no magic passage of time that you got to let them go.

So my question is very simple. Do you support the idea, did you support then the idea that indefinite detention of an enemy combatant is unlawful?

Judge JACKSON. Respectfully, Senator, when you are an attorney and you have clients who come to you, whether they pay or not, you represent their positions before the court.

Senator GRAHAM. I'm sure—I'm sure everybody at Gitmo wants out. I got that. This is an amicus brief, and I just don't understand what you're saying, quite frankly. I'm not holding it against you because you represented a legal position I disagree with. I mean, that happens all the time.

I'm just trying to understand what made you join this cause, and you say somebody hired you. But did you feel okay in adopting that cause? I mean, when you signed on to the brief, were you not advocating that position to the Court?

Judge JACKSON. Senator, as a judge now——

Senator GRAHAM. Okay.

Judge JACKSON [continuing]. In order to determine the lawfulness or unlawfulness of any particular issue, I need to receive briefs and information making positions on all sides. And the——

Senator GRAHAM. No, I got what a judge is all about. Listen, I'm not asking you to decide the case in front of me right here. I'm asking you to explain a position you took as a lawyer regarding the law of war, and I am beyond confused. I know what you said in your brief. Whether I agree with it or not is not the point. I just want you to understand that it's important for all of us to know where you were coming from.

If that brief had been accepted by the Court, it would be impossible for us to fight this war because there's some people who are going to die in jail in Gitmo and never go to trial for a lot of good reasons. Because the evidence against them is so sensitive, we can't disclose it to the public. That we're not charging them with a crime, what we're doing is saying that you engaged in hostile activities against the United States, that you are an enemy combatant under our law, and you will never be released as long as you're a danger until the war is over or you're no longer a danger. That's the difference between fighting a crime and a war.

Did you ever accuse in one of your habeas petitions the Government of acting as war criminals for holding the detainees?

Judge JACKSON. I'm—I'm——

Senator GRAHAM. The holding of the detainees by our Government that we were acting as war criminals?

Judge JACKSON. Senator, I don't remember that accusation, but I will say that——

Senator GRAHAM. Do you believe that's true, that America was acting as war criminals in holding these detainees?

Judge JACKSON. Senator, the Supreme Court held that the executive branch has the authority to detain people who are designated as enemy combatants for the duration of the hostilities. And what I was doing in the context of the habeas petitions at this very early stage in the process was making allegations to preserve issues on behalf of my clients.

A habeas petition is like a complaint that lawyers make allegations——

Senator GRAHAM. You know, I've been a lawyer, too, but I don't think it's necessary to call the Government a war criminal in pursuing charges against a terrorist. I just think that's too far. I don't know why you chose those words. That's just too far. But we are where we are.

So let's talk about the nomination process. Have you ever had any interaction with a group called Demand Justice?

Judge JACKSON. No.

Senator GRAHAM. Directly or indirectly?

Judge JACKSON. No.

Senator GRAHAM. Have you ever had any interaction with a group called American Prospect?

Judge JACKSON. No.

Senator GRAHAM. Do you know anything about Arabella? Is that the right term? Have you ever heard of a group called Arabella?

Judge JACKSON. I've heard of a group that I think is Arabella, or something like that?

Senator GRAHAM. Yes, I think you're right.

Judge JACKSON. Yes.

Senator GRAHAM. Arabella, yes. Do you know anything about them? Have you had any contact with them?

Judge JACKSON. No.

Senator GRAHAM. Okay. In your nomination, did you notice that people from the left were pretty much cheering you on?

Judge JACKSON. A lot of people were cheering me on, Senator.

Senator GRAHAM. That's true. That's true. Did you know that a lot of people from the left were trying to destroy Michelle Childs? Did you notice that?

Judge JACKSON. Senator, a lot of people were supporting various people for this nomination.

Senator GRAHAM. So you're saying you didn't know there was a concerted effort to disqualify Judge Childs from South Carolina because she was a union-busting, unreliable Republican in disguise?

Judge JACKSON. Senator, I was—I'm a sitting judge. I was focused on my cases. I—

Senator GRAHAM. Yes. But the answer is, no, I didn't know that?

Judge JACKSON. No, I didn't know that.

Senator GRAHAM. And would it bother you if that happened?

Judge JACKSON. Senator, it is troublesome that people are or were doing things related to the nomination—

Senator GRAHAM. I think that's the best way to say it. People have a right to speak out and pick the person of their choice, but all I can say is that if you missed the fact that there was an organized effort—well, here is, "President Biden has only a certain amount of political capital for keeping his party united. If he needlessly angers progressives on this SCOTUS pick, that could create all sorts of problems for him down the line." Jeff Hauser, the Revolving Door Project.

Let's see. I just got so many quotes. "It's difficult to imagine someone with a record like Judge Childs' winning votes from criminal justice advocates like Senator Cory Booker or even Dick Durbin."

"Childs' experience is nothing like the 'diversity of experience' that the Biden administration has championed."

Just let's see. "Picking her"—Childs—"would demoralize the base, side with corporate America. The fact that Lindsey Graham is vouching for her should give the White House pause."—"Our Revolution," Joseph Geevarghese, or whatever his name is. And I'm sorry about that, Joseph. He's Bernie Sanders' PAC director.

You didn't know that all these people were declaring war on Judge Childs?

Judge JACKSON. Senator, I did not.

Senator GRAHAM. Okay. Well, no, I'm not saying you did. You said you didn't know. I'll take you at your word. But I am saying that what is your judicial philosophy?

Judge JACKSON. So I have a methodology that I use in my cases in order to ensure that I am ruling impartially and that—

Senator GRAHAM. Okay. Your judicial philosophy is to rule impartially?

Judge JACKSON. No, my judicial philosophy is to rule impartially and to rule consistent with the limitations on my authority as a judge. And so my methodology actually helps me to do that in every case.

Senator GRAHAM. So you wouldn't say that you're an activist judge?

Judge JACKSON. I would not say that.

Senator GRAHAM. Okay. So we'll have 20 minutes more later on, but here's what I would say. That every group that wants to pack the Court, that believes this Court is a bunch of right-wing nuts that are going to destroy America, that consider the Constitution trash, all wanted you picked. And this is all I can say is the fact that so many of these leftwing radical groups that would destroy the law as we know it declared war on Michelle Childs and supported you is problematic for me.

Thank you.

Chair DURBIN. Thank you, Senator Graham.

Let me mention a few points here. Congressman Jim Clyburn was a strong supporter of Michelle Childs, and now I believe he is publicly supporting your nomination. And Michelle Childs has been nominated by President Biden to be a circuit judge, and she will be considered by this Committee as quickly as possible.

On the issue of Guantanamo, there are currently 39 Guantanamo detainees remaining. The annual budget for Guantanamo is \$540 million per year, which means each of these detainees is being held at the expense of \$12 million or \$13 million per year. If they would be incarcerated at Florence, Colorado, the supermax prison, Federal prison, the amount would be dramatically, dramatically less.

Since 9/11, nearly 1,000 convicted in the United States on terrorism charges. Since 2009, with the beginning of the Obama administration, the recidivism rate of the Guantanamo detainees released is 5 percent.

Senator GRAHAM. Mr. Chairman, according to the Director of National Intelligence, it's 31 percent. Somebody is wrong here.

If you're going to talk about what I said, I'm going to respond to what you said. If we close Gitmo and move them to Colorado, do you support indefinite detention under the law of war for these detainees?

Chair DURBIN. I would just say I'm giving the facts and—

Senator GRAHAM. The answer is, no.

Chair DURBIN [continuing]. I want to make sure that it's clear the 31 percent you referred to goes back to the year 2009?

Senator GRAHAM. What does it matter when it goes back to? We had them, and they got loose, and they started killing people.

Chair DURBIN. Well, I could just say that——

Senator GRAHAM. If you're one of the people killed in 2005, does it matter to you when we released them?

Chair DURBIN. I would suggest that a President of your own party released them and creating that major——

Senator GRAHAM. I'm suggesting the system has failed miserably, and advocates to change this system like she was advocating would destroy our ability to protect this country. We're at war. We're not fighting a crime. This is not some passage of time event.

As long as they're dangerous, I hope they all die in jail if they're going to go back and kill Americans. It won't bother me one bit if 39 of them die in prison. That's a better outcome than letting them go.

And if it costs \$500 million to keep them in jail, keep them in jail. Because they're going to go back to the fight. Look at the friggin' Afghan Government. It's made up of former detainees at Gitmo. This whole thing by the left about this war ain't working.

Chair DURBIN. Let me also note that Larry Thompson, who served as Deputy Attorney General under President George W. Bush; Orin Kerr, Special Counsel; Viet Dinh, who served as Assistant Attorney General for Legal Policy in the George W. Bush administration; John Bellinger; and former D.C. Circuit Judge, Solicitor General, and Independent Counsel Ken Starr were also prominent conservative lawyers signing a letter defending attorneys who represented Guantanamo Bay detainees.

I don't believe that we should associate that activity as being inconsistent with our constitutional values.

We are going to at this point recognize Senator Feinstein and then take a break after she has completed her questioning.

Senator Feinstein.

Senator FEINSTEIN. Thank you very much, Mr. Chairman, and I just would like to compliment the witness. I think you're doing very well and, as you can see, this is a bit of a tough place.

So, Judge, one of the issues that I often discuss with nominees, particularly to the Supreme Court, is the issue of abortion. I've asked the three most recent Supreme Court nominees about this issue and so I'd like to discuss it a bit with you today.

In 2017, I asked Justice Gorsuch about this during his confirmation hearing. I asked him to expand on a comment he had made about his belief that precedent is important because it adds stability to the law. In response, Justice Gorsuch reiterated his belief that precedent is important because, and I quote, "Once a case is settled that adds to the determinacy of the law," end quote. He also stated that *Roe* has been reaffirmed many times.

I also spoke with Judge Kavanaugh about this issue in 2018. I asked him whether he believes that *Roe* was settled law and, if so, whether it was correctly settled. Justice Kavanaugh said that *Roe*, quote, "is settled as a precedent of the Supreme Court," end quote. He said that *Roe*, quote, "has been reaffirmed many times over the

past 45 years and, most prominently, most importantly, reaffirmed in *Planned Parenthood v. Casey*,” end quote, and he described *Casey* as having the value of a “precedent on precedent,” end quote.

I most recently spoke about this issue with Justice Barrett in 2020. I asked her whether she agreed with Justice Scalia’s view that *Roe* was wrongly decided. She committed to, quote, “obey all the rules of stare decisis,” end quote, if faced with the question of whether to overrule *Casey*. She said she had, quote, “no agenda to try to overrule *Casey*,” end quote.

So here’s the question. Do you agree with Justice Kavanaugh that *Roe v. Wade* is settled as a precedent and will you, like Justice Barrett, “commit to obey all the rules of stare decisis in cases related to the issue of abortion,” end quote?

Judge JACKSON. Thank you, Senator.

I do agree with both Justice Kavanaugh and Justice Barrett on this issue. *Roe* and *Casey* are the settled law of the Supreme Court concerning the right to terminate a woman’s pregnancy.

They have established a framework that the Court has reaffirmed and in order to revisit, as Justice Barrett said, the Supreme Court looks at various factors because stare decisis is a very important principle. It provides and establishes predictability, stability. It also serves as a restraint in this way on the exercise of judicial authority because the Court looks at whether or not precedents are relied upon, whether they’re workable, in addition to whether or not they’re wrong and other factors as well.

So I agree with both of the statements that you read.

Senator FEINSTEIN. Well, let me add one to that and then we’ll move on. I’m particularly interested in the case of *Roe v. Wade*. *Roe* was decided nearly 50 years ago and it’s been reaffirmed over a dozen times since then. So my question is this. Does *Roe v. Wade* have the status of being a case that is a super precedent and what other Supreme Court cases do you believe have that status?

Judge JACKSON. Well, Senator, all Supreme Court cases are precedential, they’re binding, and their principles and their rulings have to be followed.

Roe and *Casey*, as you say, have been reaffirmed by the Court and have been relied upon, and reliance is one of the factors that the Court considers when it seeks to revisit or when it’s asked to revisit a precedent, and in all cases, those—the precedents of the Supreme Court would have to be reviewed pursuant to those factors because stare decisis is very important.

Senator FEINSTEIN. Thank you.

If you are confirmed, you would be one of only two Justices who has also served on a Federal district court, the other being Justice Sotomayor. In your 8 years as a trial judge on the D.C. District Court, you wrote nearly 600 opinions and presided over nine jury trials and three bench trials.

As you know from your service on the District Court, it’s important for appeals courts and especially the Supreme Court to be clear in their decisions. The clarity is necessary, as you well know, for trial judges to effectively do their job and properly apply legal precedents that are fair and consistent. As a district judge, you were responsible for applying precedent from the Supreme Court and the court of appeals to your case, and now as a judge in the

D.C. Circuit you're drafting those precedents. Your experience as a trial judge is one of your most significant assets, and I just want to add a personal comment. This is a tough place and you are handling it very well, and I appreciate your directness and think that's important.

Here's a question. I have two related questions. How did you make sure that you were properly applying the relevant precedents as a district court judge and, if you're confirmed to the Supreme Court, what would you do to make sure your opinions are clear so they could be applied correctly by district courts?

Judge JACKSON. Thank you, Senator.

As you noted, in my time as a district court judge, I had the opportunity to apply precedents that were handed down by the court of appeals and the Supreme Court. The district court is bound by the law as stated by those other tribunals, and I was very focused on making sure that I found the right precedents and applied them faithfully.

As I mentioned, with respect to my methodology, part of the process is receiving information from the parties in a case, and the parties write briefs and, in most cases, they identify the precedents that they, at least, believe are applicable and then the court does its own legal research as well to determine whether all of the relevant cases have been identified, and then you look to see whether there's anything that directly controls and, if it does, that's your answer.

In many cases, the precedents might be a little bit different in certain ways and you are assessing the parties' arguments and determining within your proper role whether what the appellate courts have said provides the law of decision for the case. But what's important, as you've mentioned, is the clarity by which courts of appeals and the Supreme Court need to operate so that the lower courts can actually follow the precedents. And I'm very conscious of that, as you said, as someone who has had to follow precedent and I would think carefully about that and use my communication skills to ensure that the precedents are clear so that lower courts can follow them.

Senator FEINSTEIN. Thank you.

I'd like to discuss, quickly, a letter this Committee received in support of your nomination from the International Association of Chiefs of Police, and as you know, this is the world's largest professional association of law enforcement leaders. And the letter states, "Judge Jackson has several family members in law enforcement and we believe this has given her a deep understanding of and an appreciation for the challenges and complexities confronting the policing profession.

"During her time as a judge, she has displayed her dedication to ensuring that our communities are safe and that the interests of justice are served." And so, Mr. Chairman, I'd like to put this letter in the record, if I may.

Chair DURBIN. Without objection.

[The information appears as a submission for the record.]

Senator FEINSTEIN. Thank you.

I understand that your brother served with the Baltimore Police Department for several years. So here's the question. How, if at all,

has having several family members in law enforcement impacted your understanding of the law or your approach to your judicial service?

Judge JACKSON. Thank you, Senator.

Some of my earliest memories, in addition to my father at the kitchen table with his law books, were of my uncles. Two of my uncles were career law enforcement and one was a detective—uniformed detective. One was City of Miami Police Department officer—patrol officer—for a long time before he became the chief. And I remember very well we would go to my grandmother's house on Sundays and she would make a big dinner for our family and my uncles would sometimes come off of their shifts.

So I see, in my mind, their uniforms coming in and they would always—they'd be carrying their weapons and they'd take them off and put them way up high on the china cabinet so the kids couldn't get to them and I remember feeling very proud of them and the service that they provided, and I think it's probably what led my brother, who is 10 years younger than I am, to decide that after he graduated from college he would want to also be in law enforcement.

So I'm very familiar with law enforcement, the important service that they provide, the perils of being out on the street protecting and serving and having a family that cares about you and worries about your safety. And so this is not something that is unfamiliar, and I'm very gratified by the support of the group that you mentioned and other law enforcement groups as I go through this process.

Senator FEINSTEIN. I joined this Committee in January 1993, and a few months later we considered the nomination of Ruth Bader Ginsburg to the Supreme Court. Justice Ginsburg's confirmation made her only the second woman to ever serve on the Supreme Court, after Justice Sandra Day O'Connor.

So we have come a very long way since then, though still not far enough. Women now make up about 35 percent of active judges on the Federal district bench and 37 percent of active judges on the Federal appeals courts.

Judge Jackson, if confirmed, you would become the sixth woman to ever serve on the Supreme Court. You would join Justices Sotomayor, Kagan, and Barrett on the Bench. This would be the nearest we have ever come to gender equity on the Supreme Court. There would be four women on a court with nine Justices.

So I have my own thoughts about why gender balance is important on our Nation's courts. But I'd really like you to tell us all what are your thoughts on what it means for our country to have women serve in meaningful numbers on the Federal bench, and, in particular, what it would mean to have four women serving on the Supreme Court for the first time in history?

Judge JACKSON. Thank you, Senator.

I think it's extremely meaningful. One of the things that having diverse members of the Court does is it provides for the opportunity for role models.

Since I was nominated to this position, I have received so many notes and letters and photos from little girls around the country who tell me that they are so excited for this opportunity and that

they have thought about the law in new ways because I am a woman because, I am a Black woman—all of those things people have said have been really meaningful to them—and we want, I think, as a country for everyone to believe that they can do things like sit on the Supreme Court.

And so having meaningful numbers of women and people of color, I think, matters. I also think that it supports public confidence in the judiciary when you have different people because we have such a diverse society.

Senator FEINSTEIN. Well, I just want to say thank you very much. This is often a hard place, and how you go through those hard times, I really think, is the most important thing and it's pretty clear to me that you go through hard times by holding your head up high and doing well. So I thank you very much.

Judge JACKSON. Thank you, Senator.

Chair DURBIN. Thank you, Senator Feinstein.

We're going to take a break. Let's see. Let's take 15 minutes starting now and then we'll return to more questions. We'll have a lunch break this—later this afternoon, in the earlier part of the afternoon.

[Whereupon the hearing was recessed and reconvened.]

Chair DURBIN. The Senate Judiciary Committee will come to order.

We're going to have two Senators ask questions and then break for lunch, somewhere around an hour from now. Senators Cornyn and Whitehouse will be recognized in succession.

First, Senator Cornyn.

Senator CORNYN. Thank you, Mr. Chairman. Judge, I want you to do me a favor. Will you nerd out with me a little bit—

[Laughter.]

Judge JACKSON. I will try, Senator.

Senator CORNYN. And we'll start with *stare decisis*.

Judge JACKSON. Yes.

Senator CORNYN. And I never figured out why lawyers speak in Latin rather than in English when describing these concepts by which judges apply precedent. But would you agree with me that even under an appropriate *stare decisis* analysis, that *Dred Scott* and *Plessy v. Ferguson* were appropriately overruled by the Supreme Court?

Judge JACKSON. Well, Senator, I've not engaged in the actual analysis, but I think it is well established now that the cases that overruled *Dred Scott* and *Plessy* were correctly decided.

Senator CORNYN. Yes. I mean, there is the—a means by which the Court can correct their mistakes, correct, by overruling previous decisions?

Judge JACKSON. If the various considerations that the Supreme Court has—uses to make that determination is satisfied.

Senator CORNYN. And have you ever heard a Federal judge talk about super-duper precedent or super precedent?

Judge JACKSON. I have not.

Senator CORNYN. I've never seen it either in any opinion. I've heard it here on the Judiciary Committee on a number of occasions when somebody has a favorite case or outcome that they don't want to see the Supreme Court revisit. Let me ask a minute. Obviously,

your nomination by President Biden is historic, and I congratulate you again. I congratulated you previously, and I think it's been long overdue. When Clarence Thomas, the second African American who was nominated to and confirmed by the Supreme Court, was nominated to the Court, did you celebrate that as a historic event?

Judge JACKSON. I'm trying to remember where I was at the time. I believe I did, yes.

Senator CORNYN. When we're talking about staying in your lane, and I appreciate your responses to a number of the questions even though I'd love to get your answer to the question, but where you've deferred answering, saying you want to stay in your lane and not be seen as a policymaker. Would you agree with me that one of the most important questions under our constitutional form of government and the separation of powers is who decides? In other words, some questions are appropriately decided by judges who are elected—unelected—excuse me—serve for life, insulated from politics, and other decisions are appropriately within the—left up to the legislative branch because they are—we are accountable to the people who can vote for us? They can vote against us if they don't like the policies that we—that we enact in legislation. Would you agree with—that who decides is an important question in terms of determining the appropriate role for both the judiciary and the legislature?

Judge JACKSON. As a general matter, I agree. It rarely comes directly like that as an issue. It's usually not a jump ball between the legislature and the executive branch.

Senator CORNYN. I get it. You don't get a lot of easy questions—

Judge JACKSON. Well—

Senator CORNYN [continuing]. But as a general proposition, you won't disagree with me.

Judge JACKSON. What I'd say is that the courts are properly tasked with resolving legal questions and that—

Senator CORNYN. Cases or controversies, right?

Judge JACKSON. Exactly, in every case, and—

Senator CORNYN. Right. Congress is not similarly constrained. We can pass broad policies, comprehensive legislation changing policy, but the difference is—one of the differences is the voters can un-elect us if they don't like what we're doing.

Judge JACKSON. That is true.

Senator CORNYN. I want to ask you what—did you study under Laurence Tribe when you were at Harvard?

Judge JACKSON. I did not.

Senator CORNYN. Well, as you know, Justice Breyer, your mentor, wrote a little book called *Active Liberty*, and Laurence Tribe, who was formerly a law professor at Harvard, wrote a review of that book in *The New York Times* review of books, and the title of it is, "Politicians in Robes." Are you familiar with that article?

Judge JACKSON. I am not.

Senator CORNYN. Well, in the article, Professor Tribe accuses Justice Breyer of engaging in what he called a noble lie. And he said—he talks about "the morality of resorting to falsehoods and delusions to conceal, usually from the masses, but sometimes from oneself, the truths whose revelation would wreak havoc, or at least

do more harm than good.” Professor Tribe goes on in criticizing Justice Breyer’s book. He says, “In his stubborn avowal that the Court, even with its current far-right supermajority, remains an apolitical body, he perpetuates a lie that is anything but noble.” You’ve talked about staying in your lane, not making policy decisions, not being seen as political. Do you agree with Justice Breyer that—or with Professor Tribe?

Judge JACKSON. Senator, I believe that judges are not policy-makers that we have a constitutional duty to decide only cases and controversies that are presented before us. And within that framework, judges exercise their authority to interpret the law and not make the law.

Senator CORNYN. So you would—you would agree with me that judges should not be politicians.

Judge JACKSON. Yes.

Senator CORNYN. Let me talk to you a little bit about some of the decisions that have been made by the Supreme Court over many years, starting perhaps with *Dred Scott* that adopts the substantive due process argument to determine the constitutionality of various laws. Perhaps the most recent decision by the Supreme Court that was a dramatic departure from previous laws in the States and in the Nation was the *Obergefell* case, which dealt with same-sex marriage.

In the opinions that were written there, it was noted that here we are 200—at the time, 234 years after the Constitution had been ratified, 135 years since the Fourteenth Amendment had been ratified, that the Supreme Court articulated a new fundamental right, which is a right to same-sex marriage. You’re familiar with that case, aren’t you?

Judge JACKSON. I am.

Senator CORNYN. At the time, it was noted that 11 States, including the District of Columbia, had passed laws sanctioning same-sex marriage, but also at the same time, there were 35 States who put it on the ballot, and 32 of those States decided to maintain the traditional definition of “marriage” between a man and a woman. Do you agree with me that marriage is not simply a governmental institution, it’s also a religious institution?

Judge JACKSON. Well, Senator, marriages are often performed in religious institutions.

Senator CORNYN. Well, when the—when the—you would agree with me that many of the major religions that I can think of—and they’re Christianity, Judaism, Islam—embrace a traditional definition of “marriage,” correct?

Judge JACKSON. I am aware that there are various religious faiths that define “marriage” in a traditional way.

Senator CORNYN. Do you—do you see that when the Supreme Court makes a dramatic pronouncement about the invalidity of State marriage laws, that it will inevitably sit in conflict between those who ascribe to the Supreme Court’s edict and those who have a firmly held religious belief that marriage is between a man and a woman?

Judge JACKSON. Well, Senator, these issues are being litigated, as you know, throughout the courts as people raise issues, and so

it's—I'm limited in what I can say about them. I'm aware that there are cases——

Senator CORNYN. Well, I'm not asking you to decide a case or predict how you would decide in the future. I'm just asking isn't it apparent that when the Supreme Court decides that something that is not even in the Constitution is a fundamental right and no State can pass any law that conflicts with the Supreme Court's edict, particularly in an area where people have sincerely held religious beliefs, doesn't that necessarily create a conflict between what people may believe as a matter of their religious doctrine or faith and what the Federal Government says is the law of the land?

Judge JACKSON. Well, Senator, that is the nature of a right, that when there is a right, it means that there are limitations on regulation, even if people are regulating pursuant to their sincerely held religious beliefs.

Senator CORNYN. You agree marriage is not mentioned in the Constitution, is it?

Judge JACKSON. It is not mentioned directly, no.

Senator CORNYN. And religious freedom and—is mentioned in the First Amendment explicitly, correct?

Judge JACKSON. It is.

Senator CORNYN. Do you share my concern that when the Court takes on the role of identifying an enumerated right—in other words, it's not mentioned in the Constitution—and creates a new right, declaring that anything conflicting with that is unconstitutional, that it creates a circumstance where those who may hold traditional beliefs, like something as important as marriage, that they will be vilified as unwilling to assent to this new orthodoxy?

Judge JACKSON. So, Senator, I understand that concern, and because there are cases that are addressing these sorts of issues, I'm not in a position to comment about either my personal views or whether——

Senator CORNYN. I'm not asking—and I'm not asking you to. Justice Alito in the—in the *Obergefell* case wrote, he said, “I assume those who cling to the old beliefs will be able to whisper their thoughts in the recesses of their homes, but if they repeat those views in public, they will risk being labeled as bigots and treated as such by government, employers, and schools.” So the *Obergefell* case we—to nerd out with you again, was decided under a doctrine known as substantive due process, correct?

Judge JACKSON. If memory serves, yes, substantive due process, and I think there might've been equal protection concerns mentioned as well.

Senator CORNYN. And the—and the Court—the Supreme Court had applied that, somehow fairly mysteriously, by saying it's created by the confluence of the Fifth Amendment and the Fourteenth Amendment to the United States Constitution. But historically, it's been applied in ways that seem to sanction explicit policymaking by the courts. For example, the *Lochner v. New York* case, which I know you talked to Senator Lee about, in particular, which it was a New Deal case which set limitations on how long bakers could work in New York. The Supreme Court struck that down and said it violated the right of free contract. Now, *Lochner*, as you know,

was overruled 30-something years later, but it's also been applied in a number of different circumstances. For example, it's been suggested that *Dred Scott*, which treated slaves as chattel property, was a product of substantive process.

Justice Hugo Black has criticized the doctrine of substantive due process as the arbitrary fiat of the man or men in power or the Court declaring a law invalid because it shocked the consciences of at least five members of the Court. He went on to say, "This use of judicial review thus subverts the liberty of government by the people, overturning laws enacted by legislatures who are answerable to the electorate rather than a majority of the Supreme Court." Finally, he said, finally, for the purpose of my question, he said, "The adoption of such a loose, flexible, uncontrolled standard for holding laws unconstitutional, if ever it is finally achieved, will amount to a great unconstitutional shift of power to the courts, which I believe"—Justice Black, that is—"and am constrained to say will be bad for the courts and worse for the country."

Justice Jackson, why isn't substantive due process analysis just another form of judicial policymaking, which you've suggested policymaking is not in your lane or—and you strive to be apolitical, something I applaud. But why isn't substantive due process just another way for judges to hide their policymaking under the guise of interpreting the Constitution?

Judge JACKSON. Well, Senator, the Justices have interpreted the Due Process Clause of the Fourteenth Amendment to include a substantive provision. The rights to due process, they have interpreted that to mean not just procedural rights relative to government action but also the protection of certain personal rights related to intimacy and autonomy. They include things like the right to rear one's children, I believe the right to travel, the right to marriage, interracial marriage, the right to an abortion, contraception.

Senator CORNYN. Treating slaves as chattel property?

Judge JACKSON. I don't quite remember the basis for the *Dred Scott* opinion, but I'll trust you that that's—

Senator CORNYN. Well, the fact is, is it not, that you can use substantive due process to justify basically any result—

Judge JACKSON. Well, the Court—

Senator CORNYN [continuing]. Whether it's conservative, or liberal, libertarian, or conservative, whatever you would like to call it. It's just a—it's a mode of analysis by the Court that allows the Court to substitute its opinion for the elected representatives of the people. Would you agree?

Judge JACKSON. The Court has identified standards for the determination of rights under the Fourteenth Amendment, substantive due process.

Senator CORNYN. And who gives them the right to do that? If it's not mentioned in the Constitution, where does the right of the Court to substitute its views for that of the elected representatives of the people, where does that come from?

Judge JACKSON. Well, the Court has interpreted the Fourteenth Amendment to include this component, the unenumerated right to substantive due process, and the Court has said that the kinds of things that qualify are implicit in the concept of ordered liberty—

excuse me—or deeply rooted in our Nation’s history and tradition. Those are standards that identify a narrow set of activities.

Senator CORNYN. Well, Judge, in the *Obergefell* case, Justice Roberts in his dissent noted that the Court invalidated marriage laws of more than half the States and orders the transformation of a social institution that has formed the basis for human society for millennia. So that was the basis for the institution of marriage is the practice for millennia and the recognition that marriage was between a man and a woman. Now, don’t get me wrong. I’m not arguing the merits or lack of merits of same-sex marriage. I believe the States and the elect—and the—and the voters can choose what they will, and that’s their prerogative, and I think that’s legitimate. But when the Court overrules the decisions made by the people, as they did in 32 of the 35 States that decided to recognize only traditional marriage between a man and a woman, that is an act of judicial policymaking, is it not?

Judge JACKSON. Senator, the Supreme Court has considered that to be an application of the Substantive Due Process Clause of the Fourteenth Amendment.

Senator CORNYN. Right, and it doesn’t—the Constitution doesn’t mention anything about substance when it talks about due process. The Fourteenth Amendment and the Fifth Amendment don’t talk about substantive due process. It talks about due process of law, correct?

Judge JACKSON. Correct.

Senator CORNYN. Well, one of the things that concerns me is here is an example of the Court’s finding a new fundamental right that is mentioned nowhere in the document of the Constitution. That’s the product of simply Court-made law that we’re all supposed to salute smartly and follow because nine people, who are unelected, who have lifetime tenure, whose salary cannot be reduced while they serve in office, they decide—five of them decide that this is the way the world should be.

What other unenumerated rights do you believe exist, and how could we possibly anticipate what those might be? For example, the Ninth Amendment says, “the enumeration in the Constitution of certain rights shall not be construed to deny or disparage other rights retained by the people,” which suggests to me that there are other as yet unidentified rights out there, and somehow, someday, some court is going to tell us we’ve identified an unenumerated right. And we’re going to reject the right of the American people to determine what the policies ought to be as regards that right because we, the nine people sitting on the Supreme Court, have decided we’ve discovered a new unenumerated right, and it shall be the law of the land, and no legislature can pass any law that conflicts with it. What other unenumerated rights are out there, or can you say?

Judge JACKSON. Senator, I can’t say. It’s a hypothetical that I’ve not—I’m not in a position to comment on. The rights that the Supreme Court has recognized as substantive due process rights are established in its caselaw.

Senator CORNYN. But, Your Honor, this is not a trick question.

Judge JACKSON. Oh, I understand.

Senator CORNYN. Okay.

Judge JACKSON. I'm just—I'm just not in a position to speak to the——

Senator CORNYN. Well, can you understand why ordinary folks wonder who do these people think they are and where does this authority come from?

Judge JACKSON. Yes.

Senator CORNYN. I think the authority comes from we, the people. That's the source of the legitimacy of government. But when the courts decide to identify an unenumerated right and negate anything that conflicts with it, can't you see how they might just—might feel that this is illegitimate or a sort of policymaking that you—that you have disavowed by saying that you don't want to make policy, you want to stay in your lane? Can you understand the concern?

Judge JACKSON. Absolutely, Senator, I do understand it.

Senator CORNYN. And how do you—and how—because I believe the Court's legitimacy is very important. That's why I agree with Justice Breyer that, notwithstanding what anybody else says, that should be an aspirational goal of the judges because we're all concerned about the legitimacy of our institutions and, particularly, I would say the institution of our judiciary. So how do—how do you as a judge, when you are approaching your decisions, how do you try to avoid being seen as a policymaker by embracing doctrines like substantive due process, which is—essentially gives judges carte blanche to do whatever they want?

Judge JACKSON. Well, Senator, I've not had that particular situation, but I do—I have a methodology that is designed to avoid my importation of policy perspectives. The judges are constrained in our system. That's part of the constitutional design. And so in all cases, I am looking neutrally at the arguments of the parties and, presumably, in a case like this, there would be arguments made on both sides of the issue.

Senator CORNYN. Your Honor, if you'll forgive me——

Judge JACKSON. Yes.

Senator CORNYN [continuing]. One reason I think the Supreme Court's different is because in your previous capacity as a trial judge, of course, you were bound by circuit court precedent, and on the circuit court, you're bound by the Supreme Court precedent. But as a member of the United States Supreme Court, you will be bound by nothing. You will be unaccountable to the voters. And so you said you can——

Judge JACKSON. Well, respectfully, Senator, I mean, yes——

Senator CORNYN. So you're not going to be able to find the answer in some law book somewhere. You're going to be presented with a case, and the argument is going to be made this is an unenumerated fundamental right, and the voters, whatever they've said is irrelevant because we five members of the Supreme Court are going to decide what the law of the land should be, and anybody who disagrees with us will be labeled a bigot or be accused of discrimination, even if those—their beliefs happen to flow from sincerely held religious conviction, like the definition of a—of a marriage between a man and a woman. But you've already told me that you see why the—this is a concern.

Judge JACKSON. I see why it is a concern, and I would just say that although the Supreme Court is not bound in the sense of having to apply prior precedent, there is stare decisis in our system. There are now standards in the stare decisis world that the Supreme Court applies when it—when it's asked to—sorry.

Senator CORNYN. Well, thank goodness the Supreme Court has been willing to revisit its precedent, or we'd still be living with *Plessy v. Ferguson* or *Dred Scott*. You know, one of the things Senator Whitehouse and I agree on is he and others frequently ask nominees for the Supreme Court, do you think *Brown v. Board of Education* is settled law, and believe it or not, some nominees won't answer the question. I mean, I'd—it boggles the mind. I tend to think that nominees from both parties tend to be over coached and not—and told you can't be—if you don't answer the question, you have a better chance of being confirmed. But some of these things are obviously settled, and I wish we had a more candid conversation about the source of the power that unelected lifetime tenured judges have to basically rule America when they decide that something is an unenumerated fundamental right.

Let me in the minute, 48 seconds I have ask you about a specific case. You remember *U.S. v. Brown*. This was a guilty plea and where you were asked to assess a punishment. And at one point in the proceedings, you said, "I'm going to state for the record, however, that this court has a longstanding policy disagreement with the criminal history guidelines with respect to the application of the two-point enhancement." Do you remember when you said that?

Judge JACKSON. I don't remember that particular statement.

Senator CORNYN. How is that policy disagreement different from other disagreements when you said that you're not going to get out of—out of your lane, you're not going to get into the policy lane?

Judge JACKSON. Yes, Senator. The Supreme Court in the sentencing realm has made the guidelines—the sentencing guidelines advisory. They used to be mandatory. Judges used to have to calculate the guidelines for sentencing purposes and then essentially apply a sentence within the guideline range. In a case called *United States v. Booker*, the Supreme Court determined that the guidelines were—are advisory now, so they don't have to be applied in every case, that you have to calculate them, but judges have more freedom to give effect to Congress—the various provisions in the statute related to sentencing. In *Booker* and in its progeny, the Supreme Court made clear that judges at sentencing—

Senator CORNYN. Judge, I only have—I only have a limited amount of time, so let me just close on one other question, and forgive me for interrupting you.

Judge JACKSON. Yes.

Senator CORNYN. But there's such a thing as a judicial filibuster, too.

Judge JACKSON. Sorry. I was trying to get to the point, but—

Senator CORNYN. Let me just—let me just ask, I don't know you well, but I've been impressed by our interaction, and you've been gracious and charming. Why in the world would you call Secretary of Defense Rumsfeld and George W. Bush war criminals in a legal filing? It seems so out of character for you.

Judge JACKSON. Senator, you may have been talked—are you talking about briefs that I—or habeas petitions that I filed?

Senator CORNYN. I'm talking about when you were representing a member of the Taliban, and the Department of Defense identified him as an intelligence officer for the Taliban, and you referred to the Secretary of Defense and the sitting President the United States as war criminals. Why would you do something like that? It seems so out of character.

Judge JACKSON. Well, Senator, I don't remember that particular reference, and I was representing my clients and making arguments. I'd have to take a look at what you—what you meant. I did not intend to disparage the President or the Secretary of Defense.

Senator CORNYN. Well, being a war criminal has huge ramifications. You could be subject to the jurisdiction of the International Criminal Court and hauled before that international tribunal and tried for war crimes, so it's not a casual comment, I would suggest. Thank you.

Chair DURBIN. Thank you, Senator Cornyn.

Senator Whitehouse.

Senator WHITEHOUSE. Thank you, Chairman. Judge Jackson, good to be with you again.

Judge JACKSON. Good to be with you.

Senator WHITEHOUSE. I know that a great many people are extremely proud that you are here today. I don't know that there are a great many who are prouder than Bruce Selya. And so with your permission, I'll take a moment and offer into the record some of his comments about you, and then maybe give you a chance to reciprocate with a word about him.

But yesterday in my opening remarks, I mentioned the Boston Globe article in which Judge Selya said that—about you, “She is absolutely everything you would want in a Supreme Court Justice. She has all the tickets in terms of her intelligence, her education, her work experience, and her demonstrated judicial temperament. I see some of the same qualities in her that I saw in Ruth Bader Ginsburg: humility, the ability to inspire others in a quiet way, not at the top of her voice. Some people have the capacity to inspire by example and the force of their reason. Intellectually, she is very smart, very well-informed, and she's very hardworking and focused. She gets the big picture.”

May I ask unanimous consent that the Globe article be admitted into the record?

Chair DURBIN. Without objection.

[The information appears as a submission for the record.]

Senator WHITEHOUSE. But he didn't stop there, Your Honor. He went onto WPRI, the local station in Rhode Island, and said about you, “She's worked hard. She deserves it, and I literally don't think that the President could've made a better choice. I think she'll be a terrific addition to the Supreme Court. She listens to what other people have to say but makes up her own mind. She has a very scholarly approach toward the law. She has a very winning personality. She's kind to the people she comes in contact with, and she has a certain humility that I find very attractive in people.” May I ask unanimous consent that the statement from WPRI be put into the record?

Chair DURBIN. Without objection.

[The information appears as a submission for the record.]

Senator WHITEHOUSE. Judge Selya went on Law360 and said, “I sense that she,”—you—“she has the same sort of desire to achieve consensus and a pragmatic streak that has characterized some of Justice Breyer’s work. I think she will be quite balanced. I have not found her to be an ideologue. She understands what the job of being a judge or being a Justice is. She wants very much to do it in the right way, and she will bend her considerable talents to that direction and won’t get distracted by any extraneous considerations or side issues. I think the country will appreciate that and will appreciate that this is a woman who understands the importance of the position and will give 100 percent of her talents every day to do that job in the right way and in accordance with her oath of office.”

Unanimous consent that that be put into the record, Mr. Chairman?

Chair DURBIN. Without objection.

[The information appears as a submission for the record.]

Senator WHITEHOUSE. And then finally, the Providence Journal, our home State newspaper, Katie Mulvaney in an interview heard Judge Selya say, “I think it’s a terrific appointment. She’s a very thoughtful person and wonderfully well qualified. I’m happy not only for her but for the whole country. She listens well. She gets the whole picture, has great respect for the rule of law. I think she’s got the whole package.” Unanimous consent that article be put in the record.

Chair DURBIN. Without objection.

[The information appears as a submission for the record.]

Senator WHITEHOUSE. So any reflections on Judge Selya?

Judge JACKSON. Well, that was very moving. Thank you, Senator, for reading his lovely remarks. It’s exactly who I know Judge Selya to be: always eloquent, always insightful. And I’m so flattered by his—by his admiration because he is someone that I have admired my entire professional life. He taught me how to look at issues very carefully, how to write, in a lot of ways, because of the way in which he’s so fastidious with his opinions, and he’s been an extraordinary mentor and role model for me.

Senator WHITEHOUSE. Well, we are very proud of him in Rhode Island. As you know, he’s on senior status, and when he went on senior status, we were able to recommend the—Rogerie Thompson to succeed him, of whom I think Rhode Islanders are equally proud, and she has now gone on senior status. And, Mr. Chairman, I hope we’ll be considering shortly an equally impressive Biden nominee for her position.

On an unrelated subject, and it relates to yesterday’s activities—you can relax a moment, Your Honor. This will not be a question for you. But a lot was said in this room yesterday about dark money by our Republican friends, to the point where one of the headlines about yesterday read, “Republicans Hammer Dark Money Groups.” And I’ll be the first to concede that there is dark money on both sides, and I hope very much we can get rid of it on both sides, shortly by legislation. But there is a difference, I believe, between a dark money interest rooting for someone and

right-wing dark money interests having a role in actually picking the last three Supreme Court Justices.

Now, how do we know that they had a role in doing that? Well, we know because everybody involved said so.

[Posters are displayed in the hearing room.]

Senator WHITEHOUSE. It was pretty straightforward stuff. President Trump said, “We’re going to have great judges, conservative, all picked by the Federalist Society.” That’s pretty plain. Senator Orrin Hatch, the former Chairman, was asked—said, “Some have accused President Trump of outsourcing his judicial selection process to the Federalist Society. I say, ‘damn right.’” The co-founder of the Federalist Society said that, “The administration is relying on the Federalist Society to come up with qualified nominees.” And then Don McGann, who ran the operation for Trump in the White House, said, “I’ve been a member of the Federalist Society since law school. Still am. So, frankly, it seems like that role has been in-sourced.” So there’s pretty clear and pretty broad agreement that that selection process took place out of the public eye, and it appears to have been informed heavily by dark money interests.

They were not alone in saying this. Here’s Laura Ingraham on Fox News concerned about abortion cases coming up before the Court. “We have six Republican appointees on this Court. After all the money that’s been raised, the Federalist Society, all these big fat cat dinners, if this Court with six Justices cannot do the right thing, then I think it’s time to circumscribe the jurisdiction of this Court. That’s the way to change things finally.” So we have people who are in a position to know what was going on behind the scenes describing the six Republican appointees on the Court who got there after all the money that has been raised, the Federalist Society and all these big fat cat dinners, and threatening if they don’t do what she considers to be the right thing, they’ll be punished by circumscribing the jurisdiction of the Court.

That’s pretty big talk, but it’s backed up by pretty big dollars. If you go back to before this enterprise got under way, the money that came into the Federalist Society from what’s called Donors Trust, which has been described as the dark money ATM of the right, a Koch brothers-affiliated operation, back, say, in 2002, it got \$5,000. No big deal. By 2019, when this operation was in full swing, it got \$7 million. We don’t know who the real donor was because that’s the job of Donors Trust is to de-identify the donor, to launder the identity off the donation so you can’t connect the dots any longer. But \$7 million, I think, is quite a lot of money.

And, unfortunately, the Federalist Society was not alone. Right down the hallway is something called the Judicial Crisis Network. Its office is on the same hallway as the Federalist Society and in the downtown Washington building, although JCN’s website and text filings list a mailing address at a different location, an address shared by multiple companies. And right down that hallway at that Judicial Crisis Network, there’s even more money pouring in, and here is how much poured into the last three nominations via the Judicial Crisis Network: \$21 million related in time to the Gorsuch nomination, \$17 million to the Kavanaugh nomination, \$14 million to the Barrett nomination. And, of course, we don’t know who the actual donor is. It could be the same donor. Who knows? And be-

cause we don't know who the donor is, we don't know what business they might've had before the Court. And I think it matters when people are seeking to influence the makeup of the Court that the public understand what business they may have before the Court, and anonymity hides all of that.

And they didn't stop with the Trump nominees. They got up on the air, a dark money group using dark money to accuse Biden's Supreme Court nominee, at that point a player to be named later—Judge Jackson had not been selected at this point—of being a tool or stooge of liberal activist dark money. This is a screenshot from their advertisement paid for by the Judicial Crisis Network.

So it's worth understanding for a moment what the Judicial Crisis Network is and where it lies, and it lies in a network of organizations. The prevailing way that political mischief is accomplished these days is with a paired 501(c)(3) and 501(c)(4) organization. The 501(c)(3) gets the tax deduction. The 501(c)(4) gets to participate in political activity. And sure enough, there's an 85 Fund and a Concord Fund that are twinned together as a 501(c)(3) and 501(c)(4) organization. And they filed under Virginia corporation law to operate under what they call fictitious names. That's the term of law under which they filed, "fictitious names." And there's the Judicial Crisis Network, one of the fictitious names of the Concord Fund. It has a parallel judicial education project that has a fictitious name of the 85 Fund. If you're interested in voter suppression, you can move down to the Honest Elections Project Action, another fictitious name, and its 501(c)(3) twin, the Honest Elections Project. And they've even got new ones that are less active—Free to Learn Action and Free to Learn. So these are eight organizations that are essentially one organization.

As lawyers, we think from time to time about piercing the corporate veil. That's corporate veiling that you could pierce with a banana, and it runs back and forth with three groups called CRC Advisors, CRC Strategies, and CRC Public Relations, that take and send money to these organizations as part of the sort of planning element. You might say that CRC Advisors, CRC Strategies, and CRC Public relations, this trio, is the command center, and this is the operational torso of the creature.

So I show this all because it shows considerable effort when somebody goes to that much trouble to create that many organizations to hide how much money they've spent to control the nomination process to the Court, and it's no small amount of money. In the original Washington Post research, they pegged it at \$250 million. Further research led to testimony in my Courts Subcommittee that the number is actually \$400 million, and we have a recent report that we haven't fact checked that the number is actually even higher than that. So I may amend this number upward once we're done with our fact checking. Four hundred million dollars funding conservative activists' behind-the-scenes campaign to remake the Nation's courts.

That operation is a very different thing than a group rooting for somebody, and I want to make sure that that difference is clear since our friends on the Republican side made dark money such a big focus of their attention already. There is a drastic difference between rooting for somebody and controlling the turnstile that de-

cides who gets on the Court, controlling the funding of the political campaigns that pursue the folks on the Court, and actually once you get on the Court, are working now with the judiciary itself to try to clean up the mess of that same anonymous money appearing before the Court through phony front groups that file amicus briefs and little flotillas, or if it's an important enough case, a full armada of dark money-funded front groups.

So that bears not at all on this nominee. But because this is a very public forum and because we've heard all that so-called hammering of dark money groups, I wanted to make sure that it was clear to everybody how this game is played and what the difference is in the way the two sides play it.

So now, back to our business, Judge Jackson. You have served as a trial court judge?

Judge JACKSON. I have.

Senator WHITEHOUSE. You have served as an appellate court judge.

Judge JACKSON. I have.

Senator WHITEHOUSE. And with any luck, you are on your way to serve as a Supreme Court Justice. Now, one of the things that is very different about trial court judges and appellate court judges is what their role is with respect to fact finding. It's my belief from my time spent as a practicing lawyer that the role of fact finding belongs at the trial court level. That's where you can look the witnesses in the eye. That's where the evidence can be amassed. That's where the trial judge has the responsibility of sifting through it. If there's a jury, then the jury, of course, is the ultimate fact finder, but if you're in a non-jury trial, the trial judge is the fact finder. Then the case goes up on appeal, and it comes up with a record, a record of fact in the case. And, in my view, that record of fact that comes up to the appellate court is actually a constraint on the power of the appellate court to go wandering off. The court is obliged to consider the appeal based on the factual record that was adduced in the district court.

So you having lived in both of those houses—the trial court house and the appellate court house—tell me a little bit about what that change meant to you as you went from being a trial judge to an appellate judge.

Judge JACKSON. Thank you, Senator. It is a really big difference. As you mentioned, at the trial court, you are on the ground level. Parties have filed the case. You have all of the issues usually at the trial level because you'll have the complaint if it's a civil case, and there'll be a lot of litigation about the development of the facts in the case. In civil cases, you have a period of discovery in many cases that is really about the development of the record, what actually happened in this case.

Sometimes there's even a trial, and that, too, is a part of the development of the facts in the case because the jury will be charged with the responsibility of determining what happened, who's guilty, for example, if it's a criminal case, or who's liable, if any, if it's a civil case. And sometimes there are even questions presented to the jury that they have to determine the facts.

At the appellate level, as you said, there is already a record, and the court is looking primarily at the law, the legal principles that

guided the decision below based on the factual record. And, importantly, at the appellate level, there are standards of review that the court of appeals applies when it decides how to review, whether or not to reverse or affirm the judgment of the lower court. And I've been very mindful, especially as a trial judge, of the standards of review.

Senator WHITEHOUSE. When I was prepping lawyers for oral argument before appellate courts, I would often say, please don't quarrel with the facts unless you have a knockdown case because if you want to get the appellate court to re-litigate the facts, you're up against the harshest standard of review available, the clearly erroneous test, and clear error is no small thing. Outside of that narrow finding by an appellate court that somehow the district court got it wrong, filtered through that clear error standard, are there other circumstances in which it's proper for appellate courts to do their own independent fact finding outside of the record of the case that they're reviewing?

Judge JACKSON. I am not aware of any. There might—there may be, but in my experience, the fact finding is done at the trial level. The court of appeals only looks at facts under standards like clear error. And so, therefore, the record is usually set and established by the time you get to the court of appeals.

Senator WHITEHOUSE. Yes, and I think that it's actually one of the constraints on the judiciary that they don't get to go and do free-range fact finding. They have to be tethered to the record of the actual case before them. It's related to the case or controversy requirement.

Judge JACKSON. That is correct, Senator.

Senator WHITEHOUSE. And in that regard, civil juries are, I think, something that Americans have prided themselves on for a long time. You go back to the colonial days, and the civil jury was one of the immediate imports from England. Every colony set up civil juries. When the crown tried to interfere with civil juries in the colonies, it became *casus belli* for the Revolution. It was in the Declaration of Independence of what the king had done wrong that offended the colonists and caused the Revolution. And the documents around the founding and around their creation of the Constitution all reflect passionate belief in the importance of the jury, including the civil jury, which as you may know from your experience in the trial court, is getting to be a rarer and rarer creature. And, in fact, there are trial judges who have written about how do we—how do we keep the civil jury alive.

And I'd like to hear your thoughts about whether there's more to the civil jury than just a fact-finding appendage of the trial judge, whether it was seen by the founders and whether it belongs in our constitutional structure as a part of the responsible self-governance that was established by our Constitution.

Judge JACKSON. Yes, Senator, it is part of our ordered liberty. It is a mechanism by which citizens can participate in governance. They can be called upon by the court to sit in judgment of other people in the community, and it was something that was a part of the democratic vision of the founders from the very beginning.

Senator WHITEHOUSE. Blackstone was one of the legal experts who the early lawyers of the United States relied on. I suppose

there were lawyers who had nothing but Blackstone's commentaries and the Bible on their shelves. And Blackstone described the jury as having a role to make sure that the power and clout of big and powerful interests could be protected against, that it was a refuge from the power of what he called the more powerful and wealthy citizens. There was long experience in Government of corruption, whether it was getting to a Chief Executive and getting them to do things your way for improper reasons or whether it was controlling a legislature, a legislative body.

But the jury is fundamentally different because they don't stick around. They're there for one case and one case only, then they disappear. You can't fix them so that they will decide your way over time. And if in that one case you try to fix them, you've likely committed a criminal offense. Tampering with the jury is a pretty significant thing, is it not?

Judge JACKSON. It is.

Senator WHITEHOUSE. If anybody tampered with the jury of yours, how would you respond?

Judge JACKSON. Oh, very seriously.

Senator WHITEHOUSE. So the jury lives in a protected environment from a lot of the political power and the danger of corruption that the elected branches often suffer. And do you have thoughts about the importance of the civil jury in that regard as the bastion where people can go where they'll get a square deal from regular citizens, and can stand toe-to-toe with the lawyers for however big or mighty an opponent they may have with almost no danger, let's put it that way, little danger, lessened danger, of the fix being put in?

Judge JACKSON. Well, certainly the jury system is designed in that manner, that citizens are brought in from the community. When we pick juries, we ask as judges, do any of you in this pool have any connection to anyone. You know, I've—

Senator WHITEHOUSE. So you screen them for conflicts of interest.

Judge JACKSON. You screen them heavily. That's part of the—what we call the *voir dire*, the sort of—

Senator WHITEHOUSE. Yes, we don't do that with people who come to Congress.

[Laughter.]

Judge JACKSON. Well, in the court system.

Senator WHITEHOUSE. They come with their conflicts of interest, often right on their lapels, sometimes hidden in their back pockets, but juries, not so, correct?

Judge JACKSON. Not so, and, in fact, that would be a reason to exclude someone from the jury. And we even ask, you know, do any of you—as judges we say, do any of you know me, and if you do, you'll have to let me know and be removed because the idea, as you've indicated, is to get people from the community who have no connection to the case and can hear the evidence that's presented in the courtroom and the arguments of the lawyers, and make a decision that is unconnected to any sort of personal interest they might have.

Senator WHITEHOUSE. Protecting the jury against the dangers of bias or corruption, giving the parties before it a clean and fair shot.

Judge JACKSON. Yes, Senator.

Senator WHITEHOUSE. So with any luck, you'll be on the Supreme Court before long, and I hope you will remember all of this because it seems to me that the Court has been on something of a campaign to deprecate and diminish the civil jury, including by allowing big corporations to build into their standard contracts, buried way down in the fine print that folks often don't read. And even if they do read it, they'll never get through the phone tree to find somebody to complain about it to try to strike it out of the contract. It's a take-it-or-leave-it adhesion proposition, and they build into that that you've given up your right to a jury, your Seventh Amendment right to a civil jury. It's right actually in the Bill of Rights.

I cannot think of another right that the Court pays less attention to or throws more readily under the bus. If you read the mandatory arbitration cases, there's rarely a mention of the Seventh Amendment, and it seems to me that flies in the face of the purpose of the jury, to allow the citizens of the greatest power and wealth, or, today, corporate citizens, to actually be able to take on the ability on their own through contracts that the customer has no chance to negotiate, the employee has no chance to negotiate, actually take away that right that was at the heart of our founding, without a squeak of objection or even notice by the Court. And I think it's created a dramatic shift in power toward big corporations, and I think it has harmed innumerable employees and customers.

So I am extremely happy that you have been able to answer these questions with such clarity about the role, and the history, and the value of the civil jury and its importance, not just as your fact-finding adjunct, but it's an important part of our constitutional structure, part of our structured liberty as Americans. I wish you well. I'll see you again tomorrow, and thank you so much for your patience with all of us here today.

Chair DURBIN. Thank you, Senator Whitehouse. And let me just say a positive word to follow up. This Committee in the last few weeks has passed legislation signed into law by President Biden, which, in cases of sexual harassment, provide that individuals who are complaining have the option of a jury trial, despite efforts to steer them into mandatory arbitration. It is the decision of the complainant the venue that they will seek. I think that is a step in the right direction, and it was passed it out of this Committee on a bipartisan basis.

And so I'd like to ask everyone to consider returning promptly at 1:30 for the much-anticipated Senator Lee of Utah.

[Whereupon the hearing was recessed and reconvened.]

Chair DURBIN. The Senate Judiciary Committee will resume.

I would like to make a statement in terms of some research that was undertaken during the break.

Judge Jackson, earlier, Senator Cornyn said that you had called former President George W. Bush and Secretary of Defense Donald Rumsfeld, a, quote, "war criminal," unquote. I noticed a little surprise in your reaction and I was surprised by the allegation.

During your service as a public defender, you filed several habeas petitions against the United States naming former President Bush and former Secretary Rumsfeld in their official capacities.

You were advocating on behalf of individuals who argued they were civilians wrongly classified as enemy combatants of the United States and your filing was part of your professional responsibility to zealously advocate for your clients.

In those petitions, the individuals raised more than a dozen claims for relief, one of which was an allegation that the Government had sanctioned torture against the individuals, which constituted war crimes under the Alien Tort Statute.

The Alien Tort Statute allows courts to hear cases for alleged violations of the law of nations or the treaties of the United States. Apparently, this is what Senator Cornyn was referencing.

So, to be clear, there was no time where you called President Bush or Secretary Rumsfeld a, quote, "war criminal," close quote. Did you want to respond?

Judge JACKSON. Correct, Senator.

Chair DURBIN. Okay.

Judge JACKSON. No. Thank you. That was correct.

Chair DURBIN. Thank you very much.

We now recognize Senator Lee.

Senator LEE. Thank you, Mr. Chairman.

Thank you, Judge Jackson, for being here.

I want to talk today about some things you heard about yesterday. There was a lot of talk from Members of this Committee about judicial philosophy. I want to talk a little bit about what that means and why it's important.

We'll start with what it means, at least, to me. One of the things that you heard from a lot of Members of the Committee, whether they couched it in terms of judicial philosophy or not, relates to the idea that justice should be blind, that justice properly administered within our system is blind, and that, therefore, individual justices and judges serving in Article III courts should be blind in the sense that they are able to see and understand and interpret the law, understand what the law is while understanding that the idea of what the law should be is left to other branches of Government, not to the judiciary.

In this respect, we recognize that blind justice and blind justices—those who are blind to the things they're supposed to be blind to—are those willing to recognize that if there's a policy flaw in the law and if there's a policy change that needs to be made it's not the role of the court to change it. That belongs to two different branches of Government, primarily, to Congress.

This, of course, requires judicial restraint. It requires judicial humility, and it gets back to what I was describing yesterday when I referred to Justice Barrett drawing on the analogy from "The Odyssey" of Odysseus binding himself to the mast of the ship.

Most of us refer to this judicial philosophy as textualism. Textualism is neither liberal nor conservative. It's neither Republican nor Democratic. It is just the approach that says what the law says matters and the job of the jurist is to look at the text and figure out what the text means to ascertain the original public meaning of the text in question.

While I doubt there are any Members of this Committee who would disagree with the idea that justice should be blind in this respect and that policy changes need to be made by the political

branches of Government, primarily by the legislative branch and not by the courts, we did hear some statements that, I think, are at least a little bit at odds with that concept of justice.

One of my colleagues mentioned that you should interpret the Constitution in a way that works for the people of today. Fair enough. We, certainly, don't want to interpret the Constitution in a way that doesn't work.

But, again, that's not the objective. The objective is not to ascertain good policy. The objective is to ascertain what the law requires.

You were urged to consider the effects of the Court's actions on people's lives. There, again, insofar as this relates to policy, it's not really the job of the courts.

You were admonished that you must, quote, "be able to see the real people at the other end of the Court's rulings like Americans who are one Supreme Court decision away from losing their health insurance or one Court decision away from the ability to make their own health care choices." And the list goes on and on.

Now, that type of judicial philosophy would have you step into the role of policymaker and decide what the law should be rather than what the law is.

You also heard quoted a couple of times yesterday—quoted or paraphrased or otherwise referenced—Federalist 78, in which Alexander Hamilton refers to the difference between law—between will and judgment. Will, as expressed by Hamilton, refers to what the law should be. Judgment pertains to what the law is. The judicial branch has the latter power but not the former. The legislative branch has the former but not the latter.

Judge Jackson, I'd love to get your thoughts on this discussion about what it means—what blind justice is, why that's important. Let's start with this formulation of it, though.

Does the law determine the outcome of a case or does the outcome of the case determine the law?

Judge JACKSON. Thank you, Senator.

The law determines the outcome of a case.

Senator LEE. And so anytime you're looking at a case and you're looking at the outcomes for ordinary Americans, for day-to-day Americans, if you're looking beyond the scope of deciding that case and if you're looking even within that case beyond what the law says, you would be stepping into a province of a different branch. Is that right?

Judge JACKSON. I believe so. The law and the facts of the case determine the outcome of cases.

Senator LEE. I think that's an accurate statement. It's important to emphasize this. This is also something that Hamilton describes in Federalist 78, where he goes on to say anytime you start to see the courts start to exercise will instead of judgment, the result is supplanting the will of the people as expressed through their elected representatives through the courts, and that tends to undermine the whole system.

You see, there's a reason, of course, why we give life tenure to Article III judges and justices and that is because we want to make sure that they have the power, the authority, the discretion, and

the confidence to issue a decision that they might not be comfortable with.

In fact, a judge who always agrees with and is always comfortable with his or her own opinions is, as Justice Scalia used to say, not a very good judge.

So we wanted them, you, all, to have confidence in being able to make the right decision even knowing that you and the public at large might be uncomfortable with the result it produces.

Congress makes laws that you won't always agree with. Congress is accountable to the people at regular intervals. You can fire every Member of the House of Representatives every 2 years. You can fire one-third of us in the Senate every 2 years.

But we insulate judges and Supreme Court Justices from that same accountability precisely for this reason. It's because political accountability is so important.

This is borne out in the judicial oath, one of the oaths that you'll take if confirmed to this position as an Associate Justice in which you'll swear or affirm that you'll administer justice without respect to persons and that you'll do it faithfully and impartially.

I read this to mean that you'd do it without consideration of external circumstances, external considerations, policy considerations, or otherwise.

Now, this relates to some interaction that you and I had when you came before this Committee for your confirmation to the U.S. Court of Appeals for the D.C. Circuit where you now sit.

In connection with that hearing, I submitted some questions to the record in which I asked you whether—to what extent the Constitution protects rights that are not enumerated in the Constitution itself and, if so, to specify what those rights were.

You responded by citing a number of cases including *Griswold v. Connecticut*, *Roe v. Wade*, *Loving v. Virginia*, and a handful of others. You also suggested that the Ninth Amendment was something—was a source for such rights, unenumerated rights.

The Ninth Amendment, of course, states, quote, “that the enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people.”

Judge Jackson, what specific rights has the Supreme Court identified as flowing from the Ninth Amendment? And by that, I mean, specifically from the Ninth Amendment, rather than in sort of an also-ran list of other features of the Constitution that might back up a particular ruling. What rights has the Constitution identified as flowing specifically from the Ninth Amendment?

Judge JACKSON. Thank you, Senator.

The Supreme Court, as I understand it, has not identified any particular rights flowing directly from the Ninth Amendment, although, as you said, the text of the Amendment suggests that there are some rights that are not enumerated.

Senator LEE. Right. Right. Its very existence and its very language suggest that, which opens up other questions as to how those are to be resolved. It's led to considerable debate among scholars and jurists alike as to whether, to what extent, and what way this is enforceable—those rights are enforceable by the courts.

But how would we go about deciding that? How would—how would jurists go about deciding this question appropriately? In

other words, would it be—would it be more appropriate to say we will ascertain the existence of rights protected by the Ninth Amendment based on the contemporaneous understanding at the time of the ratification of the Ninth Amendment or would it be more open ended to protect rights that we think are important today?

Judge JACKSON. Thank you, Senator.

The Supreme Court now very clearly has determined that in order to interpret provisions of the Constitution we look to the time of the founding and we ascertain based on what the original public meaning of the words of the Constitution were at the time.

Sometimes that yields a particular answer. Other times you may have to look to practices historically from that time. But that is—that would be the way in which you would go about interpreting the Ninth Amendment.

Senator LEE. Could it also be that it leaves this to be decided at the discretion of the Supreme Court itself, in other words, not based on any historical precedent but based on what the Supreme Court Justices themselves deem appropriate at the moment?

Judge JACKSON. I don't think so.

Senator LEE. And why is that?

Judge JACKSON. Because the way in which the Supreme Court interprets the Constitution is with reference to the meaning of the text at the time. That is one of the constraints, as I mentioned, in terms of my own way of handling—interpreting the law.

One of the constraints is that you're bound by the text and what it meant to those who drafted it.

Senator LEE. At the time. Gotcha. Yes.

Now, on February 1st of this year, President Biden said that he was looking for a Supreme Court nominee—this was, as I recall, right after Justice Breyer announced that he would be stepping down and before he had announced whom he might nominate, that he was looking for a nominee, quote—with, quote, “a judicial philosophy that's more one that suggests that there are unenumerated rights to the Constitution and all new members mean something, including the Ninth Amendment.”

So do you share the judicial philosophy that President Biden described in that statement?

Judge JACKSON. Senator, I haven't reviewed that statement. But I have not discussed anything about enumerated rights—unenumerated rights with the President.

Senator LEE. With the President.

Judge JACKSON. Yes.

Senator LEE. Did—so did President Biden ask you either about your judicial philosophy, more broadly, separate and apart from the Ninth Amendment or ask you about your approach to the Ninth Amendment?

Judge JACKSON. He did not.

Senator LEE. In a primary election debate that he had as a Presidential candidate in Nevada in 2007, Joe Biden stated, quote, “I would not appoint anyone who did not understand that Section 5 of the Fourteenth Amendment and the Liberty Clause of the Fourteenth Amendment provided a right to privacy. That's the question I'd ask them. If that is answered correctly that that is the case,

then it answers the question, which means they would support *Roe v. Wade*.”

I assume his reference to the Liberty Clause—I assume he’s referring to the Due Process Clause of the Fourteenth Amendment. In context, that appears to be what he’s saying. Did President Biden ask you whether you agreed with his analysis of the Fourteenth Amendment as it relates to the right to privacy?

Judge JACKSON. He did not.

Senator LEE. Tell me this. When we look at any provision of the Constitution, one of the many reasons it’s helpful to look at the original understanding in addition to the fundamental reason that you described, it can help us understand what motivated it and it can help us understand the actions of those who voted within Congress to propose text to be amended to the Constitution and those who voted to ratify it.

We’ve got a number of amendments, including the amendment that he referred to in that last quote I read, that had an understanding, at least an understanding that included certain “thou shalt nots” for Government.

The Equal Protection Clause, I think, is a provision of the Fourteenth Amendment that people understood. Among anything else it might do restricts government’s ability to treat people differently on the basis of race. Consistent with the Equal Protection Clause of the Fourteenth Amendment, when is it permissible for government to treat a person differently on the basis of race?

Judge JACKSON. Thank you, Senator.

The Supreme Court has interpreted the Equal Protection Clause, as you say, to generally prohibit classifications on the basis of race and it said—says that those classifications are to be rigorously scrutinized. They—strict scrutiny, which is a standard that applies that looks at the purposes of the Government and the means by which the Government seeks to achieve any end related to such classification.

The Government would have to have a compelling interest in making that classification and the means that it selects would have to be narrowly tailored to achieve that interest.

Senator LEE. And so those compelling interests can’t be for light or transient reasons. They can’t just be something like we feel like it, in other words?

Judge JACKSON. Correct.

Senator LEE. And the reason for this is because, well, number one, it’s bad—bad for anyone to treat another person differently on the basis of race. It’s especially bad when government does it because there’s not exactly equal bargaining power when you’re dealing with the relationship an individual has with government.

By definition, it’s a particularly unfair form of discrimination when it’s government doing it. Governments have enforcement officers. They have armies. They have the means of enforcing their will and their laws, and that’s one of the reasons why it’s so important.

What about under statute? Consistent with Title 7 of the Civil Rights Act of 1964, when is it permissible for an employer to treat an employee or a prospective employee differently on the basis of his or her race?

Judge JACKSON. By statute under Title 7, it is generally impermissible.

Senator LEE. And permissible only in very narrow circumstances?

Judge JACKSON. I believe so. The statute itself has some restrictions in terms of to whom it applies—

Senator LEE. Right.

Judge JACKSON [continuing]. The employers.

Senator LEE. Some exclusions in terms of religious employers, for example, not being able to discriminate on the basis of race, but it exempts religious employers within certain spheres in order to be able to protect that religious employer's discretion to operate within its faith and the rules of its faith.

And by doing that, it makes that much clearer—by making that distinction it makes that much clearer that discrimination on the basis of race in employment is not something that the law smiles upon, nor should it.

Let's talk about the Commerce Clause for a minute, if that's all right.

Now, at the time of the founding, the Founding Fathers didn't foresee and almost certainly could not have foreseen the invention of radios, televisions, airplanes, the internet, and telephone networks. And, yet, all of those things are governed by Federal law—by Federal law and not by State law. Why is this constitutional?

Judge JACKSON. Well, Senator, the Commerce Clause was initially interpreted by the Supreme Court to be very broad to allow for Federal regulation of interstate commerce and the growth of the economy in this country.

But over time, the Supreme Court has made clear that the Commerce Clause limits the Federal Government, that there is limited authority under the Commerce Clause. The state of the law now is such that the Federal Government, through the Commerce Clause, is only permitted to regulate channels of interstate commerce, instrumentalities of interstate commerce, and activities that substantially affect interstate commerce.

And with respect to the third category the Supreme Court has made clear in the *Lopez* case and in *Morrison* that noneconomic activities are not covered by Commerce Clause authority and in the *NFIB* case—the ACA case—the Supreme Court made clear that inactivity is also not covered and not authorized under the Commerce Clause.

Senator LEE. Right. And most of the items that I identified in my question—in fact, all of them, I believe—would fall under the category of channels and instrumentalities of interstate commerce.

We're dealing with interstate airways, airwaves, waterways, networks, things like that—things that depend for their existence, for their effectiveness, on their operation interstate such that they couldn't—no one could effectively regulate them and preserve their core function unless that was Federal. Those fit into the category of the channels and instrumentalities.

With the third item that you described, the substantial effects interstate commerce, is there much of a limiting principle there? I mean, with—you referred to *Lopez* and *Morrison* and *NFIB v. Sebelius*. To my knowledge, those are the only three cases the Su-

preme Court has decided since its ruling in 1937 on *NLRB v. Jones & Laughlin Steel*, which essentially created the modern substantial effects case—the modern substantial effects standard.

Those are the only three instances in which the Supreme Court identified as outside the Commerce Clause authority something that Congress had enacted.

Are these meaningful constraints, in your view, or are they examples of Congress just getting reckless and sloppy in the way it drafted things?

Some have argued, for instance, that as long as Congress doesn't get reckless and sloppy it can do whatever it wants under those. Do you have any view on that?

Judge JACKSON. Well, these cases come through the courts so I'll be general. The fact that Congress is limited in its authority under the Commerce Clause is established law.

It is a fundamental principle of our constitutional order, and those limits that the Supreme Court has recognized do carve out categories of activity that Congress is not permitted—the Federal Government is not permitted to regulate. Noneconomic activity is a category. Inactivity is a category.

Senator LEE. Now, the Supreme Court has also, through the Commerce Clause, established rules for things that the States may not do, as referred to as the—you know, the so-called Dormant Commerce Clause.

The Dormant Commerce Clause acknowledges the power of Congress—the exclusive domain of Congress—as being—regulating interstate commerce, that there's no Federal cause of action to allow for the invalidation of a State law under the Commerce Clause. It's been something that's been adopted by the courts.

Is that an appropriate exercise of the courts' judicial power or does that amount to de facto legislation on the part of the courts?

Judge JACKSON. Well, Senator, I wouldn't characterize it. I know that's what the Supreme Court has permitted. The Dormant Commerce Clause is a principle that supports the interstate nature and regulation and authority of the Federal Government and so States are not permitted under that doctrine to discriminate against other States, to preference their own commerce in a way that interferes with interstate commerce.

Senator LEE. I want to turn back for a moment to a line of inquiry you had with Senator Durbin earlier today when you were talking about your sentencing in these child pornography cases. I want to make sure that I understand your answer there.

If I understand it, you were making the argument that your concern was that the laws in this area didn't adequately take into account the transfer of these materials by electronic means to be transmitted, received, and stored through computers. Is that—am I understanding that correctly?

Judge JACKSON. Well, Senator, my—the point that I was making was that the Sentencing Commission, back when I was part of it and even since, tasked with the responsibility to evaluate and make recommendations and look at the data and information about cases has looked at the operation of the child pornography guideline, not so much the statute but the guidelines, which the Congress has tasked the Sentencing Commission with developing, and

there are aspects of the child pornography guideline that Congress, in legislation, has required.

It required certain enhancements to be included in the guideline and some of those enhancements, the data is now revealing, don't take into account the change in the way that this horrible offense is now committed.

Senator LEE. But the fact that it's easier to commit the offense shouldn't diminish the severity of the punishment, should it, I mean, any more than the more widespread availability of certain drugs, the more widespread availability of certain weapons might—I mean, surely you wouldn't argue for a lower sentence when certain things become easier in other criminal contexts. So why is this one different?

Judge JACKSON. Well, the sentencing enhancements that are in the guidelines are designed to help courts differentiate between different levels of culpability. Congress will say this is an offense, whatever it is, and the maximum penalty is X, and in most cases the range is between zero and something like 20 years that Congress gives when it establishes a penalty.

The point of the guidelines is to help judges figure out where in that range, between zero and 20 years, a particular defendant should be sentenced, and the guidelines have gradations in them that relate to various aspects of the commission of the crime.

Senator LEE. Go ahead.

Judge JACKSON. Sorry. So the commission does data—it does data gathering and research to figure out how crimes are committed and what gradations should matter in terms of the range of culpability because the problem of not doing that or of getting it wrong is that you are not able to adequately assess and determine the differences among offenders on the scale.

Senator LEE. I understand that. And so—but in these cases, as I understand it, all 10 of the cases that we've reviewed on record where you've sentenced someone to a—for a child pornography conviction—in all 10 of those cases you departed from the guidelines and departed downward.

It's hard for me to understand departing from those in every case you've got because isn't that supposed to—isn't a departure supposed to be grounded in finding that it's outside the heartland of cases in that range—cases of that sort?

Judge JACKSON. Yes, Senator, and as I said before, these are horrible cases that involve terrible crimes, and the court is looking at all of the evidence consistent with Congress' factors for sentencing. The guidelines are one factor.

But the court is told that you look at the guidelines but you also look at the nature and circumstances of the offense, the history and characteristics of the offender. There are a series of factors.

In the cases you are also getting recommendations and in most of the cases—I haven't pinned it all down but in most of the cases, if not all of the cases, the Government is asking for a sentence below the guidelines because this guideline system is not doing the work in this particular case.

Senator LEE. Understood. Section 230 of the Communications Decency Act provides a degree of immunity for tech companies operating in the space of being online interactive service providers. It

immunizes them from certain cause of action that would otherwise apply against them.

Would it be within Congress' authority to condition the receipt and availability of Section 230 immunity on those online interactive service providers operating as a public forum that is not discriminating on the basis of a viewpoint or the viewpoint of those posting on them? Would that be within our authority?

Judge JACKSON. Senator, I can't comment on a particular issue about whether or not it is constitutional or not. But the criteria that you identify it would be relevant, I think, as to whether or not the Government is seeking to regulate along viewpoint lines under the First Amendment. That is something that is generally impermissible.

Senator LEE. Thank you, Mr. Chairman.

Chair DURBIN. Thank you very much, Senator Lee.

Senator KLOBUCHAR.

Senator KLOBUCHAR. Thank you very much, Chairman and Senator Grassley.

Welcome, again, Judge, the wonderful family. They all seem to be awake throughout this entire hearing.

I just wanted to—before I start, wanted to get at something Senator Lee was talking about. It's not the Dormant Commerce Clause. But I really appreciated early on how you talked about these child pornography cases.

As a former prosecutor, I could totally see where you were coming from when you talked about looking at these cases as a mom and a judge, and would it surprise you at all that other judges, including a number of them that were supported by our colleagues on the other side of the aisle, have given out similar sentences in child pornography cases?

Judge JACKSON. No, Senator, it would not surprise me because these cases are horrific and there's a lot of disparity because of the way the guidelines are operating in this particular area.

But in every case—in every case that I handled involving these terrible crimes I looked at the law and the facts. I made sure that the victims—the children's perspectives were represented and I also imposed prison terms and significant supervision and other restrictions on these defendants.

Senator KLOBUCHAR. Well, thank you. And I just also want to note, and I know others have brought this up, the letter of support from the Fraternal Order of Police in which they said, "From our analysis of Judge Jackson's record in some of her cases we believe she has considered the facts and applied the law consistently and fairly on a range of issues. There is little doubt that she has the temperament, intellect, legal experience, and family background to have earned this appointment. We are reassured that should she be confirmed she would approach her future cases with an open mind and treat issues related to law enforcement fairly and justly," and that matters a lot to many of us.

Now, I want to go back to something I was talking about yesterday and that is why today's hearing is so monumental, including that it is occurring at a time when we, as Americans, have been reminded again, due to the courage of Ukrainians thousands of

miles away, that we can never take our democracy or, for that matter, our courts for granted.

It is also happening at a time when we are seeing each other for the first time after a 2-year pandemic, connecting to each other again, and I hope this moment will be a moment where we see a renewed interest in our democracy, that we respect each other's rights and views, and that we see that we are not a nation of 300-plus million silos. Instead, we are a nation committed to this idea that what unites us as Americans is much bigger than what divides us.

And so in that context, you come before us with this incredible strength, legal acumen, grace under pressure that you have demonstrated today and you also have come before us, as we've noted, as the first Black woman to be nominated following 115 Justices who have been confirmed.

And I will note of the 115 Justices, 110 have been men, and I actually once reminded late-night show Trevor Noah of similar issues in the U.S. Senate. In fact, in the history of the U.S. Senate, of the nearly 2,000 people who have served, only 58 have been women. And he responded that if a nightclub had numbers that bad they'd shut it down.

But today, Judge, we're not shutting anything down, not the Court, not the Senate, and you are opening things up, and I think one of the things your nomination presents is an opportunity to address a decline in the public's confidence in our Court and, increasingly, many, if you see public opinion polls, see the Court as over politicized or out of touch.

At the same time, we've seen an alarming rise in threats targeting members of our judiciary for just doing their jobs. How do you think we can work to maintain the public's confidence in the Court? What do you see your role in that?

Judge JACKSON. Thank you, Senator.

Public confidence in the Court is crucial. As has been said here earlier, the Court doesn't have anything else, that that is the key to our legitimacy in our democratic system, and I am honored to accept the President's nomination, in part, because I know it means so much to so many people. It means a lot to me.

I am here standing on the shoulders of generations of Americans who never had anything close to this kind of opportunity, from my grandparents, who had just a grade school education but instilled in my parents the importance of learning, and my parents, who I've mentioned here many times already, who were the first in their families to get to go to college.

So this nomination, against that backdrop, is significant to a lot of people and I hope that it will bring confidence, it will help inspire people to understand that our courts are like them, that our judges are like them, doing the work, being part of our Government. I think it's very important.

Senator KLOBUCHAR. Very good. I think along those lines your wonderful mentor, Justice Breyer, I quoted him about how he said we can help maintain public acceptance of the Court—and these are his words—"We can do it best by helping ensure that the Constitution remains workable in a broad sense of the term."

Specifically, the Court can and should interpret the Constitution in a way that works for the people of the day. Like, as you know, I think Section 2—Article II Section 2 doesn't refer to the Air Force because we didn't have an Air Force back then. So there are things about the Constitution that, of course, as we've gone along, have been interpreted to meet the moments of our time.

What do you think Justice Breyer means when he says the Constitution should be interpreted in a way that works for the people of today and do you think a Justice can be both pragmatic and objective and respect history?

Judge JACKSON. I do, and I think that the Justices have demonstrated that. Some of their recent opinions have had to deal with modern technology, technologies that did not exist at the time of the founding.

So, for example, the *Riley* case, the *Carpenter* case—these were Fourth Amendment decisions in which the Court was asked to determine whether or not it violated the Fourth Amendment for the police to search someone's cell phone without a warrant or for the police to use GPS location data to determine where someone had been without a warrant and, obviously, those technologies did not exist. But what the Court did was it looked back at the time of the founding and determined what the reasonable expectations of privacy were related to the term unreasonable searches and seizures, which appears in the Constitution, and having assessed what that meant back then they could use those principles to decide whether or not a cell phone is like someone's home these days with all of the information and all of the things that are stored there.

And the Court determined that it was a violation of the Fourth Amendment—that the police officers needed a warrant—and they did so with reference to what the Constitution meant in history.

Senator KLOBUCHAR. Very good. You know, you were viewed as a judge—and you talked about this a bit yesterday—that writes lengthy opinions, that believes you should spell things out, and believes in being transparent. Is that a fair characterization? I just want to—

Judge JACKSON. That is. That is.

Senator KLOBUCHAR. Okay. Good. I'm sure your clerks know that.

And I want to talk about something, to me, that's a bit the opposite and that's something that some have termed the shadow docket and that includes decisions that the Court makes on an expedited basis that are usually unsigned and issued without oral argument or a full briefing.

In the last few years, we've seen the Court increasingly deciding cases in this way, often over the dissent of maybe three or four of the Justices.

Last term, the Court granted 20 requests for emergency relief, a historically high number. Ten years ago, in the October term of 2011, the Court granted only six requests in an entire year.

When do you think it's appropriate for the Supreme Court to grant emergency relief, use this docket? When are the circumstances that warrant this? And I think you know these decisions have a profound effect on people's lives. I'll just use one example.

Last fall, in a one-paragraph decision, a majority of the Court refused to stop the enforcement of a Texas law that severely restricts a woman's access to abortion. In that case, even Chief Justice Roberts objected to the Court's decision to let the law take effect, calling the statutory scheme not only unusual but unprecedented.

As someone who believes in transparency, could you talk, in general, about when you think the shadow docket should be used, when emergency relief should be given, and how, if it's overused, it could undermine public confidence in the Court?

Judge JACKSON. Thank you, Senator.

Well, there's a balance that the Court has to consider, and that it—insofar as, on the one hand, it has always had an emergency docket. The need for flexibility, the ability to get answers to the parties at issue, is something that's important in our system.

On the other hand, the Court has also considered the interest in allowing issues to percolate, allowing other courts to rule on things before they come to the Court. And I am not privy at the moment to the Justices' views and why and how they're using the emergency docket in these cases.

If I was fortunate enough to be confirmed, I would look at those issues. But it's an interesting and important set of issues.

Senator KLOBUCHAR. Okay. You know, I think just another example of this, by the way, is the day before Wisconsin's primary election on April 6th, 2020, right as the first beginnings of some of the health orders that came out with the beginning of the pandemic the Court issued a 5–4 decision halting a district court's order allowing voters extra time to cast their absentee ballots so they could avoid waiting in line to vote and back then, people, literally, got COVID—election workers and the like—because of this.

And, again, I'm not going to belabor this point, but I think some of this is these decisions that are made that don't reflect some of the careful consideration that you have made in many of your decisions as a judge.

But speaking of voting, I'll ask you one question on that front. Since the Supreme Court gutted the Section 5 preclearance regime of the Voting Rights Act in its decision in *Shelby County*, the D.C. Circuit has not seen many voting rights cases.

However, as you know, Justice Ginsburg dissented in that case, describing the right to vote as the most fundamental right in our democratic system. Do you agree that the right to vote is fundamental?

Judge JACKSON. Senator, the Supreme Court has said that the right to vote is the basis of our democracy, that it is the right upon which all other rights are, essentially, founded because in a democracy there is one person, one vote and there are constitutional amendments that relate directly to the right to vote. So it is a fundamental right in our democracy.

Senator KLOBUCHAR. Yes. I know that's how Justice Barrett answered that question as well in her recent hearing.

I'm going to turn to an area that Senator Lee and I—we both chaired the Subcommittee on Antitrust and so it's near and dear to my heart. So I thought I'd spend a little time. It usually gets relegated to the second round but I'm putting it up on the docket here.

U.S. antitrust law has been described as a comprehensive charter of economic liberty, and I agree, and effective antitrust enforcement plays a critical role, as you know, in protecting consumers and workers, promoting innovation, ensuring new businesses have an opportunity to compete.

It, actually, from really early on in our country's history has been a very important part of assuring that capitalism works.

And in January, for the first time since the dawn of the internet, the Senate passed a tech competition bill out of the Judiciary Committee. It's a bill that Senator Grassley and I lead. Many of the Members of this Committee supported the bill—a 16 to 6 vote. It's called the American Innovation and Choice Online Act. It's now headed to the Senate floor.

I'm not going to ask you about that bill, obviously. But I want to put this in some context.

While tech monopolies have seized from 50 to 90 percent market share in major parts of their business lines, it is clear to me when you look at the plain language of the Sherman Act, Clayton Act, laws that are in place, that these monopolies are not okay.

However, court rulings for decades in antitrust have created some major obstacles to taking on these cases, and it's not just court rulings. It is on us—with, as I said, the dawn of the internet decades having passed, it is on us, the Senate and the House, to update our laws this year to give enforcers the resources to do their jobs, something you, if confirmed, would not have a role in.

But the role of the courts is also very critical. You have been nominated to replace Justice Breyer, who came to the Court with a strong background in antitrust law. I know you've handled a case. You and I discussed it in my office. I think it got—I think it got decided. The merger was abandoned. So you didn't have to rule on the merits of it. It was back in 2017—a FTC challenge.

But I'll just quote something that Justice Breyer once said. He told this Committee, "If you're going to have a free enterprise economy then you must have a strong and effective antitrust law." Do you agree with Justice Breyer's statement and how would you characterize the goals of our antitrust laws?

Judge JACKSON. Well, thank you, Senator.

The antitrust laws protect competition and, as you said, therefore, protect consumers and competitors and the economy as a whole, and the Sherman Act and the Clayton Act are broad in their statements and their protections, and there's a lot of precedent in this area.

If I were confirmed, I would use my methodology to look at the precedents in these areas to ensure that any legislation that I was considering is interpreted according to the text consistent with Congress' intent, and in the area of antitrust that is ensuring that there is consumer protections.

Senator KLOBUCHAR. Very good. And just to play it out a little bit, since the 1980s, the Court, in cases like *Trinko* and *Credit Suisse, Ohio v. American Express*, has really made it increasingly difficult to enforce the antitrust laws and protect competition.

And during that same time, and I know many of my colleagues know this, we have seen a rise in industry consolidation, market power, not only in tech with companies like Google and Amazon

and Facebook and Apple but also across our economy, really, in everything from pharma to cat food to caskets.

Do you—what role do you think that congressional intent should play in the Court’s interpretation of the antitrust laws? And I say that because I think that we’re dealing with some cases where Justices have actually substituted their own ideologies for the intent of Congress in originally passing the laws.

And I think it was Justice Souter who once said before this Committee, “When we are dealing with antitrust laws we are dealing with one of the most spectacular examples of delegation to the judiciary that our legal system knows,” and he added that, “Certainly, a respect for legislative intent has got to be our anchor for interpretation.”

So what role do you think congressional intent should play in the Court’s interpretation of the antitrust laws?

Judge JACKSON. Thank you, Senator.

So I’ve interpreted a number of statutes in my near decade on the bench and in every case the text of a statute is what the court looks at in order to ascertain what the legislature intended, and that is important because, as I’ve said, courts are not policymakers and judges should not be importing their own policy preferences.

Judges are restrained in our constitutional scheme in order to effect the will of Congress in terms of their interpretation of the laws.

Senator KLOBUCHAR. Okay. Thank you.

I’m going to turn to another topic and that’s Freedom of the Press—*New York Times v. Sullivan*, a 1964 case. We have recently witnessed, as you know, unprecedented attacks on journalists and journalism, whether it’s violence overseas, recently losing, sadly, members of the press just in the last month in Ukraine, or threats and intimidation at home.

This is very concerning to me, given the important role of the First Amendment. My dad was a newspaper reporter so the issues hit home for me.

Can you talk about your view of the role of journalists in our democracy?

Judge JACKSON. Thank you, Senator.

Journalists and Freedom of the Press is protected by the First Amendment. It is about the dissemination of information, which is necessary for a democratic form of government.

The Supreme Court has held as much and that was the basis for the Court’s determinations in protecting the press from liability in *New York Times v. Sullivan* and its progeny.

Senator KLOBUCHAR. Okay. As you know, that ruling was a unanimous ruling in support of the First Amendment and the Court held that when newspapers report on public officials they are only liable for untrue statements that are published with knowledge or reckless disregard for whether the statement was false.

The Court in *Sullivan* based its decision on our country’s, quote, “profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide open”—that’s their quote—and it recognized that, quote, “erroneous statement is inevitable in free debate,” end quote, and quote, “must be protected

if the freedoms of expression are to have the breathing space that they need to survive.”

Do you agree that those principles are just as relevant today as they were when the Supreme Court first decided *New York Times v. Sullivan*?

Judge JACKSON. *New York Times v. Sullivan* is the continuing binding precedent of the Supreme Court and it does state the principles that the Court has determined are undergirding the First Amendment right to free press.

Senator KLOBUCHAR. Okay.

And last summer, actually, in *Berisha v. Lawson*, the Supreme Court declined to review a case in which the Eleventh Circuit applied *New York Times v. Sullivan*.

Justice Thomas and Justice Gorsuch each dissented from the decision not to grant cert, arguing that the Court should reconsider its holding in *Sullivan*. How would you approach a case that sought to limit or overturn the central holding in *New York Times v. Sullivan*?

Judge JACKSON. Thank you, Senator.

Anytime the Court is asked to revisit a precedent there are criteria that the Court uses to decide whether or not to overrule a precedent.

New York Times v. Sullivan is a precedent and stare decisis is very important—the principle that courts—that the Supreme Court should maintain its precedents for predictability and stability in the law.

If the Court is asked to revisit a precedent, its criteria—what it looks at—whether the precedent is wrong and, in fact, egregiously wrong, the Court has said, whether there has been reliance on that precedent, whether there are other cases that are similar to the precedent or that relied on the precedent that have now shifted so that the precedent is no longer on firm footing, whether or not the precedent is workable—sometimes the Supreme Court will issue a ruling and determine later that it’s not actually doing what the Court intended—and whether or not there are new facts or a new understanding of the facts.

Those various criteria are what the Court looks at to decide whether or not to overturn a precedent and they would be what I would look at if I were confirmed to the Supreme Court.

Senator KLOBUCHAR. Thank you. I was recalling as you spoke about stare decisis at one of your first nominations hearing for the district court and you actually—answering in response to one of my questions you said stare decisis is a bedrock legal principle that ensures consistency and impartiality of judgments.

And I think, as you know, about how you’ve talked more broadly about this—moving off of the First Amendment questions—throughout the Court’s history stare decisis has been so key and the Court has relied on it to maintain stability in the law, reaffirm its impartiality.

As a former Justice—I know Senator Durbin just read a very famous book about him—Minnesotan, Justice Harry Blackmun, who actually Justice Breyer succeeded on the Court, said in his concurrence in *Planned Parenthood v. Casey* about the Court’s decision to uphold *Roe v. Wade*—he said, “What has happened today should

serve as a model for future Justices and a warning to all who have tried to turn this Court into yet another political branch.”

What role do you think that stare decisis plays in protecting the independence of the judiciary and avoiding the perception that the Court is acting as another, quote, “political branch?”

Judge JACKSON. I think it plays a very important role as a doctrine that keeps shifts from happening in the Court, that, as I previously mentioned, it’s very important to have stability in the law for rule of law purposes so that people can order themselves and predict their lives, given what the Supreme Court has already said, and if there were massive shifts every time a new Justice came on or every time new circumstances arose there would be a concern that public confidence would be eroded.

And so stare decisis is a very important doctrine that the Supreme Court has established and it’s one that furthers the rule of law in this country.

Senator KLOBUCHAR. Thank you very much.

Well, that’s a good way to end, Judge Jackson. And I do see Senator Cruz waiting in the wings. So, by coincidence, and it looks like he has things he’s putting up of charts—by coincidence, I have—I was going to put on the record, and since he’s here it makes a lot of sense, from the judge that you clerked for, Senator Cruz, Judge Luttig, who’s now retired, and I know you were very close to him.

And he actually submitted a letter on your behalf, Judge Jackson, and said in this letter—and he’s an appointee of George H. W. Bush, similar to Judge Griffith, who introduced you yesterday and I’ve been very impressed by the support you’ve had from retired judges—obviously, not appropriate for current judges but retired judges appointed by both Democratic and Republican Presidents as well as the bipartisan votes that you have gotten through the U.S. Senate for your other positions.

But in this letter, the judge—former Judge Luttig says that you are eminently qualified to serve on the Supreme Court of the United States, and then he actually says Republicans and Democrats alike should give their studied advice and then their consent to the President’s nomination and he adds, Republicans, in particular, should vote to confirm Judge Jackson.

So I thought that might be a good segue, Senator Cruz, to your questions.

So I ask, Chairman, that the letter of support from former Judge Luttig, who employed Senator Cruz as a trusted law clerk, be admitted to the record.

Chair DURBIN. Without objection.

[The information appears as a submission for the record.]

Senator KLOBUCHAR. Thank you very much, Judge Jackson.

Judge JACKSON. Thank you.

Chair DURBIN. Senator Klobuchar finds a Minnesota connection to almost everything.

I’m very proud of the fact that Justice Blackmun was born in Nashville, Illinois.

Senator KLOBUCHAR. Okay, he was a lawyer at the Mayo Clinic, as we know, and spent a lot of time—

Chair DURBIN. I’m going to lose this battle.

Senator KLOBUCHAR. A lawyer in Minnesota when he was chosen to the Supreme Court, but thank you for pointing that out.

Chair DURBIN. And now to the great State of Texas, Senator Cruz.

Senator CRUZ. Thank you, Mr. Chairman.

Judge Jackson, welcome.

Judge JACKSON. Thank you.

Senator CRUZ. Congratulations.

Judge JACKSON. Thank you.

Senator CRUZ. You and I have known each other a long time.

Judge JACKSON. We have.

Senator CRUZ. We went to law school together. We were on the Law Review together. We were a year apart.

Judge JACKSON. Happily so, I hope, Senator.

Senator CRUZ. We were not particularly close, but we were always friendly and cordial.

Judge JACKSON. We were.

Senator CRUZ. And you and I had a very positive and productive meeting in my office, where we discussed a number of things, including you were there with former Senator Doug Jones. And we discussed how he and I and a number of other Senators had, for 2 different years, participated in reading aloud on the Senate floor Dr. Martin Luther King, Jr.'s "Letter from a Birmingham Jail," which is one of the truly great advocacies for civil rights our Nation has seen. And you and I talked together about our shared admiration for Dr. King.

When Senator Grassley questioned you earlier, he asked in particular about Dr. King's speech on the steps of the Lincoln Memorial, where he said, most critically, "I have a dream that my four little children will one day live in a nation where they will not be judged by the color of their skin, but by the content of their character."

Do you agree with what Dr. King said in that speech there?

Judge JACKSON. I do, Senator.

Senator CRUZ. As we were discussing it, you referenced in my office a speech that you gave in January 2020 at the University of Michigan School of Law. And after our discussion, I pulled a copy of your speech and read the speech in its entirety, and there were elements of the speech that I thought were really powerful.

And let me say your opening remarks yesterday were powerful and inspirational as well, and I think you and your family, the journey you have taken to becoming a Federal judge, to becoming a Federal Court of Appeals judge, I think demonstrates the incredible promise and the incredible opportunity this Nation offers all of us.

As I read your speech at the University of Michigan Law School, however, there was a portion that surprised me. And in particular in that speech, you referenced the work of, quote, "acclaimed investigative journalist Nikole Hannah-Jones." And her—and again, this is a quote from the speech—"provocative thesis that the America that was born in 1776 was not the perfect Union that it purported to be." And indeed, Ms. Hannah-Jones in her 1619 Project describes the central thesis of the 1619 Project, which The New York Times laid out as a revisionist look of history, revising American

history, and Ms. Hannah-Jones described her central thesis as “One of the primary reasons the colonists decided to declare independence was because they wanted to protect the institution of slavery.”

Now that claim is a highly contested historical claim. Do you agree with Ms. Hannah-Jones that one of the primary reasons the colonists decided to declare independence was because they wanted to protect the institution of slavery?

Judge JACKSON. Thank you, Senator.

When I gave that speech at the University of Michigan, I was asked to speak on Martin Luther King Day, and every year, they have a Martin Luther King Day speaker. And I gave a speech about Black women in the civil rights movement. Most of the speech, if not all of the speech, was focused on African-American women, their contributions to the civil rights movement, unsung contributions in many cases, and then some of the more recent African-American women who have made claims, who have done things in our society.

One slide was of Ms.—a journalist, as you say, who made that statement, and I called it provocative. It is not something that I’ve studied. It doesn’t come up in my work. I was mentioning it because it was, at least at that time, something that was talked about and well known to the students that I was speaking to at the law school.

Senator CRUZ. So are you aware that since the 1619 Project came out, that it has been roundly refuted by very respected historians, including Gordon Wood of Brown University, including James McPherson of Princeton University. McPherson called it a, quote, “very unbalanced, one-sided account, which lacks content and perspective.”

And indeed, it was so thoroughly refuted that the New York Times quietly altered the digital version to remove references to 1619 as the year of America’s true founding and the moment America began. Were you aware of that?

Judge JACKSON. I was not.

Senator CRUZ. So let me ask you, related to the 1619 Project, which I believe is deeply inaccurate and misleading, 1619 Project is closely intertwined with a movement that is called Critical Race Theory. Critical Race Theory, as you know, originated at your and my alma mater, at the Harvard Law School.

In your understanding, what does Critical Race Theory mean? What is it?

Judge JACKSON. Senator, my understanding is that Critical Race Theory is—it is an academic theory that is about the ways in which race interacts with various institutions. It doesn’t come up in my work as a judge. It’s never something that I’ve studied or relied on, and it wouldn’t be something that I would rely on if I was on the Supreme Court.

Senator CRUZ. So Critical Race Theory, as you know, has its origins in the critical legal studies movement, which also came from Harvard Law School, from a number of critical legal studies professors—“crits” as they were known when we were in law school—who are explicitly Marxist, and they find their origins in Marxism.

Although critical legal studies frames society as a fundamental battle between socioeconomic classes, Critical Race Theory frames all of society as a fundamental and intractable battle between—between the races. It views every conflict as a racial conflict.

Do you think that's an accurate way of viewing society and the world we live in?

Judge JACKSON. Senator, I don't think so. But I've never studied Critical Race Theory, and I've never used it. It doesn't come up in the work that I do as a judge.

Senator CRUZ. So, with respect, I find that a curious statement because you gave a speech in April 2015 at the University of Chicago in which you described the job you do as a judge. And you said, "Sentencing is just plain interesting because it melds together myriad types of law, criminal law and, of course, constitutional law, Critical Race Theory."

So you described in a speech to a law school what you were doing as Critical Race Theory. And so I guess I would ask what did you mean by that when you gave that speech?

Judge JACKSON. With respect, Senator, the quote that you are mentioning there was about sentencing policy. It was not about sentencing. I was talking about the policy determinations of bodies like the Sentencing Commission when they look at a laundry list of various academic subjects as they consider what the policies should be. Critical race—

Senator CRUZ. But you were vice chair of the Sentencing Commission, so let me ask again what did you mean by it? Because that was an official responsibility of yours.

Judge JACKSON. What I meant—

Senator CRUZ. What did you mean by what you were doing was Critical Race Theory?

Judge JACKSON. What I meant was that there are a number—that that slide does not show the entire laundry list of different academic disciplines that I said relate to sentencing policy. But none of that relates to what I do as a judge.

Senator CRUZ. So let me ask you a different question. Is Critical Race Theory taught in schools? Is it taught kindergarten through 12?

Judge JACKSON. Senator, I don't know. I don't think so. I believe it's an academic theory that's at the law school level.

Senator CRUZ. Okay. As you may recall, during the confirmation hearings of Justice Amy Coney Barrett, there was a great deal of attention paid to the fact that Justice Barrett served as a board member on the board of trustees of a religious private school, and the press focused very intensely on the views of that school.

In your questionnaire to this Committee, you disclosed that you are similarly on a board. Specifically, the board of trustees for the Georgetown Day School. And that you've been a board member since 2019, and you're currently still a board member. Is that correct?

Judge JACKSON. That is correct.

Senator CRUZ. In regard to the Georgetown Day School, you've publicly said, quote, "Since becoming a member of the GDS community 7 years ago, Patrick and I have witnessed the transformative

power of a rigorous progressive education that is dedicated to fostering critical thinking, independence, and social justice.”

When you refer to social justice and the school’s mission on social justice, what did you mean by that?

Judge JACKSON. Thank you, Senator, for allowing me to address this issue.

Georgetown Day School has a special history that I think is important to understand when you consider my service on that board. The school was founded in 1945 in Washington, DC, at a time in which by law there was racial segregation in this community. Black students were not allowed in the public schools to go to school with white students.

Georgetown Day School is a private school that was created when three white families, Jewish families, got together with three Black families and said that despite the fact that the law requires us to separate, despite the fact that the law is set up to make sure that Black children are not treated the same as everyone else, we are going to form a private school so that our children can go to school together.

The idea of equality, justice, is at the core of the Georgetown Day School mission, and it’s a private school such that every parent who joins the community does so willingly, with an understanding that they are joining a community that is designed to make sure that every child is valued, every child is treated as having inherent worth, and none are discriminated against because of race.

Senator CRUZ. So, Judge Jackson, all of us will agree that no one should be discriminated against because of race. When you just testified a minute ago that you didn’t know if Critical Race Theory was taught in K through 12, I will confess I find that statement a little hard to reconcile with the public record.

Because if you look at the Georgetown Day School’s curriculum, it is filled and overflowing with Critical Race Theory. That among the books that are either assigned or recommended, they include “Critical Race Theory: An Introduction.” They include “The End of Policing,” an advocacy for abolishing police. They include “How to Be an Antiracist” by Ibram Kendi.

They include literally stacks and stacks of books, and I’ll tell you two of the ones that were most stunning. They include a book called “Antiracist Baby” by Ibram Kendi, and there are portions of this book that I find really quite remarkable. One portion of the book says babies are taught to be racist or antiracist. There is no neutrality. Another portion of the book, they recommend that babies confess when being racist.

Now this is a book that is taught at Georgetown Day School to students in pre-K through second grade, so 4 through 7 years old. Do you agree with this book that is being taught with kids that babies are racist?

Judge JACKSON. Senator, I do not believe that any child should be made to feel as though they are racist or though they are not valued or though they are less than, that they are victims, that they are oppressors. I don’t believe in any of that.

But what I will say is that when you asked me whether or not this was taught in schools, Critical Race Theory, my understanding is that Critical Race Theory as an academic theory is taught in law

schools. And to the extent that you were asking the question, I understood you to be addressing public schools. Georgetown Day School, just like the religious school that Justice Barrett was on the board of, is a private school.

Senator CRUZ. Okay. So you agree Critical Race Theory is taught at Georgetown Day School?

Judge JACKSON. I don't know because the board is not—the board does not control the curriculum. The board does not focus on that. That's not what we do as board members. So I'm actually not sure.

Senator CRUZ. Well, and I'll note that the board is chaired by Professor Fairfax, your college roommate who introduced you yesterday. So the two of you serve on the board together.

Another book that is on the summer reading for third through fifth grade is a book called "Stamped (For Kids)," again by Ibram Kendi. I read the entirety of the book, and I will say it is an astonishing book.

On page 33, it asks the question, "Can we send white people back to Europe?" That's on 33. That's what's being given to 8 and 9 years old.

It also, on page 115, says, "The idea that we should pretend not to see racism is connected to the idea that we should pretend not to see color. It's called color blindness." Skipping ahead, "Here's what's wrong with this. It's ridiculous. Skin color is something we all absolutely see." Skipping ahead, "So to pretend not to see color is pretty convenient if you don't actually want to stamp out racism in the first place."

Now what this book argues for is the exact opposite of what Dr. King spoke about on the floor of the Lincoln Memorial, and are you comfortable with these ideas being taught to children as young as 4 in respect to the first book, as young as 8 and 9 in respect to the second book?

Judge JACKSON. Senator, I have not reviewed any of those books, any of those ideas. They don't come up in my work as a judge, which I'm, respectfully, here to address.

In my work as a judge, which is evidenced from my near decade on the bench, I am——

Senator CRUZ. Okay, good. Then let's go back to your work as a judge. As was noted in the first slide, you discussed sentencing as being related to Critical Race Theory. And earlier, there's been some back-and-forth as Democratic Senators have tried to address your sentencing patterns as it concerns child pornography.

And I'll confess, Judge Jackson, as—look, as I listened to your testimony I believe you are someone who is compassionate. I believe you care for children, obviously, your children and other children. But I also see a record of activism and advocacy as it concerns sexual predators that stems back decades, and that is concerning.

You wrote your note on the Harvard Law Review on sex crimes. Your note is your major academic work on the Law Review, and yours is entitled, "Prevention Versus Punishment: Toward a Principled Distinction in the Restraint of Released Sex Offenders."

And in it, you argue—and I quote—"A recent spate of legislation purports to regulate released sex offenders by requiring them to

register with local law enforcement officials, notify community members of their presence, undergo DNA testing, and submit to civil commitment for an indefinite term. Although many courts and commentators herald these laws as valid regulatory measures, others reject them as punitive enactments that violate the rights of individuals who have already been sanctioned for their crimes. Under existing doctrine, the constitutionality of sex offender statutes depends upon their characterization as essentially preventative rather than punitive.”

And what you go on to explain is if they’re viewed as punitive, they are unconstitutional. If they’re viewed as preventative, they are not. And throughout the course of your note, you argue they should be viewed as punitive and, therefore, unconstitutional.

Indeed, in the second to last page, you go through each of those four categories. You say requirements that sex offenders register may or may not be unconstitutional depending upon whether, quote, “in which sex offenders have no privacy right in registration information or blood samples.” So you suggest that may or may not be constitutional. You raise doubts about it.

And then you raise very significant doubts about community notification, and you heavily suggest that civil commitment for sexual predators is unconstitutional. Do you still agree with the sentiments you expressed in your law school note?

Judge JACKSON. Respectfully, Senator, those are not the sentiments that I expressed in my law school note. My law school note was about sex offender registration laws, which at the time were relatively new. As you know from our time in law school, one of the things that law school students do is they look for new developments in the law, and they try to analyze them. That’s something that makes for good fodder for a law school note.

My note, which came out in 1996, was shortly after there were new Megan’s laws. And the point that I was making was not that the laws were bad, that the laws were wrong. I was trying to assess something that is sort of fundamental in terms of the characterization of the laws. I didn’t say that they were unconstitutional one way or the other. What I was trying to assess was how they are characterized.

Some—some courts would look at those laws and call them preventative, and that has a certain set of consequences. Some courts would call them punitive, and that has a certain set of consequences. And what I was trying to do is figure out how to make the determination, whether they were punitive or preventative.

Senator CRUZ. Well, your note argued that they were punitive, and I would note that view—there had been some on the bench that have advocated that. The Supreme Court in 1997 decided a case called *Kansas v. Hendricks*, in which it upheld Kansas’ civil commitment statute. That was a 5–4 vote.

This has been a question that has been close at the Supreme Court, and I would note beyond that, that in terms of the prevalence of these statutes, all 50 States and DC have registry requirements. Forty-seven States have community notification requirements. All 50 States have DNA or blood banks for sex offenders requirements, and 20 of the States, the Federal Government, and DC have laws that allow for the indefinite detention of sex offenders.

I would note in the State of Texas, a State court of appeals, relying on very much the same sort of reasoning you advocated in your note, struck down Texas' sexually violent predator civil commitment law. At the time I was the Solicitor General of Texas, I personally argued that appeal in the Texas Supreme Court, and the Texas Supreme Court unanimously reversed the court of appeals and upheld our statute.

And if the views you advocated in law school prevailed, civil commitment laws across the country would be struck down, releasing sexual predators. And under the argument, community notification and DNA bank laws could well be struck down as well. Is that—is that an outcome that should concern people?

Judge JACKSON. Senator, my note wasn't advocating for the striking down of those laws. My note was trying to identify criteria that I thought could be applied consistently to determine whether the laws were punitive or preventative. Either—

Senator CRUZ. But with respect, Judge Jackson, you argued that they were punitive, and you further say in the note if they're punitive, they're unconstitutional.

Judge JACKSON. I was looking at four different kinds of laws, and not all of them did I say were punitive.

Senator CRUZ. Okay. So let's take civil commitment laws. If you look at civil commitment laws, right now the UCLA School of Law Williams Institute estimates more than 6,300 sex offenders are currently detained in civil commitment programs. If the view you advocated prevailed, presumably those 6,300 sex offenders would be released to the public. Is that an outcome that should be concerning?

Judge JACKSON. Senator, in law school, when I was writing a note, I was looking at a brand-new set of laws that had not previously been enacted in any jurisdiction. They were new. And I was assessing at the time, as law school students do, what criteria I thought might be used by courts to make a determination in the future as to whether or not they should be treated as punitive and, therefore, not unconstitutional, but as, therefore, ones that carry with them certain rights versus—excuse me, preventative. Those—those—

Senator CRUZ. Okay. Judge Jackson, so you've pointed that these were reviews in law school. Now, listen, I will recognize that all of us when we were students may have views that as time and maturity passes on, we may change. But what troubles me is this was not just a law school view, it's one that has continued.

So when you were vice chairman of the Sentencing Commission, you expressed significant concerns that the White House has argued that your quotes were taken out of context.

So I want to provide the full context of your quotes because you said, "Yes, I want to ask you about the means by which we can distinguish more or less serious offenders. I know that all of you sort of touched on that.

"Mr. Fottrell, you talked about going from singular to one-on-one to group experience. I'm just wondering if there's some sort of inevitable and natural progression from one stage to the other such that you could say that the least serious offenders are in the singular experience stage?

“And I guess my thought is in looking at some of the testimony that other people will have later in the day, I was surprised at some of the testimony with respect to the motivation of offenders—and we’re talking about child pornography offenders—and that there are people who get involved with this kind of activity who may not be pedophiles and who may not be necessarily interested really in the child pornography but have other motivations with respect to the use of technology and being in the group and, you know, here are lots of reasons perhaps why people might engage in this.

“And so I’m wondering whether you could say that there is a—that there could be a less serious child pornography offender who is engaging in the type of conduct in the group experience level because their motivation is the challenge or to use the technology? They’re very sophisticated technologically, but they aren’t necessarily that interested in the child pornography piece of it.”

Now I find that a pretty remarkable argument that people in possession of child pornography are not actually interested in the child porn. They’re not pedophiles. They’re just interested in technology.

Is that—and I wanted to provide the whole quote because the White House said that portions of this were used out of context. So this is your entire quote. Do you agree with that sentiment that there is some meaningful population of people who have child pornography but are not, in fact, pedophiles or getting—getting satisfaction from it?

Judge JACKSON. Thank you, Senator, for allowing me to address what appears to be a question that I was asking in the context of a hearing on child pornography. You’ve provided the entire quote, and it looks as though I was asking that of someone, not taking that position.

And the position that I’ve taken in all of my sentencings involving child pornography offenders is to ensure that despite the attitude and view of many of the offenders who came before me when I was a trial judge that they were just lookers, that they weren’t really harming anyone, that they were curating their collections, and they never touched a child, I made sure that they understood that notwithstanding their collecting behavior, that they were causing significant harm.

Senator CRUZ. So, Judge Jackson, all right. You raise your actual sentencing, and I think that’s very productive. Let’s take a look at your actual sentencing. And you’ve had 10 different cases involving child pornography.

These are the cases that there were two, *U.S. v. Buttry* and *U.S. v. Cain*, for which the Government did not make a recommendation. And you said earlier, when Chairman Durbin was trying to preempt this line of attack, you said it’s a sickening and egregious crime, which I very much agree with. And you said the guidelines lean to extreme departures.

Okay. Let’s look at what the prosecutors are asking for, and I would note that this was in the District of Columbia, where prosecutors are far more liberal than many of the prosecutors in this country. And in every case in which—so *United States v. Hess*,

there was a mandatory statutory minimum of 60 months, and you imposed 60 months because you had no discretion.

In *United States v. Nickerson*, there was a mutual agreement of the parties to 120 months, and that's what you imposed. In every other case, *United States v. Chazin*, the prosecutor asked for 78 to 97 months. You imposed 28 months. Twenty-eight months is a 64 percent reduction.

In *United States v. Cooper*, the prosecutor asked for 72 months. You imposed 60 months. That was a 17 percent reduction.

In *United States v. Downs*, the prosecutor asked for 70 months. You imposed 60. That was a 14 percent reduction.

In *United States v. Hawkins*, the prosecutor asked for 24 months. You imposed 3 months. That was an 88 percent reduction.

In *United States v. Savage*, the prosecutor asked for 49 months. You imposed 37. That was a 24 percent reduction.

In *United States v. Stewart*, the prosecutor asked for 97 months. You imposed 57. That was a 41 percent reduction.

Every single case, 100 percent of them, when prosecutors came before you with child pornography cases, you sentenced the defendants to substantially below not just the guidelines, which are way higher, but what the prosecutor asked for on average of these cases, 47.2 percent less.

Now you said you made sure the voice of the children was heard. Do you believe in a case like *United States v. Hawkins*, where the prosecutor asked for 24 months, and you sentenced the offender to only 3 months, do you believe the voice of the children is heard, when 100 percent of the time you're sentencing those in possession of child pornography to far below what the prosecutor is asking for?

Judge JACKSON. Yes, Senator, I do.

Senator CRUZ. Good. Could you explain how?

Judge JACKSON. I will. A couple of observations. One is that your chart does not include all of the factors that Congress has told judges to consider, including the Probation Office's recommendation, in these cases.

Senator CRUZ. Well, Judge Jackson, we don't have those Probation—the Committee has not been given the Probation Office's recommendation. We would welcome them.

Mr. Chairman, I would love to see those.

Judge JACKSON. The second—

Senator CRUZ. We don't have access to them.

Judge JACKSON. The second thing I would say is that I take these cases very seriously as a mother, as someone who, as a judge, has to review the actual evidence in these cases and, based on Congress' requirement, take into account not only the sentencing guidelines, not only the recommendations of the parties, but also things like the stories of the victims, also things like the nature and circumstances of the offense and the history and characteristics of the defendant.

Congress is the body that tells sentencing judges what they are supposed to look at, and Congress has said that a judge is not playing a numbers game. The judge is looking at all of these different factors and making a determination in every case based on a number of different considerations. And in every case, I did my duty to

hold the defendants accountable in light of the evidence and the information that was presented to me.

Senator CRUZ. In 100 percent of the cases, was the evidence less than the prosecutors asked for?

Judge JACKSON. Senator, the evidence in these cases are egregious. The evidence in these cases are among the worst that I have seen, and yet, as Congress directs, judges don't just calculate the guidelines and stop. Judges have to take into account the personal circumstances of the defendant because that's a requirement of Congress.

Judges have to consider things like the victims. And when I was talking about making sure that victims' circumstances are heard, it was about my sentencing practices that I—

Senator CRUZ. Well, it doesn't show victims being heard, with respect.

Thank you, Mr. Chairman.

Chair DURBIN. In 2012, the Sentencing Commission, on a unanimous bipartisan basis, issued a report recommending changes to sentencing for nonproduction child pornography—which is the subject at hand—offenses because of widespread concern among judges and other stakeholders. For example, 70 percent of surveyed judges said the guideline ranges for possession and receipt offenses were too high. Seventy-one percent said the mandatory minimums were too high.

Notably, the report was supported by every member of the Commission. I believe the question which the Senator from Texas was referring to was part of the proceedings that led to that Commission report, unanimous bipartisan basis Commission report.

Senator CRUZ. Mr. Chairman, very briefly, I would ask unanimous consent that the books I referenced be entered into the record.

Chair DURBIN. Without objection.

Senator Coons.

Senator COONS. Thank you, Chairman Durbin, Ranking Member Grassley.

Judge Jackson, good to be with you.

Judge JACKSON. Good to be with you, Senator.

Senator COONS. I'd like to take a few minutes, if I could, and just give you a chance to address some of the issues just raised. My colleague suggested that you've never sentenced a defendant in a child pornography case consistent with what the Government requested, what the prosecution requested. But according to my staff's research, that's just not true. So let me briefly ask you about three specific sentencing cases.

Do you remember *U.S. v. Nickerson*? You sentenced Charles Nickerson, Jr., to 10 years in prison, exactly what the Government requested.

Judge JACKSON. I do, Senator.

Senator COONS. Do you remember *U.S. v. Fyffe*? You sentenced him to 20 years in prison, exactly what the Government requested.

Judge JACKSON. I do, Senator.

Senator COONS. And do you recall *U.S. v. McGinn*? You sentenced him to 37 months in prison, exactly what the prosecution requested.

Judge JACKSON. I do, Senator.

Senator COONS. So, in these three cases, it's also true that the Government, the prosecution, requested below guidelines sentences. Would that seem surprising to you at all?

Judge JACKSON. It would not.

Senator COONS. And is that because overwhelmingly nationwide in 70 percent of cases, and in your district 80 percent of cases, downward departures from the guidelines are the norm?

Judge JACKSON. That is correct, Senator.

Senator COONS. So to the extent there seems to be some concerted effort to try and characterize you as being soft on crime or somehow unconcerned about child safety, I just wanted to take another moment and give you a chance to respond to that. As a parent, as a member of a family that's had several members who've served—your brother, your uncles—in law enforcement, could you share a bit about how having loved ones who serve as law enforcement officers, in one case a detective on a sex crimes unit, has had an impact on your sense of the balance of justice and mercy in the case of ensuring that we hold to account those who commit crimes against children?

Judge JACKSON. Thank you, Senator.

As a mother, these cases involving sex crimes against children are harrowing. What I think is important to understand is that trial judges who have to deal with these cases are presented with the evidence or descriptions, graphic descriptions. These are the cases that wake you up at night because you're seeing the worst of humanity.

When—when there are victim's statements that are presented, when people talk about how their lives have been destroyed as children, how the people who they trusted to take care of them were abusing them in this way and then putting the pictures on the internet for everyone to see. I sometimes still have nightmares about the main witness, the woman I mentioned earlier who cannot leave her house because of this kind of fear, the vulnerability, the isolation. These crimes are horrible.

And so I take them very seriously, just as I did all of the crimes, but especially crimes against children.

Senator COONS. So, Your Honor, if I could, the characterization that was just presented in a recent column in the National Review, a conservative publication, has characterized that view of you as a smear that appears meritless to the point of demagoguery and characterizes your approach in sentencing in these cases as mainstream and correct.

And I'll just remind my colleagues, and I was watching that two of the largest, most substantial law enforcement advocacy organizations in our country, the National Fraternal Order of Police and the International Association of Chiefs of Police, have spoken up in support of your qualifications and your capabilities.

The FOP letter says, "There is little doubt you have the temperament, intellect, legal experience, and family background to have earned this appointment." That sentiment was echoed by the IACP. In their letter, they said, "We believe you have a deep understanding of and appreciation for the challenges and complexities confronting the policing profession, and you have during your time

as a judge displayed your dedication to ensuring our communities are safe and that the interests of justice are served.”

I find it hard to believe that these organizations, having looked closely at your judicial decisional record, your sentencing decisions, your lifetime conduct, would have taken those unusual steps to be that forceful in supporting you if, in fact, you had somehow a disturbing record of coddling child pornographers or being soft on crime.

In fact, Judge, your record, in my view, demonstrates you’re an even-handed and impartial judge. And I can see that when I look at cases you’ve ruled on that involve very politically charged or partisan interests. You’ve delivered rulings on both sides for plaintiffs and defendants, and in my review of your record, you’ve put any personal views or concerns aside. You’ve based your decisions on the argument of the parties, the facts in the record, the applicable law and precedent. And the well-reasoned and thorough opinions you’ve written show, to me, a judge striving to make even-handed decisions, based on facts and law, not on some caricature of a leftist agenda.

But don’t just take my word for it. We’ve received an outpouring of support for your nomination. As we’ll hear on Thursday, a very wide range of groups and individuals have sent letters or testimony to this Committee in support of your nomination. It’s no surprise to me that your legal mind, your experience, your temperament inspires strong support from some of the best and brightest of our legal community.

And I think it’s worth highlighting that among those many who have written to us are included well-respected conservative and Republican lawyers and Republican-appointed judges who agree with my characterization that you’re an even-handed and impartial judge.

We’ve received a letter from 24 conservative lawyers who held positions in Republican administrations or are well known for their conservative political or legal views, who wrote this Committee to urge your speedy confirmation. They praised your character and intellect and called you, and I quote, “a truly excellent person.”

Now I’d like to focus, though, on the way that these conservative lawyers characterized your judicial decisionmaking, which is, after all, the core issue before us is whether you are the sort of judge at the district court, the circuit court that should be elevated to the Supreme Court. And they note in this letter that in nearly 10 years on the bench as a district judge and then in the court of appeals, Judge Jackson has been involved in thousands of cases running the full range of Federal law.

Your approximately 500—I think it’s more than 570 now—opinions written during this time have—and I’m quoting—“demonstrated complete command of the legal subject matter, a judicious and even-handed approach, a fine ability to express yourself with force and great clarity.” They’ve also demonstrated, and I’m quoting, “another attribute essential for a judge, a sense of empathy for the situations of others, judicious and even-handed.”

These prominent conservative lawyers want this Committee to know you’re judicious and even-handed and recommend you for the

Supreme Court without reservation, despite having noted they differ with you concerning some political or partisan issues.

And they're not alone. Judge Griffith, in a letter to this Committee and then followed up with personal testimony in your introduction yesterday, a judge appointed by former President George W. Bush, enthusiastically supports your nomination. I was struck by his description of your intellectual capacity, your keen legal mind, as well as your character and judicial approach.

And now I'm quoting from his testimony to this Committee yesterday. "Judge Jackson," he told us, "is an independent jurist who adjudicates based on the facts and the law, not as a partisan." He went on, "As Justice Scalia taught us, an indispensable feature of the republic the Constitution created is an independent judiciary of judges who've taken an oath not to a President or a party, but to the American people and to God that they will be impartial."

And he concluded that you, Judge Jackson, have demonstrated an unwavering commitment to that oath. That's a conservative judge appointed by a Republican President who told this Committee he's confident you'll decide cases based on the facts and the law, not as a partisan.

Now I value the working relationships I have with my colleagues on both sides of the aisle. We can and do at times have fierce policy disagreements, but we also work together to try and find ways as lawmakers and individuals to respect each other.

And I take it as a personal sort of badge or source of pride when someone with whom I really disagree on one issue is able to legislate with me on another. And so I imagine, Your Honor, it must be gratifying to know that a judge who literally sat in judgment of, reviewed dozens and dozens of your opinions—in fact, I think he reversed you once.

Judge JACKSON. Oh, more than. More than.

Senator COONS. Here is someone who closely read and reviewed your decisions and, as a circuit judge, sat in review of your work over years as a district—hundreds of opinions as a district court judge and has such unequivocal praise for the even-handed, impartial, thorough, and nonpartisan way you've approached judicial decisionmaking.

Could you just briefly share with me what it means to you to hear that someone like Judge Griffith has such confidence you would make an excellent member of our highest court?

Judge JACKSON. Thank you, Senator.

It means the world to me to have the support of Judge Griffith. His coming here yesterday and testifying on my behalf was so gratifying. I have tried in every respect to follow my methodology that enables me to rule impartially in every case and to understand the limits of my own judicial authority and thereby reach decisions without fear or favor.

My record demonstrates that I am not proceeding from any sort of preconceived notion about how a case comes out. I'm not ruling consistent with any sort of ideology. I'm doing what impartial and fair judges do, which is to decide in every case based only on the facts and the law of that case.

And I'm very, very pleased that Judge Griffith has seen that in the years that he supervised me, effectively, as a court of appeals

judge when I was a district judge. And I think it's wonderful that he was able to come here and testify to that.

Senator COONS. Well, Judge, for those watching and for those following this, they might be puzzled because my colleague, the junior Senator from the State of Texas, has tried to ascribe all sorts of views to you in his recent questioning that try to paint you as some kind of an activist with a radical agenda. And in my review of your experience and your record, these letters from judges and scholars, I don't see anything that remotely substantiates that claim.

We are here to evaluate your qualifications, your judicial decisionmaking. So let me get at a few of these points specifically, if I could?

I've heard references to the 1619 Project and Critical Race Theory, but I didn't hear that cited in any reference to your opinions as a judge. In your 9 years on the bench as a district court judge, more than 570 decisions, have you ever cited the 1619 Project?

Judge JACKSON. No, Senator.

Senator COONS. In your 9 years on the bench and more than 570 opinions, have you ever cited the journalist or principal author of that 1619 Project, Ms. Hannah-Jones?

Judge JACKSON. I have not.

Senator COONS. And in your 9 years on the bench and more than 570 decisions, have you ever used, employed, relied upon Critical Race Theory to determine the outcome of any case or to impose any sentence or as a framework for your decisionmaking?

Judge JACKSON. No, Senator.

Senator COONS. Would you just explain to us briefly what sort of factors you do, in fact, consider in your analysis?

Judge JACKSON. Senator, when I analyze a case, I am looking at the arguments that the parties raise in the case. I'm looking at the record, which is the facts of the case developed—if I'm on the court of appeals, developed below, and I'm looking at the law. I'm looking at any statutes. I'm hewing to the text. I'm looking at constitutional provisions to the extent that they are applicable and any precedents related to the case at issue.

Those are the inputs that are appropriate for a judge to consider, and those are the only things that I use in my decisionmaking.

Senator COONS. Well, I appreciate your laying that out, and I'll just—let me dig into two cases, if I can, that I think are also probative here. Because I agree with the wide range of supporters we've heard from that you've demonstrated an even and impartial judicial approach in your record.

But this is true not just in the hundreds of sort of run-of-the-mill quotidian cases that are considered by a district court judge, but in several that have been highly charged and really quite political in terms of their consequences. I'd like to discuss your opinion in the *Center for Biological Diversity v. McAleenan*. Do you recall that case?

Judge JACKSON. I do, Senator.

Senator COONS. It was a dispute between groups advocating for environmental protection and the Trump administration's Department of Homeland Security. The dispute was about President Trump's efforts to quickly construct a physical border wall between the United States and Mexico.

I'm sure I don't need to remind you or anyone here that at the time, Democrats were just about unanimous in thinking that physically building a wall from coast to coast was not the wisest use of resources to secure the border. There were other ways to do it. And with Republicans pretty much unanimously willing to defend it. So it was a policy matter with some sharp divisions and some political consequences.

You ultimately ruled in favor of the construction of the wall and against an attempt by environmental groups to halt its construction through a legal case. Can you discuss what you recall, just briefly, of the claims presented and how you came to a decision in favor of the Trump administration?

Judge JACKSON. Senator, the claims in that case, which, as you say, were brought by an environmental organization, related to the Administrative Procedures Act, which is something that we often see in the District of Columbia, and whether or not the agency could waive certain environmental laws pertaining to the construction of the wall, whether or not the agency's determination to do so was lawful.

And I looked at the relevant circumstances, and I ended up, I believe, dismissing that case on threshold grounds before getting to that point in the analysis. But consistent with what you've said, I was guided by my understanding of the law and what it required and not by anything else.

Senator COONS. I could spend a lot of time on the details of this case, but let me try and summarize it this way. You analyzed the statute. You concluded Congress had clearly blocked the courts from hearing non-constitutional challenges. There was no jurisdictional bar to the constitutional claims. To decide them, you considered whether the plaintiff's claims were viable.

You looked for precedent. You found one. While not controlling, you thought it was legally sound and persuasive. But there was no controlling circuit court or Supreme Court precedent that stopped you.

If you were, in fact, an activist judge, a motivated partisan determined to let these plaintiff environmental groups proceed, you certainly could have. There was no clear precedent that barred that from happening.

You analyzed the statute. You applied the best precedent you could find, and you reached a result without regard to the political consequences.

Judge JACKSON. That is correct, Senator.

Senator COONS. So, in my view, I wanted to talk about this case because there's really nothing unusual or special about it from your perspective?

Judge JACKSON. That is correct.

Senator COONS. For those of us up here, there was a lot special and important about it. It was a highly charged partisan and political issue, but you looked at the statute, you found persuasive precedent, you applied it. You went on to the next case.

Let me ask about another decision in a case addressing another very politically charged issue, and specifically, this involves the emails of former Secretary of State Hillary Clinton. Now the Republican National Committee, or the RNC, is opposing your nomi-

nation, publicly accusing you of being a partisan, a partisan Democrat. They argue you could not possibly be an impartial Justice.

But ironically, back in 2016, you presided over a case brought by the RNC against USAID related to then Presidential candidate Clinton, and you ruled in favor of the RNC. Both the substance and the timing of the case are really quite striking.

Judge JACKSON. I did.

Senator COONS. The RNC made Freedom of Information Act requests for certain emails involving the former Secretary. And despite what the RNC would have us now believe, in this case you reinforced your deserved reputation for following the law, not a partisan agenda, because you ordered USAID to produce thousands of pages of documents related to Secretary Clinton. Do you recall when you issued that decision, that order?

Judge JACKSON. I actually don't.

Senator COONS. Well, I'll tell you. It was just before the Presidential conventions. So if there was a moment when the RNC had a political objective, it was right before the convention, and you actually issued a ruling that they were entitled to email production from the USAID on the basis of legal arguments presented to you, the statute at issue, and the evidence. Is that correct?

Judge JACKSON. That is correct.

Senator COONS. Well, Your Honor, I'm frankly really struck at the fact that for all the back-and-forth in Senate hearings and academic circles about the judicial philosophy of Supreme Court nominees, you've shown what the experience of nearly a decade overwhelmingly spent on the district court has produced: a methodology, an approach that looks at the Constitution, the statute, the facts, the arguments of the parties, and reaches a result without fear or favor, without taking into account the partisan issue at stake.

You know, I don't believe that a judicial philosophy is always all that meaningful. The judge for whom I clerked on the Third Circuit had spent years as a district court judge. And when I asked her "What's your judicial philosophy?" she looked at me and said, "I just call balls and strikes. I'm a judge who rules on the case before me," in exactly the same frame that you offered.

A judicial philosophy does not, in and of itself, constrain a judge. What constrains a judge is a judge who is willing to be constrained, who understands that the role of the Federal judiciary is a limited one.

And so the real question I think a President should consider when they make a nomination, the question that we as Senators need the answer to in order to perform our function of advice and consent, and the question that I think resonates best with the American people, who are concerned about this hearing and this nomination and how it will impact the country and their lives, is sort of what kind of Justice will you be?

We want to know if you'll be fair. We want to know if you'll be faithful to the Constitution and to the rule of law. You've been a judge almost 10 years, and you've written more than 570 opinions. I'd say your record as a judge is the best answer to the question what kind of Justice you will be.

How would you say, Your Honor, that your approach to judging on the district court relates to the way you are now judging on the circuit court, and what approach do you think you will bring with you, if confirmed to the Supreme Court?

Judge JACKSON. Thank you, Senator.

My approach all the way through is one that I believe is required by my duties, by my oath as a judge. We rule without fear or favor. We are independent as judges in our responsibilities. We understand at the district court level, at the court of appeals level, and at the Supreme Court that judges are restrained, are constrained in the exercise of our power under our constitutional scheme.

My methodology is designed to help me to make decisions within those confines at every level. It's no different now that I'm on the court of appeals than when I was on the district court with respect to my understanding of the constraints on my authority and my responsibility to be impartial in my rulings. And I think it would be no different at the Supreme Court.

Senator COONS. Well, Your Honor, I know we've walked through just a few cases today now. In some ways, we've only scratched the surface of your decade and the more than 570 opinions you've written. But it's clear to me from what I've reviewed and from just this sample that as we also heard from colleagues, from conservative lawyers, from judges who wrote to the Committee, that you are judicious and even-handed, that you have a demonstrated record of excellence, that you adjudicate based on the facts and the law and not as an advocate, activist, or partisan.

And I encourage my colleagues who want to know what kind of a Justice you'll be to take a fair and even-handed look at your record, at your impartiality, and at your methodology. Your experience is extensive and broad. Your commitment to follow the law impartially without the influence of politics is evident in your record. Your keen legal mind, judicial temperament, and impeccable character are plain to all.

As Judge Griffith told this Committee and a review of your record makes clear, you've demonstrated that the way you approach cases is based on the law and not on some political agenda. You understand the reason why the robes of our Federal judges are black, not red or blue. The American justice system, as many have said, is rooted in the impartiality, the independence, and the reliability of our Federal judicial system. It is one of the most critical bulwarks of our system of ordered liberty.

No wonder that when you came before this body to be confirmed for the district court and the circuit court, you earned and received bipartisan support. I know President Biden counts nominating a Supreme Court Justice among the most significant decisions of his Presidency, and our role here in the Senate in confirming a Justice to our highest court is among our most solemn obligations and greatest privileges. So in nominating you, I believe our President has met his mission, and it will be my honor to join, I hope, the overwhelming majority of my colleagues in supporting your confirmation as an Associate Justice of the United States Supreme Court.

Thank you, Your Honor.

Chair DURBIN. Thank you, Senator Coons.

Last week, the Committee received a letter, Judge, from the National Coalition Against Domestic Violence, representing survivors of domestic violence, urging the Senate to swiftly confirm you to the Supreme Court.

The Committee also received a letter about your nomination from nine separate organizations representing both survivors of domestic violence and sexual assault. The letter said, and I quote, "Judge Jackson is highly qualified for the position. As her career and record demonstrate, her historic confirmation as the Supreme Court's first Black woman and the sixth woman overall will represent monumental progress to the Nation it is charged to serve and that values all of its citizens equally."

The organizations also noted, quote, "Judge Jackson's rulings reflect the judicial consensus."

I move to enter these letters into the record. Without objection, they will be.

[The information appears as submissions for the record.]

Chair DURBIN. Senator Sasse, you're next up, and we're on the cusp of a vote. So I want to be fair to you. We were going to take a break at this point. I'm going to hope——

Senator SASSE. I thought we were taking a break and going to go vote, but if you want me to go first, I'm good.

Chair DURBIN. No, I think we ought to go over there and——

Senator SASSE. Okay.

Chair DURBIN [continuing]. Pray that it comes along, and we can return quickly. So why don't we declare this break time for 20 minutes. 4:05 p.m., back in the room.

[Whereupon the hearing was recessed and reconvened.]

Chair DURBIN. The Senate Judiciary Committee will come to order.

The Senator from Nebraska, Senator Sasse.

Senator SASSE. Thank you, Chairman. Judge, welcome back. By my quick eyeballing count of this you are 51 percent done as of this moment, which feels more like curse than blessing, but I meant it as a good thing.

Judge JACKSON. Thank you.

Senator SASSE. I think I am number 12 of 22, so you are just past halfway down on the downhill.

That you as well for spending time with me in my office, and thank you for answering the questions of the Committee today and tomorrow. What you have said in public matches what you have said in private, and that is obviously a testament to your character. That also can be helpful to rebuilding public trust, so thank you for the ways you have engaged thus far.

Judge, you are likely to go on to serve a lifetime appointment on the Supreme Court, which means that this is very likely the last job interview you ever have.

Judge JACKSON. And the most public, Senator.

Senator SASSE. These processes are a lot like a proctology exam. That means that it is an opportunity for you to explain to the American people how you view a Supreme Court Justice's job and the limits and bounds on that job.

So I want to go back to a topic that you and I have discussed a few times, which is how you approach cases. You have told this

Committee, and you have told me in private that you do not have a judicial philosophy yet but that you think of yourself as having more of a judicial methodology. I would like to understand that a little bit more, and I think it would be helpful for the American people to understand that argument and that distinction a bit more as well.

Earlier today you said that you, quote, “do not believe there is a living Constitution,” and you also said that you are constrained to interpret the text, and that, I think you said, sometimes that is enough to resolve the issue. So I think I have heard you pay partial tribute to the judicial philosophy of originalism but you have not adopted it or embraced it as a philosophy or label that applies to you.

So maybe one of the places we could tease that out a little bit more is trying to dig into whose jurisprudence you most admire. We have heard many nominees before, like Senator Grassley, former Chairman of this Committee—I am not an attorney, so the farming and ranching people where I come from know that John Kennedy is super smart, Rhodes lawyer, who kind of pretends to be a, you know, “Aw shucks” kind of guy as he picks your pocket.

Senator KENNEDY. Do I get equal time, Mr. Chairman?

[Laughter.]

Senator SASSE. He always gets unequal time. He always gets bonus time.

But I think it might be helpful for us to understand who you most identify with, and past nominees before this Committee have talked about the mold of particular Justices they thought they followed in. And so if you had to tell the American people who you are closest to, who is that Justice, or who are those Justices?

Judge JACKSON. Well, thank you for the question, Senator, and I must admit that I do not really have a Justice that I have molded myself after or that I would. What I have is a record. I have 570-plus cases in which I have employed the methodology that I described, and that shows people how I analyze cases.

I, in every case, am proceeding neutrally, from a neutral posture. In every case I describe thoroughly all of the arguments that are made in the case to me as a judge, because I want, in my lengthy opinions, for people to understand the inputs. This, I say, is what I am considering because I lay out in very, you know, detailed way everything that people have argued in all of the cases, and then when I am doing my interpretation I am focused on the text of any statute or constitutional provision. I am looking, as appropriate, to the intentions of the people who wrote the words, because I view statutory interpretation, constitutional interpretation, those exercises consistent with my limited authority. I am conscious of not interpreting those texts consistent with what I believe the policy should be, or what I think the outcome should be.

I am trying, in every case that involves that kind of interpretation, to assess what it is that the parties, the parties who wrote the text, intended. And, as a result, because my methodology involves these various pieces and because of the way in which I do things, I am reluctant to establish or to adopt a particular label, because the idea of how you interpret is just one part of the entirety of a judge’s responsibility.

As I mentioned, you know, I am looking at the facts in a case, and my experience as a trial judge helps me to assess the fact from all of the different perspective of the parties, because I am able to do that, I think, having heard from parties in all sorts of cases directly, as they present their arguments.

That is a part of the judging responsibility that is not really captured by something like originalism or living Constitution. And I believe that the Constitution is fixed in its meaning. I believe that it is appropriate to look at the original intent, original public meaning of the words when one is trying to assess, because again, that is a limitation on my authority to import my own policy views.

But there are times when the meaning—unreasonable searches and seizures, due process—looking at those words are not enough to tell you what they actually mean. You look at them in the context of history, you look at the structure of the Constitution, you look at the circumstances that you are dealing with in comparison to what those words meant at the time that they were adopted, and you look at precedents that are related to this topic. All of those tools judges use, and I have used, if you look at my cases.

Senator SASSE. But when you said that you look at the intent of the authors of the statute, sometimes courts have to say the people who wrote the statute, whether they meant to or not, have done something that we, the judiciary, decides—speaking in the voice of you—is unconstitutional. And deciding that something is unconstitutional requires an interpretive framework for how you get there, right?

And so you and I talked in my office about the differences between Justices Kagan, Breyer, and Sotomayor's judicial philosophies, and you told me that you needed time to study that issue further. So assuming that you have had a chance to think about that a bit more I guess I would ask you again, what are the differences, among the three of their judicial philosophies?

Judge JACKSON. With respect, Senator, I have not actually had time, with all of my meetings with Senators and the work that I have done to appear before you today. I would say that there are differences, as you see from the various opinions that they have issued. I am not sure which one I would necessarily follow because it depends on the case. I think their differences indicate that they are looking at different provisions. They are using the various tools that judges use and that I have used in my cases.

The idea of striking down a statute as unconstitutional is daunting, and should be daunting, I think for any judge or justice, and would have to be looked at very carefully because of the limited nature of the judicial role and the fact that the policies have been adopted by the branch of Government that has that authority under the Constitution.

Senator SASSE. So I guess I am surprised, after 9 years on the bench, that—I mean, you are super smart. Nobody disputes that. And having worked for Justice Breyer and knowing of some of the fights, some of the philosophical arguments he and Justice Kagan had, it just seems surprising that you would not be able to at least speculate—not speculate, but reflect a little bit on the nature of those disagreements. Because to say it depends on the particular

case, that is fine, but they have different philosophical and hermeneutic approaches to the text.

So maybe another way to get at it. I think Justice Breyer, again, for whom you clerked, and Justice Scalia used to travel together and have lively debate circuit conversations. Can you tell the American people a little bit about what Breyer-Scalia road show looked like? What were they arguing about?

Judge JACKSON. Well, my understanding is they were arguing, or at least presenting two different viewpoints as to how the Constitution should be interpreted. And I would say, just as an aside before taking about their positions, that while I have been on the bench for nine-plus years, the issue of constitutional interpretation in that sense does not come up very often. It comes up to the Supreme Court for sure, but it does not come up very often in the lower courts.

What Justice Scalia and Justice Breyer, I believe, were debating was Justice Scalia's notion of originalism meaning that the words of the Constitution should be interpreted as they were written by the founders in the founding era, and that they should not be considered to—essentially to establish principles that modern Justices could now apply, based on their own view of the needs of society, and that Justice Breyer's position was more toward that latter view, that the idea of the Constitution needing to be interpreted in a way that is consistent with modern sensibilities about the principles that the document reflects.

And I would just say that it appears now that the Supreme Court has taken Justice Scalia's view that the prevailing interpretive frame for interpreting the Constitution is now very clearly looking back through history. So we see that even in the *Heller* case, where the Justices, even the Justices in dissent, were all analyzing the issues in the Second Amendment through a historical lens. What was meant at the time of the founding? So that is now the way in which constitutional interpretation is done.

Senator SASSE. But do you identify with that position?

Judge JACKSON. I identify with the position insofar as that is how the text is interpreted, of the Constitution, that I am a strong believer, as I said, in precedent, in *stare decisis*, in predictability, in the rule of law, and the way that the law now interprets the Constitution is through this historical frame.

Senator SASSE. I am grateful for your last couple of minutes because I think that it is in the American civic interest for us to understand these different schools. Again, non-lawyer here, but my simple way of summarizing some of what I think I heard you just say is that Scalia argues hard that the Constitution has a fixed meaning and Justices are not really free to depart from it without a constitutional amendment, passed by the political branches, so that the voters get to hire and fire the people or have a role, at the State level, in the ratification of constitutional amendment.

And Breyer's position, it seems to me—and I will not get it precise enough, in technical, legal terms, jurisprudential terms probably, to satisfy him, but that the Constitution is speaking to more abstract principles and, therefore, there is a lot more play in the joints of what a Justice's job is.

And I think the way you summarized their debate was pretty fair, and I also think it is fair for us to want to understand what your position is about it, because you are obviously, as I have said, incredibly smart and incredibly likeable and winsome and on the stage for a lot of Americans to look up to. I am at the “rah-rah,” “hear, hear” side of that debate, at the level of what is a Supreme Court Justice’s job. I think that is why a lot of us are still trying to tease out the philosophical distinction, which I think is more than just a methodology. But I want to thank you for that answer.

You have also brought up the Fourth Amendment a number of times in our conversation, and I would like to talk a little bit more about the Constitution and whether its meaning changes. And so I would like to go back to the Fourth Amendment topic you brought up in my office.

You said, I think, and correct me if I am mis-summarizing your position, you said that originalism would not have much to say about the Fourth Amendment because the Founding Fathers never conceived of a tool, a piece of telecommunications equipment like this. And so I think during our conversation you said that the original meaning of the Fourth Amendment will not tell you much about what to do with a new technology. My guess is that originalists, and Scalia in particular, would disagree.

So what do you do if the text of the Fourth Amendment does not answer a question? Where do you go next?

Judge JACKSON. Well, Senator, just to clarify what I intended to say, and I may well have misspoken, there is an originalist take, I think, on the question of what happens with a cell phone. As the Supreme Court held in the *Riley* case, there was a way in which you assess principles of the Constitution, the text of the Constitution, and apply it to modern technology, and you have to because there is no question that cell phones did not exist at the time of the founding. So if the originalist principle is we look only at the Constitution as it relates to things that existed at the time of the founding, there would be no answer to what to do about a cell phone.

And so what the Supreme Court has said and done is to determine that the principle of the Fourth Amendment, with respect to searches, is to determine whether there is a reasonable expectation of privacy. They also have looked at property interests with respect to whether or not there is an invasion of privacy, and then determined from history what that reasonable expectation of privacy related to back at the time of the founding and analogized to current circumstances related to things like cell phones. It is a method of interpretation that allows you to instead of the alternative, which would be don’t worry about the history, just look at the words in the Constitution and say, “What do I think is reasonable or unreasonable with respect to police officers searching cell phones?”

That is not the way the Supreme Court handles it. They try to determine what was unreasonable historically, and then given those principles historically it would be unreasonable for police officers to enter someone’s home, to rifle through their papers and documents. They then analogize to current circumstances and the fact that a cell phone is like your personal file cabinet, and they say, okay, given what we understood the framers to have intended

about the need for a warrant or the need for protection against unreasonable searches, we are going to apply that to modern circumstances. It is still an originalist way of analyzing the current dispute.

Senator SASSE. So are there non-originalist ways to wrestle through that same question, and what would they be?

Judge JACKSON. One could imagine that rather than referencing history at all that the Court would look at the Constitution, it says “no unreasonable searches and seizures,” and would just ask, you know, in light of modern sensibilities, in light of what we would think would be reasonable today or what the Court itself would think would be reasonable today. We would apply that modern understanding to the cell phone situation.

And the danger, I think, Justice Scalia would say, is that that is a kind of framing that permits judges to make a determination based on their own views rather than hewing themselves, as Senator Lee said before, that Justice Barrett pointed out, hewing themselves to the text of the Constitution.

Senator SASSE. And does Breyer have a different view?

Judge JACKSON. You know, I have not—I am just trying to think. My understanding of the living constitutional principle is that it is closer to looking at the needs of modern society, but I am not well versed in it, in part because the Supreme Court has now so clearly taken the historical perspective, the originalist perspective, in its interpretations.

Senator SASSE. You brought up the cell phone example with me, but I know you have others. What are some other areas of life where the original meaning seems to be 2½ centuries removed? What are places that the Constitution seems to not speak to?

Judge JACKSON. Well, Senator, you know, I am reluctant to spell out different circumstances. What I will say is that when you look at the language in the Constitution there are some provisions that are completely clear on their face, without any question of what was intended—the required age of Senators, the minimum age of the President. These kinds of provisions, all you need is the text and there you are.

But there are provisions of the Constitution that are broader than that, and therefore, some interpretive frame is necessary. And to the extent—I mean, every question the Supreme Court gets that involves new technology, for example, that relates to constitutional provisions will require some kind of analogy, I think. But, you know, I cannot speak to anything more than that.

Senator SASSE. You have described Justice Breyer’s constitutional approach as “pragmatic.” What does that mean?

Judge JACKSON. I understand it to be, his approach, to be about ensuring that the rules that follow from the Supreme Court’s determinations are ones that make sense and are workable.

Senator SASSE. He said recently, explaining his approach to interpreting a statute, “You are not going to go outside the words, but it often does not give you the answer. And you look at the history and you look at its purposes, and you look at the consequences too, and you will try to evaluate them from that, the point of view of what a reasonable legislature, writing this statute, have thought that these words were there to achieve.”

Do you align yourself with that position?

Judge JACKSON. In the broad sense that what it is that the Court is tasked with when statutory interpretation is being undertaken is to achieve the purposes of the legislature. The text is the prime area, and in most cases sole indication of what the legislature intended, as opposed to the Court saying, "I see this statute but I am, you know, uncomfortable with how it is going to turn out or what it is going to mean, and so I am going to import my own policy perspective." Instead, the Court is constrained to say, "Regardless of what I think the right policy objective should be with respect to this law, my purpose, my requirement is to determine what Congress intended."

Senator SASSE. But with respect to legislative intent, when a Congress of 535 often distracted people, 100 in this body and 435 in the other, pass something, you know, by a 2-to-1-ish vote, and it is a part of a large piece of legislation, how do you determine what the intent is when it is 535 people doing something that has many, many different purposes for why somebody might vote yes?

Judge JACKSON. Well, you look at the text. I mean, the way in which statutes are interpreted is based on what the legislature says. There are times in which there are statutes in which Congress includes a purpose statement, for example, in the actual text of the statute. You look at the text of the provision. If that is not clear you look at the structure of the statute.

There are canons of interpretation that courts use to evaluate and interpret statutes, things like the word that appears in the section that you are interpreting should be defined the same way it is in another section, you know, the same word being used, Congress probably intended to have the same meaning.

So there are tools in the law that exist to help courts to interpret the text, but again, the goal is to interpret the text as a means of understanding and reflecting what Congress intended. And, of course, in statutory interpretation if Congress decides that the court has gotten it wrong then, as has happened many times, Congress comes back and clarifies and tells the court, no, this is what the statute means.

Senator SASSE. I want to go back to an exchange you had with Senator Cornyn. Substantive due process is a doctrine that often allows courts to create new fundamental rights. What is the test for determining a new fundamental right?

Judge JACKSON. The Supreme Court has said, in the *Glucksberg* case, that the fundamental rights that are recognized or that are included in substantive due process are those that are deeply rooted in the Nation's history and tradition. In a case prior to that, the Court had defined it as the rights that are implicit in the ordered concept of liberty, or the concept of ordered liberty. So there are standards for the courts to use to identify these types of rights.

Senator SASSE. So did the Supreme Court use this test in *Roe* or *Casey*?

Judge JACKSON. In *Roe* and *Casey*, I do not know that the Court used that formulation. I know that after *Casey*, the Court has determined not so much that the right to terminate a woman's pregnancy is fundamental. The right exists and it is subject to the

framework in *Casey* that allows for regulation, so long as there is not an undue burden on the exercise of the right pre-viability.

Senator SASSE. I think some of what we are wrestling with here is the question of—and I think what Senator Cornyn was driving at—is how particular the concept of deeply rooted goes and how that really is a bound on what the judiciary can do.

But I want to thank you. We are nearly at time. I want to thank you for engaging in the back-and-forth. I want to think more about what you have said, and I look forward to further discussion tomorrow.

It still appears to me that there is a very basic difference between a judicial philosophy and a judicial methodology and how you go about applying that when you are interpreting a law and making a determination about constitutionality or non. And I know that you have not claimed a judicial philosophy at all, but a judicial philosophy of originalism here. But I do think the fact that you have at least nodded to it in the Committee hearing today is, in and of itself, a pretty great testimony to how much of Scalia and Bork's work has moved the legal field.

So I am grateful for the time you are taking with us. I will look forward to listening tonight and talking with you again tomorrow.

Judge JACKSON. Thank you.

Chair DURBIN. Thank you, Senator Sasse.

Senator Blumenthal.

Senator BLUMENTHAL. Thanks, Mr. Chairman. Thank you, Judge, for your patience and your perseverance. I want to begin just by thanking you also for an extraordinary moment in our history. I think we all, as Americans, feel excitement and pride in really making history here. And the old saying, "A picture is worth a thousand words," as I look at your parents, and your husband, and your daughters, what I see is America, and the best of America.

So I think we should all feel that excitement and pride in this moment, and the extraordinary journey that has brought you here. You will make the Court look more like America but also think more like America, in the obstacles and challenges that you have overcome to be here. We do not know all of them, but you will provide a very important perspective, indeed a unique perspective, that the Court needs more than ever at this moment in its history. There are a lot of people who are book-smart. There are not as many people who are person-smart, and you are both. That kind of emotional intelligence is what our courts need, not just our Supreme Court.

So I want to really begin by asking you, as a role model for others, to talk a little bit to the young women and girls of America, particularly Black young women and girls, about those challenges and obstacles that you have had to overcome to be here, and what has helped you do it.

Judge JACKSON. Thank you, Senator. I am humbled and honored to have the opportunity to serve in this capacity and to be the first and only Black woman to serve on the United States Supreme Court. I stand on the shoulders of generations past who never had anything close to this opportunity, who were the first and the only in a lot of different fields.

My parents, as I said, were the first in their families to have the chance to go to college. I have been the first and the only in certain aspects of my life. So I would say that I agree with you that this is a moment that all Americans should be proud.

Senator BLUMENTHAL. Now you have never been a prosecutor. A lot of us on this panel have been prosecutors. I was the U.S. Attorney, the chief Federal prosecutor in Connecticut, for 4½ years, and then I was Attorney General of my State for 20 years. But I would say one of the most meaningful cases in my career was as a defense counsel. I was asked by the NAACP legal defense fund to represent a Black man on death row in your home State of Florida. He had been convicted of murder and rape. He had been on death row for a number of years. And I took the case because I was asked to do it, and eventually, somewhat to my surprise, found, in fact, he had never done the crime of which he had been convicted. And eventually we won his freedom because the prosecutor in the case concealed evidence, which was a violation of his constitutional rights, and he was a free man as a result.

Your husband, as a surgeon, saves lives. Lawyers do not do it often. But I know, from personal experience, the importance of having a good representative, an advocate, a counsel, because in that case he had been denied it when he originally went to trial. And only after years in both State and Federal courts was the truth vindicated.

So I want you to talk a little bit about why it is important for defendants to be represented by zealots, really aggressive and energetic advocates, who tell the truth to the court, put on the evidence, and present the best possible case for a defendant accused of a crime.

Judge JACKSON. Thank you, Senator. The idea is one that is rooted in our Constitution. The framers were concerned about government overreach in a lot of different areas. The provisions of our Constitution are protecting individual liberty from government overreach. This is why we have provisions about limited government, and there are many provisions in the Constitution that are limiting government action when it comes to the deprivation of liberty, because the framers understood how important liberty is to our society.

And so there is the Fourth Amendment. There is the Fifth Amendment. There is the Sixth Amendment. There is the Eighth Amendment. These provisions are crucial, and it is zealous defense counsel that ensures that the Government is protecting these rights, that ensures that these rights are protected and that people are getting due process in the criminal justice system.

And that is to all of our benefit. That helps everyone in America when we ensure that liberty cannot be denied without due process. It is defense counsel, as I said, who are making arguments, and they are not condoning the criminal behavior. They are making arguments on behalf of clients, in defense of the Constitution and these constitutional values.

And as a judge, I now see how important it is for me to be able to make my decisions after hearing from both sides. That is crucial. We have an adversarial system, which means that judges are presented with arguments from both the prosecution and the defense,

and only when I am able to hear from both sides can I make a just, fair determination. And fairness is the hallmark of our constitutional scheme, and it is what makes us the best criminal justice system in the world.

Senator BLUMENTHAL. And it is not only the reality of fairness but also the perception of fairness, the public's understanding of how courts work that is essential to the credibility that courts have. Correct?

Judge JACKSON. That is correct.

Senator BLUMENTHAL. And so I feel very strongly—I know that a number of us on the Committee agree—that more transparency, more visibility is important for the public to understand what goes on in the courtroom. I know you feel transparency is a good thing. You have been asked about cameras in the courtroom. I am a supporter of Senator Grassley's Sunshine in the Courtroom Act as well as Senator Durbin's Cameras in the Courtroom Act. I am hopeful that the Court, the United States Supreme Court, actually will back these proposals, because their support would be very important.

Tell me how you feel about the basic principle of transparency and more visibility.

Judge JACKSON. Well, Senator, one of the reasons, as I said, that I write such long opinions is because I want everybody to know exactly the arguments I have considered, the facts that I have reviewed, and in pretty fine detail the course of my reasoning. And I have done this in 570 opinions. I think it is important for public confidence, as you say, for people who are bound by the law and who are affected by the courts to know what the court's views are.

With respect to the issue of cameras in the courtroom, I understand that that is something that is proceeding through Congress, and if I was confirmed I would look forward to talking with my colleagues to understand the positions that people have regarding that issue.

Senator BLUMENTHAL. I appreciate that response. One of the other areas that I think is important to transparency and to public trust and confidence in the Court is visibility as to its own decisions, which I think is directly contradicted by the shadow docket. You have been asked about it before.

But I just want folks to understand that some of the most important decisions that Supreme Court have been decided, or at least issues resolved, without oral argument, without briefs, without any public explanation. A controversial travel ban has gone into effect. The first Federal execution in 17 years was permitted. Statewide COVID restrictions were enabled. The collection of data in the 2020 United States Census, and enforcement of voting restrictions in the 2020 Presidential elections, as well as decisions relating to immigration and blocking the Biden administration from enforcing a Federal moratorium on evictions, imposed because of the COVID-19 epidemic. Americans have a right to an open, full, fair proceeding with a record of the Court's reasons for making decisions.

So I hope that you will urge your colleagues, when you talk to them about cameras in the courtroom, also to do less on the shadow docket, and I hope that perhaps if they do not, Congress will take some action.

I finally want to ask, so far as this issue of transparency is concerned, about codes of ethics. You have followed a code of ethics as a district court judge and court of appeals judge. Correct?

Judge JACKSON. I have.

Senator BLUMENTHAL. Does that code of ethics apply to the United States Supreme Court?

Judge JACKSON. My understanding is that it does not.

Senator BLUMENTHAL. Correct. And my hope is that you will perhaps urge your colleagues as well to support a code of ethics. They have not done so as yet, but I think we have an obligation in the Congress to set forth a code of ethics, and I hope they will support it. Senator Durbin and others of us have supported that kind of measure as well, and I would just ask you whether you will raise it with your colleagues, if you are confirmed.

Judge JACKSON. Senator, certainly if Congress is taking anything up that requires our review I would absolutely consider it, and even if not I would consider it, talking to them about it.

Senator BLUMENTHAL. Thank you. You know, the reason I raised these points is that I respect the United States Supreme Court. I have argued four cases before it. I was a law clerk to Justice Blackmun, who, by the way, was from Minnesota, Mr. Chairman. In fact, he was known as one of the Minnesota Twins when he was appointed because he was thought to be exactly like then Chief Justice Warren Burger, who also was from Minnesota, in his very, very conservative views.

And as it happened, Justice Blackmun became one of the most progressive members of the Court over the years that he served. He had a capacity for growth and for learning and listening, which I believe you have, and I think it is one of the most important characteristics of anybody who serves on the Court.

But I do think the Court's crisis of legitimacy is the result of divisions within the Court, the polarization and politicization that has drawn lines, the process that has happened in recent years in confirmation proceedings. And so I really think that consensus building, building bridges with your colleagues, will be immensely important. I think that is one of the reasons that the President chose you, having talked to him about it, that you have that kind of persuasive and forceful intellect but also the personal charm and warmth and depth that will enable you to do it.

Maybe you can tell this Committee about how you worked on the Sentencing Commission, for example, or in your previous experiences on that kind of consensus building.

Judge JACKSON. Thank you, Senator. Consensus building was one of the things that Justice Breyer was particularly good at in terms of his personality. In the time that I clerked for him I witnessed the way in which he continually reaches out to colleagues, continually seeks common ground, and it is something that I would hope to be able to emulate if I were to be confirmed.

When I worked on the Sentencing Commission, the commission is a seven-member body, working on sentencing policy, which is, at times, a pretty contentious effort because we are talking about criminal justice. As commissioners, we are working on policy issues related to appropriate sentencings, and by statute, the commission is a bipartisan group. And during my 4 years as a commissioner,

I was able to work well with other members of the commission to find common ground, to work on issues, to come together. And the vast majority—I heard a statistic that something like 95 or 97 percent of the votes that the commission took were unanimous, and that happened because of a lot of effort and intention on the part of all involved to see if we could work together. And that would be the kind of thing that I would hope to do, if I was confirmed to the Supreme Court.

Senator BLUMENTHAL. You have mentioned in your previous testimony the challenges of applying the law to evolving and new technology. Obviously, the internet raises exactly those questions. Congress passed the Electronic Communications Privacy Act in 1986, when the internet was barely recognizable. It was nascent, just starting.

And now our Nation faces a mental health crisis. It is partly aggravated by the pandemic, the isolation and anxiety that has resulted from it, but also by the internet and by the tech platforms that drive toxic content at children as a result of these black box algorithms that nobody really understands. Literally, no one understands because the tech platforms want to keep them secret.

And we are trying to upgrade the law and update it to give parents tools to have greater visibility as to what their children are doing and to give parents and children tools to protect them against some of the bullying and eating disorder content and even suicidal and substance abuse stuff that they are driven to see.

And Senator Blackburn and I have introduced a bipartisan measure, the Kids Online Safety Act that will provide a more modern solution to a modern problem, to update the law to account for the role of social media in our ongoing and aggravating mental health crisis in this country.

Do you agree that it helps the Supreme Court, and judges in general, to do their job when Congress updates our statutes to account for technological change?

Judge JACKSON. Thank you, Senator. The role of the Court is to interpret statutes when there are disputes related to the statutes, and in circumstances in which statutes have not been updated, I do not think it is surprising to note that there are disputes, about the meaning of the statute, about how it applies.

And so, to the extent that Congress undertakes to make amendments and make the changes, I think it helps courts. Maybe there will be fewer disputes or easier disputes to resolve.

Senator BLUMENTHAL. Easier disputes to resolve in the sense that—and I have seen it happen—a judge will say, “I do not know what Congress meant to do in this kind of situation, because this law was written at a time when none of this stuff now existed.” I am sure you have faced that situation. I think it is true of social media and the dangers to children as a result of the toxic content that they often find, and often seemingly are addicted to use again and again and again because it is part of the business model of those social media and big tech platforms.

Judge JACKSON. Yes, I have faced the situation. One of my cases, the *Alliance of Artists and Recording Companies v. General Motors*, is a case that I ended up writing a couple of opinions about. It involved a statute of Congress related to digital recording audio de-

vices and whether or not royalties were required for the purchase of those kinds of devices. And it was enacted at a time in which recording technology was at a different stage than it is now, and disputes arose that came before me regarding whether or not to apply the royalty requirement in that statute to modern recording devices, and in particular, the recording devices that are now in automobiles.

When you take your CD and you put in your own car and record onto the hard drive of your car is that the same thing as putting your CD in one of those machines that records from CD to CD, and you give the second recording to all of your friends? That was what the statute was originally meant to cover, and the question was whether recording to your own car's hard drive counted.

And it was a very interesting interpretive exercise, but again, it was the kind of thing in which I was focused on trying to ascertain what, based on the text of the statute and the definitions in the statute, what Congress intended this statute to cover.

Senator BLUMENTHAL. And cars, other devices, appliances at home, collect huge amounts of data, do they not, and as consumers we feel we own that data. It is ours. But it can be bought and sold, exchanged, and mined, in a way that right now consumers have no consent over. And it enhances the dominance of just a few of those tech companies, just a few of the corporations. Corporate power is emboldened and enabled, in many respects, but the amount of data they collect.

It is also enabled by forced arbitration. We have had a reference to it already today, with respect to complaints about sexual harassment, which fortunately we have addressed. I have been proud to work on the Ending Force Arbitration of Sexual Assault and Sexual Harassment Act, which President Biden signed after we passed it just a few weeks ago.

I have heard harrowing stories from survivors of sexual assault and victims of workplace harassment who were silenced and denied justice by forced arbitration. But forced arbitration applies, as well, to everybody who has a cell phone. You have a forced arbitration agreement. Many workers have forced arbitration agreements. Nursing homes have forced arbitration agreements.

The point is that you have dedicated your life to access to the courts, the right of a trial, the right to a jury, the right to a judge. None of it is possible where there is a forced arbitration agreement. That is why I have worked on a measure called the FAIR Act that would make any forced pre-dispute arbitration agreement invalid and unenforceable. If both sides want arbitration, that is fine, but access to the courts should be available to everyone.

I know that you are limited as to what you can say about measures that are before us and policy issues, but I hope that you will consider the trend that the Court has adopted in support of forced arbitration and denial of rights like class action, and review whether they are appropriate.

Let me just finish with a couple of quick points. First of all, on the Harvard Law School, Harvard Law Review article on registration of sex offenders, convicted sex offenders, I must say I read this article several times. In my view it is analysis, not advocacy. Would you agree?

Judge JACKSON. Absolutely, Senator. As a law school student, I was trying to do what law school students do, which is analyze a new set of legal provisions. These laws were new, and I was trying to assess what criteria courts could use to look at them. I was not making an argument about them at all.

Senator BLUMENTHAL. Exactly. And by the way, one of those statutes was in Connecticut. It was challenged on constitutional grounds, double jeopardy. It went to the United States Supreme Court. I defended it there. It was upheld, 9–0. I do not know whether your article was cited, but I would put this Law Review article very much in the category of analysis. The distinction between prevention and punishment, I would call it protection, not punishment or prevention. That is the argument that I made to the Supreme Court.

I ask that this article be put in the record, Mr. Chairman.

Chair DURBIN. Without objection.

[The information appears as a submission for the record.]

Senator BLUMENTHAL. By the way, it took me two or three times to get through it. No disrespect to you or the Harvard Law Review.

The issue of child pornography, you mentioned, I think, that in your decisions on the sentencing cases involving child sexual abuse material, which, by the way, I agree is absolutely horrific, abhorrent. It is the reason that Senator Graham and I have actually sponsored a measure called the EARN IT Act that addresses it. But you said that you imposed a sentence that matched the recommendation by either the prosecution or the Probation Office in most of the cases where you did that sentencing. Is that right? Do have I that—

Judge JACKSON. Yes, Senator. In looking back at the records concerning my cases, it looks as though I had 14 cases that involved either child pornography, interstate travel to meet up with a child for sex, sex crimes related to children. And in 10 of those 14 cases I imposed a sentence that was consistent with or greater than what either the Government or the prosecution requested.

Senator BLUMENTHAL. The Probation Office.

Judge JACKSON. Excuse me, sorry. The Government or the Probation Office.

Senator BLUMENTHAL. And let me just ask you, the Probation Office is an independent arm of the court that investigates the defendant, looks at the crime, the defense background, his family situation, all of the relevant factors involved in sentencing, including the sentencing guidelines, and then, independently and impartially, makes a recommendation, presumably to serve the interest of justice in that particular case, based on the individual facts there. Is that roughly a correct description?

Judge JACKSON. That is correct, Senator. The Probation Office works within the court system. They are independent of the parties, and they investigate and make recommendations in cases concerning what the Probation Office thinks is an appropriate sentence.

Senator BLUMENTHAL. Thank you. Let me just finish by saying much of America is watching these proceedings on a split screen. On one hand they are literally seeing the death and destruction in Ukraine, Russia's brutal, barbaric assault on individual rights,

basic freedoms that we often take for granted here. And we are exercising those rights right here.

You are a teaching lesson. This proceeding is a teaching lesson about the importance of democracy. The people of Ukraine are fighting for it. They are dying in their neighborhoods and streets and their homes. They are huddled in basements. Their men and women are resisting, valiantly and bravely, against a huge military force that Russia has unleashed, and a reign of terror from the sky, simply because they believe in the ideals of freedom and law that we are seeking to preserve here.

And so on this side of that split screen I think it is important that we do our best to honor the norms and the rules that you have sought to uphold throughout your life, and I am proud and excited to be here with you and your family as we go through this process. And I look forward, as I hope many of us do, to a bipartisan majority in support of your candidacy. Thank you.

Thank you, Mr. Chairman.

Chair DURBIN. Thank you, Senator Blumenthal.

I would like to bring everyone up to date. We have several considerations. The remaining Senators for questions, the endurance of our witness, Judge Jackson; votes on the floor; requests for compassionate release by a number of people in the audience.

Here is where we stand. We are going to have Senator Hawley, followed by Senator Hirono, then we are going to take a 20-minute break, because that is when we think there will be some votes on the floor. We can take care of those and get back in 20 minutes, then we will return from that break to Senators Cotton and Booker, then we will take a 30-minute break or so for dinner, then there will be Senator Kennedy, Padilla, and Tillis. And we are going to start off tomorrow with our two Senators, Ossoff and Blackburn.

So, we should finish in the 9 to 10 hour this evening, God willing.

So, at this point, I recognize Senator Hawley.

Senator HAWLEY. Thank you, Mr. Chairman.

Judge, nice to see you again. I thank you, again, for being here. Congratulations, again, on your nomination.

I want to start with Senator Blumenthal left off. I want to talk with you about some of these cases. I mentioned them yesterday, so I know you know which ones I want to talk about. The seven cases, child pornography cases, in which you had discretion that came before you. You had discretion to sentence one way or another in these seven cases. Not in every case, of course, do you have discretion; sometimes, the law requires you to impose a certain sentence. But in these seven, you had discretion and in each of these seven, you chose to depart both, from the Federal guidelines and also from the Government's, the prosecutor's recommendation.

Senator Lee asked you a little bit about this. Senator Cruz has asked you about it. He had the chart with the seven cases on it.

Before we jump into those, I just want to correct the word on one or two things. Senator Coons suggested that in three cases, *Nickerson*, *Nguyen*, and *Fyffe*, you actually imposed sentences either within the guidelines or at the same level of the prosecution.

But in *Nickerson*, you didn't have any discretion. That was an 11(c)(1)(c) case; the law bound you. And *Nguyen* wasn't a child-porn case and neither was *Fyffe*.

Just one other quick thing to clarify. As to this, comments about the Probation Office, the Probation Office doesn't issue national guidelines, right; I mean, the Probation Office doesn't issue sentencing guidelines. They're not public. They're not recommended to all judges. The Probation Office provides advice to judges, case by case, usually in private, usually not available to the public.

Is that right, Judge?

Judge JACKSON. Not exactly, Senator.

The Probation Office in criminal cases is assigned by the court to work with respect to the evaluation of cases. In every case, consistent with Congress' requirements, the Probation Office prepares a presentence report, in which they review all of the statutory factors concerning sentencing.

Congress has a statute for sentencing. It requires judges to consider the nature and circumstances of the offense, the history and characteristics of the defendant, the need for the sentence imposed to promote various purposes of punishment. There are many purposes listed in the statute.

And the Probation Office is the arm of the court that does factual investigations in every criminal case unless, there are certain cases in which you can waive it, but the background is the Probation Office's assessment of the facts related to a particular sentence and a particular crime. And the Probation Office's report when a court sentences, actually, in most cases, becomes the findings of fact of the court.

And so, the Probation Office appears, just like the prosecution and the defense. The Probation Office has written a report and they have made a recommendation to the court based on their independent analysis related to the facts of a particular crime and defendant and sentence.

Senator HAWLEY. Understood. So, they give the court counsel. Understood.

However, they don't issue guidelines. They are not uniform. It is by its very nature, a case-by-case inquiry; as you said, the report goes to the judge. As I understand it the presentencing report, I'm sorry, the probation reports are not public in all of the cases that we are talking about here. I would love to see them if they are.

But it is not as if there is one set of guidelines that are Federal sentencing guidelines and then there's the probation guidelines. The Probation Office is giving advice to the judge; it varies case by case——

Judge JACKSON. Senator——

Senator HAWLEY [continuing]. But it is not the same.

Judge JACKSON. Sorry. I thought you were done.

Senator HAWLEY. No, that is all right.

Let me ask you about a specific case. I mean, let's talk about, I listed these seven cases in which you had discretion and you did not follow the prosecutor's recommendation or the sentencing guidelines, but let's just talk about one of them, because we talked about some of them as a group.

Let's talk about *United States v. Hawkins*. I think that is one you probably remember from 2013. The defendant there was Wesley Hawkins. He was 18 years old at the time. He uploaded five video files of child pornography from his computer to YouTube. This is how the police got on to him. He then uploaded another 36 depictions of child porn and other lewd photos of children to his iCloud account.

When the police executed a search on his apartment, on the premises, they found 17 videos on his laptop and 16 images of child pornography; all of them very graphic, some of them involving very young children. The 17 videos, in particular, this is from the Government's sentencing memorandum in this case, just so we understand the facts, here are some of the videos that the Government charged and they recovered.

There was a 24-minute, 6-second video depicting a 12-year-old male committing a sexual act. I am not going to read exactly what it was.

There was a 1-minute-and-57-second video depicting an 8-year-old committing a sexual act.

There was an 11-minute-and-47-second video depicting an 11-year-old committing a sexual act and being raped by an adult male.

There was a 15-minute-and-19-second video depicting two 11-year-olds committing sexual acts.

There was a 7-minute-and-51-second video depicting a 12-year-old committing a sexual act.

So, as the Government said in this case, and I am quoting now from the transcript of the sentencing hearing, 17 videos is a lot and some of the videos, including the ones that are described in the statement of the offense, and I have just related some of them are very lengthy and include numerous images, numerous views, sometimes collages, sometimes multiple victims, you see the act in progress. The Government goes on to describe some of these as sadomasochistic images.

So, this is a tough case. This is one of those tough cases you were referencing earlier. You talked about it this morning, you said these cases are terrible. This is one of them. This is terrible stuff. This is not a good guy who is doing this stuff.

The guidelines recommendation in the case was 97 to 121 months. So, if I am doing my math right that is up to 10 years. And in this case, the guidelines recommendation was essentially written by Congress, because in the PROTECT Act of 2003, Congress specified what they wanted the range to be in these kinds of cases. And Congress also specified that they wanted the mandatory minimum.

So, I know you remember the PROTECT Act, because you have talked about it; you have given lectures on it. And it was enacted, as I said in 2003. It was 84-0 was the vote, here in the Senate.

And the concern, the reason the PROTECT Act was put into place is the Senate was concerned over lenient sentences by judges in child porn cases, which is what you described. You said about it, there was an increasing perception on Capitol Hill and within DOJ that liberal judges were to blame for the downward pressure on Federal sentences and the legislation was necessary to reign them in. Now, that is you in 2011, describing this law.

So, Congress has set the guidelines here, 84—nothing. I noticed the Chairman voted for it, as did a number of other Members of this Committee. So, Congress sets the range; essentially, it is 97 months up to 10 years.

Now, the prosecutor in this case, this is in DC, of course, you are on the Federal district court, the prosecutor in this case is a liberal administration. I think it is fair to say, this isn't the State of Texas. I see my colleague from Texas next to me here.

The prosecutor in this case, nevertheless, still asked for two full years in prison. You gave the defendant 3 months. The guidelines call for 10 years. The prosecutor wanted at least 2. You gave him 3 months. And when you did, you made a number of arguments and statements on the record and I would like to go through some of them because I have read them all.

And the first argument you made was that the Federal guidelines that punished child porn offenders, the ones that Congress wrote were, and I am quoting you now, "are in many ways outdated"; that's your quote. And you went on to say about why you thought they were outdated.

I am going to quote you again. You say, and I quote, "I don't feel that it is appropriate to increase the penalty on the basis of the number of images or prepubescent victims," meaning little kids, "as the guidelines require because these circumstances exist in many cases, if not most, and don't signal an especially heinous or egregious child pornography offense," end quote.

I just want to ask you about that, because I can tell you, I am having a hard time wrapping my head around it. We are talking about 8-year-olds and 9-year-olds and 11-year-olds and 12-year-olds. He has got images of these, the Government said, that added up to over 600 images. Gobs of video footage of these children, but you say, this does not signal a heinous or egregious child pornography offense. Help me understand that. What word would you use if it is not heinous or egregious? How would you describe it?

Judge JACKSON. Thank you, Senator, for letting me address the concern that you have put forward based on the record that you have reviewed.

As a judge who is a mom and has been tasked with the responsibility of actually reviewing the evidence, the evidence that you would not describe in polite company, the evidence that you are pointing to, discussing, addressing, in this context, is evidence that I have seen in my role as a judge and it is heinous. It is egregious.

What a judge has to do is determine how to sentence defendants proportionately consistent with the elements that the statutes include with the requirements that Congress has set forward. Unwarranted sentencing disparities is something that the Sentencing Commission has been focused on for a long time in regard to child pornography offenses.

All of the offenses are horrible. All of the offenses are egregious. But the guidelines, as you pointed out, are being departed from, even with respect to the Government's recommendation. The Government, in this case, and in others, has asked for a sentence that is substantially less than the guideline penalty.

And so what I was discussing was that phenomenon that the guidelines in this area, are not doing the work of differentiating de-

fendants as the Government, itself, indicated in this very case. And so, that is what I was talking about.

But I want to assure you, Senator, that I take these cases very seriously. But these cases include the notion, by many defendants, that the folks at issue, the defendants themselves, are collecting the images on the internet. There are terrible things that have happened, but they are not involved, say, the defendants, they are not focused on, you know, what is actually happening to the children.

And so, part of my sentencings was about redirecting the defendant's attention. It is not just about how much time a person spends in prison; it is about understanding the harm of this behavior. It is about all of the other kinds of restraints that sex offenders are ordered, rightly, to live under at the end of the day.

Sentences in these cases include, not only prison time, but restraints on computer use, sometimes for decades; restraints on ability to go near children, sometimes for decades. All of these things, judges consider in order to affect what Congress has required, which is a sentence that is sufficient, but not greater than necessary——

Senator HAWLEY. Let me just say——

Judge JACKSON [continuing]. To promote the purposes of punishment.

Senator HAWLEY. Yes. Well, let me just ask you about that last point, because you have said this a couple times now, the sentences that Congress require.

Congress wanted the guidelines to be mandatory. Congress wrote the guidelines in this case. They wanted them to be mandatory.

They gave the courts factors to consider to choose between the sentencing range. Congress wanted you to choose between 97 and 121 months; that's what Congress wanted.

The Supreme Court, in *Booker*, said that the sentencing guidelines would be discretionary. So, the Supreme Court gave you the discretion.

But if we are talking about what Congress has wanted, Congress wanted them to be mandatory.

My only point in raising that is just to say that you had discretion in these cases and you used your discretion to choose the sentences that you did.

Let me ask you about some of the things that you said. You said this morning, and I appreciated it, how you want to direct the defendants, you want to get them to own up to what they have done in these cases and I thought that was powerful and I thought it was right.

But let me just ask you about what you said to this defendant. You said to this defendant, through whom you sentenced only to 3 months in prison, that "your collection," and I am quoting you, "your collection at the time you were caught was not actually as large as it seems."

The Government felt the need to respond to you on the record. They said, "the Government doesn't believe that it is appropriate to just disregard the number of images that the number of images can with appropriate, and, indeed, in this case, the defendant has

amassed an extremely large collection of child pornography.” But you disregarded that.

You also told the defendant, you said this, “This seems to be a case where you were fascinated by sexual images involving what were, essentially, your peers.” And then you went on to say, “the defendant was merely trying to satisfy his curiosity.” “Curiosity” is your word. One more thing on this same idea. You said, “you were viewing,” this is you to the defendant, “you were viewing sex acts between children who were not much younger than you.”

And the whole discussion is about why you are only giving him 3 months. Judge, he was 18. These kids are 8. I don’t see in what sense they are peers.

I have got a 9-year-old, a 7-year-old, and a 16-month-old at home and I live in fear that they will be exposed to, let alone exploited, in this kind of material.

I don’t understand you saying to him that they are “peers” and that, therefore, “were viewing sexual acts between children who are not much younger than you,” and that that is somehow a reason to only give him 3 months.

Help me understand this.

Judge JACKSON. Senator, I don’t have the record of that entire case in front of me. What I recall, with respect to that case, is that unlike the many other child pornography offenders that I had seen as a judge and that I was aware of in my work on the Sentencing Commission, this particular defendant had just graduated from high school and some of, perhaps not all when you were looking at the records, but some of the materials that he was looking at were older teenagers, were older victims.

And the point, Senator, is that you said before, the Probation Office is making recommendations and they do so on a case-by-case basis. That is what Congress requires. This is not done at the level of—

Senator HAWLEY. But you had discretion, Judge. You admit that, right? I just want to—

Judge JACKSON. Senator, sentencing is a discretionary act of a judge, but it is not a numbers game. It is not—I understand that Congress wanted the guidelines to be mandatory.

The Supreme Court in 2005 determined that they couldn’t be in an opinion by Justice Scalia, determined that they couldn’t be. And Congress, since then, has not come back to amend them or to change them or to make them mandatory again.

And so, there is discretion at sentencing and when you look at the sentencing statutes, Congress has given the judges not only the discretion to make the decision, but require judges to do so on an individualized basis, taking into account not only the guidelines, but also various factors, including the age of the defendant, the circumstances of the defendant, the terrible nature of the crime, the harm to the victims; all of these factors are taken into account and the Probation Office assists the court in determining what sentence is sufficient, but not greater than necessary.

And I appreciate, Senator, that you have looked at these from the standpoint of statistics, that you are questioning whether or not I take them seriously or I have some reason to handle them in, either a different way than my peers or a different way than

other cases, and I assure you that I do not. That if you were to look at the greater body of not only my more than 100 sentences, but also the sentences of other judges in my district and nationwide, you would see a very similar exercise of attempting to do what it is that judges do: attempting to take into account all of the relevant factors and do justice, individually, in each case.

Senator HAWLEY. Well, let's keep talking about this case. You also said to this individual, who is an adult, he was tried as an adult, he is 18 years old, you also said to him, besides saying that you thought his victims were his peers, you also said, "there is no reason to think that you are a pedophile." And then you went on to say, again, that is another reason why you weren't going to give him, you are only going to give him 3 months, because you had judged that he wasn't a pedophile.

And then you said, and this is something that I really need your help understanding, then you apologize to him. And I just have to tell you, I can't quite figure this out. You said to him, "this is a truly difficult situation. I appreciate that your family is in the audience. I feel so sorry for them and for you and for the anguish this has caused all of you. I feel terrible about the collateral consequences of this conviction." And then you go on to say, "sex offenders are truly shunned in our society."

I am just trying to figure out, Judge, is he the victim here or are the victims the victims?

You are saying that you, you are apologizing to him. You are saying, you are sorry for the anguish this has caused him.

There was a victim impact statement in this case. It didn't get read into the record, but it was there.

I described the videos that we have. You say, earlier in the case, you talked about how heinous these crimes are and you describe them, to your credit, you describe how heinous it is, to your credit and, yet, here you are giving him 3 months and apologizing to him and saying you feel sorry for the anguish it has caused him, and also saying that you think that sex offenders are truly shunned in our society.

So, just talk about that. Help me understand. I mean, is he a victim? Is that your view here? Is that why you said this? Is that what you meant by that?

Judge JACKSON. Senator, I, again, don't have the entire record. I remember in that particular case, I considered it to be unusual; in part, for the reasons that I described.

I remember in that case that defense counsel was arguing for probation; in part, because he argued that, here we had a very young man, just graduated from high school. He presented all of his diplomas and certificates and the things that he had done, and argued, consistent with what I was seeing in the record, that this particular defendant had gotten into this in a way that was, I thought, inconsistent with some of the other cases that I had seen.

Part of what a judge is doing, as required by Congress, is thinking about this case, thinking about unwarranted sentencing disparities—that is in the statute—other cases, other determinations that a judge may have made about this.

I don't remember, in detail, this particular case, but I do recall it being unusual, and so my only point to you is that judges are

doing the work of assessing in each case a number of factors that are set forward by Congress, all against the backdrop of heinous, criminal behavior.

But the guidelines are no longer mandatory. Congress has not corrected, as you would say, the Supreme Court's determination about that, Justice Scalia's decision, that the guidelines are not mandatory. Congress has not said that and Congress has given judges factors to consider.

This, in my view, was an unusual case that had a number of factors that the defendant was pointing out, that the Government was pointing out, that the Probation Office was pointing out, and I sent this 18-year-old to 3 months in Federal prison under circumstances that were presented in this case, because I wanted him to understand that what he had done was harmful, that what he had done was unlawful, that what he had done violated the law and needed to be punished, not only by prison, but also by all of the other things that the law requires of a judge who is sentencing in this area.

Senator HAWLEY. But, Judge, with all due respect, and I tell you, I will be direct with you: I am questioning your discretion and your judgment. That is exactly what I am doing. I am not questioning you as a person. I am not questioning your excellence as a judge, frankly, but you said that you had discretion and that is exactly what I am doing; I am questioning how you used your discretion in these cases.

And, to me, to take a guy who is 18 years old, who has what the Government says is an extremely large collection of prepubescent pornography, 8-year-olds, 10-year-olds, 11-year-olds, we are talking about, I mean, gobs of hours of time here that he has, and you say to him, what, that, you say that, well, you know, it was just a collection. I mean, he was just viewing it and it was, you know, essentially, they were his peers.

You say to him that he is not a pedophile. I don't know how you know that. I don't know why that's relevant to the guidelines, but maybe it is. You say he is not a pedophile.

You say that you are very sorry for him and what he suffered, and then you give him 3 months, when, frankly, a liberal prosecutor is asking for 2 full years. I mean, it does seem like an extraordinary case to me.

It would bother me no matter what. It really bothers me when, in every case, child porn case you have had, you have had discretion, you sentenced below the guidelines and below the Government's recommendation.

And saying that sex offenders are truly shunned in our society, as you said to him, it reminds me, it echoes what you said as early as law school in that Harvard Law Review article Senator Blumenthal was just talking about. There, you say, and I am quoting you now, "In the current climate of fear, hatred, and revenge associated with the release of convicted sex criminals, courts must be especially attentive to legislative enactments"—regarding these sex criminals, I guess, like this, the enactment here, the PROTECT Act that Congress enacted.

So, I want to try to understand here, is it your view that society is too hard on sex offenders? You say they truly are shunned in so-

ciety. You wrote that many of these laws are products of a climate of fear, hatred, and revenge. So, is that still your view? I mean, do you think that these laws are too tough, that we are too tough on sex offenders? Explain what you meant in this case in 2013. And it seems to be the same thing you said many years ago.

Judge JACKSON. Senator, it is not the same thing I said many years ago. Many years ago, as a law school student, I was evaluating a new set of legislation, State laws about registration and I was analyzing them, as law students do. It wasn't about the sex crime; it was about the characterization of the law. Is it a punitive law? Is it a prescriptive law? And how would a court go about determining that? That was the frame that I used then. It could have been about anything. It was about the characterization of legislation.

Senator HAWLEY. And just to, and I am sorry, I don't mean to interrupt you. I only have 2½ minutes left. I just want to make sure I understand this.

This is, I am quoting from your conclusion now, this is on page 1732–1728 of the Harvard Law Review. This is your conclusion: “In the current climate of fear, hatred, and revenge associated with the release of convicted sex criminals, courts need to be especially attentive to legislative enactments.”

See, that's a conclusory statement. You are saying that there is a climate of fear, hatred, and revenge that are informing these laws, and you described some of the laws earlier, I think Megan's Law and others. Senator Cruz asked you about some of those.

I am just trying to understand what you meant by that, because you are saying something similar in the *Hawkins* case. You are saying that society truly shuns our sex offenders.

Judge JACKSON. Senator, with all due respect, my article is now in the record. People can read it and they can see that I was evaluating these laws, not to determine their constitutionality, not to say that they shouldn't be enacted, but to talk about the ways in which courts make determinations about the character of the law and all of the consequences that follow from them.

In law school, I had not had any experience in terms of the criminal justice system, and I was doing what law students do, which is seeking to analyze, in a creative way, new legislation.

With respect to Mr. Hawkins, I was doing what judges do, which is look at the statute, 18 U.S.C. 3553(a), exercise discretion, as Congress has required us to do, take into account all of the various aspects of a particular case, and make a determination, consistent with my authority, my judgment, and understanding, fully, the egregious nature of the crime.

As you said, even the prosecutors in these cases are not recommending guideline sentences. The Probation Office, which is an independent authority looking at these cases and the facts related to them, are not recommending guideline sentences. This is a particular area where the Commission has seen an enormous amount of disparity and has, in fact, asked Congress to come back and address, to help judges, who are looking at these cases, to be able to rely on the guidelines.

Senator HAWLEY. Which Congress has declined to do.

Judge JACKSON. Senator, in that case, we have the statute that Congress has enacted concerning penalties and we have judges who are doing their level best to make sure that people are held accountable, as they need to be, in our society in a fair and just way.

Senator HAWLEY. Mr. Chairman, my time has expired.

Thank you, Judge.

I have no further questions at this time.

Chair DURBIN. Just checking with my staff, so the original statute was passed in 2003. The Scalia decision in 2005, the *Booker* decision?

Judge JACKSON. So, the original statute that I am talking about, I am just thinking, was, I felt like it was in the 1980s.

Chair DURBIN. We think it may have been——

Judge JACKSON. In 2003, all right.

Chair DURBIN [continuing]. In a decision by——

Judge JACKSON. Justice Scalia, the *Booker* decision, made the guidelines advisory, so that even though judges have to calculate them, they are no longer binding. And what it meant in the statute is that the guidelines became one factor, among many, that judges consider at sentencing.

Chair DURBIN. I am not going to opine on Justice Scalia in his conduct and decision as it relates to the overall topic. I hope we all agree that we want to do everything in our power, reasonably within our power to lessen the incidents of pornography and exploitation of children. You have made that clear that is your position, too.

But I just want to tell you, Congress doesn't have clean hands in this conversation. We haven't touched this now, for 15, 16, or 17 years. And this, you aren't the only one who faced this kind of a challenge with the cases before you.

I said this morning, and it bears repeating, in *United States v. Klotz*, Trump appointed Judge Sarah Pitlyk, Hawley's choice, Senator Hawley's choice for the Eastern District of Missouri, sentenced an individual, convicted of possession of child pornography, to only 60 months, well below the 135- to 168-month sentence recommended by the guidelines.

Senator HAWLEY. Mr. Chairman, you have mentioned me now.

Chair DURBIN. Let me finish. I will finish and then, of course, I will recognize you.

Senator Hawley, you have said some very powerful things in support of this judge, but, clearly, she faced a situation where she decided she would not follow the guidelines and sentenced to less than half of what they recommended.

We have created a situation because of our inattention and unwillingness to tackle an extremely controversial area in Congress and left it to the judges, and I think we have to accept some responsibility for that, Senator.

Senator HAWLEY. I just wanted to say, Chairman Durbin, since you mentioned Judge Pitlyk in the *Klotz* case, she followed the prosecutor's recommendation in that case.

My, as I have said over and over, part of my concern with Judge Jackson is that she had not followed the prosecutor's sentences. She didn't in the *Hawkins* case we were just talking about or the guidelines.

And I am happy, we can have a policy debate about whether or not the guidelines are too lenient. I would argue in this era of exploding child pornography, they are not too lenient, at all.

I think you were right the first time when you voted in 2003 to make it tougher.

Chair DURBIN. I will just say that I don't know if you have sponsored a bill to change this. I will be looking for it. But I will tell you that there isn't a long line of people waiting to co-sponsor this controversial issue.

If we are going to tackle it, we should, but we should concede in the meantime, that we have left judges in the lurch in many of these situations. There is no clarity in this situation. And I think to hold this judge responsible for the overall situation is to ignore our nonfeasance, malfeasance, whatever it might be, and lack of responsibility in dealing with this.

Senator HIRONO.

Senator HIRONO. Thank you, Mr. Chairman.

Judge Jackson, as you may know, I ask the following two preliminary questions of every nominee who appears before any of the Committees on which I sit, so I will ask you these two questions first:

Since you became a legal default, have you ever made unwanted requests for sexual favors or committed any verbal or physical harassment or sexual assault of a sexual nature?

Judge JACKSON. I have not.

Senator HIRONO. Have you ever faced discipline or entered into a settlement related to this kind of conduct?

Judge JACKSON. I have not.

Senator HIRONO. Judge Jackson, my colleague from Missouri seems to think that it is appropriate for Federal judges to sentence individuals below—inappropriate to sentence individuals below the sentencing guidelines in these kinds of cases, horrific cases and so, I think it is important to offer a couple of clarifications for the record.

Judge Jackson, when the U.S. Sentencing Commission first addressed the issue of sentencing in this area in 2012, do you remember that only 40 percent of convicted offenders in this category were receiving sentences within the guidelines?

Judge JACKSON. Senator, I don't remember, exactly, the number, but I do know that there was a great deal of variance from the guidelines.

Senator HIRONO. Forty percent.

Judge JACKSON. Uh-huh.

Senator HIRONO. Would you be surprised to learn that the Department of Justice, which prosecutes these cases, sent a letter to the U.S. Sentencing Commission in 2013 stating that the existing sentencing guidelines for child pornography offenses do not accurately reflect the current landscape of child pornography offense conduct?

Judge JACKSON. I don't remember that particular letter, but there was a lot of concern about this guideline from all sides.

Senator HIRONO. And now the Sentencing Commission issued another report just last year on this topic. And do you know that as

of that report, an even lower percentage of convicted offenders were receiving sentences within the guidelines?

Did you know that——

Judge JACKSON. I am not surprised. I——

Senator HIRONO [continuing]. It was 40 percent before and now it is even less?

Judge JACKSON. I didn't know, but I am not surprised.

Senator HIRONO. Did you know that, as of last year, it was just 30 percent of non-production offenders who were sentenced within the guidelines?

Judge JACKSON. I did not know, but I am not surprised.

Senator HIRONO. My Republican colleagues made a big show yesterday of promising a fair process and, to me, that means ensuring that you are treated no differently than any other Federal judges that have got—nominees that have come before us.

See, there was an article recently that highlighted the fact that many of President Trump's circuit court nominees who were previously district court judges, had also issued below-guideline sentencing to child pornography cases.

Judge Ralph Erickson, who was confirmed to the Eighth Circuit in 2017, with support from every Republican Member of this Committee, who was serving in the Senate at the time, there were at least 11 cases where he sentenced people to below-guideline sentences.

Does that surprise you?

Judge JACKSON. It does not, Senator.

Senator HIRONO. I am not sure if you know Judge Erickson, but do you have any reason to believe he is soft on child pornography, based on these sentences?

Judge JACKSON. I don't have any reason to believe that.

Senator HIRONO. Do you think my Republican colleagues are soft on child pornography just because they voted for Judge Erickson to become a Federal appellate judge, even after he issued these 11 sentences?

Judge JACKSON. Senator, I am not in a position to evaluate whether your colleagues are soft on crime because of their votes. I have no reason to believe that.

Senator HIRONO. They voted for this person, but I think it would probably be quite unfair to characterize him as being soft on child pornography.

I would also like to talk to you about Judge Joseph Bianco, who was confirmed to the Second Circuit in 2019 with support from every Republican Member of this Committee who was serving in the Senate at the time, including Senator Hawley.

In the case, *United States v. Bowen*, Judge Bianco sentenced a defendant to 60 months in prison when his guidelines range was 151 to 188 months. And here is what Judge Bianco said in the sentencing transcript for that case, quote, "and the guidelines here are just way disproportionate under the facts of this case and I don't view them as particularly helpful in this case. I believe the probation department got it right in terms of the statutory, mandatory minimum being sufficient, but not greater than necessary to achieve the factors of sentencing," quote.

I am not sure if you know Judge Bianco, but do you have any reason to believe that he is soft on child pornography, based on that sentence or those comments?

Judge JACKSON. I do not, Senator.

Senator HIRONO. Do you think my Republican colleagues, including Senator Hawley, are soft on child pornography, because they voted to confirm Judge Bianco to the Second Circuit, even after he issued below-guideline sentences and made these comments?

Judge JACKSON. I have no reason to believe that.

Senator HIRONO. Here are some of the other circuit judges that all of my Republican colleagues voted to confirm, despite the fact that they sentenced child pornography defendants to below-guideline sentences: Judge Amul Thapar on the Sixth Circuit; Judge Richard Sullivan on the Second Circuit; Judge Andrew Brasher on the Eleventh Circuit.

Again, I am not sure if you have ever met these judges before, but do you have any reason to believe they don't take child pornography seriously?

Judge JACKSON. I do not.

Senator HIRONO. I would like to note that Senator Cruz referred to a chart that listed eight cases and the Government recommendations and the sentencing guidelines, and that you did not adhere to those sentencing guidelines.

What was not included in the chart was what the probation recommendations were, and if you add those probation recommendations, in five of the cases you followed the probation recommendations. In one instance you were lower and one instance, you were higher than the probation recommendations.

Mr. Chairman, I would like to introduce the complete chart for the record.

Chair DURBIN. Without objection.

[The information appears as a submission for the record.]

Senator HIRONO. You have been asked to answer a lot of questions about your judicial philosophy. Some of my colleagues, particularly on the other side, seem dead-set on finding out if you are an originalist, a textualist, if you believe in a living Constitution, or various other labels.

I don't find these labels particularly useful. Take originalism, proponents claim you just have to dig deeply enough into the historical record and you'll somehow find the one true meaning of a constitutional provision.

The fallacy of this approach is illustrated in *District of Columbia v. Heller*. There, Justice Scalia's majority opinion and Justice Stevens' dissenting opinion each apply originalism, Justice Stevens, more effectively, in my opinion, and reach completely different conclusions about the scope of the Second Amendment.

Take textualism. In *Bostock*, Justice Gorsuch applied textualism to find that Title VII of the Civil Rights Act protected employees from discrimination, based on sexual orientation and gender identity.

In dissent, Justice Alito mocked Justice Gorsuch's application of textualism and he wrote the following, Justice Alito, quote, "the Court attempts to pass off its decision as the inevitable product of the textualist school of statutory interpretation, championed by our

late colleague, Justice Scalia, but no one should be fooled. The Court's opinion is like a pirate ship; it sails under a textualist flag, but what it actually represents is a theory of statutory interpretation that Justice Scalia excoriated; the theory that courts should update old statutes so that they better reflect the current values of society," end quote.

These are two Justices who are usually in agreement. So, so much for labels.

So, instead of trying to affix some label on you, I would rather focus on the fact that you are fair and objective in your approach, that you are even-handed in your application of law to the facts, and that you are independent. During your last confirmation hearing, you spoke about judicial independence, about what you learned during the three clerkships and your then 8 years on the bench.

You said, and I quote, "I know very well what my obligations are, what my duties are: not to rule with partisan advantage in mind, not to tailor or craft my decisions in order to gain influence or anything of the sort," end quote.

Well said.

So, my question is the following: What do you do to ensure that you maintain independence, free from partisanship when you handle a case?

Judge JACKSON. Thank you, Senator.

What I do and what I have done in all of my 570-some-odd opinions is to apply a methodology that is designed to ensure my impartiality and to respect the limits of my judicial role. What it means is that I am receiving the cases and at the outset, I am setting aside any personal views that I might have about the parties, about the issues.

As I also said in my D.C. Circuit confirmation, it doesn't matter to me whether the argument is being made by the President of the United States or a death row inmate. What I am doing is looking at the argument. I am looking at the facts. I am applying the law in as neutral and consistent manner as I can, because that is the duty and requirement of the judicial oath.

I am also very conscious of the limits of judicial authority, of the restrictions that exist in the law to prevent me, as a judge, from becoming a policymaker. This means that I carefully scrutinize my jurisdiction. It means that I look at the text and focus on the text and the intentions of the legislatures that drafted that provision, or the intentions of the framers that put forward that constitutional principle. It means I am looking at precedent.

If I was fortunate enough to be confirmed to the Supreme Court, I would be upholding the principles of stare decisis as I consider the precedents, in making sure that the Court is putting forward consistent and predictable rulings, as is important, to maintain the rule of law.

All of these I see as constraints on judicial authority that I care deeply about in order to maintain my independence, as is necessary, to ensure public confidence in my rulings as a judge.

Senator HIRONO. Judge Jackson, I have sat on this Committee now for a number of years and as some of my colleagues continue to try to pin labels on the nominees that come before us, frankly, I find your methodology to be as succinct a definition of what would

lead a judge to come up with fair and objective results. I thank you for that.

As a lower court judge, you were generally bound by the Supreme Court's and the D.C. Circuit's precedents. That certainly won't be the case if you are confirmed to the Supreme Court. The Supreme Court can overturn its own precedents.

That is why I found your analysis in *Committee on the Judiciary v. McGahn* instructive. In that case, you had a precedent, *Committee on the Judiciary v. Miers*, that had already confronted the issue you faced; however, it was another district court decision and you were not bound by it. You, nonetheless, followed that precedent.

Why did you find that opinion so persuasive?

Judge JACKSON. Well, Senator, in the law, there are different kinds of precedent, and by that, I mean there is vertical precedent, which is what people are most familiar with. There are cases that are handed down by higher courts, the appellate court, the Supreme Court, and those bind the lower courts, so that even if you disagree with them, you have to follow them because they are binding precedent.

But there is also horizontal precedent. It, too, is about maintaining consistency and predictability in the rule of law. And what that means is that when you are in a district, there are many judges and if someone else in your district has handled a case that comes out or that involves the same issues, it comes out in a certain way, you, as the second judge, have to contend with that ruling. You can't ignore the fact that there is precedent in your district that handles a case in a particular way.

And with respect to the *McGahn* case, the precedent wasn't just close; it was nearly identical.

The *Miers* case involved the former White House Counsel and the argument by the Executive that the former White House Counsel had absolute immunity in, with respect to a request by the legislature that she provide testimony.

My case involved a former White House Counsel who was claiming absolute immunity at the request of the Executive, in response to a legislative subpoena.

In both cases, not only was the absolute immunity issue on the table, but in both cases, the same threshold issues about whether or not there was jurisdiction in the court because the legislature had standing or didn't have standing, which was the argument that was being made. The same question about whether the court could hear a dispute between the legislature and the executive branch. All of those issues had previously been considered by my colleague in the district court and he wrote an extensive, I am talking about Judge Bates, he wrote an extensive opinion analyzing each of the issues, and so at a minimum, as the second judge dealing with these exact same issues, I had to look at what he did and decide, was it persuasive? Did I agree?

And I did.

Senator HIRONO. Judge Jackson, of course, if there had been a vertical precedent, i.e., from the Supreme Court or the circuit court that was on point to your *McGahn* situation, yes, you would have had to follow that precedent, but there wasn't, and so you followed

a reasoning by another district judge. That made a lot of sense to me and that certainly makes sense to me.

You discussed *stare decisis* and the importance of precedent in your opinion, and this is what you wrote, quote, it is interesting to note that the doctrine of *stare decisis* performs a limiting function that reflects the foundational principles that undergird the Federal Government's tripartite constitutional system. This is 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 saying what the law is and into the realm of legislating what the law should be.

I know that you have been asked today the questions about the importance of precedent before, but maybe you can just tell us one more time why precedent is important in our judicial system.

Judge JACKSON. Thank you, Senator.

Our judicial system is one that is designed to uphold the rule of law. Unlike other systems in other societies—some other societies, we believe that we have a government of laws and not men, and yet, there are men and women who are acting as judges in the context of our system.

What precedent does is ensure that there is consistency across the different individuals who are tasked with the solemn responsibility of interpreting the law. It ensures that there is public confidence that the law is what is guiding judges in their decision-making and not just their own individual views.

And so, it is crucial for maintaining public confidence, maintaining stability in the law, establishing a system that has predictability in it, all of which supports confidence in the judiciary, which is the currency of the judicial branch.

Senator HIRONO. Because of the importance of precedents and promoting confidence, et cetera, I mean, people need to know what the law is and so, precedent is important on that score.

And if you are confirmed to the Supreme Court, what factors would you consider before overturning precedent?

Judge JACKSON. Well, there are many factors that the Supreme Court considers and not just whether they think a prior precedent is wrong; that is one of the factors. The Court has said that a precedent that is egregiously wrong is one that is subject to reconsideration, but in order to actually make the determination about overturning it, in addition to it being wrong, the court considers whether or not there has been reliance on that precedent, and if so, how much. The court considers whether or not the precedent is workable. Sometimes the court will issue a ruling in a case and it turns out that it is not actually functioning in the way that the court intended, and so that might be a reason to revisit it. The court considers whether or not other precedents in the area have shifted, such that the foundation for the particular precedent is no longer sustainable. And the court considers whether there are changes in the fact that relate to that precedent or a new understanding of the facts that relate to a precedent.

All of those factors are things that a court takes into account that the Supreme Court takes into account when it decides whether or not to revisit a precedent.

Senator HIRONO. Therefore, the Court should consider all of those factors, I would say reliance factors loom large, as far as I am concerned, before overturning a precedent. But, basically, if you have five members of the Court deciding to overturn a precedent, they can do so, right?

Judge JACKSON. Under our scheme, yes; under the Constitution.

Senator HIRONO. And so, we are seeing more and more, precedents being asked to be overturned. An analysis by national affairs found that since 2017, when Justice Gorsuch was appointed to the Court, the Court has shown, and I quote, “an increasing readiness to overturn precedent,” end quote.

This is true for both, longstanding precedents and those that are just a few years old. For example, in 2018, *Janus* decision, the Court overturned a 41-year-old precedent called *Abood*. That decision weakened public sector unions.

Justice Alito first signaled that he wanted conservative anti-union groups to challenge *Abood* in his 2012 decision in *Knox v. SEIU*. This is called signaling, and Justice Alito definitely signaled his desire to revisit the *Abood* decision.

So, yes, these groups, they got the message. They brought case after case to meet the criteria that Justice Alito laid out and although they came close in 2016, Justice Scalia’s death left the Court stuck in a 4–4 decision in a case called *Friedrichs v. California Teachers Association*.

Basically, the minute Justice Gorsuch was confirmed, the Court finally had a conservative 5–4 majority to overturn *Abood* and the result was *Janus*. I follow these lines of cases very closely, so that is what happened. They waited for Justice Gorsuch and, boom, 5–4 against unions.

In another example, the Court’s acknowledged four most conservative Justices, Thomas, Alito, Gorsuch, and Kavanaugh, dissented in *June Medical*, voting to overturn a precedent banning burdensome and unnecessary restrictions placed on abortion providers. This particular precedent was only 4 years old. Now, the Court is poised to overturn *Roe v. Wade*, even though women have relied on their constitutional right to have an abortion for nearly 50 years.

Of course, I am not suggesting that Supreme Court precedents are sacrosanct, because I am thankful the Court can and did revisit precedents like *Plessy v. Ferguson* that were wrong the day they were decided.

But Justices should not be seen to be amassing their individual, political, or ideological agendas at the expense of individual rights and precedents that people have relied on. One result of the Court’s new approach is that people’s view of the Court is changing for the worse. A recent Pew poll found that 44 percent of Americans now disprove of the Supreme Court. This is up 15 points from August 2020, shortly before the late Justice Ruth Bader Ginsburg died and Amy Coney Barrett was appointed to fill her seat.

I think court watchers acknowledge there is an ideological split in this current Supreme Court when we are seeing more cases decided on ideological bases, not on the facts and the law. I think it leads to the American people questioning whether the Court is a fair and objective arbiter of cases in controversy.

You were asked earlier today about your representation of Guantanamo detainees. Just to make it clear, as a Federal public defender, you were assigned to represent Guantanamo detainees; is that right?

Judge JACKSON. That is correct, Senator.

Senator HIRONO. And then while at Morrison & Foerster, you also did pro bono work for Guantanamo detainees. Were you assigned to do that work, as well?

Judge JACKSON. So, there was one detainee who I had represented as a Federal public defender, who was brought into my firm's practice, unbeknownst to me, and when I arrived at the firm, the attorneys who were working on that case, recognized that I had previously been a lawyer who had represented this particular detainee and asked if I would help with his habeas petition at that stage.

Senator HIRONO. I think you clarified that earlier today. And you served as counsel of record on amicus briefs related to detention; I think that was brought out today.

Judge JACKSON. Yes.

Senator HIRONO. Were you working on behalf of detainees at that point or were you working on behalf of other groups or individuals?

Judge JACKSON. I was working on behalf of other groups or individuals with respect to—

Senator HIRONO. Were they retired judges?

Judge JACKSON. I—yes, there were three briefs in total, two different cases. And one of the briefs that I filed was on behalf of 20 retired Federal judges, including one who was a partner at my firm at the time, and who wanted to make a particular argument to the Court concerning the detention process.

Senator HIRONO. And these were judges that were nominated by various Presidents; it must have been a diverse group, and they asked you to do the brief.

Judge JACKSON. And they did, yes.

Senator HIRONO. So, as part of your work at the law firm, a responsibility of your employment, you were assigned to work with this diverse group of retired judges and to represent conservative or libertarian organizations such as the Cato Institute and the Rutherford Institute to advocate their views.

Judge JACKSON. Yes, the other two briefs that I filed were at the cert stage and then at the merits stage of a case that was eventually mooted, but my clients in those cases were a diverse group of organizations, including the Cato Institute, the Rutherford Institute, and the Constitution Project.

Senator HIRONO. Members of this Committee know full well that lawyers are, we are, we have to follow the Code of Professional Conduct, which says that we have to zealously represent our clients and that is what you were doing, with regard to the detainees.

And I would just want to note that some of the very Senators who are openly questioning you for representing defendants or detainees have, in the past, made the argument that judicial nominees should not be opposed for the arguments they make in the course of representing clients.

I am going to quote one of my colleagues: "I have been a military lawyer for almost 30 years. I represented people as a defense attor-

ney in the military that were charged with some pretty horrific acts and I gave them my all. The system of justice that we are so proud of in America requires the unpopular to have an adequate and an advocate. And every time a defense lawyer fights to make the Government do their job, that defense lawyer has made us all safer.”

Do you agree with that?

Judge JACKSON. I do, Senator.

Senator HIRONO. In 2012, prominent conservative lawyers signed a letter defending attorneys who have represented Guantanamo detainees and part of that letter said, quote, “The American transition of zealous representation of unpopular clients is at least as old as John Adams’ representation of the British soldiers charged in the Boston Massacre. Good defense counsel is key to ensuring that military commissions, Federal juries, and Federal judges have access to the best arguments and most rigorous factual presentation before making crucial decisions that affect both national security and paramount liberty interests,” end quote.

So, the quote that I read isn’t the first time that my colleagues on the other side of the aisle have tried to say that your representation and your work as a public defender, somehow, I don’t know, disqualifies you or makes you leaning one way or the other. So, you have made it very clear that that is not what you are about.

I just have one more question in the remaining time—oh, I am sorry. I am over.

Chair DURBIN. Senator, I am sorry. We are on a roll call.

Senator HIRONO. I am on such a roll.

Chair DURBIN. You are on a roll and we are on a roll call.

Senator HIRONO. Yes. Thank you.

I apologize.

Senator CRUZ. Mr. Chairman, before we break, if I could ask one question of the Chairman?

Chair DURBIN. Sure.

Senator CRUZ. Senator Hirono just made reference to the recommendations of the Probation Office in five of these cases. To the best of my knowledge, those probation recommendations are not in the record. I haven’t seen them. My staff hasn’t seen them.

And that raises two questions: number one, whether the White House is providing differential material on this nominee’s background to Democratic Members than Republican Members, because I don’t know where Senator Hirono would get access to them, other than from the White House.

But, second, regardless of whether it is differential, would the Chairman agree that there is considerable focus on these cases and the Committee, both sides, should have access to the presentence reports and to see the underlying facts.

Judge Jackson has said she was following the facts and the factors in those cases—

Chair DURBIN. Senator, you know we completed discovery before we started this hearing.

Senator CRUZ. Mr. Chairman, how did Senator Hirono—

Chair DURBIN. For you to now—

Senator CRUZ. How did Senator Hirono get the information that the Republicans have not been given?

Chair DURBIN. I am not going to entertain this. We have been through discovery.

Senator CRUZ. Do you have access to them?

Chair DURBIN. I don't know that I do. I really don't.

Senator CRUZ. Can we ask Senator Hirono how she got access to them?

Chair DURBIN. I am sorry to interrupt you, Senator, but I want to make an announcement.

We are going to have a 10-minute break. Members are going to head to the floor——

Senator CRUZ. So, you are going to keep differential access to this information?

Chair DURBIN. I am not sure what differential access—I'll look it up.

We have a vote on the floor that will take about 10 minutes. So, 10 to 15 minutes, relax, and then we are going to come back and we have two Senators, Cotton and Booker, who will be recognized and then take a break for dinner, and then we are going to try to still finish tonight with two remaining Senators, Senator Ossoff and Tillis, who are going to be first thing in the morning.

So, we stand in recess.

[Whereupon the hearing was recessed and reconvened.]

Chair DURBIN. The Senate Judiciary Committee will resume.

I want to make one thing clear for the record. Senator Blackburn, you're going to be recognized this evening because Senator Tillis has asked—he's volunteered to be paired in the morning with Senator Ossoff for the morning show.

Senator BLACKBURN. Yes. Mr. Chairman, I just felt like we should——

[Voice off microphone.] Microphone.

Senator BLACKBURN. It's on. My voice is just soft. I felt like we should finish tonight and——

Chair DURBIN. We're trying to.

Senator BLACKBURN. I know.

Chair DURBIN. Senator, there are a lot of people involved in this. I'm doing my best.

Senator BLACKBURN. I fully appreciate that.

Chair DURBIN. And you asked to be on the program tonight, and we're going to put you on the program.

Senator BLACKBURN. And I appreciate that.

Chair DURBIN. How about that?

Senator BLACKBURN. Thank you.

Chair DURBIN. Okay. Good.

Senator Cotton.

Senator CRUZ. Mr. Chairman, before we start this questioning, right before the break, I asked the Chairman about—Senator Hirono had referenced five probation reports that were not in the record, and I asked the Chairman whether the Democrats had access to information about Judge Jackson's judicial record that Republicans did not. You did not answer me at the time, but as we returned——

Chair DURBIN. I can give you an answer. I can give you an answer.

Senator CRUZ. Okay. Well, hold on. Let me finish my question. When we returned and when we walked in, each of the Republicans was handed this piece of paper, which is the first time any of us have ever seen, which is a chart of probation recommendations. We were just told that the White House gave it to Democrats earlier today. I don't know if that's true or not. And what I would ask you is, is there anything else that Democrats have access to in this case that they're not sharing with Republicans on this Committee? And, Mr. Chairman, how would you have reacted if, say, during the Kavanaugh confirmation, the White House shared judicial materials with Republicans and did not share it with Democrats? I'm pretty confident you would've expressed extraordinary displeasure at that.

Chair DURBIN. If I recall, there were some discovery issues in the Kavanaugh case involving several years of his performance in the White House, which your own counsel decided we couldn't—

Senator CRUZ. But, sure, that's disclosure to the whole Committee.

Chair DURBIN. Yes, right.

Senator CRUZ. And in this case, is there anything else that Democrats have access to of Judge Jackson's record that you have not shared with Republicans on this Committee, and, in particular, the presentence reports?

Chair DURBIN. No, I—

Senator CRUZ. I suspect if they were helpful, you would've made them public, so the fact that you haven't raises an inference that they're not helpful to the case you're making.

Chair DURBIN. Senator, you always draw your own inferences, and I know where most of them head. I will just tell you that the information that we received from the White House, I am told everyone had access to if they wanted it, and now you have it, just a matter of hours after we've received it—

Senator CRUZ. So is there anything else Democrats have that Republicans do not from Judge Jackson's record?

Chair DURBIN. Not to my knowledge.

Senator KENNEDY. Mr. Chairman, could I ask you a question about this?

Chair DURBIN. Sure.

Senator KENNEDY. I want to be sure I understand. The handout that I just saw, the White House gave to some of us earlier today but not all of us?

Chair DURBIN. It was available, I'm told. The information was available to anyone who requested it. The White House—

Senator KENNEDY. So you had to be clairvoyant—

Chair DURBIN. No.

Senator KENNEDY [continuing]. And know they had it?

Chair DURBIN. No, not clairvoyance. I think it's pretty obvious, Senator. If when—

Senator CRUZ. How would you know to request it?

Chair DURBIN. Well, you would know it after Senator Hawley launched his attack on the judge. At that point, all of this information became relevant to countering—

Senator KENNEDY. So I would be expected to say, geez, after Senator Hawley asked questions, I'd better call the White House and see if they can help me research this? That's not realistic.

Chair DURBIN. No, that's not the point. The point I'm getting to is, and you know as a good lawyer what you do during discovery. I wasn't aware of the fact that this was available. The White House requested it, received it. We asked for a copy, and within an hour or two, you received the same copy.

Senator KENNEDY. When did y'all get—let me finish. When did y'all get your copy?

Chair DURBIN. Sometime today.

Senator KENNEDY. Sometime today. That covers a lot of ground, Richard.

Chair DURBIN. I don't have any personal knowledge of this, I'll be honest with you.

Senator KENNEDY. You don't have any personal what?

Chair DURBIN. Knowledge.

Senator CRUZ. Does your staff?

Senator KENNEDY. Does your staff know?

Chair DURBIN. I haven't—

Senator CRUZ. They're standing behind you.

Chair DURBIN. I talked to them earlier and—

Senator BOOKER. Mr. Chairman, I'm so sorry. I just don't want to make this a partisan issue if it doesn't have to be. My staff just says we just got it 10 minutes ago as well, so I'm very upset. I join Ted Cruz.

Chair DURBIN. Good.

[Laughter.]

Senator LEE. Mr. Chairman?

Chair DURBIN. That's an alliance that's well known.

Senator BOOKER. Yes. Yes.

Senator LEE. Mr. Chairman, I do think it's significant. We've had now reference to presentence reports, and we've got this material that references recommendations made by the Office of Adult Probation and Parole.

Chair DURBIN. We don't—we don't have presentence reports, Senator.

Senator LEE. Well, okay, but we've got critical information that is contained within them. The recommendation made by the Office of Adult Probation and Parole in these cases is something that's drawn from the presentence report. It seems to me that if we're going to have a jot-for-jot selective incorporation of information in there, we ought to have access to the whole report. So I respectfully request that we be given access to these reports. They've been made now by a Member of the Committee in reliance on information that we haven't had access to, and I think we need to be given those. You can't—you can't—

Chair DURBIN. Senator, I'd like to draw this to a conclusion. I can tell you what I know and—

Senator LEE. Well, so would I.

Chair DURBIN. And here's the point. Most of this information was published in The Washington Post 5 days ago, all right? This is not confidential information. When the Hawley attack on the judge started, we requested more information—the White House did—

and then shared it with us within the day, and you now have the same copy that we have. End of story.

Senator LEE. Is it fair for you to characterize Senator Hawley's questions or the questions raised by any of us as an attack?

Chair DURBIN. Yes.

Senator LEE. It's not a personal attack. This is a——

Chair DURBIN. Let me just tell you, a difference of——

Senator LEE. We've raised a legitimate question regarding sentencing regarding the most heinous crimes imaginable.

Chair DURBIN. Oh, come on.

Senator LEE. So these were legitimate questions, Mr. Chairman. Don't call them attacks.

Chair DURBIN. Well, I can just tell you, I've characterized them as attacks and other things as well. I think it's pretty clear what's going on here, and now you have all the information we have. Is that enough?

Senator CRUZ. So, Mr. Chairman, for example, in the questioning about the *Hawkins* case, Judge Jackson said she relied on the factors, relied on Probation's recommendation. We just found out in what you just handed us that in the *Hawkins* case, the Probation Office recommended 18 months, and Judge Jackson only sentenced him to 3 months. You can get more than that almost for a speeding ticket.

Chair DURBIN. Senator——

Senator CRUZ. This Committee, given that she raised it as the basis for her sentence, it is highly relevant to the Committee's analysis to see what the presentence report says. Why did the Probation Office recommend 18 months and she only sentenced to 3 months?

Chair DURBIN. March 19th, The Washington Post. In the case of *U.S. v. Hawkins*, the sex offender had multiple images of child porn over 18. Sentencing guidelines called for a sentence up to 10 years. Judge Jackson sentenced the perpetrator to only 3 months in prison. Printed.

Senator CRUZ. But those facts we knew.

Chair DURBIN. Yes.

Senator CRUZ. It's the Probation recommendation. We don't dispute that the guidelines set at 10 years and she sentenced him to 3 months.

Chair DURBIN. Sorry. I didn't finish reading it. The Government and Probation both recommended sentences well below the guidelines. The Government recommended 24 months, Probation recommended 18 months, and defense recommended 1 day. I'm telling you, it was published in the newspaper. Now——

Senator CRUZ. Well, I can't help what is leaked to the newspaper or not. This Committee—you keep referencing discovery. This is not litigation. This is a Committee of the United States Senate where both sides of the aisle have a right to access to the record, and we're carrying out our constitutional duty of advice and consent.

Chair DURBIN. I will tell you this. For some reason, your side didn't request the information.

Senator CRUZ. But how would we know to request it? So I'm hereby requesting all other information you magically have that

you haven't told us you have and you're not sharing with the other side.

Chair DURBIN. So noted. So noted for the record. We'll continue with the questioning now. Senator Cotton.

Senator CRUZ. And we're requesting the presentence reports, in particular, which are highly relevant to the issues before this Committee.

Chair DURBIN. Senator Cotton, please proceed. We don't have any presentence reports.

Senator COTTON. Judge, I'd like to talk about crime. In 2019, there were about 16,000 murders in America. In 2020, there were more than 20,000. That's a 25-percent increase in 1 year. 2021 data isn't complete, but we know many cities have reached record levels of murder, including Philadelphia, Atlanta, and Milwaukee. At the same time, the prison population has decreased by about 14 percent, in part from pandemic policies, but also from fewer prosecutions and weaker sentencings. I think it's safe to say that there's a surge in crime, especially violent crime and murder across America. You have noted that some members of your family have law enforcement backgrounds, and I honor them and thank them for their service. Does the United States need more police or fewer police?

Judge JACKSON. Thank you, Senator. As you just noted, I have law enforcement in my background, and I am very familiar with the problems that crime causes in the communities where we live.

Senator COTTON. Okay. Judge, I'm sorry. We have a few minutes here. You have a lifetime appointment if you're confirmed. I asked a simple either/or question. Does the United States need more or fewer police?

Judge JACKSON. Senator, the determination about whether there should be more or fewer police is a policy decision by another branch of Government. It is not something that judges have control over, and I will stay in my lane in terms of the kinds of things that are properly in the judicial branch.

Senator COTTON. Okay. If you don't want to address whether the United States needs more or fewer police, we'll move onto sentencing, which is certainly in your lane. There's been a lot of talk about criminal justice and sentencing approaches and theories today. In general, is someone more likely or less likely to commit a crime if they know that they will be caught, convicted, and sentenced?

Judge JACKSON. Senator, what is in my lane is the consideration of particular cases of prosecutions—

Senator COTTON. Judge, you've spoken—you've spoken a lot today about criminal sentencing, about the theory of sentencing. You've written a lot about it in your record. It is a very simple question. Is someone more likely or less likely to commit crime if they're more certain that they're going to be caught, convicted, and sentenced?

Judge JACKSON. Senator, I am aware from my work on the Sentencing Commission and not as a judge that there is research into recidivism rates, into rehabilitation, into the factors that go into a determination about whether someone is more or less likely to commit crime. Part of what Congress has taken into account when it

determines that one of the purposes of punishment is deterrence is the idea that if someone is convicted and punished, they will be deterred from committing other crimes.

Senator COTTON. And you've mentioned that, and you've written about that in your writings. There's four purposes of punishment. One of those is deterrence. Isn't it inherent in the concept of deterrence that people are less likely to commit crime if they're more likely to get caught, convicted, and sentenced? Why can't you just say that's the case?

Judge JACKSON. Senator, it's not that I'm avoiding saying that's the case. It's that I——

Senator COTTON. No, that's—Judge, that's exactly what you're doing. I'm asking a very simple question. In general, is someone more likely or less likely to commit a crime if they know they're going to be caught, convicted, and sentenced——

Judge JACKSON. It's very——

Senator COTTON [continuing]. As a part of deterrence theory?

Judge JACKSON. It's very difficult to answer questions in general when you're asking about things like phenomena related to crime. It's the theory behind deterrence that by punishing someone, they will be less likely to commit the crime in the future. That is a theory that undergirds——

Senator COTTON. Do you think that theory is correct?

Judge JACKSON. Senator, there is research that supports that deterrence is something that can occur. Does it occur in every case? I can't say that.

Senator COTTON. Okay. Let's turn to something more concrete then. Do you know how long the average inmate convicted for murder serves in prison in America?

Judge JACKSON. No, I don't.

Senator COTTON. The answer is, 17 years on average. Is 17 years too long or not long enough for a criminal to spend in prison for murder?

Judge JACKSON. Senator, these are policy questions. Whether they're in the province of the Sentencing Commission in terms of recommendations, whether they are in Congress, they're not the kinds of things that I can opine about.

Senator COTTON. So you don't want to opine on whether 17 years is too long or too short a sentence for murder.

Judge JACKSON. Senator Cotton, the Congress has prescribed a number of factors that judges look at when they sentence. It may in many cases not be. I don't—I can't answer in the abstract in the way that you——

Senator COTTON. Well, these are very concrete. Let's turn to rape. Do you know how long the average inmate convicted of rape serves in prison in America?

Judge JACKSON. Well, Senator, rape is not a crime in the Federal system that I'm familiar with working with, so I don't know.

Senator COTTON. It's 7.2 months. Do you think 7.2 months is too long or too short for someone convicted of rape to be sentenced to prison?

Judge JACKSON. Senator, that's a policy question about the egregious crime of rape, and Congress has said that the court is sup-

posed take into a number—take into account a number of factors when it sentences.

Senator COTTON. Okay.

Judge JACKSON. I can't answer in the abstract.

Senator COTTON. Well, these are—Judge, these are not abstract. These are very concrete, and, remember, these are just the length of sentence if you're caught, convicted, and sentenced. Let's look at cases in which people are never caught. As I said, in 2020, murders increased by the fastest rate ever in the United States. Do you know what percentage of murders are solved in America?

Judge JACKSON. I do not, Senator.

Senator COTTON. The answer is, about half, 54 percent in 2020. Do you think we should catch and imprison more murderers or fewer murderers?

Judge JACKSON. Well, Senator, it's very important that people be held accountable for their crimes, so that is a fundamental tenet of the rule of law.

Senator COTTON. So is that a, yes, we should catch more murderers, specifically the 46 percent of murderers who get away with it?

Judge JACKSON. Senator, I'm not—to the extent you're asking about enforcement or law enforcement, those—

Senator COTTON. It's a—Judge, it's a very simple and common-sense question. Forty-six percent of all murders go unsolved. Should we catch more of those murderers or should we catch fewer of them?

Judge JACKSON. Senator, we should hold people accountable for their crimes, and so if people are not being held accountable, then that is a problem.

Senator COTTON. Let's turn to assaults. Do you know how many assaults were solved in this country in 2020?

Judge JACKSON. No, Senator.

Senator COTTON. Forty-four percent, so 56 percent of all assault victims did not receive justice. Do you think we should catch and imprison more criminals who commit assault against innocent people or fewer?

Judge JACKSON. Senator, it's very important that people be held accountable for their crimes, so if they're not, then it would be a problem for the rule of law.

Senator COTTON. Let's look at sexual assault and rape. Do you know how many—what percentage of sexual assaults and rapes go unsolved in this country?

Judge JACKSON. I do not, Senator.

Senator COTTON. Seventy-seven percent. More than three-quarters of all sexual assaults and rapes go unsolved. Do you think we should catch and imprison more rapists and sex criminals or fewer?

Judge JACKSON. Senator, one of my two uncles was a detective in a sexual crimes and battery unit, so I'm very familiar with that type of crime. It's a horrible type of crime as are all of these that you are articulating, and it is important for people to be held accountable for criminal behavior. It's fundamental to the rule of law.

Senator COTTON. Okay. So in 2020 alone, well over 1 million—1 million—violent crimes went unsolved in America. Do you think we imprison too many violent criminals or not enough?

Judge JACKSON. Senator, it's important for our rule of law to ensure that people are held accountable who are breaking the law in the ways that you mention and otherwise.

Senator COTTON. What do you think the families of all those victims think? Do you think they think that we should arrest, and convict, and sentence all these criminals who get away with it?

Judge JACKSON. Senator, I know what the families of law enforcement officers think because I'm one of them. I know what crime does to our society. I care deeply about public safety. And as a judge, it's been my duty when I was at the trial level—I'm no longer there—but when I was at the trial level to ensure that people are held accountable for their crimes.

Senator COTTON. Okay. Let's turn to the crime of child pornography. I know there's been a lot of talk about it today. I don't want to spend much time on it. A lot of people have tried to explain the various differences in these cases, and the presentencing reports, and the sentences they got, so let me just ask you a simple question about it. Should the United States strengthen or weaken sentences for child pornographers?

Judge JACKSON. Senator, that's not a simple question, and the reason is because what this country does in terms of penalties is in Congress' province. You all decide. You all decide what the penalties are. You decide what the factors are that judges use to sentence. If you determine that any set of penalties is insufficient, then it is in your purview to make that determination. There are many crimes that Congress has determined warrant mandatory minimum penalties, warrant other kinds of penalties, and that is in your purview to determine.

Senator COTTON. I have to say, Judge, I think whether or not we should strengthen or weaken sentences for child pornographers is a pretty simple question, but I'll move on. I think the difference we've heard today gets to this simple fact that a bunch of elite lawyers, whether they are judges, or Federal prosecutors, or public defenders, or law professors, think that sentences for child pornography are too harsh. I don't, and I bet a lot of normal Americans don't either. You have said repeatedly that sentencing is a discretionary act, and I understand that and I agree with it, but you always seem to use your discretion in these child pornography cases to reduce the sentences. I have to say if I have that discretion, I'd probably throw the book at child pornographers. Maybe that's just me.

Now let's turn to drug crime. Last year, more than 100,000 Americans died from drug overdose. Drug overdose deaths and gang crime have both skyrocketed in recent years. At the same time, a lot of soft on crime laws and lower sentences have been advocated, including, on occasions, Judge, by yourself. In general, do you think the United States should weaken or strengthen sentences for fentanyl traffickers? Traffickers, not users.

Judge JACKSON. Senator, whether or not Congress chooses to strengthen or weaken penalties for any crime is a determination of this body, which is ordinarily made after study, and review, determination. That is in the province of Congress.

Senator COTTON. Well, Judge, you've said before that sentencing is a discretionary act, so that is literally the job of the judge in

many of these cases to determine whether to have a shorter or longer sentence.

Judge JACKSON. Respectfully, Senator, the judge makes that determination not based on one data point in general, which is what you asked me—in general, should we lower or heighten sentences. A judge is making a determination in a particular case, looking at all of the factors. It's discretionary for sure, but we do so within the bounds of a sentencing range that Congress prescribes. And at times in which Congress decides that a penalty needs to be heightened, they impose a mandatory minimum, then our range is shorter. And when we're looking at the crime, we're not looking as a policy matter across all fentanyl crimes in determining whether the penalty should be increased.

As a judge, we are asked, in the context of a single prosecution regarding a particular person who has committed a horrible crime but also, says Congress, is a person who has a life, who has a job, who has all of the other factors, that Congress has told judges they have to look at, when they decide what penalty to impose in that particular case, between the range that Congress sets. So it's not a situation in which I can, in my role as a judge, tell you as a general matter whether a penalty should be increased or decreased.

Senator COTTON. I have to say I think that not many Americans, especially not the 100,000 Americans who's lost someone to a drug overdose, think these are tough questions, but let's move on. Let's talk about retroactivity. When you were on the Sentencing Commission, you repeatedly advocated for retroactively reducing drug trafficking sentences. So this is a case where a drug kingpin who's dealing fentanyl gets sentenced, and then a few years later he gets lucky. He gets in front of some new judge who's maybe more sympathetic and thinks he got a raw deal, or maybe he just gets in front of the same judge a few years removed from seeing the faces of the victims of his crime. Do you believe that resentencing years after a conviction tends to reduce sentence lengths?

Judge JACKSON. Senator, respectfully, I just wanted to remark on your previous question and your statement that these are not difficult questions. It's not that they're difficult questions. It's that they're not questions for me. I am not the Congress. I am not making policy around sentencing. My job is to look at a particular case and decide what the penalty should be within the range that Congress prescribes.

Senator COTTON. I understand. You were making policy, though, at the Sentencing Commission when you're implementing changes to sentencing guidelines. So my question again is, do you believe that resentencing years after a conviction tends to reduce sentence lengths?

Judge JACKSON. I'm not sure I understand your question. Obviously if you resentence, you're giving the judge another opportunity to look at the circumstances in light of the changed penalties. Sometimes the judge in that new situation will keep the same penalty. A resentencing is just an opportunity for the judge to reevaluate in light of the changed circumstances.

Senator COTTON. Okay. Almost without exception, retroactively weakening sentencing laws and guidelines lets hardened criminals out early. I always hear the argument—I hear it from some of the

Senators on this panel, I heard a version of it from you earlier—that each case is going to go before a judge, and there won't be an automatic release because each judge is going to assess the facts and hear the arguments.

In 2014, you said that judges would not—would not likely reduce the sentences in the vast majority—vast majority of cases if sentencing guidelines for drug trafficking were reduced. I think you missed that one, Judge. Since 2014, retroactive reduction took—when retroactive reduction took effect, approximately two-thirds of all convicted drug traffickers who asked for early release got it. That's 31,614 hardened drug traffickers back on the streets. More than 7,500 of those hardened drug traffickers use weapons in their crimes. So that means that only one-third of these drug traffickers who sought to have retroactive reduction of their sentence were denied. Judge, is one-third a vast majority?

Judge JACKSON. Senator, it's hard for me to answer questions about these numbers because I'm trying to understand whether this is a retroactive release that was a result of the Sentencing Commission's actions or Congress'. Congress made a decision about retroactive reductions in drug penalties, so I'm just not sure what—

Senator COTTON. But, Judge, in both cases, we always hear the argument, whether it's from Members of Congress, to include Senators on this Committee, or the Sentencing Commission, that we shouldn't worry, there's going to be an individualized, case-by-case determination.

Judge JACKSON. And that is my—that is my experience. When there's a—when there is a retroactive change—so what happens is that whether it's the guidelines that are changed or the laws that are changed, which happens in Congress, there is a subsequent determination as to whether or not to apply that retroactively, apply that change, so that both the people who get convicted of that penalty moving forward and the people who have already been convicted, both of them get the benefit of the change if the determination is made to make it retroactive.

Under that circumstance where you're talking about a penalty change applied to prior people, each one of those prior people goes back before a judge, and a judge, usually the sentencing judge in the first instance, will reevaluate whether or not to—this is generally. There are some exceptions, but generally speaking, the judge will reevaluate whether or not to give that person the benefit of the change. This is an individual assessment. That's what Congress requires in every sentence and ultimately one that benefits all of us under the law because judges are being asked to look at these cases and not make just generalized determinations.

Senator COTTON. So the 2014 comment was specifically about the Sentencing Commission, but generally, whether it's in front of the Commission or the Congress, we always hear this argument that judges are going to make these individualized cases, and not that many people will be released. I'll point out that of the one-third that were not reduced, the vast majority of those were not eligible. The percentage of cases in which a sentence is not reduced for public safety reasons because someone is viewed as too dangerous to release early is 1 percent. It's 1 percent.

Judge, do you remember a man named Keith Young?

Judge JACKSON. Yes.

Senator COTTON. Good. For the benefit of my colleagues, let me quickly cover the basics of his case. You sentenced him in 2018. Keith Young was a career criminal who had previously been convicted of trafficking cocaine. In 2017, he was running a drug business in his house where his children lived and was found with two 1-kilogram bricks of heroin worth hundreds of thousands of dollars along with a gun, ammunition, thousands of dollars in cash, and equipment to cut and package heroin for retail sale. The drug lab also confirmed that there was fentanyl in both bricks of heroin. In one of the two bricks, there was actually more fentanyl than there was heroin.

While at the DC jail awaiting trial, Young bragged about his arrest and about how he was a kingpin. Those are his words, not mine: “kingpin.” He was even recorded calling his wife and brother to give them instructions on collecting drug money from people for him. The prosecutors filed a notice of Young’s criminal history, which meant he faced a mandatory minimum of 20 years. You did not seem to like that, Judge. In fact, at his sentencing, you said—this a quote—that you shared his frustration that you couldn’t give him a lighter sentence. I was shocked to see this in the transcript. I was also shocked that you apologized to this drug kingpin for having to follow the law. You literally said that you didn’t think 20 years was fair. This is the quote, “And for this, I am sorry, mostly because I believe in second chances.” You apologized to this career criminal, a drug kingpin in his own words. He was not some low-level, first-time drug offender who made a bad choice. That was in 2018, but in 2020, you got a second chance.

After Young’s sentence, Congress passed something called the First Step Act which reduced sentences for serious drug traffickers with lengthy criminal records. During the pandemic, lots of criminals like Keith Young tried to twist the First Step Act’s compassionate release provision, which was intended for terminally ill, elderly inmates get early release, and blame it on COVID. You had none of that, and that’s good. You rightly said at his resentencing hearing, “COVID-19 is not only present in prisons,” and you said that Young’s past as a smoker and his claim of various other health issues did not entitle him to early release. If you’d stopped there, I would’ve cited that as a great example of how you follow the law and made a well-reasoned decision. Unfortunately, you didn’t stop there.

You said in the resentencing that, quote, “Congress did not make their changes under the First Step Act retroactive,” that if they had, then you could’ve given him a reduced sentence. But then you said, “No matter what the law says,” and this is a quote, Judge, “the Court feels as though in this moment, per Mr. Young’s compassionate release motion, the Court is being called upon to evaluate the length of his sentence under the revised section of law in the First Step Act. And so it is almost as if I am sentencing him today, and if I were to do so, he would face a sentence that would be well below the 240 months that Mr. Young received. And so for that reason, I will grant Mr. Young’s motion.”

Judge Jackson, before you granted this fentanyl kingpin's motion to reduce his sentence, did you contact any of the victims from his case?

Judge JACKSON. Senator, thank you for allowing me to address Mr. Young's situation.

Senator COTTON. I asked a simple question. Did you contact the victims in his case or not?

Judge JACKSON. Senator, Mr. Young was not released. His sentence was reduced, and I did not contact the victims in his case—

Senator COTTON. And that's—

Judge JACKSON [continuing]. Because there were no victims. He committed a crime, a drug crime. There were no identifiable victims in his case.

Senator COTTON. Drug crime is not a victimless crime. A hundred thousand Americans were killed by overdoses last year.

Judge JACKSON. Understood, Senator, but there was no one to contact because there were no identifiable—

Senator COTTON. You just acknowledged—Judge, you just acknowledged that you did not release him. You're right, you didn't release him. He filed a motion for compassionate release. You denied that rightly, but you reduced his sentence. He didn't file a motion to reduce his sentence. He wasn't eligible for a reduced sentence under the First Step Act because it wasn't retroactive towards him. You took a motion for compassionate release to get out of prison and turned it into a motion to reduce a sentence, so he's going to be released 7-and-a-half years earlier, years from now.

Last week, Judge, when we talked in our office, you talked about—a lot about judicial restraint. Is transforming his motion for compassionate release into a motion to reduce the sentence for this drug trafficking kingpin an example of judicial restraint, Judge?

Judge JACKSON. Yes, Senator, it is, and I will explain how. Mr. Young, as you say, was facing originally a sentence of 20 years in prison, which I imposed. I tried Mr. Young, who went to trial primarily because he was facing such a long penalty. I looked at the evidence in his case. He was absolutely the kingpin that you're talking about, but the way that our laws work, the 20-year sentence that he received for the amount of heroin that he had was increased based on a sentence that he received, I think it was 10 or 15 years before. He had no criminal history between the old-old sentence, and forgive me, I can't remember exactly what it is, and I'm sure people will look it up. But 10, 15 years before, he had some minor sentence, then he had this really obviously serious terrible sentence, and the Government filed what is called an 851, which is an enhancement based on his really, really old prior criminal history. I followed the law, which said that he had to go to jail for 20 years. It would've been more like 10 years if the Government hadn't taken into account his very old criminal history, but I said, fine, this is the law. I'm following it. You're going to jail for 20 years.

In the interim, COVID happens. We get lots of compassionate release motions, and there's a statute that Congress has enacted which allows defendants to seek compassionate release, to seek reduction of their sentence—not just release, reduction, release, some adjustment to their penalty under the law if there are extraor-

dinary and compelling reasons to do so. That's the quote from the statute, "extraordinary and compelling reasons." It doesn't say anything more narrow than that, although you do have to look at the guidelines related to compassionate release, all of which I did related to his motion, and he argued several things. He argued his smoking, his asthma, these were reasons, he said, for compassionate release, and I disagreed.

What I did find extraordinary and compelling is the fact that between the 20-year sentence that I gave him originally and the compassionate release motion that he filed, Congress changed the law. Congress decided that the old penalty, the old crime was no longer eligible for the increase, so that a person who was convicted at the time of his compassionate release motion for doing exactly what Mr. Young had done would not get a 20-year sentence. That would not be lawful for a person at that moment. And one of the things that Congress says to the judges is care about unwarranted sentencing disparity. Care about the fact that the person you're sentencing is being treated differently than someone else who committed exactly the same crime.

And I understand it wasn't retroactive in the sense that everybody, absent a compelling—absent a compassionate release motion wouldn't have been eligible for resentencing. But here I have a defendant before me, and all of the factors that Congress has asked me to take into account, and a compelling argument that there were extraordinary and compelling circumstances that is a change in the law that would create unwarranted sentencing disparity if I didn't take account of it.

Senator COTTON. So—

Judge JACKSON. And so what I determined under those circumstances is that I would sentence—re-sentence Mr. Young to the penalty that Congress had decided was the appropriate penalty for the conduct that he committed as of the time of his motion.

Senator COTTON. Judge, Congress did change the law after his sentencing in the First Step Act. That was a terrible mistake. Congress specifically did not make that change retroactive, and you saw that and you thought it was extraordinary and compelling even though Congress specifically did not make it retroactive. You chose to rewrite the law because you were sympathetic to a fentanyl drug kingpin whom you had expressed frustration at having sentenced him to his—to his 20-year sentence in the first place. You twisted the law, and you rewrote it so you could cut the sentence of a drug kingpin. That's what you did, Judge.

Judge JACKSON. Respectfully, Senator, I disagree. Congress provided judges, through the compassionate release motion mechanism, with the opportunity to review sentences. Prior to the compassionate release mechanism being enacted, a judge who imposed a sentence would have no opportunity to revisit. In Mr. Young's case, the question was, with this compassionate release motion under a circumstance in which Congress had changed the law, was that an extraordinary and compelling circumstance to revisit his sentence, and I made a determination that it was.

Senator COTTON. So suppose then if you're confirmed, we can just count on you to always rule in favor of retroactivity, no matter what the facts of the case are because it was a blatant—blatant—

rewrite of the law here so you could reduce the sentence of a drug kingpin who you didn't like sentencing to 20 years in the first place.

Judge JACKSON. No, Senator, it was not.

Chair DURBIN. Senator Booker.

Senator BOOKER. Approaching 11 hours now of a long day, and forgive me, I want to go back to one of my early Senators, Lindsey Graham. I think he asked you something, and I'd like to just put it this way—on a scale from 1 to 10, how deep is your faith—but I won't ask that question.

Judge JACKSON. Are you asking me or you won't ask me?

Senator BOOKER. I'm just joking.

Judge JACKSON. Okay.

[Laughter.]

Senator BOOKER. I won't ask you that, but I do want to go through some of the things that some of my colleagues did on topline. And forgive me, I don't want to dwell too much, but some of it, I found today, just, to me, really didn't hold water. And I want to start with my friend and colleague, Ted Cruz, who is my friend. I like—he's a Texan. One of my favorite Texans is Brene Brown, who says, "It's hard to hate up close, so pull people in." And a lot of times in this culture of tribal politics, the reality is we know each other, we get to know each other over years, and I've had the privilege of working with Ted on a lot of really good policy.

So I went back to my office and relistened to his questioning of you about Critical Race Theory, and he referenced your speech which I hadn't read. You Harvard folks are so well focused on these things, but I just—I read your speech, and I was very surprised. Ted had a very big chart. I think he needs to give Senator Whitehouse some advice on charts. Senator Whitehouse's were very small. It was almost as though they were proportionate to their State sizes.

[Laughter.]

Senator WHITEHOUSE. Easy there, New Jersey.

[Laughter.]

Senator BOOKER. Mr. Chairman, I would request that my colleagues in the Democratic Party would stop interrupting me.

[Laughter.]

Senator BOOKER. But he talked about your speech, and when I read your speech, there's a couple things that jumped out. First of all, he acknowledged it was a very powerful speech, very moving speech about extraordinary Black women. I have a criticism. Your mother was not in it, but I will leave that alone.

[Laughter.]

Senator BOOKER. But there's some things he honed in on almost as if they seemed to be accusations, which don't hold merit to me. We have a saying in New Jersey, "I felt it was all hat and no cattle." And so here we—he said that you called—the woman who wrote the 1619 Project, that you called her provocative. That's not a compliment necessarily if you call someone provocative, is it?

Judge JACKSON. No.

Senator BOOKER. No. I mean, I think Ted Cruz is very provocative, and that doesn't mean I agree with what he's saying, his philosophy. It doesn't mean I agree with his statements, but he point-

ed out you also called the author acclaimed. She won a Pulitzer Prize, correct?

Judge JACKSON. She did.

Senator BOOKER. In journalism, so she is acclaimed.

Judge JACKSON. She is.

Senator BOOKER. But nowhere are you heralding her as this is reflective of your philosophy. That's true, right?

Judge JACKSON. Correct.

Senator BOOKER. Yes, so I don't understand that at all. Part of his chart also was a lot of ellipses skipping out things, but you mentioned Critical Race Theory when you're talking about policies in general. I actually went back to that talk, too, and I saw you threw everything in there. You were talking about psychology, economics, all different types of disciplines as touching upon the law. I think there was everything in there, it seemed to be, except for astrology. But you understand that that's—that was you just listing a list of things that people could say touch the law. They weren't your philosophies at all.

Judge JACKSON. Correct, Senator, and that speech was not related to what I do as a judge. That was talking about sentencing policy and all of the different academic disciplines that might relate to it.

Senator BOOKER. And then finally, we're entering an age that is surprising to me in American society where lots of books are being banned and lots of talks about books being read. You're on the board of a private school, and you have no supervision or authority over what books the children read in a private school, correct?

Judge JACKSON. Correct.

Senator BOOKER. I really—I really do appreciate that. Jumping really quickly to a lot of talk today about these child exploitation cases. And Senator Durbin, I think that actually Josh Hawley used the word “attack” when describing his own—his own, so I don't understand what that point of sensitivity was. But I—individual cases, and we've now heard about two, you've presided over as a judge more than 10, 15 cases?

Judge JACKSON. I've presided over 14 cases that involve child sex crimes, but I—over my career as a trial judge, I presided over more than 100 cases.

Senator BOOKER. Right, and cases are heavily fact-specific, right?

Judge JACKSON. That is true.

Senator BOOKER. Did you remember all the facts of the case that Senator Hawley was—

Judge JACKSON. I did not.

Senator BOOKER. You did not, right. And the facts matter, right?

Judge JACKSON. They do.

Senator BOOKER. And as a judge, you're looking at all the facts of the case, not just what might be talked about later or what people are honing in on. You have to take everything into account and make a decision, correct?

Judge JACKSON. Yes, that's what Congress has required judges to do.

Senator BOOKER. Right. And just to clarify that Congress thing because, again, you went to this elite law school. I went to a gritty inner city law school, Yale—

[Laughter.]

Senator BOOKER [continuing]. And so you know this better than me. But it was actually 1984 that the sentencing laws—the sentencing standards were passed down, correct?

Judge JACKSON. I believe so, yes.

Senator BOOKER. Yes, it was 1984. And then later in 2002 or 2003, things were updated, but that—1984 was before the internet completely. And I just want to clarify also, the *Booker* decision.

Judge JACKSON. Yes.

Senator BOOKER. Could just clarify for the record because my mom might be watching. No relation to me whatsoever, correct?

[Laughter.]

Judge JACKSON. So the *Booker* decision, which earlier I mentioned that I thought Justice Scalia wrote.

Senator BOOKER. It was not.

Judge JACKSON. In fact, it was Justice Stevens.

Senator BOOKER. Yes.

Judge JACKSON. But Justice Scalia concurred, so he had a separate opinion, and he had written a previous decision that was very similar.

Senator BOOKER. Yes.

Judge JACKSON. The *Booker* decision made the guidelines—the sentencing guidelines advisory.

Senator BOOKER. Why? Why would the Supreme Court, joined by some of the most conservative members, why would they do that?

Judge JACKSON. Well, they determined that, in essence, the *Booker*—that if the guidelines were mandatory, that it would violate the right to a jury trial to have jurors decide every aspect of your sentencing.

Senator BOOKER. Yes, it's just sort of the separation of powers, Sixth Amendment.

Judge JACKSON. Yes.

Senator BOOKER. This is—this is really important.

Judge JACKSON. Yes.

Senator BOOKER. And so that gave judges latitude.

Judge JACKSON. Yes.

Senator BOOKER. Now, if you were falling out of the norm, and this is where, you know, I've now read conservative periodicals looking at this line of attack. That's not a negative pejorative—again, my colleague himself used it, but this line of attack on you. I've seen conservative papers, liberal papers, mainstream papers all say this doesn't hold water, and the reason is, and, again, I, unlike Whitehouse and Cruz, I don't have a chart. I'm uncharted, but I would like to hold this up for you. You are well within the norm nationally for going below the sentencing guidelines because of this problem where you have this incongruency that judges on both sides of the—that have been appointed by people of both sides of the aisle have seen. I just want to make that very clear. You are—you are well within the norm in the United States of America.

I love—I'm the former mayor, and one of my favorite mayor friends used to always say, "In God we trust, but everybody else, bring me data," and so the data kind of shows that you're not some outlier. And forgive me because this is—you're not allowed to do this, but I kind of sat here, and I was a little insulted about the

accusation that somehow this mother of two, confirmed three times by the United States Senate, who has victim advocacy groups writing letters for you, who has child victims advocacy groups supporting you, who has presided over fact-specific cases of the most heinous crimes, that somehow the implication that you are somehow out of the norm of other Federal judges that we have confirmed where these issues have never come up, who, again, I held up this chart, but the majority of the—of the decisions, a percentage of sentences below guideline range in non-production child pornography cases in DC, 80 percent of them are under the guidelines: in Missouri, 77 percent; in Iowa 62 percent; in North Carolina, 77 percent; in Nebraska, 81 percent, and so on, and so on, and so forth, down to Utah, alphabetical order, 71 percent.

And so, this implication that somehow your thoughtfulness on these very dense, fact-specific cases is somehow out of the norm, to me, does not hold up, doesn't hold water. And then you add that to the endorsements that you have gotten from folks that deal with victim advocacy groups, it is, to me, just a line of attack that does not hold in no way for me. I'm sorry. In the totality of your career, what you've accomplished and what you've done. I just think it's unfortunate that, unlike the sort of fair arbiters of this on both sides of the aisle who dismissed it, I appreciate the way you've stood there—sat there and addressed all of that stuff.

And that really brings me to the larger implication. You've talked a lot about your uncles. One of them served in Baltimore. Is that right? He was a police officer?

Judge JACKSON. My brother was a police officer in Baltimore.

Senator BOOKER. The gentleman over there?

Judge JACKSON. Yes.

Senator BOOKER. Who volunteered to serve in the United States military?

Judge JACKSON. Yes.

Senator BOOKER. And you have talked about that police work, right?

Judge JACKSON. Yes.

Senator BOOKER. I live in Newark. I love my city. If you cut me, I bleed bricks. The nickname of our city is "Brick City." Your brother and I probably understand something. The majority of murder victims in the United States of America, do you know who the majority of murder victims are?

Judge JACKSON. I don't.

Senator BOOKER. They're Black men. I imagine in your conversations with your brother and your two uncles, who patrolled some of these streets, I imagine you feel a different way about the anguish of what many communities of color struggle with when it comes to crime. Am I—am I—am I right there?

Judge JACKSON. You are right, Senator. It is very anguishing, and it is something that I know all too well.

Senator BOOKER. And you are a person that has that same fear that many mothers have for their daughters who do go out in this world. My mom used to say when you have a child, it's like your heart is going around outside of your body all of a sudden. And I just find it hard to believe, given your law enforcement background—you're a mom—that you don't take any of this urgency to

keep America safe seriously. And then I see that, like, folks I know well—I've worked with the FOP. I began negotiating with them. I have to say I thought Jim Pasco, before I knew him—the whole thing, Brene Brown, “bring people close.” At first I thought he was an ogre, biggest police union. I had some tough negotiations with my police union. He and I sat down and we shared our stories, and I think we realized we were coming from the same place when we were working on police reform.

FOP endorsed you, and they wrote a powerful letter. I won't read it again. The IACP, they represent the largest—that's the rank-and-file, the FOP. The IACP represents the bosses, the managers. They endorse you. There's another group that maybe my colleagues don't know as well as I do. It's called NOBLE. Do you know them?

Judge JACKSON. I do.

Senator BOOKER. They're the Black law enforcement organization nationally, people like your brother——

Judge JACKSON. Yes.

Senator BOOKER [continuing]. Who love their communities.

Judge JACKSON. Yes.

Senator BOOKER. Who have seen, like I have, too many young men lying with bullet holes bleeding into our pavements. These are—these are folks who come from communities like your brother knows, where you too often see sidewalk shrines to murdered youth. I've talked to the women and men of NOBLE so many times. Anybody ever accuse them of being soft on crime? But they understand the complicated factors of crime in our country, and what they have to say to you—about you—I won't read it—is just beautiful.

Law enforcement family, mother of two, law enforcement organization after law enforcement organization, victims advocacy organizations after victims advocacy organizations, Republican-appointed judges, Democratic-appointed judges, that's who's in your corner. We're politicians. We have a sworn oath right now. I just watched you with dignity and grace field what I can only imagine is behind those questions is this doubt that is being sown. I just want America to know that when it comes to my family safety, when it comes to Newark, New Jersey or my State, God, I trust you. I trust you.

Now, I brought in your mother, and I have to go back there. My mom has a saying that is awfully embarrassing when she talks about me. She says—she'll introduce me and she'll say, behind every successful child is an astonished parent.

[Laughter.]

Senator BOOKER. But there's something about your mother, looking at her, is that she doesn't seem all too astonished. She seems like, almost just very slyly, she knew that a day like this might come. And so I just want to share with you that I have done a lot of hiring. Before I was in a legislative body, I ran New Jersey's largest city, and I could write a book about all the management mistakes I made in my first year and how it made me a really good manager. And the first mistake I made was I was just looking for the most talented, credentialed, skillful, smart people to help me run things, and I soon learned it wasn't enough. I made some mistakes in hiring, and I began to see that those skills which you have a tremendous amount of—it's been said so many times: stacking

you up against other Supreme Court Justices, you have more qualifications, more credentials than many of them.

But I learned that you should hire—first, there’s necessary credentials but not sufficient—that you should hire for character. That’s what made me hire a great team in Newark eventually, and we operated so well. And so I believe I’ve gotten to know your character over these weeks, but I want America to know a little bit more about your character right now. And so I know my values—Booker T. Washington said it—excuse me. James Baldwin said it, “Children are never good at listening to their elders, but they never fail to imitate them.” If I want to know your character, you haven’t let me do this yet, but I want to hang out with your parents a little bit, and so let’s draw them into this conversation. We won’t swear them under oath, but just could you share with me what are their bedrock values that are most a part of your values now that you hope and pray are your grandchildren’s—unborn grandchildren’s values? What are those most important values you inherited from those two folk over there?

Judge JACKSON. Thank you, Senator. I inherited a number of bedrock values, as you say, from my extraordinary parents. As I mentioned, my parents grew up in a time in this country in which Black children and white children were not allowed to go to school together. They persevered. They were the first in their families to go to college, to have that chance. They each went to Historically Black Universities, and they taught me hard work. They taught me perseverance. They taught me that anything is possible in this great country.

And I think it came, as I said in my introduction, from the sea change that we had in this country from the 1960s when Congress passed two Civil Rights Act and African Americans finally had the chance to become a part of the dream, become a part of the fabric of this wonderful Nation. My parents moved to Washington, DC, because this is where it all started for them in terms of having new freedoms, and I was born here on that hope and dream. I was born here with an African name that my parents gave me to demonstrate their pride, their pride in who they were and their pride and hope in what I could be.

Senator BOOKER. And it seems to me, as a guy whose parents came here, and you and I both were born here months apart. I would hear my parents’ tough stories at the dinner table about facing bigotry. Here in this city, my father told me stories about his early jobs, but I never noticed a hint of bitterness. That hate he saw never generated hate with him. In fact, he just loved people, all people.

Judge JACKSON. That is correct, Senator, and I would say that my wonderful parents went on to become extraordinary public servants. They had new opportunity. They could’ve done, you know, other things, but each of them decided to give back to the community. My mother was in the public school system. She was a teacher and then became an administrator, became the principal of a magnet school for the arts in Miami, a new school that had started up, and became the sort of beloved principal of New World School of the Arts. And so many of her students continue to see me, meet me, and they know me for my mother, which is fantastic.

Senator BOOKER. And she had diverse students.

Judge JACKSON. She had extraordinarily diverse—

Senator BOOKER. And she loved on all those children.

Judge JACKSON. Every one.

Senator BOOKER. Black, white, Asian.

Judge JACKSON. Every one.

Senator BOOKER. Well, let me—let me ask you this because I'm going to push you a little harder because, again, I have some people I really respect on the other side of the aisle, and they do—my friends and I talk about religion sometimes. Faith is important. I was teasing Lindsey—Senator Graham earlier, but I don't want to ask you anything specific about your faith except for this, because you brought it up in your opening statement. And I have to tell you I don't think Black women have any providence over struggle. People from all backgrounds in America struggle. But I do know often as trailblazing Black women, they have often faced many challenges being the first or being a trailblazer of breaking glass ceilings.

But I know on your journey to this moment right now, you have faced very tough moments. Probably you've been knocked down by life. I always say if America hasn't broken your heart, you don't love her enough. You've been heartbroken by something, a circumstance. You've been like Zora Neale Hurston who says, "I've been through Sorrow's kitchen, and I licked out all the pots." You've been like Langston Hughes, that poem, Mother to Son: "Life for me ain't been no crystal stair." Could you talk to me maybe about one moment or what you do when you get knocked down like that? Where do you get the grit and the guts to get back up and keep on going?

Judge JACKSON. Well, Senator, I think that, too, is something that I learned from my grandparents, who, as I said, didn't have it easy; my grandparents, who didn't have a lot of formal education but who were the hardest-working people I've ever known, and who just got up every day and put one foot after the other, and provided for their families, and made sure that their children went to college even though they never had those opportunities. I reflect on them in the context of this historic moment. I stand on the shoulders of people from that generation, and I—and I focus at times on my faith when I'm going through hard times.

Those are the kinds of things that I learned from my grandmother who used to have those family dinners and bring us all together. And I think that's a common experience of Americans that when you go through difficult times, you lean into family and you turn to faith. And that's part of my experience as well.

Senator BOOKER. It's, I think, the experience of my colleagues and I on both sides of the aisle, leaning on that faith and that family. I want to give you—there's one thing about your opening statement, and I have to say I haven't actually shaken your husband's hand yet, but yesterday I was mad at him because when he started tearing up at your remarks about him, it triggered—I don't really have it, but it triggered a sympathetic cry in me as well. So I'm a little upset at him, but I will—I will deal with him individually.

[Laughter.]

Senator BOOKER. But you said something that I found provocative, to use that word one more time, and I felt—afterwards I reflected. I even talked to my staff about it because I thought that statement, it didn't seem congruent to me, and it was—I don't know if it was a profession of humility or overly critical of yourself. But I want to end my last 5 minutes giving you space to explain yourself to me because, much to my mom's chagrin, I am not a parent yet, and I want to—I'm looking at somebody that I admire.

But you said something that struck me because, look, my mom was a working mom, and, God, it was tough. My colleagues will not believe this, but there was a time I was very melodramatic, and I was in a bathtub of—oatmeal bathtub, and my mom was getting ready to go on a business trip. And I look at her with these sad eyes, and I say, "Mom, if you leave me, I'll die," and she looked at me knowing that you don't die from the chickenpox. But I still remember her going to the phone, having a long conversation, taking off her business suit, and changing into her sweatpants. She would tell me later that that was not a sign of love. She loved me, but a lot of women who love their kids can't stay home because we don't have paid family leave in this country.

So you said in your opening remarks that you haven't been as good a parent, I think if I'm paraphrasing it right, as good a mom as you'd like to be. And I looked at your two girls, and I look at you, and I don't understand that statement. Could you—could you maybe explain for me what you meant, and maybe take one more beat and explain to me what it means to you to be a mom of two young women growing up in America today?

Judge JACKSON. Thank you, Senator. What I said in my statement was that I had struggled, like so many working moms, to juggle motherhood and career, and it takes a lot of hard work to become a judge, to do the work of a judge, which I've done now for almost 10 years. You have a lot of cases. You don't have all that many resources comparatively speaking, and it's a lot of early mornings and late nights. And what that means is there will be hearings during your daughters' recitals. There'll be emergencies on birthdays that you have to—that you have to handle. And I know so many young women in this country, especially who have small kids, who have these momentous events and have to make a choice.

You talked about your mom making the choice to make sure that she cared for you in that moment, and there are times when obviously you have to care for your family members. There are other times when there are events that you wish you could be a part of, but here's the emergency case that you have to deal with. And so I said in my opening that, girls, you know, you've had to deal with me juggling motherhood and job responsibilities, and I didn't always get the balance right. And so I would hope for them, seeing me—hopefully you all will confirm me—seeing me moved to the Supreme Court, that they can know that you don't have to be perfect in your career trajectory, and you can still end up doing what you want to do; that you just have to understand that there are lots of responsibilities in the world, and that you don't have to be a perfect mom. But if you do your best and you love your children, that things will—things will turn out okay.

Senator BOOKER. Well, I'm sure your mom probably feels she wasn't perfect, but things have turned out okay. And I will tell you this: I'm sure they've said it, and if they haven't, I'm sure they will. The older I get, the more I appreciate my parents. I know they're proud of you, but as a guy who does have faith, and I sit at home in a room of my ancestors where I have generations of my ancestors' pictures up, and they're Black folk and white folk. I have a very interesting family tree. I sit there to feel my ancestors sometimes and think about them.

I hope right now with these questions and blistering that you know that at that desk, there are a whole lot of spirits around you with their hands on you. Not only your children and your parents are proud, but so are your ancestors.

Mr. Chairman, thank you.

Chair DURBIN. Thank you very much, Senator Booker. And, Judge Jackson, there are a lot of politicians on this Committee, 22 of them. There's only one Cory Booker. And when he does his cross-examination on the human side, I always wait to see can the—can the witness get through this without little emotion. There was a little there as there should've been as he talked about your family, your parents, and your children. Cory, you're one of a kind. We love you.

We have three more to ask questions tonight: Senator Kennedy, Senator Padilla, Senator Blackburn. We're going to break for 20 minutes, grab a bite to eat, freshen up, come back for the last round.

Judge JACKSON. Thank you.

Chair DURBIN. The Senate stands in recess.

[Whereupon the hearing was recessed and reconvened.]

Chair DURBIN. The Senate Judiciary Committee will resume, and the questioning is to Senator John Kennedy of Louisiana.

Senator KENNEDY. Thank you, Mr. Chairman.

Judge, I have enjoyed listening to you today. I find you to be very intelligent and very articulate. I'm still a little uncertain about how you think, how you approach cases, deciding cases, and we'll talk about that in a moment.

I'm not going to ask you, nor should I, how you would decide a case. And I'm not going to ask you, nor should I, to tell me whether you think a particular precedent is a good precedent or not. So, but I am going to talk to you about the law.

But, first, you don't support efforts to delegitimize the United States Supreme Court, do you?

Judge JACKSON. Senator, I have nothing but esteem for the United States Supreme Court, for my hopefully future colleagues on the Court, and the work that the Court does.

Senator KENNEDY. Can we agree that the calls to pack the Court delegitimize the Court?

Judge JACKSON. Senator, it would not be appropriate for me, in my view, to comment on calls to pack the Court, as you say, to increase the number, to do any structural changes. Those are policy determinations for Congress. What the consequences of those are policy considerations for Congress. I'm just looking forward to working with the brilliant people who are there at whatever size Congress decides, if I am confirmed.

Senator KENNEDY. Well, the calls to pack the Court don't legitimize the Court, do they?

Judge JACKSON. Well, Senator, I think that would be for you to decide.

Senator KENNEDY. I'm asking your opinion.

Judge JACKSON. Respectfully, Senator, I'm not in a position to give my opinion on issues that are policy issues concerning the Court and not something that a judge would have to consider or should consider, in my view.

Senator KENNEDY. Yes, but you're a citizen.

Judge JACKSON. Oh, I am.

Senator KENNEDY. And as best I can tell, a very good one. I don't understand why you won't weigh in on this issue. Tell me why you won't weigh in on this issue.

Judge JACKSON. Senator, I feel so strongly about ensuring that judges remain out of political debates, and this is something that is being debated. It is something that other nominees—Justice Barrett was asked about the same sort of thing and also declined to give her opinion, and I think that was the right way to handle this particular issue.

Senator KENNEDY. So you think Judge Barrett was right to dodge the question?

Judge JACKSON. I think that each judge has to make a determination when asked about whether they would like to speak to issues, and I know that I'm not comfortable, in part because I'm so committed to making sure that there is confidence in me in terms of public confidence in my ability to stay in my lane, my ability to not speak to contentious political issues.

Senator KENNEDY. You have an opinion, though, don't you?

Judge JACKSON. Senator, any opinion that I would have is not something that would ever come up in my work as a judge, something that I would ever rely on. This is a political issue for Congress.

Senator KENNEDY. But do you have an opinion, Judge?

Judge JACKSON. Not a strongly held opinion, actually.

Senator KENNEDY. But you have an opinion?

Judge JACKSON. I haven't really thought about it, but I hear the arguments on both sides, and I understand it to be a political issue.

Senator KENNEDY. Now, Judge, you're very intelligent, and you're very articulate, and I know you're very well informed. You're telling me you don't have an opinion about packing the United States Supreme Court?

Judge JACKSON. Senator, I have opinions about a lot of things. I don't have an opinion that I think it appropriate to share. I work very hard to set aside my opinions when I'm thinking about cases, which is the work of a judge. And so this particular issue is one that is very contentious, as you say—

Senator KENNEDY. Mm-hmm.

Judge JACKSON [continuing]. One that's in the province of Congress, and one that I think it not appropriate for me to comment on.

Senator KENNEDY. I understand that, but I think it would tell us a lot about you if you would answer the question. I'm a little confused about your answer earlier. It's probably more my fault than

yours. Do you have an opinion about whether these efforts to pack the United States Supreme Court delegitimize the Court? Do you have an opinion?

Judge JACKSON. Senator, I have an opinion about the efforts. It's not an opinion that I think is appropriate for me to share, and so, therefore, I don't have anything further to add.

Senator KENNEDY. So you do have an opinion, but you don't want to share it. Is that—

Judge JACKSON. I don't think it's appropriate for me, as nominee, to comment on a political matter that is in the province of Congress.

Senator KENNEDY. Well, in deciding to join the United States Supreme Court, if you're affirmed, wouldn't it make a difference to you whether you're 1 of 9 or 1 of 28?

Judge JACKSON. Would it make a difference?

Senator KENNEDY. That impacts the judiciary. That involves the judiciary.

Judge JACKSON. Senator, it certainly involves the judiciary. I would be thrilled to be one of however many Congress thought it appropriate to put on the Court.

Senator KENNEDY. Okay. So you'd be okay if it was 28?

Judge JACKSON. If that's Congress' determination, yes. The Congress makes political decisions like that.

Senator KENNEDY. Okay. A couple of my colleagues asked you about the Supreme Court overturning precedent. Now it doesn't happen every other Thursday, but it's not—what's the word I'm searching for, Judge? It's not extraordinary that the Supreme Court overturns precedent, is it?

I mean, it happens I wouldn't say a lot, but it's not once every 50 years. Am I correct?

Judge JACKSON. You are correct that it's more frequent than once every 50 years, for sure—

Senator KENNEDY. Yes.

Judge JACKSON [continuing]. Yes.

Senator KENNEDY. And so it happens?

Judge JACKSON. Yes.

Senator KENNEDY. And you talked earlier briefly about the different factors that the Court considers in deciding—

Judge JACKSON. Yes.

Senator KENNEDY. Give me a couple. Give that another lick for me. Just give me a couple.

Judge JACKSON. Whether the decision is egregiously wrong. Whether there's been reliance on the decision that is being revisited. Whether the decision is workable or unworkable, the one that they're looking at. Whether the facts are—new facts have come to light, or the facts have—the circumstances are such that there's now a new understanding of the prior facts. And whether the caselaw in the area has shifted.

Senator KENNEDY. And in fact, those are the factors that the Supreme Court listed 3 years ago in *Janus*, were they not?

Judge JACKSON. Those are the factors. I don't have the *Janus* opinion in front of me, but those are the factors that the Court uses when it determines—

Senator KENNEDY. *Janus* overruled—I think Senator Hirono talked about it. *Janus* overruled *Abood*—

Judge JACKSON. Yes.

Senator KENNEDY [continuing]. Dealing with whether labor unions can require non-members to pay dues. Do you remember that case?

Judge JACKSON. Yes.

Senator KENNEDY. Is age, the age of the case a factor in whether the Supreme Court will overrule a precedent?

Judge JACKSON. I think age relates to the reliance factor. I think the longer an opinion has been in effect, the Court has considered that to be relevant to its determination of reliance.

Senator KENNEDY. But sometimes the Court looks at it not just in terms of reliance, they look at it from the other side of the age issue. And that is that maybe facts and circumstances and science have changed, do they not?

Judge JACKSON. I believe that is part of the changed circumstances factor.

Senator KENNEDY. Yes. So the Supreme Court is more likely to overturn a case, which would not be that extraordinary, if the precedent were 49 years old as opposed to 4.9 years old?

Judge JACKSON. I'm sorry. Can you repeat the question? I'm just trying—

Senator KENNEDY. Yes. Well, you said that the older the case is, one could make an argument that the reliance interest would be great. But you also said, I think—I don't mean to put words in your mouth—but the older the case is, the more facts and circumstances and science could have changed. So that would argue in favor of overruling it because of a change of circumstances. Did I get—

Judge JACKSON. It might. It might. These are all different circumstances that the Court could consider under this multifactor test.

Senator KENNEDY. Okay. Well, all things being equal, let's say a decision is 49 years old versus 3 years old, like *Janus*. The older decision is more likely to be overturned, do you think, based on your experience?

Judge JACKSON. Oh, I don't—I don't know that I could make that prediction. I'm just saying that one of the factors, the reliance factor, the age of the opinion and how long people have been relying on it—

Senator KENNEDY. Yes, ma'am.

Judge JACKSON [continuing]. Can be relevant to—is one of the factors that the Court considers.

Senator KENNEDY. Right. Okay. Let me jump gears here. I took some notes. You talked earlier about how you decide cases. I'm going to kind of summarize this.

You said you clear your mind of any bias. You read everything. You read the briefs and the record, and then you apply them all. That's your methodology. You said you're not an activist judge. You said—am I right?

Judge JACKSON. Yes.

Senator KENNEDY. You said judges are not politicians.

Judge JACKSON. That is true.

Senator KENNEDY. And judges should stay in their lane.

Judge JACKSON. Yes, sir.

Senator KENNEDY. Tell me again what you mean by “stay in your lane.”

Judge JACKSON. What I mean is that in our system of government under the Constitution, we have a separation of powers, and each branch has their own sphere of responsibility. To say “stay in your lane” is the shorthand that I’m using for indicating that judges should not be policymakers, that those responsibilities are left to the elected branches, and that judges are to interpret the law, not make the law. And I use it to refer to the part of my methodology that is mindful of the constraints on judicial authority.

Senator KENNEDY. Okay. Well put. So let me ask you, we could go to the Constitution—let’s say the Bill of Rights, to narrow the discussion—and read about our explicit rights. Religious freedom, our right not to be unreasonably searched or seized, freedom of speech, they’re right there. That’s why they call them explicit.

But the Court has ruled we have a bunch of unenumerated rights. Am I correct?

Judge JACKSON. The Court has determined there are certain personal rights related to individual autonomy that are implicit in the concept of ordered liberty or deeply rooted in our Nation’s history or tradition.

Senator KENNEDY. But they’re unenumerated?

Judge JACKSON. Yes.

Senator KENNEDY. Okay. Should these unenumerated rights, that only Supreme Court Justices can see, should they be decided by the people through their elected representatives or by the unelected Federal judiciary?

Judge JACKSON. Well, Senator, the Supreme Court has interpreted the Fourteenth Amendment to have a substantive component, and I’m not in a position to critique the Court in terms of its precedents. That is the precedent of the Supreme Court.

Senator KENNEDY. Right, right. Let me ask you this. What is a—what is a fundamental right?

Judge JACKSON. The Court has interpreted the Fourteenth Amendment’s Due Process Clause to include a substantive component and not just a procedural component, meaning the Fourteenth Amendment guarantees due process, and the Court has interpreted it to mean that with respect to certain rights, individual rights concerning intimacy, certain things like the right to contraception, the right to childrearing.

There was a case at the Supreme Court that talked about making decisions for children in terms of visitation with respect to conflicts with grandparents. Marriage—

Senator KENNEDY. Right, I’m with you.

Judge JACKSON. These sorts of rights the Court has found are implicit in ordered liberty, as I said, or deeply rooted in our Nation’s history and tradition.

Senator KENNEDY. Okay. The right to assisted suicide, is that one of those enumerated or unenumerated rights?

Judge JACKSON. I believe the Court found that it was not.

Senator KENNEDY. Okay. Which body do you think is better able to make that decision, the Congress or the Federal judiciary?

Judge JACKSON. Well, Senator, the Supreme Court has interpreted the Constitution, and the Supreme Court has the authority under our constitutional system to interpret the law.

Senator KENNEDY. Right.

Judge JACKSON. And they've made the determination that the Constitution includes those unenumerated rights.

Senator KENNEDY. Yes. But here's the thing, Judge. Maybe a better example, it's a very hot topic today. The right of a transgender woman to compete in women's sports. Do you think Congress, the people ought to get to decide that through Congress or the judge can just find it as an unenumerated right, a penumbra of the Constitution?

Judge JACKSON. Well, Senator, that—the topic that you raised is something that is, as you say, a hot topic today—

Senator KENNEDY. Yes.

Judge JACKSON [continuing]. And could certainly be litigated. So I'm not in a position to say more about whether or not it's actually one of the unenumerated rights in the Constitution.

Senator KENNEDY. I don't want to ask you how you'd rule, but would you have any problem saying, okay, if that case—that is litigated, saying this is a political question. Whoa, stop, I'm staying in my lane. Congress needs to decide this case. The people need to decide that through their elected representatives. Would that be appropriate?

Judge JACKSON. Well, respectfully, Senator, that is a decision. In other words, you say I'm not asking you to decide it, but in every case, the determination about whether or not something is a political question or whether or not the Court has or has not jurisdiction is an issue for judges, and so I'm not able to speak to it.

Senator KENNEDY. Okay. All right. Well, here's the thing about the fundamental rights. That's why I asked you about the definition of them. These are unenumerated rights now. I'm not talking about right to free speech and freedom of religion.

The Court has said repeatedly that there is no test for a fundamental—unenumerated fundamental right, that the determination has not been reduced to a formula. Am I right?

Judge JACKSON. Well, they've given those standards in the cases in which they have been evaluated.

Senator KENNEDY. In some cases. Sometimes the Court talks about these unenumerated fundamental rights have to be deeply rooted in the Nation's history and traditions. Sometimes the Court says—they change the language—these unenumerated rights, like the right to assisted suicide we talked about, it's a potential unenumerated right, the right has to be implicit in the concept of ordered liberty.

But you've read *Obergefell*, and *Obergefell*, I think Justice Kennedy wrote that opinion. He didn't bite. In fact, he cited with approval Justice Harlan's dissent in *Poe v. Ullman*. And Justice Harlan said, look, there's no formula here. Justice Harlan always said you have to go case by case.

Can you understand why some Americans go, wait a minute, are Justices—these are unenumerated rights. Are Justices interpreting the Constitution, or are they just deciding a right when they get five votes, and it's just a moral conviction?

Judge JACKSON. Yes, Senator. I do understand.

Senator KENNEDY. Okay. Well, when you talk about judicial restraint, where does the restraint start with fundamental rights? Let's take the Ninth Amendment, okay? What's it say? I know you know because you talked about it earlier.

Judge JACKSON. Well, it says that—it indicates that there are rights—that the fact that there are some enumerated rights in the Constitution doesn't mean that there aren't others.

Senator KENNEDY. And how are we supposed to determine what others there are?

Judge JACKSON. I think the Supreme Court has not found any others coming from that particular constitutional provision.

Senator KENNEDY. Could they?

Judge JACKSON. I can't speak to that, Senator.

Senator KENNEDY. I mean, it's possible, right? If they get five votes, right?

Judge JACKSON. Well, anytime the Supreme Court has five votes, then they have a majority for whatever opinion they determine.

Senator KENNEDY. But do you think that would be a prudent course of action to start creating fundamental rights through the Ninth Amendment, unenumerated now, without consulting Congress?

Judge JACKSON. Senator, I can't speak to a hypothetical about whether or not it would be a prudent course of action for the Supreme Court to hold that there were other rights in the Ninth Amendment, that—

Senator KENNEDY. Well, the reason I'm asking, Judge, is you've talked a lot today about judicial restraint, and that's kind of like being for children and prosperity. We're all for children and prosperity and judicial restraint, but the rubber meets the road when you get down to, well, what does that mean? What does that mean?

Judge JACKSON. What it's meant for me, Senator, is what you've seen in my opinions, in the way that I have approached issues that have been before me, in my fidelity to the restraints that exist in the law in terms of the exercise of judicial authority. That adherence to precedent, for example, is something that I do. And even in cases, as you heard me discuss earlier, in which there are not binding precedents, I find that the court needs to take into consideration what has previously been determined and not be a policy-maker in my decisions.

Senator KENNEDY. Okay. Well, here is what's—here is what's—bothering me is too strong of a word, sounds pejorative—here's what I'm uncertain about, and please don't take this the wrong way.

How do we know—I'm not saying you would do it. But how do we know that since I can't seem to flesh out this judicial restraint and the limits of it for you, how do we know that if you get on the Court, you won't say, well, you know, Congress can't get anything done. And there are all these issues that we need to address, and so I think the United States Supreme Court ought to create all these rights through the Ninth Amendment. What would you say to that, if somebody made that allegation?

Judge JACKSON. Well, Senator, I think that I have a record as a judge in terms of having been given responsibility, having looked

at cases, having decided issues, and that my record demonstrates how I handle cases. I'm not in a position to hypothesize a circumstance in which a case appeared that raised a question about the recognition of an unenumerated right and whether I would say under those circumstances that I couldn't find such a right because that's a hypothetical, because I decide cases and controversies that come before me, because I'm a nominee and I can't speak to hypothetical scenarios about how I might rule in the future with respect to cases.

Senator KENNEDY. Boy, the time goes fast. Let me ask you one other question.

Judge JACKSON. Yes.

Senator KENNEDY. This business of having unenumerated rights through substantive due process, there's no textual basis for that. The Court just started to do it, okay? I'm not asking you whether you think it was good or bad because it's clear to me you don't want to share your thoughts on that, and I get it. I'd feel better if you would, but I get it.

But don't you think the fact that our Founders included a way to amend the Constitution is a testament to the fact that they were saying: here are your rights, we're writing them down, you can all go to the Bill of Rights and read them, and if you want more we put in a way to amend the Constitution.

Judge JACKSON. I do understand that argument, and there are people who argue that. The Supreme Court has determined that the Due Process Clause—

Senator KENNEDY. Yes, ma'am.

Judge JACKSON [continuing]. Includes a substantive component, and I understand the critiques of that view.

Senator KENNEDY. I'm going to try to get in two more. Boy, the time flies.

When does life begin, in your opinion?

Judge JACKSON. Senator, I don't know.

Senator KENNEDY. Ma'am?

Judge JACKSON. I don't know. I don't—

Senator KENNEDY. Do you have a belief?

Judge JACKSON. I have personal religious and otherwise beliefs that have nothing to do with the law in terms of when life begins.

Senator KENNEDY. Do you have a personal belief, though, about when life begins?

Judge JACKSON. I have a religious view.

Senator KENNEDY. A religious belief?

Judge JACKSON. That I set aside when I am ruling on cases.

Senator KENNEDY. Okay. When does—when does equal protection of the laws attach to a human being?

Judge JACKSON. Well, Senator, I believe that the Supreme Court—actually, I actually don't know the answer to that question. I'm sorry, I don't.

Senator KENNEDY. Okay. All right. You're familiar with the warrant requirement, I know.

Judge JACKSON. Yes.

Senator KENNEDY. What if Louisiana said we don't want to follow the warrant requirement? Would that be legal?

Judge JACKSON. Are you positing a statute of Louisiana that we're not following or——

Senator KENNEDY. Sure. Yes, let's call it a statute.

Judge JACKSON. Well, Senator, I'm thinking about all of the potential legal arguments that could be made. I can't answer the hypothetical about whether or not it would be lawful or unlawful.

Senator KENNEDY. Can you think of an instance where a State could say we're not going to follow the warrant requirement? We're going to write our own warrant requirement.

Judge JACKSON. I've never heard of that happening.

Senator KENNEDY. What if Article I Section 5 of the Louisiana Constitution is our State's unreasonable searches and seizure? Couldn't we say we're not going to follow the Federal interpretation? We're going to make it stricter under the State constitution. And in——

Judge JACKSON. Well, the State can also——

Senator KENNEDY. And in fact, under the State constitution, we're going to say a warrant is required in every instance. Don't give me this stuff about plain view and hot pursuit. You serve somebody, you better go stop and get a warrant.

Now I'm not saying Louisiana will do that, you understand, and I'm not saying they should or shouldn't. They can do that, can't they, under their own State constitution?

Judge JACKSON. They can provide more protection than the Federal Government, yes.

Senator KENNEDY. Yes. How can they get away with that under the Supremacy Clause? You got to go fast because Durbin is about to cut me off.

Judge JACKSON. Yes, I'm sorry. How can they—how can they get away with providing more protections to people?

Senator KENNEDY. Yes, yes. Under the Supremacy Clause.

Judge JACKSON. Because it would depend on whether or not it conflicted with Federal law. It doesn't conflict, I think, if the State provides more protection.

Senator KENNEDY. We call that the adequate and independent State ground doctrine, right?

Judge JACKSON. Yes.

Senator KENNEDY. Okay. I'm over, but only by 22 seconds. So I'm going to land this plane, and we'll take off again tomorrow.

Judge JACKSON. Thank you.

Chair DURBIN. Thanks, Senator Kennedy.

Senator PADILLA.

Senator PADILLA. Thank you, Mr. Chairman.

Judge JACKSON, how are you doing?

Judge JACKSON. Good evening, Senator. I'm good. Thank you.

Senator PADILLA. It's been a long day.

Judge JACKSON. It has. And thank you for spending it with me. I understand it's your birthday.

Senator PADILLA. Yes. So I'll cut to the chase on my first question. And I've been reading up a lot about you since the nomination and studied your record. We've had an opportunity to meet in my office, spent some time there, and I've been listening pretty closely to today's hearing.

And my first question may be the highest stakes. What would you say to a Member of this Committee who is sitting here like you for about 12 hours now on his or her birthday?

[Laughter.]

Judge JACKSON. I would say “happy birthday” and “thank you.”

Senator PADILLA. Great. And we’re off to a great start here. You know, I actually only ask that question half-jokingly because I was moved by your opening statement yesterday as well, especially moved by my colleague, Reverend Booker here, a little while ago when he uplifted your commentary about the struggle you clearly feel and that I share about being a working parent.

And I couldn’t help but think to myself how I’ve had to grow, and Angela and I remind each other of this pretty regularly, try to give good advice to our children. We’re trying to raise three gentlemen. We’re not trying to raise three boys. We’re trying to raise three gentlemen, and it’s not always perfect, but we give them the advice of just try your best to be your best, right?

We’re not expecting perfection. And sometimes parents need to remind themselves of that, too. We can’t expect perfection because we got to try our best to be our best.

It’s also dawned on me that we’ve been here for more than 12 hours, and there’s a very fundamental question that hasn’t been asked. You’ve given thoughtful answers throughout the day, but fundamentally, what this hearing is today, it’s a job interview. It’s a very public and very thorough job interview, as it should be.

If you’re confirmed, you could potentially serve on the Supreme Court for decades, helping shape the direction of American law and American life in profound and lasting ways. So it’s appropriate that over the course of this interview, you should be asked some in-depth questions about your background, about your experiences, and your approach to the law.

But before I get to some of those questions that I have, the first question I have for you is, so why would you want this job? And now with the added flavor of why would you want this job—you have a great one now—while we’re thinking on a daily basis how we try to find that right balance that is often elusive between work and family and other obligations?

Judge JACKSON. Thank you, Senator.

I’ve spoken many times about the fact that I came to love the law starting as early as 4 years old, watching my dad study when he went back to law school when I was a child. And I honestly never thought that there was anything else that one could really do because I was so enamored of my father and so proud of his decision to follow his dream after I was born.

And so if you’re a lawyer and if you believe in public service, which was a core family value for my family, then becoming a judge is certainly an option that one pursues, and then, of course, being on the Supreme Court is the capstone of a life in public service. And I would just be so honored to have the opportunity to use my time and talents in this way.

Senator PADILLA. Thank you. Thank you for that.

And now to some of the more specific questions. Now as I mentioned, I’ve been listening closely throughout the day. Your knowledge of the law, your even temperament, your charm, and clearly

your endurance is impressive. They all shine through. But I note that at times this hearing has been a little frustrating. Not because of your answers, but I actually point to the process itself.

You know, there's probably a whole, whole lot of questions that everybody watching would really love to hear answers to, but they're questions that you can't directly answer, questions like a woman's right to choose, questions like the Second Amendment, questions like expanding the Supreme Court.

Now to be clear, this is not a criticism of you. Let me explain. When you're asked a question that comes close to asking your views on a pending case or on an issue that may come before you, you've declined to answer as to not prejudge the issue. And I'll remind the Committee I believe that's been the approach taken by every Supreme Court nominee for the last three decades.

So for the benefit of the people watching at home, can you explain why you and other judicial nominees have followed this approach? Why is it important?

Judge JACKSON. Yes, thank you, Senator.

The approach is consistent with the requirement of judicial independence, with the duty to have and keep an open mind when you are considering cases. Judges, unlike policymakers, are not supposed to be forming opinions in—my mother would say “in the ether,” right? Judges are supposed to be waiting until a dispute is presented that they can hear in the context of the case, and then with an open mind receiving the arguments that are made in the context of that case, applying the law and making a decision.

The concern is that if you are engaged in a public forum like this, and you start talking about issues that are being litigated in the courts, the concern is that it will erode public confidence in your ability to be open-minded, hear and consider only the facts and circumstances in the cases that are presented. People might think that you are ruling based on conversations that you had with Senator Kennedy or discussions that I have with you.

And so judges tend to not speak publicly about issues that are being litigated and especially judges who are being considered for the Supreme Court because, at the end of the day, a lot of these issues will come before that forum, and you want people to know that you have an open mind, that you haven't prejudged any issue, and that you are waiting and staying in your appropriate constitutional lane.

Senator PADILLA. Great. Confidence in the judiciary and the justice system are clearly important, and I think I'm going to be coming back to that in a minute. But maybe as a segue, I want to raise a similar concern about confidence in the electoral process and discuss for minute democracy and voting rights.

Now I approach this conversation not as a lawyer, but as a former elections official. For 6 years, I served as California's chief elections officer, and my objective during that time was to, yes, ensure that our elections were safe and secure, but also to help facilitate the participation of as many eligible Californians as possible, as we are guided by—or as we're guided to do by the National Voter Registration Act.

And frankly, I relished in that responsibility because I believe in the right of every eligible voter to be able to register to vote, cast

their ballot, have their voice heard in our democracy. So you can appreciate my outrage when I watched the Supreme Court play a role in dismantling one of the crowning achievements of our democracy, the Federal Voting Rights Act of 1965.

Over the course of five decades, the Federal Voting Rights Act protected voters from unnecessary obstacles and barriers to the ballot. In fact, the Voting Rights Act was authorized and reauthorized five times with overwhelming bipartisan support. The Voting Rights Act helped dramatically increase Black voter participation in the South in the post-Jim Crow era, and in States like Arizona, Texas, California, and others, Latino voters have benefited from the Act's voter protections.

And across the country, Native voters, Asian-American voters, and members of language minority communities have all achieved greater access to the polls because of the Act's prohibition of discrimination on the basis of race or language minority status. But in 2013, the Supreme Court gutted the teeth of the Voting Rights Act. In *Shelby County v. Holder*, the Court struck down the preclearance provisions that had required States with a known history of voter disenfranchisement to prove that any changes to their voting laws wouldn't harm voters.

And last year, the Supreme Court drastically restricted the reach of Section 2, which prohibits discrimination in voting on the basis of race. Now I find it hard to see the outcome of this as anything but counter to the spirit of the movement that led to the Voting Rights Act.

Not on any specific case, but I know earlier in this hearing, you have acknowledged that the Supreme Court's precedents that the right to vote is fundamental and must be protected have been acknowledged. So can you just share for a couple of minutes what you believe the role or responsibility of the Supreme Court might be in protecting this fundamental right to vote and, by extension, our democracy?

Judge JACKSON. Thank you, Senator.

The right to vote is protected by our Constitution. The Constitution makes clear that no one is to be discriminated against in terms of their exercise of voting, and the Congress has used its constitutional authority to enact many statutes that are aimed at voting protection. There are also—there are also laws that relate to ensuring that there is not only voting access, but ensuring that there isn't fraud in terms of voting.

These concerns are embodied by various laws and provisions, and there are disputes at times over the concerns and the balances that are being made across the country relating to the exercise of voting. And those disputes come to court and then, eventually, to the Supreme Court that interprets the laws that pertain to the fundamental right to vote, which, as you say, the Supreme Court has acknowledged is a fundamental right.

Senator PADILLA. Thank you. On a different topic, not unique to California, but I'm proud that California is home to the largest Native-American population in the country. More than 1 in 10 Native Americans call California home, and California is home to 109 federally recognized Tribes who have a nation-to-nation relationship with the United States of America.

As a Senator from California, I believe that respect for Tribal sovereignty is paramount. So after your nomination, as part of the homework that I was doing, I carefully considered your record on Tribal issues. And for the most part, it seems that you haven't had to deal with too many cases involving the rights of Native peoples or Tribes. The cases you've had so far, such as *Mackinac v. Jewell*, ultimately dealt more with questions of administrative procedure rather than fundamental issues of Native and Tribal rights.

If you're confirmed, though, I have no doubt that you'll eventually have to weigh in on major questions related to Tribal sovereignty, treaty rights, Tribal resource preservation, and the Federal Government's trust responsibility. Now there's already at least one major case related to Indian law on the Supreme Court's docket for the next term, and it deals with the constitutionality of the Indian Child Welfare Act of 1976.

Now I'm not going to ask you to comment on that case specifically or any case that may come before you, but as a general matter, can you just share what your understanding is of the Federal Government's legal and moral trust responsibility and relationship with Tribal governments?

Judge JACKSON. Yes, Senator.

It is established in the law, the Supreme Court has established that there is a special trust relationship between Indian Tribes and the Federal Government. Indian Tribes are, as a general matter, considered to be sovereigns, and the relationship is a sovereign-to-sovereign relationship, but it's one in which the Federal Government has some responsibilities related to the Indian nation. And it's a very, very important care and trust responsibility that the Federal Government has in terms of making sure that the Tribes are recognized and cared for in the context of our system.

Senator PADILLA. I look forward to our ongoing conversation on that area of the law as well.

I want to now revisit something that had been a theme throughout yesterday's opening statements and a lot of today's questions from Members, and that's the general appreciation for diversity. We're celebrating history and what a potential impact it would be for somebody like you to join the United States Supreme Court.

I know some of my colleagues have touched on this already, so I'm going to take it to another level. While judges are certainly the face of the judicial branch, their work, as you can appreciate, is significantly supported by the work of law clerks. Now, typically, these clerks are well-credentialed, talented young lawyers who spend a year or two working closely with a judge who hires them, who helps them conduct research, research the law, and write legal opinions.

Now clerkships at the district courts, the court of appeals, and even especially the Supreme Court are often a launching pad for a successful legal career. Many former clerks are leaders in the profession. They serve as law firm partners, public interest lawyers, public sector attorneys, and yes, Federal judges.

In fact, seven of the nine current Supreme Court Justices were Federal clerks once upon a time, and six of the nine Justices clerked at the Supreme Court itself. So it's no wonder that many

law students and recent graduates compete pretty intensely for these coveted positions.

But like the judiciary itself, the ranks of Federal clerks are not particularly diverse. According to a February 2021 bulletin by the National Association of Law Placement, only 21 percent of Federal clerks from the class of 2019 were people of color. And at the Supreme Court, the statistics are similar, with the National Law Journal reporting in 2017 indicating that since 2005, only 15 percent of clerks were people of color, and only one-third were women.

These are unacceptably low figures for what has become a de facto pipeline for Federal judges. With such low clerkship selection rates, minorities and women lawyers are denied an early credential that can be of significant help later in their legal career. I believe creating more avenues for diverse candidates to participate in clerkships is critical to diversifying the legal profession in the long run.

Judge Jackson, I'd like you to maybe share with the Committee your clerkship experience and maybe how that affected the trajectory of your career and if you believe the judiciary would be better served by a more diverse pool of law clerks.

Judge JACKSON. Thank you, Senator.

I think there's very little question that my law clerks changed the trajectory—my law clerkships, excuse me, changed the trajectory of my career. Through that opportunity, I was able to work for three extraordinary jurists. I got to see what it was like to be a judge. I got to understand how judges think as they evaluate cases, which for a young lawyer is an extraordinary training opportunity. And you are correct that it is something that is career changing in a lot of ways.

I have tried in my time on the bench to do a significant amount of outreach to young people. I go to law schools whenever I'm asked. I speak in a lot of places. You've heard some of my speeches get referenced because I'm often asked to go, and I try to go every time I am asked because I know how important it is for people to see that people like me are in the judicial branch and for people to hear about clerkships.

One of the things that I often get when I go to law schools is surprise from some groups and some people about the chance to clerk. They weren't even really aware that that was something that they can do or should try to do.

So it's been a part of my practice to go to schools to reach out to young people, to tell them about clerking, to try to get them to apply to me, if I can, and to show them that this is something that's possible. If I could do it, they could do it. And I think it's to the benefit of us all to have as many different law students seeking clerkships as possible.

Senator PADILLA. I think you can expect some more invitations from California law schools, colleges, and maybe even some high schools in the near future, and I'm happy to go with you.

Now another theme that's been pretty consistent throughout the day has touched on the right to counsel. You've been asked questions about your work as a public defender. Some have criticized you for providing a defense to certain clients who could not afford an attorney.

Now I want to talk to you about this issue, but I also don't want to assume that everybody watching at home is a criminal law scholar. And so, as a Senator from California, which is home to Hollywood and the entertainment industry, I'll make the reference that whether it's a TV show or a movie, most people have heard a law enforcement officer on the screen while making an arrest recite what we know as the Miranda rights:

"You have the right to remain silent. Anything you say can and will be used against you in a court of law. You have the right to an attorney. If you cannot afford an attorney, one will be appointed for you."

Now the Miranda rights are not a Hollywood invention. These and other rights afforded to all individuals, including those accused of a crime, come from the Fourth, Fifth, and Sixth Amendments to the Constitution. They come from over half a century's worth of Supreme Court precedents.

Judge Jackson, while many Americans know how critical these rights are to our systems of liberty and justice, not everyone does. So for those who may not fully understand, can you reiterate why the Constitution protects these fundamental rights?

Judge JACKSON. Yes, Senator.

The Constitution protects these rights because the Constitution is designed to protect liberty. That's one of the values that the Framers were focused on when they set up our system of government.

The Federal Government is limited in its powers in part because the Framers wanted to preserve liberty, did not want the Federal Government to encroach on individual freedoms, and there's no bigger sphere of encroachment than the Federal Government or even State governments using their power to deprive people of liberty in the context of the criminal justice system. So the Constitution says that when the Government seeks to deprive someone of liberty because they accuse them of a crime, they have to afford certain rights to the individual. They have to make sure that the person is processed fairly.

Criminal defense lawyers protect those constitutional rights by ensuring that the Government is doing what the Constitution says the Government has to do when they seek to deprive someone of liberty. It's the criminal defense lawyer who makes the objection to prosecutorial overreach in a case or who makes sure that all of the rights that the Framers put into the Constitution are being observed in actual practice by the Government.

And it's also really important, one of the things that you said the Miranda rights say, if you can't afford a lawyer, one will be appointed to you. The person who appoints is the court. The court is appointing lawyers for criminal defendants because the court, the judges, know that in order to be able to do our jobs, in order to be able to make sure that criminal processes are fair, we have to get arguments not only from the prosecution, but also from competent counsel who is making arguments for the defense.

So it's the court that appoints lawyers for people who can't afford them to make sure that justice is being done in the cases that come to court.

Senator PADILLA. And just as a follow-up, as much as we hope the process is always fair, it is something that it's always understood. Now you shared earlier today—and when you were in my office, you shared your observation from your time as a public defender that many defendants going through the criminal justice process don't always understand what it is exactly that's happening to them.

Can you explain what the impact of this is on our criminal justice system and how your experience—through your experience, it affirms the need for a constitutional right to counsel through the eyes of a defendant?

Judge JACKSON. Yes, Senator.

In my experience, one of the things that is important for our entire system of government is that people are being held accountable if they commit crimes. That's the point of the criminal justice system. And what I noticed as a Federal public defender is that the process of ensuring that there is accountability, there is responsibility, there is rehabilitation is impeded if the people who are in the system aren't actually understanding the process.

That one of the purposes of punishment, one of the goals of our system is to ensure that consequences are handed down for criminal behavior and then, as a result, that people stop committing crimes. And so the obligation to make sure that people understand what's happening I've seen aids in that goal. That the person who is receiving the punishment is more likely to be able to reflect on their own contribution to be able to realize that they made a mistake, that they committed a crime, that here are the consequences, this is a horrible thing, and I'm not going to do it again if they understand the process that this is justice in our system.

If they go through and they don't understand, if people aren't explaining, if they feel they haven't been heard in the process, it's my experience that, instead, they feel bitter, they feel victimized and are less likely to be rehabilitated in the long run.

And so, as a judge, I took that observation and tried to ensure that not only that criminal defendants understood what was happening, but that they understood the harms that they had caused, with an eye toward making sure that rehabilitation was happening in the long run as a result of my sentences.

Senator PADILLA. Thank you. And I'd share that I think it's part of the comprehensive work we need to do to buttress confidence in the justice system as a result.

Now our criminal justice system is imperfect and too often unfair, but when we talk about the virtues and the promises of our criminal justice system, we include the constitutional right to an attorney. Just in closing, Mr. Chair, we include the constitutional right to an attorney. We talk about Miranda rights and the right to an impartial jury of one's peers. We talk about the Fourth, Fifth, and Sixth Amendments.

And through the lens not of a particular case or defendant, but the system as a whole, the work of public defenders is not just the work of defending the accused. It's the work of upholding the fundamental legal principles that make up our Bill of Rights. So anybody who may criticize Judge Jackson for providing a constitutionally required defense to any individual accused of a crime, I'd

suggest that the criticism is not of Judge Jackson, but of the Constitution itself.

And just in closing, not an additional question, but Judge Jackson, I've listened to you respond to questions now for the last 12 hours, and I've watched some of my colleagues take some of your work and some of your views out of context to try unsuccessfully to paint you as someone that you are not. I've been struck by your thoughtfulness, your temperament, and your integrity in responding to these questions.

And I really hope that America is watching today. Because if they are, they've seen the perfect example of what the temperament of a judge should be—thoughtful, balanced, and very, very patient.

Thank you, Mr. Chair.

Chair DURBIN. Thanks, Senator Padilla.

Senator Blackburn.

Senator BLACKBURN. Thank you, Mr. Chairman, and, Judge, thank you again for your time.

I made a note earlier. Senator Blumenthal had mentioned that to do this job that you are before us wanting to take on it takes book smarts and people smarts, and I think that's a very appropriate summation.

And as we have spent the past few weeks going through your records, getting to know you, reading letters that have come in about you, hearing from people, I've kind of looked at it and said, okay, she has been richly blessed with God-given talents and then she has experiences and education, and then coupling with that, hopes, desires, and a lot of drive that really make you the person that you are.

And we have heard from your friends about how you are a friend and you've been a mentor, and as one of my friends would say, and I bet you fill—kind of fill this void—you're the answer lady for a lot of issues that friends would bring to you.

You love your family and they, obviously, love you, and I wish you could see your dad's face. It is wonderful. He beams when you talk about the things that he has taught you. But all of that has been repeated time and again in letters for you. But it's important that we know this and it's why we continue to ask you about your views on issues because all of that goes into forming who you are and your worldview and it all is applicable to the job that you've done in the past and, likewise, the job that you are going to do in the future and it does have bearing on different issues.

And it's been so interesting to me to get text messages from friends at home that are watching this. I had one from a friend from church and she said, you know, she seems really likable but I'm not sure I agree with her on the issues, and this is someone who is incredibly pro-life, and she's about my age so she's a mom and a grandmom and she is—this is a question that is important to her, to look at life. And Senator Feinstein talked about that issue with you a little earlier today.

You've also said today that it would be inappropriate for you to share your views on political issues or issues that may become—might come before the Court like abortion.

But I want to go to you on something you said when you were in private practice. You made your views on pro-life and the pro-life movement very clear and, in fact, you attacked pro-life women, and this was in a brief that you wrote.

You described them, and I'm quoting, "hostile noisy crowd of in-your-face protesters," end quote, and you advocated against these women's First Amendment right to express their sincerely held views regarding the sanctity of each individual life.

And I'm a pro-life woman. Seventy-nine percent of the American women support restrictions of some type on abortion, and so I find it incredibly concerning that someone who is nominated to a position with life tenure on the Supreme Court holds such a hostile view toward a view that is held as a mainstream belief that every life is worth protecting.

So how do you justify that incendiary rhetoric against pro-life women?

Judge JACKSON. Thank you, Senator.

The brief that you're referring to was a brief that I filed on behalf of clients who were clients of my law firm. This is in, I believe 1999 or 2000s, maybe 2000 or 2001.

I was an associate at a law firm and I had appellate experience because I had just finished my Supreme Court law clerk position, and in the context of my law firm I was asked to work on a brief concerning a buffer zone issue.

In Massachusetts at the time, there were laws protecting women who wanted to enter clinics and there was a First Amendment question about the degree to which there had to be room around them to enter the clinic and—

Senator BLACKBURN. Right. I understand all of that. I'm asking about the rhetoric.

Judge JACKSON. Senator, I drafted a brief along with the partners in my law firm who reviewed it and we filed it on behalf of our client—

Senator BLACKBURN. Okay.

Judge JACKSON [continuing]. And to advance our client's arguments that they wanted to make in the case.

Senator BLACKBURN. Let me ask you this. When you go to church and knowing there are pro-life women there, do you look at them thinking of them in that way, that they're noisy, hostile, in your face? Do you think of them—do you think of pro-life women like me that way?

Judge JACKSON. Senator, that was a statement in a brief made—

Senator BLACKBURN. Okay.

Judge JACKSON [continuing]. An argument for my client. It's not the way that I think of or characterize people.

Senator BLACKBURN. Okay. All right. Thank you for the clarification on that because I think even zealous advocacy doesn't allow that type of rhetoric on a free speech issue.

You know, *Roe v. Wade*—let's talk a little bit about that. It's come up a touch today.

In my opinion, that was an awful act of judicial activism and has cost the lives of over 63 million unborn children, and nearly 50 years later this shameful ruling remains binding precedent. But

the battle is being fought in the courts and, as you know and as we discussed when we visited, the Supreme Court is reconsidering whether the Constitution protects the right to an abortion in *Dobbs*.

And if you're confirmed, you will be in a position to apply the Court's decision in *Dobbs*, whatever that decision is going to be, and you've talked about following precedent and what the Court decides.

So do you commit to respecting the Court's decision if it rules that *Roe* was wrongly decided and that the issue of abortion should be sent back to the States?

Judge JACKSON. Senator, whatever the Supreme Court decides in *Dobbs* will be the precedent of the Supreme Court. It will be worthy of respect in the sense that it is the precedent and I commit to treating it as I would any other precedent of the Supreme—

Senator BLACKBURN. There's one other thing. One of the central issues in the *Dobbs* case is about whether the Constitution protects the right to an abortion. So let's talk about that.

Can you explain to me, on a constitutional basis, the Court's decision in *Roe* and where is abortion protected in the Constitution?

Judge JACKSON. Senator, abortion is a right that the Supreme Court has recognized is one of the kinds of rights that is unenumerated. It is in that same category of rights that the Supreme Court has recognized with—

Senator BLACKBURN. But the text of the Constitution does not mention abortion.

Judge JACKSON. That is true.

Senator BLACKBURN. That is true. That is correct. So you agree that the Constitution does not mention the right to an abortion and, yet, through one of the most brazen acts of judicial activism our Supreme Court created the right through *Roe v. Wade*. This is why Americans—this is why so many women that I've talked to are really concerned about who sits on the Federal bench. We need a Justice who will adhere to the text of the Constitution. You've talked a little bit about that today as you talked about historical context, and they don't want Justices who are going to invent rights out of whole cloth to serve a political interest.

Let's move on. I want to go to when you were at Harvard, your thesis entitled "The Hand of Oppression: Plea Bargaining Processes." In that piece you argued that judges have, and I'm quoting—I brought this up yesterday—"personal hidden agendas that influence how they decide cases."

So what personal hidden agendas do you harbor or do you think other judges harbor?

Judge JACKSON. Thank you, Senator.

That line, to the extent it appears in my thesis, was written by someone who had not gone to law school and was a senior in college who had spent a summer at an internship working in—making observations in the context of a criminal justice internship. It is not a view that I hold.

Senator BLACKBURN. Okay. Then what led you to that belief?

Judge JACKSON. I am thinking back. It has been 30 years.

Senator BLACKBURN. Okay.

Judge JACKSON. But the summer before my senior year I interned at a public defender's office in New York and I was part of a team of—there was lawyers and interns on this team and they were handling misdemeanor cases and I—

Senator BLACKBURN. So it was from an internship experience?

Judge JACKSON. Yes. Before I became a lawyer.

Senator BLACKBURN. All right. Let's go to something else.

Senator Cruz was discussing with you—and I think this is important—is something that parents all across the country are worried about and that is the progressive indoctrination of their children and the pushing of Critical Race Theory in the schools, and you told Senator Cruz that as a board member of the Georgetown Day School you didn't have any control over what was taught at the school, no control over curriculum, and you weren't aware that the school was pushing CRT.

But I would think that there would have been parents that came to you and said, have you seen these books—are you aware that this is being taught, being on that school board.

Judge JACKSON. No, Senator.

Senator BLACKBURN. No one ever mentioned it?

Judge JACKSON. Georgetown Day School is a private school.

Senator BLACKBURN. Right.

Judge JACKSON. It's not a public school.

Senator BLACKBURN. I'm fully—I'm fully aware. And you mentioned that you said that you meant—you thought he meant that Critical Race Theory isn't being taught in public schools, yes?

Judge JACKSON. Correct.

Senator BLACKBURN. Okay. But we know that's not the case. We know that CRT is being pushed in our K through 12 schools.

And I've got a letter here, Mr. Chairman, that Senator Tuberville and I wrote last year to the National Education Association on this issue. I'd like to submit that to the record because it's relevant to our discussion.

Chair DURBIN. Without objection.

[The information appears as a submission for the record.]

Senator BLACKBURN. And we had admonished the NEA for adopting pro-CRT materials during their annual organizing meeting and proposing to spend \$127,000 in teachers dues to combat opponents of CRT, and there are countless reports of CRT being pushed in the public school system and a lot of parents that I work with every day, every week, don't have the funds to send their child to a private school.

They're relying on the school systems—the public school systems—and it is important to them to have a Supreme Court that is going to protect parental rights to teach these children as parents see fit to have their children taught.

And I will tell you, too, with Georgetown Day School I found it astounding that it teaches kindergarteners—five-year-old children, and I've got grandchildren—and they teach them that they can choose their gender.

So is this what you were praising when you applauded the, and I'm quoting you, “transformative power of Georgetown Day School's progressive education”?

Do you agree that our schools should teach children that they can choose their gender?

Judge JACKSON. Senator, I'm not remembering exactly what quote you're referencing, but Georgetown Day School is——

Senator BLACKBURN. It was in a book——

Judge JACKSON. In a——

Senator BLACKBURN [continuing]. And you gave the quote.

Judge JACKSON. Georgetown Day School is a private school that——

Senator BLACKBURN. Yes. I am asking do you agree that schools should teach children that they can choose their gender?

Judge JACKSON. Senator, I'm not making comments about what schools can teach their——

Senator BLACKBURN. Let me ask you this then. *United States v. Virginia*—the Supreme Court struck down VMI's male-only admission policy.

Writing for the majority, Justice Ginsburg stated, "Supposed inherent differences are no longer accepted as a ground for race or national origin classifications. Physical differences between men and women, however, are enduring. The two sexes are not fungible. A community made up exclusively of one sex is different from a community composed of both."

Do you agree with Justice Ginsburg that there are physical differences between men and women that are enduring?

Judge JACKSON. Senator, respectfully, I am not familiar with that particular quote or case——

Senator BLACKBURN. Okay.

Judge JACKSON [continuing]. So it's hard for me to comment as to whether or not——

Senator BLACKBURN. All right. I'd love to get your opinion on that and you can submit that.

Do you interpret Justice Ginsburg's meaning of men and women as male and female?

Judge JACKSON. Again, because I don't know the case, I don't know how I interpret it. I'd need to read the whole thing.

Senator BLACKBURN. Okay. Can you provide a definition for the word "woman"?

Judge JACKSON. Can I provide a definition?

Senator BLACKBURN. Mm-hmm. Yes.

Judge JACKSON. No. I can't.

Senator BLACKBURN. You can't? Okay.

Judge JACKSON. Not in this context. I'm not a biologist.

Senator BLACKBURN. So you believe the meaning of the word "woman" is so unclear and controversial that you can't give me a definition?

Judge JACKSON. Senator, in my work as a judge, what I do is I address disputes. If there's a dispute about a definition, people make arguments and I look at the law and I decide. So I'm not——

Senator BLACKBURN. Well, the fact that you can't give me a straight answer about something as fundamental as what a woman is underscores the dangers of the kind of progressive education that we are hearing about.

Just last week, an entire generation of young girls watched as our taxpayer-funded institutions permitted a biological man to com-

pete and beat a biological woman in the NCAA swimming championships.

What message do you think this sends to girls who aspire to compete and win in sports at the highest levels?

Judge JACKSON. Senator, I'm not sure what message that sends. If you're asking me about the legal issues related to it, those are topics that are being hotly discussed, as you say, and could come to the Court. So I'm not able to—

Senator BLACKBURN. And I think it tells our girls that their voices don't matter. I think it tells them that they're second-class citizens, and parents want to have a Supreme Court Justice who is committed to preserving parental autonomy and protecting our Nation's children.

So I—let's move on. I want to go to the child porn issue and I know that we've discussed this today on several different times. What's troublesome to me is your consistent pattern of sentencing these predators below the sentences recommended by the Government and the sentencing guidelines, and Senator Cruz, Senator Hawley, have laid out some of these disparities. I know Senator Blumenthal mentioned the Kids Online Safety Act that he and I are working on.

You have talked about how horrifying it was to get some of that information. As we have held these hearings, that too has been horrifying. We've had moms all—from all over the country call us and tell us their story of how these pedophiles, these child abusers, these pornographers, are using technology and that technology has really advanced and, unfortunately, we know that online right now it is more dangerous for kids than ever.

Here's a couple of stats for you. In 2021, NCMEC's cyber tip line received nearly 30 million reports of online child sexual abuse material, which is a 35 percent increase over 2020. Those 30 million tips contained 44.8 million videos and 39.9 million images, and as a mom and a grandmom, this is an issue of tremendous concern. I have grandsons that are 12 and 13 years old, and these are things that concern me—how these people work.

I find the discussion that you made—the distinction you made, between pedophiles who produce child pornography and those who were only collectors to be one without a difference.

You said, and I'm quoting you, that “it was a mistake to assume that child pornography offenders are pedophiles.” Do you believe that it matters to the children and their parents who suffer abuse what motivation those abusers had?

Judge JACKSON. Thank you, Senator.

As you said and as I've said, these cases are among the most difficult—

Senator BLACKBURN. They are.

Judge JACKSON [continuing]. For judges who have to deal with the evidence, judges, who, like me, are parents—

Senator BLACKBURN. My question, Judge, do you think it matters to the kids and their parents the motives of the abuser, of the pornographer?

Judge JACKSON. Senator, it does not matter—

Senator BLACKBURN. Okay.

Judge JACKSON [continuing]. To the victims in these cases what the motivation is. The quote—I'm not exactly sure where it came from. I know that what Senator Cruz showed me before was questions that I was asking in the context of a hearing to——

Senator BLACKBURN. Okay. Well, I've got some serious concerns about that. I do want to go to your judicial philosophy and back to the Ninth Amendment.

President Biden said he was looking for a judicial nominee with a judicial philosophy that is more of one that suggests that there are unenumerated rights in the Constitution and all the Amendments mean something, including the Ninth Amendment.

You told Senator Lee that you didn't discuss this statement with President Biden. But I want to know whether you agree with it.

Do you share the judicial philosophy that President Biden is looking for? And Senator Kennedy tried to walk through some of this with you. Do you believe that the Ninth Amendment is a source of unenumerated rights?

Judge JACKSON. Senator, the Supreme Court has not found any unenumerated rights that derive from the Ninth Amendment and so that's not the precedent of the Court, and there aren't any rights that have been established under that provision of the Constitution.

Senator BLACKBURN. Okay. White House Chief of Staff Ron Klain has written that the Supreme Court should intervene whenever the Nation's conscience and laws need a jolt in a progressive direction. Presumably, that is what he and his boss, President Biden, expect a Justice to do.

So do you believe that the role of the Court is to intervene whenever we need a jolt in a progressive direction and would you do that through the unenumerated rights? Would you do it on issues like abortion or any other issue?

Judge JACKSON. Senator, the role of a judge is to decide cases and controversies based on the facts and the law, mindful of their obligation to rule impartially and to remain in consideration of only the law and their constraints under the Constitution.

Senator BLACKBURN. Okay. A lot of special interest groups have come out in support of your nomination. One of those is Demand Justice, and they are a progressive dark money group that has launched a million-dollar ad buy to push for your confirmation.

Demand Justice is also pushing for radical changes to the structure of our country and our Constitution including a demand that Democrats pack the Supreme Court. One of Demand Justice's board members has urged Senate Democrats to add 10 more Justices to the Court.

It's clear that Demand Justice believes that if the issue of court packing were to come before you on the Supreme Court you would rule in their favor.

Are they wrong to believe that you would rule in their favor?

Judge JACKSON. Senator, it's very unlikely that the issue of court packing would come before the Supreme Court. That question is in the province of Congress. It's a political question.

Senator BLACKBURN. Okay. Let's see. I want to follow up on this *Make the Road New York* issue that has come up a couple of times today.

Congress granted DHS sole and unreviewable discretion to determine which illegal immigrants should be deported. This means DHS's decision was unreviewable by a Federal judge and any attempt to challenge DHS's decision should have been dismissed by the court.

And, yet, you did the very opposite. You didn't dismiss it. You inexplicably construed the law to permit a judicial challenge to DHS's immigration decision despite the plain language of the statute.

The D.C. Circuit, where you sit, reversed you. It noted that it could hardly imagine a more definitive expression of congressional intent than the one in the law at issue and it questioned how you could have come to any other conclusion based on the text of the statute.

So I'd like to know what was ambiguous about the immigration law that we enacted and we explicitly stated that DHS's decision was unreviewable? What more could we possibly have said or have made clear that you were not authorized to review DHS's decision?

Judge JACKSON. Thank you, Senator.

When Congress strips the court of jurisdiction, Congress, in many cases, does so explicitly. It says something other than sole and unreviewable. It says things like no court shall hear, there's no jurisdiction to consider.

There are ways that Congress clarifies that judges have no authority or no jurisdiction to hear a particular case. The D.C. Circuit considered jurisdiction with respect to this statute in this dispute and determined that the court did have jurisdiction and the question was whether there was a cause of action to proceed.

What I determined in looking at the statutes at issue in this particular case is that sole and unreviewable meant that DHS had the sole power to make a decision about—

Senator BLACKBURN. Right. Not to interrupt you. My time is going to run out and I want to be respectful of getting you out of here tonight.

But we were clear in what we said on that, and I heard your explanation on that earlier today. That's why I wanted to come back to it tonight, because this is the kind of judicial activism that really concerns Tennesseans, these issues that I've been through with you today, the statements that—your statements that I gave back to you last night in my opening, things that you had said, decisions that you had made. These cause concern.

So we'll take up a little bit more of it tomorrow. Thank you for your graciousness.

Mr. Chairman, thank you for the time.

Chair DURBIN. Thank you very much, Senator Blackburn.

I want to thank Judge Jackson for this long day and part of it under tough circumstances. You were a model of grace under pressure.

At times, things were said about you which turned out to be inaccurate. It was said you called President Bush and Secretary Rumsfeld war criminals. That didn't happen. It was said you also sentenced—you always sentence criminals too lightly. That didn't—that's not exactly true. It was said you apologized to a defendant

in the child pornography case without any sympathy for the victims and that wasn't true, either.

The truth is you've been a judge for nearly 10 years. You've sentenced more than 100 defendants, some to decades in prison, and even the child pornography cases my colleagues continued to raise over and over with you, your sentences were in line with the recommendations of the Government or a Probation Office in the vast majority of the cases that you heard.

We invited a number of people to come here today and one special guest was a lady who cleans our office at night. She works the midnight shift, but she wanted to be here today to see you and hear you and stand by your side, and she said afterwards that it was a great moment for her to be in this room today.

But she asked me or she asked my staff, why are some people so mean? Well, I have to tell you, the overwhelming majority on both sides of the aisle were not mean. They were constructive and positive and really raised the important questions that we all care about.

Some are always going to be a little disappointing. That's the nature of human life.

Tomorrow morning, we're going to gather at 9 a.m. for Jon Ossoff and Thom Tillis. I don't know if America is ready.

[Laughter.]

Chair DURBIN. I know this Committee will be ready.

And thank you very much, and this meeting of the Senate Judiciary Committee will stand in recess.

[Whereupon, at 10:12 p.m., the hearing was recessed.]

[Additional material submitted for the record for Day 2 follows Day 4 of the hearing.]

**CONTINUATION OF THE
CONFIRMATION HEARING
ON THE NOMINATION OF
HON. KETANJI BROWN JACKSON
TO BE AN ASSOCIATE JUSTICE OF THE
SUPREME COURT OF THE UNITED STATES**

WEDNESDAY, MARCH 23, 2022

UNITED STATES SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Committee met, pursuant to notice, at 9:06 a.m., in Room SH-216, Hart Senate Office Building, Hon. Richard J. Durbin, Chair of the Committee, presiding.

Present: Senators Durbin [presiding], Leahy, Feinstein, Whitehouse, Klobuchar, Coons, Blumenthal, Hirono, Booker, Padilla, Ossoff, Grassley, Graham, Cornyn, Lee, Cruz, Sasse, Hawley, Cotton, Kennedy, Tillis, and Blackburn.

**OPENING STATEMENT OF HON. RICHARD J. DURBIN,
A U.S. SENATOR FROM THE STATE OF ILLINOIS**

Chair DURBIN. The Senate Judiciary Committee will come to order.

We have two Senators, Senator Ossoff of Georgia and Senator Tillis of North Carolina, who will do their 30 minutes of questioning to complete the agenda from yesterday, and then each Senator will be allowed 20 minutes to ask questions if they wish, but the Chair is more than anxious to entertain efforts to yield back your time. I'm sure the witness, Judge Jackson, would appreciate it as much as all of us in that respect. I'm going to make an opening statement, Senator Grassley is going to do the same, and then we will proceed with the questions by the two Senators.

First, I would say, Judge Jackson, that I thought that President Biden got it right yesterday. He tuned in and watched the proceedings and said you showed both grace and dignity. I'd use the phrase "grace under pressure," and it's been referred to by many people. This is a tough assignment, and many have risen to the challenge, but none as well as you did yesterday. Thank you for doing it so much.

I would just say this: much of what we heard from a handful of Senators yesterday has to be put in context. The overwhelming majority of Senators on both sides, I thought, were asking appropriate questions, and positive in their approach, and respectful of the

nominee before us. But for many Senators, yesterday was an opportunity to showcase talking points for the November election. For example, "All Democrats are soft on crime. Therefore, this nominee must be soft on crime." Well, you've made a mess of their stereotype. The endorsement of the Fraternal Order of Police, the International Association of Chiefs of Police just doesn't fit with their stereotype of a Harvard grad, a Black woman who is aspiring to the highest court in the land. But you earned it. Law enforcement is on your side because you've been on their side at critical moments. And your family has dedicated a big part of their lives to law enforcement, and you obviously believe it at your core. You said that over and over again. So the soft on crime charge, which leads all others, falls on its face.

The second thing is that you are somehow out of the mainstream when it comes to child pornography cases, and, of course, that gets down to the question of sentencing and your choices in sentencing. It is difficult, if not impossible, for each of us to put ourselves in your place when you're facing all the totality of facts concerning a certain defendant, then looking at your requirements under the law, as enacted by Congress, in trying to do the right thing to keep America safe but to meet justice. You are in the same place as 80 percent of Federal judges when it comes to sentencing on child pornography cases. Eighty percent.

And, of course, Congress is not without fault. We have failed to pick up the responsibility that was assigned to us some 17 years ago when the Supreme Court decided that the basic guidelines would not be mandatory on judges. We should've stepped in at that point, but it's a tough, hard, controversial subject, and we've stayed away from it. And what has happened is the judges have tried to make do with a fractured situation where they have guidelines that are advisory. They have opinions coming to them about sentencing from the Government as well as from the Probation Office and others.

So I would say that the bottom line is this: you have done what 80 percent of the judges have done. You are in the mainstream of sentencing when it comes to child pornography cases. I also think it's ironic that the Senator from Missouri, who unleashed this discredited attack, refuses to acknowledge that his own choice for a Federal judge in the Eastern District of Missouri has done exactly what you did.

You also have been criticized as having been wrong to be a public defender or even to be in a law firm representing a Guantanamo detainee. It's interesting that Republican judges, very conservative ones, don't see this as a blemish on your character. They understand, as we do, that the Sixth Amendment creates a responsibility that people have a right to counsel. You have exercised that responsibility in your professional life.

This, incidentally, yesterday turned—your nomination turned out to be a testing ground for conspiracy theories and culture war theories. The more bizarre the charges against you and your family, the more I understand the social media scoreboard lit up yesterday. I'm sorry that we have to go through this. These are not theories that are in the mainstream of America, but they've been presented here as such.

Finally, you are a respected, successful woman of color. You've been approved three times by this Committee for increasingly significant judicial assignments. Now the President of the United States has chosen you to serve on the highest court of the land. America is ready for this Supreme Court glass ceiling to finally shatter, and you, Judge Ketanji Brown Jackson, are the person to do it.

Senator Grassley.

Mr. CORNYN. Mr. Chairman?

Chair DURBIN. Yes?

Mr. CORNYN. Mr. Chairman, I think you've, in the main, provided both sides an opportunity to be heard and ask their questions. But unfortunately, I notice that after every series of questioning on this side of the aisle, you choose to editorialize and contradict the points being made by this side of the aisle. I don't know whether we will have an equal opportunity to editorialize about the advocacy that you and your colleagues, the points that you're trying to make.

I especially was concerned that after my questioning yesterday, I left the hearing room, and you chose to come back after a break and raise with the judge a point that I had asked her about, and which I, frankly, think was misrepresenting my position and what the facts are with regard to whether the judge has accused President George W. Bush and Donald Rumsfeld of war crimes. My language was—I asked her whether she called him a war criminal, and she said under oath to you, "No, I did not," although the record is plain as can be that she accused them of war crimes. Now, I don't understand the difference between calling somebody a war criminal and accusing them of war crimes. Maybe in some other foreign language that I don't frankly understand, maybe that would make sense, but not in accordance with a common understanding of the English language.

So I just don't—I just want to lodge a protest and say that I don't think it's appropriate for the Chairman, after every time somebody on this side of the aisle asks questions of the judge, you come back and you denigrate, and you attack, and you criticize the line of questioning. I think the judge is doing a pretty good job of defending her own position in answering questions. So thank you for giving me a chance to express my objection to the way that you've been editorializing after each time this side of the aisle asks questions.

Chair DURBIN. Thank you, Senator Cornyn.

Senator KENNEDY. Mr. Chairman.

Chair DURBIN. Excuse me.

Senator KENNEDY. Mr. Chairman.

Chair DURBIN. Excuse me. Thank you, Senator Cornyn. It's known as Chairman's time.

Senator GRASSLEY. Could I—could I make my statement first?

Chair DURBIN. Do you want to make your statement?

Senator KENNEDY. Well, I—may I respond to what Senator Cornyn said?

Chair DURBIN. Well, if you want to speak before your Ranking Member.

Senator KENNEDY. May I? Thank you.

Chair DURBIN. Entirely your right.

Senator KENNEDY. Mr. Chairman, I agree with Senator Cornyn. You and I have talked about this before. I have great respect for you, you know that, but I've had the same issue in normal hearings, non-Supreme Court hearings where you make editorial comments after I question. I appreciate your input, but they're not offered in an evenhanded way, and I just don't think it's productive. I mean, you just referred by name to Senator Hawley. I think he should have a chance to respond. You know, this is America. We have the right to express ourselves. You know, you're not free if you can't say what you think, and I just—I want to join my colleague, Senator Cornyn. I just don't think it's appropriate, Mr. Chairman.

Chair DURBIN. It's called Chairman's time. It is a tradition in this Committee exercised by Senator Lindsey Graham as Chairman and Senator Grassley in previous Supreme Court—

Senator KENNEDY. But they didn't do it the way you do it, Mr. Chairman.

Chair DURBIN. I'm going to allow—I'm going to allow you to be heard, but I want to be heard—

Senator KENNEDY. Of course.

Chair DURBIN [continuing]. Without interruption.

Senator KENNEDY. Of course.

Chair DURBIN. And so in the Minority, we waded through Chairman's time when we had Republican Chairs. There will not be a separate set of rules for Democrats in control of this Committee. That was used as a response time and again by both of those Senators, and it was accepted. If what I said was somehow problematic or painful yesterday, I'm sorry, but the Democrats are going to use the same mechanisms that the Republicans have used in this Committee.

Senator KENNEDY. And I appreciate that, Mr. Chairman, but I think if you're going to personalize it as to—as to Senators by name, you ought to give them a chance to respond.

Chair DURBIN. Well, they will have a chance.

Senator OSSOFF. Mr. Chairman?

Chair DURBIN. Each and every Senator has 20 minutes today to respond if they wish.

Senator OSSOFF. Mr. Chairman?

Chair DURBIN. Who's seeking—Senator Ossoff.

Senator OSSOFF. Could we hear from Ranking Member Grassley, and then I'd like the opportunity to ask questions on behalf of the State of Georgia. I think the American public is now tuning into these proceedings expecting a substantive discussion of matters of grave importance to the country with a nominee for the Supreme Court before us. I don't think we set an appropriate tone by bickering over time and process at the outset of our proceedings.

Every Senator deserves to be heard. I would like to humbly request that Ranking Member Grassley make his statement, that I and Senator Tillis have our opportunity to question the nominee, and that then we can litigate balls and strikes from yesterday's hearing. Would that be acceptable to the Committee?

Chair DURBIN. I think in the name of your humility, we should do that.

[Laughter.]

Senator OSSOFF. Thank you, Mr. Chairman.

Chair DURBIN. Senator Grassley.

Senator GRASSLEY. Yes.

**OPENING STATEMENT OF HON. CHARLES E. GRASSLEY,
A U.S. SENATOR FROM THE STATE OF IOWA**

Senator GRASSLEY. Senator Ossoff, my statement doesn't quite fit in with what you ask, but I feel like I have to say it anyway because of the conflict that happened late last night. But before I do, I want to somewhat tongue-in-cheek, but with some seriousness as well, when the Chairman quoted Biden as saying that Judge Jackson handled herself with grace and dignity, I want to compliment the Democrats on this Committee for using grace and dignity unlike it was during the Kavanaugh hearings. Thank you all very much for making this—I've heard a lot of compliments about how this is the way a hearing ought to be held.

So I want to address that issue that was raised yesterday about records. Senator Cruz raised a very legitimate question about data related to U.S. Probation Office recommendations. The White House and Members of this Committee used that information to attempt to discredit information raised by Senator Hawley and others about the nominee's sentencing record as a district judge. No one on our side of the aisle had access to this information. In fact, before this past week, I'm not sure anyone but the Probation Office and the court had access to this information.

My understanding is that the Probation Office recommendations aren't part of any public record. The specific sentencing recommendations aren't always shared with prosecutors or defendants. Somehow it appears that the White House obtained this information. It was leaked in pieces to media outlets in order to cast doubt on legitimate Members' questions, and then it was provided to only Democratic Members of this Committee without any of the underlying documentation. I'd like to add my name to the letters that are requesting at least—well, this is Senator Lee's letter of request for at least the Probation Office recommendations so that we can be sure of the data handed out by Democratic staff last night. I'd also like to add my name and have added my name to Senator Cruz's follow-up request for access to any other data that might be shared with our colleagues on the other side.

One last thing. To suggest that all that we have to do is ask for information doesn't pass muster. You can't ask for information you don't know if it exists. I've asked for non-public records related to the Judge's tenure on the Sentencing Commission. Those have not been produced just like 48,000 pages of records withheld by the White House.

How is the United States Senate supposed to review a record that we don't have? This process might be timely, but it's neither thorough nor fair to the American public, and I hope we can rectify that.

I yield.

Chair DURBIN. Thank you, Senator Grassley.

Senator Ossoff.

Senator OSSOFF. Thank you, Mr. Chairman, Ranking Member Grassley, and, Judge, good morning.

Judge JACKSON. Good morning, Senator.

Senator OSSOFF. Welcome back.

Judge JACKSON. Thank you.

Senator OSSOFF. We had a late night doing our job as Senators and you as a nominee, and we're off to a morning start. I was considering asking you if you were a coffee or a tea drinker, but I thought that might be too personal and immaterial to the question of your nomination.

I want to begin, inspired by the presence of my brother, Senator Reverend Warnock, who's joined us this morning, in a spirit of national unity, offering thanks for these proceedings for our Constitution, for this opportunity to air in public before the American people a vital grappling with ideas core to our republic: questions of the role of branches of Government, questions of the proper role of judges in our society, questions that keep the peace and ensure that this remains a Nation of laws. As I noted in my opening statement a couple of days ago, democracy is the exception and not the norm in history or around the world, and this public exercise is a vital one, and so I'm thankful for it. I'm thankful that the American people have the opportunity to observe it.

And, I'm thankful for your presence, Judge, for your service to the country throughout your life as a district judge, as an appellate judge, as a member of the U.S. Sentencing Commission, as a nominee for the Court. So thank you for being here. Thank you for subjecting yourself and your family to an intrusive, at times cruel and unfair, but, on the whole, necessary and proper process of scrutiny as you are considered for this appointment.

The American people who are now tuning in for the second day of these proceedings are hearing about your approach to the law, to your role as a judge and as a potential Supreme Court Justice, and they're also getting to know you personally. And we've had the opportunity to hear a bit about your family, your background. I think it's also appropriate that the American public hear a bit more about your brother's story, who, as I understand it, served in the Baltimore Police Department, served in the U.S. Army. Before we turn to matters of law, will you please help introduce yourself and your family to the American public as you seek this lifetime appointment? Tell us a bit about him and his story.

Judge JACKSON. Thank you, Senator. My brother followed in a long tradition in my family of public service. It was a core family value. My parents were both public servants, and my mother's—two of my mother's brothers were career law enforcement. And my brother and I are almost a decade apart in age, and he, I think, looked up to my uncles, who were often around in their uniforms, keeping their weapons away from the kids by putting them up on high shelves. And we looked up to them, and we understood through their service what it meant to give back to your community.

My brother went to college, a Historically Black College, Howard University here in Washington, DC, after growing up in Miami, and decided to follow in—follow in my uncles' footsteps. He could've done many things coming out of college with a college degree but

decided he wanted to be a police officer and went to Baltimore, which, as many of you know, struggles like many cities with areas that are—have a lot of crime. And it was a very—it was a very stressful period for us as a family because as proud as we are of his service, as much as we know it's important, law enforcement is a dangerous profession, and as family members, you worry. When you don't get the phone call, when you haven't heard for a couple of days, when you hear about things in the news, in the community, you worry.

And so I grew up with family members who put their lives on the line. I understand the need for law enforcement, the importance of having people who are willing to do that important work, the importance of holding people accountable for their criminal behavior. I also as a lawyer and a citizen believe very strongly in our Constitution and the rights that make us free. And what that means to me is an understanding that, although we need accountability, although there is crime, we also have a society that ensures that people who have been accused of criminal behavior are treated fairly. That is what our Constitution requires. That is what makes our system so exceptional.

My brother understood that as part of his work, and he also served in the military. He also decided, as many people did, to defend our country after 9/11 that he would go into the Army. And I remember when he made that decision, he had a college degree. He could've been officer right away. He could've been a type of military officer that didn't have to actually be on the battlefield. And I remember saying, are you going to do something with, you know, radio signals? Are you going to be behind the scenes? And he said, no, no, I'm going to be infantry, boots on the ground. He said, I believe strongly in the protection of our country, and if I'm going to be leading, I'm going to be out front. That's the kind of person my brother is. It's the kind of service that our family provides.

And for me, what that meant was an understanding that to defend our country and its values, we also needed to make sure that when we responded as a country to the terrible attacks on 9/11, we were upholding our constitutional values, that we weren't allowing the terrorists to win by changing who we are. And so I joined with many lawyers during that time who were helping the courts figure out the limits of Executive authority, consistent with what the Framers have told us is important: the limitations on government. I worked to protect our country, my brother worked on the front lines, and it was all because public service is important to us.

Senator OSSOFF. Thank you, Judge Jackson. Let's talk a bit about limitations on power. Our Constitution is a document that renounces monarchism and, instead, establishes a Republic. You, in an opinion that has been widely cited, made the observation that, "Presidents are not kings." What does that mean, and what are some of the most important bulwarks in our constitutional system against the abuse of Executive power, against tyranny?

Judge JACKSON. Thank you, Senator. Our constitutional scheme, the design of our Government, is erected to prevent tyranny. The Framers decided, after experiencing monarchy, tyranny, and the like, that they were going to create a government that would split the powers of a monarch in several different ways. One was fed-

eralism. It was vertical. It would split the powers between the Federal Government and States. Another was to prevent the Federal Government from itself becoming too powerful, from having all of the authorities, from having legislative, executive, and judicial authority concentrated in one place.

So the Constitution in its design puts the legislative authority in Article I and gives it to the Congress, the power to make laws. It puts the Executive authority in Article II and gives it to the President, the power to execute the laws. And it puts the judicial authority, the power to interpret the laws, in Article III and gives it to the court. The separation of powers is crucial to liberty. It is what our country is founded on, and it's important, as consistent with my judicial methodology, for each branch to operate within their own sphere. That means for me that judges can't make law. Judges shouldn't be policymakers. That's a part of our constitutional design, and it prevents our Government from being too powerful and encroaching on individual liberty.

Senator OSSOFF. Thank you, Judge. I mentioned in my opening remarks that the Court has played a vital role, constrained within its proper constitutional boundaries, in the national process of making America in real life what America is in text. And reflecting on your experience as a public defender, a vital role in our justice system, let's talk a little bit about the Sixth Amendment and the role that the Court played in ensuring that the Sixth Amendment is real in practice in the *Gideon v. Wainwright* decision. Can you help all those who are tuned in right now to reflect upon that decision, what it means, what it says about the role of the Court?

Judge JACKSON. Yes, Senator. Prior to *Gideon v. Wainwright*, people who could not afford lawyers were not entitled to lawyers under our system, so a person could be accused by the Government of criminal behavior and would have to fend for themselves in court. They would have to make their own arguments. Someone who is not a lawyer would still be the responsible for defending him or herself in front of a judge if the Government brought charges.

Earl Gideon was a criminal defendant from Florida, my home State, who had a handwritten petition. He complained that it wasn't fair under our constitutional scheme that protects and requires people to be tried. He said, I need help. I'm not a lawyer. I can't make these arguments. I think it's important for the protection of liberty to ensure that people are able to have counsel. And that handwritten petition made its way to the Supreme Court, and the Justices read it and they determined to take his case, and in the end decided that the protections of the Sixth Amendment, the right to trial, includes the right to appointed counsel so that everybody who is accused of criminal behavior now has the right to an attorney, and that's very important.

I mean, one of the things that I see or saw as a trial judge is that it was crucial for our justice system to have representation from both sides. It was the only way that a judge—it is the only way that a judge can really make fair determinations. And in cases—you know, we've heard a lot about my criminal cases. In every case I'm getting, as a judge, arguments from the prosecution. I'm getting arguments from the defense counsel. I'm getting argu-

ments or statements from Probation in these criminal cases. And the work of a judge is to look at the facts and circumstances, hear the arguments of the parties, apply the law, and make a fair determination. And so having lawyers for criminal defendants aids in that process and benefits us all in our criminal justice system.

Senator OSSOFF. I would just take the opportunity to note at this time, Judge Jackson, that it so happens that the Southern District of Georgia is one of just three Federal districts without a Federal defender's office. And I've offered legislation to establish one, and I'll be seeking support from my Republican colleagues to try to make that bipartisan to ensure there is access to counsel for defendants in my State.

Let's talk a bit about the First Amendment: freedoms of speech, publication, assembly. There's a well-known Supreme Court case, *Brandenburg v. Ohio*, which establishes a certain test to ensure that the Government is constrained in any effort that may be made to punish speech. And the impulse to censorship is something that can emerge from time to time across the ideological and political spectrum, particularly in times of great controversy or in times of national security crisis. Can you please walk the Committee and the broader public, watching now from all across the country, through that decision and how you will approach these vital protections for speech, publication, and assembly, should you be confirmed?

Judge JACKSON. Thank you, Senator. Freedom of speech, publication, assembly is in the First Amendment of the Constitution. It is a core foundational protection against censorship. It is important in our constitutional scheme that people be allowed to express themselves, that ideas be exchanged. That is the groundwork for a vigorous and vital democracy. There are many tests, many cases in the Supreme Court's jurisprudence that discuss various disputes about circumstances in which the Government can restrain or regulate speech. And that decision establishes, to a certain extent, that if there is speech that is an incitement to violence, that's one circumstance in which the Government might be able to prevent it. But other than that, short of that, free speech is supposed to be allowed to happen. And there are, again, various tests and circumstances that the Court has applied in deciding whether the Government can regulate the content, place, and manner of speech, but the general principle is that our democracy is—thrives because the Government is restrained and cannot censor its citizens.

Senator OSSOFF. I think in the—in the same spirit of thanks with which I opened these questions, I also want to just take a moment and recognize the members of the press who are here, the reporters and photographers who ensure that these proceedings are truly accessible to the public, and ask you to describe your approach to press freedom. The question of prior—of prior restraint has been litigated, a famous case in the context of the Pentagon Papers in the latter years of the Vietnam War. I know—I believe for all of us on this Committee, we recognize the vital role of press freedom in ensuring the free exchange of ideas, access to truth, and debate in our democracy. How will you approach cases that implicate press freedom?

Judge JACKSON. Thank you, Senator. This is another area in which there is well-established caselaw that supports the freedom of the press to be able to write and report. There is a general obligation of truth in terms of the press but also a recognition that sometimes there may be things that get published that aren't exactly accurate. And so the Court in *New York Times v. Sullivan* determined a higher standard of liability for press: things that are put out in the press have to be knowingly false. There's an actual malice test because the Court was balancing the concerns about libel, people claiming that they have been misrepresented in the press, with the need to allow the press to do their job. The overall understanding is that press freedom, again, is one of the First Amendment freedoms that undergird our democracy.

Senator OSSOFF. Something I just want to take a moment and observe, Judge Jackson, is, you know, and this is my first such proceeding, so I'm grateful to the Chairman for opening today's ceremonies at the end of the dais. But something that I've studied and am aware of is that there's been a range over time of how willing nominees are to candidly, and openly, and forthrightly discuss these core matters of constitutional principles in proceedings like this one, and a tendency over time to allow less and discuss less a more restrictive approach. And I want to thank you because, while you have prudently and disciplined—in a disciplined way refrained from commenting inappropriately on potential pending caselaw, you have been willing to engage in a forthright and expansive discussion of these vital principles in a way that I think stands out among some recent nominees. That's not a criticism of any recent nominees; it's an observation about your performance. And I think that having an open, and honest, and forthright dialogue about these matters of national significance is part of the vital role that these proceedings serve.

I want to turn now to the Fourth Amendment. I want to discuss with you the protections against unreasonable search and seizure. We discussed how the Constitution was a renunciation of monarchism and tyranny. It establishes core civil liberties, one of which is the protection against unreasonable search and seizure. How will you approach Fourth Amendment caselaw, and can you help those tuned in across the country, remind them of what, for example, the principle of a reasonable expectation of privacy means in the context of Supreme Court jurisprudence?

Judge JACKSON. Thank you, Senator. The Fourth Amendment is one of the Amendments in the Constitution that protects individual liberty by limiting what the Government can do with respect to criminal processes. It restrains the Government from engaging in unreasonable searches and seizures. And the Supreme Court has developed a series of tests and ways of evaluating whether any particular act by an officer in a case qualifies as an unreasonable search or seizure. Let me just say that this is the kind of area of Supreme Court and judicial review that is very fact-specific because courts, in order to stay in our appropriate role, can't make policy about police behavior writ large, can't just sort of look out into the universe and say we have a Constitution that says unreasonable searches and seizures, so let us tell you all what that means. That's not the way that courts operate.

Under Article III, courts can only hear individual cases and controversies and decide them. So every court, including the Supreme Court, is looking at unreasonable search and seizures in the context of a particular dispute where someone has had something searched by an officer in their house, they've been seized under a particular set of facts, and they claim in the context of a lawsuit or in the context of defending themselves that there has been an unreasonable search or seizure.

And so the Court, case by case by case, looks at the facts and circumstances and decides. And I would say that this is—this is the kind of analysis that takes into account a number of things, but one of the things, in addition to understanding the facts and circumstances, is understanding what is meant in the Constitution by “unreasonable search and seizure.” There is caselaw that the Supreme Court has developed that looks at whether or not something is an unreasonable search and seizure, in part by analyzing whether there was a reasonable expectation of privacy in that item, in that area. Is there a reasonable expectation of privacy in your house, for example? If a police officer were to come into your house, you would not be able to claim Fourth Amendment protection unless, says the Supreme Court, there was a reasonable expectation of privacy in your house.

And the Supreme Court has determined whether there is a reasonable expectation of privacy, for example, in your house by looking at what areas were protected at the time of the founding when the words “unreasonable searches and seizures” were written into the Constitution. Lo and behold, something like your house, the Court has determined, there is a reasonable expectation of privacy because that's what those terms meant back then. And so if a police officer were to come without a warrant, the Court has said, in areas where there is a reasonable expectation of privacy that would be an unlawful search.

Senator OSSOFF. This is an area where the emergence of new technologies makes it likely, I believe, that should you be confirmed, you will have to consider Fourth Amendment claims in light of circumstances that couldn't have been anticipated at the time of the drafting of the Constitution. And indeed, constitutional interpretation has already evolved over time to adapt to the reality of new technologies, from phone booths, a classic case in the late 1960s, about whether a closed phone booth door demonstrates an expectation of privacy, to more recent caselaw involving geolocation data from cell phones. And I want to urge you, should you be confirmed, to remain vigilant about how the emergence of new technologies, the way that they become ubiquitous in our lives, the way that virtual spaces are increasingly akin to physical spaces, will require the Court to consider very complex questions, and to seek technical advice because these are technologically complex questions.

What is your view on how the Court should seek such technical expertise, which may be, with all due respect, beyond the training or experience of a Justice or their clerk, and if, for example, one such method of seeking advice is through amici? What's the importance of understanding the provenance, and origin, and funding source of such briefs submitted to the Court? This is a two-part

question. I want to restate it. The first is, again, I want to urge you, should you be confirmed, as I'm confident you will, to vigorously defend the constitutional rights of American citizens against unreasonable search and seizure in the context of new technologies. I'd like to hear how you'll approach seeking technical expertise to inform that decisionmaking. And then a question about the transparency of briefs filed before the Court, something that Justice Scalia noted in some campaign finance caselaws, that it's important for the public to know who's funding electioneering communications in the context of political campaigns. I think it's important for the Court to know who's briefing them, what the motive and funding source of such briefs might be. Could you please, with my remaining time, and then I'll yield and we'll have some more time later to discuss war powers. Could you please comment on those matters? Those would be my final questions for this round.

Judge JACKSON. Thank you, Senator. One of the ways in which the Court receives information, other than directly from the parties in a case, is through a practice, an established practice, of receiving amicus briefs. Amicus is a term for "friend of the court" briefs. These are people who are not parties to the case, who don't have that kind of interest in the case, but may have expertise, or information, or arguments that they wish the Court to hear. And I think that that would be the primary mechanism by which, if the Court were to decide to hear a case concerning a matter that involves some technical expertise, I would think that there might be amicus briefs related to the technology, for example.

I have not looked at the Court's rules. I would certainly want to discuss with the Court's other Justices the ways in which determinations are made about which amicus briefs are received and what disclosures are related to them. But the Court does receive amicus briefs in cases in order to inform itself so that it can make a decision related to the issues in a case.

Senator OSSOFF. Thank you, Judge Jackson. Thank you for your courage and your grace, your forthrightness in answering my questions. I look forward to the opportunity to ask a few more later, and I yield, Mr. Chairman.

Chair DURBIN. Thanks, Senator Ossoff.

Senator TILLIS.

Senator TILLIS. Thank you, Mr. Chairman. Judge Jackson, thank you for being here. I hope you got some rest last night, and congratulations——

Judge JACKSON. Very little, Senator, but that's all right.

Senator TILLIS. Me, too.

[Laughter.]

Senator TILLIS. But thank you for being here, and congratulations to your family and your husband, who has an impressive medical list of accomplishments that he should be proud of. I'm sure that you are, too. And thank you to your family, the public servants serving in the military, serving in law enforcement, educating our children. You're a role model family.

I do want to go back. This morning, I ended up turning to a channel that I never watch just to see what was being said about the proceedings. I thought it was interesting that they were ridiculing some of my colleagues on this side of the aisle for bringing

up the behavior of past Supreme Court hearings. This is really the appropriate venue to do it. I guess we could talk about it when we're reviewing intellectual property or something else, but, contextually, this is the time to do that. And I think we all have to agree that the behavior in the Kavanaugh hearing was inappropriate. I hope we never get back to it. And I hope we can all agree that many of the behavior or the positions that some of my colleagues took on the other side of the aisle with Justice Barrett was abhorrent, and we should never do it again. That's why I'm so glad that, for the most part, we've behaved in an appropriate manner here.

I'm going to get to some questions, if time allows, that relate to some other questions that my colleagues have asked. But, Judge Barrett, did I understand correctly that at a young age you won a debate competition, or was it an oratory competition?

Judge JACKSON. I was in speech and debate. It was one team, and I did original oratory as my primary event.

Senator TILLIS. And did you continue your debate competition? Did you continue to do that, first question. Did you continue to do debate competition?

Judge JACKSON. Continue into college?

Senator TILLIS. Yes. I mean, were you doing that in school, in college as you—

Judge JACKSON. I did not do it in college, no. I did it—I did it from middle school through high school—

Senator TILLIS. Okay.

Judge JACKSON [continuing]. And stopped when I graduated high school.

Senator TILLIS. I did, too, and I recall with that that we would get assigned a topic that wouldn't necessarily be one that we agreed with, but we had to argue it. Were you ever in a situation or did you get to pick a topic and only argue the side that you were for?

Judge JACKSON. So I didn't—it sounds like what you're referencing is extemporaneous speaking.

Senator TILLIS. Yes.

Judge JACKSON. I think I did that once in one competition. I did original oratory—

Senator TILLIS. Okay.

Judge JACKSON [continuing]. Which is where I wrote my own speech.

Senator TILLIS. Okay. You've had an opportunity to debate a lot as a defense counsel, I would assume, in the court of law when you're debating a position. And the reason I asked that question is that yesterday when Senator Kennedy was asking you about the expanding the Court, or what we call court packing, you said, "I haven't really thought about it, but I hear the arguments on both sides—I hear the argument on both sides." So could you briefly describe to me your perception of the arguments on both sides?

Judge JACKSON. My understanding of the arguments is about whether or not to expand the Court beyond the nine Justices that are on the Court right now, the nine seats that are there, and—

Senator TILLIS. If you—if you were to view—I mean, right now it's, "nine is fine," "four are more." I mean, that's really the two ar-

guments. So do you understand or have you heard any of the arguments for or against either side?

Judge JACKSON. I'm not even sure about the four. I've just heard people talking about——

Senator TILLIS. Okay.

Judge JACKSON [continuing]. Putting more Justices on the Court, expressing concerns that the Court has become politicized, that the Court has become unbalanced in terms of what people perceive to be views of the majority of the Justices, and so I've heard arguments about rebalancing the Court on that side. And then there's the argument that many on the dais have stated about the inappropriateness of doing so, the concern that it might lead to some kind of a war of every time there's a new President, adding Justices to the Court.

Senator TILLIS. Actually, yesterday when Senator Whitehouse—I think it was Senator Booker who observed Senator Whitehouse's presentation, made a comment about how Rhode Island—New Jersey being a bit bigger would have a bigger graphic to display. I went back. I think that New Jersey is 6 times the size of Rhode Island by square miles. North Carolina is 36 times the size of Rhode Island.

[Laughter.]

Senator WHITEHOUSE. We appreciate you pointing that out, Senator.

Senator TILLIS. And before my friends from Texas chime in, I would—I would let them know that if Alaska were two States, they'd be the third-largest State. So I've decided to use the Whitehouse format for dark money so that we have a balanced understanding of the fact that our proceedings here, the aspirations for the Court, there is an ecosystem out there on both sides. As a matter of fact, we had a judicial nominee who actually participated in this ecosystem. I think you could reasonably assume if they participated in that ecosystem, that they probably would've been an activist judge.

[Chart is displayed in hearing room.]

Senator TILLIS. The point that I make here is that we've seen this ecosystem mobilized to support you, and I think, Judge Jackson, you said you haven't had any encounter with Demand Justice. I don't know if you've had any encounter with some of these. They're abbreviated or—I'm sorry—either acronyms or abbreviated, so I wouldn't expect you to. It would be interesting, if we could for the record, determine if you have had any interactions.

Judge JACKSON. I have not, Senator. I've never seen most of those——

Senator TILLIS. That's good enough. I mean, I wouldn't expect you to, to be honest, sitting on the bench. But they are out there, and they have a specific plan, and their specific plan—as a matter of fact, I was inspired by Senator Whitehouse's chart, so I went out to Demand Justice. They have a specific plan. Step one, four seats on the Supreme Court. “We must add four seats on the Supreme Court to restore balance,” which, by their opinion, is a majority with their view and their judicial philosophy. They're thrilled that President Biden has promised to appoint a commission. In fact, they're so thrilled that they want to make sure that they can influ-

ence the outside of the commission by endorsing their four-seat strategy.

They want to recruit 25,000 volunteers—this is on their website, their strategy—to influence the commission’s recommendation. And then they want to nuke the filibuster, 51 votes to make a decision that could ultimately be to pack the courts. This is their stated goal. They’re proud of it. Senator Whitehouse was talking about how the prior President was influenced by an organization. I would say that, Senator Jackson, and almost everybody that the President vetted before—I’m sorry, Judge Jackson—are on this list. So I think it’s intellectually dishonest to say that the administration, that my colleagues on the other side of the aisle are not influenced by this organization. We’ve tracked some of the fundraising and support in reelections. They’re engaged, and they’re influenced by it.

But let me tell you what I’m really worried about with the court packing risk that we have today. We’re talking about the ultimate destruction of two institutions. Back in January, Senator Schumer laid a vote down on the floor that ultimately would’ve reduced the majority of 60—the filibuster limit of 60 to 51. He was doing it as a—as a way to pass a single bill, but we all know what happened when Senator Reid nuked the Executive Calendar for circuit court judges. It led to you only being subject to 51 votes to be confirmed. That nuked the Executive Calendar. In January, Senator Schumer was laying the groundwork for the same thing.

Now, I worry—that’s the destruction of the Senate institution as far as I’m concerned. I think we have to be a consensus-based organization. We don’t need to be a 100-member House of Representatives, and that vote happened. What disappointed me most about that vote is back when President Trump was calling on us and pressuring us to nuke the filibuster when we had control of Congress, I signed onto a letter with more than 60 Members to say that I would never do that in the face of our—in the face of a Republican President whose policies I supported. I did that to send a very clear message. I respect this institution, and I respect the Court, which almost certainly would have been—we would’ve had pressure from our side of the aisle to pack a Court a little bit more.

Now, every Member who was here back when we signed that letter who’s on this Committee changed their position and voted to potentially nuke the filibuster just 2 months ago. So I hope you can understand my concern about the political winds and the potential damage that it could do to the Senate and do to the Supreme Court. I think it was Federalist Paper 78 where Hamilton talked about the vulnerability or, I think, the feebleness. Now, he was arguing, I think, the case for lifetime appointments, but I do think that the Supreme Court is a fragile institution, and I do believe that if we think it’s politicized now, think about how it would be if we destroyed the institution of the Senate so that on a strict party-line partisan vote, we expand the Court.

That’s why court packing is important, and that’s why we ask a question that I know you’re not going to answer, but I know that Justice Breyer and Justice Ginsburg did. And if there’s any Supreme Court Justice listening right now, I wish that they would speak up because I think your institution is in peril. And accel-

erating it to a truly political body is only one successful nuking of the filibuster vote away in the U.S. Senate. This is serious stuff.

I was at Pricewaterhouse. I was a partner at Pricewaterhouse back during the Arthur Andersen Enron scandal. I saw about a 100-year-old, top-tier, Big 5 consulting firm cease to exist because their reputation suffered. If we pack the Court, the only thing that you all have, that the Supreme Court has, is its integrity and the esteem of the American people and the trust they put into it. Packing the Court could cause the Supreme Court to lose the trust of the American people, and I think if we want to expand the Court, let's do it for the only valid reasons. Maybe the Justices come to us and the Chief Justice comes to us and say, the workload is too great, the times have changed, and then convince 60 Members of this body to consider it.

But when you've got a partisan organization here that's putting a pipeline of people in there that they think like them and have a judicial philosophy like them, how can any reasonable person think that this is just kind of fixing the mechanics? It's a partisan decision that even some of my colleagues on the other side of the aisle have taken the bait, so much so that they would reverse a commitment that they made with me when they signed that letter to say they would never nuke the filibuster and then nuke it.

President Biden's on that list, too. Back in 1983, he gave a rousing speech in a Judiciary Committee hearing saying don't pack the Court. He gave a rousing speech on the Senate floor saying don't nuke the filibuster. But now we're in this posture to where we could destroy two institutions if we're not careful. So I actually hope that you can at some point study the issue thoroughly and understand the risk to this institution that you're likely to be confirmed to. It's serious, and you could end up being there—you'll have a lifetime appointment. You could actually be there and witness its demise real time if we're allowing—if we allow the Court to be packed.

Now, I want to talk a little bit about the—I think you were—you were a part of a—of a case in Massachusetts that some people are casting as a pro-life versus pro-choice issue. Now, to be clear, I am Catholic and I am pro-life, and I'm proud to have signed and ratified pro-life bills in North Carolina when I was Speaker of the House that have withstood judicial scrutiny. But I don't really think that case was about pro-life. I think it was about free speech, so I want to ask you a few questions about it, and maybe you could describe it to me if your memory serves you.

But it seems to me that the argument that you were a part of—I think that you joined with a couple of others. It seemed as if the argument was because the pro-life protesters were "threatening to—threatening and dangerous to women attempting to enter the clinic." I'm not necessarily saying you put those words in the brief, but they were in there, and "they were a hostile, noisy crowd in the face of protesters." Now, am I correct that a part of the argument was because they were noisy, in-your-face protesters, they needed to be a little bit further away than people who were pro-choice advocates? Because as I understand it, I think the underlying law in Massachusetts was ultimately struck down unanimously by the Supreme Court. Is that correct?

Judge JACKSON. Thank you, Senator.

The brief that you—

Senator TILLIS. Oh, by the way, I didn't expect you to respond to my riff on packing the Court.

Judge JACKSON. Yes.

Senator TILLIS. Just to net it out, it's a bad, bad, bad idea. But back on this one.

Judge JACKSON. I understand. The brief that you are referencing was a brief that I worked on right after finishing my Supreme Court clerkship, when I joined a big law firm in Massachusetts. This is 1998—maybe 2000—at the end of my clerkship. And it is a First Amendment free speech set of arguments that the lawyers at my firm—I was a part of a team representing clients who wanted to make an argument about buffer zones, which, at that time, had not yet been litigated all the way up to the Supreme Court.

Senator TILLIS. But was it a buffer zone that put pro-life and pro-choice people in the same buffer or one that argued that pro-life people were in your face and perhaps needed a bit better—bigger buffer than the pro-choice? I was just trying to discern—

Judge JACKSON. Yes. No, I—

Senator TILLIS [continuing]. The facts of the case.

Judge JACKSON. I'm—I believe that it was viewpoint-neutral, meaning it wasn't about what the people were saying. It was about clearing a path—

Senator TILLIS. Yes.

Judge JACKSON [continuing]. To allow people to enter the clinic. The laws at the time were about how far—

Senator TILLIS. Yes.

Judge JACKSON [continuing]. Did people have to be kept back, whether they were pro-life or pro-choice, because if they were blocking the entrance—

Senator TILLIS. Do you understand why the underlying law was ultimately deemed unconstitutional by the Supreme Court?

Judge JACKSON. I didn't follow the jurisprudence. At that time, it had not been, and the First Circuit, this was a First Circuit brief. I don't remember what happened in the district court, but my clients wanted to argue in the First Circuit that the laws that allowed for the clearing of the path so that people could enter the clinic and have people stand back were constitutional and important, and the First Circuit agreed.

I think, ultimately—I don't know exactly, but I think, ultimately, as you say, there was some litigation that went all the way to the Supreme Court, and the Court had other jurisprudence about the extent to which buffer zones are constitutional.

Senator TILLIS. Yes. Well, it looked at—I'm not an attorney. I watch Law and Order from time to time, and I'm not going to get into a debate. But on its face, it almost looked as if there was this notion that there was bad speech and good speech, that somehow—look, I'm somebody who's had protesters come to my house, get in my face, and be very nasty. Four times by land and two times by sea. I live on a lake. Okay with them doing it as long as they stay off my lawn. In the last case, they didn't.

But it almost felt like to me that those protesters who didn't like me needed to be a little bit further away than the protesters that

maybe I would allow to be a little bit closer. It may not be right, but I'll make sure that I get my facts right before this afternoon and the second round.

I want to go to sentencing. I'm not going to cover any of the ground that my colleagues have. I'm sympathetic to some of it, not necessarily all of it, because I think the details are something that we don't have possession of. I'm sure we're going to talk a little bit more about that.

But I want to talk more about a pattern. I know—and I was really impacted by your description of family dinners and your uncles coming in in uniforms and putting their guns up on the cupboard and having a sense of pride that you had family that served in law enforcement.

There are a couple of cases—I'm very focused on law enforcement and backing the blue. I think that law enforcement, I talk with a lot of them. Their morale is low. They feel like “defund the police” and some of these other efforts are already making a very difficult and dangerous job more difficult, more dangerous.

There have been a few cases where you have recommended lower sentences than even, I think, the defense attorneys have. But I'm sure that if I were you, and observing you yesterday, you would probably point to some mitigating circumstances or factors that are not necessarily available to the Committee as a basis for doing that.

I think in one case, the Government recommended a 30-month sentence, and the defense recommended 21 months, and you gave him 18 months. And this was a third conviction for assaulting an officer.

There was another one that was a lower sentence for they were officer assaults, and it just seemed like it went lower. But I don't want to get into those because you may have factors that you would point to that would justify the decision.

I've got a question about—and see, that's at an atomic level. I mean, you're looking at the facts of the case. You're looking at the defendant. And as you've described in some of the other cases here, you made a judgment that you thought was fair and that was in bounds with your peer group.

But back at the beginning of the COVID pandemic, I believe you made this statement, and I'll give you time to provide context if it's out of context. But in the interest of time, I'm only going to read the most striking.

You said, “The obvious increased risk of harm that the COVID-19 pandemic poses to individuals who have been detained in the District's—that's the District of Columbia's—“correctional facilities reasonably suggests that each and every”—and I think that means everyone—“every defendant who is currently in the DC Department of Corrections custody and who thus cannot take independent measures to control their own hygiene and distance themselves from others should be released.”

I checked in April 2020—I think that's when you made the statement—that there were 1,200 or 1,600—let's call it 1,200, I'll be conservative—people in the Department of Corrections. Do I read that statement to say that you felt, given the circumstances at the time,

they should all be released? Because that's broad. That's not looking at their individual cases.

Judge JACKSON. No, Senator, you don't read it correctly.

Senator TILLIS. Okay.

Judge JACKSON. It was not a statement. It was a line in an opinion. And the beginning of the COVID-19 pandemic was a really obviously horrible—

Senator TILLIS. I was there.

Judge JACKSON [continuing]. And difficult time for all of us. And what was happening at the beginning in the prisons, which was part of the criminal justice system that, as judges, we were involved in—

Senator TILLIS. I tracked it—quickly, let me—

Judge JACKSON. Yes.

Senator TILLIS. I want—because I do not want to go over. I don't go over, but—

Judge JACKSON. Can I just—

Senator TILLIS. Well, let me—

Judge JACKSON. Yes.

Senator TILLIS. Let me just give you a little bit more context. I've actually written letters to the Department of Justice encouraging the release of nonviolent offenders in North Carolina at a Federal correctional facility. I've also supported early release programs. I voted and supported the First Step Act.

I, as speaker of the house, was the first speaker in probably 2 decades that actually did the Justice Reinvestment Act early release of nonviolent prisoners. But how can I not read this to say that perhaps they should be released, irrespective of the crime for which they've been charged?

Judge JACKSON. Senator, if you read two more sentences down, that is precisely what I focus on. This is a case, *United States v. Wiggins*, where I was setting up my analysis as to why I would not be releasing Mr. Wiggins in this case. He was arguing essentially what I said in that statement. He was arguing that the circumstances of COVID-19, which, at that point, was rampant in the prisons. We had not had a vaccine. There were very difficult circumstances for prisoners, who could not be separated from each other in the context of our jails.

And as I say at the beginning of that opinion, at that point, COVID was ravaging the jail. And the question for courts under the statute that Congress has enacted for compassionate release was whether COVID-19, a pandemic in the jail, was an extraordinary and exceptional circumstance or extraordinary and compelling circumstance that should warrant release.

What I said in that statement that you read was it would seem as though something like a deadly pandemic, rampant in the jails would justify releasing everyone. But, I go on to say in that very opinion, Congress has indicated that we have to take each case individually. We have to look at the harm to the community that might be caused by the release of individual people. We can't just release everybody, I said in that opinion.

And so—

Senator TILLIS. Okay. I wanted to give you—and I'm sorry to interrupt you, but I'm on—

Judge JACKSON. That's all right.

Senator TILLIS [continuing]. On 4 minutes. But I feel like—I also had my staff provide me this morning in very, very small type, recidivism and Federal sentencing outcomes. I've said, I'm on record as saying that I want people out. I want to have them an opportunity to reenter society, become productive members, and I've got a track record for ratifying bills to that effect and supporting similar measures since I've been here in the Senate. I'm going to continue to work on it.

But tell me why the numbers that I'm looking here, we have a recidivism rate, the most recent one that I have before me—and I'd be happy to share it. I'll ask to have this submitted to the record. But I think an 8-year lookback says that 49 percent of the people incarcerated are rearrested within 8 years.

If you take a look at the types that are most likely to be re-offending, it's firearms offenders, robbery offenders. Violent offenders reoffended at a higher rate than nonviolent offenders.

And so if I look at this and I look at your philosophy with respect—and it's admirable. I said that the content of your character would be demonstrated this week in my opening statement, and it has been. And one of the things that are first among them are your compassion and your belief that people can redeem themselves.

But if you look at some of the cases that our—my colleagues have brought up and if you look at—even with the context that you provided on the last statement about the Department of Corrections statement in *Wiggins*, can you understand how some of us may think that your compassion could lead to bad results, based on the numbers that we have here with recidivism, that Congress may need to work more on that to make sure that we get it right?

Can you understand how somebody who from our side of the aisle could see that maybe there is some pattern to give the benefit of the doubt to someone who has been incarcerated in some cases with very serious crimes?

Judge JACKSON. Thank you, Senator.

I don't recall saying anything about compassion in the way that you're describing it. But what I—

Senator TILLIS. No, no, no. I'm just saying that if I take a look at your responses to some of my colleagues' questions and your statements to some of the—to some of the defendants, it seems as though you're a very kind person and that there is at least a level of empathy that enters into your treatment of a defendant that some could view as maybe beyond what some of us would be comfortable with, with respect to administering justice.

Judge JACKSON. Thank you for letting me clarify.

The statements that I made about my practices as a trial judge, which I'm no longer a trial judge, but were intended to explain how trial judges operate and how they impose sentences within the framework that Congress has provided. The statute that applies to us tells us to look at all of the various factors that Congress has set forward, including the nature and circumstances of the offense, the history and characteristics of the defendant, and it tells us that we should be imposing a sentence sufficient, but not greater than necessary, to promote the purposes of punishment.

Congress also tells us that one of the purposes of punishment is rehabilitation. My attempts to communicate directly with defendants is about public safety because most of the people who are incarcerated via the Federal system, and even via the State system, will come out, will be a part of our communities again. And so it is to our entire benefit, as Congress has recognized, to ensure that people who come out stop committing crimes.

And so what I convey or did when I was a trial judge, as I sentenced people to very lengthy periods of incarceration, was you are getting your day in court. You are able to say what you want to say, but you have to sit here and listen to my reading into the record the victim's statements in this case. You have to go away understanding that I am imposing consequences for your decision, your decision to engage in criminal behavior.

And the reason why I did that, I've said, is because I recognized as a defender that there were lots of people in our system who, instead of taking responsibility for what they had done and then, ultimately, understanding the harm and potentially not doing it again, instead of that, those people were bitter. They were angry. They were feeling victimized because they didn't get a chance to say what they wanted to say because nobody explained to them that drug crimes are really serious crimes.

Nobody said to them, "Do you understand that there are children who will never have normal lives because you sold crack to their parents, and now they're in a vortex of addiction? Do you understand that, Mr. Defendant?"

I was the one in my sentencing practices who explained those things in an interest of furthering Congress' direction that we're supposed to be sentencing people so that they can ultimately be rehabilitated to the benefit of society as a whole.

Senator TILLIS. I appreciate that, Judge Jackson. I'd just still note that virtually half of those people, statistically speaking, that you gave that speech to within 8 years were back in prison. And in some cases for more serious offenses than the first incarceration.

Thank you, Mr. Chair.

Chair DURBIN. Thank you, Senator, for that line of questioning.

And I've noted that you joined a letter with Senator Grassley and myself in March 2020 at the earliest stages of this, talking about release under these similar circumstances. And, of course, we all said at the same time low-risk inmates would be considered, but—

Senator TILLIS. Only low-risk inmates.

Chair DURBIN. Yes.

Senator TILLIS. Yep.

Chair DURBIN. And I wanted to make that note for the record.

We're going to start the second round of questions, 20 minutes each, and I'll kick it off.

This is an unusual document, this Constitution of ours, which has taken up so much time in the hearing, the conversation about it. And it is really at the core of public service. I don't know that there's a place that you can take a job at the Federal level in any branch of Government without taking an oath to defend this document.

I don't know about other countries and the oaths that might be required, but we even within the Constitution spell out the oath to be taken by the President of the United States, and it's to uphold and defend this document.

And there is great debate about just what this document means in today's context. We understand the wisdom, the inherent wisdom of the document in the fact that we're still here some 230 years later with the design of a government that has endured longer than virtually any other democracy, which, of course, speaks to the wisdom of the Founding Fathers and their plan for this Nation.

But we also understand, taking an honest look at it, that you barely get into this document, Article I, Section 2, and you run into a problem. Because in Article I, Section 2, the Article that relates to Congress, they talk about who will be counted for apportionment among the States, and there is that awful reference to "three-fifths of all other persons," which though the document never mentions the word "slavery" or "slaves," what was being spelled out here by the Founding Fathers was how are we going to count these slaves?

And for apportionment purposes, they were to be counted as three-fifths of a person, which is a horrible notion by any standard. But the wise Founding Fathers included it, trying to deal with the reality of their day.

I hear debates back and forth of originalists, textualists, and others, and you've been asked as often as any nominee what your thought is. You've talked about staying in your own lane judiciary and methodology and the like, but I'd like to explore for just a moment, without asking you to get into any particular fact pattern, the reality of a couple things.

First, when the Bill of Rights was written, the First Amendment to it made certain to guarantee freedom of press. Freedom of the press in 1790 was, of course, referring to a piece of paper, a newspaper, and saying that there would be freedom to engage in that process in this democracy of America. Now that freedom of press is referring to this, and things have changed an awful lot.

We have a circumstance now where people no longer have just a handful of television networks or known publications—The Washington Post, New York Times, and such—but turn for their sources of information to places like Facebook and Twitter and beyond. And we have a real serious question about what is a publication in America? What does it take to be a publication and be press?

Is my blog that I publish tomorrow "the press"—guaranteed with a constitutional right that I have a right to publish it as I wish and say what I want to say, with certain boundaries? And I guess my question to you as we look at this is how do you move from the language of 1789, 1790 to the reality of 21st century and make sure it's relevant?

If more people are relying on Facebook and Twitter, for example, for information than they are common sources of television and newspapers, how do we rationalize that they can say—Facebook and Twitter—to a former President of the United States, you can't publish here? You're not going to be allowed to do it. And they've done that.

So how do you reconcile that conflict of the changing times, the dramatic changes in technology, what the Founding Fathers envisioned, and what we face today?

Judge JACKSON. Thank you, Senator.

The challenges that you identify are the types of things that the Supreme Court is now dealing with. We have a foundational document that has text, and it has principles. It establishes freedoms and foundational important concepts that are intended to govern us and that we are bound by as a society.

There is modern technologies, as you say, that have not—that the Framers, the Founders could not have imagined the cell phone and all the other things that we now rely upon. And as I mentioned earlier, the Supreme Court and every court deals with individual cases, disputes about issues, and when the Court gets an issue that requires constitutional interpretation, it looks at the facts and circumstances of the particular case and the text and principles of the Constitution in light of the times in which they were written and analogizes to present day.

So the Supreme Court, for example, has considered the cell phone issue with respect to the constitutional principle of unreasonable searches and seizures, which is a protection from Government intrusion that the Framers called an unreasonable search. The text “unreasonable search” is not—does not have an inherent definition. What the Supreme Court has done is looked back at the time of the founding to determine what kinds of intrusion would have been covered when those words were written into the Constitution.

And to the extent that at the time of the founding those words covered things like police officer intruding into your home and looking into your papers and affairs, then the Supreme Court analogizes that circumstance to the modern-day circumstance of a cell phone, which now is in all respects, says the Court, like rifling through your papers and affairs.

So it’s a process of understanding what the core foundational principles are in the Constitution as captured by the text, as originally intended, and then applying those principles to modern day.

Chair DURBIN. I’ll just give you two illustrations of my thinking on this and of my frustration or at least understanding of the challenge, let’s say. Let’s put it that way.

Senator Feinstein and I joined in legislation several years ago to talk about confidentiality of sources for news entities and whether or not a person could—a reporter could be compelled to disclose those sources. The effort really drew some of the best and brightest in the news business to come testify before the Committee.

The effort failed and faltered over what is a publication? Who is a publisher? Who is in the business of dispensing news? Does it involve money has to pass between them for this to be an official publication, or can I just put up on my blog what I wish and resist any efforts to discover my sources? That was one of the serious issues that we faced.

We also took a look—I took a look at where this is going in terms of the future and our entities that we rely on for news so often. And I’m going to leave it at that because I think you’ve addressed

the general and don't want to get into more specifics, nor should you.

But when people pledge that they are originalists, we're sticking with the original words, you better have your mind open to the reality that this world is changing and changed, and many of those principles are sound today, but the challenges of interpreting them with the reality of today's technology is a challenge, a very difficult one, which you would face in the Court.

I'm going to try to set an example here. We have 20 minutes, and I'm going to try to yield back some part of it.

I see that Senator Cornyn is here, and I'm glad he is because I'm going to address an issue which he raised yesterday and again this morning. And I wanted to do it while he was physically present so that when he gets his turn, he can address it, and I'm sure he will.

Yesterday, Senator Graham said that you had gone too far in calling the Government "a war criminal in pursuing charges against a terrorist." Later, Senator Cornyn asked Judge Jackson, and I quote, "You referred to the Secretary of Defense and the President of the United States as war criminals. Why would you do something like that?"

As I noted yesterday and repeat this morning, these charges don't hold up. A CNN fact check said, quote, "Both Graham and Cornyn left out important context. Specifically, neither mentioned that Jackson's allegation of war crimes was about torture. Also Jackson didn't explicitly use the phrase 'war criminal.'"

The New York Times noted that the allegation, quote, "is a distortion and lacks context." The New York Times went on to say, "Judge Jackson did not specifically call the former President and Defense Secretary war criminals. She was one of several lawyers in 2005 signing four essentially boilerplate habeas corpus petitions on behalf of detainees at Guantanamo that claimed the U.S. Government had tortured the men and that such acts constitute 'war crimes.'" That's in quotes. "The petitions each name Mr. Bush and Mr. Rumsfeld, along with two senior military officers who oversaw the Guantanamo detention operation, in their official capacities as respondents."

The Washington Post noted, and I quote, "One key thing to note, as law professor Steve Vladeck does, is that Bush and Rumsfeld are named in the petitions because they have to be to clear procedural hurdles. Indeed, those petitions later name Barack Obama after the administration changed. Another is that they are named in their official capacities, not because of actions they personally took as individuals."

They continued, "But the larger point is that Jackson was acting as the detainees' lawyer in her role as public defender, and one of the underpinnings of the American justice system that is even the most reviled alleged criminals have the right to a vigorous defense."

Would you like to comment on that statement that I just made?

Judge JACKSON. Well, Senator, I would just say that public defenders don't choose their clients, and yet they have to provide vigorous advocacy. That's the duty of a lawyer. And as a judge now, I see the importance of having lawyers who make arguments, who make allegations.

In the context of a habeas petition, especially early in the process of the response to the horrible attacks of 9/11, lawyers were helping the courts to assess the permissible extent of Executive authority by making arguments, and we were assigned as public defenders. We had very little information because of the confidentiality or classified nature of a lot of the record. And as an appellate lawyer, it was my obligation to file habeas petitions on behalf of my clients.

Chair DURBIN. Thank you, Judge.

I'm going to try to set an example by yielding back about 7 minutes of my time. I invite my colleagues to follow that example if they wish.

Senator Grassley, you're next.

Senator GRASSLEY. Yes. Before I start, I'd like to make a brief point. Yesterday, Senator Durbin referenced Congress' efforts to stop child pornography and the exploitation of minors. I've worked on this issue for decades.

In 1983, I supported the Protection of Children Against Sexual Exploitation Act. In 2012, I sent a letter to the Sentencing Commission while Judge Jackson was vice chair. In the letter, I encouraged the Sentencing Commission not to lower sentences for child pornography.

I said that, quote, "It would be a disservice to the American people to have the Commission issue a report that advocates for the reduction in sentencing for a class of criminals who cause profound and lasting damage to their victims."

I'd like to have that put in the record.

Chair DURBIN. Without objection.

[The information appears as a submission for the record.]

Senator GRASSLEY. Yesterday, you referred to your record of decisions as the best thing to look at when explaining and evaluating your nomination. But you also said that you haven't had enough cases involving constitutional law to develop a judicial philosophy. If you haven't had to develop a philosophy for deciding cases yet, what else do you think would be helpful for us to look at?

Judge JACKSON. So, respectfully, Senator, I do have a philosophy. The philosophy is my methodology. It is a philosophy that I have developed from practice. Unlike some judges who come to appellate work from academia and who have some overarching theory of the law, I approach cases from experience, from practice, and consistent with my constitutional obligations.

So my philosophy is one in which I look at cases impartially, consistent with my independence as a judicial officer. I understand my limited role in the constitutional scheme and, therefore, take very seriously all of the constraints on the exercise of my authority that exist in our system.

What that means is that at the beginning of every case, I am setting aside my personal views. I'm——

Senator GRASSLEY. That's the three steps you gave us——

Judge JACKSON. Yes, sir.

Senator GRASSLEY [continuing]. Tuesday?

Judge JACKSON. Yes.

Senator GRASSLEY. So you don't have to go into that. Let me go on.

Should the Supreme Court overrule a precedent when it is clear to the Justices that the precedent was wrongly decided?

Judge JACKSON. Thank you, Senator.

Stare decisis, which is the principle that the Supreme Court uses at the outset—it's the sort of background rule of judicial maintenance of precedents in order to have predictability, stability in the law—is the kind of principle that the Court begins with when it is asked to overrule or revisit a precedent.

And the Court has developed certain factors that it looks at before it actually undertakes to reverse a precedent. One of those factors is the view that the precedent it's reconsidering is wrong, but that's not the only factor.

The Court also determines, in addition to whether or not the prior precedent was egregiously wrong, the Court has said, the Court looks at whether there's been reliance on that prior precedent, whether the precedent is workable or has proven workable over time, whether the cases in the area of the precedent have shifted such that the precedent itself is no longer on firm foundation, and whether there have been either new facts or a new understanding of the facts that give rise to a need to revisit the precedent.

So it's not just a look at whether or not it's wrong, and it's important that the Court take into account all of those factors because stare decisis, meaning letting the precedent stand, is a very important pillar of the rule of law.

Senator GRASSLEY. When is it appropriate for a judge to impose a sentence enhancement under the guidelines?

Judge JACKSON. Thank you, Senator.

The Federal Sentencing Guidelines are crafted to assist courts in making sentencing determinations within the broad range that Congress prescribes for cases for crimes. So in the typical case, a defendant is convicted of some crime. In the Federal system, they're usually very serious crimes, and Congress will say, Judge, you can give that person a sentence anywhere between 0 and 20 years, for example.

The sentencing guidelines are designed to set out a series of factors that judges should be looking at when they decide what they're going to sentence that particular person to. And those factors will be things like: if this is a violent crime, does the person have a weapon? If this is a violent crime, was there any injury?

And so the judge is looking at these facts, in many cases horrible facts, and calculating the guidelines based on what we call enhancements. Each one of those different characteristics or conditions is an enhancement.

So you ask when is it important to——

Senator GRASSLEY. Appropriate.

Judge JACKSON. When it's appropriate. Well, the judge has to calculate the guidelines in every case. That's how we start the process. But under the statutes, in addition to calculating the guidelines with all of those enhancements, the way our system now works is you determine what the guideline range of punishment is going to be, and then Congress says you look at a series of other factors in addition to the guideline range. And at the end of the day, the judges in the system now are choosing sentences based on

both the consideration of the guidelines and also the consideration of the statutory factors that Congress has put forward.

Senator GRASSLEY. Have you ever declined to impose an enhanced sentence on a defendant because you disagreed with the enhancement as a policy matter?

Judge JACKSON. Thank you, Senator.

Yes. And the reason is because of Supreme Court caselaw concerning the way in which the guideline system operates. The Supreme Court has determined in a case we discussed yesterday that the guidelines are no longer binding on judges, meaning the guidelines, you calculate, but you don't have to stay in the guideline range anymore. That was the Supreme Court's *Booker* case.

In—and I can't remember if it's in that case or in subsequent caselaw, but the Supreme Court has also made clear that when you are calculating the guideline range in the new system that we're in right now, judges are free, the Supreme Court has said, to decide in particular cases whether as a "policy matter" they disagree with a particular enhancement. That is the state of the law. That is what the Supreme Court has said judges are permitted to do in cases.

And so I have in certain cases, given the way in which the guidelines are operating, the disparities that are created in cases, I have at times identified various enhancements that I have disagreed with as a policy matter because the Supreme Court has said that that's the authority of a sentencing judge in our system.

Senator GRASSLEY. Are nationwide injunctions constitutional?

Judge JACKSON. Well, Senator—

Senator GRASSLEY. Well, you've issued them.

Judge JACKSON. Thank you for letting me address that circumstance.

The reason why I paused is because what I have issued is not technically a nationwide injunction. People call—call it that. But in a particular set of cases, administrative agency cases, that are brought under the Administrative Procedure Act, these are challenges to agency actions, like agency rules that they have promulgated, and if the challenge is to the procedures that the agency undertook to create the rule, the statute that applies, the Administrative Procedure Act, tells the court that if you agree with the plaintiff that the agency rule is faulty procedurally, the remedy in the statute is to invalidate the rule. That's what Congress tells judges to do.

Now, technically, that's not a nationwide injunction. That is invalidating a rule that the agency has enacted. It may have nationwide effects because the agency may have implemented its rule nationwide. But what the court is doing is not reaching out and touching everyone in the country. The court is directing the Government that has promulgated that rule that the rule is invalid, and that's what the statute tells us we have to do in those cases.

That's different than a nationwide injunction because a nationwide injunction would be a situation in which we're not dealing with a rule. We're not dealing with the Administrative Procedure Act. We're dealing with a particular case in which something has happened between the plaintiff and the defendant, and the court says based on what happened in this case, I'm going to tell every-

body in the country that you can't—the defendant you can't operate in this way anymore.

I'm going to find on the basis of this particular case. I'm going to join everyone in the country not to do that anymore. That's a nationwide injunction, which is not what I've done in I think the cases that you're talking about.

Senator GRASSLEY. How can the judiciary address concerns about forum shopping, given the rise of nationwide injunctions?

Judge JACKSON. Well, forum shopping is—is a concern that arises when litigants seek to go to different places in the country where they think that they may get a better result, and it's something that Congress can address because Congress has the power to determine various aspects of judicial process.

Senator GRASSLEY. Explain the political question doctrine, and then what standards would you apply to determine whether a claim before you implicates a political question.

Judge JACKSON. So the political question doctrine is a doctrine that relates to the jurisdiction of the court. As I mentioned, the courts are in a particular branch of Government, the judicial branch that is limited in its power. The courts can't make policy. They can't reach out into the world and decide that certain things are good or bad and then address them. They have to wait for cases to come and decide them.

And when a case comes, it has to be presenting a question of law for the court to answer it. If a person comes to the court and they ask the court to answer something that is properly in the province of Congress, if they ask a political question, then the court has to say, "I'm sorry. That's not my role."

So I had, for example, a case that involved Yemeni citizens who—I'm trying to get the facts exactly right. But they had relatives. I think they were resident in the United States, and they had relatives in Yemen, a war-torn area. This is a few years ago. And they came to the court, me, asking if I could direct the administration to extract their relatives from Yemen, that they wanted me to order the executive branch to send in troops and get their relatives out because it was, obviously, dangerous for their relatives to be in that country.

And what I said in that circumstance is essentially I don't have jurisdiction to do that because what you're asking me to do is a political question. The question of when and where troops can be sent and who can be extracted from foreign governments belongs with the executive branch, and so you have to ask them. And so I said I have no jurisdiction. That's a political question doctrine, and it's well established in our law.

Senator GRASSLEY. Yesterday, in response to a question from Senator Durbin, you said that a judge—as a judge, you are, quote, "trying in every case to stay in your lane," end quote. That's the same time you gave us the three steps you go through as you work yourself through a case.

You also described the text of a law as a constraint on your authority. But in several cases I'll list—*Make the Road New York*, *AFGE v. Trump*, *Watervale Marine Co.*, and others—the D.C. Circuit reversed your decision or criticized your reasoning for failing

to follow a clear and unambiguous text. Why didn't the clear text of the law constrain your authority in these cases?

Judge JACKSON. Thank you, Senator.

You mentioned three cases. Certainly with respect to the second one, the D.C. Circuit didn't say that the text was clear, and in fact, that's what happens in cases, that judges at the trial level do their best to make interpretations. In that case, it involved a channeling provision.

This is *AFGE v. Trump*. It involved a provision, a statute that was designed to channel the judicial authority into an agency. And I interpreted the statute, and I thought the arguments that were being made, the claims that were being made were not ones that Congress had intended to channel. And I went through the analysis, and I explained my reasoning as to why I thought I still had jurisdiction. And I went on to address the merits, which is the duty of the judge if they determine they do have jurisdiction.

The D.C. Circuit disagreed. They wrote an opinion that interpreted the statute differently with respect to those claims, but it was a case of first impression as to what those claims meant and whether they were supposed to be channeled or not. And that happens. District judges do their best, and sometimes the court of appeals and the Supreme Court haven't spoken to the issue, and the parties disagree.

In *Make the Road*, I explained that what I was attempting to do in light of Congress' enactments, not only the particular immigration provision, but also the Administrative Procedure Act, was reconcile the statutes of Congress, which is something that the courts also are supposed to do. That there are statutory interpretation canons that make clear that courts are supposed to understand that Congress intends for its statutes to work together, and to the extent that you are interpreting and the claim is made that allows you to do that, that's the sort of way in which interpretation is done.

I can go through my actual analysis. I did it yesterday as we talked. But there was a good faith disagreement between me and the court of appeals, which gets to decide, as to what the language meant and whether or not Congress actually intended to exclude the APA using that language under those circumstances.

Senator GRASSLEY. Thank you very much.

Chair DURBIN. Senator Leahy.

Senator LEAHY. Thank you, Chair.

And welcome back, Judge Jackson. I know yesterday was a grueling day of questions and I commend you for your poise, your endurance, your thoughtful answers. I felt privileged to be here for hours of that and you had even more hours.

But I want you to know the reaction in my own State of Vermont. I've gotten all kinds of emails and calls from friends across the political spectrum.

They've all been praising you and they said they realized that a lot of the questions that were lobbed at you had nothing at all to do with your qualities as being on the Supreme Court but were some Members, unfortunately, aiming for a sound bite that they may be able to put it on a political website where it now is.

For example, we heard some overheated claims yesterday that your representation of Guantanamo detainees somehow signaled your policy preference with how the United States has dealt with those detainees.

Every single Member of this Committee, especially those of us who had been assigned as counsel in cases, should know better than to conflate a nominee's past representation with their policy positions or to argue that a nominee espoused their client's viewpoint simply by choosing to represent them.

So your policy views aside, can you reiterate why it's so important for our courts to have the benefit of the best possible legal representation on both sides of any case and especially in cases where we are in uncharted legal and constitutional waters?

Judge JACKSON. Yes. Thank you, Senator.

So I've been a judge for almost a decade and what I've learned is that as part of my duty to render decisions consistent with my judicial oath in support of our Constitution and the rule of law I need to consider all of the arguments related to the dispute that is being brought in my courtroom.

I need to hear from not only the parties who are prosecuting a case—for example, a crime—but also from the defense, and some of these crimes are terrible crimes.

Our Constitution is designed to ensure that the Government affords due process to people who are being accused of crimes, and one might think even—it's even more important, in a way, in a case in which someone is so reviled.

It's kind of like the First Amendment. It's a protection for unpopular views. It's needed when there's a chance that the Government will suppress or, you know, do something that's untoward.

And so in the criminal justice system we have many, many Amendments that are designed to make sure that unpopular people, people who are accused of doing terrible things, are still treated fairly by the Government and that's a limitation on government power, which is the—which is the framework of our Constitution. It is about limiting government overreach.

And so in the criminal justice system, you can imagine and the Framers imagined a world in which the Government would use its authority to deprive people of their liberty, to throw people in jail, to lock them up and throw away the key, to not give people the opportunity to make arguments about their freedom.

That would be a real exercise of government power, government overreach. And so the Framers said, what we're going to do is we're going to put in our foundational documents a protection for people that the Government is accusing of crime.

And that's not to say that the people are innocent. That's not to say that they haven't done terrible things. What it's about is ensuring that the Government does what is required in order to ensure all of our liberty.

It protects all of us because there might be someone who is innocent and the Government—if the Government is able to just do whatever it wants in criminal process we are all at risk.

Senator LEAHY. Well, and I think we've all seen cases where that happened. I mentioned to you yesterday that I spent nearly a dec-

ade as a prosecutor, and especially when I had serious cases I wanted the best defense attorney possible on the other side.

I wanted a case that if—usually went up on appeal automatically if it carried a heavy penalty, I wanted the court—the appellate court—to look at it and say, okay, there were not errors of counsel on either side.

But I also, as a strong proponent of our Constitution, I think what you're saying is something I totally agree with. We have to have—we have to have individuals' rights protected. It doesn't mean the defense counsel is in favor of murder or rape or armed robbery. But the rights have to be protected.

Let me tell you about another area. I've authored and I've long championed the bipartisan John Lewis Voting Rights Advancement Act. I think it would help curtail the growing wave of voter suppression sweeping across our country—again, something we don't have to worry about in Vermont but, unfortunately, they do in other States.

I'm passionate about this legislation. I've always believed that our democracy is stronger when we expand, not shrink, the ranks where our citizens are fully participated. I believe our democracy grows stronger with your historic nomination and your presence before us today, and I've told you privately how my family members feel about that.

Why is it important for our democracy's institutions, courts and all others, to reflect the rich diversity of our Nation's citizenry?

Judge JACKSON. Thank you, Senator.

One of the things we've been talking about is the difference between the judicial branch and the other branches of Government.

We have three branches in our Federal system and the legislative branch has certain powers and it can do certain things to ensure that its prerogatives are achieved, and the executive branch has the power of might. The President controls the military.

The judicial branch—its force in our system is the protection of the rule of law, which can only be done by, essentially, the consent of the governed. It can only be done if people in our society believe, decide, and agree that they're going to follow what it is that courts decide.

And so one of the reasons why having a diverse judicial branch is important is because it lends and bolsters public confidence in our system. We have a diverse society in the United States. There are people from all over who come to this great Nation and make their lives, and when people see that the judicial branch is comprised of a variety of people who are—have taken the oath to protect the Constitution and who are doing their best to interpret the laws consistent with that oath, it lends confidence that the rulings that the court is handing down are fair and just, that everything has been considered, that no one is being excluded because of a characteristic like race or gender or anything else, and that's important.

I would also say that it's important from the standpoint of role modeling, that I have been so touched by the numbers of people who've reached out to me in this period of time to say how much it has meant to their daughters, to their sons, to the next genera-

tion, that I've been appointed—nominated and, hopefully, confirmed.

Senator LEAHY. Well, I agree with you. I've, certainly, seen that within my own family.

You know, we do have areas where we agree on things on this Committee, Judge. Senators Grassley and Senator Cornyn, myself and others, believe in transparency as part of our democracy.

We've done this with the Freedom of Information Act where we've updated it a number of years. Senator Cornyn and I have been the key sponsors of legislation and joined by Senator Grassley and Senator Durbin and others to improve the Freedom of Information Act.

You've talked about the detailed opinions you've written to try to do the same thing. I think it's safe to say you believe transparency is central to the duties of a judge.

Do you intend to carry that attitude when and you will—and you will—become a member of the U.S. Supreme Court?

Judge JACKSON. Thank you, Senator.

The value of public confidence, which I was just discussing, I think, is enhanced when the public understands the reasons that a judge renders his or her ruling.

One of my mentors used to say people think the judicial branch is so secretive. But, in fact, the judicial branch is the only branch that actually has to tell everyone. It actually has to write their opinions and explain why it is that they did what they did.

And so I tried—I've tried in the nearly 10 years that I've been on the bench to make my rulings transparent, to explain all of the inputs that I have considered with respect to the case, to lay out the law as I see it in interpreting what Congress, for example, has done in—with respect to a particular case and what legal provisions that I think are relevant to the dispute, and then to explain my analysis—why am I granting this motion or denying this claim.

And my hope is that it will help people to be confident in my reasoning, and even if they disagree with it they will understand what it is that I think, and I think that's important for public confidence in promoting the rule of law.

Senator LEAHY. Well, you know, you had talked about your clerk-ing for Justice Breyer and how it opened up doors of opportunity. I remember so well our conversation in my office and the President Pro Tem's office talking before these hearings began.

You told me what you thought it would mean to your parents and your family—your husband, your daughters, your parents—who have been here throughout this and what it would have meant to your grandparents.

You said you were the lucky first inheritor of Dr. King's civil rights legacy. I keep a daily journal. I wrote that down. I just—it means a lot.

So let me do this sort of open-ended question. You've patiently answered our questions this week. I told you the reaction in Vermont, but disappointment when some of them were, obviously, political—I heard that from both Republicans and Democrats—because they're thinking it should be your legal thoughts in the Supreme Court.

So I'd like to give you an opportunity to speak directly to the American people, including my little State of Vermont. Is there anything you want to convey to them about what kind of Supreme Court Justice you would be if and when you're confirmed?

It's all yours, your Honor.

Judge JACKSON. Thank you, Senator.

Well, first, let me just address my comments to you in your office, which is something that I've said in speeches because it speaks to who I am and what I value.

My parents grew up in Florida under lawful segregation and what that means is that when they were coming through middle school and high school they were not allowed to go to school with white students.

This is in the era before and right after the *Brown v. The Board* decision. There was lawful segregation in places in this country. And it was after that time that Dr. King made his famous comments that people mention, about having a dream where people can be judged by the—not by the color of their skin but by the content of their character.

And I then was born in 1970, and the contrast between my reality growing up in Florida and my parents' reality growing up in Florida, like, night and day, in terms of the opportunities that were available to me that weren't available to Judge Motley, who is one of my role models in the law.

And so what my being here, I think, is about, at some level, is about the progress that we've made in this country in a very short period of time, I would say. Seems like a long time, but one generation we've gone from the reality of my parents' upbringing to the reality of mine, and I do consider myself, having been born in 1970, to be the first generation to benefit from the civil rights movement, from the legacy of all of the work of so many people that went into changing the laws in this country so that people like me could have an opportunity to be sitting here before you today.

What I would hope to bring to the Supreme Court is very similar to what 115 other Justices have brought, which is their life experiences, their perspectives, and mine include being a trial judge, being an appellate judge, being a public defender, being a member of the Sentencing Commission, in addition to my being a Black woman, a lucky inheritor of the civil rights dream.

And in my capacity as a Justice, I would do what I've done for the past decade, which is to rule from a position of neutrality, to look carefully at the facts and the circumstances of every case without any agendas, without any attempt to push the law in one direction or the other, to look only at the facts and the circumstances, interpreting the law consistent with the Constitution and precedents, and to render rulings that I believe and that I hope that people would have confidence in.

Senator LEAHY. Thank you.

And, Chair Durbin, I've had the opportunity to be here when the first Justice I got to vote on was John Paul Stevens, nominated by President Gerald Ford. Proud to vote for him.

And it's a long arc, Judge Jackson, but I'm so proud of your answers and I appreciate it.

Yield back.

Chair DURBIN. Thank you, Senator Leahy.

Let's take a break for about 15 minutes.

Judge JACKSON. Thank you.

Chair DURBIN. Thank you very much, Judge.

[Whereupon the hearing was recessed and reconvened.]

Chair DURBIN. The questioning will resume.

Senator Graham.

Senator GRAHAM. Thank you, Mr. Chairman. Good morning, Judge.

Judge JACKSON. Sorry. Good morning, Senator.

Senator GRAHAM. I want to comment on the last exchange and, Judge, this is not of your making so it's really not about you.

But Representative Green, who's a fine man, came up and said he thought the exchange between you and Senator Leahy at the end about the arc of time and how far we've come as a nation was powerful.

I agree, it was powerful. And I guess here's my point I'm trying to make to the American people and to my Democratic colleagues, I wish you had that same attitude when an African-American conservative is appointed to high office in the judiciary.

So what happened with Janice Rogers Brown? In 2003, she was an African-American nominee for the D.C. District Court. Fifty-four years old, a little bit older than you but pretty close. She was the daughter and granddaughter of sharecroppers, a childhood in Alabama under Jim Crow. She was a single mother, a member of the California Supreme Court.

Instead of celebrating how far we've come, my Democratic colleagues filibustered her ascension to the D.C. Circuit Court because it was well known on our side that we were very much considering her to be the first African-American woman on the Supreme Court.

So rather than this wonderful exchange, which was wonderful, Representative Green, where were you and others when there was a wholesale assault on her nomination? Nowhere to be found.

The filibuster was used for 2 years to stop her nomination, and we eventually did—the Gang of 14, of which I was a part—so that she could make it through after 2 years of waiting.

This is what the current President said when he was in the Senate—Joe Biden—asking about her, Janice Rogers Brown, being on the Supreme Court: “I can assure you that would be a very, very, very difficult fight and she probably would be filibustered.”

That's what he said about an African-American conservative nominee by President Bush who had served 5 years on the California Supreme Court.

We're not going to live in America like that any longer. To my Democratic colleagues, if you're a person of color, a woman, supported by liberals it's pretty easy sailing. But if you're Miguel Estrada, Janice Rogers Brown, Amy Coney Barrett, on and on and on, your life gets turned upside down.

You had nothing to do with that. I just make this observation that when you come up to me and talk about how moving the exchange was, I agree, and I just want to remind you there was somebody else of color—a woman of color—that was picked for the D.C. Circuit, one of the highest courts in the land, that did not meet the same fate and those days should be over.

Do you believe illegal immigrants should be allowed to vote, Judge Jackson?

Judge JACKSON. Thank you, Senator.

Under our laws, you have to be a citizen of the United States in order to vote.

Senator GRAHAM. So the answer would be, no?

Judge JACKSON. It's not consistent with our laws. So the answer is, no.

Senator GRAHAM. Okay. Why do they do that in New York?

Judge JACKSON. Senator, I'm not aware of the circumstances that you're—

Senator GRAHAM. Okay. All right. Well, that's a good answer. The answer is, no. Can an unborn child feel pain at 20 weeks in the birthing process?

Judge JACKSON. Senator, I don't know.

Senator GRAHAM. Are you aware of the fact that anesthesia is provided to the unborn child at that time period if there's an operation to save the baby's life because they can, in fact, feel pain? Are you aware of that?

Judge JACKSON. I am not aware of that.

Senator GRAHAM. Well, that may come before you one day. So just keep an open mind. That's the only thing I ask you to do.

You said just a bit ago that you apply the law and the facts and call them as you see them. Is that right?

Judge JACKSON. That is correct, Senator.

Senator GRAHAM. Okay. And you look at the statute as the way it's written and you try to apply it in its plain meaning. Is that correct?

Judge JACKSON. That is correct, Senator.

Senator GRAHAM. Have you heard of a case called *Make the Road v. McAleenan*?

Judge JACKSON. *Make the Road New York*? Yes.

Senator GRAHAM. Yes. Okay. *Make the Road New York*—who are they?

Judge JACKSON. *Make the Road New York* is a nonprofit that represents various individuals in the sort of immigration law field.

Senator GRAHAM. Right. They're a nonprofit advocacy group for immigration issues. Did you know they received large donations from the Arabella Network and from George Soros' Open Society Foundation Network?

Judge JACKSON. No.

Senator GRAHAM. Okay. Well, they did.

Now, in that case, what was the issue?

Judge JACKSON. The issue in that case was a challenge to a change in administration policy concerning expedited removal, which is a policy that Congress enacted in order to expedite certain removals in the immigration system. Ordinarily, before expedited removal—

Senator GRAHAM. Asylum cases do not fall in this category, right?

Judge JACKSON. Well—

Senator GRAHAM. Trust me on that, because the statute says it doesn't.

Judge JACKSON. If a person who could otherwise be subject to expedited removal makes and has a credible fear of torture in their country they can be determined——

Senator GRAHAM. Mm-hmm. And can they make that claim. Right.

Judge JACKSON [continuing]. They can be determined——

Senator GRAHAM. Right.

Judge JACKSON [continuing]. To qualify for regular removal rather than expedited removal.

Senator GRAHAM. Right. So expedited removal is a creature of Congress, folks, and if you've been here 2 years or less the statute—the statute—I'm sorry, the statute——

[Posters are displayed in the hearing room.] Senator GRAHAM. The statute would allow the administration in office to have expedited removal, avoiding a lot of the hurdles that would exist otherwise for people here 2 years or less.

So in the Obama, even Bush years, they did not look at it in terms of applying it to everybody. Some people coming by air got expedited removal. Others didn't. The Trump administration decided to use the authority given to it by Congress to remove all eligible cases 2 years or less under the expedited removal statute.

Is that a fair summary?

Judge JACKSON. Well, Senator, I would say it differently.

Senator GRAHAM. Well, say it differently.

Judge JACKSON. All right. The statute that you've put up indicates that Congress is giving the Department—it says the Attorney General, but now it's the Department——

Senator GRAHAM. Right.

Judge JACKSON [continuing]. The ability to determine what category of aliens——

Senator GRAHAM. If you have 2 years or less.

Judge JACKSON. Yes. But, importantly, the authority was—it was not Congress saying 2 years or less. What Congress said is you, agency, have the authority to determine what category of persons between—who have been here between zero and 24 months could be——

Senator GRAHAM. Which is 2 years. Yes.

Judge JACKSON. No, but what—forgive me, Senator. I'm just—what I'm trying to explain is that the authority given to the agency was to determine what length of time——

Senator GRAHAM. They had discretion to make that——

Judge JACKSON [continuing]. What length of time. It was not the authority to deport everyone who's been here for 24 months. It was the authority to determine what length of time a person has to be here in order to be subjected to expedited removal.

Senator GRAHAM. Here's what the statute said: "The Attorney General," which is actually the DHS Secretary, "may apply clauses (i) and (ii) of this subparagraph to any or all aliens described in subclause(II) as designated by the Attorney General"—well, actually, DHS—"Such designation shall be in the sole and unreviewable discretion of the Attorney General and may be modified at any time."

Now, I've been in this business for quite a while. What the Trump administration did was to use the discretion given to it by statute in a way different than prior administrations.

This advocacy group—the Arabella-supported advocacy group—tried to strike it down. You ruled for them. Here's what the D.C. Circuit Court said about your ruling: "There could hardly be a more definitive expression of congressional intent to leave the decision about the scope of expanded removal within statutory bounds to the Secretary's independent judgment."

The forceful phrase "sole and unreviewable discretion"—by its exceptional terms—"such designation shall be in the sole and unreviewable discretion of the Attorney General and may be modified at any time"—to those of us in the law-writing business, I don't know how you could tell a judge more clearly that the administration—the agency in question—has discretion to do certain things within the statute.

So this is an example to me—and you may not agree—where the plain language of the statute was completely wiped out by you. You reached a conclusion because you disagreed with the Trump administration and the D.C. Circuit Court of Appeals said, as I've quoted just a minute ago, "there could hardly be a more definitive expression of congressional intent to leave the decision about the scope of expedited removal within the statutory bounds to the Secretary's independent judgment."

That, to me, is Exhibit A of activism.

Let's go back to the child pornography cases.

Judge JACKSON. Senator, would you allow me to—

Senator GRAHAM. Yes, please.

Judge JACKSON. Thank you.

The statute and the circumstances that you reference are accurate insofar as that is what the statute says. It's not all of it. It doesn't describe the designation process that I was trying to articulate and it doesn't address the fact that Congress has another statute that is presumptively applied in agency cases to tell agencies how to exercise discretion.

There's also D.C. Circuit caselaw that says that in addition to having that procedural statute be presumptive, even very clear designations of authority to an agency may still be subject to Congress'—

Senator GRAHAM. Judge—

Judge JACKSON [continuing]. Other directions regarding how to exercise the discretion. So—

Senator GRAHAM. Judge—right. That argument fell on deaf ears.

Judge JACKSON. Understood. That's our appellate process.

Senator GRAHAM. But, wait—I've got other things I want to talk about. You've given an explanation. But it didn't work. The D.C. Circuit Court said, "there could hardly be a more definitive expression of congressional intent." This is good as it gets. There's no way to write a statute saying discretion lies in an agency. It's sole. It's nonreviewable.

So you're not convincing me—

Judge JACKSON. With respect, Senator—

Senator GRAHAM [continuing]. That this was anything other than activism and we can talk about it all day long, but I agree with

the D.C. Court. This, to me, is an example—Exhibit A—of a judge ignoring limitations placed in the law by Congress to get a result they wanted.

Child pornography—I have no doubt that you find child pornography disgusting as the rest of America. You’re a mother. You seem to be a very nice person.

Are you aware of how many images are out there on the internet involving children in sexually compromising situations?

Judge JACKSON. Senator, I’m not aware of the numbers but I’ve seen the images in my role as a judge.

Senator GRAHAM. And they are disgusting, right? Well, let me tell you the numbers.

In 2021, the National Center for Missing and Exploited Children cyber tip line received 29.3 million reports of apparent child sexual exploitation containing 85 million images, videos, and other files. That’s in 2021. It’s up. In 2019 it was less. So there’s an epidemic of this on the internet, that if you go out on the internet there are millions of pictures of kids being abused.

When it comes to sentencing child pornography possession cases, do you routinely discount the fact that a computer was used?

Judge JACKSON. Thank you, Senator, for allowing me to address this concern.

The guidelines related to child pornography were drafted at a time in which a computer was not used for the majority, if not almost all, of these kinds of horrible crimes. The guidelines have enhancements in them—

Senator GRAHAM. In two areas that you said you disagree. What are those two areas?

Judge JACKSON. At the time that the guidelines were drafted, it was an aggravating factor—a substantial aggravating factor—to use a computer in order to distribute and disseminate the images because the ordinary crime was not committed by computer. So the baseline—

Senator GRAHAM. Would you now agree with me that computers are sort of the venue of choice for child pornographer people?

Judge JACKSON. Yes, Senator.

Senator GRAHAM. Okay. So here’s my point. If you believe, as I do, the computer has created a bigger demand, there are more photos out there because of the internet, more websites exposing this garbage, wouldn’t you want to deter people from going down that road?

Judge JACKSON. Senator, this crime is among the most difficult, the most—

Senator GRAHAM. No. Answer my question. Wouldn’t you want to deter people from going down the road of using the computer that allows these people to have access to millions of photos because of the technology? I want those people deterred.

Judge JACKSON. Senator—

Senator GRAHAM. So if you’re listening to my voice today and you’re on a computer looking at child pornography and you get caught, I hope your sentence is enhanced because the computer and the internet is feeding the beast here, that all these images out there are going to be more over time because people use computers.

Now, didn't you also say that the number of images should not be considered as a sentence enhancement?

Judge JACKSON. Senator, with respect to the computer, one of the most effective deterrents is one that I imposed in every case and that judges across the country impose in every case, which is substantial, substantial supervision. Any of these defendants——

Senator GRAHAM. You're—wait a minute, Judge. Do you think it is a bigger deterrent to take somebody who's on a computer looking at sexual images of children in the most disgusting way is to supervise their computer habits versus putting them in jail?

Judge JACKSON. No, Senator, I didn't say versus.

Senator GRAHAM. That's exactly what you said. I think the best way to deter people from getting on a computer and viewing thousands and hundreds and, over time, maybe millions, the population of the whole—of children being exploited and abused every time somebody clicks on is to put their ass in jail, not supervise their computer usage.

Judge JACKSON. Senator, I wasn't talking about versus——

Senator GRAHAM. You just said you thought it was a deterrent to supervise them. I don't think it's a deterrent. I think the deterrent is putting them in jail.

Chair DURBIN. Senator, would you let her respond?

Senator GRAHAM. Does sentencing have a deterrent component?

Chair DURBIN. Senator, would you let her respond?

Senator GRAHAM. Yes. Does sentencing have a deterrent component?

Judge JACKSON. Yes, Senator. Deterrence is one of the purposes of punishment and Congress has directed courts to consider various means of achieving deterrence. One of them, as you've said, is incarceration. Another, as I tried to mention, was substantial periods of supervision once the person——

Senator GRAHAM. So if I could may ask you, in your view, it's more of a deterrent to have somebody substantially supervised in terms of their computer use who's looking at child pornography than it is to put them in jail?

Judge JACKSON. Senator, I'm not saying it's more or less.

Senator GRAHAM. That's exactly what you're saying.

Judge JACKSON. But what I'd like to point out is that if we're going to—let me say it this way. Congress has authorized courts to use a number of different means to achieve the purposes of punishment and the——

Senator GRAHAM. And one of them is an enhanced punishment by using a computer.

Judge JACKSON. The enhancement with respect to using a computer relates to the penalty in terms of incarceration——

Senator GRAHAM. And you—and you would choose not to apply that in these cases. You've said that. I'll read you the quote. But you've decided not apply the use of computers in enhancement. You've also said you're not going to hold the number of images that the person has looked at as a sentencing enhancement factor. Is that true?

Judge JACKSON. No, Senator, it's not the number of images that the person has looked at because we don't have that information.

Senator GRAHAM. Well——

Judge JACKSON. It is the number of images that they've either received or distributed that are——

Senator GRAHAM. Well, you don't—we don't know if they looked at them, but you're not going to hold it against them that they received 10,000 images versus 100?

Judge JACKSON. That's not what I've said, Senator.

Senator GRAHAM. Well, here's what you said. "I have decided to apply my general policy disagreement with respect to those enhancements, at least, that is, the computers and the number of images."

Folks, what she is saying—the reason she's always below the recommendation, I think, is because she doesn't use the enhancements available to her. She takes them off the table.

And I think that's a big mistake, Judge. I think that every Federal judge out there should make it harder for somebody to go on a computer and view this filth, that if you use that venue, which is the venue of choice for all these child pornography cases, that you use it against them. I think the more you download—like drugs, the more you have the more you should go to jail.

You've made a conscious decision to disregard those two enhancement sentencing factors and I think that is a wrong way to go in terms of deterrent. To me, putting somebody in jail for using a computer is more of a deterrent than supervising their activity of watching the computer.

That's just a difference that we have. I know I'm out of time and, listen, you've lived an incredible life. But here's one thing that won't happen to you as we wrap this up.

How would you feel that if I'd had a letter from somebody accusing you of something, a crime or misconduct, for weeks and I give it to Senator Durbin just before this hearing is over and not allow you to comment on the accusation? How would you feel about that?

Judge JACKSON. Senator, I'm not sure. I don't understand the context of the question.

Senator GRAHAM. Well, let me—did you watch the Kavanaugh hearings?

Judge JACKSON. No, sir.

Senator GRAHAM. Are you familiar with what happened in the Kavanaugh hearings?

Judge JACKSON. Generally.

Chair DURBIN. Senator, your time is——

Senator GRAHAM. Well, please, Mr. Chairman.

So to be honest—so a minute and 47 seconds—she filibustered every question I had and she has a right to give an answer. But I'm trying to make a point in 20 minutes.

You were here for Kavanaugh. If she's confused about what happened, some people on the other side had an accusation against Judge Kavanaugh that during high school he sexually assaulted somebody, and the rest is history. That was known to the people on the other side and never revealed during the meetings they had with Judge Kavanaugh. It was, literally, ambushed. He was ambushed.

How would you feel if we did that to you?

Judge JACKSON. Senator, I've appreciated the kindness that each of you has shown me to see me in your offices, to talk with me about my approach——

Senator GRAHAM. But my question is, what if, at during our 15-minutes exchange—it was very pleasant, and you're a very nice person. You have a lot to be proud of. I would never do that to you.

If I had some information that's sketchy at best that somehow you've done something wrong, I promise you just from human decency I would share it with you. I would not disclose it at the last minute of the last day of the hearing, and I have already given it to a newspaper so the whole country can read about it before you ever said a word.

Chair DURBIN. Senator, she's had nothing to do with the Kavanaugh hearing.

Senator GRAHAM. No, but I'm asking her about how she may feel——

Chair DURBIN. You won't even let her finish her response.

Senator GRAHAM [continuing]. About what y'all did.

Senator LEAHY. Can we have order here?

Chair DURBIN. Senator, your time has expired, and I'm going to give her an opportunity to finally complete an answer.

Judge JACKSON. So if I could——

Senator GRAHAM. Just answer the question.

Judge JACKSON. Senator, I don't have any comment on what procedures took place in this body regarding Justice Kavanaugh.

Senator GRAHAM. What did you think about the Kavanaugh hearing?

Chair DURBIN. Would you let her finish?

Judge JACKSON. What I'd like to answer is your points about my sentencings in child pornography cases.

The point of the guidelines is to assist judges in determining what punishment to provide in cases, and they are horrible cases but the idea is that between the range of punishment that Congress has prescribed judges are supposed to be providing proportional punishment based on what a person has done.

The sentencing scheme doesn't place everybody at the same level. The point of judging and the guidelines is to look at what has happened in a case, compare defendants to each other in terms of what they've done, and give proportional penalties based——

Senator GRAHAM. Mr. Chairman, this is—she has said, Mr. Chairman, she does not use sentence enhancements in the area of somebody using the computer for everybody.

Judge JACKSON. Can I explain why, sir?

Chair DURBIN. I'm going to give the witness an opportunity to respond to you, Senator.

Senator GRAHAM. Finally. Why?

Judge JACKSON. At the time that the guidelines were created for child pornography, this crime was primarily being committed by people who were, literally, mailing one, two, five, 10, 100 photos at a time.

Senator GRAHAM. How is it being committed now?

Chair DURBIN. Would she—please, let her complete her answer?

Senator GRAHAM. Go ahead. Go ahead.

Judge JACKSON. As a result, the commission determined in the guidelines that it was a substantial aggravating factor if the facts of the case demonstrated that someone had been distributing hundreds of images because what that meant was over this long—maybe it was a long period of time—they had collected one photo at a time, they had amassed it, they had, potentially, mailed one at a time and that showed really aggravated terrible conduct.

I'm not saying as a baseline it's not terrible. It's all terrible. But what we're doing is we're differentiating among defendants.

So in a world in which the mail is used for the purpose of distribution, it really matters whether the person has distributed one or five or a thousand. And so the guideline says, you know what, we are going to treat a person who's distributed a thousand a lot worse because that shows that this person is really engaged in this really horrible behavior.

In comes the internet. On the internet, with one click you can receive, you can distribute, tens of thousands. You can be doing this for 15 minutes and all of a sudden you are looking at 30, 40, 50 years in prison—

Senator GRAHAM. Good. Good. Absolutely good. I hope you are. Good.

Judge JACKSON. I understand, Senator. But what I'm trying to do—

Chair DURBIN. Allow her to finish, please.

Senator GRAHAM. I hope you go to jail for 50 years if you're on the internet trolling for images of children and sexual exploitation.

So you don't think that's a bad thing. I think that's a horrible thing.

Chair DURBIN. That's not what the witness said and she should be allowed to answer this question once and for all, Senator.

Judge JACKSON. Senator, all I'm trying to explain is that our sentencing system, the system that Congress has created, the system that the Sentencing Commission is the steward of, is a rational one.

It's a system that is designed to help judges do justice in these terrible circumstances by eliminating unwarranted disparities, by ensuring that the most serious defendants get the longest periods of time.

And when modes of commission of the crime change such that in 2 seconds someone can receive or distribute thousands of images, that's no longer a—and this is what the commission found in their studies—an indicator of a person who, relative to other people, has committed this crime in a more aggravated way—

Senator GRAHAM. Well, unlike—

Judge JACKSON [continuing]. And so what we're trying to do is be rational in our dealing with some of the most horrible kinds of behavior. This is what our justice system is about. It's about judges making determinations in meting out penalties to people who have done terrible things.

Senator GRAHAM. It is not rational to take the venue of choice of child pornographers—the computer that have 85 million images on it—and not consider that feeding the beast.

We're trying to get people to stop this crap. So when you troll on the internet and you pull down thousands of images of children

from the internet, I want you to stop that. I want people to go to jail who do that, because you're feeding the beast. We have a bill here, the EARN IT Act that would allow the victims who are on the internet over and over again to sue the media companies that provide these images.

We have fundamental differences of how you deter crime. I think the best way you deter crime when it comes to child pornography is you lower the boom on anybody who goes on the internet and pulls out these images for their pleasure.

Judge JACKSON. Senator, every person in all of these charts and documents I sent to jail because I know how serious this crime is. Every person I discussed the harm of these terrible, terrible images to the victims who are portrayed in them.

I talked about what this crime does to the children who are being abused in these photos and on the other side of their terms of imprisonment I ensured that they were facing lengthy periods of supervision and restrictions on their computer use so they could not do this sort of thing again. That's what Congress has required of judges and that's what I did in every case.

Senator GRAHAM. You always were under the recommendation of the prosecutor, many times the parole people, and to be honest with you, Judge, a 32-year-old man who sent an image of his own 10-year-old daughter you substantially reduced the—not only the guidelines, but the recommendation.

And all I can say is that your view of how to deter child pornography is not my view. I think you're doing it wrong and every judge who does what you're doing is making it easier for the children to be exploited.

If you're on a computer right now looking at a kid in a sexually compromising situation and you get caught, I hope nobody gives you a break because you used the computer.

Chair DURBIN. The conduct that's been described is reprehensible and I think everyone in this room agrees, and the fact of the matter is that I'm co-sponsor of your bill, the EARN IT Act, and I believe that we should be doing our job here.

But part of our job we have failed in responding to the changing circumstances that face this crime. What has it been, 15 or 16 years? She is currently not an outlier in sentencing. Seventy percent of the Federal judges face the same dilemma and wonder why Congress has failed to act and when it will act.

Senator GRAHAM. This is our fault?

Chair DURBIN. Partially it is, Senator. To be honest with you, it is. We have to upgrade these guidelines and decide whether we're going to stick with the Supreme Court decision that they're not mandatory.

Senator Feinstein.

Senator FEINSTEIN. Thank you very much, Mr. Chairman.

I would like to compliment the witness. You've been answering, I think, close to 15 hours worth of questions and I know how difficult this is and hard it is. But I just want you to say and this Senator—know that in this Senator's eyes you've handled it very, very well.

Judge JACKSON. Thank you, Senator.

Senator FEINSTEIN. So thank you, and I'll move on to my questions.

Congress has recognized how important it is for crime victims to participate in the legal process and one example is the Crime Victims Rights Act, which I authored with Senator Jon Kyl in 2004.

That law provides certain rights for victims at critical stages of the legal process—the right to be notified, to be present, to be heard, among others—and I understand that in your 8 years as a district court judge you would carefully consider victim impact statements when imposing criminal sentences.

Could you tell us a little bit about this and how you considered crime victims in making your sentencing decisions as a judge?

Judge JACKSON. Thank you, Senator.

As you say, the law provides for victims to have an opportunity to address the judge, to address the court, to explain the harms that happen as a result of criminal behavior, and in the time that I was a trial judge I found it to be a very important part of our criminal justice process because my sentencings were about handing down consequences for the behavior that defendants had engaged in and making sure that the defendants who received those consequences understood that they were getting those consequences because of the harm that they had caused.

And so what I felt was important for promoting the purposes of punishment, which is what Congress has required of judges to do, is to ensure that the harms were made clear to the defendant in every case.

So I had, for example, a case involving robbery. There were two—it was a single defendant who committed two robberies, one in April, and one in September, of the same small pharmacy in Dupont Circle, which is not far from here.

It's a small, independent pharmacy selling pharmaceuticals and this person decided that he was going to rob the pharmacy of their oxycodone and other kinds of prescription drugs for sale.

That's a sort of standard scenario that we see in the Federal system. But what was so particularly egregious in this case is that this defendant was so bold in his robberies, he came in in April with a gun. He held the employees hostage, essentially, forcing them to open the safe with the drugs in it at gunpoint, stole the drugs, not masked, not hiding his identity—and this is pre-COVID so we're not talking about having to have a mask. He was a robber, plain and simple, with no fear of people identifying him.

And then in the period between April and September he would come back to the pharmacy. He would loiter outside on the street. This is according to the victims. They would see him looking in the window. Once or twice, he came inside, looking like he was going to buy something and staring them down and they knew who he was. And they called the police and they weren't able to, you know, apprehend him because he hadn't really done anything at that point, and the people who worked in the pharmacy were terrified and they were terrified by that behavior, the menacing nature of it.

By the time we get to September, he actually comes in and they think maybe this is another time when he's just loitering. But no, he pulls out a gun. He hops over the counter. He assaults one of

the people who were working there and steals the drugs again, and that time they were able to call the police and enough time for them to come and apprehend him.

So at his trial—excuse me, he did not try. He didn't go to trial. Senator FEINSTEIN. You're the judge.

Judge JACKSON. I'm the judge. He pled guilty to this behavior, which was well documented. There was no defense that it wasn't him.

But the guidelines in the case and the statutes that applied said because he used the gun he was supposed to get something like 7 years. And I used the victim statements to, first of all, explain to him how he had terrorized the people.

Their statements said—one woman said, I can't work at the pharmacy anymore because I am so fearful that this guy will come back. It's changed my whole life.

It was a whole set of really horrible circumstances that I read to him at his sentencing so that he can understand what he'd actually done and then I sentenced him above the requirement of the law because I thought it was warranted to make clear to him that this was a terrible, terrible thing that he had done to these people.

So the victim statements were really important because they explained to me and to him the consequences of his behavior but beyond just how many drugs he stole or the fact that he used a gun. They were the real-life circumstances that resulted from his behavior and it was important for him to understand that.

Senator FEINSTEIN. I've listened to most all of this testimony, which, I think, now you've gone on for over 15 hours, and I just want to say that I think you have a stamina and a very good brain, and a real sense of empathy has been communicated to me in these 15 hours and I want you to know that.

One of the things that I'm concerned about is that the public perception of the Supreme Court has turned increasingly negative over the last few years. A recent Pew Research survey found that 44 percent of adults have an unfavorable view of the Supreme Court. Less than 3 years ago, that number was 30 percent of adults that held that view.

And I understand that as a judge on the D.C. bench you have frequently accepted invitations to speak at public events in the hopes of giving the public more information about the judicial process and more confidence in the outcome.

So here's the question. Why do you think there's been a decline in the public's perception of the Court, and if you are confirmed how would you strive to improve the public's confidence in the Court and its decisions?

Judge JACKSON. Thank you, Senator.

I think that public confidence in the Court is very important. It's crucial to the rule of law that the public believe in the judicial process and, therefore, choose to accept the rulings of the courts—not just the Supreme Court but all of the courts. It's part of the way our process works.

And I think that I have taken that to mean in terms of my role as a judge that outreach to the public to explain what it is that we do, to inspire, hopefully, law school students and high school students, young lawyers in law firms and elsewhere, to think about

careers in the judicial branch or think about careers in law as one of the ways that I have attempted to try to shore up public confidence.

And if I'm confirmed, I would plan to continue as best as I can to do that kind of thing because, as you say, it's very important for the public to understand the work of the Court and to follow its pronouncements concerning the law.

Senator FEINSTEIN. Earlier, you—when you and I spoke in my office, we discussed some of the people who have mentored you throughout your career and one of those was Judge Patti Saris.

You served as a law clerk for her on the Massachusetts District Court, I believe, early in your career and you've spoken publicly about the role she has played as a mentor in your legal career. You have described her as, quote, "a consensus builder, a good listener, a careful speaker, the essence of judicial temperament," end quote.

So would you share with all of the Members here more about how Judge Saris' approach to judging and her mentorship have shaped you and your career? If you'd give some of the specifics—

Judge JACKSON. Yes.

Senator FEINSTEIN [continuing]. I think everybody would be interested.

Judge JACKSON. Thank you, Senator.

As I reflect on her mentorship and also the mentorship of my other two judges, it's very interesting because I think I learned maybe different things from each of them. Judge Saris, who was my first clerkship—you're correct, she serves on the District Court of Massachusetts, which is the trial level court—I learned how to look at the facts in a case from Judge Saris.

That's part of what the trial court level does. We, as trial judges, develop the record in a case, take testimony, have trials, and she is extraordinary at developing a record and making sure that all of the relevant facts are adduced from the witnesses and considered in the context of her trial and record responsibilities.

And so that, I think, is something that I learned from her in terms of the law, and her warmth and care for her law clerks meant that she has been a lifelong mentor to me. And, ironically, she became the chair of the Sentencing Commission after I had been on the Sentencing Commission. So we worked together later in my career.

So I often use that story to tell young people, you know, you never know what's going to happen.

[Laughter.]

Judge JACKSON. Someone who you worked for at some point might be your colleague down the line.

Senator FEINSTEIN. Well, let me just one more. You've handled a large number of cases during your career, both as an advocate and a judge. As an advocate, you've worked on a very wide variety of cases, from work for corporate clients during your time in private practice to your work for low income clients during your service as a Federal public defender, and during your 9 years as a Federal judge you've written nearly 600 opinions. I think that's really quite a sterling record, and I imagine that some of the cases have really stuck with you.

And so I would like you, if you can, to talk a little bit about some of the cases, maybe one or two, that you have had that have made a deep impression and have really enabled you to progress as you have.

Judge JACKSON. Thank you, Senator.

Well, as you say, I have handled a lot of cases in my time nearly a decade on the bench and you learn something in almost every case, in some respect, if you're doing your job right and you're looking into all of the issues.

I think there might be—I'd mentioned one from sort of a few years into my service as a trial judge. I handled the case, *Yah Kai v. Napper*, and the case involved trademark infringement.

And you would ordinarily think that trademark infringement charges are dry and technical, and what I learned from this case is that even areas of the law that you might think apply only to businesses impact real people at times.

So this case involved a small community, a cultural community, of people who believe in vegan lifestyles. They call themselves the African Hebrew Israelites but it's not a religious community. It's a cultural community around healthy living.

And they have created a restaurant and a series of restaurants here in the Washington, DC, area with menus involving really, I'm told, terrific vegan foods and in this community there was a member who was the one who created the recipes and who was responsible for the restaurant. The whole community had other aspects to it.

He ended up falling out with the community and the dispute involved his actions, essentially, taking over the restaurant and reopening it by himself using the same name.

The restaurant was called Everlasting Life, which was an important phrase for this community and he, essentially, ejected the other members because he was the lease holder or he had signed the lease on behalf of the community, and he kicked them out for a day and then he reopened the restaurant using the same name.

And so the question was under the Lanham Act, which is the statute for trademark violations. The question is whether there is a potential for confusion in that sort of circumstance.

But ordinarily—I see Senator Coons nodding—ordinarily, when you have a trademark infringement you're talking about two different businesses who have very similar products and the question is, you know, are they similar enough to cause confusion because the idea of the law is that people should be able to have products that are identified with them and you shouldn't be confused.

And in this case, we had a bench trial about it but it was pretty clear—I was the fact finder as the judge—it was pretty clear that when you open the same business with the same name using the same recipes and food that you have created this kind of problem that is a trademark violation.

But what was so interesting to me about the case, in addition to the fact that I got to be the fact finder—it was a bench trial—was that we had witnesses come in who testified about the circumstances.

This was a very small community and they all knew each other, and the testimony about what it meant to them to have one of their

members ejected in this way and then have him turn on them was very, very moving in the courtroom.

So even though we were talking about this kind of arcane area of the law, it was real circumstances that were happening.

Senator FEINSTEIN. Well, stop for a minute—

Judge JACKSON. Yes.

Senator FEINSTEIN [continuing]. Because I think you're a very important addition to the Court and what I'm trying to fathom out from the hearing is what kind of judge will she be—how will we look at her in five or 6 years.

And so what I really want to ascertain is what kind of a judge you will be. What will be the principles you hold dear and how will you function in this capacity?

If you could just answer that one question. I've been waiting for it—

Judge JACKSON. Yes.

Senator FEINSTEIN [continuing]. For about 15 hours so I'd appreciate it. Thank you.

Judge JACKSON. Well, I would hope to be the kind of judge that I have been during this last decade. I have been the kind of judge who understands that it's my responsibility to rule neutrally, to not have any agenda when I'm looking at a case.

I've been the kind of judge who understands that facts matter, facts like the ones that I was just describing, and that it's important for a judge to take into account and be able to understand the arguments of all of the different parties and participants.

And I've been the kind of judge who takes my responsibility to not be a policymaker, to try to understand and ascertain the will of Congress if it's a statute or to hew to my own—I've been saying stay in my lane—to not exert my authority beyond what the Constitution requires when I'm interpreting and applying the law.

I think I've been the kind of judge who lives up to the oath in terms of being fair and impartial, ruling without fear or favor, and ruling consistent with Article III.

Senator FEINSTEIN. Thank you. Thank you, Mr. Chairman.

Chair DURBIN. Thank you, Senator Feinstein.

Senator CORNYN.

Senator CORNYN. Good afternoon, Judge. I understand I'm the last one maybe before lunch. So if your blood sugar is getting a little low, you can think about having a little break.

But just because the Chairman keeps bringing this topic up, let me just ask you one question. When you accuse somebody of a crime, are you calling them a criminal?

Judge JACKSON. Oh, Senator, I haven't accused anybody of a crime.

Senator CORNYN. That's not my question. When—in common understanding and in plain English, if you accuse someone of a crime, are you accusing them of being a criminal?

Judge JACKSON. I—it depends on the context. It depends on what else you say about them. It depends on the circumstances.

Senator CORNYN. It depends on the circumstances?

Judge JACKSON. Yes.

Senator CORNYN. So you put this in the same category as defining what a biological woman is?

Judge JACKSON. No, I'm just——

Senator CORNYN. You're really not sure.

Judge JACKSON. I didn't say I wasn't sure. I said it depend on the circumstances.

Senator CORNYN. So you are sure?

Judge JACKSON. No. I said it depends on the circumstances that—that you're positing as to whether or not you are calling someone a criminal.

Senator CORNYN. I just don't think that's credible, Judge.

Let me ask you another question. You talk about the public confidence in the courts, in our institutions, which I agree are very, very important that the public has confidence in our judiciary. Would you agree with me that to the extent that people perceive that judges—unelected, lifetime-tenured judges—are making policy pronouncements or political decisions that it undermines public confidence?

Judge JACKSON. I do.

Senator CORNYN. Thank you.

Yesterday, we talked a little bit about precedent, and I know Senator Feinstein, as she does in these hearings, talked about super precedent and, in particular, *Roe v. Wade*. And I want to talk a little bit about that, but first, let me just ask you. Do you think there's any good reason for the Supreme Court not to overrule a previous decision when they've concluded that that decision was wrong?

Judge JACKSON. Thank you, Senator.

Again, it's hard for me to answer that question in the abstract. What I'll say is that the Supreme Court has laid out factors beyond just the precedent being wrong as a reason to overturn it.

Senator CORNYN. Well, we talked a little bit about this yesterday. The Supreme Court revisited the issue of separate, but equal, which was the law, the constitutional interpretation of the Supreme Court under *Plessy v. Ferguson*, and overruled that precedent——

Judge JACKSON. Yes.

Senator CORNYN [continuing]. Because it concluded it was wrong, right?

Judge JACKSON. I haven't looked carefully at whether all of the different factors that the Supreme Court now uses to overturn were discussed in the opinion. But now the Supreme Court's precedent is to overturn on the basis of a number of different factors and not just whether or not it's wrong.

Senator CORNYN. So are you suggesting that the Supreme Court could not or would not overrule a precedent that it determined was wrongly decided?

Judge JACKSON. No. I'm suggesting that the Supreme Court's caselaw indicates that it looks at multiple factors——

Senator CORNYN. No, I understand. You go through the stare decisis analysis, right?

Judge JACKSON. Yes. Yes.

Senator CORNYN. But if it's wrong, that's one of the factors that you consider, right?

Judge JACKSON. Yes. But it's not the only one.

Senator CORNYN. So are you suggesting that there may be circumstances under which the Court determines its previous decision is wrong, but it will not overrule it?

Judge JACKSON. The fact that there are multiple factors indicates that the Court looks at more than whether or not it's wrong.

Senator CORNYN. Okay. So the fact—so you would say, if I'm interpreting you correctly, that if the Court concludes its previous decision is wrong, it won't necessarily overrule that. It applies a multipoint analysis.

Judge JACKSON. Yes. I think that's accurate.

Senator CORNYN. Okay. Back when *Roe v. Wade* was decided in 1973, generally speaking, the Court said that the States may not limit access to abortion pre-viability. But post-viability, there could be some restriction on the right to abortion. Is that generally the—

Judge JACKSON. As a general matter, yes.

Senator CORNYN. Okay. Thank you. Okay.

Well, and then I think it's since 1973, the question of viability has risen again, what that actually means, because now viability was around 28 weeks. That is the fetus could live outside the womb. But today, because of advances in medical science, the fetus can live outside the womb after about 23 weeks.

Is that your understanding?

Judge JACKSON. Senator, I haven't studied this. So I don't know the—a number of weeks in the way that you're saying.

Senator CORNYN. Okay. Well, let's talk a little bit about viability, the line that was drawn for pre-viability and post-viability analysis by the Court. What does viability mean when it comes to an unborn child, in your understanding?

Judge JACKSON. Senator, I hesitate to speculate. I don't—I know that it is a point in time that the Court has identified in terms of when the standards that apply to regulation of the right.

Senator CORNYN. Justice Brennan, at a later point in his career on the Supreme Court, admitted that the viability line was an arbitrary line. Do you agree with—agree with him?

Judge JACKSON. Senator, I'm not able to comment on viability. There is a case pending in the Supreme Court right now concerning the issues—

Senator CORNYN. I'm asking you about previous decisions, but I hear you. No one suggests that a 20-week-old fetus can live independently outside the mother's womb, do they?

Judge JACKSON. I don't know.

Senator CORNYN. I mean, you need—the child will need to be fed or sheltered and all the other essentials to sustain human life. So there's no suggestion that after 20 weeks that a child can live independently. Correct?

Judge JACKSON. Senator, I'm not a biologist. I haven't studied this. I don't know.

Senator CORNYN. You don't know whether an unborn child could live outside the womb at 20 weeks gestation?

Judge JACKSON. What I know is that the Supreme Court has tests and standards that it's applied when it evaluates regulation of the right of a woman to terminate their pregnancy. They have a—the Court has announced that there is a right to terminate up

to the point of viability, subject to the framework in *Roe* and *Casey*, and there is a pending case right now that is——

Senator CORNYN. Right.

Judge JACKSON [continuing]. Addressing these issues.

Senator CORNYN. The Constitution doesn't mention the word "abortion." Correct?

Judge JACKSON. That's correct.

Senator CORNYN. Just like it doesn't mention the word "marriage." Correct?

Judge JACKSON. That is correct.

Senator CORNYN. And so, as you and I discussed, perhaps ad nauseam yesterday when we were talking about substantive due process, this is one of those unenumerated rights that the Court has created—court-made doctrine or law—and creating a constitutional right even though it's not explicitly mentioned in the Constitution itself. Correct?

Judge JACKSON. The Court has interpreted the Due Process Clause of the Fourteenth Amendment to include——

Senator CORNYN. Right. We talked about substantive due process yesterday, and that's—that's what this is, right? The Supreme Court cases that deal with the right of abortion is a result of substantive due process analysis like you and I talked about yesterday?

Judge JACKSON. Yes.

Senator CORNYN. Okay. In the—you'll remember when you were confirmed for the court of appeals, in that process there was—we had a hearing, and then we sent you questions for the record, what we call QFRs around here.

Judge JACKSON. Yes.

Senator CORNYN. And one of those, question number 10, was "Does the Constitution protect rights that are not expressly enumerated in the Constitution?"

As part of your answer, you said—you mentioned *Roe v. Wade* and *Planned Parenthood v. Casey*, and you said this—and I'll quote. "They articulate a limited right to terminate a pregnancy."

What is the limitation that you understand that was pronounced in *Roe v. Wade* and *Casey* when it comes to a right to terminate an abortion? What are the limitations under current law?

Judge JACKSON. Under current law, as I understand it, there are limitations insofar as there can be regulation of that right pre-viability, unless the regulation imposes an undue burden on the exercise of the right. And there can be regulation after viability as long as there is exception for the health—the health and I think maybe life of the mother. So it's the limitations are about whether and to what extent the Government can regulate the right.

Senator CORNYN. Is it your understanding under the current precedent of the Supreme Court that there is a right to abortion up to and including the time of delivery of the child?

Judge JACKSON. Senator, I don't know, actually. I mean, the Supreme Court in every case is looking at individual regulations of the Government related to—related to individual rights. And I am not aware of the Court having made a pronouncement about whether or not regulation can extend all the way up until birth. I'm just not aware of that.

And it's because the Court is looking at individual cases and making its rulings in the context of individual cases and not making sort of pronouncements in general.

Senator CORNYN. So you are suggesting that in some individual case, the right to abortion could extend through the entire pregnancy up until the time the child is delivered?

Judge JACKSON. No, Senator. I'm suggesting that I'm not aware of any case that's handled the issue.

Senator CORNYN. You told us that you think that you believe *Roe v. Wade* and *Casey* are precedents, and we talked a little bit about some of the questions about whether it's a super precedent and the like. Are you familiar with the Supreme Court's decision in the *Heller* case?

Judge JACKSON. I am.

Senator CORNYN. And that was a decision by the United States Supreme Court that recognized the individual right to keep and bear arms under the Second Amendment. Correct?

Judge JACKSON. Yes.

Senator CORNYN. Is that a precedent of the Court?

Judge JACKSON. It is.

Senator CORNYN. And you would respect that precedent?

Judge JACKSON. Yes, Senator. All precedents of the Supreme Court have to be respected.

Senator CORNYN. Is it as—is it equivalent in terms of its precedence to *Roe v. Wade*, or would you evaluate it differently?

Judge JACKSON. I'm not aware of any ranking or grading of precedents. All precedents of the Supreme Court are entitled to respect on an equal basis.

Senator CORNYN. I agree with you. That's why it kind of blows my mind when people talk about super precedents, as if somehow one precedent was different in terms of its significance or priority under the Constitution than others.

In the short period of time I have remaining, let me just revisit with you some of the questions we talked about yesterday with regard to free exercise of religion. And, of course, that's recognized explicitly under the United States Constitution, the First Amendment. Correct?

Judge JACKSON. Yes.

Senator CORNYN. Are you familiar with the cases that had been litigated before the Supreme Court of the United States involving the Little Sisters of the Poor with regard to the Affordable Care Act's mandate on contraception coverage?

Judge JACKSON. Yes.

Senator CORNYN. Now the Little Sisters of the Poor are a benevolent group of nuns. I think there are about 300 of them that take care of elderly and infirm individuals. And, of course, as a matter of their religious beliefs, as documented in the Court's opinions, they don't believe in either contraception or abortion. Do you agree with that?

Judge JACKSON. I believe that was described in the case that you're talking about.

Senator CORNYN. I think that's right, too. Yes.

Judge JACKSON. Yes.

Senator CORNYN. And so when the Affordable Care Act mandated that every health insurance policy contained coverage for contraception or chemically induced abortions, they objected and said that this violated their conscience and their free exercise of religion rights under the First Amendment, right?

Judge JACKSON. I believe so, yes.

Senator CORNYN. Well, after the—after the Obama administration, during the Trump administration, the Trump administration expanded the regulations to allow not only churches but also religious organizations like the Little Sisters of the Poor a waiver from that contraception and abortion-inducing drug mandate. Do you recall that?

Judge JACKSON. Yes.

Senator CORNYN. Have you—are you familiar with the fact that President Biden—excuse me, yes, President Biden has said he would restore the previous regulation and—that was promulgated under the Obama administration and exclude organizations like the Little Sisters of the Poor from that waiver potential for abortion drugs or contraception coverage?

Judge JACKSON. I am not aware of that, Senator.

Senator CORNYN. Well, I guess what all this boils down to, you know, Congress passed a bill called the Religious Freedom Restoration Act, which tried to make sure that people's sincerely held religious beliefs could be accommodated under their First Amendment rights, as opposed to Congress mandating things that would violate their conscience and violate their religious beliefs. Do you agree with me that it's important to accommodate the sincerely held religious beliefs of all Americans when it comes to legislation that the Congress may pass?

Judge JACKSON. Thank you, Senator.

Religious freedom is a core foundational, constitutional right. It's in the First Amendment of the Constitution and reflects the Founding Fathers' understanding of this country as being one that is based on in large part the idea of pluralism, the idea that people can come and have sincerely held religious beliefs and practice them without persecution. That's part of the foundational—foundation of our—of our Government and the Amendment that you're discussing.

And as a result, that right is protected in many ways. You mentioned the Religious Freedom Restoration Act.

Senator CORNYN. Right.

Judge JACKSON. Congress has enacted a statute that when it comes to Federal regulation, if there's a substantial burden placed on religion, then the strict scrutiny standard applies.

Senator CORNYN. I agree. I have one minute. So I have one more question.

Judge JACKSON. Yes.

Senator CORNYN. I agree with what you just said.

Judge JACKSON. Yes.

Senator CORNYN. So since I have asked this question or made this point of some of your predecessors who sat in the same chair and expressed my concern about some of the Court's establishment law, establishment jurisprudence, I don't want to leave you out of that concern.

When I was Attorney General of Texas, I had a chance to argue a case in front of the United States Supreme Court. It's called *Santa Fe Independent School District v. Doe*. This was a lawsuit brought by the ACLU, which sought to enjoin or prevent a student-led prayer before football games at the Santa Fe Independent School District right outside of Houston.

In the end, five judges said that that violated the Establishment Clause of the Constitution, causing Chief Justice Rehnquist to write in his dissent that the Constitution mandates neutrality toward religion, not hostility, but that the Court's decision evidenced hostility toward religious expression. Leaving me to conclude that in the public square, we can talk about everything from violence to misogyny to sex, you name it. But we can't talk about religious—sincerely held religious beliefs.

I would just footnote that for you and plant the seed, for what it's worth.

Thank you very much.

Judge JACKSON. Thank you.

Chair DURBIN. Thank you, Senator Cornyn.

Welcome to Majority Leader Schumer. Glad you're with us. And he would report, if he could, that we have a challenge to finish our hearing today at a time when we can go to the floor for a series of votes, which will end the day. So we want to stick to the schedule as much as we possibly can.

I will just say that Senator Cornyn's suggestion of lunch was aspirational.

Judge JACKSON. Okay.

[Laughter.]

Chair DURBIN. It was an unenumerated right.

Senator CORNYN. You're in charge of the agenda, Mr. Chairman.

Chair DURBIN. What we had hoped to do was to take three more Senators before we have an actual lunch, but it's up to you. Is that all right?

Judge JACKSON. Oh, whatever you want to do. I'm open and here, happy to answer whomever would like to ask me a question.

Chair DURBIN. Thank you. I appreciate that.

Senator Whitehouse.

Senator WHITEHOUSE. Thank you, Chairman.

Judge Jackson, you can relax for a bit. I voted for you for the D.C. Circuit, and when you appeared as a potential nominee, we started doing work looking at your record and your story. We met with the President to discuss his process and his goals. When your nomination was announced, we obviously brought the work on your record more into focus.

And now I've had the chance over, what, 15, 16 hours to see your performance in this hearing, which I think sets the gold standard for patience and courtesy. So I'm prepared to not only support you, but to let you know that I will be very proud and very honored and very excited to support you.

There are two things that have come up during the course of the hearing, Mr. Chairman that I'd like to take my time to have a chance to respond to. And the first has been a question—you know, I've been through a bunch of these now. I don't think I've ever it

come up so much, questions about the nominee's judicial philosophy.

I didn't know you needed to have one. I actually thought that when you're dealing with the Constitution, your oath of office, the constitutional precedents, and the Constitution itself kind of gave you your guide path. And when you're construing statutes, the law and the conventions of the language and your logic gave you that path.

So the fact that Judge Jackson had said "I don't have a judicial philosophy, I've got a judicial methodology" doesn't bother me a bit. In fact, it kind of bothers me the expectation that a nominee to the Supreme Court should have a judicial philosophy. Because a judicial philosophy can be a screen for a predisposition that judges, frankly, should not have, but that folks and powers and interests influential in the process may very well want them to have.

So when I think about judicial philosophy, one of them that's come up a lot has been originalism, and one of the problems with a judicial philosophy is occasional adherence, selective adherence, which, in my mind, makes it less of a judicial philosophy and more of a doctrine of convenience to be trotted out when it helps the people that you want to help. And originalism strikes me as being that kind of a doctrine.

And the place where I think we have the biggest gap between philosophy and practice in all of this has been with respect to what I've witnessed with respect to corporate power in our democracy in the time that I have been in the Senate. If you go back to the founding days, there was no expectation that corporations would have any role in American democracy. Nil. Doesn't turn up in the constitutional debates. Doesn't turn up in the arguments leading up to the approval of the Constitution.

It's only when corporations became big and powerful many decades later that they began to intrude in our politics, and they corrupted our politics in a terrible way, history shows. And that led to the movement by muckrakers, whose probably best leader was Teddy Roosevelt, to knock down the grasping political power of corporations and rein them in.

And we had some real victories at that time, but ambitions of those of great wealth and power do not go away, and they have continually crept forward. It's an age-old story. And right now, we have corporate power controlling this Congress in a way that is really remarkable.

We have a complete inability to address the climate havoc that fossil fuel emissions are creating because half of Congress has been disarmed and disabled by political influence of the fossil fuel industry. We can't even have a reasonable and sensible discussion on it because the power of that industry is so great.

And we've seen that manifested first with Republican Justices on the Supreme Court letting corporations into politics. That was an interesting invention. And then, once they were in, they let them spend money in politics. And then, once they let them spend money in politics, they let them spend unlimited money in politics.

And now we are looking at a Court whose majority is in the process of building a right for corporations, the biggest and most powerful corporations that we have, to not only get into politics, spend

money in politics, and spend unlimited money in politics, but to spend unlimited money in politics anonymously. To hide from the real voters, the “we the people,” who they actually are when they’re intervening in our politics and to play this game through phony front groups with ridiculous names. Rhode Islanders for Peace and Puppies and Prosperity. You know, this is sort of the quality of the name that’s involved.

So let’s not get too excited about judicial philosophy if it’s nothing more than a screen for a predisposition that will benefit certain players in the arena, and let’s certainly not take judicial philosophy too seriously when it evaporates in the face of the interests that have pushed the philosophy. And I think originalism qualifies that way, and I just wanted to say that.

I don’t think you have to have a judicial philosophy. I think you have to have integrity. I think you have to have a judicial temperament. But a philosophy? Where has that come from?

The second thing I want to say has to do with the question of court packing and the integrity of the Court. And I have a position on this, and I just want to say it so it’s all clear and nobody is reading things into it that I don’t believe, and I’ve had a chance to make my point here.

And that is that court packing can be done by adding new seats to the Court. I haven’t proposed that. I think there’s only one Member in the Senate that has proposed that. It’s gotten a lot of attention here, but I don’t think it’s been proposed here.

But you can also pack a court by picking the Justices. And in fact, there is a long, unpleasant American tradition of agencies being taken over by virtue of picking the members. It’s called “agency capture” or “regulatory capture.” It goes back a long way.

There is an abundant literature, both in economics and in administrative law, about capture, and there is nothing that makes a court immune to capture. That is why, when I talked about this in my initial remarks, I said that the folks that have tried to capture the Court have treated it no different than a 19th century railroad commission because they were legendary for having been captured by picking the members who would rule for the railroad.

And there are many others. Go back to MMS and the Gulf oil explosion. So that is my concern. My concern is that the picking of the Justices has been handed to special interests, and we know that’s the case because, as I showed yesterday, everybody involved admitted it.

The President of the United States said so. The co-founder of the Federalist Society said so. A former Chairman of this Committee said so. And the President’s legal counsel said so.

And what happened in that process by which the Justices were picked over at the Federalist Society? We don’t know. There wasn’t a poll that was taken of Federalist Society members saying, you know, give us your recommendations. I don’t know that there was any meeting of the board. “Let’s take this up. Let’s go through a proper agenda.”

What appears to have happened is that people went into a back-room, and there was wheeling and dealing, and millions and millions of dark money dollars flowed into the Federalist Society during this period, and what came out were names. And those went

straight to the President and straight to here. But the picking appears to have been done in the confines of a private organization by anonymous special interests.

There is no country in the world that does that by way of how you pick judges. If we went to some banana republic to try to educate them in democracy and that was the way they picked their judges, we'd have a lot to say about it. But that is the way that recent Justices have been picked. court packing by Court picking.

And deputizing this to the Federalist Society is very unusual. Them having no process, no public process for implementing that deputization is very unusual. The provenance of these mysterious lists that were produced and how people got on and off them, that is very unusual, unprecedented in our history.

And it's surrounded by lots and lots of dark money. Four hundred million dollars, I think, is a lot of anonymous money that has been chronicled being spent to control who gets put on the Court. And controlling who gets put on a governmental body is how you capture a governmental body, and a captured governmental body is a wrong thing, whether it's a railroad commission or the United States Supreme Court.

There is in that method of judicial selection not just the prospect of impropriety but, indeed, the likelihood of impropriety. If it's pay to play and checks for millions anonymously delivered will get you into the room to decide who is going to be on the Supreme Court, we got a problem. And that's what happened.

And the thing that makes it even worse, in my view, is that as you pursue this and play it out, you see the decisions of the Court line up in an astonishingly clear pattern with the interests of big Republican dark money donors. That is my concern.

That, I think, is a legitimate concern. If you disagree with me, disagree with me. But that is the concern, and I wanted to lay it out here because it's not about court packing. It's about the integrity of the Court, and it's about the unfortunate comparison that can be made now between the captured agencies delivered through picking of their membership and what looks more and more like a captured Court delivered by the picking of its membership in secret with a very, very high ticket price to be in the room where the picking took place.

So, like I said, colleagues can agree. Colleagues can disagree. We all have our shots to make our cases. Because this has come up tangentially in multiple different ways, I wanted to take this moment and lay out what my case is and explain it as clearly and simply as I can.

And I thank the Chairman for allowing me that opportunity, and I yield back my remaining 7 minutes.

And I congratulate, Your Honor, you for the patience that you've shown with all of us. It's not over, but it's close.

Judge JACKSON. Thank you, Senator.

Chair DURBIN. Thank you, Senator Whitehouse. And, of course, you've joined the hall of fame, yielding back 7 minutes.

Senator Lee.

Senator LEE. Thank you, Mr. Chairman.

Thank you, Judge.

I want to talk next a little bit about a case that you were involved in, a case called *Coal River Mountain Watch v. United States Department of the Interior*. It was decided, a ruling that you issued in 2015 while on the Federal district court. I know you've handled a lot of cases.

Judge JACKSON. I have.

Senator LEE. I can't imagine that by merely triggering the case name that would necessarily bring it back. But this case involved a challenge to an administrative action within the Department of Interior on some issues bearing on coal mining within the State of West Virginia.

There were two parallel challenges brought against that administrative action. One in a Federal district court in West Virginia, where the land in question was located, and another in the U.S. District Court for the District of Columbia, where you sat.

The Government, defending itself against that action brought by some environmental groups, asked that you dismiss the D.C. case so that the matter could be litigated in West Virginia, but you denied that. Can you—based on my description of the facts, does that ring any bells, and can you tell me why you might have denied it?

Judge JACKSON. Thank you, Senator.

It actually doesn't. It sounds like, you know, dozens of cases that I handled with similar issues and requests. Something like a Motion to Dismiss is early in the action.

Senator LEE. Sure, sure.

Judge JACKSON. And so denying a Motion to Dismiss is pretty routine in the District of Columbia.

Senator LEE. No, I understand, and I'm sure you handled a lot of those—a lot of those all the time as a district judge. The reason I raise it is just because it relates indirectly to some concerns that I've got that are somewhat unique to the Western United States.

We have a lot of cases that involve the U.S. Department of the Interior and agency actions taken relative to the public land that we have. In every State east of Colorado, the Federal Government owns less than 15 percent of the land. In most of those, it's much less than 15 percent, in the single digits or low single digits.

In every State Colorado and west of Colorado, the Federal Government owns more than 15 percent of the land, and most of the time, it's a lot more. In my State, it happens to be about two-thirds of the land that's owned by the Federal Government.

As a result, it complicates our ability to do just about everything we do, whether it's recreation, construction, oil and gas development. Whether it's just accessing people's farms and ranches or even something as simple as trying to fund local fire, police, search and rescue operations. All these things are affected by the excessive ownership of Federal land by the Federal Government and the way it's often managed.

Sometimes decisions made at the Federal level are challenged in parallel actions like these—one in the forum State, in the host State to where the action is happening, another in DC. And I'm always concerned about forum shopping, and I'm sure that's something you watched out for as a judge and saw forum shopping from time to time.

It's also something that touches on an issue that involves statutory interpretation. There is something called the Antiquities Act passed 110 years ago or so, designed to give Presidents of the United States the authority to designate Federal—parcels of Federal land as national monuments. The text of the statute states that the limits of the parcels in question should be, quote, “confined to the smallest area compatible with the proper care and management of the objects to be protected.”

Now given that these Presidential proclamations tend to be broad, it's sometimes the objects to be protected are also broad. And as a result of that, it's difficult to tell what the limits are. Do you have any reaction as to how we could discern that, how we could define any meaning out of that?

It's got to mean something, the text of the statute. You try not to leave language simply unaddressed or meaningless in a statute. Do you have any thoughts on how a statute like that, saying it should be confined to the smallest area compatible with the proper care and management of the objects to be protected, any thoughts briefly on that?

Judge JACKSON. Well, Senator, if I were presented with a case with that statute in that circumstance, I would proceed as I always have. You would have to understand the parties' arguments about the particulars in the case, what—what does the Presidential proclamation say? To what does it relate? Whether there are any precedents in this area that define, further define or further address what Congress intended with respect to the statute at issue.

Senator LEE. And I would assume that it would also matter if the Government's lawyers defending the President's action made an argument that would leave the interpretation open-ended and meaningless?

Judge JACKSON. Well, as part of your interpretive exercise, as you're considering the parties' various arguments, one that did not account for all the words in a statute would be one that you would—

Senator LEE. Excellent. Excellent.

Judge JACKSON [continuing]. Might not—might not agree with.

Senator LEE. No, I get it, and this is one of the things that I've appreciated about what you've told us in these hearings. I really like the way you've described the fact it's important to construe the text that you're asked to interpret. And in interpreting that, you look at the language, and you're endeavoring to figure out the original public meaning. And I think that is a very helpful thing.

All right. Let's move to a different issue a moment ago. Now you clerked on the U.S. Supreme Court for Justice Breyer in October term 1999. Is that right?

Judge JACKSON. That is right.

Senator LEE. That was the same—and you clerked for Justice Breyer?

Judge JACKSON. I did.

Senator LEE. And that was the same year that the Supreme Court issued its decision in a case called *Stenberg v. Carhart*. This is a case where the Supreme Court of the United States struck down a Nebraska law prohibiting partial-birth abortion and in the

absence of circumstances where the baby posed a threat to the life of the mother.

Now to be clear, the law prohibited a procedure where the abortionist causes an unborn baby to be partially delivered by the mother, and then the abortionist intentionally kills the baby outside the womb by puncturing its skull with scissors and then collapsing the skull. This is gruesome, and I don't like having to quote this, but it is relevant to the topic we're covering here.

Justice Kennedy described it this way in chilling terms in his dissent when he describes the fact that, "When scissors are inserted into the back of the head, the fetus' body, wholly outside the woman's body and alive, reacts as though startled and then goes limp."

Justice Scalia, in his great eloquence, expressed—lamented the ruling, but also expressed optimism for the fact that future Courts would get it right, saying, quote, "I'm optimistic enough to believe that one day *Stenberg v. Carhart* will be assigned to its rightful place in the history of this Court's jurisprudence beside *Korematsu* and *Dred Scott*. This method of killing a human child, one cannot even accurately say an entirely unborn human child, proscribed by this statute is so horrible that the most clinical description of it evokes a shudder of revulsion."

We then saw a few years later the Supreme Court of the United States issue a different ruling. The Supreme Court issued a different ruling in a case called *Gonzales v. Carhart*. *Gonzales v. Carhart* upheld a different statute. This one was Federal rather than State, but it was a different—a Federal statute that also prohibited partial-birth abortion.

Judge Jackson, can you distinguish these cases for me? What was the difference between *Gonzales v. Carhart*, where the partial-birth ban in question was upheld, whereas in *Stenberg v. Carhart*, it was invalidated?

Judge JACKSON. Thank you, Senator.

I don't have the opinions in front of me. I think—I think it had to do with the method of extraction, the fact finding related to the procedure. In one case, the district court had made some findings, and the Court felt bound by them. In another, there was considerations beyond those that were previously relied upon. So there were distinctions that the Court looked at and considered in the cases, but yes.

Senator LEE. Let's talk about court packing for a minute.

Judge JACKSON. Yes.

Senator LEE. One of the reasons court packing concerns me, one of the many reasons, is because it's not prohibited. In the first instance, it's not prohibited by the Constitution. There's nothing in the Constitution that says that Congress may not change the size of the Supreme Court. There's no limitation on that.

We have for 152 years stuck with the number 9. It has worked. And in the absence of an argument saying that that number is too—is too low, the Court is too small, from a work force standpoint, we need to expand it, it's difficult to imagine why it would be a good idea to change it. Particularly because if you increase the size of the Court in one fell swoop and you do that for partisan political purposes, allowing one President, the current President, to

have a disproportionate impact on the Court, it could change its rulings, that portion of the Court's docket that tends to be more politically contentious. It can turn the Court into a political football of sorts.

Given the fact that our Supreme Court Justices serve for life, once you do that, it becomes something of a one-way ratchet, always expanding, never contracting. Before long, you could see an increasingly larger Court, with the Court expanding each time a different party secures the coveted circumstance of a majority in the House, majority in the Senate, and control by the same party of the White House.

And so this is why it concerns me. I understand why it is that the Canons of Judicial Ethics don't allow you to comment on matters that might come before you. This is one that could not come before you as a Justice. This is a nonjusticiable political question. It's committed to the two political branches of Government.

There's not even a constitutional challenge that could lie to it. Even though it would undermine the separation of powers in the Constitution, as I see it, it's not unconstitutional. So it couldn't and it would never come before you.

Last night, when you were asked a question by my colleague Senator Kennedy on this, you acknowledged that you have an opinion. Did I understand that right? You have an opinion on court packing?

Judge JACKSON. Senator, I have a lot of opinions. I have opinions on—I'm a human being, and I have an opinion on a lot of things.

The reason why, in my view, it is not appropriate for me to comment is because of my fidelity to the judicial role. I understand that it's a political question, and that is precisely why I think that I am uncomfortable speaking to it.

Senator LEE. No, I understand that, and I respect the impulse. I respect the overall issue. And I think it's better for Article III judges and Justices ordinarily to not wade into the political thicket.

This one I do think is different because, number one, as I say, it can never come before you. Number two, it does have an impact on what you would be doing. And you also, as an Article III judge, someone who's served for nearly 9 years as a Federal judge, you've developed experience and intuition and a thorough understanding of our Federal court system, and that's why I think your perspective on it would be valuable.

The reason it concerns me so much is that even when court packing doesn't succeed legislatively, it can leave an impact. The last time this was attempted was in 1937. President Franklin D. Roosevelt was upset at the Supreme Court on a number of bases.

He didn't like the then 32-year-old precept of *Lochner v. New York*, where the five conservatives on the Supreme Court engaged in an act of judicial activism, reading something into the Constitution that wasn't really there. Some people disagree with me on this, but it wasn't there, and they imposed that.

But the bigger reason was he didn't like the Court's interpretation of the Commerce Clause. It was that interpretation of the Commerce Clause, the one we discussed yesterday. You know, prior to 1937, you had the Supreme Court agreeing as far as the channels and instrumentalities of interstate commerce that we talked

about yesterday. You had the Court more or less in agreement over time as to the impact of the Dormant Commerce Clause.

But as to the substantial effects test, that didn't exist yet. It required something much closer to an interstate commercial transaction in order for Congress' Commerce Clause authority to kick in.

There were the so-called "Four Horsemen of the Apocalypse," as FDR affectionately called them. Four conservatives who were consistently pushing for limits on Congress' authority. And then you had other Justices who would sometimes join with them. Usually, that included Justice Owens Roberts, who had stood with them in maintaining narrower authority before Congress under the Commerce Clause.

All that changed when, on April 12, 1937, 2 weeks to the day when the case often associated with the so-called "switch in time that changed nine," the *West Coast Hotel v. Parrish*, where they undid the *Lochner* precedent.

April 12, 1937, the Supreme Court decided a case, *NLRB v. Jones & Laughlin Steel*, that forever changed and magnified, expanded the Commerce Clause in a way that had it been through a constitutional amendment, it would be among the most significant, impactful constitutional amendments ever adopted. And yet it's rarely discussed.

This, this case resulted from one vote, one person on the Supreme Court who changed his vote, Associate Justice Owen Roberts. It is widely believed—and I believe it, based on what I've researched on it—he was influenced heavily by FDR's court-packing plan. He didn't want to be on a Court that was packed.

He didn't want—he convinced himself that he made that switch in order to save the Court as it was. And that has changed everything. It's led to a much bigger, more expensive, more intrusive Federal Government. We can disagree as to the policy merits of that, but it did change the Constitution. That's why I worry about that.

So I hope—I understand you don't want to answer, and I hope that between now and the end of the day, you'll see fit to tell us what your opinion is. I do think it's worth discussing.

Let's talk for a minute—I've got just moments left. I want to go back to your sentencing approach. Now when you approach these child pornography cases, what you're describing in many circumstances is an overall concern that you've got with the sentencing guidelines, and particularly that portion of the sentencing guidelines that deals with child pornography cases.

This showed up in the transcripts of some of your sentencing hearings, including the transcript of your sentencing hearing in the *Hawkins* case. Turn to that, page 38, lines 17 to 24 of that transcript, and here is something you say in that *Hawkins* case. And I believe this was the 18-year-old defendant that you sentenced to 3 months in prison, when the lower end of the guidelines range would have been 97. I think the higher end would have been in the 120s or something like that.

You said, "And in your case"—this is you speaking to Mr. Hawkins—"In your case in particular, I don't feel that it is appropriate necessarily to increase the penalty on the basis of your use of a computer or the number of images or prepubescent victims as the

guidelines require because these circumstances exist in many cases, if not most, and don't signal an especially heinous or egregious child pornography offense."

I've got a couple of questions about that. Were those—you start off that paragraph sounding like you're making a determination as to him, but then the observations you make in that paragraph seem to apply broadly. Is that—is that right? So it would—

Judge JACKSON. Senator, I don't have the transcript of Mr. Hawkins' case. I recall that I found that case, like all child pornography cases, to be difficult, really difficult. And his case, I recall, was, in many ways, an outlier in terms of the various considerations that Congress required me to take into account.

Senator LEE. But there were prepubescent victims that were at stake in that case?

Judge JACKSON. I don't remember how many. I don't remember the circumstances of his actual crime. What—what I will say is that consistent with Supreme Court caselaw and Congress' statute in this area, judges have to take into account a number of factors, and the guidelines, which are no longer I won't say not mandatory. You have to calculate the guidelines. They're no longer binding.

And the Supreme Court has said that under the statutory schemes, judges have discretion to—

Senator LEE. Okay. But my—I'm almost out of time here.

Judge JACKSON. Yes.

Senator LEE. I want to make a point.

Judge JACKSON. Yes.

Senator LEE. Hawkins, as I recall, and as Senator Hawley discussed yesterday, he specifically asked for images of 11- to 17-year-olds. So I don't understand how that can be an instance where that shouldn't matter. The fact that he did it with a computer hardly atones for what he was doing, hardly offsets the fact that he was seeking and obtained prepubescent child pornography images.

Nor does the fact that the images become easier over time to transmit and receive and store because of computers. I actually think it cuts in precisely the opposite direction that you describe. It makes it more severe, not less. I see this as an aggravating factor, and that is of great concern to me.

I see I've exceeded my time. Thank you.

Chair DURBIN. You may respond.

Judge JACKSON. Senator, as in every child pornography case that I sentenced, I considered all of the evidence, all of the relevant factors. It is not the same exercise to look at a transcript, to think about guidelines, to not have in front of you the individuals, the victims, the pictures, the circumstances that trial judges have to review in these cases or any cases.

I understand, Senator, that there are some questions about records, et cetera. Courts have all of the evidence, and courts have all of the recommendations of various parties. And courts have, under Congress' authority, the responsibility of using our judgment to make determinations that are sufficient, but not greater than necessary to comply with the purposes or promote the purposes of punishment, taking into account things like unwarranted sentencing disparities.

And it may seem—it may seem like an easy exercise. It may seem in retrospect, when you look back at a few pieces of data, that courts have not done what it is that they are supposed to do. But what I can assure you is that I took every one of these cases seriously in my duty and responsibility as a judge, and I made my determinations in light of the seriousness of the offense, the nature and circumstances of the offense, the history and characteristics of the defendant, the need for the sentence imposed to promote various purposes of punishment, and all of the other factors that Congress prescribed.

Senator LEE. Okay. But you keep reciting that standard, and yet you specifically excluded from consideration the fact that he had requested and obtained images, prepubescent child pornography images.

Judge JACKSON. Senator, I didn't—I didn't exclude it. I didn't exclude it. What I did was I looked at the guidelines, which is what the Supreme Court requires, and I was making policy determinations, as the Supreme Court says that judges are to do in these situations.

Senator LEE. Look at page 38 of your transcript. It looks to me like you excluded it, and your action sentencing him to 3 months for one of the most heinous offenses imaginable. Keep in mind because these are transmitted electronically—

Chair DURBIN. Senator, we've—

Senator LEE [continuing]. They're there for years. They revictimize these victims the rest of their lives.

Chair DURBIN. Senator? We're asking everyone to try to stick with the 20 minutes, please.

Next is Senator Klobuchar, but before recognizing her, I'd like to ask consent to enter into the record a support letter for Judge Jackson from 48 former Federal prosecutors in South Florida.

Without objection.

[The information appears as a submission for the record.]

Senator Klobuchar.

Senator KLOBUCHAR. Thank you very much, Chairman Durbin. Welcome back, Judge Jackson.

Yesterday, you and I discussed the Court's increasing reliance on issuing unsigned orders on its shadow docket. And less than an hour ago, the Court once again used the shadow docket to throw out Wisconsin's redistricting maps. And because this decision just came out, I don't expect you to have immediately reviewed it, but I just want to make this point, that in her dissent, Justice Sotomayor, joined by Justice Kagan, called the Court's move unprecedented. She noted that, "In an emergency posture, the Court summarily overturns a Wisconsin Supreme Court decision resolving a conflict over the State's redistricting, a decision that was rendered after a 5-month process involving all interested stakeholders, based on an obligation that is"—these are her words—"hazy at best, even though summary reversals are generally reserved for decisions in violation of settled law."

And, again, I don't expect you to be familiar with this case, but I do want to point out that this underscores the point that I made yesterday, that the Court's increasing practice of using the shadow docket to decide cases that have grave consequences for our democ-

racy, including the right to vote that you and many other nominees have said is fundamental, is incredibly troubling. You had the other case I mentioned yesterday where Justice Roberts dissented, the Texas abortion bounty hunter case, that that should not have been done on the shadow docket.

And while I'm not going to ask you about this because you couldn't possibly have read it, just your record of writing decisions that are thorough and listening to litigants in cases, could you just generally talk about the importance of having full briefings on the merits as well as public oral argument if you believe in transparency?

Judge JACKSON. Thank you, Senator. As a judge, in my work over the last decade, I've seen that it is very important, at least to me in my time as a judge to date, to hear arguments from all sides in a case. The duty of a judge is to make determinations, and under our system of adversarial proceedings, you make determinations based on arguments, and it's important to do so.

I know that with respect to the emergency docket, I—you haven't asked me the question about it because I would say what I said before, which is I would benefit from being able to speak with the Justices. I understand that there's a need to balance getting a full briefing with emergency circumstances, and the Court has long had in its procedures the ability to rule quickly on various cases.

Senator KLOBUCHAR. Mm-hmm.

Judge JACKSON. It's also my understanding from my time clerking on the Court that the Court does recognize the value of allowing things to what we call percolate, meaning lower courts get to hear issues. And my understanding is that at least in some of the recent cases, the Justices have had oral argument related to some emergency matters. But from my perspective as a judge and the work that I've been doing, I know that it's important to hear from the parties.

Senator KLOBUCHAR. Mm-hmm. Another hallmark of your work has been taking complex issues and making them accessible to the public, so much so that I actually referred to one of your opinions from a debate stage in Los Angeles saying, "As a wise judge said"—those were my words; I guess I was ahead of my time—"the President is not king in America. The law is king." I paraphrased it. That was a written opinion that you wrote that was over 65 pages long, relied extensively on Supreme Court and circuit precedent. It was *Committee on the Judiciary v. McGahn*. And could you talk about really two things: the importance of having the law written in terms that are easy to understand by people, and then, second, your opinion was actually a narrow one. It required Mr. McGahn to appear to testify but said he remained free to assert any legally applicable privilege in response to the questions asked. So what you did there was a narrow opinion. What role do you think that narrow rulings play in helping to maintain the legitimacy of the Court? Why is it important to have plain language in orders?

Judge JACKSON. Thank you, Senator. Well, I'll start with the second first. I think that, you know, as we've been discussing, we have a rule of law in this country which requires a certain amount of predictability and stability in the law. If there are big shifts in terms of legal principles and doctrines and whatnot, it could lead

to people not understanding that judges are ruling on legal principles. It could lead to undermining public confidence thinking that judges are injecting their own policy preferences rather than following the law in terms of their rulings.

And so, to further predictability and stability, there are many doctrines in judicial practice. There's *stare decisis*, which is the principle that if something has already been decided very similarly, you at least—it may be binding on you if you're a lower court, but at least you have to contend with it because that is the law that was—that existed before you got the case, and you don't want to make a big shift. And then there's also the principle that, you know, the understanding that when you are announcing rulings, you are building on what exists before. And so not—so you don't want to make a big shift if you don't have to because if you can find a way to rule incrementally in a more narrow way, it keeps the law stable, is a part of the proposition that I—that I mentioned before.

In *McGahn*, in particular, it was—it was a case in which there was a precedent directly on point from my district. It was not binding on me, but the exact same set of circumstances and arguments had been presented to another judge in my district, I believe it was something like 10 years prior to my case, and so we had law that governed the circumstance. And I looked at that, determined it was persuasive, and that I should continue the principles that had been laid down by—in the prior case.

Also, in accordance with those principles, the prior judge and I made the determination that when the President claims absolute immunity, the argument was that the person who had been subpoenaed by the legislature, a former employee of the White House, could say that they had immunity of some sort; in other words, could have invoked Executive privilege in response to particular questions, but they couldn't say "I don't have to show up at all." And so the argument that was being made was when the House of Representatives issues a subpoena and says show up on this day at this time to answer questions, does that person—can that person just ignore and say I have immunity, I don't have to follow the law—in other words, respond to the subpoena—or do I have to show up and sit there and listen to the questions, and if there are things that I believe I can't answer because they're privileged, then you invoke the privilege.

And the prior case had said in this narrow way, you have to show up. You don't necessarily have to give the information. That's determined on question-by-question basis, but you have to show up, and that's what I held in that case as well. And it's important to be clear in your rulings so that people understand that judges are ruling consistent with the law and not their own personal views.

Senator KLOBUCHAR. Right. And speaking of being clear and being careful in your rulings, some of my colleagues have, I think, given not a necessarily true view of your whole record because when it comes to your rulings being upheld, the numbers show that out of over 550 cases, your district court cases, you were reversed less than 3 percent of the time. And in some of the instances, you were reversed only to have your decision later upheld. I noticed one case, *Territory of Guam v. United States*, in which you were ini-

tially reversed, but then a unanimous Supreme Court reversed that decision, then siding with you in an opinion written by Justice Thomas who aligned with your view. Do you want to quickly talk about that case?

Judge JACKSON. Well, that case is kind of legally complicated. It was a—it was a CERCLA case, which is a Superfund cleanup kind of case, where the country of Guam, which had—which has a dump site on it that was used by both the citizens of Guam and the United States before the 1950s when the United States was stationed there. Military operations happened out of Guam, and there was a lot of dumping into this site. And over time, the site got contaminated, and Guam was charged with having to clean it up, which is millions and millions of dollars.

And there are statutes, very complicated statutes, about the circumstances under which you can seek contribution, under which a country like that can ask for the United States to pay some of that cost or other countries to pay some of that cost. And that was sort of the nature of the dispute, and I did a statutory interpretation about whether or not Guam's action could proceed.

The United States filed a motion to dismiss saying that all of the technical requirements of the law weren't met and that the action had to be dismissed. And I denied the motion to dismiss after interpreting the statute, saying that the action could continue. The D.C. Circuit reversed my view, had a different reading of the statute, saying that the motion to dismiss should have been granted, and dismissed the case. And then it was appealed to the Supreme Court, and, as you say, the Supreme Court reinstated the action saying it could proceed.

Senator KLOBUCHAR. Very good. Thank you. In 1972, in *Branzburg v. Hayes*, a 5–4 Court did not recognize the reporter's privilege in the context of criminal grand jury testimony. And I spoke with you earlier at length about *Times v. Sullivan* and First Amendment issues, so this will be my last question on this. Since the Court's decision, my State, like many other States, enacted strong reporters privilege laws to protect journalists from having to divulge unpublished materials, confidential sources. How would you approach balancing the need to protect journalists and the role they play in informing the public against the need for law enforcement officers to gather information?

Judge JACKSON. I would apply the precedents of the Supreme Court in this area. It would depend on the circumstances. As I mentioned, press freedoms is one of the fundamental First Amendment rights. The Court has a number of precedents in terms of expressive freedom, press freedom, and, in every case, there'll be a specific set of circumstances regarding an alleged violation of the right. And the Court would need to look at the facts and circumstances, the prior precedent in order to determine whether that particular regulation could be upheld.

Senator KLOBUCHAR. Okay. Thank you. This is my very last question, Chair, before all of us get to eat lunch, including you, and that is really the important role of dissenting opinions. Justice Ginsburg once said that—she said, “Dissents speak to a future age. It's not simply to say my colleagues are wrong and I would do it this way, but the greatest dissents do become Court opinions, and

gradually over time, their views sometimes become the dominant view.” When Justice Ginsburg’s rabbi gave a eulogy at her memorial service here in the Capitol, and some of us were fortunate enough to be there, he said, “Justice Ginsburg’s dissents were not cries of defeat. They were blueprints for the future.” What do you think is the purpose of a dissent, and if you want to talk just a little bit about that, this idea that they can be blueprints for the future.

Judge JACKSON. Thank you, Senator. On the Supreme Court, there are nine Justices, and in every case, they’re all sitting together to hear the issues in a case. And one hopes, and it often happens, that the Justices agree as to issues in cases. I believe in the vast majority of cases that the Justices here are actually not—there is no dissent, that they—that they agree to the outcome. But there are cases in which, after deliberation, and collaboration, and consideration, the Justices may disagree about how the case should be resolved. And there’s a mechanism for every Justice to decide whether they’re going to join others either in the majority, whether they’re going to write a separate opinion that might agree with the majority but wants to make a different point, or whether they want to dissent. And sometimes more than one Justice might dissent or join a dissent. It’s a way of expressing one’s own view that may differ from your colleagues.

And with respect to the point that you made, there are actually many Justices in history who have used the dissent mechanism to discuss the law in ways that others find, over time, to be more persuasive. And so I’m thinking of—I’m thinking of the first Justice Harlan, who dissented famously in *Plessy v. Ferguson*. He dissented alone. All of the other Justices agreed with the proposition of separate but equal, and he said “no” in a dissent. And his dissent, generations later, became—according to Justice Thurgood Marshall, became the blueprint for Justice Marshall to make arguments that led to *Brown v. Board*. So there is the opportunity for Justices to describe their views in ways that become persuasive to others in the future.

Senator KLOBUCHAR. Thank you for all you’ve given us the last few days.

Judge JACKSON. Thank you.

Senator KLOBUCHAR. We look forward to working with you. Thank you.

Judge JACKSON. Thank you.

Chair DURBIN. Thank you, Senator. Thank you, Senator Klobuchar, and we’re going to break now for a 30-minute lunch. I’d say to everyone that when we return, if we stick to 20-minute rounds and don’t yield back time, we’ll be finishing in something around 4-and-a-half hours, which would take us to about 7. So that doesn’t include a break, but we’ll consider that later on. Thank you, Judge, again.

Judge JACKSON. Thank you.

[Whereupon the hearing was recessed and reconvened.]

Chair DURBIN. Welcome back, Judge. As you can see, things get off the rails here when they decide they have a floor vote. We will do our best to stick with the program and finish this in a proper way.

The next up is Senator Cruz of Texas.

Senator CRUZ. Thank you, Mr. Chairman. Judge, good afternoon.

Judge JACKSON. Good afternoon, Senator.

Senator CRUZ. Under Article III of the Constitution, Federal courts have jurisdiction over only cases and controversies, which means under the Constitution it has to be an actual dispute, that Federal courts cannot simply issue advisory opinions on a question they may have a view on. And one component of Article III jurisdiction is the requirement of standing, that in order for a plaintiff to have standing to bring a case that that plaintiff, at least generally speaking, must have a real and concrete injury. Is that right?

Judge JACKSON. That is correct.

Senator CRUZ. So for example, that means that even if I might have a disagreement with some particular policy or some particular law, that I cannot bring a case unless I am personally aggrieved by that policy or that law. So for example, your and my alma mater, Harvard, is currently being sued for its explicit, and in my view, egregious policy of discriminating against Asian Americans. Even though I think that policy is egregious, I, as an individual plaintiff, could not bring a lawsuit challenging it because I am not Asian-American. Is that right?

Judge JACKSON. If you brought a lawsuit, the court would have to evaluate whether you had an actual injury in order to be able to determine whether it had subject matter jurisdiction to hear the suit.

Senator CRUZ. But if I am not in the class being discriminated against then I do not have the ability to bring the lawsuit. Is that right?

Judge JACKSON. You would have to have an actual injury. Certainly people, I think, who are in the class could claim that they had an injury for that purpose.

Senator CRUZ. So, now you are on the Board of Overseers of Harvard. If you are confirmed, do you intend to recuse from this lawsuit?

Judge JACKSON. That is my plan, Senator.

Senator CRUZ. Okay. We discussed yesterday how the standard for race discrimination was strict scrutiny. The Court has laid out a different standard for gender discrimination. What is the constitutional standard that applies to gender discrimination?

Judge JACKSON. Gender discrimination, the Court has held, intermediate scrutiny applies, which is that the Government has to have an important interest, and the tailoring does not have to be as narrow.

Senator CRUZ. Right. So yesterday, under questioning from Senator Blackburn, you told her that you could not define what a woman is, that you are not a biologist, which I think you are the only Supreme Court nominee in history who has been unable to answer the question, "What is a woman?"

Let me ask you, as a judge, how would you determine if a plaintiff had Article III standing to challenge a gender-based rule, regulation, policy without being able to determine what a woman was?

Judge JACKSON. So, Senator, I know that I am a woman. I know that Senator Blackburn is a woman, and the woman who I admire

most in the world is in the room today, my mother. It sounded as though the question was——

Senator CRUZ. But let me ask, under the modern leftist sensibilities, if I decide right now that I am a woman, then apparently I am a woman. Does that mean that I would have Article III standing to challenge a gender-based restriction?

Judge JACKSON. Senator, to the extent that you are asking me about who has the ability to bring lawsuits based on gender, those kinds of issues are working their way through the courts and I am not able to comment on them.

Senator CRUZ. Okay. If I can change my gender, if I can be a woman and then an hour later if I decide I am not a woman anymore I guess I would lose Article III standing, tell me, does that same principle apply to other protected characteristics? For example, I am a Hispanic man. Could I decide I was an Asian man? Would I have the ability to be an Asian man and challenge Harvard's discrimination because I made that decision?

Judge JACKSON. Senator, I am not able to answer your question. You are asking me about hypotheticals, and——

Senator CRUZ. Well, I am asking you how you would assess standing if I came in and said, "I have decided I identify as an Asian man."

Judge JACKSON. I would assess standing the way I assess other legal issues, which is to listen to the arguments made by the parties, consider the relevant precedents, and constitutional principles involved, and make a determination.

Senator CRUZ. Okay. Let's go back to your favorite topic of this hearing, which is the criminal law cases you had as a district judge, and in particular the cases involving child pornography. Now your defenders, both on the Democratic side of the dais and also in the press, have suggested that the criticism that has been raised has been somehow cherry-picked, that it is only some specific examples. So I am going to give you an opportunity to discuss each and every case you have had, because looking at your cases—and I have now examined all of the child porn cases you have had as a Federal district judge—there is a very consistent pattern.

So let's start—and by the way, I am excluding the cases—so Senator Durbin and Senator Coons focused on the *Nickerson* case, the *Fyffe* case, the *Nguyen* case, and the *Hillie* case. I am excluding those because those are not child porn cases. Those are actual sexual assault of a child, which is markedly different. And I will concede when you are dealing with sexual assault you have been willing to impose stricter penalties.

So let's focus on actual child pornography cases, and let's go through each of them, because if it is right that we are cherry-picking then you should be able to explain quite powerfully.

[Posters are displayed in the hearing room.]

Senator CRUZ. Now your justification is that you are following the statute, and as you know, 18 U.S.C. 3553 lays out the factors that as a district judge you had to consider in sentencing. And let's start with the *Hess* case, *United States v. Hess*. Now in that case a man sent six pictures of a prepubescent girl that he claimed was his daughter to an undercover law enforcement officer. Officers found over 600 images of child pornography, including images of

sexual acts being performed on prepubescent children. The defendant pled guilty, and I believe in all of these cases the defendant pled guilty, so there was no question about guilt. They came in and pled guilty in your courtroom.

The charge carried a mandatory minimum sentence of 5 years and a mandatory maximum sentence of 20 years. The sentencing guidelines recommended 151 to 188 months' sentence. The Government, as part of the plea deal, agreed to argue for 60 months but did not agree that that would be the sentence, simply that they would advocate it. And you, in turn, sentenced Hess to 60 months.

So under the terms of the statute, why did you choose to sentence Hess to the absolute lowest possible sentence you were allowed to sentence under law?

Judge JACKSON. Thank you, Senator. I have spoken at length throughout this hearing about these cases. I have said what I am going to say, which is I have taken every case seriously. These are very horrible—

Senator CRUZ. Could tell me what you say about the *Hess* case. I am asking you specifically—

Judge JACKSON [continuing]. Crimes—

Senator CRUZ [continuing]. About the *Hess* case.

Judge JACKSON. I have taken every case seriously.

Senator CRUZ. So you are not going to answer that?

Judge JACKSON. These are very horrible crimes, as was that one, and as a mother, having to look at these pictures, having to follow Congress' directive, having to listen to recommendations like the Government in that case, which argued for 60 months, I imposed the sentence that I believed was the sentence that was required by law.

Senator CRUZ. So I believe you, and actually I have read your sentencing hearing in each one of these cases for which we have transcripts, and there are several of which we do not have transcripts. So in each of these cases you read from the same script. So in each of these cases you say that the distribution of child pornography is an extremely serious Federal crime, and you point out that the crime involves people who are taking pictures and videos of real children while the children are being sexually abused.

In *Hess*, you pointed out that he had hundreds—hundreds—of images of children in sexually compromised positions, some of them engaged in sadomasochistic acts—all of this I am reading from you, on the bench—and most importantly, the children in these pictures are not knowing and willing participants in the degrading conduct that was being depicted. They were being forced, forced by someone off-screen, to commit unspeakable acts of sexual violence for the pleasure of the people filming them, and for the gratification of people everywhere. And what concerns me is that many of those people have absolutely no shred of empathy for what that conduct does for the children who were being abused in this way. And you read this script in every one of these cases. So you talk about that these are terrible, terrible crimes.

But you also—and in *Hess* you said, "I have to say that what I found particularly disturbing about your offense was that you apparently concocted a story about having photographed your own daughter, who you purportedly were willing to take pictures of to

trade with other people. I know from your comments, and from those who know you, that you are unlikely to ever harm a child,” which I find remarkable that you have got a child predator in your court who says, I am unlikely to harm a child, and you say, Well, you told me that so clearly you are unlikely. But you say, But in the context of the crime, you represented that you would. That, in and of itself is astonishing.’

So you talk about it as astonishing. You nonetheless sentenced him to the very lowest possible sentence allowed under law. And what is striking is in the cases, in half of them, in five, you sentenced the defendant to the absolute lowest sentence under law.

Let’s look at another case. Let’s look at *United States v. Chazin*. Now *Chazin* is a particularly nasty case. In *Chazin*, the defendant was accused—accessed a dropbox that contained 35 videos and 13 partially downloaded files of prepubescent, minor females engaging in sexually explicit conduct. At least three of the instances of prepubescent female children were engaged in sexual activity with adult men. The images included the sexual abuse of children, including those as young as toddlers, and several of these cases that you had involved the sexual abuse of toddlers, which is truly horrifying.

In this instance, Chazin pleaded guilty. The guidelines recommended a sentence of 78 to 97 months. The prosecution argued that should be what the sentence was, and you sentenced Chazin to just 28 months. Why did you sentence someone who had child pornography of toddlers being sexually abused to 28 months, 64 percent below what the prosecutors asked for?

Judge JACKSON. Thank you, Senator. You have picked out, I do not know, seven, eight cases. I have sentenced more than 100 people.

Senator CRUZ. But not to child pornography.

Judge JACKSON. And in every case—

Senator CRUZ. These are child porn cases.

Judge JACKSON [continuing]. In every case, Senator, I look at the evidence, I look at the recommendations of not just the Government, because my duty as a judge is to consider all of the arguments that are made in a case. I look at the evidence. I talk to the defendants about the harms that they have engaged in. Many of these defendants are people who—

Senator CRUZ. Okay, Judge, with respect, you are not answering my question. You are right. You talked to them about the harms. Let me read you again from what you said at the bench. You said, in this instance, with Mr. Chazin, you said, “Among the defendants nationwide who received a below-guideline sentence on the basis of a downward variance, as opposed to a departure, the average sentences ranged from 84 to 92 months.” So that is what you lay out as the average.

Our Democratic colleagues say, “Well, other Federal judges sentenced below the guidelines.” That is true. A number of Federal judges do. Our Democratic colleagues have not pointed to a single Federal judge in the country who 100 percent of the time sentences child porn defendants to markedly below what the prosecution has recommended, unless you have a mandatory minimum and no ability to do so.

In this case you say, "Comparable defendants are sentenced to 84 to 92 months." Sentencing guidelines, by statute, require you to have similarly situated defendants sentenced to similar sentences, but you do not sentence Chazin to 84 to 92 months. You sentenced him to 28 months. Why?

Judge JACKSON. Senator, I have said what I am going to say about these cases. No one case can stand in for a judge's entire record——

Senator CRUZ. Okay, but I am discussing every one of these cases.

Judge JACKSON [continuing]. And I——

Senator CRUZ. So if you are not going to explain it——

Chair DURBIN. Senator, would you please let her respond?

Senator CRUZ. No. Not if she is not going to answer my question.

Chair DURBIN. Well if you are just going to give a speech you should not engage in questions.

Senator CRUZ. And you are not taking my time. If you want to filibuster, you are welcome to do so, but do it on your own time.

Chair DURBIN. I would at least give you an opportunity to speak, and you should give her an opportunity to respond.

Senator CRUZ. If she wants to answer the question. I asked her why——

Chair DURBIN. Please allow her to answer the question.

Senator CRUZ [continuing]. I asked her why she sentenced Chazin to 28 months when comparable defendants, in her own words——

Chair DURBIN. And let's hear the answer.

Senator CRUZ [continuing]. Were sentenced to substantially higher. And she said she is not going to answer. I mean, I would welcome your answer.

Chair DURBIN. I did not hear that.

Judge JACKSON. Senator, I did not say I am not going to answer.

Senator CRUZ. Okay. Well, then, please tell us——

Judge JACKSON. I said my answer——

Senator CRUZ [continuing]. In these facts, in this case, *Chazin*, why did you sentence him to just 28 months?

Judge JACKSON. Senator, you are looking at the record. I do not have the record here. What I will say is that in every case I looked at the recommendations of not only the Government but also the Probation Office, the defendant, the record, the evidence. I took into account the seriousness of the offense, and I ruled.

Senator CRUZ. By the way, you know, one of the striking things in *Chazin*, the prosecutor comes in front of you and says—this is the prosecutor's argument at this point. And the prosecutor says, "I understand, from my experience before Your Honor, Your Honor's objection, policy objections, to the 2G2.2 sentencing guidelines." And he goes on to say, "However, in this case in particular the four-point specific offense characteristic is justified because it contains sadomasochistic images of infants and toddlers."

I am trying to understand how you see someone that possesses images of infants and toddlers being sexually violated and you sentence them to 64 percent below what the prosecutor is asking for. You do not provide a justification other than a generic concern that

the guidelines are too high. You do not provide a justification, as required by statute.

So I am asking you to take the opportunity to explain to this Committee and the American people why, in 100 percent of the cases, you have people with vile crimes, and you have language saying they are vile crimes, but then you sentence them to very, very low sentences. And why do you consistently, 100 percent of the time, choose to do that?

Judge JACKSON. Senator, no one case can stand in for a judge's entire sentencing record. I have sentenced more than 100 people. You have eight or nine cases in that chart.

Senator CRUZ. Okay. Judge, you said that before. These are the eight or nine child porn cases. I will say, to correct the record—

Chair DURBIN. I would just say to the Judge, there is no point in responding. He is going to interrupt you.

Judge JACKSON. Thank you.

Senator CRUZ. Look, I appreciate the Chairman trying to filibuster, and if you do not like your witness' answers you are welcome to provide your own. She is declining to answer the question. And Chairman Durbin, if you want to join her on the bench, you can. But Chairman Durbin—

Chair DURBIN. My job is to make sure—

Senator CRUZ. Chairman Durbin, I am not interrupting your questioning.

Chair DURBIN. I am asking you to give her a chance to answer. You refuse to do it.

Senator CRUZ. But she consistently said she is not going to answer.

I want to clarify for the record, by the way, the case I was discussing was *Cooper* and not *Chazin*. But *Chazin* is—the case that I was reading from, your transcript, was *Cooper*, but *Chazin*—all right, let's get to *Chazin*. I pulled the wrong tab.

Chazin is equally horrifying, and you say in *Chazin*—this is something Senator Graham asked you. So the guidelines lay out different enhancements, and you say, repeatedly—and this is true in all your cases—you say, you disagree with the guidelines. You think they are wrong. And the two guidelines you disagree with is, one, there is an enhancement for use of a computer, and you say the world has changed and now all of these are on a computer, and I understand that. I do not agree with you but I understand that. That is an understandable thing to say.

But the second thing you say, over and over again, is there is an enhancement for the number of images, and you say repeatedly, for example, in *Chazin*, you say, "Whatever the state of the law and technology at the time of the guidelines were first adapted, neither the use of the computer nor the number of images are especially aggravating factors today."

Now I find that bizarre. And you say it in every case. You say the number of images is not an aggravating factor, it doesn't matter, and you won't apply the enhancement.

Do you really believe that a predator that has hundreds or thousands of images of hundreds or thousands of children being sexually violated has not committed an offense that is more serious than someone that has a single picture of a single child? A single

picture of a single child is horrifying, but hundreds of children that have been violated, do you really believe that is not a more serious offense?

Judge JACKSON. Senator, I did not have any cases involving hundreds of thousands of pictures.

Senator CRUZ. No, no. I said hundreds or thousands. You had cases involving hundreds and you had cases involving thousands. You are right, you did not have hundreds of thousands.

Judge JACKSON. And I also applied an enhancement, just not to the degree of the guidelines.

Senator CRUZ. You are right. It is a five-point enhancement of the guidelines. You provide two.

Judge JACKSON. Yes, so not zero——

Senator CRUZ. Okay. You are right, but——

Judge JACKSON [continuing]. Not the suggestion that I did not——

Senator CRUZ [continuing]. Are you suggesting the number of images does not matter? Because you say it in court, over and over again, that the number of images does not reflect that it is a more serious crime. Do you really believe that?

Judge JACKSON. Senator, as I said to Senator Graham, the court is taking into account a number of circumstances. The commission has done a report about the operation of the guidelines, which enhancements actually reflect different levels of culpability with respect to——

Senator CRUZ. So let me ask you this, Judge. You have said the purpose of sentencing is to distinguish, and distinguish between crimes that are not as serious from truly egregious crimes. Is that right?

Judge JACKSON. No, Senator.

Senator CRUZ. So what is the purpose of sentencing, if it is not to distinguish from less serious crimes from truly egregious crimes?

Judge JACKSON. It is to assign proportional punishment. It is to do justice in cases where you have defendants who are convicted of the same conduct but have different differing levels of culpability.

Senator CRUZ. Well, I will point out that you have a pattern. It does not matter how egregious the case is. Senator Hawley talked about the *Hawkins* case, where you had an 18-year-old with pictures of boys as young as 8 being sexually assaulted and raped, and you sentenced him to just 3 months in jail.

And I will point out the *Stewart* case, the last one on this list, because we are running out of time, the *Stewart* case, you describe that he had over 6,700 images and videos—so that is a lot, 6,700. That is a lot of kids being sexually assaulted——

[Gavel is tapped.]

Chair DURBIN. Your time has expired, Senator.

Senator CRUZ. You have taken over a minute of my time, Mr. Chairman.

Chair DURBIN. You have been given extra time. You usually ask for it. You are given it.

Senator CRUZ. Okay. I know you want to interrupt. I know you do not like this line of questioning.

Chair DURBIN. I just want you to play by the rules.

Senator CRUZ. I know you like to interrupt, but——

Chair DURBIN. I would like you to play by the rules.

Senator CRUZ [continuing]. This is a substantial question—time of my questioning, and I am going to ask my questions. And if you want to testify you are welcome to.

Chair DURBIN. Senator——

Senator CRUZ. Judge——

Chair DURBIN [continuing]. You play to the same rules as every other Senator.

Senator CRUZ [continuing]. In the *Stewart* case, you said, from the bench, “Thus, although this is not necessarily an atypical case, your child pornography possession crime was egregious in the court’s view.” Okay. So this is a bad one. If you are actually sentencing defendants, you said this was egregious. What did you sentence Stewart for? The guidelines said 97 to 121 months. The prosecutor said 97 months. You said it is egregious—6,700 images—you come in with 57 months.

[Gavel is tapped.]

Chair DURBIN. Time is expired——

Senator CRUZ. Why did you sentence him——

Chair DURBIN [continuing]. The Senator is 2 minutes over the allotted time——

Senator CRUZ [continuing]. To just 57 months, in the *Stewart* case? Do you want to address that, because you are claiming it is cherry-picking. In fact, you are welcome to explain any of these cases, but let’s take the *Stewart* case. Why——

Chair DURBIN. Senator Coons.

Senator CRUZ [continuing]. Did you sentence him for half the amount?

Chair DURBIN. You are not recognized, Senator.

Senator Coons.

Senator CRUZ. You do to want her to answer that question?

Chair DURBIN. You would not allow her anyway.

Senator CRUZ. But Mr. Chairman, she may answer the question. I have asked her why she sentenced Stewart——

Chair DURBIN. You have gone over the time, Senator, by 2 minutes and a half.

Senator CRUZ. Because you have interrupted me for 2 minutes, Mr. Chairman. Will you allow her to answer the question, or do you not want the American people to hear why, with someone she described as an egregious——

Chair DURBIN. You know, there comes a point, Senator, where you get a little bit——

Senator CRUZ. Chairman Durbin, will you allow her to answer the question?

Chair DURBIN. You will not allow her to answer the question.

Senator CRUZ. I will happily allow her. The question is, why——

Chair DURBIN. Senator Coons, you may proceed.

Senator COONS. Thank you, Mr. Chairman.

Senator CRUZ [continuing]. Did you sentence Stewart, an egregious child pornography possessor to half of the amount——

Chair DURBIN. Please, Senator.

Senator CRUZ [continuing]. Requested by the prosecutor.

Chair DURBIN. Please, Senator.

Senator CRUZ. Will you allow her to answer the question, Chairman Durbin?

Chair DURBIN. Senator Coons.

Senator COONS. Thank you.

Senator CRUZ. But why are you not allowing her to answer the question. There is not another Senator here—

Chair DURBIN. You are over time by 2 and a half minutes.

Senator CRUZ [continuing]. That you have not allowed her to answer the question. I am not asking another question, but allow her to answer the question, Chairman Durbin.

Senator COONS. Thank you, Chairman Durbin.

Senator CRUZ. Why do you not want the American people to know what happened in the *Stewart* case, or any of these cases? Chairman Durbin, I have never seen the Chairman refuse to allow a witness to answer a question.

[Gavel is tapped.]

Senator CRUZ. You can bang it as long as you want.

Chair DURBIN. I can just tell you, at some point you have to follow the rules.

Senator CRUZ. Okay. Will you let her answer the question? You have been interrupting me, and by the way, with Senator Graham it went 10 minutes over.

Chair DURBIN. It sure did.

Senator CRUZ. You have taken a big chunk of the time. Will you allow her to answer the question?

Chair DURBIN. You have given her full opportunity—

Senator CRUZ. Why are you afraid of her—she is welcome to answer it right now. Will you let her?

Chair DURBIN. Senator Coons.

Senator CRUZ. So no, you do not want her to answer the question?

Chair DURBIN. Senator Coons.

Senator CRUZ. Will you let her answer the question?

Senator COONS. Chairman Durbin—

Senator CRUZ. Apparently you are very afraid of the American people hearing the answer to that question.

Senator COONS [continuing]. We, here in the Senate, in this Committee today, are in the middle of a policy fight. It is my understanding that across this Nation more than 70 percent of district court judges who impose sentences in cases such as the ones that have been so vigorously debated here depart downwards from the sentencing guidelines, from the request of the prosecutors. And as you have explained, repeatedly and in detail, that is because a sentencing judge is required to weigh a whole series of factors.

How many opinions have you written as a judge, Your Honor?

Judge JACKSON. I have written at least 570 opinions, Senator.

Senator COONS. And I how many cases have you imposed sentences as a Federal judge?

Judge JACKSON. More than 100 cases.

Senator COONS. And across all of those, we just heard very forcefully assertions made about you and your character and your capabilities, your background, narrowing in on just a few. And I would simply put, for those who are watching and trying to understand what all of this is about, that in an attempt to distract from your

broad support, your deep record, your outstanding intellectual and legal credentials that we are taking what is a policy dispute that should be decided by Members of the Senate. If we want to change the sentencing guidelines to make them mandatory rather than advisory, if we want to change the structure within which a Federal judge imposes sentences, we could do that. But to demand that you be held accountable for this practice that is nationwide and is years old, I view as an unfair misrepresentation of your record.

So if I could, let's go to something that you did, as the vice chair of the Sentencing Commission, an important vote that you took in 2014, because in my view it shows how fundamentally misguided are the attacks that try to characterize you as someone who, at all costs, will do what you can to help criminal defendants.

Let me just lay out the context for a moment. In 2010, Congress enacting a policy choice, unanimously passed the Fair Sentencing Act, a bill that reduced the disparity in sentences between crack cocaine and powdered cocaine from 100-to-1 to 18-to-1, and the Sentencing Commission unanimously concluded this law meant those currently in prison on crack offenses could seek to shorten their sentences.

Four years later, the commission further concluded that individuals who provided substantial assistance to the Government, people who cooperated, who helped out the prosecution, could use this law to shorten their sentence retroactively, beyond any break they might have gotten for their cooperation. But you disagreed.

In your public remarks at the time you explained that although given your prior service as a Federal public defender it might seem logical you would support this direction, you could not do so because you concluded it was manifestly inconsistent with the law and would create unfair disparities between those previously sentenced cooperators and those sentenced today.

Essentially, if I understand your view, it was that the sentence of a cooperator should not be understood to be based on the sentencing ranges modified by the Fair Sentencing Act but was best understood as a fixed discount of the mandatory minimum that the Fair Sentencing Act had not changed. I know this is technical, but I just wanted to make sure I am characterizing this correctly before reaching a conclusion.

Do I understand the context correctly in which you made this decision?

Judge JACKSON. Yes, Senator, perfectly. It was debate among the commission, one of the very few in which we could not reach agreement about the retroactive application of the Fair Sentencing Act reduction.

Senator COONS. And so just to finish the framing, the Sentencing Commission, which often decides things unanimously, was sharply divided, and here is who was on each side. You voted to deny relief to cooperators, to deny them a pathway toward reducing their prison sentences, and you were joined by two conservatives well known to us, Judge William Pryor and now-Judge Dabney Friedrich. And the three of you were outvoted by four commissioners, which included Judge Hinojosa, an individual nominated by President Reagan and described as a hard-nosed, no-nonsense judicial conservative, who was on the other side of the argument from you.

So you have got four commissioners, including an outstanding conservative Reagan nominee, and they thought the law could be interpreted to give a break on sentencing, and you were on the other side of that argument.

If, as someone as tried to paint you, you simply were determined to give every break you could to criminal defendants, all you had to do was join the majority and this would have passed, but that is not what you did. Help me understand why not.

Judge JACKSON. Thank you, Senator. As you say, this is a sort of technical kind of in-the-weeds discussion, but the top line is that when I looked at the issues and I looked at the law it was my opinion that the law did not provide for the further reduction that was being considered.

Senator COONS. So across an incredibly broad range of sentences you have had to impose and cases on which you have had to opine, I am picking this one, in part because it is not getting any attention in this confirmation process. But for folks who would like some insight into how you make decisions and how you explain those decision, there is a video that is publicly available of your April 2014, of the public meeting of the Sentencing Commission, where you laid out your position. So I encourage folks to just watch that, and they will see a jurist who understands that her commitment above all is to determine what the law requires and then follow it. In my view, that is an individual who belongs on the Supreme Court.

By the way, your position, that the law required that there not be further breaks given in this context, ultimately won the day. My colleague from New Jersey made a point of mentioning a relevant case, *United States v. Booker*, yesterday. I have to say that in this case it was decided in *Koons v. United States*, with a K, not a C. [Laughter.]

Senator COONS. Look, we all have our judicial record from which we work. But the Supreme Court ruled for exactly the same reasons you did in this argument that was made public.

So I just think, Your Honor, this is an example of you looking hard at the law, making a tough decision, ultimately being vindicated in that decision, but taking a position that is not the caricature that has been proffered by some of you.

Yesterday I ran through a number of the letters and statements that debunk some of the attacks that have been levied based on a handful of sentencing decisions. There was the National Review piece by a conservative former prosecutor who calls out the smear on your sentencing practices in cases involving child pornography; the statement by the Fraternal Order of Police and the International Association of Chiefs of Police, endorsing your even-handed and judicious approach to the law; the glowing letter from 24 prominent conservative attorneys; and the resounding recommendation we heard in person from Judge Griffith.

There has also been received here a letter from a number of retired Federal judges, including 2 Republican nominees, rejecting this mischaracterization of your sentencing record. As I have said, this is a policy dispute that we should be deciding, not an appropriate basis on which to mischaracterize your record or your character.

We have letters from the National Coalition of Domestic Violence in addition to these law enforcement leaders, from survivors, advocates, crime victims. The breadth of your support from the very communities my colleagues have suggested you are making less safe shows just how off-base these attacks are, and in my view is a testament to your qualities and qualifications.

So we all agree, all of us that it is critical to protect our children and prevent the kinds of heinous crimes we have heard about in some detail earlier today. It is why I am introducing a bipartisan reauthorization of the Victims of Child Abuse Act, something that we could act on as a Committee to do our job, which is set policy and pass laws.

But I also, frankly, think we need to be mindful that we are asking of you to get engaged in that policy dispute in front of this Committee, which is not the role of a judge, something you well understand.

Let me turn, if I could, to another reason I think you are deeply qualified and that you will bring something important to the Supreme Court. Bryan Stevenson, one of America's civil rights lawyers, and, by happy coincidence, a Delaware native, has spoken about how achieving justice requires being proximate to the people most impacted by the criminal justice system, and you have done that. As a public defender, you have represented individuals in the criminal justice system. As a district court judge, you have looked individuals in the eye and told them that for their crimes against society they will spend years or decades in prison. You have met with, fought for, and advocated for victims.

You have also studied the big picture. As an effective and engaged member of the Sentencing Commission you have pored over data, reviewed thousands of letters, and thought hard about the appropriate national approach to just punishment, in a more policy-oriented role.

You have also thought about the big picture as a judge when considering the precedent that your opinions set. I would be interest, briefly, in how your experience on the Sentencing Commission shaped your approach as a district court judge and how the interplay of all these factors might shape or contribute to your decisions as a Supreme Court Justice.

Judge JACKSON. Thank you, Senator. One of the things district judges, sentencing judges, often say, when asked about the task, is that sentencing is the hardest thing that a judge has to do, and it is in part for the reasons that you have articulated, that it is one thing to understand the law, to read it in a book. It is one thing to look at data and numbers and make policy based on that. It is quite another to have someone in the courtroom, whether as a victim of crime or a defendant who has perpetrated a crime, and have to decide how to proceed and pronounce a sentence on that individual.

The work that I did on the Sentencing Commission, which was prior to my becoming a district judge, I think enabled me to understand unwarranted sentencing disparities, to understand some of the policy reasons behind the guidelines, and to make the kinds of evaluations that the law now requires, since the guidelines are no longer mandatory. And I felt better, in a sense, about the task of

calculating the guidelines, which is what courts have to do at the beginning of a sentence. They can be a little complex, and having been on the Sentencing Commission I think that helped. And some of these cases do make their way to the Supreme Court.

So I think that I am prepared to handle the cases that involve sentencing, that do go to the Court.

Senator COONS. In preparing for this confirmation I went back and read a lecture you gave, but it was later published in the Harvard Law Review, about the balance, the challenge of sentencing, about that moment. I had the joy, the blessing, of clerking for a judge on the Third Circuit. My legal skills and talents did not allow me the opportunity to clerk for the Supreme Court, as you did, and also the district court, and also the circuit court.

But I clerked for a judge who I first met when she was a district court judge and imposing a sentence on someone who was a crack dealer, and she did a remarkable job of speaking to the victims, speaking to the community, speaking to the prosecutor and the defense attorney, and then speaking directly to the defendant, in imposing a very long sentence. And as I got to know her later I recognized that, you know, as a member of our community and as someone who saw the importance of that moment, that public moment, of helping the defendant understand what they had done so that they might somehow change, but also helping the victims understand what had happened, that she took that very seriously, incredibly seriously.

In the Harvard Law Review publication of your remarks you said that you were persuaded by the theories of punishment that accept all human beings are responsible moral agents, and you view punishment as a necessary consequence of the defendant's decision to engage in criminal behavior. You also went on to say that "the challenge is balancing the acknowledgement all of us are more than just the worst thing we have ever done, but there is a need to ensure the defendant is adequately addressed and punished."

What I think you say in that lecture, what you have shown across the arc of your public service, reveals someone who understands the appropriate need for punishment in our society but who is also striving to follow the balance of recommendations, guidelines, statute, and the context and facts. And I trust that as Members of this Committee and the Senate as a whole and the general public take the time, which they should do, to give a fair reading to the whole scope and arc and reach of your service that they will see you as someone who cares deeply about our Constitution and the rights that make us free, as you said in your opening statement.

Your career in the law, your service on the bench, your thoughtful responses to questions put to you, the way you have maintained your composure all impress me.

As I mentioned, I do not think labels such as judicial philosophy are always that meaningful or dispositive. I think in your case a deep admiration for the Constitution and an understanding that the role of a judge is a limited one are critical and qualifying.

You opened yesterday by referencing how your parents were educated in racially segregated schools in Florida but how you, just one generation later, were raised in integrated schools and had far

greater opportunities to put your evident, God-given talents to work in service to our Nation. You cited this one-generation change as an example of the greatness of America. Of course, the Supreme Court played a central role in more correctly interpreting the Constitution and applying it in a manner that allowed this reversal of unjust law to occur.

I think the experiences of your own family and your connection to the experiences of trailblazers who came before you, on whose shoulders you stand, has meaningfully shaped what kind of a Justice you will be. I think you know in your bones how important our Constitution and the rule of law is, and I think, as someone who served on the Sentencing Commission, a public defender in the trial court, and appellate court judge, you have the ability to see across the whole scope and reach of how the law impacts families, communities, and our Nation.

Last, and in some ways I think most importantly, I have learned that as a person and a judge you have humility. Judge Griffith, who came before this Committee to introduce you, and scores of others we have heard from, I just referenced, have lauded your practice of judicial restraint, and you have said a core component of your philosophy is your understanding that the judge's role is a limited one. Well, I think restraint is a core part of your approach to decisionmaking, partly because you are a judge who is humble enough to know that the Constitution and the laws passed by Congress say what the law is. The judge has a limited role in deciding questions of law based on facts presented.

Penn law professor, Lisa Fairfax, your other introducer, your dear friend, explained that since college at Harvard and then through law school you have been a mentor and a role model. She praised your warmth and intelligence, your devotion to friends and family, but she also mentioned your humility. She knew you were honored and humbled by the significance of this moment, not what it means for you but what it means for our Nation.

I remember thinking about this on Monday, and I had a chance to talk to your brother, Ketajh, and he mentioned that he knew you were destined for this moment your whole life. I am sure he would say you have been exceptional since you were student body president at Palmetto High School. I suspect your wonderful family upbringing is partly responsible for this facet of your character.

I suspect your faith has played a role in sustaining you, as mine does, and so does many others in this room. I have often found instruction and comfort in the verse, "What does the Lord require of you but to do justice, love mercy, and walk humbly with your God." I am not going to ask you to reflect on that verse, Your Honor, but I would not be surprised if it is one of your favorites that sustains you.

Let me close by returning to what Judge Griffith said when he told us, in his heartfelt introduction of you on Monday, and something you have also shown in the hours you have been grilled by this body. He had already written a letter to this Committee delivering his endorsement. He took the extra step to then amplify it in person, and he did so because of confidence in you and because he was delivering a message to us, as a Committee, that Supreme

Court confirmations should be more than just exercises in partisan tribalism.

He said there should be nothing unusual about a judge who just happened to be appointed by a Republican President and who holds conservative legal views coming forward to support a nominee with your impeccable qualifications and character, especially a nominee whose legal opinions, whose actions and decisions as a judge he was in a position to review for years, given that you were a district court judge and he was a circuit court judge.

Look, our confirmation hearings for Justices have sadly been devolving over many years, into longer and longer exercises of partisan politics, punctuated by just brief glimpses and occasional thoughtful examinations of a nominee's judicial decisionmaking and views on the Constitution, which should properly be our main focus.

I have to believe this sad state of affairs troubles my colleagues of both sides and all who watch this, but as I reflect on these hearings I am hopeful that your gracious, thoughtful exchanges with some Members will be remembered as just one more service you have rendered to our Nation, and I hope some watching these hearings will be reminded that even though we disagree with the policy preferences or opinions of a nominee, we should all recognize when a nominee is fundamentally qualified, deeply committed to the Constitution and rule of law, and a person of great character.

Judge Griffith reminded us at the outset of this week, and I quote, "As Justice Scalia taught us for so long, an indispensable feature of the republic the Constitution created is an independent judiciary of judges who have taken an oath not to a President or a party but to the American people and to God that they will be impartial."

I could not agree more with Judge Griffith. You have demonstrated your unwavering commitment to that oath and your impartiality and your abundant qualifications. It will be my honor to support your confirmation for Associate Justice.

With that, Mr. Chair, I yield.

Chair DURBIN. Thank you, Senator Coons.

The Senator from Nebraska, Senator Sasse.

Senator SASSE. Thanks, Chairman Durbin. Judge, welcome back. I would like to associate myself with parts of what Chris said there in his closing. I would differ with him about whether or not getting to precision on judicial philosophy matters, but you know that. You and I have been wrestling about it for a couple of weeks. But I would like to affirm Chris' point about the beauty of the hymn to America you told, through the eyes of your parents, and the changes, the growth in the country over the course of the last two generations. The Wall Street Journal had an editorial this morning that said pretty much the same thing as Chris just said, which is that the hymn to America that you gave in your opening on Monday afternoon and some of your comments yesterday were inspiring and beautiful. So I associate myself with Senator Coons on that.

I would like to talk a little bit about your time as a judge and particularly how you see development and growth and change over that time. So take us back 9 years, and maybe 5 years ago, and

then today. How has your approach to being a judge changed from Year 1 to Year 5 to today?

Judge JACKSON. Thank you, Senator. I do think there was a little bit of growth. I hope there was a little bit of growth. Certainly in Year 1 and Year 5 I was still a district judge, and both of those years differed dramatically from my work as an appellate judge, which is where I am currently stationed.

In every job in Year 1 you are new. You are trying to figure things out. I do not know that I had quite pinned down at the very beginning exactly how I would approach cases, but by the time I got to Year 5, I think I had a really good sense of this judging thing, and was able to demonstrate in my opinions, the many, many opinions that I have written, the way in which I go about making my decisions.

I was able to demonstrate, clearly, I think, that the particular parties in the case, the issues in the case, what it is about, from a standpoint of personal preference, is not an issue. I am setting those things aside. I am ruling from a position of neutrality and trying to determine, in every case, what the law requires. I am looking at only the facts and the law in the case. I am evaluating the arguments of the parties, and if it is statutory interpretation I am trying to ascertain what Congress has intended.

I am committed. I think my record shows, to the understanding that that is the role, and the only appropriate role for a judge.

Senator SASSE. I would like to talk a little bit about the troubling pattern we see on law school campuses and across higher education more broadly, especially in the last 5 years. There is obviously a trend toward shouting down and canceling opinions that are outside the left-leaning mainstream, calls for firing professors, canceling professors, shouting down and sometimes threatening speakers who bring divergent, diverse opinions, calls to discipline fellow students. These tactics are increasingly commonplace, particularly against conservative speakers and professors and students, but also increasingly against traditional liberals.

I am a former college president, and one of the sort of oddities that does not fit inside the tribalism of how a lot of times media covers things in DC—one of the oddities for me is how often I have liberal professors reaching out to me, saying that their experience on campus is becoming much less interesting, that the divide on American political campuses is less and less conservative policy-leaning versus liberal or progressive policy-leaning, but more and more liberal versus illiberal.

And I think these campaigns are obviously deeply problematic. They shut down debate rather than teaching students how to engage ideas that they might not have encountered before, which is also a pretty decent definition of education. If you already knew everything before you ever encountered a new idea, you would not need to write checks or take time off of productive life.

So there is obviously a tendency and response for students to self-censor rather than learn from each other, and this robs students of the chance to engage with ideas from across the political spectrum. But in particular, in law schools, it robs students of the opportunity to learn how to consider an alternative position and argue a different point of view than they might have had.

So given that you are a debate champion in earlier days as well, I would like to ask if you agree that law students should be engaging with ideas from across the political spectrum, even those they disagree with, rather than trying to shun those different ideas.

Judge JACKSON. Thank you, Senator. Let me just say, in part because these issues are things that could implicate matters that come before the courts, I will just say that as a general matter law school, like many schools, is a place where ideas and perspectives are considered, and in the law, as I have said, it is important for the judge who is making the decision to have different arguments.

And so one of the things that traditionally happens in law schools is that you are trained in law to make arguments that are at times not even the arguments that you personally agree with, because the understanding is that in litigation, in disputes that come before the court, the court is going to want to hear from different viewpoints. So in that sense, the essence of legal instruction is to have different arguments being made, because that models, in great part, what happens in a courtroom.

Senator SASSE. I really am not trying to ask any kind of gotcha question here—

Judge JACKSON. Yes.

Senator SASSE [continuing]. But we highly agree, so I do not understand the qualification you put at the beginning. There is no sort of second-order fork on my question. It is better to debate ideas that you disagree with than shout them down, isn't it?

Judge JACKSON. It is better in law schools to make sure that there are ideas from all perspectives, and in order to have that happen they cannot be suppressed.

Senator SASSE. So you do not want students shouting down other students or visiting professors, right? I mean, honestly, I did not think there was any chance we would differ on this, so I am not—

Judge JACKSON. No. I am not suggesting that we do differ.

Senator SASSE. Okay. You are against canceling people, I assume.

Judge JACKSON. I am not suggesting that we differ. What I am saying is that these issues about speech on campus and the like are the kinds of things that are issues that are working their way, you know, in different formats and different ways through the courts. And so I am just being careful in terms of my answers.

Senator SASSE. Okay. I am trying to lead you, because I want to, because I think American civic health will be better off. You are going to be a hero—you are already a hero—to lots and lots of kids, students, maybe some bound for the law, but more broadly students across the country. And I think it is in America's public interest for them to hear you as an advocate for the full, vigorous, strong kid debate of different views. And so I suspect you are an advocate for vigorous and robust debate. I do not see how you might be constrained against saying that because of future cases. But I am going to assume we are mostly aligned on this.

Judge JACKSON. I think that is a fair assumption.

Senator SASSE. Thank you. I do want to make, before we move on, just because we have had a number of Members of this Committee comment on cameras in the Court, I have made my position

on this clear a lot of times, but if I can give a tiny bit of friend-of-the-court brief in advance, because I think when you are on the Court and you all continue to debate this issue, I think it should be a decision for the Supreme Court to make about whether or not there are cameras in the courtroom, not a decision for the Article I branch to make for Article III.

But I think it is incredibly important for us to recognize, because I think I differ from a lot of my colleagues on this who are advocates for cameras in the courtroom. I get their position that transparency is a virtue; transparency is a good thing. I also believe that pen and pad can facilitate a whole heck of a lot of transparency just fine, and it is healthy for Americans to recognize the second- and third- and fourth-order effects of cameras.

A huge part of why this institution doesn't work well is because we have cameras everywhere. Camera's change human behavior. We know this. You do not have the same kinds of conversation over the dinner table with your family when you are wrestling through issues, and apologizing for something, and saying, "I said this before but maybe I should modify what I said. My tone was jerky. My substance did not account for your position."

There is a whole bunch of things that humans can do if they are not immediately mindful of some distant camera audience that they might be trying to create a soundbite for. Instagram can be useful for some small things but for intellectual discourse it is not a friend. And I think that we should recognize the jackassery we often see around here is partly because of people mugging for short-term camera opportunities, and it is definitely a second- and third- and fourth-order effect that the Court should think through before it has advocates in there who are not only trying to persuade you nine Justices but also trying to get on cable that night, or create a viral video.

So for what it is worth, I hope that the Court doesn't respond to some well-meaning impulses from the Congress to push for cameras in the courtroom but also some bullying. And there are ways that you can get to a lot of transparency. Audio recordings are increasingly released from the Supreme Court, in timelier fashion, over the past few decades. So for what it is worth, I am glad that you, on the Court, are making that decision, and I hope it is not made for you by the Congress.

I want to go back to the "legitimacy" of the Supreme Court. That term has been used a few times over the last 3 days. Do you think the Supreme Court is legitimate?

Judge JACKSON. I do, Senator.

Senator SASSE. And so some of the ways that the Court has been derided and called "illegitimate" by Members of the Senate include, over the course of recent days and weeks, quote, "leans into extreme partisanship," "leans into extremism," "twists the law," "threatens basic liberties," "has been hijacked by Republicans." These kinds of attacks undermine the public's trust in the Court. We need the public to believe in the legitimacy of its government, including all three branches.

So I would ask you, do you agree with these characterizations of the Court that have been levied in this room over the last few days?

Judge JACKSON. Senator, I have nothing but respect for my former judicial colleagues, my current judicial colleagues, and hopefully my future judicial colleagues. I do believe that we need legitimacy. I have said that is the currency of the Court, and I look forward, if I am confirmed, to joining this institution.

Senator SASSE. So do you think there could be any opinion that would be handed down this term that could undermine the legitimacy of the Court?

Judge JACKSON. Senator, I think the Supreme Court makes its determinations, and all of them are precedents, and they are entitled to respect.

Senator SASSE. I would like to come back to our conversation from yesterday. You pointed out a number of times that as both a district and now a circuit court judge you are constrained and bound by the Supreme Court's holdings. You mentioned a couple of times that you have not had a chance to do much constitutional interpretation for yourself. I largely agree with the way you framed most of that for the lower courts, but I think you would also agree with me that the job of a Supreme Court Justice is different than a district court judge, and in certain ways from a circuit judge as well.

When you serve on the Supreme Court, you will have to interpret what the Constitution means, and based on what you told us about the constrained role on the lower courts, lower court decisions would then not be able to answer how you would approach the new job you would have on that highest court. And so that is why I thought our conversation on judicial philosophy yesterday was somewhat helpful. I am not a lawyer, but I think you took a lot of us to law school yesterday in ways that were helpful. And in particular, you walked us through some different schools of constitutional and statutory interpretation in ways that I think were good for the Committee, were good for the Court, and were good for the public, more broadly.

So I guess I would ask you if you could take us to law school one more time, and walk us through some of the different approaches to substantive due process and unenumerated rights. What are the different ideas on the Supreme Court and in the broader legal community?

Judge JACKSON. Thank you, Senator. I am mostly familiar with the Supreme Court's precedents in this area. It has been a while now that the Supreme Court has determined that the Fourteenth Amendment, which guarantees due process, includes a substantive component in addition to procedure. The term "due process," one would think is just about the procedures that the Government has to afford you before it affects your life, liberty, or property, but the Supreme Court has also said that that protection extends to certain personal, individual rights that relate to dignity and autonomy, and that are deeply rooted in our Nation's history and traditions or implicit in the concept of ordered liberty.

And the kinds of things the Court has recognized, pursuant to that line of jurisprudence are things like marriage, interracial marriage, access to contraception, a woman's right to terminate her pregnancy, abortion pursuant to—subject to the framework established in *Roe* and *Casey*, travel, child-rearing, the ability to direct

your children. Those are some of the rights that have been recognized pursuant to the Fourteenth Amendment due process laws. I am less familiar with the sort of scholarly debate outside of the Supreme Court's rulings.

Senator SASSE. So will there be new ones in the future?

Judge JACKSON. Senator, I am not able to forecast. In every case, the Supreme Court is looking at a particular set of circumstances consistent with the Article III requirement that the Court look only at cases and controversies. So it would depend on what cases came before the Court.

Senator SASSE. So I think that gets at the challenge here that you and I have been going back and forth on over the course of a couple of weeks, because I get the modesty points about being on the district court, but it seems pretty important to understand what the limits might be as a Justice. And so I think this morning again you stated that your—I think the quote was that your “judicial philosophy is your methodology.” But I think that a judicial philosophy of some kind is necessarily an input into your judicial methodology and into every Justice's actual jurisprudence on the Court.

And that is why I think it is important for us to unpack that, because the philosophies that you have outlined for the Committee—again, I think yesterday's back-and-forth that you and I had on Breyer versus Scalia is important, and you wouldn't claim any of those philosophies for yourself. And yet I think the philosophies ultimately instruct judges on the sources and the tools they consult, on how they discern intent, on whether the Constitution is protecting specific limited and defined principles or more general values, and whether modern values can be used to infuse our understanding of the Constitution.

So again, when you narrated a bit of the debate between Justice Breyer, I know you have got lots of intellectual inputs in life, but you've credited him as a brilliant jurist and role model before, and the Scalia debates, you did not really tell us who you thought got the better of the argument. And so I think throughout these 2 days you have focused a lot on what the Supreme Court has said, and I think that is helpful and important. But I have been also trying to get at what you think the limits might be on what Justice Jackson would be constrained by.

So I feel like, I believe we still have not heard your judicial philosophy, and I wish I had made more progress with you on that. But what we do know, on a personal note, is that these Committee 3 days have been very long, and I want to thank you—I got to have a nice conversation with your parents earlier, your whole family—for what you have endured and for spending time with us. And obviously I wish best wishes to you and your family. Thank you, Judge.

Judge JACKSON. Thank you.

Chair DURBIN. Thank you, Senator Sasse.

And Senator Blumenthal is next.

Senator BLUMENTHAL. Thanks, Mr. Chairman.

Good afternoon—

Judge JACKSON. Good afternoon.

Senator BLUMENTHAL [continuing]. Judge Jackson.

I know your birthday. September 14th.

Judge JACKSON. Yes, sir.

Senator BLUMENTHAL. You have the happy coincidence of a birthday with Constance Baker Motley.

Judge JACKSON. Yes, sir.

Senator BLUMENTHAL. Who just happens to have been born in New Haven, Connecticut.

Judge JACKSON. Ah.

Senator BLUMENTHAL. And we are very proud that she is a daughter of New Haven and Connecticut and she is one of my heroes, as well.

As you know about her, she was the first Black woman appointed to the Federal bench. She is the first Black woman to have argued before the United States Supreme Court; in fact, her record before the Court was 10 wins and zero losses. She was very predominantly responsible for *Brown v. Board of Education*. Thurgood Marshall got most of the credit, but she did a lot of the work. It probably sounds familiar to you.

So, why don't you tell us, and maybe tell those folks, particularly women and girls who are watching or listening, why you said at the outset of the hearings here that she was one of those whose shoulders you stood upon as you came here today.

Judge JACKSON. Thank you, Senator.

Well, in addition to the fact that we share a birthday, which I discovered when I was in law school and thought, what a happy coincidence in terms of someone who I so admired. And, secretly, at that point, I was thinking maybe I might want to be a judge, so it was a wonderful coincidence.

I so admired the fact that she was the first. It is not necessarily easy to be the first, but it is an opportunity to show other people what is possible. When you are the first, it means no one has ever done it before like you and there may be hundreds, thousands of people who might have wanted that opportunity and thought, I can't do that because there is no one there like me.

And so being a trailblazer, whether it is Judge Motley or Justice Marshall or Justice O'Connor, being a trailblazer is really inspiring, I think. And I was always moved by Judge Motley's experience and think it may even be part of why I moved in this direction.

Senator BLUMENTHAL. Well, it is inspiring.

And I hope that your very inspiring story will make it possible for a lot of others to think it not secretly, but say it out loud and aspire to it, because it is what this country needs. And, fortunately, President Biden has recognized it in the nominees that he has put before us, and we have tried to work with the great leadership of Senator Durbin to confirm people of real merit, the kind of qualifications in intellect and character and depth and warmth that you bring to us today.

I want to talk a little bit about voting rights, because part of the reason why those dreams now are realities is that more people have the right to vote, at least until recently; in fact, there has been a lot of backsliding about turning back the clock on voting rights.

The gentleman sitting behind you, Doug Jones, our former colleague, who we very much respect and admire, wrote a tribute to

Vivian Malone Jones, who has a rich story as a civil rights warrior and who succeeded John Lewis as head of the voter rights project. And he said in a speech that Doug Jones wrote in a tribute to her as she was inducted posthumously into the Alabama Women's Hall of Fame, I'm quoting, "We can best honor her by acknowledging that while most doors are unlocked today, they are still heavy and so hard to open for so, so many people in Alabama and the rest of the Nation. Let us commit ourselves to do our part to open these doors as wide as possible so that everyone can take the walk that Vivian took."

I am going to ask that former Senator Jones' full speech be entered in the record, Mr. Chairman.

Chair DURBIN. Without objection.

[The information appears as a submission for the record.]

Senator BLUMENTHAL. Thank you.

The simple fact of the matter is, Judge Jackson, Congress passed the Voting Rights Act in 1965. It was a source of real power to so many people who got the right to vote for the first time in practical terms, because it struck down more than 1,000 discriminatory election rules, proposed by State and local officials. It opened the ballot box to millions and millions of Americans and it became regarded as the crown jewel of the Civil Rights Movement.

And then, just in the last few years, the Supreme Court has hacked away at it in an exercise of judicial activism that has been historic in magnitude; judges supplanting their views for the policy preferences and official acts of legislatures in opinions that were written and joined by only conservative Justices. These decisions were about as far from judicial restraint as there could possibly be—not even close, and they rewrote the rules of our most cherished and most bipartisan civil rights law; you know the cases, *Shelby County*, *Brnovich v. Democratic National Committee*. In effect, their opinions, including Justice Alito's decision in *Brnovich*, are completely untethered from the clear statutory text and they impose a series of so-called guide posts on Section II that create unreasonably high hurdles to the exercise of the Voting Rights Act.

I hope that you will bring to the Court that deliberate, careful methodology that you described earlier, very convincingly. It is part of your judicial philosophy in the sense that it is your approach to cases and it has been very persuasively and clearly articulated. And I think that if that kind of deliberate and careful methodology had prevailed on the United States Supreme Court, we would still have the Voting Rights Act in full right now, and I hope that we can, once again, return to bipartisan support of those rights.

The most recent exercise of unfortunate decisionmaking in the voting rights area came just hours ago when the Supreme Court struck down the decision of the Wisconsin State Supreme Court in *Wisconsin Legislature v. Wisconsin Elections Commission*. What is striking is not only the result, but the fact that it was done as part of the shadow docket.

We have talked a lot about it here and what the people of America should know is there is no oral argument; there is only minimal briefing. There are no full opinions of the Court; in fact, I am holding up a per curiam opinion that is about 12 pages in length from the Court, which means you don't know who wrote it, and there is

a powerful dissent. I recommend that everyone read it. Again, use of the shadow docket has become increasingly prevalent since 2017 and, in effect, the United States Supreme Court is shirking its duty.

I hope you will bring to the Court the kind of responsible and methodical approach to decisionmaking that will lead to an avoidance of the shadow docket, as well as a return to the Voting Rights Act.

And if I can just offer one more piece of advice on the Court's workload, I have a chart.

[Poster is displayed in the hearing room.]

Senator BLUMENTHAL. I know we are not going by the Rules of Evidence here, but this chart indicates the signed decisions of the United States Supreme Court over a good part of its history. And I think the pattern here is pretty clear. The Court issues fewer signed opinions, in fact, it has declined precipitously since 1972. This little blip at the end here is an increase from 53 to 57, but you can see it is only a fraction of what the Court used to do in signed opinions. Even from a time when I was a law clerk, it has diminished profoundly.

The Supreme Court needs to do its job; it needs to issue signed opinions, not the shadow docket. It needs to take cases and resolve real, fundamental, important issues.

And taking your record, 573 opinions over 9 years, I am not a math major, but that is about 64 opinions a year. That is a lot more than they do, all nine of them.

So, I hope that you will bring the energy that you have demonstrated in this room, the energy and the work ethic to the United States Supreme Court, because, clearly, you have both and I think the Court is very much in need of it, as it is some of the other great qualities, intellect, character, that you have demonstrated here.

Just a couple more points, if I may. You were asked earlier about dissents. I want to ask you about one, in particular; the dissent of your mentor and your predecessor on the Court, Justice Breyer. I am told, I think I have read that there is one opinion that he is proudest of.

Can you tell us what you recall it being, if you know?

Judge JACKSON. Senator, I am not able to answer that question.

Senator BLUMENTHAL. Well, I think he said that the dissent that he is proudest of was in *Parents Involved in Community Schools v. Seattle School District*. I think he said it was the opinion that he was proudest of and he cited it in a Harvard Law School symposium about his notable opinions and he said this dissent was most notable.

I will give you the citation when we are done and ask that it be entered into the record, Mr. Chairman.

Chair DURBIN. Without objection.

[The information appears as a submission for the record.]

Senator BLUMENTHAL. It is 77 pages long and it is a dissent. It is a dissent in the *Parents Involved* case, which was a five-justice plurality, invalidating public school integration plans in Seattle and Louisville. The plans had been in place for decades, put in place by two local school boards voluntarily trying to address school segregation in public schools in both of those cities. And the Jus-

tices, conservative Justices striking down the school integration plans said, in effect, they couldn't move forward with those integration plans.

You may recall it is the opinion where Chief Justice Roberts said, very famously, the way to stop discrimination on the basis of race is to stop discrimination, to stop discriminating on the basis of race.

Justice Breyer, in dissent, which reminded me of a lot of what you said here this week, wrote, quote, "I do not claim to know how best to stop harmful discrimination, how best to create a society that includes all Americans, how best to overcome our serious problems of increasing de facto segregation. But as a judge, I do know that the Constitution does not authorize judges to dictate solutions to these problems; rather, the Constitution creates a democratic political system, through which the people themselves, through their legislators, must find—must together find answers. The Court should leave them to their work."

I think that is the philosophy that you have articulated here today. The judicial philosophy of separate branches of Government, as you so eloquently described, our constitutional scheme, our federalism that really should have led the Court to respect the Wisconsin Supreme Court's decision and the Wisconsin Governor's decision, and to stay in its lane, as you have put it so well.

The fact is there has been a lot of progress and we see it in this hearing room, but there is a lot of work still to be done and there is a lot of reason for folks to feel even some anger at what we have seen on voting rights and on resegregation in some areas.

So, I am really excited, as I have indicated, and joyful at the great landmark and the historic accomplishment that your nomination represents and reflects. And I hope, as I have said, that not only will you make the Court look like more like America, but hopefully think more like America.

And I want to thank you for your very hard work, all of what you, personally, have done, because you, as a person, have done it, and history has given you this opportunity.

Your parents have helped to make it possible. Your family story is so powerful, but you have really earned it, and we are grateful to you for providing all of us that role model.

Thank you, Mr. Chairman.

Chair DURBIN. Thank you, Senator Blumenthal.

Senator Hawley.

Senator HAWLEY. Thank you, Mr. Chairman.

Judge, good to see you again.

Judge JACKSON. Good to see you, Senator.

Senator HAWLEY. We don't have a lot of time, so let me just get straight into it.

Senator Cruz was asking you at the end of his time in questioning about *United States v. Stewart*. This is the case where Neil Stewart tried to cross State lines to rape another person's 9-year-old daughter. He had 6,700 images and videos of egregious and brutal child pornography. The Government recommended 97 months. The guidelines said 97 to 121 months. You came in at 57 months. Senator Cruz asked you why. The Chairman wouldn't let you answer. I thought maybe you would like to answer now.

Judge JACKSON. Thank you, Senator.

No one case can stand in for a judge's entire record. I have sentenced more than 100 people in a variety of egregious circumstances. In every case, and especially cases that involve the kinds of acts that you are talking about, the kinds of evidence that I had to deal with as a judge, in every case, I am balancing the factors that Congress has determined are appropriate and required for a judge to make a determination.

The data points that Senator Cruz pointed to that you may have in front of you don't account for all of the information that was before me as a judge. And the authority that you all, Congress and your prior confirmation, when I was a district judge, provided for me to exercise my judgment. And I treated those cases, and every case, very seriously and imposed a sentence that was sufficient, but not greater than necessary to promote the purposes of punishment.

Senator HAWLEY. Would it surprise you to learn that Mr. Stewart is a recidivist? There were warrants issued, again, for his arrest just 3 years after you sentenced him.

Judge JACKSON. Would it surprise me?

Senator HAWLEY. Yes, would it surprise you?

Judge JACKSON. You know, Senator, there is data in the Sentencing Commission and elsewhere that indicates that there are recidivism, serious recidivism issues. And so, among the various people that I have sentenced, I am not surprised that there are people who reoffend, and it is a terrible thing that happens in our system.

Senator HAWLEY. Yes, indeed, it is.

Let me ask you about the *Hawkins* case. You and I talked about this yesterday. You have been able to think about it overnight.

This is a case where you had an 18-year-old who possessed and distributed hundreds of images of 8-year-olds and 9-year-olds and 10-year-olds and you gave him, frankly, a "slap on the wrist" sentence of 3 months.

Judge JACKSON. Senator, I don't—

Senator HAWLEY. Do you regret it?

Judge JACKSON [continuing]. I don't remember whether it was distribution or possession.

Senator HAWLEY. It was both.

Judge JACKSON. In the law—

Senator HAWLEY. Do you regret it?

Judge JACKSON. In the law, there are different crimes that people commit in this area—

Senator HAWLEY. Judge, you gave him 3 months.

My question is: Do you regret it or not?

Judge JACKSON. Senator, what I regret is that in a hearing about my qualifications to be a Justice on the Supreme Court, we have spent a lot of time focusing on this small subset of my sentences.

And I have tried to explain many times—

Senator HAWLEY. You regret the focus on your cases?

I don't understand.

Judge JACKSON. No, no, no. I am talking about the fact that you are talking about—

Senator HAWLEY. Child pornography cases?

Judge JACKSON [continuing]. Seven very serious cases—

Senator HAWLEY. I am glad we agree on that.

Don't you think you should be——

Judge JACKSON [continuing]. Some of which, involve conduct that I sentenced people to 25, 30 years for——

Senator HAWLEY. Three months in this case, Judge.

Do you regret it? You haven't answered my question yet.

Judge JACKSON. Senator——

Senator HAWLEY. Do you regret the sentence?

Judge JACKSON. Senator, I would have to look at the circumstances.

What I am telling you——

Senator HAWLEY. You know the circumstances; we discussed it for half an hour yesterday. There is a 55-page transcript, which I am sure you have read.

You lived it——

Judge JACKSON. I have not—I did not——

Senator HAWLEY [continuing]. As you have emphasized to this Committee over and over, you have lived it, right?

You said that you have been through all of this. You have looked at all of the images. You are the one who has had to endure all of it.

You gave him a 3-month sentence. I just wonder if you regret it or if you stand by it. I mean, do you stand by that sentence?

Judge JACKSON. Senator, in every case, I followed what Congress authorized me to do in looking to the best of my ability at all of the various factors that apply, that constrain judges, that give us discretion, but also tell us how to sentence. And I ruled in every case, based on all of the relevant factors.

Senator HAWLEY. So, you don't regret it?

Judge JACKSON. No one case, Senator, can stand in for a judge's entire record.

Senator HAWLEY. I'm not asking that; I am asking if you regret this sentence in this case and it sounds like the answer is, no.

But I want to tell you I regret it. I regret that you only gave him 3 months.

Let me read to you what you said about these kinds of cases, in fact, to this defendant. You said: "Make no mistake, Mr. Hawkins, the children you saw in those pictures were not willing participants in the conduct that you witnessed. They were being forced to commit unspeakable acts of sexual violence for the pleasure of the person who was filming and for the gratification of sick people everywhere, people who apparently have no shred of empathy for what this must be doing to the children who are being abused in this way."

You go on: "Some of the children you saw in those pictures will never have an adult—a normal adult relationship. Some of them will turn to drugs and prostitution and other vices to try to deal emotionally with the pain that results from the torture that they have experienced. And even those who manage to lead a somewhat normal adult life say they live in constant fear of being recognized. Some people are even unable to leave their houses, because once those pictures are on the internet, they are there forever and the victims can't do anything without worrying that every person that they meet has seen them in their most vulnerable state, at the most horrible time in their lives."

That is your words, pages 34 and 35 of the transcript. Powerful words, Judge. I just don't understand why, after saying this and believing this, you could give this guy 3 months in prison when the Probation Office that we have heard so much about, recommended 18 months. Even the Probation Office recommended 18 months.

Do you have anything to add?

Judge JACKSON. No, Senator.

Senator HAWLEY. Let me ask you about your policy of not giving enhancements when there are prepubescent children, like there were in the *Hawkins* case, who are 8, 9, 10 years old, when there are prepubescent children involved. I don't, I am just struggling to understand this.

You said it in *Hawkins*. You said that you weren't going to give him an enhancement. You weren't going to give—make a sentence any tougher, despite the fact that we had all of these terrible videos that you and I talked about at length yesterday.

This is page 38 of the transcript, just so that we are all following along. You said: "In your case, I don't feel that it is appropriate, necessarily, to increase the penalty on the basis of your use of a computer"—and we talked about that—"or the number of images or prepubescent victims, as the guidelines require, because these circumstances exist in many cases, if not most, and they don't signal an especially heinous or egregious child pornography offense."

You said the same thing in the *Cooper* case just last year. This was an individual, Cooper, who was 30 years old at the time of his sentencing. He pleaded guilty to distributing child pornography. He posted between three and four dozen images of child exploitation to Tumblr, where it could be accessed publicly.

The Government said, and I will quote from the transcript in that case, page 37: "When his devices were found, including the computer, within the computer and on an untitled folder were many, many, many videos. The nature of these videos went well beyond mere child pornography."

The Government says: "I don't mean to make light of the content of any child pornography, but, rather to say that the content of those videos is on the more egregious or extreme spectrum of the child pornography videos that are encountered in these cases."

And, yet, when you sentenced him, you said, I am quoting now from the transcript in *Cooper*: "I am really reluctant to get into the nature of the porn."

And then later: "It is very difficult to assess how different Mr. Cooper's images are than those of other similarly situated child pornography defendants, such that I, without going in to look at them, and I'm not an expert," you say.

So, you say: "While I understand the Government's arguments, Mr. Miranda, the Government's arguments in that regard, I don't find them persuasive from the standpoint of characterizing this as an especially egregious child pornography offense."

Help me understand this, Judge. Why is it that you, what is your policy disagreement with the guidelines treating images, videos, pornographic images that have small children, infants, 7-, 8-, 9-year-olds, why wouldn't you give an enhancement for those?

Help me understand that.

Judge JACKSON. Thank you, Senator.

I will make two responses. First, that is not my policy disagreement. I don't know why you have characterized that in that way.

Senator HAWLEY. Well, wait a minute. Wait a minute.

Senator LEAHY. Mr. Chairman, can she be allowed to answer the question?

Senator HAWLEY. You say right here in the cases, I mean this is, I want to get—I want to make sure we are talking about the same thing here.

This, in the *Hawkins* case: “I don't feel that it is appropriate, necessarily, to increase the penalty on the basis of your use of a computer or the number of images or prepubescent victims.” And you say the same thing in *Cooper*.

Judge JACKSON. Senator, two observations.

One, I am sentencing in every case, I have policy disagreements with certain aspects of the operation of the guidelines that I lay out in every case, as Congress has required, and as the Supreme Court permits in light of my experience, not only as a district judge, but also on the Sentencing Commission, which did a report about the operation of the guidelines.

Second, you have read extensively from the Government's argument in this case. You have not provided information from the Probation Office or the defense. And when a judge——

Senator HAWLEY. I don't have the Probation Office reports.

Judge JACKSON. No. Excuse me, Senator.

The Probation Office provides a recommendation. There has been information gathered about what a recommendation was given in each one of these cases.

I don't have that information here, but what I am saying is that in every case, the judge is not just hearing from the Government. The judge is not just evaluating what the Government says in these cases.

In every criminal case, a judge has to take into account all sorts of factors, including arguments being made by the defendant, by the Government, by the Probation Office.

So, I understand that in certain cases, the Government may have made an argument, but there other people in our criminal justice system who make arguments and the court evaluates everything, as Congress has directed. And no one case can stand in for my entire record of how I deal with criminal cases, or did, when I was a district judge.

I have law enforcement in my family. I am a mother who has daughters, who took these cases home with me at night because they are so graphic in terms of the kinds of images that you are describing. They give you, not only the actual videos, which you can ask to see, but they describe in the briefs, in detail, what these videos show.

So, I am fully aware of the seriousness of this offense and also my obligation to take into account all of the various aspects of the crime, as Congress has required me to do, and I made a determination, seriously, in each case.

Senator HAWLEY. But what I'm trying to understand is why is it that you say, multiple times, that just because there are prepubescent victims in *Cooper*, in *Hawkins*, that that does not signal that this is a heinous or egregious child pornography offense and

you are not going to apply any sentencing enhancements that the Government is asking you for.

The sentence given is to be less because you say, I am not going to apply. The Government asked for enhancements related to pre-pubescent children, related to the nature of these images. You say: "I am not going to apply it."

But what you are telling me is, I guess, that you don't have a policy objection. I mean, why didn't you apply the enhancements as they were asked for?

Judge JACKSON. Senator, I have answered this question many times from many Senators who have asked me, so I will stand on what I have already said.

Senator HAWLEY. So, you have nothing to add about why these crimes, why these images, in your view, "do not signal an especially heinous or egregious child pornography offense"; that is *Hawkins*.

You say in *Cooper*: "I understand the Government's argument, but I don't find them persuasive, the fact that there were prepubescent children, from the standpoint of characterizing this as an especially egregious child pornography offense." That is page 58.

Let me ask you this, you said to Senator Graham earlier today that you were trying to do what was rational and you didn't, in the sentencing of these cases, and you didn't think it was rational to sentence people who had thousands of images by using a computer to the sentencing guidelines, to the mandatory range—I'm sorry, it is not mandatory—to the no-longer mandatory range, the discretionary range.

Judge JACKSON. No, Senator. I said the guidelines system is designed to be rational.

Senator HAWLEY. Okay. So, let me ask you this, why isn't it rational to sentence people who have thousands of images on a computer to more time, as opposed to somebody who has one or two pictures in the mail?

In other words, the more images there are, why wouldn't you want to sentence that person to more time, rather than less; why isn't that rational?

Judge JACKSON. Senator, I have answered this question and I will stand on what I already answered.

Senator HAWLEY. So, but your answer was what; I mean, refresh my memory.

Judge JACKSON. Senator, I have answered this question. I have explained how the guidelines work. And I will stand on my answer.

Senator HAWLEY. But the guidelines are not mandatory. I wish they were, but they are not; the Supreme Court made that determination.

I am trying to understand why you think it is rational not to sentence criminals, based on the number of images they have. You say that this is a policy disagreement that you have with the guidelines. This gets to the core of your judicial philosophy.

You served on the Sentencing Commission, where you recommended changes to the guidelines, based, in part, on this policy disagreement. So, I think it is relevant and, indeed, vital, we understand what the policy disagreement is. That is what I am trying to get at here.

Judge JACKSON. Senator, I previously explained what the policy disagreement is and I will stand on my answer.

Senator HAWLEY. So, you are not going to answer my question?

Judge JACKSON. No, I have answered your question in my answer—

Senator HAWLEY. You haven't answered my question.

Judge JACKSON [continuing]. As I have explained.

Senator HAWLEY. I am sitting here asking you and you are declining to answer.

Judge JACKSON. I have explained how the guidelines work. I have explained that the guidelines were developed at a time in which the commission of this crime was different than it is today. I have explained that Congress has not intervened to revise or direct the Commission around how to deal with the changes in the commission of this crime.

And so judges, all over the country, are grappling with how to apply this guideline under these circumstances and there is an extreme amount of disparity. And in each case, a judge has to look at all of the factors, not just the guidelines, not just what the Government asks for, but the recommendations of the Probation Office, the arguments of the Government and the defense, the nature and circumstances of the offense, the history and characteristics of the defendant, the need for the sentence imposed to promote the purposes of punishment, which include things like rehabilitation.

Also, in every case, Congress has authorized judges to impose not only terms of imprisonment, which are a very important part of the consequences for these crimes, but a range of other preventative kinds of measures which courts impose in cases to prevent these defendants from repeating these egregious—this type of egregious conduct.

And I talked to each defendant, as you have quoted, explaining to them the harms that their crimes caused and I imposed not only a term of imprisonment, but also all of the other consequences of the offense to include decades of supervision, restrictions on use of a computer, and the like. That is my answer. I have answered it many times.

Do you have other questions for me?

Senator HAWLEY. Yes, I do—I do because I want to try to understand when you talk about the guidelines being outdated and outmoded, I understand that they were written, the initial guidelines were written at a time when computers were not common; everybody didn't have one and certainly didn't have phones in every pocket like we do now, smartphones. So, I understand that.

I also understand that the number of images, sexually exploitative images of children on these devices has exploded. And so, I am trying to get at what Senator Coons earlier characterized as a pretty fundamental policy question, which I think is the correct characterization here. I am trying to understand your view on why it is that while the images, the number of images available on these things has exploded, that sentencing shouldn't track that.

Do you see what I am saying?

I mean, you have made the argument, if I understand you right, and I want you to correct me if I'm wrong, you made the argument that, well, look, the guidelines were written at a time when this

stuff was like, it was an individual picture, it was, you know, magazines, whatever.

Now, almost every offender, I think, this is the argument, so you correct me, almost every offender, because of the nature of this——
[Gestures to cell phone.]

Senator HAWLEY [continuing]. They have got tens, hundreds, sometimes thousands, I mean, probably because the nature of this——

[Gestures to cell phone.]

Senator HAWLEY. My question to you is, wouldn't we want to deter that? Isn't that a reason to impose tougher sentences? I mean——

Judge JACKSON. Senator——

Senator HAWLEY. Go ahead.

Judge JACKSON [continuing]. The Congress has every ability to do that. What is happening now is that you have a guideline that has gradations in it for the number of images that ends up being when you look at the scale, something like the difference of 10 years. I am making, I don't know exactly what it is, but each two-level enhancement is like several years and the gradations are like zero to, and, again, I don't have it in front of me, but it is like zero to 50 pictures, 50 to 100 pictures, 100 to 150 pictures, set up at a time in which the mail was the primary mode of possession and distribution. And so, if somebody had 50 pictures, they, according to Congress and the Commission at the time, deserved an extra 10 years in prison.

Now, with that scale, everybody is at the top immediately, just because of the nature of the internet. So, you are not differentiating using that scale anymore, given the way this crime is committed. And so judges are having to decide how are we going to deal with the penalties and do our jobs to impose sentences that are sufficient, but not greater than necessary, under these circumstances.

Senator HAWLEY. Yes, thank you, Judge.

I will just say in closing that I appreciate that answer and I understand that as a policy matter. I just think we disagree. I think that somebody—the more images that are there, the more punishment there should be. And I want to see this deterred and I just think we pretty fundamentally disagreed.

I am enjoyed our exchanges. Thank you for your candor and I appreciate it. I just disagree with you on the law.

Thank you, Mr. Chairman.

Chair DURBIN. Senator Hirono.

Senator CRUZ. Mr. Chairman?

Chair DURBIN. It is Senator Hirono's turn.

Senator HIRONO. Thank you, Mr. Chairman.

Senator CRUZ. Mr. Chairman, I am asking to be recognized to make a point to the Chair——

Mr. LEAHY. No. Mr. Chairman——

Senator HIRONO. I believe he recognized me.

May I proceed?

Senator CRUZ. Mr. Chairman?

Senator LEAHY. Mr. Chairman, I waited my turn on here and I have been on this Committee for 47 years. I think we ought to follow the regular order.

Senator CRUZ. Mr. Chairman, the witness just said that we cannot understand those cases without the presentence reports.

Chair DURBIN. I'm sorry, Senator. I don't want to go through this again.

Senator CRUZ. I have a letter that I want to enter into the record——

Chair DURBIN. There are rules that——

Senator CRUZ [continuing]. That is signed by 10 Senators on this Committee.

Are you not even going to allow a letter from 10 Senators on this Committee?

Chair DURBIN. If you want to submit any letter, you can do it at the end, not right now.

Senator CRUZ. This letter that is signed by 10 Senators on the Committee addressed to you, makes the point that the White House gave you probation information for Democrats that was not provided to the Minority on this Committee.

And just now, Judge Jackson told Senator Hawley, you cannot understand these cases without reading the probation reports.

Ten Senators on this Committee are asking the Chairman——

Senator LEAHY. Mr. Chairman?

Senator CRUZ [continuing]. To provide those reports so we can do what Judge Jackson just said——

Senator LEAHY. Mr. Chairman, I know the——

Senator CRUZ [continuing]. Which is to assess those reports.

Senator LEAHY. Mr. Chairman, I know the junior Senator——

Senator CRUZ. And here is the letter, and I ask unanimous consent for it to be admitted into the record.

Senator LEAHY. I know the junior Senator from Texas likes to get on television, but most of us who have been here for a long time are trying to follow the rules. And he could very easily hand you a letter to go in the record.

He is saying he is doing this to help Senator Hawley. Senator Hawley could have put it in and he didn't.

But let's get back to regular order——

Senator CRUZ. Senator Hawley didn't write the letter.

Mr. Chairman, I ask unanimous consent that it be admitted into the record.

Chair DURBIN. Senator Hirono.

Senator HIRONO. Thank you.

Senator CRUZ. Are you denying consent?

Senator HIRONO. Thank you, Mr. Chairman.

Aloha, Judge Jackson.

Judge JACKSON. Aloha.

Senator HIRONO. I am going to try to spread some aloha into this room.

[Laughter.]

Senator HIRONO. I am taking a lead from my friend, Senator, sitting to my left.

Well, at least you and I are very color-coordinated today.

[Laughter.]

Senator HIRONO. So, since 2018, I have been asking every nominee that comes before the Committees on which I sit the two questions that I asked you at the start of my time; namely, whether or not they have a history of sexual assault or harassment. This is something I started in 2018 to make sure that harassment and abuse, that women, mainly, have put up with since, as far as I am concerned, time immemorial, didn't continue to get swept under the rug.

I found these questions to be important for nominees to the judiciary. As Chief Justice Roberts stated in his 2017 year-end report on the Federal judiciary: "Events in recent months have illuminated the depth of the problem of sexual harassment in the workplace and events in the past few weeks have made clear that the judicial branch is not immune."

Here are just a few examples of abusive practices by Federal judges. In December 2017, six former law clerks and staffers accused Ninth Circuit Judge Alex Kozinski of suggesting them to a range of inappropriate sexual conduct and comments. In September 2019, the Tenth Circuit Judicial Council entered an order finding that District Court Judge Carlos Murguia—I apologize if I mispronounced his last name—had harassed multiple employees over a period of years, including by subjecting them to sexually suggestive comments, inappropriate text messages, and excessive, non-work-related conduct. In February 2020, former law clerk to the late Ninth Circuit Judge Stephen Reinhardt accused the judge of a months-long harassment campaign.

And these are a few of the cases that we know about. There are undoubtedly many more we don't know about, both because of the power and balance between Federal judges and their clerks and employees, who often rely on connections and recommendations to advance in their careers and because of the lack of legal recourse available to the judicial employees.

Many may not realize this, but Federal judicial branch employees are not protected by the foundational Federal statutes, such as Title VII of the Civil Rights Act of 1964 that prohibit discrimination and retaliation.

And that is why I introduced, along with Chair Durbin, and Senators Whitehouse and Murray, the Judicial Accountability Act, which would ensure the more than 30,000 employees of the Federal judiciary have strong statutory rights and protections against discrimination, sexual harassment, retaliation, and other forms of workplace conduct.

I know you can't comment on legislation, so I won't ask you whether you support the Judicial Accountability Act; instead, I would like to hear what you do to make sure your chambers is a safe, inclusive place to work.

Judge JACKSON. Thank you, Senator.

I, as you know, have been a judge now for almost a decade and I take my responsibilities not only to hear and decide cases seriously, but also my responsibility as an employer. When I bring law clerks into my chambers, I was a law clerk to three wonderful Federal judges who were role models for me, and I try to act as a role model to my law clerks. I try to bring in people who have the respect of others, people who come with strong recommendations,

people who I think will get along with one another, and certainly people who likely will get along with me. And we create a little group, a working group, and I think that it has worked out well.

Senator HIRONO. And I would think that you would make sure that there are no instances of inappropriate behavior, sexual harassment from any of your clerks or employees?

Judge JACKSON. That is absolutely correct.

Senator HIRONO. During our courtesy meeting, I enjoined learning more about your background and family. And of the nine sitting Justices of the Supreme Court, only three, Justices Alito, Breyer, and Kagan, were educated in our public school system. And you would, as far as I am concerned, make a welcome addition to the Court from that standpoint as a public school graduate, myself.

So, public high schools educate people from all backgrounds and most people go to public schools. Most people don't get to go to private schools, so your classmates probably came from different racial and ethnic backgrounds, income, social statuses, academic abilities, athletic abilities, among others.

How, if at all, has your public school experience shaped the person you are and your approach to the law?

Judge JACKSON. Thank you, Senator.

I was very fortunate to go to public school in Miami, Florida. I had a wide range of classmates and it was a wonderful opportunity to get to know people who were different than me and to learn at the end of the day that they were not so different than I am, even if they came from different backgrounds.

And I talked a lot about my debate team. That was one of the activities that I engaged in and spent a lot of time with my colleagues on the debate team and with my wonderful coach. And you learn how to support each other, how to speak across difference, how to communicate with different kinds of people, and it was a wonderful experience, and as I have mentioned, in many ways, different than the generation before, who, in Florida, were segregated by law.

Senator HIRONO. So, I take it that not only did you have, I would say, a broad experience of encountering people from all different walks of life and backgrounds, but there was still a commonality that you had?

Judge JACKSON. Very much so.

Senator HIRONO. And that is very much exemplified in your approach to your work.

I also talked with you about the importance of the creative part of our lives, because I think lawyers tend to be very left-brained and I know that you are a very well-rounded person, and so I asked you, what do you do to pay attention to the creative side of your life?

Judge JACKSON. Thank you for the question.

I took up, not too long ago, but took up the fiber arts, as they say. My mother is an expert crochet artist; she makes beautiful pieces of all kinds. And I always wanted to do that and I always wanted to, and she tried to teach me when I was younger and it didn't quite turn out.

But as I have gone along in my career, in wanting to have some sort of a creative outlet, and especially in times of high stress—

Senator HIRONO. Uh-huh.

Judge JACKSON [continuing]. I started pinning for something to do to express my creative side, and I bought a book on crochet. I talked to my mom. I started making hats and scarves. And then I moved to knitting during one of my confirmation hearing scenarios, because I needed something to keep my mind off of the stress. So, I have a basement full of yarn if you would like to come over.

[Laughter.]

Senator HIRONO. I think that is another way that you are connecting to the people who really mean a lot to you.

The creative outlet is really important to me, because in a changing world, I think it is our ability to be creative in our approaches and how we think about things that will enable us to deal with the rapid changes that happen every day in these days.

I view you as a consensus builder, and so I know that in your work with the Sentencing Commission, you really worked hard to come up with some 95 percent of the time, the—in this very diverse group, there was consensus in your recommendations.

How important do you think a consensus is on what I characterized yesterday as a very ideologically split Supreme Court?

Judge JACKSON. I think consensus is very important. It was one of the things that I most admired about having the opportunity to work for Justice Breyer as a law clerk, to observe his process for reaching out to colleagues and trying to collaborate in his thought process about the outcomes of cases, and it is something that I tried to emulate when I was on the Sentencing Commission, which as you said, is a very diverse body. And I saw, in that context, the importance of trying to reach common ground, with respect to your determinations.

Senator HIRONO. Mr. Chairman, thank you very much.

To illustrate the kind of broad support that this nominee has, I would like to enter into the record two letters, one signed by a thousand public defenders from all across the country and another signed by 48 prosecutors from across the country.

Judge JACKSON. I have very much enjoyed—

Chair DURBIN. Without objection.

[The information appears as submissions for the record.]

Senator HIRONO [continuing]. The privilege of talking with you—

Thank you, Mr. Chairman.

—and it will be my privilege to support your nomination. Aloha.

Judge JACKSON. Thank you, Senator.

Chair DURBIN. Thank you very much, Senator.

Senator GRASSLEY. Mr. Chairman?

Chair DURBIN. The Senator from Iowa.

Senator GRASSLEY. Yes, I have a letter here signed by Members on my side of the aisle that I would like to put in the record.

Chair DURBIN. Without objection.

[The information appears as a submission for the record.]

Chair DURBIN. I would like to comment.

I had a chance to review this letter for the first time just a minute ago. There is apparently a concern on your side, Mr. Chairman about whether you have, on your side of the aisle, access to

all the information that we have on this side of the aisle and all of the information that is in the possession of the White House.

During a break earlier today, I met with the Ranking Member, Senator Grassley, and his staff and with White House staff to discuss it.

Here is my understanding of what has transpired. Last Wednesday evening, the Senator from Missouri selected a handful of Judge Jackson's more than 1,000 district court cases to claim that Judge Jackson, quote, "endangers our children," closed quote.

On Thursday, the next day, the White House contacted Judge Jackson's chambers to request the Probation Office recommendation in each of the cases, I am going to underline Probation Office, that Probation Office provided a chart reflecting these recommendations.

[Poster is displayed in the hearing room.]

Chair DURBIN. This is the sum total of what was provided. They shared with the White House from the chambers, when the Senator from Missouri continued to raise questions and request the Probation Office's recommendation in these cases, the Probation Office provided this chart, reflecting those recommendations, which were shared with the White House.

When the Senator from Missouri continued to raise questions about Judge Jackson's sentencing record, my staff asked the White House for information about the Probation Office recommendations.

[Poster is displayed in the hearing room.]

Chair DURBIN. These are just numbers for each one of the cases; that is all it is.

The White House and my office didn't have this information earlier because we didn't know the Senator from Missouri was going to make this claim in the first place.

Once the Republican side requested the same information, my staff shared it within minutes. So now, your side, Senator, has exactly what the White House and the Democratic side has: the same chart provided by the Probation Office.

And I might add that some of this had been published in the press, in The Washington Post and other places, but it consisted, in each case, of the case number, name, the Probation Office recommendation for custody, the sentence imposed custody, Probation Office recommended supervision and release, and the supervision and release imposed. All of that information has now been shared equally.

Some information on the other side, on the Republican side, includes frequent reference to transcripts, which we don't have on this side, and the reason being, we didn't anticipate this objection from the Senator from Missouri and request that information.

Now, the letter also goes a step beyond, which I think is a very important decision for this Committee to make, this request for presentence reports from each of these cases. Now, these presentence reports are typically filed under seal. They can contain highly sensitive, personal information. Not just about the defendant, but about innocent third parties and victims.

We have spent a lot of time here reflecting on these terrible crimes. Everyone has acknowledged how terrible they are and how damaging they can be to the victims. We have heard story after

story and I don't question a single word that was spoken, in sympathy for these same victims.

I would not want it weighing on my conscience that we are turning over these presentence reports to this Committee for the first time in history and that information out of this, or because it was released, would somehow compromise or endanger any victim as a result of it.

This information was not requested before. It has never been requested by this Committee. And I think we ought to think long and hard about whether or not we even consider going into presentence reports. So, I am going to take this matter up with our side, and I am sure you will with your side. I have your letter requesting it.

As far as this information, you have exactly what we have; no more, no less.

In terms of presentence reports, this is a critical policy question, which ought to be carefully weighed. It goes way beyond, I'm sorry, Senator—Judge Jackson, it goes way beyond your nomination and I want to make certain that we don't take a step here that endangers the lives or well-being of innocent people.

Senator CRUZ. Mr. Chairman, since you just responded to the letter that I wrote and was submitted on behalf of 10 Senators, I will point out that in Judge Jackson's answer to Senator Hawley, she said that he and this Committee did not have sufficient information to assess her sentencing decisions because we heard the arguments of the prosecutors in the transcript, but we did not have the recommendation from the Probation Office. And what she testified under oath is you can't understand why she issued her sentences without having those probation reports.

You are right that there can be sensitive victim information in those reports and everyone on this side, I am confident, would agree to redacting out any information that would violate the privacy of a victim. But Judge Jackson has told us it is relevant to understanding those cases, and that is why 10 of us have requested we have those reports, and there is explicit statutory authority for us to do so that is cited in the letter we just submitted.

Chair DURBIN. Senator, I don't know where others Members of your caucus stand on the basic question of this nomination. They can decide on their own and they will and they should; that is their responsibility.

I think I know where you are headed, and I would just suggest that we ought to think long and hard, my friends, about Members of the Judiciary Committee endangering the lives of innocent people to pursue this line of questioning. We spent 2 days, 15, 16, 17, 18 hours, and a large part of it on this issue.

I don't believe these presentencing reports are going to change anyone's disposition if they are going to vote on this issue and I do not want it weighing on my conscience that I gave the green light to release this information so that it might endanger the lives of innocent victims.

I am sorry, that is a bridge too far for me. I think the issue before us on sentencing, you each had a chance to hear plenty of testimony on it and I believe it should be taken up with the individual caucuses on both sides if you wish, but that, to me, is, it has gone way too far. Way too far. I don't want it on my conscience.

Senator LEAHY. Mr. Chairman, if I might?

Chair DURBIN. Senator.

Senator LEAHY. I want to agree with you.

I prosecuted, literally, thousands of people. I would have to go back, it is over 8 years. I can't remember the hundreds of sentencings I was at where we had presentence reports; over and over again, there were things in there that were sensitive, sometimes where you were talking to somebody who would be putting their lives on the line to even give a report. Neither the defense counsel, nor I, as the prosecutor, ever thought those would be made public.

And we assumed that the judges, and we had judges across the political stripes who read them, kept the conference so that as a result we knew that the reports were thorough, and then the judge has the final statement.

As a prosecutor, I might have a recommendation, but I never questioned a judge who might give a different sentence because my responsibility was to prosecute them; theirs was to sentence them.

Chair DURBIN. Senator Lee.

Senator LEE. Yes, might I just weigh in here?

I totally understand the concern that you are describing, relative to the confidential nature of presentence reports. As a prosecutor and as a law clerk, I reviewed those with some regularity and I understand the sensitivity of them.

Let me suggest a couple of things. First of all, it is not unusual for us, as a Committee, and as Members of the United States Senate, to review materials that would be inappropriate for public release. I don't think one of us is suggesting that.

There are means by which we can review things in a classified environment and treat them as classified. We have done that with significant success in this hearing.

Second, to the extent that wouldn't provide the level of comfort necessary, we would also be happy to review them on a redacted basis. These are things that have become relevant in our conversations. We want to make sure that we have the facts, but not one of us wants to endanger anyone or to render public, information that is sensitive in nature. There are abundant ways around that.

Chair DURBIN. I would suggest that the information contained in these reports is dangerous; dangerous to the victims and to the innocent people who are mentioned in these reports, and unnecessary at this point.

It has never been requested by this Committee and it is merely a fishing expedition in dangerous territory. In classified settings, redacted versions of the reports, this has never happened in the history of this Committee.

And I would say—Senator, I will just tell you, I am not going to be party to turning over this information and endangering the life of an innocent person for a political quest to find more information.

We have exhausted this topic. We have gone through it over and over again and I think this is a bridge too far for the Committee. That is my personal feeling.

I take it that Senator Leahy may agree with me and he would be right.

This nominee has been before this Committee for 18 hours. I don't believe that this information is going to change anyone's vote. You can decide in your caucus what you want to do to go forward. I have told you my position.

I want to proceed, if I can. I thank the nominee for waiting for this colloquy and I would turn it over to Senator Cotton.

Senator COTTON. Judge, I want to return to the question of crime and, specifically, sentencing. In any of the cases where you've sentenced an offender below the guidelines, has that offender gone on to commit another crime after getting released from prison?

Judge JACKSON. Thank you, Senator.

When judges sentence they often impose terms of supervised release and there are times in which, when a person is on supervised release, they reoffend. There are also times when they don't.

But even after the period of supervised release the court doesn't continue to have any way of tracking or knowing what happens because if they were to reoffend it wouldn't necessarily come back to the same court or the same judge.

Senator COTTON. So you don't have a factual basis to know whether or not anyone you've sentenced below the guidelines has reoffended in the future?

Judge JACKSON. Do I have a factual basis? I know that there are people who have reoffended while on supervised release. I can't remember whether any of them were guideline sentences, below guidelines, or above guideline sentences.

Senator COTTON. Okay. I know you've answered a lot of questions the last 2 days about sentences in sex crimes. I just want to be exact about this.

In these cases, have you ever sentenced an offender above the guidelines recommendation?

Judge JACKSON. I'd have to take a look at—I know that I have sentenced offenders to the guidelines in the category of sex crimes in general.

I know that I've given 30-year sentences for at least one offender, almost 30 years—29.5. I've given, I believe, a 12-year sentence for someone at the agreement of all of the parties, which was a sentence that was a part of his plea agreement. I'm not remembering the others.

Senator COTTON. I understand, you've sentenced in a lot of cases. I want to return briefly to the *Hawkins* case. Wesley Hawkins, as a reminder, was convicted of child—a child pornography offense in 2013.

The sentencing guidelines for this offense called for a sentence of 97 to 121 months, or eight to 10 years. The prosecutors asked for 24 months. You sentenced him to 3 months.

We've heard a lot about this case and your 3-month sentence of Wesley Hawkins. But you got another crack at him in 2019, Judge.

In 2019, you sent Wesley Hawkins back under conditions of confinement with the Bureau of Prisons for 6 months with additional restrictions on his computer usage. That's twice the amount of time in custody that you sentenced him to in 2013. What did Wesley Hawkins do in 2019, Judge?

Judge JACKSON. Oh, I don't remember, Senator. I have a lot of defendants who I've sentenced who are on supervision who violate conditions of supervision.

If, in our system, someone like Mr. Hawkins, especially given the crime—the egregious crime that he committed was likely on a very long period of supervision and during that time he would likely be under computer restrictions for 10, 20 years or something where he's not allowed to do certain things with a computer, and a Probation Officer is monitoring. They put software on the computers of individuals who have these kinds of conditions imposed and that restricts their ability to access certain information on the internet.

And so it's not uncommon for a Probation Officer to report violations of supervised release, not just in this area but across all crimes, and then the court has to determine how to handle that.

And you could, in fact, send someone back to jail for violating conditions of supervised release that are not themselves criminal behavior. It's just, you know, the court says in their supervision order I'm imposing a 20-year or whatever it is sentence of supervision and during this time you're not allowed to access your computer, et cetera, et cetera.

So if he were to do that it wouldn't be additional criminal behavior but it would be a violation of my order, and when he comes back to the court on violation the court has factors that we look at to determine whether or not to treat that, essentially, as the kind of violation that would require him to go back to jail.

Senator COTTON. Judge, yesterday we had an extended conversation of your sentencing of a man named Keith Hodges, a fentanyl kingpin. That sentencing occurred in 2018. You had very detailed recall of that sentence.

To my knowledge, that's the only time anyone's asked you about Mr. Hodges' sentence. You've been asked repeatedly over the last 2 days about the *Hawkins* case. It's been in the news, as Senator Durbin has cited, for days on end.

This sentencing happened in—resentencing happened in 2019 and now you're saying you don't have any recollection of it. Let me see if I can refresh your recollection.

[Poster is displayed in the hearing room.]

Senator COTTON. This is the order you signed, Judge, on April 17th, 2019, in *USA v. Hawkins* and it says that you concur with the recommendation of the Probation Office to return him to a residential reentry facility for 180 days and to engage in various kinds of computer monitoring and—computer monitoring and search. There's your signature over there, Judge.

Judge JACKSON. Yes.

Senator COTTON. You really don't—you really don't remember what—

Judge JACKSON. Senator that is a very, very common thing that judges do. I've sentenced over 100 people and supervised release, which is the kind of post-incarceration condition that judges ordinarily impose, is something that's done on a standard form, which is what that is and—

Senator COTTON. I understand you've done a lot, Judge. But none of them have been the centerpiece of your hearing for the last 2 days. Do you really—do really expect this Committee to believe

that you don't remember what happened in this *Hawkins* case when it came back before you? A center——

Judge JACKSON. Yes, Senator. I do expect you to believe. That's my testimony.

Senator COTTON. Well, I don't find it credible, Judge. It's been in the news for days. Senator Durbin has cited it being in the news for days.

You've been asked about it probably more than any other case you've ever had, and I just don't find it credible that you weren't prepared for that matter in 2019.

You know what I think? I think he got caught with child pornography again and he wouldn't have if he had been in prison for the eight to 10 years the guidelines called for in 2013 when you first sentenced him.

Let's turn, though, to your work for detainees at Guantanamo Bay. First off, let me just ask, do you think most detainees at Guantanamo Bay were mostly terrorists or mostly, I don't know, innocent goat farmers?

Judge JACKSON. Senator, it's impossible for me to answer that question. The people at Guantanamo Bay have been accused by the Government of engaging in terrorist activities and, therefore, classified by the executive branch as enemy combatants.

Senator COTTON. Okay. Do you think it would—America would be safer or less safe if we released all the detainees at Guantanamo Bay?

Judge JACKSON. Senator, I'm trying to figure out how to answer that question. 9/11 was a terrible attack on our country and the executive branch, pursuant to authority that the Supreme Court said it had, designated people as enemy combatants and sent them to Guantanamo Bay.

The Supreme Court also said that anybody who was so detained could seek review of their detention, and as a Federal public defender my role and responsibility was to make arguments in defense of the Constitution and in service to the court that was trying to assess, based on the authority given to it by the Supreme Court, whether or not people were adequately classified, what the legal circumstances were, how these habeas petitions were going to be processed.

This was a series of—a series of legal challenges in a novel environment that Federal public defenders and lawyers across the country were engaged in helping the court to evaluate so that we can understand what the Constitution required in this time of emergency.

Senator COTTON. Okay. So no opinion on whether America would be safer or less safe if we released all the detainees from Guantanamo Bay?

Judge JACKSON. Senator, America would be less safe—if we don't have terrorists out running around attacking this country. Absolutely.

America would also be more safe in a situation in which all of our constitutional rights are protected. This is the way our scheme works. This is how the Constitution that we all love operates. It's about making sure that the Government is doing what it's supposed to do in a time of crisis.

As Justice Gorsuch said, the Constitution is not suspended in times of crisis. The Government still has to follow the rules, and so criminal defense lawyers make sure that in times of crisis the Government is following the rules.

Senator COTTON. Okay. Let's turn to the actual cases. How many of these terrorists at Guantanamo Bay did you represent?

Judge JACKSON. When I was a defender, four cases were assigned to me in our office. I don't know how many cases came into the office in total. But—

Senator COTTON. You personally had four?

Judge JACKSON. I was assigned to them along with another defender who worked on the same cases. She was more senior. She did a lot of—she did all of the sort of fact gathering related to the cases, and as an appellate defender I worked on the legal arguments.

Senator COTTON. Okay. Did you ever represent any of the detainees at Guantanamo Bay when you were not a public defender?

Judge JACKSON. One of the people who I'd represented while I was in—a Federal defender his case got spun off and taken up by a law firm. Law firms around the country were also engaged in this work at the time.

Senator COTTON. I'm well aware of what law firms were doing at the time.

Judge JACKSON. Yes. And I left the Federal Public Defender's Office. I joined a law firm and the—one of the people that I had represented was now at that law firm. They had him as a client and they—

Senator COTTON. That's Mr. al-Salam.

Judge JACKSON. Al-Qahtani.

Senator COTTON. Al-Qahtani was the one.

Judge JACKSON. Was the one who—

Senator COTTON. Just coincidentally both he and you went to Morrison & Foerster?

Judge JACKSON. Yes, Senator.

Senator COTTON. Okay. What about Mr. al-Salam?

Judge JACKSON. I don't know what happened to Mr. al-Salam.

Senator COTTON. You were listed as counsel for 2 years during your time at Morrison & Foerster.

Judge JACKSON. What happens is when you leave—when you leave from any place—firms or government service—you have to let the court know or their records—their records reflect where you are in the system and not so much the case in terms of your address. So—

Senator COTTON. So and to go back to Mr. al-Qahtani—

Judge JACKSON. Yes.

Senator COTTON [continuing]. So he just coincidentally—it's a small world—went to Morrison & Foerster the same time you did and then you represented him and you did file multiple motions on his behalf.

Judge JACKSON. So I don't know if it was at the same time. I'm not sure when—

Senator COTTON. But you did file multiple motions for him in 2008 and 2009?

Judge JACKSON. I only—I don't recall whether it was multiple, but he was still at the habeas stage of the process and I don't know when he came because the partners who picked up the case were in Los Angeles. I was in Washington, DC.

They contacted me to say, oh, we see on the docket that you had previously represented him and now you're with our firm—will you assist us with looking at these briefs, working on these briefs. There were many lawyers who were working on the filings that you're talking about.

Senator COTTON. After you left the Public Defender's Office, did you continue in your representation of any other client you had had at the Public Defender's Office?

Judge JACKSON. I didn't continue my representation of any client. I left the Federal Public Defender's Office and then picked up Mr. al-Qahtani through the circumstances that I talked about and there were no other clients that I represented in that way.

Senator COTTON. I have to say that sounds like continuation. You represented him at the Public Defender's Office and then you represented him in private practice as well. And you're telling us that's the only person you represented at both the Public Defender's Office and in private practice?

Judge JACKSON. Yes.

Senator COTTON. So you didn't continue to provide any kind of pro bono work for murderers or rapists or anyone else but you did continue to represent this terrorist at Guantanamo Bay?

Judge JACKSON. When I got to the firm and they told me that the case was there and they recognized that I was at the firm and had previously worked on the case, and by they I mean the partners in the firm, they asked me as a member of the Supreme Court and Appellate Group of the firm, which is where—was my practice if I would help review and work on some of the briefing that they were submitting on his behalf, given my familiarity with the case.

Senator COTTON. Were you representing him pro bono at Morrison & Foerster?

Judge JACKSON. The firm—the firm takes on pro bono representations, which means that the person isn't paying and—

Senator COTTON. Let's turn to your amicus briefs. You had two briefs in Guantanamo cases, one for a think tank, one on behalf of a group of former judges. I think—as anyone who's done amicus work knows, sometimes the clients seek out the lawyers, sometimes the lawyers seek out the client. For either of those amicus briefs, were you involved in any way in seeking or recruiting those clients or suggesting the idea for an amicus brief in the first place?

Judge JACKSON. No, Senator.

Senator COTTON. Were both of those briefs done on a pro bono basis?

Judge JACKSON. Yes, because the Supreme Court and Appellate Group in the law firm has paid clients and also has pro bono clients, and the briefs that I worked on were on—the one brief was 20 former Federal judges who wanted to make an argument in the *Boumediene* case that was in the Supreme Court, and one of them was a partner at my law firm. She was a former Federal judge whose idea it was and she knew the other judges and wanted our group to work on the brief.

The other was not just one think tank, it was the Cato Institute, the Rutherford Institute, and the Constitution Project, an ideologically diverse group of nonprofits who wanted to make arguments in another case that the Supreme Court had taken up related to these issues, because all of this was novel and a lot of issues were being evaluated by the Supreme Court regarding the scope of Executive authority during this time of crisis.

Senator COTTON. Okay. So you've done pro bono work for or on behalf of detainees at Guantanamo Bay. Have you ever done pro bono work for the victims of terrorism?

Judge JACKSON. Senator, I'm not aware of any such cases in my law firm. I was in a group of lawyers that was often approached to ask, would you file a brief for some group, and I'm not aware that any victims of terrorism asked our firm to participate.

Senator COTTON. Okay. So we talked a lot about the people you represented. Let's talk a little bit about the defendants in those cases and how you characterized them. I'll remind you that those were the President, the Secretary of Defense, and active duty Army officers.

Senator Graham and Senator Cornyn said that you called them war criminals. You disputed that and Senator Durbin has repeatedly denied it as well. And I'll concede you didn't use those exact words, you didn't say war criminals, but you did say in multiple court filings that they committed acts that constitute war crimes.

I'm sorry, but I got to confess I don't understand the difference between saying someone is a war criminal and saying they've committed acts that constitute war crimes. So can you explain that difference to me?

Judge JACKSON. Yes, I will. Thank you for the opportunity.

So when you file a habeas petition under our law, you can't file it against the United States because of sovereign immunity. The way our law works, you have to file it against individual officers in their official capacity. That's the way in which you're able to file a habeas petition.

So whoever is the Executive at the time becomes the named party in the brief, and a habeas petition is like a complaint in a civil case. It's making allegations to begin the litigation about the person's detention. You—

Senator COTTON. But, Judge, official capacity, personal capacity, all that it's just a bunch of procedural gobbledygook. These are the people that you said committed acts that constitute war crimes.

Judge JACKSON. With respect, Senator—

Senator COTTON. And what is—I just don't understand the difference between calling someone a war criminal and saying they committed acts that constitute war crimes.

Judge JACKSON. With respect, Senator, they were not sued in their individual capacity. We weren't making allegations about those individuals and, in fact, over the course of the case the names changed.

So later on, the habeas petition became against President Obama because he then became the Executive for the purpose of the habeas petition. So it wasn't—

Senator COTTON. I'm well aware the names changed. It probably changed from Bob Gates—or from Don Rumsfeld to Bob Gates as

well. But they were not the ones in office. They were not the ones who were overseeing the Government when you filed these suits and you said they committed acts that constitute war crimes.

I just don't—I don't understand how you expect this Committee to believe that there's a difference between saying someone's a war criminal and saying they committed war crimes.

Judge JACKSON. Thank you for the opportunity to explain, Senator.

One of the allegations that had been publicly reported with respect to the group of people who were in Guantanamo Bay was an allegation concerning the use of torture, and when you make that allegation you bring it under laws that themselves constitute crimes of war. That's the way in which the law works.

So if you were in a—if you're writing a habeas petition and you say, upon information and belief, Mr. al-Qahtani was tortured, that allegation is made under a law that says that there was a war crime that occurred as a result of that torture and anyone—and you're making that allegation against the United States, but because you can't sue the United States the actual petition is named in the name of whoever is leading the United States at the time.

So later in this—the course of this, it moved from President Bush, Donald Rumsfeld, to President Obama. It didn't—it's not about the individual. It's about the allegation that Mr. al-Qahtani, upon information and belief, had been tortured in the lead-up to his detention.

Senator COTTON. I don't know, Judge. Sounds like a debate about how many terrorists can dance on the head of a pin to me.

Chair DURBIN. Thank you, Senator Cotton.

I ask unanimous consent to enter a letter in the record from nine former national security officials defending Judge Jackson's Guantanamo representation.

The signatories include former Attorney General Loretta Lynch, the Department of Homeland Security Secretary Jeh Johnson, and the former Judge Advocate General of the United States Navy.

[The information appears as a submission for the record.]

Chair DURBIN. Senator Booker.

Senator BOOKER. Thank you very much.

Judge, after me, only five to go.

[Laughter.]

Senator BOOKER. But sit back for a second because I don't have questions right away. I actually have a number of things I just want to say because this has been not a surprise. Given the history that we all know, not a surprise, but perhaps a little bit of a disappointment, some of the things that have been said in this hearing.

The way you have dealt with some of these things, that's why you are a judge and I am a politician, because you have sat with grit and grace and have shown us just extraordinary demeanor during the times where people were saying things to you that are actually out of the norm.

I had to go up dais to ask some of my more senior colleagues about what I feel like is a dangerous precedent. People are taking—a thousand cases you've been over? Is that right? I'm sorry. I said I wouldn't ask you questions, but just give me a—

Judge JACKSON. Something like that.

Senator BOOKER. Something like that. And from what I understand is that these cases are—often takes—take days, weeks, sometimes months, right?

Judge JACKSON. To decide in a case? Yes.

Senator BOOKER. To—yes. Yes. There's a trial sometimes. And folks are taking any of those cases and just trying to pick pieces out.

And so my colleague, Senator Hawley, has been doing this all into the lead-up and saying things, tweeting things, that I think that a lot of us—when I was just trying to get some advice here as this is what the new standard is going to be, that any judge coming before us that has ever chosen outside of the sentencing guidelines, below the sentencing guidelines, we're creating this environment now where I could make myself the hero of people who have been victims of some horrible crime and suddenly put whatever judge I want on the defensive by trying to drag out little bits when they have no context to the case. None of the facts. They're seeking to exploit the complexities of a criminal justice system, the reason why we have a third branch of Government.

I feel bad that there was a judge mentioned by name in this hearing that's from Senator Hawley's State. What is that judge going to think next time they have a complicated sexual abuse case that comes before them and they know that they could possibly be called out if they go below the sentencing guidelines, which I showed you yesterday in my lack of chart—if you'll remember, I was uncharted—but that you are deciding completely in the norm. Seventy-plus percent in many States are people who are doing just like you did.

But I'm a Democratic Senator. I've never quoted from this very well-respected conservative periodical. This is the National Review, very well respected. They're not necessarily something I agree with all the time.

But here's what the National Review—this is the title: "Senator Hawley's disingenuous attack against Judge Jackson's record on child pornography." I'll just read the first paragraph.

"I would oppose Judge Ketanji Brown Jackson because of her judicial philosophy for the reasons I outlined last week. I addressed that in a separate post. For now I want to discuss the claim by Senator Josh Hawley that Judge Jackson is appallingly soft on child pornography offenders." This is the kicker here. "The allegations appear meritless to the point of demagoguery."

I got letters from leaders of victims rights groups, survivors of assault, all saying sort of the same thing with the National Review. Feel proud about yourself. You brought together right and left in this calling out of people that will sit up here and try to pull out from cases and try to put themselves in a position where they're the defenders of our children to a person who has children, to a person whose family goes out in streets and defends children.

I mean, this is a new low, and what's especially surprising about this is it didn't happen last year. You were put on a court that I'm told is considered, like, the second most powerful court in our land and you were passed with bipartisan support. Nobody brought it up

then. Did they not do their homework? Were they lax? Did they make a mistake?

I wonder as they asked you the question, “do you regret,” I wonder if they regret that, that they didn’t bring that out. No. Why? Because it was an “allegation that is meritless to the point of demagoguery.”

You are—I don’t mean this in any way because if anybody called me average I would—I would be upset. But you are a mainstream judge. Your sentencing—I’ve looked at the data—falls in the mainstream on everything from child sexual assault to all the other issues that people were trying to bring up.

Some of these things that are being cast at you, that you called George Bush a war criminal, come on. That is painful, especially because, as you said, the brief changed. These are names that you have to put in, and we’re talking about a real issue that goes to the core of our values—torture.

Barack Obama was named once Bush left office. There is an absurdity to this that is almost comical if it was not so dangerous because the next time a judge comes before us on the right or the left that has a body of work like you do, gosh, one of the—some performance artist on our side could pull out one of the cases where they were below the sentencing guidelines.

Say, for example, it was on something like—as horrific as rape that we all agree is horrific and they can suddenly put themselves as the—how dare we put someone in who’s soft on crime. Well, are you soft on crime?

God bless America. I got this great text. I’ve become really good friends with the folks at the FOP for my negotiations and this was my favorite text. You all got to get this. I think my brother, Kennedy, might get a kick out of this.

It goes, “Things that are uncountable: stars in the sky, grains of sand on the beach, and the number of times Democrats will mention that the FOP endorsed Judge Jackson in this hearing.”

[Laughter.]

Senator BOOKER. But let me mention it again. Just in case my people say you’re rough on crime, folks, really want to try to make that stick? You were endorsed by the largest organization of rank and file police officers.

You are endorsed by the bosses, the largest organization of chiefs of police, and you were endorsed by NOBLE, who I hope people find out more about that organization. You got uncles that are officers. You got a brother, not just an officer, who went to serve after 9/11. Your family’s not soft on terrorism. He went out there to capture and kill and defend this country from terrorists.

I actually, sitting back here, am finding this astonishing but then I do my homework. I love that my colleague brought up Constance Baker Motley. You know, when she was getting to the floor of the Senate they were trying to stop her with outrageous accusations. You know what the accusation was back then? She was a communist. Dragging up stories, trying to throw anything that they might stick.

But this is what you and I know. Any one of us Senators could yell as loud as we want that Venus can’t return a serve. We could yell as loud as we want that Beyoncé can’t sing. We can yell as

much as we want that astronaut Mae Jemison didn't go all that high.

But you know what? They got nothing to prove. As it says in the Bible, let the work I've done speak for me. Well, you have spoken.

You started speaking as a little girl, watching that man right there try to raise a family and study law while your mama supported everybody. You spoke in high school when you started distinguishing yourself, and you know what you said when they told you you couldn't go to Harvard? Watch me.

I went to law school. I didn't serve on the Law Review. You did. I didn't clerk at every level of the Federal court. You clerked for a Supreme Court Justice, one widely respected on both sides, which really shaped you.

You left there and you went to private practice, and you know what you found—this is what you told me—that you had those tough choices that working moms have to make—the demands of a private law firm, raising your kids. It just didn't add up.

You went before the Senate three times in a bipartisan manner. God bless America. We don't do that much stuff bipartisan around here. You went to—became a public defender because you wanted to understand all aspects of the law. Who does that?

We live in a society that's very materialistic sometimes, very, very consumeristic. You went into—do people become public defenders for the money? No.

Your family and you speak to service, service, service, and I'm telling you right now, I'm not letting anybody in the Senate steal my joy. I told you this at the beginning. I am—I'm embarrassed. It happened earlier today. I just look at you and I start getting full of emotion.

I'm jogging this morning and I'm at the end of the block I live on and I get tired—because I put my music on loud when I'm jogging, trying to block out the noise of the heart attack I'm having. [Laughter.]

Senator BOOKER. And this woman comes up on me, practically tackles me—an African-American woman, and the look on her eye, she just wanted to touch me because I think—because I'm sitting so close to you, and tell me what it meant to her to watch you sitting where you're sitting.

And you did not get there because of some left-wing agenda. You didn't get here because of some dark money groups. You got here how every Black woman in America who's gotten anywhere has done, by being like Ginger Rogers said—I did everything Fred Astaire did but backward in heels.

And so I'm just sitting here saying nobody's stealing my joy. Nobody's going to make me angry, especially not people that are called at a conservative magazine demagogic for what they're bringing up that just doesn't hold water. I'm not going to let my joy be stolen because I know, you and I, we appreciate something that we get that a lot of my colleagues don't. I know Tim Scott does.

When I first came to this place, I was the fourth Black person ever popularly elected to the United States Senate and I still remember—a lot of mixed people—white folks, Black folks—work

here, but at night when people are in line to come in to clean this place the percentage of minorities shift a lot.

And so I'm walking here first week I'm here, and somebody who's been here for decades doing the urgent work of the Senate but it's the unglamorous work that goes on no matter who's in offices, the guy comes up to me. All he wants to say, I can tell, is, I'm so happy you're here.

But he comes up and he can't get the words out and this man, my elder, starts crying, and I just hugged him and he just kept telling me, it is so good to see you here. It's so good to see you here. Thank you. Thank you. Thank you.

I love my brother, Tim Scott. We could write a dissertation on our disagreements. He gave the best speech on race—I wish I could have given as good of a speech—but talking to the challenges and indignities that are still faced, and you're here.

I was in the White House with my Democratic colleagues and, again, I'm in my joy—I can't help it. And the President's asking everybody who should we nominate and whatever. And I look at Kamala and we have a knowing glance, which we've had for years when she and I used to sit on this end of this Committee at times, and then I tried to get out to the President what it means—what it means.

And I want to tell you—when I look at you this is why I get emotional—I'm sorry, you're a person that is so much more than your race and gender. You're a Christian. You're a mom. You're an intellect. You love books.

But for me, I'm sorry, it's hard for me not to look at you and not see my mom, not to see my cousins, one of them who had to come here and sit behind you. She had to have your back. I see my ancestors and yours.

Nobody's going to steal the joy of that woman in the street or the calls that I'm getting or the texts. Nobody's going to steal that joy. You have earned this spot. You are worthy. You are a great American.

Your hero is Constance Baker Motley. Mine, she has sat on my desk for my offices that I've held. She's my icon of America. Her name is Harriet Tubman.

There is a love in this country that is extraordinary. You admitted it about your parents. They loved this Nation, even though there were laws preventing them from getting together. When they were loving there were laws in this country that would have prevented you from marrying your husband. It wasn't that long ago. It was last generation.

But they didn't stop loving this country even though this country didn't love them back. And what were the words of your heroes and mine? What did Constance Baker Motley do? Did she—this country that she saw insult and injuries. When she came out of law school law firms wouldn't even hire her because she was a woman.

Did she become bitter? Did she try to create a revolution? No, she used the very Constitution of this Nation. She loved it so much she wanted America to be America. As Langston Hughes wrote, "Oh, let America be America again, the land that never has been yet but yet must be the land where everyone is free. Oh yes, I say

it plain. America never was America to me. But I swear this oath, America will be."

That is the story of how you got to this desk, you and I and everyone here, generations of folk who came here and said America, I'm Irish. You may say no Irish or dogs need apply. But I'm going to show this country that I can be free here. I can make this country love me as much as I love it.

Chinese Americans, forced into near slave labor building our railroads connecting our country, saw the ugliest of America but they were going to build their home here and say, America, you may not love me yet but I'm going to make this Nation live up to its promise and hope.

LGBTQ Americans, from Stonewall women to Seneca, hidden figures who didn't even get their play until some Hollywood movie finally talked about them and how they were critical for us defying gravity—all of these people loved America.

And so you faced insults here that was shocking to me. Well, actually, not shocking. But you are here because of that kind of love and nobody's taking this away from me.

So you got five more folks to go through, five more of us, and then you can sit back and let us have all the debates, and I'm going to tell you, it's going to be a well-charted Senate floor because it's not going to stop. They're going to accuse you of this and that. Heck, in honor of your—the person who shares your birthday you might be called a communist.

But don't worry, my sister. Don't worry. God has got you, and how do I know that? Because you're here and I know what it's taken for you to sit in that seat.

Harriet Tubman is one of my heroes because the more I read about this person, the more—I mean, she was viciously beaten. Her whole life she used to fall into spells—cracked skull. She faced starvation, chased by dogs. And when she got to freedom, what did she do? Did she rest? No, she went back again and again and again.

The star was—the sky was full of stars. But she found one that was a harbinger of hope for better days, not just for her and those people that were enslaved but a harbinger of hope for this country and she never gave up on America. She fought in the—led troops in the Civil War. She was involved in the suffrage movement.

And as I came back from my run, after being near assaulted by someone on the street, I thought about her and how she looked up. She kept looking up. No matter what they did to her, she never stopped looking up and that star was a harbinger of hope.

Today, you're my star. You are my harbinger of hope. This country is getting better and better and better, and when that final vote happens and you ascend onto the highest court in the land, I'm going to rejoice. And I'm going to tell you right now, the greatest country in the world, the United States of America, will be better because of you.

Thank you.

Chair DURBIN. Thank you, Senator Booker.

We're going to take a 10-minute break and come back and have the last five Senators ask their questions.

[Whereupon the hearing was recessed and reconvened.]

Chair DURBIN. The Committee will resume with Senator Kennedy of Louisiana.

Senator KENNEDY. Thank you, Mr. Chairman. Judge, I want to continue where we left off yesterday and try to get, if I can, get to the essence of this tension between judicial power and judicial restraint. You have testified, and stop me if I get this wrong, that judges should stay in their lane, and I think it's fair to say that one of your definitions of "staying in your lane" is that judges don't make policy. Am I right so far?

Judge JACKSON. Yes, that is correct, Senator.

Senator KENNEDY. Then how do you explain or help me understand the following. We have a judicially created doctrine with no textual basis either in the Constitution or a statute called substantive due process, and through substantive due process, our Federal courts—let's just narrow it down—the United States Supreme Court has given itself the authority to read into the Constitution unenumerated, unmentioned rights, not read the Constitution and say, well, there it is, freedom of speech, but these are unmentioned, unenumerated. Isn't that making policy?

Judge JACKSON. Senator, the Supreme Court interprets provisions of the Constitution, and there are provisions of the Constitution that require interpretation because they don't, just on the text in every circumstance, answer the question before the Court. So due process, what does that mean? And the Supreme Court has—the words "due process" do appear in the text of the Constitution, and the question is, what is covered by that provision? The Supreme Court—oh, sorry. Go ahead.

Senator KENNEDY. I was just going to say, but when they do it, aren't they making policy?

Judge JACKSON. Well, Senator, the role of the judiciary is to interpret the law. To the extent that somebody argues to the Court that there's been a violation of the Due Process Clause of the Constitution, it is within the role of the Court to determine what that means and whether the person is correct that what happened with respect to their case violated the Due Process Clause. And so there's an interpretive function that is a part of the judicial function.

Senator KENNEDY. Let me see if I can put a finer point on this. It's not the right so much. It's how the right is created. That's why I asked you yesterday whether you think that enumerated—these unenumerated, unmentioned rights ought to be decided by the people through their elective representatives versus the Federal judiciary. Let's take two rights that I talked about yesterday: the right to assisted suicide, the right of a transgender woman to participate in women's sports.

I can see how—I'm not predicting that it will, but I can see how the Court, either through the Due Process Clause or the Ninth Amendment, could find those rights in the Constitution. As we talked about yesterday, the Supreme Court has—it looks to me like they've adopted the policy of there is no test for a fundamental right. There are several tests, and in *Obergefell*, Justice Kennedy cited with approval Justice Harlan's dissent in *Poe v. Ullman*, which says there's no test. We go case by case.

And the—but I know there are tests, like—I’ll get the language here. Somewhere I’ve got it. I don’t want to look it up, but implicit in the concept of ordered liberty, and you talked about that. Here’s a new one that Justice Kennedy talked about in *Obergefell*. He said, “inherent in the concept of individual autonomy.” Well, I can see how that the Court with five votes wanted to say even though the right to assisted suicide or the right of a transgender woman to participate in women’s sports, I can see how somebody—you’re smart. You could write an opinion and say that’s inherent in the concept of individual autonomy. And maybe—again, it’s not the right. It’s who’s supposed to decide, and that’s where the judicial restraint comes in. I mean, don’t you think that the values of ordinary Americans and their ability to decide these issues are just as good as those of five members of the Supreme Court?

Judge JACKSON. Thank you, Senator. There are policy determinations that are made by vote and, absolutely, in the democratic process. People get to decide things. The question and the difficulty is when you have a constitutional scheme of government and you have a Constitution that does protect certain rights, and it does so in a circumstance in which those rights, whatever they are, enumerated or not, are—might be things that the people have disagreed with. That’s the tension, that although we have democracy, as we do, and people vote and should absolutely, we also have a Constitution that protects certain rights against the sort of majority will about those things.

Senator KENNEDY. But the rub, of course, is—I agree with everything you said, but the rub is, these are unenumerated rights.

Judge JACKSON. Yes.

Senator KENNEDY. They’re read into the Constitution.

Judge JACKSON. Yes.

Senator KENNEDY. And what troubles me, I’m not saying I disagree with all the rights that the Supreme Court has created, but I don’t think we talk honestly enough about how those rights should be adjudicated. For example, I’m not asking you to comment on this. I think you already have. But when President Biden announced your appointment, or at least shortly before, he talked about, I want a judge that’s going to read new rights into the Constitution through the Ninth Amendment. And I’m sure some Americans are saying that’s a good thing, but you got a lot of Americans going, hey, wait a minute, the Supreme Court isn’t elected. A couple years ago, Chief of Staff Ron Klain wrote an opinion piece, and he said he hopes, and I’m going to quote, “the Supreme—I hope the Supreme Court will intervene whenever the Nation’s conscience and laws need a jolt in a progressive direction.” That’s policymaking. Do you agree with that statement?

Judge JACKSON. Do I—do I agree with the statement that that’s policymaking or—I’m sorry.

Senator KENNEDY. No, did you agree with what the chief said.

Judge JACKSON. Senator, that’s a political statement made by someone in the executive branch.

Senator KENNEDY. I’m not going to push you. I get it.

[Laughter.]

Senator KENNEDY. It’s not a good time to make the chief of staff mad, is it?

[Laughter.]

Senator KENNEDY. Well, I just—I hope you’ll keep this in mind, Judge, if you’re confirmed. I mean, this is what judicial restraint is all about, and I think part of the division in our country—America is a big, wide, open, diverse, sometimes dysfunctional but sometimes imperfect, but basically good country, but we have different values. That’s a part of our diversity, and I think our country works because of our system of federalism. The values in Louisiana may be different from the values in Maine, and if you don’t like what’s going on in Maine and you don’t—you like what’s going on in Louisiana, you can move. But as our Federal Government has gotten bigger, and bigger, and bigger, and bigger, what has developed, at least here in Washington, is this managerial elite. And I—when I say the “managerial elite,” I mean—I mean the entrenched politicians. I guess I shouldn’t say “entrenched,” because that’s pejorative, but we do have a lot of politicians that have been here a long time.

There are members of the media that are part of the managerial elite. There are members of the administrative state. They’re academics that are part of it. There are a lot of corporate phonies that are part of it. And many people in this cabal think they are smarter and more virtuous than the American people and that they ought to set forth how people should live their lives. People should shut up and just do what they’re told, and if they behave, maybe the managerial elite will let them eat meat occasionally. I think that’s part of the division in our country. And I think, to some extent, the Supreme Court—I don’t want to say contributes to it, but it needs to be mindful of this.

I’ll give you another example, and this case bothers me. I want you to explain it. I think Lindsey talked to you about it, but I don’t know that—I want to hear you explain it. It’s *Make the Road New York v. McAleenan*. You remember that one.

Judge JACKSON. I do.

Senator KENNEDY. Yes. Here’s the way I read it. Congress, we in a rare moment of consensus, gave DHS the “sole and unreviewable”—those are not my words, they’re in the statute—“the sole and unreviewable right to determine when illegal immigrants should be removed on an expedited basis.” The Department of Homeland Security, taking this statute, decided to use its sole and unreviewable authority or discretion to state that we’re going to have expedited removal of all illegal immigrants who’ve been in the U.S. less than 2 years. And you said no, and not only that, but you issued a universal injunction, and I don’t understand why. You talked about judicial activism, and I don’t see how clearer Congress could’ve been. Now, the D.C. Circuit reversed you, but I want to hear your reasons for issuing that nationwide injunction.

Judge JACKSON. Thank you, Senator, for allowing me to address that decision in that case. The statute at issue gave discretion to DHS to determine the amount of time that a person needed to have been in the country, between zero and 24 months, in order to be subject to expedited removal as opposed to the normal removal process in the immigration system.

Senator KENNEDY. Mm-hmm.

Judge JACKSON. The statute said that DHS had sole discretion, meaning no—I interpreted, meaning no other agency was to have the authority to make that determination. And the statute said that DHS' determination in that regard was unreviewable, meaning it was final—this is how I'm interpreting—meaning that once the decision was made, it was over. Nobody else gets to review. The court doesn't get to say, no, you're wrong if you pick 12 months, for example, or 16 months, or 24 months, as they did in this case.

The statute did not speak to whether Congress intended, with that grant of very broad discretion, to exclude another statute that Congress has passed that directs agencies when Congress gives them discretion. The other statute, the APA, directs agencies as to how they go about making decisions that Congress has given them the authority to make. The APA is a procedural statute. It says to agencies when Congress gives you discretion to make a determination, you have to do so in a way that's not arbitrary and capricious. You have to use your expertise.

Senator KENNEDY. Right.

Judge JACKSON. In certain kinds of decisions, you have to use notice and comment in order to get information. It's procedural. The claim that was being made in this case, as I read it and understood it, was not that the Agency couldn't pick 24 months because obviously Congress had said in the statute you can pick between zero and 24 months. The claim that was being made is that the Agency picked 24 months arbitrarily in violation of Congress' direction about how you go about exercising—

Senator KENNEDY. The APA was violated?

Judge JACKSON. Yes.

Senator KENNEDY. Okay.

Judge JACKSON. The claim was an APA violation. So no one was saying that the statute was violated in the sense that the Agency did something that it couldn't have done per the statute, picking 24 months. They said the APA was violated because—this is the claim that they were making—

Senator KENNEDY. Sure.

Judge JACKSON [continuing]. Because the Agency did no analysis, the Agency had no expertise. The Agency did not evaluate, okay, if you've been here 6 months, these are the kinds of ties that you have if you've been here 18 months, right?

Senator KENNEDY. I got it. I got it.

Judge JACKSON. The Agency didn't do anything. Essentially, according to the claimants, the Agency heard the President say we're going to now do 24 months when everybody else—all of the other administrations up to this point—

Senator KENNEDY. I've got it. I'm interrupting you because I've only got—

Judge JACKSON. Yes, I'm sorry. All right. So—

Senator KENNEDY. What I hear you saying is—tell me if I'm wrong.

Judge JACKSON. Yes.

Senator KENNEDY. They didn't follow the APA in your opinion, which you have to do even though Congress passed the statute? Is that—

Judge JACKSON. Well, no, because two things. One is the APA, under D.C.—longstanding D.C. Circuit caselaw is presumptively applicable to every situation in which an agency is exercising its discretion. So that's the first thing. It's always there as a background rule. So the D.C. Circuit has said Congress has to be pretty clear when it decides to exclude the APA, when it's saying I'm giving you discretion, but you can do this arbitrarily, you can do it however you want. And in other places in the immigration statute that sets up expedited removal, Congress says we are excluding the APA. We're telling you that with respect to this kind of discretion, the APA doesn't apply.

Senator KENNEDY. Okay.

Judge JACKSON. So here I had these two statutes, and there are canons of statutory interpretation that says that you should try to get an effect to all of the will of Congress. You should try to read statutes so that they go together in a way if you have these directives. And there's also D.C. Circuit caselaw—

Senator KENNEDY. Judge, I got to stop you—

Judge JACKSON. All right.

Senator KENNEDY [continuing]. Because I got it.

Judge JACKSON. And let me just say I agree that the D.C. Circuit reversed me. They disagreed with my interpretation, and that's the way that our system works.

Senator KENNEDY. Let me ask this last question. This is—this is a question about—based on your experience. Can we agree that if—I want to emphasize “if”—cocaine is cocaine, that crack cocaine is equal in its danger to powdered cocaine. You with me?

Judge JACKSON. I think so.

Senator KENNEDY. One is not more dangerous than the other. If that's true—

Judge JACKSON. Mm-hmm.

Senator KENNEDY [continuing]. Then the sentencing rules ought to be the same, okay? I don't—

Judge JACKSON. It's a policy matter for Congress. You could make them differently if you wanted to.

Senator KENNEDY. Right. That's what I want to ask you.

Judge JACKSON. Yes.

Senator KENNEDY. Based on your experience—

Judge JACKSON. Yes.

Senator KENNEDY [continuing]. You've been on the bench a decade.

Judge JACKSON. Yes.

Senator KENNEDY. Is crack cocaine more dangerous than powder, or less, or the same?

Judge JACKSON. Senator, that's a policy determination. That's what policymakers do. They look at the evidence related to these things, and they decide what's more dangerous, what should—

Senator KENNEDY. What have you seen?

Judge JACKSON. I have seen evidence through the Sentencing Commission that the two compositions are chemically similar, so similar as to be indistinguishable.

Senator KENNEDY. Mm-hmm.

Judge JACKSON. And the Commission, for very many years as a policymaking body, indicated its view that they should be equiva-

lent and lobbied Congress concerning that, and Congress made a determination about—in the policy realm making it 18-to-1 instead of 100-to-1, which is what it had previously been.

Senator KENNEDY. Okay. Thanks, Mr. Chairman.

Chair DURBIN. Thank you, Senator Kennedy.

And now Senator Padilla.

Senator PADILLA. Mr. Chairman, before I begin, I know you're being very mindful of the clock, so I just want to say I have two initial, more substantive questions and then I think two very brief questions that are very important. So I'll get right to it.

Judge Jackson, I am so glad that you take so much pride in sharing your family's story, as you should. I know I take pride in sharing mine. My colleagues have heard it, but I never get tired of reminding folks that I am the proud son of immigrants. My parents came to the United States from Mexico decades ago, and through their hard work and determination, they raised three of us. My sister, my brother, and I, we all attended and graduated from college, and we've all found successful careers in public service.

Now, it's a story that is shared by hard-working immigrant families across the country and over the course of generations, families who work diligently each day to create a better life and to contribute to the country, whether it's as farmworkers, short-order cooks, celebrity chefs, software engineers, or tech CEOs, as school custodians, teachers, principals, whether they're documented or undocumented. People who migrate to this country seeking asylum, seeking refuge, or a shot at the American Dream all deserve to be treated with dignity and humanity.

Now, unfortunately, our laws and our courts don't always do that. Beyond our often cruel and counterproductive choices that we've made over the years when it comes to immigration policy, the language that we use to speak about immigrants can often have dehumanizing effects. For example, in the Immigration and Nationality Act, it's replete with references to "aliens," and court opinions written by Federal judges across the country can be found referring to undocumented persons as "illegal aliens." Now, I know NASA has put a man on the moon and there are billionaires increasingly exploring space, but let's be clear. No person is an alien, and no human being can be illegal.

So with that context, I read your immigration-related decisions on the district court with great interest. Now, beyond the substance of your opinions, what stood out to me is that you seem to have tried to avoid making the same choice as many of your predecessors and many of your colleagues when not quoting statutes or precedent. Your opinions appear not to refer to immigrants as "alien" or "illegal." Instead you use terms such as "undocumented" and "non-citizen." I imagine—I hope that was a conscious choice.

The language we use and the language our courts use to describe people, whether immigrants, the formerly incarcerated, individuals who identify as LGBTQ, or other historically marginalized people, really matters a great deal. Our language matters. It's exactly for that reason that 6 years ago, Congress passed a bill to remove derogatory and offensive references to Black Americans, Asian Americans, and Native Americans from the U.S. Code, and it's why last year, President Biden ordered the Customs and Border Protection

Agency and ICE to stop referring to migrants as “illegal immigrants.”

With all that said, Judge Jackson, do you agree that the language we use to describe one another and the language used by the bench matters?

Judge JACKSON. Thank you, Senator. As I mentioned earlier in this hearing, judges are the only branch of Government who are required to write our opinions, to explain our decisions, and I have long believed in that capacity that our clarity and language matters. We’re explaining the law to people, and people read and understand what the law is, what the rule of law is in this country through the opinions of judges. So they do matter, language.

Senator PADILLA. Thank you. Now I want to discuss with you an issue of law and technology, an issue previously raised by Senator Ossoff earlier today, and I’m excited to talk to you about this topic. Just as an aside, any day that an MIT engineer gets to question of Harvard lawyer, it’s a good day, so thank you for indulging. But as you know, the Supreme Court only hears a tiny fraction of all Federal appeals. That means that the cases that get to the Supreme Court are typically either new questions of law or very difficult questions of law. And I think the intersection of law and technology is one where many cases are both new and difficult.

Over the course of human history, innovation has constantly disrupted our culture and our norms, and for the most part with good intentions, but societal benefits have not always been the result of innovation. Innovations have challenged us to respond with new means of safeguarding basic rights, whether in the context of privacy, security, competition, employment, just to name a few. And I appreciate that the speed of innovation will always challenge our ability to keep the law up to date with new technologies and their impact.

I’ve grappled with this question as a city council member, as a State senator, as a secretary of State, and now as a United States Senator. But clearly it’s also a challenge for the courts, which often have to decide cases during that period between technological progress and the enactment of new laws that seek to account for that progress. Now, new technology alone has given rise to a number of fundamental questions of law, as you mentioned yesterday and earlier, including how the Fourth Amendment applies to new contexts that no Founder could have ever contemplated. And likewise, the Court has to grapple with questions, like how copyright law applies to computer code. And in the coming years, new technologies will present new questions, not just in the context of the Fourth Amendment, but in areas of communications, energy, transportation, healthcare, and many others.

So if you can take just a minute, Judge, to discuss the challenges that courts at every level face in addressing cases involving new and emerging technologies and how you as a Supreme Court Justice would begin to prepare for these types of cases.

Judge JACKSON. Thank you, Senator. The court does get cases that involve disputes that touch on technological innovation. Whether it is something like a copyright kind of case, or a patent kind of case, or the Fourth Amendment search and seizure, new technologies do intersect with what the law says in the Constitu-

tion and in statutes. And at least as far as statutes are concerned, it's certainly much easier for judges who are doing their duty to interpret the law if Congress makes changes that update the statutes to track the modern innovations.

What happens with constitutional interpretation is similar to what I described earlier about cases in which the Court analogizes back to the time of the founding concerning the principles in something like search and seizure, what qualified as a search that violated the Constitution when those words were written, and then determines whether that same kind of violation is at issue with respect to the technology today. And the Court has done that with respect to searches regarding cell phones, police access to GPS data, tracking technology that is put on vehicles because these disputes do come up.

And so I'll take this opportunity to encourage Congress to help us by ensuring that new technologies are addressed in statutes that we interpret.

Senator PADILLA. You're absolutely right. Both judges and Members of Congress are never done doing more homework and learning hopefully. Judge, on Monday, which at this point feels like so long ago, I suggested in my opening statement that by the end of these hearings, America would know just how qualified you are to serve on the Supreme Court. And over the course of this hearing, I think the American people have seen that and have gotten to know you as a person. They have heard your family's journey and everything that your nomination represents.

Now, I also said on Monday that your qualifications bear repeating over and over again. And so, Judge, with your help, I'd like to remind the Committee and the American people once again just some of your incredible credentials. Yes or no: After law school, did you serve as a law clerk for a district court judge, a court of appeals judge, and a Supreme Court Justice?

Judge JACKSON. I did, Senator.

Senator PADILLA. Yes or no: Did you practice law for more than 10 years before becoming a judge?

Judge JACKSON. Yes, Senator.

Senator PADILLA. And did that include time in private practice and time as a Federal public defender?

Judge JACKSON. It did.

Senator PADILLA. How many years have you served as a Federal district court judge?

Judge JACKSON. I served as a Federal district court judge for, I believe, 8½ years.

Senator PADILLA. And circuit since?

Judge JACKSON. Circuit since last June.

Senator PADILLA. And as a district court judge, approximately how many opinions did you write? I think we've covered this before.

Judge JACKSON. As a district court judge, I believe I wrote somewhere in the neighborhood of 560.

Senator PADILLA. With a very low rate of having been reversed if I've done my homework correctly. Look, I can go on and on, and don't worry, Mr. Chairman, I won't, but, Judge Jackson, for 2 days, here's what I've seen. I've seen a number of my colleagues trying

to engage with you in good faith on questions about the law, and you've answered them fully, fairly, and thoughtfully in every instance. You've shown yourself to have the keen intellect and legal acumen to serve on the Supreme Court.

Now, you've also sat here and politely listened as some of my colleagues have attempted to disparage your judgment and character based on allegations that even, as Senator Booker pointed out, conservative commentators have called "meritless to the point of demagoguery." And through that, you've shown clearly that you have the temperament to serve on the Supreme Court.

Now, this confirmation hearing has been a reminder and, in some ways, a new Exhibit A that people of color, particularly those who have the audacity to try to be the first, often have to work twice as hard to get half the respect. Judge Jackson, I offer that with your talent and exemplary qualifications on full display, if my colleagues truly believed in maintaining the legitimacy of the Supreme Court, if they really care about Americans' faith in the judicial system, they will see that even if they may disagree with you on a particular area of the law, that you're exactly the type of judge that should serve on the Supreme Court. You're exactly the type of judge that should receive bipartisan support, not just from this Committee, but from the full Senate. And if any Senator doesn't, then I hope they'll think long and hard about what it says to the country about the politicization of the Supreme Court, that someone as eminently qualified as Judge Jackson in all the ways that we've been discussing cannot receive bipartisan support.

Judge, and there's just a couple minutes left, and I'd like to ask you just one last question. Last Friday, in my preparation for these hearings, I took the opportunity to spend some time with a group of students at South San Francisco High School. I went there to speak with them about this historic Supreme Court nomination and to speak with them about you. We had a great conversation about how the Court's decisions affect the everyday lives of Americans and about the past and the future of the Supreme Court. But as I was speaking with the students, I couldn't help but be reminded of my own high school experience when one of my teachers discouraged me from applying to MIT because they didn't want me to be disappointed. I turned that discouragement into motivation.

Judge Jackson, I know that you, too, have been doubted on your way to the seat that you find yourself in today. Even over the last 3 days of this hearing, your experience and qualifications have been called into question by some, despite your clear, lengthy record of talent, achievement, and accomplishment. So I want to end my time today by asking you this question: on behalf of the young people I visited with last Friday in South San Francisco, and for the many others across the country who are watching this confirmation hearing today, what would you say, Judge Jackson, to all those young Americans, the most diverse generation in our Nation's history, what do you say to some of them who may doubt that they can one day achieve the same great heights that you have?

Judge JACKSON. Thank you, Senator. That was very moving, and I appreciate the opportunity to speak to young people. I appreciate it very much. I do it a lot for the reasons that you have articulated.

I hope to inspire people to try to follow this path because I love this country, because I love the law, because I think it is important that we all invest in our future. And the young people are the future, and so I want them to know that they can do and be anything.

And I'll just say that I will tell them what an anonymous person said to me once. I was walking through Harvard Yard my freshman year. As I mentioned, I went to public school, and I didn't know anything about Harvard until my debate coach took me there to enter a speech competition, and I thought, this is a great university. It was basically one of the only ones I'd seen, and I said maybe I'll apply when I'm a senior.

But I get there and, whoa, so different. I'm from Miami, Florida. Boston is very cold. It was—it was rough. It was different from anything I'd known. There were lots of students there who were prep school kids, like my husband, who knew all about—

[Laughter.]

Judge JACKSON. Knew all about Harvard, and that was not me, and I think the first semester I was really homesick. I was really questioning do I belong here, can I—can I make it in this environment? And I was walking through the Yard in the evening, and a Black woman I did not know was passing me on the sidewalk. And she looked at me, and I guess she knew how I was feeling, and she leaned over as we crossed and said, "Persevere." I would tell them to persevere.

Senator PADILLA. Thank you, Judge Jackson. You don't have to hope. I'll tell you right now, you do inspire. You are an inspiration.

Judge JACKSON. Thank you.

Senator PADILLA. And I will associate myself with the closing words of my colleague and my brother, Senator Booker, that I, too, refuse to let anyone steal my joy. Thank you, Madam Chair.

Chair DURBIN. Thank you, Senator Padilla.

Senator TILLIS.

Senator TILLIS. Thank you, Mr. Chair. Judge Jackson, as Senator Booker was providing his closing comments, I could only think, and they were very powerful, that if you liked his, how much you're going to like mine on the subject of intellectual property.

[Laughter.]

Senator TILLIS. But before I do that, I know you've been spending a lot of time here. Do you have much experience in matters of copyright protection, patent protection?

Judge JACKSON. Senator, I mentioned earlier that I did a trademark case.

Senator TILLIS. Yes.

Judge JACKSON. Not that—

Senator TILLIS. By the way, I looked up the menu.

Judge JACKSON. Did you?

Senator TILLIS. It looks like a really good menu.

Judge JACKSON. I think it's a good restaurant. They had a lot of evidence to that effect.

Senator TILLIS. I haven't done a lot of food or restaurant trademark work, but when I came to Judiciary, fortunately, the former Chair and the current Chair indulged us in reinstituting the Intellectual Property Subcommittee. And I love that Committee because you really have to work hard to be partisan in it, and, in fact, it's

not partisan. I worked very well with, as the Chair, with Senator Coons and done very well with Senator Leahy and Senator Hirono, in working together on things that I think are really important, because I think one of the things that make the—our country great is the founding fathers got it right on understanding the value of intellectual property and how it could catapult us into the innovation powerhouse that we are today. So I may ask you a few questions about it, but I'm not going to dig too deeply.

I do want to go back to maybe getting a suggestion from you. I thought—I told you I don't even pretend to be an attorney, but I am about 30 years into technology. As a matter of fact, I spent 2 years in Boston at Wang Laboratories. And it was no coincidence, having been born and raised in Florida that I moved 1 September because I couldn't bear another winter. But I made—I've been in the technical field. I was working on IP, or internet protocol, before anybody knew what internet protocol was back in the early 1990s.

And I do think that we should go away and understand the threat. If you've seen the multiple of illicit activities, and for the purposes of this discussion, child pornography now, imagine what it's going to be like 5 years from now. I was talking with someone in the hallway. They're taking a playbook from drug kingpins. The creators, and the aggregators, and the distributors are using technology, I think, in some cases to reach out to people and incent them to go to these websites, to infect their computers, to download thousands potentially from a single click. I think that we have to examine these criminal enterprises and put law enforcement resources into cutting the heads off of these people, figuratively speaking. And one of the ways you do that is to provide, I think, more ways to go about prosecuting more technology, that we need to cut down the supply.

But we still have to deal with the demand, and that's another area where these criminal organizations and others are taking advantage. And, you know, today, if you think about technology 10 years ago, it was a little odd, at least 15 years ago, to see a child. I've got two granddaughters. One is 4 years old. One is 2 years old. They're technologically savvy. As matter of fact, I love talking to them on the phone, but even my 2-year-old knows how to deal with the filters to make me look like I've got the rabbit ears and everything. They're technologically savvy. There's a real danger there that these horrible people, and I genuinely believe that you think they're horrible people, are going—excuse me—they're going to infect and destroy a lot of lives.

And so I don't know is it with the Sentencing Commission, and incidentally, this is a toxic subject in Congress because if you start talking about better understanding this, most people are going to run away from it, but we do it at the expense of destroying a lot of victims' lives. So I don't—unless you have ideas off the top of your head, I'm trying to get an idea of how we can make people understand. Maybe we could even have a discussion to say that the penalties today are the floor to begin the discussion, just to simply eliminate people from making this so toxic that we don't better understand it and get ahead of it.

But how can we even start having an intelligent discussion and a productive discussion where Congress is clearly going to need to

act to do what I think everybody in this room wants to do, is just erase it from the planet of the Earth, or at least make a lot of progress, because, quite honestly, it has exponentially grown, and there are exponentially more victims today than there were even 10 years ago. Any ideas?

Judge JACKSON. Thank you, Senator. I actually don't. I haven't been working on, or looking at, or dealing with sentencing policy for a long time now. In my work as a judge, we're looking at individual cases, not systems or crime organizations and policies related to them.

Senator TILLIS. Yes. Well, I do—I think it's something that that we should take seriously after we cool the temperatures and have people have legitimate concerns about some of the rulings. I think that we have to clear up some of the complexity and recognize that Congress is a part of the solution.

Okay. Now, on the weighty subject of intellectual property. Are you familiar with copyright preemption under Section 301(a)?

Judge JACKSON. No, I haven't worked with that.

Senator TILLIS. Okay. I wouldn't have expected you to necessarily, but—and I won't get into patent questions. We've got a lot of work that I think, ultimately, is going to require us getting rid of the shambles of jurisprudence that we have. It's a very complicated field. We've got a lot of mixed signals and current jurisprudence, and my Committee's working on that. So it may be something that ultimately works its way up to you all, if you're confirmed. But I'm not going to take a lot of time, particularly because the hour is late and I intend to yield back some of my time.

I do want to go back because I felt like this morning when I went through some of my comments, I mentioned law enforcement. I talked about a couple of your decisions that gave me pause, mainly—excuse me—because, you know, law enforcement is under attack. Law enforcement needs to be held to a high standard. I've been involved in this for nearly 22 years, making sure that when I was a town councilman that we did something audacious and spent a lot of money in getting our law enforcement officers in a small town of only 20,000 people CALEA certified. That's a national certification to make sure that they understand how to deescalate, get engaged in the community, and reduce crime, and it worked. But now we've—you know, there's some people that think it's fashionable to attack the police and to defund the police, and, quite honestly, there's increasing data that suggests the communities that are loudest about that are becoming the least safe.

So I want to ask, you mentioned several times, I think, yesterday and more today about your methodology. So if—is the *United States v. Jenkins* fresh in your mind or roughly fresh in your mind? A criminal pleaded guilty to assaulting a law officer. It was his third conviction in assaulting a law enforcement officer. The Government recommended 30 months, the defense recommend 21 months, and you decided to go with an 18-month sentence. So I was trying to—does it—do you recall—

Judge JACKSON. I don't recall. I would want to look at the records and see the Probation Office's recommendation as well.

Senator TILLIS. Okay, and that, again, is something I wouldn't have access to, so I'm just trying to figure out what the mitigating

circumstances were, and there were other ones. Unless you immediately recall it, I'm not going to ask you to go into details. The other one was *United States v. Weeks*. Similar situation. That was a 24-month request from the Government for the conviction on assaulting an officer, and you gave them 12 months. Are you—does that ring a bell, *United States v. Weeks*?

Judge JACKSON. I think *Weeks* had a number of different appearances, and there were different aspects to his case, but I'd have to look at the whole file to recall.

Senator TILLIS. I just feel like the—again, because I know that you've rendered some 100 sentences over a period of time, I wouldn't expect you—but it is an area that—we'll submit it as a question for the record so that maybe you can refresh your memory and try to get back on that because it's something that I, for one, think that we need to place a priority on.

We've got so many law enforcement agencies across the country now—excuse me—that we're having a hard time recruiting people and having a hard time retaining people. A lot of people are retiring. And, you know, I know not every police officer is an angel. I was talking with somebody in my office who was talking about her brother. She had a lot of confidence in him. She was here to talk to me about police reforms. And I actually believe that the vast majority of police officers, like your brother and your family members, are good people. And a part of what we have to do is just make sure that when we have these assaults, which are increasing, that we have just punishment because we need to do that for the protection, not only of the law enforcement officers, but the communities they serve.

So, you know, and I'm going to yield back time because I know we've got two other people talking. And, you know, I thought you've done a great job over the last 2 days. I've tried to be here. I had an emergency and had to leave for about an hour and a half, but I tried to be here—for a business emergency. But I thought that you presented yourself well, and there was a lot of pressure, and that demonstrates a certain temperament or poise. I can't imagine what's going on inside your head, but at least overtly you did very well, and you should be proud of that. It's not an easy thing.

It's very easy up here to feel comfortable, right, because there's 22 of us, and it's not like you can really come at us. So you have an arm tied behind your back, and I'm sure that there were a number of things you'd like to say, but time didn't allow. But, you know, I just want to commend you, your family, your daughter who has been glowing every time you talk, and I appreciate your service. Thank you.

I yield back, Mr. Chair.

Judge JACKSON. Thank you, Senator.

Chair DURBIN. Thank you, Senator Tillis.

Senator Ossoff, you started the day for us.

Senator OSSOFF. Judge, good evening. We've come full circle to the end of the dais. Likewise, I don't intend to use all of my time.

I do want to echo the sentiments expressed by Senator Tillis. You have conducted these hearings with extraordinary poise, strength, grace under pressure. You've had a lot of poison thrown at you, and

you've responded with substance and truth. And it's shone through not just in this room, but across the country and around the world.

So I have two substantive questions regarding the First Amendment, one question, as I noted, that I wanted to address regarding war powers, and then I'll be yielding the remainder of my time to the Chair and on to Senator Blackburn to close.

We discussed earlier this morning, Judge, the constituent elements of the First Amendment with respect to speech, expression, and assembly. I just briefly want to touch on the free exercise of religion.

My great-grandparents came to this country fleeing antisemitism in Eastern Europe. Many Americans' stories, including many of the very first American stories, involve flight from religious persecution. Just briefly would ask you to touch upon the constitutional roots and significance in our system of government of the First Amendment protection of the free exercise of religion.

Judge JACKSON. Thank you, Senator.

As you mentioned, free exercise of religion and the Establishment Clause, which prevents the Government from preferring a religion over another, is foundational. It is the principle that many people originally came to this country, when it was founded, in order to support. It was people who fled from religious persecution and wanted to found a country in which everyone could believe what they wanted to believe and not have the Government encroach on, impinge on, burden that right.

And so it is a core foundational right. It's in the First Amendment, and your family story is very similar to many families who moved to this country for that reason.

Senator OSSOFF. Thank you, Judge Jackson.

We discussed in brief earlier today the *Sullivan* decision, *New York Times v. Sullivan*, in which the Court established a standard by which libel and defamation claims by public figures would be judged. And my understanding, correct me if I'm wrong, is that the standard is that false statements must be made knowingly, that the party making the false statement must know that it is false, and must make such knowingly false statements with malice. Am I correct that that's the standard in the case?

Judge JACKSON. I believe it's knowingly or with reckless disregard for the truth, and that that standard is termed or thought of as actual malice, yes.

Senator OSSOFF. Is there any generalized obligation in law that you're aware of to accurate reporting or accurate publication where there is not malice or where there is not one of the components established in the *Sullivan* case?

Judge JACKSON. If I understand your question, I know that the standard related to the *Sullivan* case does pertain to public figures. And so if a public figure is not involved, there may—there is a different standard in terms of liability for inaccurate or defamatory statements.

Senator OSSOFF. Thank you, Judge.

And I want to note that the Chairman earlier remarked upon the disruptions in the market in publishing and the dissemination of information that technology has caused in recent years. And I was just reflecting, as the Chairman spoke, that at the time of the in-

vention of the printing press, many of those who previously had centralized control of the production and dissemination of information recognized that it was disruptive and threatening and that it disrupted power dynamics and it empowered new participants in public discourse to participate.

And I just want to express to you—this is not a question, but express to you my view that it is vital that we in Congress and the judiciary relentlessly defend the principles of the First Amendment and the free expression of ideas, even as new technologies emerge, which disrupt these markets and present challenging new particular circumstances to the Court.

A very brief question on the not lighthearted, but important subject of war powers. I reviewed some of the comments that prior nominees have made when asked about questions with respect to the allocation of war powers between the legislative and executive branches. And something that I've seen in some of those transcripts has been a tendency to say, well, these are disputes between the political branches, and questions about those authorities should be resolved between the political branches.

I noted in the *McGahn* opinion that you issued, you noted in that case that one of the reasons it was appropriate for the judiciary to consider the claim made by the U.S. House in that case was that where there is a dispute between the legislative and the executive, in that case and perhaps in many cases, the judiciary is precisely the appropriate forum for the resolution of that dispute.

And so it seems to me that the Court and you, should you be confirmed, may very well have to entertain cases and controversies pertaining to disputes between the legislative and the executive with respect to war powers because there is, in my opinion, unsettled law. There is some ambiguity in statute. The Constitution allocates various authorities to the two branches.

So not asking you to posit a thesis on this point but just want to ask you how you will approach such cases? I assume applying the methodology that you have laid out for us consistently throughout these hearings where war powers may come before the Court.

Judge JACKSON. Thank you, Senator.

In every case, I apply the methodology that I have laid out in order to ensure that I'm ruling impartially and consistent with my judicial authority. In the part of my methodology that addresses my judicial authority, one of the things that I do, as judges do, is decide whether I have jurisdiction to hear a particular issue.

The *McGahn* case was not a war powers case. The *McGahn* case, I determined in that opinion, and Judge Bates had determined in the prior opinion, raised a question of law. The question essentially was whether the subpoena that had been issued by the House had to be responded to by the person who received it, or whether that person had absolute immunity and did not have to respond. That's a question of law that courts answer all the time with respect to the enforceability of subpoenas.

In the war powers realm, there may be questions of law that are appropriate for courts to decide, but there may also be political questions. And so it would depend. A political question, if there was a dispute between the legislature and the executive branch over some exercise of authority that was not governed by law but

was in the discretion of either of those branches under the Constitution where they got to make determination, something, say, for example, like the exercise of Executive authority in war to move troops or do that kind of thing, that would not present a question of law that the court could decide.

So it would depend on exactly what the court was being asked to do as to whether or not it had jurisdiction. And then, under my methodology, that would be the kind of thing that I would have to carefully examine in order to determine whether I could rule.

Senator OSSOFF. Thank you, Judge.

Let me close with this comment. As I said, you have conducted yourself with extraordinary skill and grace throughout these proceedings, and it's in some ways a lonely place for you to sit there under the lights, facing questions, many of them substantive. Some of them less so. Many of them constructive. Some of them mean-spirited and distracting.

You've handled it all extraordinarily well. It's been a very long 2 days. I know you know this, but I just want to make sure you do. That throughout this process and right now, there are millions and millions of people who are watching and cheering you on, right at this very moment. In homes across this country, there are millions and millions of people inspired by you and your example who are cheering you on.

And not just that, there are people all over the world—all over the world—who are watching these proceedings and seeing what is possible in America. After some years when there's been some doubt about what this country stands for—that's my opinion, not yours. But people all over the world are watching this and seeing what is possible in America, what is possible in the system of government that we have, what values this country stands for, and I thank you profoundly for the service you've rendered throughout your life and in this hearing.

And with 7 minutes remaining, Mr. Chairman? I know you'll remain focused right through the end. I have no doubt that Senator Blackburn has some provocative questions for you.

I yield the remainder of my time.

Judge JACKSON. Thank you, Senator.

Chair DURBIN. Thanks very much, Senator Ossoff.

And Senator Blackburn, you're recognized.

Senator BLACKBURN. Thank you, Mr. Chairman.

And I know that Senator Ossoff is over there watching your wonderful family and taking notes because he's a new daddy. And if you have time, he'll show you pictures.

But, indeed, we have all enjoyed hearing about your family and your parents and how hard they worked to open doors of opportunity for you. And look at how you went through those doors and really created such a wonderful life.

And I mentioned yesterday that I would hear from friends in Tennessee, and so many of them talk about they like how you have pushed those barriers aside because a lot of them have had to do the same thing to kind of make their way into careers, and so they've appreciated that very much about you.

And I'll have to tell Senator Booker, now I like the fact that he talked about Fred Astaire and Ginger Rogers. And when my

daughter was in high school, I actually bought that poster—and I’ve probably told Senator Klobuchar this before. But I bought that poster of Fred Astaire and Ginger Rogers, and they’re dancing, and it says, “I took every step he took, but in high heels and backward,” just to make the point with her that she was going to have to work hard.

And indeed, she accepted that challenge, and I’m really proud of her, like I know all parents are proud of their children. I do want to get to a couple of things, and we do have the vote on the board.

Yesterday, during our discussion, you had mentioned that you were unfamiliar with some of the statements that I had read back to you, your previous statements and writings, including the statements on child pornography and Critical Race Theory. I was a little surprised by that because I know the White House has worked really hard to prepare you for the hearing.

So I wanted to introduce documents just so that we have those in the record, Mr. Chairman. The first document is an article in which you’re quoted as praising the progressive curriculum at Georgetown Day School. The quote appeared in the Winter 2019–2020 edition of Georgetown Day’s magazine.

You stated, and I quote, “Since becoming a part of the GDS community 7 years ago, I have witnessed the transformative power of a rigorous progressive education.”

Second document is a transcript of a 2012 hearing before the Sentencing Commission at a time when you were vice chair of the Commission. The topic was “Child Pornography Offending—Pathways, Community, Treatment.” You stated during the hearing, and I quote, “I had mistakenly assumed that child pornography offenders are pedophiles.”

So I went back and pulled that to show that it was a statement and not a question.

So, Mr. Chairman, I ask permission to enter those.

Chair DURBIN. Without objection.

Senator BLACKBURN. Thank you, Mr. Chairman.

We talked about abortion yesterday, and I want to go back to that. On abortion, I had another question there.

Some have argued that bills seeking to protect children who survive abortions are unconstitutional. They say that the right to an abortion includes the right to an effective abortion. So, in other words, does the constitutional right to an abortion include the right to let a baby die if that baby unintentionally survives an abortion? I’d like to know if you agree with that.

Judge JACKSON. Thank you, Senator.

Issues like the one that you have raised are in the court system now. And as a result, as a nominee to the Supreme Court, I’m not able to opine about the constitutionality or not of the kinds of legislation that you mention.

Senator BLACKBURN. Well, I—you know, one of the main factors the Supreme Court is considering is deciding whether to uphold *Roe* in all of this, and with precedent is if all of this is a settled issue or not. And some of those that are on this about whether it is to an abortion or an effective abortion, and if that constitutional right includes the right to terminate the life of a baby that survives that abortion.

So that is an issue you will—that will be decided before you go to the Court, but I think it's important to have that discussion.

I do want to go back to the issue about the child predators, and as you've heard, Senator Blumenthal and I are working on legislation. Senator Klobuchar has got some legislation that deals with technology. But I want to ask you this because of some of the questioning, and it's just a "yes" or a "no." Do you believe child predators are misunderstood?

Judge JACKSON. Senator, I don't—I don't have a context for that. I believe they are——

Senator BLACKBURN. Well, I'm going back to the comment on the Sentencing Commission, as you said that not all child predators were pedophiles.

Judge JACKSON. Senator, I believe that all child predators are dangerous, that the behavior that they engage in is horrible.

Senator BLACKBURN. Okay.

Judge JACKSON. That it needs to be taken seriously by the Court and by Congress in setting the penalties for their behavior.

Senator BLACKBURN. So is it your position that child pornography offenders are not pedophiles?

Judge JACKSON. Senator, I believe that the statement that you referenced was a part of a hearing before the Sentencing Commission in 2012.

Senator BLACKBURN. It was a meeting, yes. That's right.

Judge JACKSON. It was a meeting. And what the Sentencing Commission does is it——

Senator BLACKBURN. Right.

Judge JACKSON [continuing]. Reviews evidence about various things, and I believe I was——

Senator BLACKBURN. Right. And as I said yesterday, the children that are victimized, they don't understand the difference between an offender and a pedophile or a pornographer. And I do think it's a distinction without a difference.

Let me ask you about gun rights. Violent crime is rampant. We have seen that during the last year it's making people really nervous. I pulled some stats. In 2021, 27 major U.S. cities experienced a 44 percent increase in homicides since 2019. Over a dozen cities set new homicide records in 2021.

And a lot of families no longer feel safe. So they're buying guns. They're buying ammo and trying to make certain that they can protect themselves. And in times like this, I think we're really fortunate that the Founders afforded such constitutional protection as the Second Amendment.

So very quickly, walk me through what current Supreme Court precedent says about the Second Amendment.

Judge JACKSON. Thank you, Senator.

Current Supreme Court precedent——

Senator BLACKBURN. Yes.

Judge JACKSON [continuing]. Says that under the Second Amendment, there is an individual fundamental right to keep and bear arms in the home, and the opinion focuses on those circumstances.

Senator BLACKBURN. Okay. So you agree it is an individual right, and not only reserved to militias. Because there are some that keep trying to say it's only reserved to militias.

But if my memory is correct, you base this on *District of Columbia v. Heller* that it is an individual right?

Judge JACKSON. Yes, ma'am. The——

Senator BLACKBURN. Okay.

Judge JACKSON [continuing]. Supreme Court has established it's an individual right.

Senator BLACKBURN. I wanted to get that on the record because I don't think anybody had asked you that this entire time.

Here is another question. I've asked other judicial nominees that are coming to us for the district court and the appellate court, and I've really not gotten a satisfactory answer from anybody. So why is it constitutionally permissible for the right to keep and bear arms, which the Supreme Court has recognized as a fundamental right—and you agree with that—why is it constitutionally permissible for this right to be subject to the discretionary issuance of a license by a local official?

Judge JACKSON. Thank you, Senator.

The Supreme Court is looking at that very issue in a case before it right now, and as a nominee for the Supreme Court, it's important that I not speak to it because the Court is deciding this question. It has a pending case, I believe arguments have even occurred related to it.

Senator BLACKBURN. Okay. So should other unenumerated rights be subject to the same type of forbearance, having to get a local license? Should someone that wants an abortion have to go before a government bureaucrat? Because the Second Amendment, that right to keep and bear arms, is enumerated in the text of the Constitution. So the question would be why should it have to have an extra burden?

Judge JACKSON. I understand the question. It's one that the Supreme Court is looking at, and consistent with past practice and the need to ensure that I'm not speaking to issues that are live——

Senator BLACKBURN. All right. Then let me move, move on. I want to turn to some of the sentencing decisions, and particularly your decision to grant criminal defendants compassionate release. And you've had an unmistakable pattern of releasing criminals with dangerous backgrounds into the community, and the COVID-19 pandemic seemed to exacerbate the trend.

To name just a few examples, you used the COVID-19 pandemic as justification to release a fentanyl drug dealer, a bank robber addicted to heroin, a convict who murdered a U.S. Marshal back on the streets. And at a time when violent crimes, including homicide, are spiking all across the country, and we're facing an opioid epidemic driven in large part by the trafficking of fentanyl across our border, how can you stand by your decision that these offenders do not pose a danger to the community?

Judge JACKSON. Thank you, Senator, for allowing me to answer this question.

The statutes that govern judges and that allow for compassionate release are policy determinations that Congress has made to permit individuals who are in various circumstances and various stages in the system to seek release. People who are detained after their final sentencing can seek something called compassionate re-

lease. People who are detained between when they've been convicted and when they're sentenced can—

Senator BLACKBURN. Right. I—not to cut you off, but time is going to run out, and we do have—you know, this is a question that I have been asked so much. Here is a stack. These are the ones that you sought for compassionate release.

There were 1,561 that were detained in DC Department of Corrections, and your statement—and this was in the opinion that you issued. It was *U.S. v. Wiggins*. You stated, and I'm going to quote you, "Each and every criminal defendant in the DC Department of Corrections custody should be released because of the COVID-19 pandemic."

And in that same opinion, you lamented the fact that you, as a Federal judge, were limited in your ability to order the universal release of criminals back onto the streets. And I am shocked that that would have been your position because people are so—they are just really concerned about crime in the streets.

So do you stand by your position that it would have been the right thing to do to release all of those prisoners back onto the streets during COVID?

Judge JACKSON. Senator that was not my position. In that opinion, *United States v. Wiggins*, I started off by explaining that, given the compassionate release system and the COVID-19 pandemic, it would seem as though that was an extraordinary and compelling circumstance. But two sentences later, I say we can't release everyone. There are people who are too dangerous to release.

And so even in *Wiggins*, I decided that he had to remain incarcerated, notwithstanding his compassionate release motion. So the point, the sentence that I have there I did say, but I said it to lead up to my statement, which was the actual ruling in which I said we are not releasing everybody. We are not opening the jails.

Senator BLACKBURN. And Judge, you know, to lament that you were limited in your ability to order the release of all. That is what causes—that is a judgment issue, and that is what causes the concern with that.

Let me go to the Critical Race Theory issue because you were asked yesterday about a speech you gave in April 2015 when you had stated, and I'm going to quote you again, that it melds—when you were talking about sentencing. "It melds together myriad types of law, including Critical Race Theory."

And you told Senator Cruz, I think it was, that when you made that statement, you were talking about decisions regarding sentencing policy. You said, and again, I'm going to quote, "I was talking about policy determinations. None of that relates to what I do as a judge." I take that to mean that you don't make policy determinations when you're making sentencing decisions as a judge.

So, today, in response to a question from Senator Grassley, you said the exact opposite. You said, and I'm going to quote you again, "I have at times identified various enhancements that I have disagreed with as a policy matter because the Supreme Court has said that that's the authority of a sentencing judge in our system."

So given that you admitted you made policy determinations in sentencing and you stated that you consider Critical Race Theory

in sentencing policy, let me ask you again. Do you consider Critical Race Theory in your sentencing decisions as a judge?

Judge JACKSON. Thank you, Senator.

Critical race theory, any academic theory is not considered in my sentencings. It never comes up in sentencing. It was not what I was talking about in the speech in 2015.

Senator BLACKBURN. Okay. I appreciate that. I do have one intellectual property question I'm going to submit to you for writing. You've had a long day.

Judge JACKSON. Thank you.

Senator BLACKBURN. And you've been very gracious. And I think that these are tough questions, but this is part of our doing our due diligence and meeting our responsibility to the people that we represent. And they expect this of us.

And as I mentioned, they've been very engaged in this. As some have said, you know, I think I would like her. I don't agree with her, or I agree on some things, but not on everything. But they want to know what you're going to do when you get on the Court because their kids and their grandkids are not going to have the opportunities that you have had unless we keep this Nation free.

So it demands your best, and it demands that you go to the Constitution first. In your opening statement, I pulled this, and this is where I'll end with you. You say, "I've been a judge for nearly a decade now, and I take that responsibility and my duty to be independent very seriously. I decide cases from a neutral posture. I evaluate the facts, and I interpret and apply the law to the facts of the case before me without fear or favor, consistent with my judicial oath."

I wish you had said "consistent with the Constitution of the United States."

Thank you so much, Judge, for being with us.

Thank you, Mr. Chairman.

Chair DURBIN. Thank you, Senator Blackburn.

This concludes our rounds of questioning.

And before we recess, a few observations. First, Judge Jackson, you are extraordinary. Your story is a great American story and I think we've all benefited by getting to know you a little better during the last 2 days.

You are exceptionally qualified for this position, I won't read through your résumé. It's been read many times. But I think there is no one in the room who, in the 2-day period of time, has questioned your qualifications.

There have been some dissenters. My colleagues promised a fair and respectful hearing. Most, including my Republican colleague Senator Grassley, followed that admonition. He always does. But there were a few obvious glaring exceptions, and I'm sorry for that. But your patience, dignity, and grace in the face of what was, frankly, some offensive treatment is a real testament to your judicial temperament.

To your mom and dad and the Brown family, and your Chicago lawyer brother, I thank you for being with us and being part of this historic occasion. Dr. Patrick, I don't know if surgery is any easier than this, but I imagine that you—

Dr. JACKSON. Much.

[Laughter.]

Chair DURBIN [continuing]. Want to get back to it.

And I just want to say a word to Leila and Talia, if she's here or if she can hear us. You've got a great mom. You really do. And what she's been through in the last couple days, most people would not even consider going through one minute. But she is strong. She is caring. She's kind. And you're lucky to have her, and we're going to be lucky to have her on the Supreme Court.

So we've got a little bit of work to do. Incidentally, I could go through the list of all the invitees that have been filing in and out of the room behind you, wanting to be here for a moment to share this history with you.

I will let you in on something that you may know. Tomorrow, we're going to announce that you've been rated "unanimously well qualified" by the American Bar Association. That's the highest possible rating.

We're going to conclude the public portion of this hearing and convene in Dirksen 226 for a closed session for discussing the background investigation. That should only take a minute or so.

And I have discussed this with the Ranking Member, Senator Grassley, and for the information of all Members, the Committee will meet in executive session to consider Judge Jackson's nomination to the Supreme Court on this Monday, March 28 at 3 p.m.

And with that, the Committee stands in recess.

Thank you.

Judge JACKSON. Thank you.

[Whereupon, at 7:35 p.m., the hearing was recessed.]

[Additional material submitted for the record for Day 3 follows Day 4 of the hearing.]

**CONTINUATION OF THE
CONFIRMATION HEARING
ON THE NOMINATION OF
HON. KETANJI BROWN JACKSON
TO BE AN ASSOCIATE JUSTICE OF THE
SUPREME COURT OF THE UNITED STATES**

THURSDAY, MARCH 24, 2022

UNITED STATES SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Committee met, pursuant to notice, at 9:03 a.m., in Room SH-216, Hart Senate Office Building, Hon. Richard J. Durbin, Chair of the Committee, presiding.

Present: Senators Durbin [presiding], Whitehouse, Klobuchar, Coons, Blumenthal, Hirono, Booker, Padilla, Ossoff, Grassley, Cornyn, Lee, Cruz, Sasse, Hawley, Tillis, and Blackburn.

**OPENING STATEMENT OF HON. RICHARD J. DURBIN,
A U.S. SENATOR FROM THE STATE OF ILLINOIS**

Chair DURBIN. Good morning. A special welcome to the guests who are testifying before us today. Traditionally, the Supreme Court hearings end with a day of testimony from outside witnesses, and this approach will be no different.

The last 3 days have been long and exhausting for Senators, and I'm certain they were much more so for Judge Jackson. I believe that she carried herself with grace, humility, and dignity, was thoughtful and forthright in her responses. I can't tell you how many people have spoken to me since the end of last—yesterday's hearing and talked about how she managed to maintain that grace and dignity throughout all of the questioning.

I look forward to hearing from today's witnesses, starting with the American Bar Association's Standing Committee on the Federal Judiciary. With us today from the ABA are three witnesses: the Honorable Ann Claire Williams, who is the chair of the Standing Committee, as well as Mr. Joseph Drayton, and Mrs. Jean—Ms. Jean Veta. I'm glad all three are here, and I would be remiss if I didn't say a special word about my dear friend, Judge Williams, an Illinoisian, the first judge of color to sit on the Seventh Circuit, and a special attachment she has to Notre Dame University, which I learned. She was nominated by President Reagan in 1985 to serve on the Northern District of Illinois, and then in 1999 nominated by

President Clinton—talk about bipartisanship with my strong support—to serve on the Seventh Circuit.

After stepping down from the bench in 2017, she joined the Chicago office of Jones Day where her work focuses on efforts to advance the rule of law in African nations. She is truly, truly a respected leader in the Chicago legal community, and I'm looking forward to her testimony.

These panelists from the ABA are here to talk about their rating of Judge Jackson, a unanimous rating of "well qualified." The Standing Committee confines its evaluations to qualities of integrity, professional competence, and judicial temperament, and they unanimously found Judge Jackson in all of these areas to be deserving of their highest rating. This comes as no surprise. It's exactly what we saw in the last few days from Judge Jackson, and I'm looking forward to hearing more about the Standing Committee's evaluation.

Let me say a few words about this nomination hearing. First, I want to salute this man sitting to my right and to your left. I am fortunate to have a Republican leader on their side who is such a gentleman and has such a high degree of integrity. He and I were just reminiscing about the history of the Senate and the nomination process. Throughout, we have maintained an honest relationship, no surprises, no stabbing in the back, so that we know which way we're going. I'm a lucky man to have him as my Ranking Member. Thank you, Senator Grassley.

Senator GRASSLEY. Thank you.

Senator TILLIS. Mr. Chair?

Chair DURBIN. Who's seeking—

Senator TILLIS. Over here. Mr. Chair?

Chair DURBIN. Over there. Senator Tillis, I'm sorry.

Senator TILLIS. I also would like to point out that 62 years ago this week, Chuck Grassley started his political career in the Iowa State Legislature. And I believe we—I shared a picture with him this week, and I believe that picture was him debating Iowa statehood. I'm not sure.

[Laughter.]

Senator TILLIS. And I also reminded him that he gave birth to his political career a year after my mother gave my birth.

Chair DURBIN. Yes.

[Laughter.]

Chair DURBIN. Well, I will tell you that I'm also fearful of what I just said because one year I did something like this, and he took a quote from me and put it in his campaign brochure.

[Laughter.]

Chair DURBIN. I received telephone calls from Iowa Democrats saying, what are you doing. So—

[Voice off microphone.] Don't do it again.

Chair DURBIN. I'm also—I want to thank the Members on the Republican side. The majority of them handled themselves professionally in the best traditions of the United States Senate. Senator Sasse of Nebraska is not here, but I want to thank him particularly for a comment he made, which has been quoted widely, in which he used the term "jackassery," which I had never heard before. And

I thank him for that observation because I think there was great truth in what he said.

I wish I could say that across the board. On our side of the aisle, I'm proud of all our Members, particularly proud of one Member who spoke at right—at the right moment. My wife is my go-to critic of what's happening in my political life and on this Committee, and she said when Cory Booker spoke yesterday, it cleared the air finally and refocused us on what we were doing and why we were here. And I have to tell you, his statement will go down in the annals of this Committee and the United States Senate for the impact that they had at the moment.

I wish I could say that for all of the things that have happened over the last 72 hours, but I can't. Some of the attacks on this judge were unfair, unrelenting, and beneath the dignity of the United States Senate. You can disagree with a Senator's vote, you can disagree with a judge's ruling, but to draw conclusions that really reflect on them personally and their values and take it to the extreme is unfair, whether the nominee is a Democrat or a Republican. I was so saddened by that, and it happened over and over and over again, and I hope that that is not the lasting impression that the people have of the work of this Committee.

My lasting impression is of a judge who sat there through it all, head held high with dignity and determination and strength. A lesser person might've picked up and told her family, we're leaving, this is beyond the pale. She didn't, and it says an awful lot to me about her character and why the President was correct in choosing her to be the next Supreme Court Justice.

Before we turn to questions, I want to turn to Senator Grassley for opening remarks.

Senator GRASSLEY. I have no opening remarks.

Chair DURBIN. Well, that's new.

[Laughter.]

Senator GRASSLEY. Yes, it is.

Chair DURBIN. Now let me turn to the ABA panel. Before you make your opening statements, I'll swear you in, if you'd please stand and raise your right hand.

[Witnesses are sworn in.]

Chair DURBIN. Let the record reflect that the witnesses have all answered in the affirmative.

Judge Williams, please commence.

Judge WILLIAMS. Good morning, Chair Durbin.

Chair DURBIN. You need to turn on your microphone.

Judge WILLIAMS. All right. Thank you.

STATEMENT OF HON. ANN CLAIRE WILLIAMS, JUDGE, RETIRED, AND AMERICAN BAR ASSOCIATION, STANDING COMMITTEE ON THE FEDERAL JUDICIARY, WASHINGTON, DC

Judge WILLIAMS. Good morning, Chair Durbin and Ranking Member Grassley. You were at both of my confirmation hearings, and yes, so a thumbs up to you, Senator Grassley, and other Members. It's an honor and privilege to appear before this Committee. Thank you for the invitation, Chair Durbin.

I'm a retired Federal judge, as you said, and chair of the American Bar Association's Standing Committee on the Federal Judici-

ary. Today I'm joined by our two principal evaluators, Jean Veta, D.C. Circuit representative, and Joe Drayton, the Federal Circuit representative. Our vice chair, David Brown, deeply regrets that he is unable to attend, particularly since he was the principal evaluator of Judge Jackson's D.C. Circuit nomination.

For almost 70 years, the Standing Committee has been asked to present to this Committee our peer-reviewed, independent, non-partisan, comprehensive ratings on the professional qualifications of lifetime-appointed Federal judges. The Standing Committee is made up of outstanding lawyers from every circuit with varied backgrounds, professional experiences, and practicing in law firms with 6 to 2,000 lawyers. We don't give suggestions on who should be nominated, don't recommend or endorse any nominee. We don't base our ratings on or express any view of the nominee's philosophy, political affiliation, or ideology. Nonpartisan peer-review evaluations are the hallmark of the Standing Committee.

We began our work on February 25th, the day Judge Jackson was nominated. On 8—March 18th, the Standing Committee voted unanimously that Judge Jackson earned our highest rating, "well qualified," for an appointment to the Supreme Court. Why? Quite frankly, "well qualified" was a rating we were compelled to reach after our exhaustive, comprehensive peer review. To get that "well qualified" rating, a Supreme Court nominee must be a preeminent member of the legal profession, have outstanding legal ability, have exceptional breadth of experience, and meet the very highest standards of integrity, professional competence, and judicial temperament.

Everyone we talked to, interviewed, or had substantive contact with uniformly gave the highest praise: "brilliant," "beyond reproach," "first rate," "patient," "insightful," "impeccable," "A-plus." We contacted more than 2,800 judges and lawyers, including Federal judges, from 50 States, 13 circuits, 94 districts, as well as State supreme court justices, law school deans, and bar associations. We focused our confidential interviews on those who had first-hand knowledge of her legal abilities. We spoke to Federal prosecutors, defense counsel, civil lawyers who appeared before Judge Jackson, her judicial colleagues, and judges, and lawyers that were very familiar with her career before she became a judge.

We created three reading groups to examine over 240 of her published opinions and other writings because the principal way Supreme Court Justices communicate is by writing opinions. Opinions that touch the lives of people throughout this Nation for years to come. Two academic reading groups from the University of Illinois and Stanford, co-chaired by each school's dean, working independently, 37 academic experts, and 18 member practitioner reading groups reviewed the same writings, the majority former law clerks to Supreme Court Justices, Justices appointed by both political parties. Most have regularly argued before the Supreme Court. Their words: "strikingly talented," "even handed," "exceptional," "thorough," "respectful."

Finally, we went beyond what Judge Jackson does in the courthouse. We looked at the other contributions she's made on the Governing Council of the American Law Institute, the United States Sentencing Commission, a bipartisan commission, Chief Justice

Roberts' appointment to the Judicial Conference of Defender Services Committee. Representatives from every organization said again and again: "humble," "brilliant," "consensus builder."

The question we kept asking ourselves, how does one human being do so much so extraordinarily well, reflecting the combined views of more than 250 judges, attorneys, and academics? The Standing Committee concluded that Judge Jackson is well qualified to serve as an Associate Justice on the Supreme Court.

I now turn to Jean Veta for more specifics on the findings from judges and lawyers, and then Joseph Drayton with comments on the reading groups and the breadth of Judge Jackson's experiences.

[The prepared statement of Judge Williams on behalf of the American Bar Association appears as a submission for the record.]

Chair DURBIN. Thank you. Ms. Veta?

**STATEMENT OF D. JEAN VETA, AMERICAN BAR ASSOCIATION,
STANDING COMMITTEE ON THE FEDERAL JUDICIARY**

Ms. VETA. Thank you, Mr. Chairman, Ranking Member Grassley, and Members of the Committee. My name is Jean Veta, and I am the co-lead evaluator of our committee's evaluation of Judge Jackson.

In assessing the professional qualifications of Federal judicial nominees, our committee considers three factors: integrity, professional competence, and judicial temperament. I will address each of these factors in turn and explain why Judge Jackson readily meets our "well qualified" rating.

In evaluating integrity, our committee considers the nominee's character and general reputation in the legal community as well as the nominee's industry and diligence. We surveyed countless lawyers and judges at every level of the Federal judiciary, and all regard Judge Jackson as possessing the utmost integrity. Reviewers describe her integrity as: "beyond reproach," "impeccable," and "of the highest caliber." As one reviewer put it, "You write the word 'integrity,' and then you put her initials next to it." Another reviewer said, "Judge Jackson has a well-deserved reputation for the highest level of ethics and integrity." Based on these and many other laudatory comments, the Standing Committee concluded that Judge Jackson plainly possesses the highest integrity, deserving of a "well qualified" rating.

In evaluating a nominee's professional competence, our standards provide that a nominee for the Supreme Court must possess exceptional professional qualifications, including an especially high degree of legal scholarship, strong analytical and writing abilities, and overall excellence. Judge Jackson ably meets this heightened standard. As summarized by one judge, "Studying her opinions is like a master class in judicial writing." An appellate jurist stated that she, quote, "She does a fantastic job of making impenetrable issues understandable." And a litigant who lost a case before Judge Jackson stated, "I've appeared before Judge Jackson many times, both in the district court and in the D.C. Circuit. In my opinion, Judge Jackson is one of the very best judges or, for that matter, Justices, I have ever argued a case in front of. She is brilliant. Her intellect is simply formidable. And equally important, she possesses all of the other important attributes of a great jurist. She is prac-

tical and intuitive and curious and courteous, and always impeccably well prepared.”

Given the uniform strength of these and many other comments, the Standing Committee readily concluded that Judge Jackson demonstrates the exceptional professional competence expected of a Supreme Court Justice, and thus merits a “well qualified” rating.

Finally, in evaluating judicial temperament, the Standing Committee considers a nominee’s compassion, decisiveness, open-mindedness, freedom from bias, and commitment to equal justice under the law. As part of our evaluation, we considered whether Judge Jackson demonstrated any bias that favored criminal defendants. Notably, no judge, defense counsel, or prosecutor expressed any concern in this regard, and they uniformly rejected any accusations of bias.

For example, when asked about the allegation that Judge Jackson is soft on crime, one high-ranking attorney in the U.S. Attorney’s Office responded, “I vehemently disagree.” Another prosecutor, who has appeared multiple times before Judge Jackson, responded by saying such an allegation, quote, “absolutely was not borne out based on my experience with her.” Instead, prosecutors like the other lawyers we interviewed praised Judge Jackson as a judge who considers all arguments before coming to a decision. One prosecutor stated that Judge Jackson was generally regarded by his office as “a good draw” because, as he put it, “She is a smart judge without any biases, which is all we’re asking for.”

For these reasons, the Standing Committee found that Judge Jackson clearly meets the “well qualified” rating for judicial temperament expected of Supreme Court Justices.

In sum, because Judge Jackson easily satisfies the highest standards of integrity, professional competence, and judicial temperament, it is the ABA Standing Committee’s unanimous conclusion that Judge Jackson is well qualified to serve as an Associate Justice of the Supreme Court of the United States. Thank you.

Chair DURBIN. Thank you, Ms. Veta.

Mr. Drayton, you’re with the law firm of Cooley, LLP, and lead evaluator. Would you please report to the Committee what you found?

STATEMENT OF JOSEPH M. DRAYTON, AMERICAN BAR ASSOCIATION, STANDING COMMITTEE ON THE FEDERAL JUDICIARY

Mr. DRAYTON. Thank you, Chair Durbin, Ranking Member Grassley, esteemed Senators. To supplement our discussion, I will share a perspective related to Judge Jackson’s writings and her contributions to shaping the law. Various groups of highly credentialed judges, lawyers, administrators, and legal scholars confirm that Judge Jackson has the ability, as required by our standard for a Supreme Court nominee, to communicate clearly and persuasively in a manner to harmonize bodies of law and to give guidance to lower courts and the legal community, and she has done so across a significant range of complex issues.

Judge Jackson, for example, has served on the American Law Institute and their Leadership Council, an organization impacting American jurisprudence for close to 100 years. It publishes Restatements of the Law, Model Code, among other things. Her fellow ALI

leaders remarked, and I quote: “incredible work ethic,” “very well prepared.” Another quote: “I would describe her competence in this way: thoughtful intelligence, thoughtful superior competence.” With regard to Judge Jackson’s service as vice chair of the United States Sentencing Commission, a bipartisan, independent agency created by Congress to, among other things, reduce sentencing disparities, her fellow commissioners praised her contributions, and their collective views are summed up by three quotes. The first quote: “She was gracious, respectful, and wonderful to work with. She remained calm and positive, even when debating emotional issues of sentencing policy. She was also very trustworthy, absolutely no indicia of bias.” Second quote: “She works hard and is committed to the rule of law.” Third representative quote: “Judge Jackson was a strong consensus builder during her time as a commissioner who worked across party lines.”

Judge Jackson also served on the United States Judicial Conference Committee on the Defender Services, which oversees the Federal Defenders Program and the Administration of Criminal Justice Act. Quotes reflective of her committee members: “Judge Jackson listens carefully, and when she spoke and weighed in, she was persuasive and often would sway the whole room. She is highly respected.” Second quote: “An independent thinker who brings a different viewpoint to the Court.” Third quote: “Brilliant and conversant in many areas of law.”

I next turned to an observation of our scholarly reading groups, our teams of law professors and legal experts from Stanford and the University of Illinois College of Law, as well as practitioners that include former Supreme Court clerks, law partners, attorneys who worked at the Solicitor General’s Office, and veteran evaluators of Supreme Court nominees, all of whom were impressed.

One reviewer who argues routinely before the High Court described Judge Jackson’s writing in a manner representative of the collective thoughts of all three reading groups, and I quote, “Her opinions consistently reveal a deep commitment to legal process. She identifies and states the relevant legal standard and meticulously applies them to particular records. The hallmark of her opinions is thoroughness. No matter how routine the case, Judge Jackson’s opinions precisely and exhaustively describe the applicable standards and doctrinal context, recite in detail the contentions of the parties, and painstakingly explains her applications of those legal standards. Her opinions are also structured. She at all times orients the readers to the guidepost for her decision and her reasons for reaching them. Her opinions show no favoritism or bias,” close quote. This type of comment is representative and consistent across all reviewers and provides keen insight into Judge Jackson’s approach to adjudicating legal issues.

In conclusion, Judge Jackson’s leadership in the legal profession, reputation among such leaders, acclamatory remarks from each of these groups consisting of well over 60 of the top legal minds in our country, further supports that Judge Jackson is a preeminent member of the legal profession, with outstanding legal ability and exceptional breadth of experience, and merits the highest rating of the American Bar Association’s Standing Committee on the Federal

Judiciary, the rating of “well qualified,” to serve on the U.S. Supreme Court.

Chair DURBIN. Thank you, Mr. Drayton. I want to also acknowledge, as Judge Williams has, the contributions of the two universities, Stanford and University of Illinois, in this process. I want to make a note for the record that virtually everyone involved in it was doing it on a volunteer basis to serve the needs of the profession.

And I also would like to establish one other point. I believe, Judge Williams, you said some 2,800 people were contacted, interviewed in this process, represented virtually everyone who came into contact with her professional career who was available to question. So it strikes me that this is the kind of scrutiny, which is rare but is—was done in a professional and complete way.

So here’s the question I have to ask. When you were looking for certain things, over the last several days here in this Committee, we have had a handful of Senators argue that Judge Jackson is out of the mainstream when it comes to sentencing, particularly when it came to sentencing in cases involving child pornography, for example. And this was stressed over and over and over and over again. So in the course of your interviews of 2,800 people who came in contact with her, would such an assertion have arisen during the course of your questioning? Were there people who would’ve been able to observe whether they felt, at a professional level, there was any truth at all to that charge?

Judge WILLIAMS. Well, first, Senator Durbin, you said 2,800 that we spoke with or interviewed. We cast a very wide net, so we contacted 2,800. But we actually spoke with 250 judges and lawyers who had firsthand knowledge. We don’t rely on someone just saying she has a good reputation. We find out what the basis of that is. Have they appeared before her? Have they worked with—alongside of her? Have they been on a committee with her? And with respect to those issues, I’ll turn to Judge Drayton. Sorry, Joe, I’m promoting you now. I’ll turn to Joe Drayton who actually spoke to various prosecutors about this issue because it never came up in any of the interviews we conducted.

Mr. DRAYTON. Yes. Chair Durbin, we did speak to various prosecutors and defense counsel who appeared before Judge Jackson, the majority of them in 9 child porn cases and child sexual offense cases, and none of them felt that she demonstrated bias in any way, and I can share a few remarks from some of the people that I personally spoke to. And one prosecutor said, “I did not observe any bias, and the judge was fair to all sides in connection with sentencing in all aspects.” Another prosecutor remarked, “Judge Jackson displayed the highest level of competence and integrity throughout the proceedings. Her rulings on the state of the law were reasoned and steeped in authority.” And we asked pointed questions as it related to bias, whether it be to defendants, whether it be to the Government, and we found no bias.

Chair DURBIN. So one of the Senators on the other side actually tweeted that they felt that her sentencing in these child pornography cases, in sexual abuse cases, “endangered children.” Those were his exact words: “endangered children.” What I’m asking you is, would that have come out—I mean, during the course of your

interviews with all of 250 judges and professionals who had contact with her, would such a thing have emerged from your questioning?

Mr. DRAYTON. To the extent that a prosecutor or defense counsel who appeared before her in those types of cases felt that way, it would've come out in our interviews. We have a confidential interview process that allows us to really have transparent communications with the folks that appear before nominees, and we did not find any evidence of that.

Chair DURBIN. No evidence of it.

Mr. DRAYTON. No evidence.

Judge WILLIAMS. And I might add, Senator Durbin, we went beyond the Senate Judiciary questionnaire, so not just the individuals who are listed there that the nominee selects, but beyond that, to test her—her ability, to test her integrity, to test her ability to be a fair and impartial jurist, and it never came up in any group.

Chair DURBIN. And also the assertion was made over and over and over again that Judge Jackson was soft on crime when it came to prosecution versus defense, that her background as a public defender, the fact that she would consider representing a detainee who's being detained at Guantanamo Bay, raised the question of whether or not she was soft on crime. I assume that means releases people who would be a danger to the community in an unfair manner. Did you find any evidence from all the people that you interviewed of that assertion?

Judge WILLIAMS. None whatsoever, and Jean Veta actually did most of the work in that area.

Ms. VETA. And, Mr. Chairman—Mr. Chairman, in response to the question you raised, we heard consistently from not only defense counsel, but prosecutors, how unbiased Judge Jackson is. We heard phrases like, “doing things by the books.” And, for example, one prosecutor described a sentencing hearing involving a very high-profile, sensitive national security matter, and what she said was, “It was classic Judge Jackson.” She said, “I had my sentencing manual, Judge Jackson had her sentencing manual, the defense counsel had his sentencing manual, and we went page by page,” and it was a very complicated legal issue that they were trying to work their way through. And what this prosecutor said was that Judge Jackson put both parties through their paces.

And what really impressed this prosecutor was that after oral argument, Judge Jackson took a recess, went back to chambers, and when she resumed the bench, came out with a sentence that was more in favor of the Government. And what more impressed the prosecutor was that the judge's ruling included arguments and—that had been made both by the defense and the prosecutors during oral arguments. So it's not as if she came into the hearing with her mind made up. She listened to what counsel on both sides said and then came up with a sentence that the prosecution was quite happy with.

Chair DURBIN. So from what I gather, and I'm going to turn to Senator Grassley, the facts as well as the observations of 250 professionals belie two of the major criticisms that emerged over the last several days before this Committee in terms of the sentencing standards that were being used by Judge Jackson in cases—very sensitive cases—involving exploitation of children, as well as her

general approach against the prosecution and defense in criminal cases, led those who were her contemporaries and her peers, and worked with her on a professional basis, to conclude that she met the highest of the legal standards that one could ask.

I think that is what obviously led to your conclusion, the American Bar Association, that she's unanimously well qualified to serve on the Supreme Court.

Ms. VETA. Your characterization is correct.

Judge WILLIAMS. Absolutely, Senator.

Chair DURBIN. Thank you very much. Senator Grassley.

Senator GRASSLEY. I think you'll find my tone a little bit different than it has been sometimes that I've questioned ABA about—I've been critical of your involvement in this process, so I hope you understand. Well, maybe some of you folks haven't been around long enough to know my history of criticizing the ABA from time to time. So my first question is, does it remain the ABA's policy to keep confidential the names of the people it's interviewed as well as its material dealing with deliberations and analysis of nominees? Is this information available to the Judiciary Committee?

Judge WILLIAMS. Senator Grassley, that is our policy. Those interviews—the names are kept confidential. The deliberations are kept confidential. And the heart of it and the reason, Senator Grassley, is because we want candid, honest statements from those that we interview. If people knew their names would be associated with their comments, no one would answer our calls. No one would answer our calls. And if our deliberations were shared openly, again, even if we didn't name a name, one might be able to identify who made particular statements. The whole key of the ABA investigation, we're the peer review—

Senator GRASSLEY. I think that satisfied it with what you said.

Judge WILLIAMS. All right.

Senator GRASSLEY. Can you then tell me how—just give me some justification, without having that information, that the interviews are not stacked for or against a particular nominee. Please give a short answer.

Judge WILLIAMS. All right. The evaluators take what I think is almost like a sacred oath to conduct nonpartisan questioning, to get to the bottom line, to make sure individuals are able to be free to answer the questions that we pose. And, Jean, you might want to comment more on that.

Senator GRASSLEY. I think—I think you've answered that okay. What I need to just hear from you, accepting the legitimacy of everything you've told me to this point, would there be anything wrong with people interviewing it or for Members of this Committee seeing that material in a confidential environment?

Judge WILLIAMS. There would be a problem with that, Senator.

Senator GRASSLEY. Because if two people know about anything in Washington, DC, it's no secret.

Judge WILLIAMS. Well, you are absolutely right about that.

Ms. VETA. Only one of us is from Washington on this panel.

[Laughter.]

Senator GRASSLEY. Okay. You gave Judge Jackson a "well qualified" rating but most recently gave Justice Amy Coney Barrett, a

minority “well qualified” rating. Besides the reading groups, what objective measurements of writing or analytical skill do you use?

Judge WILLIAMS. Well, first, Senator Grassley, if I could make one point, Judge Barrett actually received a “well qualified” rating. When the majority votes “well qualified” or “qualified,” if it’s a majority vote, the rating of the nominee is qualified as “qualified.”

Ms. VETA. Is “well qualified.”

Judge WILLIAMS. “Well qualified.” We use the very same standard for each nominee, and we followed the process with Justice Barrett. I wasn’t on the committee at the time. Certainly our report is a matter of public record, but the bottom line is she received a “well qualified” recommendation from this Committee—rating from this Committee.

Senator GRASSLEY. Give me just a rough idea of the objective measurements you—writing or analytical skills.

Judge WILLIAMS. Well, her analytical skills were excellent, as I recall from our report. As I said, you can refer to that report, and as I said, our rating was “well qualified.”

Senator GRASSLEY. Why did you choose to limit your review of her record to her, quote, unquote, “over 240 published opinions” on the district court?

Judge WILLIAMS. You mean Judge Jackson, the reason we limited—we focused on published opinions. We focused on other writings, and we had the reading groups focus on those, and we did not delve into the other orders. Many of those were very short. Many of those didn’t really give a sufficient—many of the orders were short. I guess that’s the easiest way to say it. And so the published opinions, which people view, we felt were more important to review. We also consult—consulted with our academic committees and our practitioners group, and they felt that those writings that were published would be most appropriate. Joe, did you have anything?

Ms. VETA. Well, and, Senator Grassley, on that point, as you know, published opinions among—within the legal community are those that are relied on for precedential value more so than unpublished opinions. So it was really those opinions she was putting out there for the legal community.

Senator GRASSLEY. I might have one question I’ll submit to you for answer in writing.

Chair DURBIN. Thank you, Senator Grassley.

Senator Whitehouse.

Senator WHITEHOUSE. Thank you, Chairman, and welcome to the members of the panel. I don’t know any of you and I don’t know your backgrounds very well, so I don’t know if any of you have ever been involved in a sentencing proceeding.

Judge WILLIAMS. I have—

Senator WHITEHOUSE. Ms. Williams, have you?

Judge WILLIAMS. Yes, I have many times because I served on a district court for 13 years.

Senator WHITEHOUSE. As a district court judge?

Judge WILLIAMS. Yes.

Senator WHITEHOUSE. So when a Federal sentencing proceeding is going on, the judge involved—you in the case of your own courtroom—gets recommendations as to what sentence should be im-

posed from several different sources during the sentencing proceeding. Is that correct?

Judge WILLIAMS. That's correct.

Senator WHITEHOUSE. One of those sources is the U.S. Attorney's Office.

Judge WILLIAMS. Yes.

Senator WHITEHOUSE. They're the prosecutors.

Judge WILLIAMS. Yes.

Senator WHITEHOUSE. And do they customarily ask for higher sentences? Well, let me go back. The others who offer recommendations to the court are the defense counsel?

Judge WILLIAMS. Yes.

Senator WHITEHOUSE. Defense counsel will offer a recommendation on behalf of the defendant, correct?

Judge WILLIAMS. Yes.

Senator WHITEHOUSE. And the court is also served by the probation department in all of this, and the probation department also makes recommendations—

Judge WILLIAMS. Yes.

Senator WHITEHOUSE [continuing]. Regarding the application of the—

Judge WILLIAMS. Yes, in a presentence report, Senator.

Senator WHITEHOUSE. Correct. Of those three, is it customarily the prosecutor's office that makes the highest sentencing recommendation? Not every time, but is that the sort of ordinary course of events in a sentencing?

Judge WILLIAMS. I can't agree with that statement, Senator. You're asking me about cases generally.

Senator WHITEHOUSE. Yes.

Judge WILLIAMS. And that was not my experience.

Senator WHITEHOUSE. Let me ask—

Judge WILLIAMS. It was a mix. Sometimes the Probation Officer would make a recommendation higher than the prosecution. Sometimes the prosecution's recommendation—well, certainly the defense didn't object if it was lower than what the defense recommended.

Senator WHITEHOUSE. You rarely saw a defense recommendation higher than the prosecution.

Judge WILLIAMS. Exactly. That's exactly what I'm saying.

[Laughter.]

Judge WILLIAMS. But all of those were taken into account. And then the sentencing guidelines, Senator, are very—an instrument that judges use because the sentencing guidelines identify a defendant as identified by their criminal history, so if you have no convictions, you start out as a 1. You look at the crime itself, and there are various factors that add the numbers up. And then you look at the criminal history number and you look at the offense number, and it gives you a guideline range.

Senator WHITEHOUSE. Yep.

Judge WILLIAMS. And that's what judges take into account along with what the prosecutor says, the defense counsel says, and the Probation Officer says.

Senator WHITEHOUSE. Is the recommendation of the United States Attorney's Office the appropriate benchmark by which to measure the judge's sentence?

Judge WILLIAMS. Not in my opinion. I think all of those factors that we identified are critical in the judge making a decision.

Senator WHITEHOUSE. Yes. Thank you very much.

Chair DURBIN. Senator Cornyn.

Senator CORNYN. Thank you, Mr. Chairman. Thank you all for your testimony today, and I know a lot of hard work went into the—what you've produced here. I want to just ask a question generally about the American Bar Association. I've been a member of the American Bar Association in the past. Frankly, on occasion I've been troubled by some of the public advocacy of the American Bar Association on behalf of legal profession that, frankly, did not represent my views. And I want—I'm just looking here at the—for example, at the website of the American Bar Association and under a heading that says, "What's New in Washington," for example, the ABA president wrote a letter to the Secretary of Homeland Security urging temporary protected status for people who are refugees from Ukraine, for example. That's obviously a matter of great public interest.

But some of the areas that the—that the ABA president has also opined on—for example, opposing certain provisions of Florida legislation, the Florida Senate Bill 1843 and House Bill 1557, which concerns parental rights in education—obviously that's another matter of tremendous public interest and discussion in the press and elsewhere. And then finally, I'll mention, because there's a whole long list and—but I'm trying to give you some specifics that hopefully make my—frame my question.

There is a—there's also a position where the ABA is asking for migrants who come across the Southwestern border and claim asylum to provide them lawyers. And as you know, there's been 2 million, roughly, people—border encounters in this last year alone. Obviously whether or not taxpayers should be required to provide lawyers for people who are not citizens of the United States and who are claiming asylum is a controversial matter.

So I'd like to know, how should people understand ABA's role when it comes to speaking to these matters? Are you a public advocacy association, and if so, people should be able to understand that maybe some of the opinions you render in terms of judicial qualifications should be understood in a larger context. But I'd appreciate if you'd take a stab at answering my maybe not great, well-formed question, but I think you get the drift.

Judge WILLIAMS. Oh, I definitely get the drift. And, Senator, I think it's really important for me to make clear, the only action that the ABA takes with respect to the Standing Committee is appointing the members of the committee. We stand alone. The only function that we have is peer-reviewed evaluation. So we do not stand for the American Bar Association in the sense that you made, all the different positions you outlined, and that's purposeful. It's purposeful that we do our work in rating nominees and don't have anything to do with the policies of the American Bar Association. Both Jean and Joe have served on the committee longer and might want to comment on that as well.

Senator CORNYN. Certainly.

Ms. VETA. Yes, Senator. As Judge Williams said, we are separate and apart from the ABA. So I understand the questions you're raising about ABA policies and would invite you to ask those of the president of the ABA because, as Judge Williams said, our committee has nothing to do with those policies.

Senator CORNYN. Well, you're here representing the ABA, correct?

Ms. VETA. No, sir, we're here representing—

Senator CORNYN. Oh, you're not?

Ms. VETA. The Standing Committee of the Federal Judiciary of the American Bar Association.

Senator CORNYN. Right, but that's part of the ABA, right?

Ms. VETA. As Judge Williams said, we are appointed by the president of the American Bar Association, but that's the only substantive interaction we have with the ABA.

Senator CORNYN. Well, I know in times past, the ABA has appeared to be a, frankly, a partisan during some of the judicial confirmation proceedings that I participated in the past, and that's a cause for concern. I'm not suggesting that's happening here today, and I take your testimony at face value. I know you've done a lot of hard work, and I appreciate that. That's important. Your voice is important. But it's—I think one of the things that Senator Grassley perhaps alluded to in the past—in past—some Supreme Court nomination proceedings, it's appeared that the American Bar Association has taken sides, so to speak, in controversial nominations.

And I'm not suggesting that that's the case today, but I'm just saying that causes concern about whether we should take the testimony of the Standing Committee at face value or whether you're a combatant in the political battles that rage here in Washington sometimes over judicial nominations.

Judge WILLIAMS. Senator, just let me say, there's been no communication of our committee with the ABA about any of our work. It is designed so that we can do it separately.

Senator CORNYN. Yes.

Mr. DRAYTON. And, Senator, I will follow up just to say that we're trained to be independent. We basically take an oath amongst our committee members to be independent, and we—we focus on the three criteria: integrity, judicial competence, and judicial temperament. And so in that regard, we focus on the record of the nominee, we focus on the writings of the nominee, and we focus on the feedback we get from the lawyers and judges that practice with the nominee, against the nominee, and administer justice alongside the nominee.

Senator CORNYN. Well, Mr. Drayton, I know part of the questioning of the judge had to do with, for example, sentencing that Senator Durbin and others brought up. Did the ABA itself review Judge Jackson's sentencing memoranda as part of your investigation?

Mr. DRAYTON. We reviewed the publicly available records for a sampling of her sentencing, including the child pornography cases and the sex offense cases, and we looked at the recommendations of the prosecutors. We looked at the recommendations of the de-

fense. We looked at whether she—and she did, in fact, in some cases look at sentencing statistics of other judges. And so we looked at the record and how she came out, and it didn't appear as though she favored the prosecutor nor the defense in such cases.

Senator CORNYN. Well, you made an important qualification. You said “publicly available.” In other words, and I've heard the Chairman talk about his concerns about public distribution of some of the sentencing memoranda. And so you did not review all of Judge Jackson's sentencing memoranda, only a portion. Is that correct?

Judge WILLIAMS. So perhaps I could clarify. The presentence report is highly confidential. Only the judge—

Senator CORNYN. So you did—you did not review that.

Judge WILLIAMS. No, because it's highly confidential because of the rights of the individual defendant. We could not review the presentence report. Second, there were not transcripts of all the hearings. You know, if we had a transcript of the hearing, we could review that, but there are memos filed. Those are public. What the position the prosecution takes, the position the defense takes, that is available in a public record, and the dockets are there. So we did as much as we could.

Senator CORNYN. I understand, Judge. I just want—the only point I was trying to make is you did not have access to everything in her record, but you did have access to public—what was public. Is that correct?

Judge WILLIAMS. Yes, and we thought that that was sufficient.

Mr. DRAYTON. A substantial amount of the record.

Senator CORNYN. Well, I—you had me until you said you thought that was sufficient. How do you know if you didn't get access to the rest of the record?

Mr. DRAYTON. Well, in many cases, we spoke to the prosecutors and defense attorneys.

Senator CORNYN. Right.

Mr. DRAYTON. And they gave us their thoughts and opinions, and they walked away and said she calls balls and strikes, she's fair, we would be happy to go before her again in cases. We also queried into her reputation because, as you know, folks talk and they mingle, and they're out in the evenings at bars, and her reputation is stellar. And so we did query. We pressed hard. We asked questions of these prosecutors and defense attorneys.

Senator CORNYN. That's especially true of my experience of the legal profession, Mr. Drayton.

[Laughter.]

Senator CORNYN. But, again, these—these people that you talked to are anonymous to us. They've been unnamed for the reasons that Judge Williams described.

Mr. DRAYTON. Correct.

Senator CORNYN. Okay. Thank you very much.

Chair DURBIN. Thank you, Senator.

Senator KLOBUCHAR.

Senator KLOBUCHAR. Thank you very much, Mr. Chair. Thank you to all of you for your good work. You know, we have heard a lot from some of our colleagues on the other side of the aisle, not all of them, and I think there was a mix of questioning that somehow she would have—the judge would have an agenda—a personal

agenda of her own that she would bring to the Court. And after hours of listening to her answer questions, I think it is pretty clear to me and to anyone that watched the hearing that that just isn't true.

You did a careful review of her background and her record, and I assume you were able to watch some of the hearing. I don't think you were, like, sequestered during the hearing. Is there anything in her record or in the answers she gave before the Committee that makes you believe that she will be anything but an impartial, even-handed justice?

Judge WILLIAMS. There was—well, number one, Senator, we were not glued to the hearings. We were preparing for our testimony.

Senator KLOBUCHAR. Okay. Very good.

Judge WILLIAMS. Okay. So I can't attest to or speak to everything, but certainly there is nothing that's come to our attention to change our "well qualified" rating.

Senator KLOBUCHAR. Mm-hmm. Very good. You know, as someone who myself, I will call it, was in the arena as a prosecutor in my case, hundreds of thousands of cases over my years and supervising hundreds of lawyers, it's always easy for anyone to step back and pick apart any case. I think Senator Blumenthal knows that. I think Senator Whitehouse knows that. You can say someone is too tough, which I've heard, or you can say they're too weak, which I've also heard. But I think your review and actually talking to the people who work with her and appeared before her is really quite important. And I know this is the same kind of review you have done for other Justices regardless of the political party of the President. Is that right?

Mr. DRAYTON. Correct.

Judge WILLIAMS. Correct.

Senator KLOBUCHAR. One of the things that I brought up with her yesterday, and whatever—that discussion you wouldn't have had to see, was that of her over 500 opinions, I think nearly 600 opinions, she only had a 3-percent reversal rate. And in one case that she and I discussed involving Guam, she actually wrote an opinion, the D.C. Circuit reversed her, but then the U.S. Supreme Court reversed the D.C. Circuit and sided with her unanimously, and Clarence Thomas wrote the opinion. I just think it's an interesting twist on if people have an agenda and also about a judge that is calling things as they are. And just in general, when it comes to reversal rates, is that something you look at? Would you be alarmed if she had a very high reversal rate as opposed to what we see here?

Judge WILLIAMS. Well, we certainly look at reversal rates, and I think Mr. Drayton can comment on the reaction of our reading groups who looked at specifically those cases as well and what their conclusions were.

Mr. DRAYTON. Well, first, Senator, the conclusions were that in cases in which she was reversed, she was analyzed unquestioned legal questions, unsettled legal questions, and thus, they were questions of first impression. They—when they looked at her analysis in those cases, they found her analysis to be reasonable.

Senator KLOBUCHAR. Mm-hmm.

Mr. DRAYTON. And so they felt that she handled difficult questions of jurisdiction and statutory interpretation, and so they felt that her record was excellent given the fact that only less than 2 percent of her cases were reversed.

Senator KLOBUCHAR. Mm-hmm. Very good. All right. Well, I want to just thank you for your good work. I read some of the comments, which I'm sure are in the record, of some of the people that you interviewed, but I guess I'd end with that. "She's one of the brightest legal minds in the country." "We have a lot of smart people, but she is brilliant." "Studying her opinions"—this was my favorite—"is like a master class in judicial writing." And then finally, I think, which is very important after our hearing yesterday: "Judge Jackson has the perfect temperament for a judge." And with that, I will close. Thank you.

Chair DURBIN. Senator Blumenthal.

Senator BLUMENTHAL. Thank you, Mr. Chairman. I don't think anybody has ever said about us that we have the perfect temperament for a Senator.

[Laughter.]

Judge WILLIAMS. No comment.

Senator KLOBUCHAR. That's why I closed that way, Senator Blumenthal.

Judge WILLIAMS. Yes. No comment, Senator Blumenthal.

[Laughter.]

Senator BLUMENTHAL. Thank you, Your Honor. I want to, first of all, thank you for the hours and hours and hours, and the energy that you have put into this work and that the ABA does on its recommendation. I know how thoughtfully and carefully you review somebody's record, but also to kind of sift through the different opinions that you encounter. Having been in the arena, as Senator Klobuchar says, you know, it's an arena. It's an adversarial process. People go at each other in the courtroom and in litigation, and that can leave scars and animosities that sometimes are elicited when you do this kind of report. So what I find amazing here is that nobody has a bad thing to say about Judge Jackson. Nobody says, you know, she was mean to me or she was disrespectful. Is that impression correct?

Mr. DRAYTON. That impression is definitely correct. And to put a little color on it, when we talk about prosecutors, Senator, and we talk about defense counsel, you know, many defense counsel are former prosecutors. When we talk about liberals and conservatives, there are defense counsel that are liberals and conservatives, and so when we speak to these attorneys, they have different perspectives. And it is surprising that unanimously the Bar appreciates Judge Jackson, sees that she has high competency, integrity, and temperament.

Ms. VETA. And, Senator, again, we talked to lawyers and judges throughout the country, and what was remarkable was how consistent they were in their comments about how everyone gets a fair shake.

Senator BLUMENTHAL. I think that's really what comes through, that everybody gets a fair shake, that she listens so intently and carefully to everybody who comes into her courtroom. And that seems to be the hallmark of her professional career that she listens

well to people and assesses fairly the grievances and intentions that they may make.

Let me ask you about this thing called judicial philosophy. I don't think if I were to ask most judges, they would know how to answer the question of what's your judicial philosophy. You don't ask people to evaluate her judicial philosophy, do you? I mean, that seems kind of so amorphous an issue, you wouldn't be able to evaluate it. Is that correct?

Ms. VETA. That's correct, and for two reasons. Number one, in terms of what is a judicial philosophy, and then number two, how would we measure it? Instead, we focus on criteria that people do understand, and that is, does the nominee have the requisite integrity, professional competence, and judicial temperament.

Senator BLUMENTHAL. And just a couple of last questions. If you were given more time to do this assessment, it strikes me you've done it very, very thoroughly and carefully. You feel you've been given enough time, and you've had access to enough information and records. There's no question in your mind that there's something missing here that you would've wanted to see.

Ms. VETA. There is no question in my mind that there's a subject that we missed. I feel very comfortable with the review we did. It was comprehensive. It was nonpartisan. It reached out to people and asked probing questions on the particular topics that we knew there had been allegations about, and none of them panned out. And instead, we got a consistent response that she met the criteria that more than satisfies our rating of "well qualified."

Judge WILLIAMS. I agree completely, Senator. And just to give you an idea, when the President mentioned that there—when Justice Breyer stepped down, our committee immediately went into action. We already had all the email addresses of all the judges, Federal judges, throughout the country. We were ready to just hit the button as soon as we knew who the nominee was. And so in my—there was nothing more we could've done, and we're absolutely convinced we've covered it. We cast a wide net for that very purpose. And we have circuit representatives that know the judges, and lawyers, and bar associations, and law deans in their area. So the circuit representatives are comfortable, and those in their circuits are comfortable with them, and we're very confident we covered the landscape.

Mr. DRAYTON. I agree as well, Senator.

Senator BLUMENTHAL. I really appreciate your candor and the completeness of the work you've done. Thank you very much.

Chair DURBIN. Senator Ossoff.

Senator OSSOFF. Thank you, Mr. Chairman, Ranking Member Grassley.

Thank you all for your testimony today and for your work.

I take very seriously my constitutional obligations and responsibilities with respect to advice and consent on behalf of my constituents in Georgia and want to just engage you and interrogate the work that you've done and the conclusions that you've drawn.

First of all, you are here under oath. Correct?

Judge WILLIAMS. We are.

Mr. DRAYTON. Yes.

Judge WILLIAMS. Yes.

Senator OSSOFF. And you conducted a robust review of the nominee's professional record. Correct?

Judge WILLIAMS. Yes.

Mr. DRAYTON. Correct.

Senator OSSOFF. You interviewed colleagues. You interviewed counsel who had argued cases before her. Correct?

Judge WILLIAMS. Yes.

Mr. DRAYTON. Correct.

Senator OSSOFF. You convened reading groups who undertook a comprehensive review of her published decisions. Is that correct?

Ms. VETA. We did.

Judge WILLIAMS. Yes.

Senator OSSOFF. Please, Judge Williams, what were your conclusions with respect to the nominee's reputation for integrity?

Judge WILLIAMS. Outstanding, excellent, superior, superb. Those were the comments of virtually everyone we interviewed.

Senator OSSOFF. And Judge, that is substantial praise. I want to just clarify, you're not here in an advocacy role or a partisan role. Correct?

Judge WILLIAMS. No. No, we're not. We are doing peer review, which means we get all the information. That's our job, to get the information and then to relay that information to the Senate Judiciary Committee as it applies to the standards that we use to measure a nominee.

Senator OSSOFF. As the organization has undertaken such reviews of past nominees nominated by Presidents of both parties. Correct?

Judge WILLIAMS. Correct.

Senator OSSOFF. Ms. Veta, if I might, what were your conclusions regarding Judge Jackson's professional competence based on this review?

Ms. VETA. My conclusions are that she has the highest degree of professional competence and is admired by both the bench and bar with her—as a result of her keen intellect, her strong analytical skills, and the clarity and sophistication in her writing.

Senator OSSOFF. Thank you.

Mr. Drayton, you also undertook, as part of this review and analysis based on these interviews, based on the review of the nominee's record, an assessment of her overall professional competence and qualifications. Correct?

Mr. DRAYTON. Correct.

Senator OSSOFF. And what were your conclusions?

Mr. DRAYTON. She's of the highest stature when it comes to professional competence.

Senator OSSOFF. Thank you, Mr. Drayton.

What were the conclusions of the reading groups, Judge Williams, that were convened to assess her decisional history?

Judge WILLIAMS. I will let Mr. Drayton—

Senator OSSOFF. Thank you. Mr. Drayton, please?

Judge WILLIAMS. Focus on that, but they—it was of the highest caliber.

Mr. DRAYTON. Correct. The reading groups found that her writing was impressive. She was meticulous. She considered all argu-

ments. She made a roadmap of her arguments that the layperson could understand.

They looked at her reversals, and they found that she was reasonable. They found that she took sound legal positions in novel areas of law. They also looked at how she also had her record supported by the Supreme Court in one of her reversals.

And so the reading group, who are top legal minds in the United States, felt that she was a phenomenal writer, and they thought that she was well qualified, in their opinion, based on her writings, to be a part of the United States Supreme Court.

Senator OSSOFF. Thank you, Mr. Drayton.

And my final question, if I might just move down the bench, beginning with you, Ms. Veta, please? Did your organization encounter in the course of this review any derogatory information, any testimony that raised any serious questions about the nominee's integrity, qualifications, or impartiality?

Ms. VETA. We did not.

Judge WILLIAMS. Absolutely nothing.

Mr. DRAYTON. Not a thing.

Senator OSSOFF. Thank you. Thank you, Mr. Chairman.

Chair DURBIN. Thanks, Senator Ossoff.

I'm going to recognize Senator Whitehouse for the few remaining moments of his time, and we're just going to try to establish whether Senator Blackburn is available after him, if she could reach out to us and let us know. She may be contacting us virtually.

Senator Whitehouse.

Senator WHITEHOUSE. Thank you. I believe I had a few minutes left, and if no other Senator is seeking recognition, I'd like to ask Judge Williams.

Judge Williams, are you familiar with the phrase "asked and answered"?

Judge WILLIAMS. I am.

Senator WHITEHOUSE. Could you tell me under what circumstances the phrase "asked and answered" would come up in your courtroom?

Judge WILLIAMS. When a witness is asked a question and then continues to be asked the same question, there would be an objection by opposing counsel.

Senator WHITEHOUSE. And what is the ruling?

Judge WILLIAMS. And that objection would be sustained.

Senator WHITEHOUSE. So the role of the judge in that is to do what?

Judge WILLIAMS. The role of the judge is to monitor the trial; to monitor the—to make sure the evidence that's coming in is properly admitted; to make sure when I say administer it, something like that, asked and answered, if we allowed counsel to just continue to ask the same questions over and over again, we'd never conclude the trial.

So judges manage trials, and that's part a critical role of a judge.

Senator WHITEHOUSE. Thanks, Your Honor.

Chair DURBIN. Thanks, Senator Whitehouse.

And I want to thank the panel. Senator Blackburn has informed us she is not going to be participating in this panel, and so we want to thank you for your service to the ABA, your testimony,

your dedication in helping the American people better understand the qualifications and integrity of judicial nominees, including Judge Jackson.

Thanks for joining us this morning.

Senator CORNYN. Mr. Chairman? I can just—if I can just say in response to Senator Whitehouse, we could only dream that our proceedings here in the legislative branch were as efficient and orderly and relied upon non-hearsay information like you did in your courtroom, Judge.

So thank you very much.

Judge WILLIAMS. Well, maybe, Senator, you need a judge here in the chamber.

[Laughter.]

Chair DURBIN. We have one.

Senator CORNYN. We have recovering judges here.

Chair DURBIN. A retired Supreme Court Justice. Thank you very much for joining us.

Judge WILLIAMS. Thank you.

Mr. DRAYTON. Thank you.

Chair DURBIN. We're going to turn to our final panel, 10 outside witnesses, and we have to do a little bit of logistical work to be prepared for them.

Now these 10 witnesses are 5 called by the Majority, 5 by the Minority. And when they arrive, we're going to call on them alphabetically, alternating between Majority and Minority.

I'm going to go through the list of witnesses. It appears that I'm going to—well, first, I'll start with the Majority witnesses.

Representative Joyce Beatty, Ohio's Third Congressional District, serves as chair of the Congressional Black Caucus. Great to see you, Congresswoman.

Risa Goluboff—forgive me if I didn't pronounce it quite right—dean at University of Virginia School of Law.

Wade Henderson, president, CEO of the Leadership Conference on Civil and Human Rights.

Richard Rosenthal, a childhood friend of Judge Jackson.

Captain Frederick Thomas, national president of the National Organization of Black Law Enforcement Executives, also known as NOBLE.

Minority witnesses include Attorney General Steve Marshall of Alabama. I hope he's here.

Professor Jennifer Mascott of George Mason University's Antonin Scalia Law School.

Eleanor McCullen, petitioner in the case of *McCullen v. Coakley*.

Keisha Russell, a counsel at First Liberty.

And Alessandra Serano from Operation Underground Railroad.

Before you all get comfortable, I want to swear you in. So if—I ask each of you, if able, please rise or raise your right hand.

[Witnesses are sworn in.]

Chair DURBIN. Let the record reflect that all of the witnesses have answered in the affirmative.

And so we're going to alternate between the Majority and Minority and try to do this alphabetically, and the staff starts with Congresswoman Beatty.

STATEMENT OF HON. JOYCE BEATTY, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF OHIO, AND CHAIR, CONGRESSIONAL BLACK CAUCUS

Representative BEATTY. Good morning, Chairman Durbin——

Chair DURBIN. Be sure to punch the button so we can hear you loud and clear.

Thank you.

Representative BEATTY. Good morning, Chairman Durbin, Ranking Member Grassley, and Members of the Committee.

I am Congresswoman Joyce Beatty, chair of the Congressional Black Caucus, Representative for Ohio's Third District, and a proud HBCU graduate. It is an honor to appear before you to express my strong and unwavering support for the nomination of Judge Ketanji Brown Jackson to the Supreme Court of the United States.

As the Nation has learned during these hearings, Judge Jackson is an exceptionally qualified jurist of unimpeachable character. As chair of the Congressional Black Caucus, I speak on behalf of 59 Members of Congress, including 28 Black women and 31 Black men, together representing 17 million Black Americans and 82 million Americans.

For over two centuries since our country's founding, the Court consisted exclusively of white men. Of the 115 Justices, 108 have been white men. Judge Jackson would be only the sixth woman and the first Black woman to serve on our Nation's highest court.

If confirmed, she would shatter a glass ceiling that many Americans, including those who fought and died for voting rights, a more perfect Union, and a just America, believe that they would never live to see it broken.

As a Black woman myself, I urge this body to remember that Judge Jackson's confirmation vote must not be isolated to her gender or to her race. Instead, I urge you to closely examine her credentials and her sterling judicial record. To me, they read like a storybook for a perfectly prepared jurist to sit on the Nation's highest court. She is grounded in family values, love of God and country, and academic excellence.

In my recent conversation with her, it became immediately clear why President Biden chose her. Her life experience, education, and reverence for the rule of law clearly demonstrate that she has been preparing for this moment her entire life.

Senators this week quoted Dr. King, and as I am reminded to paraphrase, King said, give us the ballot so we could put judges on the bench who will do justice and love mercy. Judge Jackson will do exactly that.

Sadly, but not surprisingly, Judge Jackson has been the subject of unfair attacks. These bad faith efforts exist, despite a résumé that arguably surpasses those of previous nominees. I remind this body and America just last year Judge Jackson was confirmed by this body on a bipartisan vote to serve on the D.C. Circuit Court and that she clerked for Justice Breyer, whose very seat she is being considered for.

Judge Jackson's confirmation will send a message to Black women and little girls like my granddaughter Leah, whose mother is the first Black woman to serve on the Tenth District Court of

Appeals. And Leah's first known President was a Black man, and now she sees a Black female Vice President. So if a guidance counselor tells her "your goals are too high," she will remember how Judge Jackson soared against adversity as one of our Nation's brightest legal minds.

I want to be crystal clear. Judge Jackson will be a judge that will serve all of America and all of America can be proud of.

Watching Judge Jackson sit at this very table displaying poise, grace, courage, and brilliance, no matter what was thrown at her, reminds me of the heroes whose shoulders she stands on. From Ida B. Wells to Rosa Parks to Constance Baker Motley, the first Black woman to argue at the Supreme Court and the first Black woman appointed to the Federal judiciary, these heroic Americans and Judge Jackson remind me of this phrase, Senators, never limit yourself because of others' limited imagination. Never limit others because of your own limited imagination.

Last, the Congressional Black Caucus, often called the conscience of the Congress, is calling on all Senators to dig deep into their hearts and minds to unequivocally stamp out any unconscious or conscious bias or discrimination as this process moves forward. CBC stands with Judge Jackson to ensure that she will be treated with the dignity and respect she deserves.

Let's change America and confirm her with a bipartisan vote. Thank you.

[The prepared statement of Representative Beatty appears as a submission for the record.]

Chair DURBIN. Thank you, Congresswoman. Appreciate your being here this morning.

Now we have the Attorney General of the State of Alabama, General Steve Marshall.

**STATEMENT OF HON. STEVE MARSHALL, ATTORNEY
GENERAL, STATE OF ALABAMA, MONTGOMERY, ALABAMA**

General MARSHALL. Mr. Chairman, Ranking Member Grassley, distinguished Members of the Committee, thank you for the invitation to testify today.

I'm Steve Marshall, and I serve as the Attorney General for the State of Alabama. I'm here today as a representative of a community of experienced and dedicated prosecutors who are gravely concerned about the direction our country is heading as it relates to law and order.

This Committee is likely well acquainted with the wave of lawlessness that has swept across our Nation over the past few years, leading to a surge in crime, including a horrific spike in homicides unseen since the 1990s. This week presents an important opportunity to discuss the role that the judiciary plays in the criminal justice system and the effect judges' decisions have on public safety.

Upon the President's announcement of Judge Jackson's nomination, one supporter, an executive director of an influential progressive group that supports defunding the police, pronounced, "We're in a moment where there's been an active movement to reform our broken criminal justice system. This appointment signals the ad-

ministration's commitment to pursuing criminal justice reform at the highest level."

Though I strongly disagree with the assessment that our criminal justice system is broken, I share his observation that this appointment may well be intended by this administration to initiate a transformation of our criminal justice system. Or, as Judge Jackson has described it, "a fundamental redesign of our system." And as we know from history, the United States Supreme Court can absolutely transform criminal justice for better or for worse.

The Senate must now do its due diligence to ensure that the ideology of the anti-incarceration and anti-police movement, views that the Biden administration seemingly has increasingly embraced, is never permitted to make its way onto our Supreme Court. As detailed in my written testimony, criminal justice advocacy groups have repeatedly highlighted Judge Jackson as a jurist focused on serving the most vulnerable and giving a voice to the voiceless, referring also to the socioeconomic and racial status of the defender population as evidence of a biased and broken system while overlooking the inconvenient reality that the race and socioeconomic status of a crime victim is often identical to his or her offenders.

A 2018 report by the Bureau of Justice Statistics found that the offender was of the same race or ethnicity as the victim in 70 percent of violent offenses involving Black victims and 62 percent of violent offenses involving white victims. That same report showed that the largest percentage of violent crime victims were from households with annual incomes of less than \$25,000 annually.

Another study on crime victims found that the overall risk of violent victimization is housed among persons who are younger, male, Black, living in the poorest households, and living in urban areas. These voices matter, too.

And Judge Jackson's now-infamous Law Review article gives me no assurance that she would give voice to the voiceless victims of sex crimes. In that note, she questioned and assessed the sex offender community notification requirements, a common sense public safety measure that this body passed with bipartisan support and that the public overwhelmingly approves. Remarkably, the word "victim" did not appear once in her analysis.

Promoting the false creed that the American criminal justice system is unfair, a reference Judge Jackson herself used in the opening line of a 2020 opinion, undermines justice itself. It denigrates the rule of law. It impedes the ability of law enforcement to protect and serve. It impairs the duty of prosecutors to keep violent criminals behind bars.

All of this subverts the safety of the public and is most detrimental to the very voices Judge Jackson claims to speak for. I've heard nothing this week to alleviate my fear that Judge Jackson believes that a fundamental redesign is needed in our criminal justice system and that she would be so inclined to use her position on the Court to this end.

For this reason, I respectfully oppose her nomination.

Thank you again for the opportunity to testify today. I would ask that my written testimony be accepted for the record.

[The prepared statement of General Marshall appears as a submission for the record.]

Chair DURBIN. Without objection.

Thank you, General Marshall.

Dean Goluboff?

**STATEMENT OF RISA GOLUBOFF, DEAN, ARNOLD H. LEON
PROFESSOR OF LAW, AND PROFESSOR OF HISTORY, UNI-
VERSITY OF VIRGINIA, CHARLOTTESVILLE, VIRGINIA**

Professor GOLUBOFF. Thank you, Senators, for the opportunity to comment on the nomination of Judge Ketanji Brown Jackson, whom I have known personally and professionally since 1998 and whose career I have followed closely since that time.

I have taught constitutional law and legal history for 20 years at the University of Virginia, and I've served as the Dean of the School of Law since 2016.

Today, I am speaking in my personal capacity, not my official capacity as Dean, and my testimony is not based on the views or positions of the University of Virginia. It is based, rather, on my personal views as a scholar, placing Judge Jackson in both a broad historical perspective and the context of contemporary thought on the judicial role.

My conclusion is that the Supreme Court and the Nation will benefit enormously from the keen intelligence, impeccable integrity, broad experience, and intellectual open-mindedness of a Justice Jackson.

Before I turn to the main portion of my testimony, let me add my historian's brief reflection on the historic nature of this appointment. It was some 56 years ago that the Senate confirmed Constance Baker Motley—Judge Jackson's role model—to be the first Black woman judge on any Federal court. That Judge Jackson shares Judge Motley's birthday is, as has been said, a happy coincidence. That she shares her status as a trailblazer is far more than that. It is causal. She and we would not be here today without Judge Motley and others like her who paved the way.

I have three main points. First, Judge Jackson is eminently qualified to serve on the Supreme Court of the United States. To illustrate with just a few numbers, she holds two degrees with Latin honors from Harvard University. She has served as a law clerk to three Federal judges nominated by Presidents of two parties. She has been confirmed by bipartisan votes of the Senate three times to Federal office. Altogether, she has accumulated 26 years of legal experience, 7 in private practice and 19 in public service, including 2 years as a Federal public defender, 6 with the bipartisan Sentencing Commission, and 9 years as a judge on 2 Federal courts.

You know all this. But this abbreviated description both makes clear that Judge Jackson will bring enormous distinction to the Supreme Court and highlights how her varied experience will enrich both her own opinions as a Justice and the collective deliberations of the Court.

That Judge Jackson has represented clients from well-resourced corporations to the indigent and unpopular is testament not only to her robust embrace of every lawyer's obligation to the serve the

public, but also to her commitment to the rule of law in an adversarial system in which every party is entitled and criminal defendants are constitutionally entitled to zealous advocacy. Her insights from the district court will especially enhance the Supreme Court's understanding of how trial courts implement their decisions.

This brings me to my second point about the salutary judicial approach Judge Jackson has developed out of this varied experience. As a trial judge, she has shown deep respect for precedent. She has written about the importance of *stare decisis*, which informs her view of the judge's role in our constitutional scheme as simultaneously crucial and modest.

Accordingly, her opinions are based on precedent and committed to the rule of law. They are fact-based and pragmatic, open-minded and analytical. Among the more than 500 cases that Judge Jackson has decided—whether the matters at hand concerned environmental regulation or immigration law, criminal charges, employment discrimination, or business disputes—she has found in favor of both plaintiffs and defendants, for individuals, nonprofits, businesses, and the Government.

One simply cannot presume what Judge Jackson's ruling will be based on the parties' political affiliations, positions in the world, or other characteristics. Rather, what remains constant across these hundreds of opinions is Judge Jackson's commitment to applying precedents to the facts before her, maintaining procedural consistency, reasoning with common sense and humanity, and doing justice for the parties, consistent with the rule of law. These traits place Judge Jackson in the heartland and the mainstream of the American judicial tradition.

My final point is personal, as well as scholarly, about the connection between Judge Jackson and Justice Stephen Breyer for whom she and I both clerked. Judge Jackson is very much her own judge, and her judicial approach stems from her own experience in the mainstream currents of judicial thoughts in the 21st century. That said, two similarities bear highlighting.

First, Justice Breyer and Judge Jackson share their deeply held patriotism, which they both absorbed from family members who dedicated their professional lives to public service. Judge Jackson believes as deeply as Justice Breyer in service to American values and in the value of the American Constitution. Moreover, Judge Jackson, like Justice Breyer, has always been as interested in hearing the views of others as in sharing her own. She worked with lawyers from across the political spectrum and found consensus with her colleagues on the Sentencing Commission and the D.C. Circuit.

After Justice Breyer announced his retirement, I reflected, as I think many of his clerks did, that the lessons he taught me are ones I rely on every day. The appetite for dialogue, optimism, open-minded and open-heartedness, and joy. I hoped then that they would remain with the Court and the Nation long after his retirement.

If you confirm Judge Jackson, as I urge you to do, those virtues, both personal and judicial, will indeed remain with the Court, much to the benefit of us all.

Thank you.

[The prepared statement of Professor Goluboff appears as a submission for the record.]

Chair DURBIN. Thanks, Dean Goluboff.

The next person to testify is Professor Mascott, Jennifer Mascott of George Mason University, Antonin Scalia Law School.

Professor?

STATEMENT OF JENNIFER MASCOTT, ASSISTANT PROFESSOR OF LAW AND CO-EXECUTIVE DIRECTOR, C. BOYDEN GRAY CENTER, ANTONIN SCALIA LAW SCHOOL, GEORGE MASON UNIVERSITY, ARLINGTON, VIRGINIA

Professor MASCOTT. Chairman Durbin, Ranking Member Grassley, and Members of the Committee, thank you for the opportunity to testify today. It's an honor to appear before this Committee to discuss this nomination.

As the hearings have so far demonstrated, Judge Jackson has a wealth of experience and is very well respected. I'm grateful for the opportunity to participate in this body's serious and substantial consideration of a nomination to serve on the Nation's highest court. My testimony will focus on the constitutional doctrines applicable to the role of the Court within our constitutional system and on judicial philosophy.

As its Preamble states, the Constitution was ordained by the people to establish justice and form a more perfect Union, and the nomination process under consideration today in many ways demonstrates the success of that effort.

The Constitution's text and structure include two critical framework protections for liberty—federalism, the division of power between States and the Federal Government with significant freedom retained by the people and their critical institutions like the family and religious bodies, and the horizontal separation of Federal power across three distinct branches.

The Federalist structure is perhaps the primary protection of the two, in that it lays the foundational threshold groundwork for the enumerated, limited nature of the powers that any branch of the Federal Government may exercise. The Constitution does not empower the Federal Government to enact just any law, in any form. Rather, Article I sets forth limited enumerated powers, vesting only those legislative powers herein granted in that Article to the policymaking body of the U.S. Congress.

The constitutional structure also intentionally makes Federal action difficult and cumbersome, serving as a brake on the Federal Government's ability to regulate people even within its enumerated areas of authority. One's interpretation of the proper role of these structural safeguards is a critical component of one's understanding of the role of each of the three Federal branches and is critical to shaping judicial philosophy.

The component of Federal power, of course, front and center today is the vesting of judicial power that authority under Article III extends only to the power to resolve cases arising under the Constitution, Federal laws and treaties under them, and certain categories of controversies. As the discussion during this hearing demonstrates, that power constrains a judge to application of the

text and rule of law, not shifting policy preferences, cultural norms, or extensions emanating from governing text.

The Article III limited authorization to resolve concrete cases and disputes ensures that the Article III judge is not charged with general responsibility to decide questions of national policy or the power to offer advisory opinions on legal questions. And particularly when deciding cases arising under Federal laws and the Constitution, the Article III judge must faithfully interpret and apply the text, and the limited power to decide cases and controversies also suggests caution in the imposition of remedies. An Article III nominee's judicial philosophy should reflect deep awareness of these limitations.

As a number of Supreme Court nominees before this body have previously testified, the interpretive philosophies most consistent with the constitutional role of a judge are originalism and textualism. Those methodologies, generally understood, essentially seek to identify the ordinary meaning of the relevant legal text at the time that it became governing law.

Originalism is applied through the identification of original public meaning at the time of ratification, is consistent with constitutional provisions such as the Article VII providing that the Constitution would become governing law as of its ratification by the conventions of nine States.

Judges must take a constitutionally required oath to be bound by this Constitution and the laws of the United States made in pursuance thereof. And it's the text of those laws that have supreme effect.

Finally, the Constitution provides for a finely grained amendment process, with substantially challenging procedural hurdles. This process cannot be overcome by jurists' developing sense of cultural norms apart from constitutional text.

Original public meaning's commitment to identifying the meaning of constitutional or amendment text at the time it's given effect is consistent with these principles, and the statutory interpretive methodology of textualism similar—similarly maintains consistency with these constraints.

Just as Article VII procedures give authority to the constitutional text, Article I, Section 7 procedures indicate that statutes have governing effect once they are enacted by Congress and the President. Therefore, the text of those enacted laws, the publicly understood text as of the time of its enactment, governs the proper interpretation of these laws.

In testimony and statements, Judge Jackson, like prior nominees representing a range of views and jurisprudential approaches, has articulated general support for originalism and textualism. But commitment to these methodologies hinges on their application in practice. When asked about judicial philosophy, Judge Jackson has declined to identify express commitment to a particular philosophy, instead focusing on a multistep interpretive method highlighting the steps she'd take in deciding cases, such as looking at briefs, the factual record, congressional intent, purpose, and precedents.

It is challenging to definitively discern or predict a jurist's future methodological approach on the Supreme Court on the basis of service on a Federal district court, but hesitance to commit to a

particular judicial philosophy could leave flexibility for incorporation of various interpretive approaches during Supreme Court service. And Judge Jackson's explanation of her interpretive methodology during the hearing suggests perhaps more reliance on legislative history and extra-textual sources and purpose than that used by textually committed jurists like the late Justice Scalia, Justice Thomas, and more recent nominees like Justices Barrett, Kavanaugh, and Gorsuch.

In addition, some of Judge Jackson's prior body of work suggests that she also may have a different view than a traditionally applied method of originalism. In the recent decision involving a conflict between the Congress and the executive branch, Judge Jackson inferred an implied cause of action from the Constitution, a determination that was later reversed by the D.C. Circuit, finding that inference of an applied cause of action outside the judicial role.

This body is appropriately weighing constitutional principles, the role of the Senate and the Federal judiciary, and interpretive philosophy in its consideration of nominees. The interpretation of law, consistent with originalism and textualism as traditionally applied, is important to maintain limits on governmental power and to preserve liberty.

Thank you very much for the opportunity.

[The prepared statement of Professor Mascott appears as a submission for the record.]

Chair DURBIN. Thank you, Professor Mascott.

Next is Wade Henderson, president and CEO of the Leadership Conference on Civil and Human Rights. Welcome back.

STATEMENT OF WADE HENDERSON, PRESIDENT AND CHIEF EXECUTIVE OFFICER, THE LEADERSHIP CONFERENCE ON CIVIL AND HUMAN RIGHTS, WASHINGTON, DC

Mr. HENDERSON. Thank you.

Chairman Durbin, Ranking Member Grassley, and Members of the Committee, I'm Wade Henderson, interim president and CEO of the Leadership Conference on Civil and Human Rights, a national coalition of more than 230 organizations dedicated to building an America as good as its ideals.

Thank you for inviting me to share our coalition's strong support for the confirmation of Judge Ketanji Brown Jackson as an Associate Justice of the U.S. Supreme Court.

By any standard, she is an exceptionally qualified nominee. When confirmed, Judge Jackson will make history as the first Black woman to serve on the Supreme Court, and it will happen 55 years after civil rights lawyer Thurgood Marshall was confirmed as the Nation's first Black Supreme Court Justice. We have waited far too long for this day, but we are nonetheless overjoyed that it has finally arrived.

Judge Jackson's presence on the Court will matter tremendously. We know that a more racially diverse Court includes the perspectives of communities who have been traditionally excluded from seats of power and that judges from different demographic and legal backgrounds infuse more viewpoints into their deliberations. Importantly, a diverse Court helps communities trust that judicial decisions are not biased in favor of a select few.

As you've heard this week, Judge Jackson will also be the first former public defender on the Court and the first Justice with any significant criminal defense experience since Justice Marshall. This is vital.

Public defenders play a critical role in our criminal legal system, protecting the constitutional rights of people who cannot afford lawyers, but they remain vastly underrepresented on the Federal bench. Institutions that we entrust to safeguard our democracy, including the Supreme Court, must work for everyone. It is imperative for the Federal judiciary to be made up of fair-minded judges and Justices who are committed to civil and human rights of all and who reflect diverse experiences.

Our communities depend on the Federal courts to administer justice and, importantly, to recognize injustice from the perspective of many. Judge Jackson, who has a commitment to defending the constitutional rights of all, is exactly who we need on the Supreme Court.

As a district court and circuit court judge, Judge Jackson has demonstrated her even-handed approach to the law. Her record is immense. And while we may not always agree with her decisions, her commitment to follow the law and the measured ways in which she has approached the law has been remarkable.

Judge Jackson's impressive record on and off the bench demonstrates that she is a fair-minded arbiter of justice, and it is why the civil and human rights community has so strongly endorsed her. Last week, the Leadership Conference sent a letter to Senators signed by nearly 200 national organizations calling for her confirmation. We know that her distinguished legal career, her collegiality to all she encounters, her remarkable judicial temperament, and her demonstrated commitment to equal justice make her the perfect choice.

Fifty-seven years ago tomorrow, Dr. King and thousands of foot soldiers arrived in Montgomery, Alabama, after marching from Selma in their quest for voting rights. Decades later, this historic moment represents yet another step on our Nation's long march toward a more inclusive democracy.

As Dr. King said that day, the arc of the moral universe is long, but it bends toward justice. Today, we must all recognize that Judge Jackson's confirmation to the Supreme Court will bend that arc a little more. All of us who are impacted by decisions of the Court can be confident that Justice Jackson will continue to do her part to keep the sacred promise of our courts and our country.

Thank you, and I'm happy to answer any questions.

[The prepared statement of Mr. Henderson appears as a submission for the record.]

Chair DURBIN. Thank you, Mr. Henderson.

And the order is a little different here, I'm told. The next witness is Mrs. Eleanor McCullen. Mrs. McCullen?

**STATEMENT OF ELEANOR McCULLEN, MASSACHUSETTS
RESIDENT AND SIDEWALK COUNSELOR**

Mrs. McCULLEN. Thank you.

Mister Chairman, Ranking Member Grassley, and Members of this wonderful Committee, my name is Eleanor McCullen, and I

am honored to be with you today as you consider the nomination of Judge Jackson to the Supreme Court.

I also would like to say I am grateful for all of your service to our country.

I have dedicated my life in service to empowering women as a sidewalk counselor. I was also the lead plaintiff in an important free speech case, *McCullen v. Coakley*.

Today, I would like to touch on two topics that are very near and dear to my heart. The first, the importance of empowering and supporting pregnant women who feel alone and without options. Two, the importance of confirming judges committed to preserving one of Americans' most cherished freedoms, the freedom of speech.

For over 20 years, I have served as a sidewalk counselor, and I offer hope, help, and love to the Boston women and their families. So many women I've met believe that their only choice is to end the life of their baby. It is in that moment of isolation and fear that I have the privilege of offering a different choice, one that empowers and encourages the woman to know she is fully capable of becoming a mom and pursuing a job, and going to school, and having a successful and happy life.

When I see a woman approaching, coming down Commonwealth Avenue, I always say "Good morning. I'm Eleanor. How can I help you?" It's a powerful moment when a woman looks at me, and our eyes connect, and she stops to talk. It's in that moment I promise her she will never walk her journey alone.

Of course, women often share with me their fears and their concerns about their pregnancy. I honor their thoughts and concerns, and I say, "I understand. That is a challenge. But I also know you can do it with support, and I will support you with all my kinds of support. I will stand with you throughout the 9 months and beyond. I will hold your hand."

I'm able to provide the mothers whatever resources they might need in that moment, including medical care, financial support. Of course, they come to our house. Of course, baby clothes and bassinets. I've had many, many, many, many baby showers.

Of course, if some of my mothers want to go to school, we're able to help them financially to go back to school. And I just stick with the mothers and their families for as long as they need my help.

For me, it's a joy to be able to offer women love and kindness, no matter what time of night or day they might call and need me. And being able to watch the children grow up, children who wouldn't be here had the mother not stopped to talk to me, this is an incredible privilege.

In the midst of this joy, however, I know firsthand the pain of being unable to serve women when the Government tries to violate our right to free speech. In 2007, Massachusetts enacted a "buffer zone." It was a law prohibiting pro-life speakers from coming within 35 feet of the entrance of an abortion facility.

As you might imagine, this prevented us from being compassionate and serving women and their babies because the law prevented us from having quiet, intimate conversations with them. I quickly realized that if I wanted to continue supporting women and babies as a sidewalk counselor, I had to challenge the law.

Even though I never thought I'd be part of a lawsuit, I knew I couldn't compromise or allow Massachusetts to rob Americans of our constitutional freedoms. So I stood for women. I stood for the babies and for every American's right to free speech, regardless of their views on life and abortion.

I was deeply saddened to find out that Judge Jackson, while in private practice, advocated in favor of Massachusetts' previous "buffer zone" law in her amicus brief on behalf of abortion clinics. She and her colleagues maligned pro-life counselors, characterizing us in ugly and false ways.

Her misrepresentations certainly don't describe me or any of the sidewalk counselors that I have worked with over the years. Indeed, the entire reason I challenged the buffer zone law was because I did not want to shout from a distance or come across as a woman with no compassion. Thankfully, in 2014, all nine Justices of the Supreme Court ruled that Massachusetts' buffer zone did violate the First Amendment.

When a woman is alone, sidewalk counselors walk with her in that moment. When a child is just minutes from losing his or her life, sidewalk counselors serve as their voice. The unborn have no voice.

As Americans, we will disagree on many important issues, but that's the beauty of why our Constitution protects free speech and allows each of us to speak truth with love. My hope is that this precious freedom, which preserves our Nation from tyranny and violence, will remain respected and upheld. I would ask Judge Jackson that if she is confirmed to the Supreme Court, that she will choose to uphold all Americans' First Amendment freedoms.

And I would like to end with a story. It just happened this week. I was home, and the telephone rang. And the woman said, "Eleanor?" I said, "Yes." She said, "Oh, I'm so glad to talk with you." She said, "I was just looking through my baby book of my little 3-month-old little girl," and underneath the picture of the baby was my card.

My card that I give out—hope, help, and love—and she had pasted that in the album. Underneath the baby picture, there was my card and my number, and she called me.

And she said, "I have to tell you," she said, "Rose is now 18. She's graduated from high school. She's on her way to college, and I want to thank you for being there that day in January, and you talked to me. And I have to tell you Rose is the joy of our life."

So, in conclusion, you might ask why I am so passionate about supporting mothers and free speech? Well, it's called love. And love, you can't argue with that.

And thank you so much for listening.

[The prepared statement of Mrs. McCullen appears as a submission for the record.]

Chair DURBIN. Thank you, Mrs. McCullen, for being here today. We really appreciate it.

Mrs. MCCULLEN. You're welcome.

Chair DURBIN. Our next witness is Mr. Richard Rosenthal.

**STATEMENT OF RICHARD B. ROSENTHAL, SOLO APPELLATE
LAWYER, MIAMI, FLORIDA, AND SAN FRANCISCO, CALIFORNIA**

Mr. ROSENTHAL. Mr. Chairman, Ranking Member, Members of the Judiciary Committee, thank you for the distinct honor of appearing before you today.

Just a few weeks from now, I will marry my beloved fiancée, Ana. And today, I get to testify in support of the nomination of my lifelong friend, Judge Ketanji Brown Jackson, to be on the Supreme Court. So I feel especially blessed these days. And get well soon, Dad. I love you.

Senators, I have known Ketanji Brown Jackson for nearly 38 years. We first met in 1984, as students in our public junior high school in Miami, Florida. I was 12 years old back then, and Ketanji was 14. We were friends back then right away, and now, 38 years later, we still remain dear friends.

From the very first day I met Ketanji, I knew she was special. In my entire life, I have never met anyone like her. In junior high, and then again at our large public high school, Ketanji was seemingly everywhere and everything—the president of the student body, the upbeat voice delivering the morning announcements over the school’s public address system, the graduating senior voted “Most Likely to Succeed.” And in our speech and debate program, she was literally the national champion in her event.

Through it all, she was the one student who stood out as universally loved and admired by everyone—her fellow students, teachers, and administrators alike. Ketanji’s incandescent brilliance was obvious to all of us from day one. But even more importantly, she has always been one of the kindest, warmest, most humble, and down-to-earth people I have ever met.

All this, while still possessing boundless charisma, drive, maturity, and grace. For all of these remarkable characteristics to somehow reside in the same one person, well, I suppose you can understand why everyone who knows Ketanji believed she was destined for greatness.

I could go on and on describing Ketanji’s amazing qualities, but instead, let me relate two stories from our high school days.

First, Ketanji wasn’t just a supernova national champion from our debate squad, though, of course, she was. She was also the unofficial leader of our tight-knit debate family, acting basically as a student-coach and mentor for all the younger students.

Outside in the grassy area between the school’s hallways, we would sit cross-legged on the ground, all of us in rapt attention while Ketanji would stand and explain to us the keys to success, in particular the need for preparation, poise, discipline, and, above all, hard-work.

She was a born leader. No matter how high she would climb, she always threw ladders down to the rest of us, and encouraged us and helped us on our upward climb, to the best of our abilities.

In 1998, for just a few weeks, Ketanji’s path and my path overlapped again, as we both served as law clerks for judges on the same court, the U.S. Court of Appeals for the First Circuit. She was finishing up her 1-year appellate clerkship and I was just beginning mine.

For those few weeks, I confess that I felt a surge of excitement and satisfaction because I had actually accomplished something that Ketanji had accomplished. But for her part, Ketanji has never been about comparing herself to anybody else's accomplishments. She simply sets her own goals and then works tirelessly to achieve them.

In the nearly 40 years that I've known Ketanji, I can't remember ever hearing her say an unkind word to anybody, or even an unkind word about anybody. That's just not her nature. And it's not how her amazing parents, Mr. Brown and Mrs. Brown, raised her.

That leads me to my second story about high school. It was the fall of 1987. I was a sophomore, and Ketanji was a senior. In our Latin American history class, I sat in the seat next to hers. But on this particular day, her chair was empty. But just then, the school principal came on the PA system and announced that a handful of our senior class had just been accepted to Harvard College that day, a huge achievement for our large, and often underfunded, public high school.

As fate would have it, at that very moment that the principal announced Ketanji's name, Ketanji happened to open the door and walk in the classroom. The entire classroom immediately leapt to its feet, exploded in applause, and ran over to Ketanji to embrace her. It was one of the most genuine, heart-warming moments I have ever seen.

Every student was so happy for Ketanji and so proud of her accomplishment. Nobody was jealous, nobody was resentful, and nobody was at all surprised. Because she was Ketanji.

And now, some four decades later, the President of the United States has nominated Ketanji to be a Supreme Court Justice. It seems fitting. After all, this is what great Americans are supposed to do. They're supposed to achieve great things. And Ketanji Brown Jackson is a great American.

Personally, I feel blessed to have been born in a country that can produce such an extraordinary person. My grandparents, a blessed memory, were Jews who escaped persecution in Nazi Germany. And they, along with my dear parents, always reiterated to me and my siblings what an amazing country this is because in America, anybody can succeed, no matter who they are, what they look like, or where they come from.

My grandparents and my parents were right. In America, a great person like the Honorable Ketanji Brown Jackson can, indeed, succeed and can ascend to positions of great trust and great responsibility.

Members of the Senate, by confirming this extraordinary woman to a seat on the Supreme Court, you will honor everything that is good and right about America. For the good of our country, and for the good in our country, I hope that you will.

Thank you.

[The prepared statement of Mr. Rosenthal appears as a submission for the record.]

Chair DURBIN. Thank you, Mr. Rosenthal.

Ms. Keisha Russell?

**STATEMENT OF KEISHA RUSSELL, COUNSEL,
FIRST LIBERTY INSTITUTE, PLANO, TEXAS**

Ms. RUSSELL. Good morning, and thank you for the opportunity to testify.

I am a constitutional lawyer at First Liberty Institute. First Liberty is a national legal organization with a mission to defend and restore religious liberty for all Americans. In addition to being a lawyer, I am also the daughter of Jamaican-born parents, and I am a former elementary school teacher in Atlanta public schools.

I'm here to explain how Critical Race Theory may impact a judge's judicial philosophy, including the fulfillment of her oath to uphold the Constitution, as well as to remain impartial and uphold the integrity and independence of the judiciary.

Critical Race Theory, or CRT, is a subset of critical theory that began with Immanuel Kant in the 1790s. Critical theory rejected the principles of the Enlightenment and the Age of Reason on which the American republic was founded. Critical Theory teaches that all human relationships are relationships of power between the oppressors and the oppressed. The oppressor/oppressed lens of critical theory helped establish totalitarian ideologies such as Marxism and Nazism.

CRT's key assertion is that racism is not the result of individual, conscious prejudices, actions, or thoughts, but rather that racism is a systemic and structural force. CRT teaches that racism is embedded in America's legal system, institutions, and capitalist economy, and it demands "whiteness" as the societal norm.

I will address three of CRT's erroneous assumptions and the possible impact on judicial philosophy.

Number one, believing that America was founded on racist ideals is wrong and incompatible with a judge's oath to uphold the Constitution. CRT proponents claim that America was founded, and the Constitution was drafted, to promote racism and slavery.

Historians have debunked this claim as false. The truth is that America's Founders were divided on the issue of slavery, and many of the Founders were abolitionists. America's core ideals of freedom and equality, expressed in the Declaration of Independence and the Constitution, sparked the movements that led to the eventual elimination of both slavery and Jim Crow.

CRT is sometimes erroneously analogized to the civil rights movement, and some CRT proponents even assert that Dr. King was a critical race theorist, but he was not. Now King would argue that Bull Connor, the head of the Birmingham, Alabama, police, and the Southern racists were violating the principles of the American founding. But Critical Race Theory would argue the opposite, that Connor was the fulfillment of the American founding because America was founded to perpetuate this white supremacy.

Ultimately, we cannot expect someone who subscribes to a critical race theorist to defend and protect the Constitution because CRT asserts that the Constitution is not worth defending. Such a view completely contradicts the oath every judge takes.

Number two, a judge who embraces Critical Race Theory's perspective that America must address racism by encouraging racism cannot be an impartial judge. Contrary to CRT's assertion that racism is socially created, racism is the result of individual feelings of

superiority and prejudice. There is no doubt that bad laws will further a racist society, but such racism must first be alive in the individual before it can become alive in society.

Ultimately, when unaddressed prejudice gets married to power, there is going to be an unintended pregnancy, which will give birth to the evil of racism.

Since personal prejudices advance a racist society, we cannot address racism by encouraging racist behaviors. Mr. Kendi, one of CRT's advocates, brazenly declares that that only remedy to prevent discrimination is future discrimination. In essence, CRT proposes that the oppressed group must be granted advantages in society to the detriment of the oppressor group in order to address past injustices.

Adherence to CRT removes the principle of equality before the law that is necessary for just judicial decisionmaking. Consider, for example, how a CRT philosophy could influence a judge's view in criminal sentencing. If a judge believes that the only way to correct racism is to provide advantages to Blacks and disadvantages to whites, this would create dire injustices in that judge's practices. A judge who embraces CRT's views may engage in favoritism and partiality, contrary to the judicial canons.

Number three, a judge must uphold the integrity and independence of the judiciary, and she cannot do so if she considers systemic racism in her decisionmaking. While racism is alive in the hearts of many people in our country, it does not determine the outcome of any minority's educational, professional, or economic accomplishments.

My own testimony is a reflection of this truth, as I am a first-generation American and the daughter of Jamaican-born parents. And despite the fact that my parents came to this country to build a life for themselves from the ground up, my parents still raised many successful children.

And CRT does not acknowledge that regardless of the struggles that people face in life, we are all individually responsible for the lives we live and the success we attain. Instead, CRT makes race the predominant relevant factor.

Every lawyer and judge promises to defend and protect the U.S. Constitution, but she cannot uphold this oath if she believes that the Constitution and the principles of America's founding are inherently racist and inherently flawed. Neither can a judge remain impartial and administer justice independently if she holds a philosophy that correcting racism requires affording privileged classes less justice than oppressed classes.

Ultimately, a judge should consider America's history as a lesson and a blueprint for why and how we must constantly seek to uphold and protect America's founding promises.

For these reasons, First Liberty opposes the nomination, and I thank you for the opportunity to testify today.

[The prepared statement of Ms. Russell appears as a submission for the record.]

Chair DURBIN. Thank you, Ms. Russell.
And next is Captain Frederick Thomas.

STATEMENT OF FREDERICK L. THOMAS, CAPTAIN, EAST BATON ROUGE PARISH SHERIFF'S OFFICE, BATON ROUGE, LOUISIANA, AND NATIONAL PRESIDENT, NATIONAL ORGANIZATION OF BLACK LAW ENFORCEMENT EXECUTIVES

Captain THOMAS. Good morning Committee Chairman Senator Richard J. Durbin and Ranking Member Senator Charles E. Grassley, and Members of the U.S. Senate Committee on the Judiciary, I bring you greetings on behalf of the executive board, members, and constituents of the National Organization of Black Law Enforcement Executives, NOBLE.

My name is Frederick L. Thomas, and I am the national president of NOBLE and current Captain for the East Baton Rouge Parish Sheriff's Office in Baton Rouge, Louisiana.

I have served more than 30 years in the law enforcement profession and 26 years in the Louisiana Army National Guard. I am a U.S. military combat veteran, who served in support of Operation Iraqi Freedom.

The organization I represent is NOBLE, and the mission is to ensure equity in the administration of justice in the provision of public service to all communities and to serve as the conscience of law enforcement by being committed to justice by action. NOBLE has approximately 50 chapters and represents over 3,400 members worldwide that consist of chief executive officers and command-level law enforcement officials from Federal, State, county, municipal law enforcement agencies, and criminal justice practitioners.

It is an honor for NOBLE to provide written testimony on the nomination of Ketanji Brown Jackson to be an Associate Justice of the Supreme Court of the United States. We endorse President Joe Biden's nomination of Federal Appeals Court Judge Ketanji Brown Jackson to serve on the U.S. Supreme Court.

A graduate of Harvard Law School, Judge Jackson brings a long and impressive résumé, including her background in public service, experience as a Federal public defender, and a Federal judge on the U.S. Court of Appeals for the District of Columbia. Throughout her career, Judge Jackson has demonstrated deep knowledge and respect for law, balanced judgment, and unwavering commitment to justice. She is eminently qualified to serve on the highest court in the land.

NOBLE joins the International Association of Chiefs of Police, Fraternal Order of Police, the more than 60 top law enforcement leaders, and former Republican and Democratic Attorneys General in endorsing Judge Jackson. She has a unique perspective on the needs of law enforcement through the association of her family members in the profession.

Judge Jackson has two uncles who were career law enforcement officers. One was a detective for Miami-Dade County, and the other rose through the ranks to become chief of police for the Miami Police Department. In addition, her brother served as an undercover officer in a drug sting unit in Baltimore after graduating from college.

It is our opinion that her direct familiarity with the complexities, challenges, and opportunities within law enforcement provides a perspective on criminal justice issues that can be an asset to the Supreme Court. In evaluating her judicial track record, it is the

opinion of NOBLE and other law enforcement organizations that Judge Brown Jackson has consistently adjudicated based on the facts and applied the law fairly.

Ketanji Brown Jackson has been previously vetted twice by the Judiciary Committee and twice confirmed by the full Senate as a judge, garnering bipartisan support as recently as 2021. She was also confirmed in 2010 as the vice chair of the U.S. Sentencing Commission. It is NOBLE's hope that Ketanji Brown Jackson will receive the bipartisan support for this most prestigious nomination to the Nation's highest court.

In closing, this is a watershed moment in our Nation's history. Judge Ketanji Brown Jackson is a stellar nominee with an extraordinary background. She is clearly qualified and possesses the knowledge, legal acumen, and experience to serve on the United States Supreme Court.

NOBLE is honored to endorse a nominee of this stature who, if confirmed, will participate in deciding pivotal legal cases impacting the lives of all people across this mosaic of our country. We encourage this esteemed body to send her nomination to the Senate floor.

I thank you, Chairman Durbin, for the invitation to appear today, and the Committee Members for your kind attention.

Thank you.

[The prepared statement of Captain Thomas appears as a submission for the record.]

Chair DURBIN. Thank you, President Thomas.

Our last witness is Ms. Serano, who I believe is going to join us by virtual WebEx. Let's hope that it's connected.

Ms. Serano?

STATEMENT OF ALESSANDRA PARISI SERANO, CHIEF LEGAL OFFICER, INTERNATIONAL OPERATIONS, OPERATION UNDERGROUND RAILROAD, ANAHEIM, CALIFORNIA

Ms. SERANO. Good morning, Chairman Durbin, Ranking Member Grassley, and Members of the Committee.

Nelson Mandela once said, "There can be no keener revelation of a society's soul than the way it treats its children."

The people who sexually exploit and abuse children must be held accountable, not only to society but to their victims. Incarceration and sex offender registration are ways to hold these criminals accountable and responsible for their despicable acts.

Child pornography, or child sexual abuse material or CSAM, is a horrific crime that plagues victims long after the initial sexual abuse.

My name is Alessandra Parisi Serano. I work for Operation Underground Railroad, a nonprofit organization that partners with governments here and around the world to help victims of human trafficking and child exploitation get the necessary aftercare and support they so desperately need.

Operation Underground Railroad also helps train foreign law enforcement and other entities who may have contact with potential victims on how to identify, investigate, and prosecute traffickers and exploiters of children. I recently joined this organization in December 2021.

For the preceding 18-plus years, I served as a Federal prosecutor for the U.S. Department of Justice. During my DOJ career, I personally handled hundreds of child exploitation and human trafficking cases involving thousands of victims.

I saw firsthand not only what these victims endured from the initial abuse but also the continued abuse and exploitation for years to come, oftentimes for the remainder of their lives.

The Supreme Court in the *Paroline* case recognized this fact when it allowed victims depicted in CSAM material to obtain mandatory restitution from voyeurs, distributors, and transporters of CSAM long after the initial sexual abuse has occurred.

While the initial sexual abuse causes great harm from which victims may never overcome, CSAM retraumatizes victims for years after their abuse. Every time a person views CSAM that child is reexploited, retraumatized, and reabused.

When an offender is caught viewing, downloading, or distributing these horrific images, mandatory notice goes to these victims that yet another offender viewed CSAM. Upon receiving these notices, victims are forced to relive the crime.

Persons who download, view, and distribute CSAM cause increase in the production of CSAM images. No one wants to see reruns of TV or movies. We've all experienced this during COVID when the release of new movies and TV shows stopped, and that includes voyeurs and distributors of CSAM.

With this appetite for new material comes the increased demand for the abuse of younger kids and more violent, sadistic, and masochistic images, according to recent statistics. I personally prosecuted cases with images of abuse and exploitation of children as young as premature infants.

This trend by certain judges to routinely decrease sentences far below the advisory sentencing guidelines and prosecutors' recommendations for CSAM consumers minimizes the gravity of the offence.

While the amount of material being produced and number of people consuming this material has increased exponentially over recent years, the sentences have decreased. This makes no sense.

I live in Southern California where destructive wildfires are a yearly issue. The fires leave hundreds of victims in its wake. When the fires spread and get bigger, do we put fewer firefighters on the front line? Use less water or resources? Fewer containment measures?

No, of course not. That scenario is akin to reducing—routinely reducing sentences for CSAM consumers when the supply is undisputedly increasing. I say, again, it makes no sense.

I hope all of the Members of this Committee agree that there is no cause more noble than protecting our children. Whether some crimes warrant longer prison sentences is a debate left for another day.

However, purveyors of CSAM, especially those with prior conduct involving sexual abuse or exploitation, deserve to be taken out of society for a substantial period of time and to be identified by the public through sex offender registries.

It has been my experience that offender—offenders are only remorseful because they get caught and not because of what their de-

viant and destructive conduct has done to countless victims, many of whom are unidentified.

Last, the notion that CSAM crimes only involves pictures is appalling to most prosecutors and victim advocates. CSAM depicts real children who deserve justice. These victims are survivors, deserve our respect and dignity for what they endured. They do not deserve to be treated with less consideration than offenders who take sexual pleasure in viewing CSAM of what is the darkest days of their lives. Our society is better than that, at least I hope it is. Our most precious resource, our children, deserve it.

On behalf of victims of CSAM and other sexual exploitation, I thank you for the Committee's time and attention to this important matter.

Thank you.

[The prepared statement of Ms. Serano appears as a submission for the record.]

Chair DURBIN. Thank you, Ms. Serano.

We're now going to have rounds of questions. They are 5 minutes—5 minutes—and I hope the Members will hold to that standard.

I'll begin, and let me start with Captain Thomas. Thanks.

Thanks for coming here. Thanks for more than 30 years of service in law enforcement. Thanks for more than 26 years of military service, including combat duty.

It's an honor to have you as a panelist here, as it is with all of our panelists. But, certainly, I wanted to commend you for those things.

Captain THOMAS. Thank you, sir.

Chair DURBIN. You're probably aware of the fact that Judge Jackson has received the unqualified endorsement not only of your organization, NOBLE, but also of the Fraternal Order of Police and the International Association of Chiefs of Police, in addition to other law enforcement officials. Are you aware of that?

Captain THOMAS. Yes, sir.

Chair DURBIN. So there have been charges made yesterday, day before, even this morning, that she is somehow part of a, quote, "anti-incarceration anti-police movement," that somehow she is affiliated with the defund the police movement.

Would you or your organization have endorsed her if that were true?

Captain THOMAS. Sir, that would never happen if we knew that—if she would have made a statement like that. We never saw that in our research. That never came out, and I don't really think it's true, sir.

Chair DURBIN. I don't either.

And I would assume the same thing is the case for the Fraternal Order of Police, the largest organization representing rank and file policemen in America, and the International Association of Chiefs of Police, respected at their own level for the leadership they bring to law enforcement.

So that is a charge which, I think, is belied by the fact that this endorsement has taken place.

Captain THOMAS. Yes, sir.

Chair DURBIN. Wade Henderson, you were in the audience. Welcome back.

You were in the audience and heard the earlier testimony from the American Bar Association. Two or three, maybe four, Members have really dwelled on this whole question of sentencing in child pornography cases and child abuse cases, and I asked the three representatives of the American Bar Association if they had made inquiry among the professionals—prosecutors, defense lawyers, judges—who have witnessed Judge Jackson's role in criminal justice, particularly in this particular area of the law, and they testified that they had consulted with 250 professionals to reach their conclusion of giving her a unanimously well-qualified rating.

And I asked them during the course of this, since we spent so much time here with three or four Members dwelling on that issue, whether they found any evidence to back up the charges that were being leveled at this Committee level and their answer was no, no evidence, not at all, you would think that one person out of 250 would have found the same conclusions as three or four of my colleagues did in the last several days.

What is your conclusion from that?

Mr. HENDERSON. Mr. Chairman, your questions to the American Bar Association representatives, in my view, were dispositive of this issue of whether Judge Jackson, in some way, was outside of the legal mainstream of other jurists or somehow tolerated the abuse of children implicitly by the questions that were posed.

I thought their responses this morning were completely dispositive. I began, when I saw the testimony yesterday, thinking that, unfortunately, this hearing has devolved, in some ways, to a partisan attack on an otherwise extraordinarily well-qualified nominee.

By any standard, Judge Jackson's record both on and off the bench, her academic achievements, are unparalleled with almost anyone who has been appointed to the Supreme Court.

A failure to find her voluble on the basis of qualification has somehow led to a series of questions focused on seven decisions that she rendered in sentencing that, in my view, bordered on the demagogic.

I think when one takes a look at the repeated effort to pose questions about her record somehow being outside of the mainstream, indeed, reinforced that view.

Ultimately, I think the issue, as Senator Whitehouse mentioned, was both asked and answered, and that the judge had clearly demonstrated that she was well within the mainstream of judicial thinking.

Finally, I felt that the criticism of some directed at her for her decisionmaking was misplaced. To the extent that her decisions, at least to those who questioned her, was somehow at variance with what the law was, they could have said that. No one did. But they could also recognize that it is up to Congress to establish the standards that judges apply in their decisionmaking responsibility.

To the extent that there were questions posed about her, better to look inward at the role that Congress played in establishing the role that judges fulfilled in this moment.

Chair DURBIN. Thank you, Mr. Henderson.

Senator Grassley.

Senator GRASSLEY. Ms. Mascott, we heard several times from Judge Jackson that her judicial philosophy is in her 500 cases, or whatever number that we have, from her district court work. How—and then, so that was her answer to the questions about what’s her judicial philosophy.

How important is a Justice’s judicial philosophy in determining how they will rule on the Bench?

Professor MASCOTT. Sure, Senator.

Well, I think, as these hearings and numerous Supreme Court nomination proceedings previously have indicated, is judicial philosophy is, obviously, paramount because in contrast to the political branches—this body and the Presidency—judges have a limited role to decide cases and controversies.

And as Mr. Henderson is saying, Congress has a large role in establishing what the role and the jurisdiction of courts are going to be and the procedures they’re going to put into place.

And so a judge’s approach and philosophy in interpreting both the Constitution and statutory text is critical.

And in the past, I think nominees that have gone on to serve on the Supreme Court and be committed and consistent and exclusive in their adoption of originalism and textualism have, clearly, discussed those methodologies, those philosophies—expressed commitment to them before this body and articulated their grounding in the Constitution.

Senator GRASSLEY. I’m going to ask Ms. Serano, you’re a former Assistant U.S. Attorney?

Ms. SERANO. Yes.

Senator GRASSLEY. You’re familiar with these crimes where children are victims?

Ms. SERANO. Yes, sir.

Senator GRASSLEY. Could you describe the sentencing enhancement around child pornography cases for use of computer, the number of images, prepubescent victims, but not so much on the mechanics of it but explain why we have these enhancements?

Ms. SERANO. It’s my understanding that the enhancements were created to recognize the aggravation that the use of a computer or somebody with more images versus less images or someone with images of very, very young children, they would deserve a higher sentence than somebody who has not had those characteristics with their offense.

Senator GRASSLEY. Could you explain why possession of child pornography—pornography is not a victimless crime?

Ms. SERANO. Yes, sir.

So as I said in my testimony, these pictures or videos are real children. They’re somebody’s kid. They have parents. They have grand—they may have siblings. These are real children.

And every time somebody views it, downloads it, possesses it, transports it, revictimizes them. Can you imagine your most embarrassing moments on the internet forever? And this is not just embarrassing. This is brutal, sometimes often very violent, horrible conduct that victims know that somebody is out there looking at it.

Senator GRASSLEY. Mr. Marshall, based upon your experience, which communities would be hurt most by anti-police movement

and is there anything in Judge Jackson's record specifically that concern you about her jurisprudence?

General MARSHALL. Appreciate the question.

As I raised in my opening statement, what gets lost when we describe the victims of crime is particularly where those victims are located, and those that advocate in anti-police and anti-incarceration statements are advocating directly against those that they claim to be able to speak for.

You know, when I hear that Justice Jackson would be a voice for the vulnerable, very rarely do I hear that being described to those victims of violent crime who truly are the innocent and most vulnerable of the system as a whole.

My broader objection as it relates to what I've seen of the record is when there is a judicial opinion drafted by the nominee in which she cites The New York Times for a quote that "our criminal justice system is unfair and unjust," to me, that raises very specific questions about whether the nominee fully embraces whether or not our system is broken or whether or not she believes that the system works, because to the extent that there continues to be the mindset that our system is unjust, not only does it undermine the rule of law but the ability of law enforcement to do their job and the public's confidence in the system in which we all hold dear.

Senator GRASSLEY. Ms. Russell, mindful of the fact that Judge Jackson told us more than once that Critical Race Theory never entered into her opinions or maybe even matter of discussion, if a judge or justice is making decisions based upon that theory and those principles, how might we see that reflected in their opinions?

Ms. RUSSELL. Well, thank you for that question.

I think that, based on my expertise in religious liberty and constitutional law, I think you always have to start with the original meaning of the Constitution and understand that regardless of the changing of the culture and what the social structure might call for, the standard never changes and that ensures that there's an anchor and there's constantly a foundation to go back to.

And so if you look at the Constitution through the lens of CRT then you're going to assume that it's inherently flawed and incorrect, and you're less likely to view it as being something or a source that you need to go back to or a source that should be relied upon and, certainly, not in the original meaning, because the original meaning is going to be inherently discriminatory if you look at it through that lens.

And so if you see it reflected in an opinion, say, in a religious liberty case, you might be inclined to, say, change that original meaning in order to reflect the current culture's new understanding of what religious liberty should mean.

Senator GRASSLEY. Thank you, Mr. Chair.

Chair DURBIN. Thank you, Senator Grassley.

Senator Whitehouse.

Senator WHITEHOUSE. Thank you, Chairman.

Ms. Russell, Ken Klukowski worked for First Liberty before he went to the Department of Justice to become senior counsel to Assistant Attorney General Jeffrey Clark and participate there in the drafting of a proposed letter in an effort to overturn the Presidential election in Georgia.

Did you personally or did your organization have any role in helping to prepare or facilitate the preparation of that letter proposed by Jeffrey Clark?

Ms. RUSSELL. No.

Senator WHITEHOUSE. Thank you.

Mr. Marshall, you were the chairman of the Republican Attorney Generals Association and the Rule of Law Defense Fund in the run-up to the January 6th assault on the Capitol, and Rule of Law Defense Fund sent robocalls urging recipients to march to the Capitol on January 6th.

Were you personally present in Washington, DC, on January 6th?

Your microphone should probably come on.

General MARSHALL. I was not.

Senator WHITEHOUSE. Did RAGA or RLDF have staff present here on January—

General MARSHALL. I can't speak to that.

But, Senator, what I can tell you is that we have denounced lawlessness, not only as it related to what took place on January 6th but also the lawlessness that continues to go on across our country with violent crime.

And what I would hope is that part of this hearing that this body is likewise questioning our nominee about her philosophy on criminal justice as it relates to decisions she would make on the Court.

Senator WHITEHOUSE. Did you personally know of or approve the text of the robocall that went out from RLDF?

General MARSHALL. No.

Senator WHITEHOUSE. Did you—do you know how that robocall was funded? Was that out of general revenues of RLDF or was a specific solicitation made to fund it?

General MARSHALL. No knowledge.

Senator WHITEHOUSE. No knowledge? Did you personally solicit funding for that robocall?

General MARSHALL. Senator, I've made multiple comments here already. The question before this body is the nomination of Judge Jackson.

Senator WHITEHOUSE. I get to ask the questions and my question to you is did you personally—

General MARSHALL. Yes, sir. And what I'm telling you is that we have denounced what took place that day as we do continue to denounce the violence that took place across this country.

Senator WHITEHOUSE [continuing]. Solicit money for the RLDF robocall that day? Pretty simple question. Yes or no, did you personally solicit money to support the robocall that brought people to the Capitol and who then assaulted the Capitol?

General MARSHALL. No.

Senator WHITEHOUSE. Very well.

Did you have any contact with Members of Congress in any effort to keep the electoral process open through objections to give those coming to assault the Capitol time to breach the Capitol and disrupt the elections process?

General MARSHALL. No.

Senator WHITEHOUSE. Have you offered any testimony to the January 6th Commission?

General MARSHALL. I have not been asked.

Senator WHITEHOUSE. You've not been asked.

As you sit here, you enjoy the protection of the Capitol police officers who are here and who defended our Capitol against the assault on January 6th by the crowd that your organization helped recruit.

Do you have anything to say to them, particularly to those who were injured in the line of duty on that day?

General MARSHALL. Senator, I object to the premise of your question that somehow or another the organization I was connected with had anything to do with the violence that took place. We've denounced that violence before and as I've done with you here today.

Senator WHITEHOUSE. Is Joseph R. Biden of Delaware the duly elected and lawfully serving President of the United States of America?

General MARSHALL. He is the President of this country.

Senator WHITEHOUSE. Is he the duly elected and lawfully serving President of the United States?

General MARSHALL. He is the President of our country.

Senator WHITEHOUSE. Are you answering that omitting the language duly elected and lawfully serving purposefully?

General MARSHALL. I'm answering the question. He is the President of the United States.

Senator WHITEHOUSE. And you have no view as to whether he was duly elected or is lawfully serving?

General MARSHALL. I'm telling you he is the President of the United States.

Senator WHITEHOUSE. No further questions.

Chair DURBIN. Senator Cornyn.

Senator CORNYN. To me, one of the most important aspects of the confirmation hearings is the opportunity to revisit first principles about our Government, separation of powers, freedom of speech.

Mrs. McCullen, thank you for your eloquent testimony about the importance of free speech.

But I want to—Professor Mascott, I want to start with you and take you back to the Declaration of Independence where it says that government derives its just powers from consent of the governed.

And while we heard a lot from the nominee about staying in her lane, not making policy and the like, I, personally, believe that many judges have a blind spot when it comes to things like substantive due process or articulating new and unenumerated rights and eliminating any discussion or debate or even vote on some of those rights that they discover because the judiciary says this is the way it is and we don't care what anybody else thinks.

Could you just describe for us the danger of eliminating from consent of the governed some of these important decisions under the guise of judicial lawmaking like substantive due process?

Professor MASCOTT. Yes, Senator. Thank you for the question, and I think it's great to go back to considering the consent of the governed, obviously, because the right of the people and liberty is foundational to our constitutional system, and as my written testimony goes through in more depth and I mentioned today, I mean,

I think there are multiple structural limitations in the constitutional system—some that we often overlook—that lead to quite a modest role for judges.

So, first, you know, there's the role of federalism of the States, the people, our important institutions like religious bodies, the family, continuing to have a great say—we the people—that limits, really, the power under the text of the Constitution that the Federal Government in any branch is supposed to exercise.

Senator CORNYN. The Federal Government is one of limited powers, correct?

Professor MASCOTT. That's correct, Senator, listed in Article I of the U.S. Constitution.

And so that structural constraint is the first threshold thing to be considering when thinking about the Federal role, and the—where the source of the legal and constitutional authority for law to begin with.

And then even within that system, as this body has discussed many times, there's the separation of powers among three branches and, of course, with the—with Congress being closest in elections to the American people and the President being elected, the role of the judiciary is quite modest.

Senator CORNYN. Forgive me. Since our time is limited—

Professor MASCOTT. Sure.

Senator CORNYN [continuing]. Let me ask another question.

And when judges get outside their lane—when they make policy, when they make political value judgments—does it violate those principles that you articulated about our form of government and the limitations on the judicial power?

Professor MASCOTT. Yes, Senator, which is why it's important to have a muscular reliance on the text and structure of the Constitution and statutes.

Senator CORNYN. Ms. Russell, we—I know your practice involves protection and defense of religious liberty. That's another provision of the First Amendment that Mrs. McCullen addressed that—beyond free speech, the freedom of religion in our country.

And when the Supreme Court Justices identify new unenumerated rights and hold that no State, no local government, can enact any policy in conflict with that new right that they identify, does that potentially endanger the religious liberty of Americans?

Ms. RUSSELL. Well, yes, it definitely could. If you are not taking into account sort of the—as I said, the foundational importance of religious liberty and you instead usurp that with the new right that you've created, that was likely not considered when the initial provisions of the Constitution were drafted.

Senator CORNYN. And in the *Obergefell* case, I think Justice Alito and, perhaps, Justice Thomas and others expressed their concerns that when judges make law and create a national standard and take these issues out of the debate that they ordinarily would be subject to in the political system and the legislative branch, that, basically, people who don't agree with it, let's say, because of sincerely held religious belief, could be identified as bigots. Do you share that concern?

Ms. RUSSELL. Well, yes, because, certainly, if you create a new right based on the current prevailing culture and their thoughts about whatever it might be, generally speaking, you're going to end up in a situation where everyone who has a traditional view of those subjects are going to be seen as the enemy and they will be demonized in the culture.

Senator CORNYN. And it's the ultimate cancel culture?

Ms. RUSSELL. Ultimately, yes.

Senator CORNYN. Thank you.

Chair DURBIN. Thank you, Senator Cornyn.

Senator KLOBUCHAR.

Senator KLOBUCHAR. Well, thank you very much, Chair Durbin, and thank you to all of you.

Representative Beatty, thank you so much for your leadership and for being here today. You talked about, in your testimony, about how there have been 115 Justices and only—she will be the first—Judge Jackson, if confirmed, will be the first Black woman and she will also be the first public defender. So those are two firsts.

Sitting in the room where it happened, offering a different perspective, could you give us your perspective, two things—one, on what that means as someone that knows what it's like to go into an institution that didn't have different perspectives—that would be the House of Representatives—and two, just your view as a Black woman about the hearing yesterday?

Representative BEATTY. Let me start with your last question. And, first of all, Senator, thank you for that.

As I witnessed yesterday and, certainly, want to say to Congressional Black Caucus Member Senator Cory Booker, thank you yesterday. It was emotional. It was heartfelt. But it also spoke not only to Black America but to America of how valuable this will be because what we will see when she is confirmed is what America looks like. We are no longer looking at where we were 56, 65 years ago, but yet we're still fighting for the same thing.

So I say to little girls and especially little Black girls it will be important for them to see that they could do what her best friend said of her when they were 12 and 14 years old.

I think it builds hope for America, and we know that all too often as elected officials and wanting to get more people who are representative of this wonderful America that we live in and that includes making the change and having the courage as Senators to confirm a Black woman, not because she's Black—and this is what I want you to hear loud and clearly—but because she is qualified, more qualified than most we have seen in this room.

And that's not just based on my opinion or my thought, but it is based on facts. It is based on when you look through the 600 some opinions, when you look through the 12,000 pages that were sent here on what she did on the United States Sentencing Commission, the 70,000 some pages that came from the Obama Library, when you look at what all the fact finding checkers have said about her record, I say look to each of us and this is why it is important to me.

There is not a perfect person in this room. Yesterday, a Minority Senator said he did not agree with everything that his colleagues

were saying. So I think you can look at anything or any person and find something that you want to find fault with.

But in this case, there are so many things that she has just been impeccable, on her reverence for the rule of law, for her impeccable decisionmaking. She is not perfect but she is amazing, and that's what I want America to know.

And I just want to end with this because I am also chair of the Congressional Black Caucus, and I want you to know while we are very diverse our power is our unity and we embrace and endorse her 100 percent.

Thank you.

Senator KLOBUCHAR. Thank you very much. Thank you.

Mr. Henderson, you've been a leader on voting rights. Yesterday, Judge Jackson talked about how the right to vote is a fundamental right in our democracy, as other nominees have said in the past.

How can the Court, in your view, particularly after what happened yesterday with the shadow docket case in Wisconsin, work to reestablish public confidence in voting rights cases? Very quickly.

Mr. HENDERSON. Thank you for the question. Thank you also for your leadership in trying to protect democracy in your role as Chair of the Rules Committee.

I think the Court has a very important role to play to preserve the right of all Americans to the vote. We now see democracy under attack in unprecedented ways. It, certainly, began with the January 6th insurrection but it continues now at the State level in some States that are rolling back protections that guarantee the right to vote.

I am hopeful that the Court will reexamine the role it has taken with regard to the Voting Rights Act, which it has stripped of its essential powers at the Supreme Court level, and I think a case has been made that there is a need for a new structured Voting Rights Act and we hope, of course, that the Senate will, ultimately, come to accept that requirement.

Senator KLOBUCHAR. Well, thank you.

Mr. Chairman, I'm not going to ask another question. But I did want to say to you, Mr. Rosenthal, as someone who's kept my friends since middle school and high school, I especially enjoyed your testimony and it reminded me of when I asked one of Sonia Sotomayor's friends in a similar panel who was a friend from middle school or high school, what she was like at that point—maybe it was elementary school—and he said judicious.

[Laughter.]

Senator KLOBUCHAR. So I enjoyed it very much. Thank you to all the witnesses.

Chair DURBIN. Thank you, Senator Klobuchar.

We've been told by the Republican staff that the order based on the early bird rule on their side is Senators Lee, Tillis, Blackburn, and Cruz.

It appears, Senator Tillis, you're next up.

Senator TILLIS. Thank you, Mr. Chair. Thank you all for being here. I listened to your testimony and watched it in my office.

Mr. Rosenthal, you're getting married in a couple of weeks?

Mr. ROSENTHAL. Yes, Senator.

Senator TILLIS. And I also wish that your father returns to good health.

Mr. ROSENTHAL. Thank you.

Senator TILLIS. Captain Thomas, thank you for your law enforcement service and your service in Iraqi Freedom.

Mrs. McCullen, I think this is the first time I've asked somebody questions who were actually a plaintiff in a Supreme Court case. It's an honor. Your testimony was unbelievable. Before I leave today, I hope I can get one of your cards.

Mrs. McCULLEN. Oh, sure.

Senator TILLIS. I think it reads "Hope, health and love."

Mrs. McCULLEN. "Hope, health and love."

Senator TILLIS. So you were at this abortion clinic as a counselor?

Mrs. McCULLEN. Yes.

Senator TILLIS. Sidewalk counselor. Yesterday, I tried to make the distinction because I think some people were approaching that case as a pro-life or pro-choice case and I was trying to make the point it was about freedom of speech. You agree with that. I think you said that in your testimony.

Mrs. McCULLEN. Sure.

Senator TILLIS. Now, in the amicus brief that was created I think there were quotes in there. So these weren't words necessarily of those who created the amicus brief but they were quotes from, I guess, the plaintiffs in the original case—that you were mean, in your face, aggressive, and I think that the other quotes said that they even felt like they may be shot by you.

Now, I know that was a couple of years ago. But that seems to be not characteristics of your behavior. Would you agree with that?

Mrs. McCULLEN. Oh, absolutely. Yes.

Senator TILLIS. Can you—you were out there.

Mrs. McCULLEN. Yes.

Senator TILLIS. You were not the only one. Were there are others out there as life counselors or—

Mrs. McCULLEN. Sure.

Senator TILLIS. Yes. Were any of them mean, in-your-face, people that looked likely to shoot somebody?

Mrs. McCULLEN. No. Absolutely not.

Senator TILLIS. Okay. So tell me a little bit about the—I'm sorry I got to go quick—

Mrs. McCULLEN. That's okay.

Senator TILLIS [continuing]. Because I'd like to hear you talk—I'd like for you to repeat your opening statement. But tell me about the—I was trying to get with Judge Jackson yesterday who, incidentally, Congresswoman, I think is eminently qualified and I'd find it hard to believe that anybody on my side of the aisle would disagree with that. So this has more to do with the application of philosophy and worldviews that could potentially influence.

But I think you should make no mistake that I agree with the ABA that she is highly qualified and I'm glad to see she got that rating.

But the—I'm trying to get an idea of what it was like on the ground. They were telling you—now, one of the reasons you mentioned in your testimony that you may have to raise your voice is

you were so far away from these young expectant mothers who may not have ever known that there was a choice of life that would fulfill them like the mother who sent you the picture of her 3-month-old baby——

Mrs. McCULLEN. Yes.

Senator TILLIS [continuing]. Who's now in her teens. So I could understand if you're several feet away you may have to raise your voice just to get their attention. Maybe that's what they meant by shouting and in your face.

But with the Supreme Court striking—ultimately, striking down the underlying Massachusetts law that was used as a basis for the complaint, were there people that were inside the envelope or maybe—I was trying to determine whether there were people that were escorting them in, which are, basically, expressing their free speech rights to choice.

Were they there or was it just that—I mean, so were there people inside the buffer who were able to escort them in and your argument was that you want to be there to give—hold their hand, I think you said, never walk the journey alone.

Is that an accurate portrayal of the facts on the ground, that you felt like you were not given fair access?

Mrs. McCULLEN. Fair. Fair. That's true.

Senator TILLIS. Okay.

Mrs. McCULLEN. Because—yes, you have it there, Senator. And, yes, they are inside the buffer zone and they're all—they're talking to the mother-to-be and——

Senator TILLIS. That's what I thought.

Mrs. McCULLEN. But we're not. Yes.

Senator TILLIS. That's why I just wanted to get it right. And I think it's wonderful that you're here because you're either an Oscar-winning actor or actress or the fact of the matter is that was a wholly unfair assertion——

Mrs. McCULLEN. Yes.

Senator TILLIS [continuing]. Of who you were.

Just a quick question. I actually had one for Ms. Russell and Ms. Mascott. I'm not going to have time for both.

So, Ms. Mascott, you talked about, in your opening testimony, application and practice. I was thinking about a case that Senator Cornyn brought up that had to do with the congressional direction, the plain word of the statute said that the removal—are you familiar with this?

Professor MASCOTT. Are you talking about *Make the Road New York*?

Senator TILLIS. Yes.

Professor MASCOTT. Okay.

Senator TILLIS. And it was my understanding that Judge Jackson used it as a basis for the nationwide injunction that it did not comply with the APA. But that seems to be a tactic every once in a while, even though the plain letter of the text seemed like—and I think it's the reason why it was ultimately struck down by the D.C. Circuit.

But do you know of any other examples where Ms. Jackson may have applied a similar logic to a case?

Professor MASCOTT. Well, in that particular case that you're speaking of I think it was—it was failing to rely on a provision that clearly limited the role of the courts and gave the discretion to make the decision to the acting Department of Homeland Security Secretary.

I think in other opinions what seems to be the case is that Judge Jackson is using a blend of sources, perhaps relying on legislative history or looking at intent or purpose more than other Justices in the past who have expressed exclusive commitment to textualism, or maybe in applying canons of construction perhaps moving beyond text sometimes in a way that might be different from other Justices in the past, like Justice Scalia and Thomas.

So, of course, it's hard to predict, based on district court rulings, how a judge will rule but there are these other instances like the one you mentioned or in the *McGahn* case where the D.C. Circuit disagreed that suggests maybe—

Senator TILLIS. Sorry. In the interest of time, because I know we have a vote. I'd be very interested—thank you for that. But I'd be very interested, as a follow-up, if you have time over the next week, to just provide me a few specific examples, if you can. You don't have to go to a great level of detail but I would appreciate it.

Mr. Chair, thank you.

Mrs. McCullen, do you have one of those cards? I'm going to get it on the way out. Thank you.

Senator BLUMENTHAL [presiding]. Thanks, Senator Tillis.

This isn't a coup. Senator Durbin has gone to vote and, as is customary, one of the Members of the Committee takes his place and I'm in the Chair now, Richard Blumenthal of Connecticut, and very pleased to have my round of questioning while I am taking the Chair for Senator Durbin.

Let me ask Dean Goluboff, you have an extraordinary career yourself as a trailblazer, the first female dean at University of Virginia. You had a distinguished clerkship with Justice Breyer and before that our good friend, Guido Calabresi, one of the most distinguished judges and scholars in the United States at Yale Law School where you went as well.

A number of us on this panel have talked about the legitimacy crisis that the Supreme Court faces—maybe the result of self-inflicted wounds, maybe the result of the times in which we live. But Justice Breyer's very thoughtful, deliberate, methodical approach, as was outlined by Judge Jackson as well, seems to be one of the hallmarks of his ability to bring the Court together to overcome divides and disagreements, which, in my view, is very important at this point in the Court's history.

Would you agree?

Professor GOLUBOFF. I would.

Senator BLUMENTHAL. And maybe you could elaborate as to why that is important for this Court at this moment in its history.

Professor GOLUBOFF. I think the Court's authority, as Professor Mascott has been talking about, in the separation of powers really comes from its deliberative nature. It doesn't have the power of the sword. It doesn't have the power of the purse.

What it has is its reality and perception of being a neutral arbiter, and I think Justice Breyer played a critical role in enhancing and facilitating deliberation across all of the Justices of the Court and I think everything that we know about Judge Jackson suggests she will do exactly the same thing.

Senator BLUMENTHAL. So the lack of trust and credibility is a threat to the Court because it doesn't have armies or police forces or, as you say, the power of the purse. What it has is the trust and respect of the American people?

Professor GOLUBOFF. Yes. That's something Justice Breyer talks about frequently in his writing and in his speaking is the fact that without the trust of the American people the Court simply can't do its job.

The rule of law—the Justices are committed to the rule of law and the rule of law exists because the American people follow the rule of law and only do so when they have faith in the Court.

Senator BLUMENTHAL. Let me ask—and I think that point is very well said—Congresswoman Beatty and Mr. Henderson, we are celebrating here a remarkable achievement. I've said it should have happened long ago. It's a leap into the present in the historic nomination by President Biden of the first Black woman to the United States Supreme Court.

But as much as we celebrate, as I pointed out yesterday, the decisions of the Court in *Shelby County* and *Brnovich* that, essentially, have set us back and especially in this area of voting rights—John Lewis was a great friend and hero to you and to me on integration—backsliding as well.

Maybe I can ask you to reflect on—both of you, because you have such deep and broad experience and expertise in this area—about the ways that the Supreme Court has reversed some of the progress that was made in our own lifetime.

Congresswoman Beatty, why don't you go first?

Representative BEATTY. Well, first of all, let me just say thank you for that question, and I am sure that Congressman John Lewis is looking down on us in a hopeful manner, especially as it relates to civil rights and voting rights.

I think what we have to look at first, as was said by both of the professors, that the power is not in the policy or the Congress. So I think what this does with this confirmation would be it will be a hope for the people out there to help us as Members of Congress and also as Senators that we have to first do our job.

And I think we have an obligation to help those Justices by sending them policy, sending them voting rights legislation that they can then do within the rule of the law what the people are looking for.

So I think that it starts here, and I think that question is so wonderful as I am sitting here as a Member in the Majority, with Members in the Majority and the Minority, that the work starts with the House and the Senate.

And so if that question would allow me to say that I am willing, because voting rights is the fundamental of everything that we talk about right now, whether it is the freedom of speech, whether it is working with our police, whether it is being the voice for those who are voiceless, let's start by saying we're going to give not only

this Justice but all of the Justices something that they can look at and rule on because we've sent them something that we're united.

And I would ask, since I'm here today and with that question, that I ask my colleagues that we start with voting rights legislation, that we look at where we are with nullification. If we look at where we are in that case—if we look at history, the voting rights are in with this and you know this well.

The Voting Rights Act has been reauthorized in a bipartisan way five times. Four Republican Presidents reauthorized the Voting Rights Act. Wouldn't this be a wonderful time in this America to build a better America if this Senate and this Congress could come together and send our Justices something that they could rule on that would be reflective of our democracy?

Senator BLUMENTHAL. Thank you.

Mr. Henderson?

Mr. HENDERSON. Senator Blumenthal, thank you so much for the question. Let me say at the outset that I support completely the response of Congresswoman Beatty and believe her answer was full and complete.

But let me also say that the right to vote is foundational of all other rights, as Congresswoman Beatty alluded to, and so all the issues that we've discussed this morning, from free speech to the rights of individual victims in cases of police accountability or others, are all tied to the right to vote.

The Supreme Court decision beginning with the *Shelby County* decision in 2013, with the *Brnovich* decision of a couple of years ago, and recent interpretations of what the Court has done by district court judges raise serious questions about the fidelity of the Court to the role that Congress has been designated to address discrimination under Section 5 of the Fourteenth Amendment.

The fact that the Court seems to have gone out of its way to find ways of eviscerating the protection of the Voting Rights Act has taken us back, literally, to the period that existed prior to 1965 when the Voting Rights Act was adopted.

Some people consider that criticism to be hyperbolic. But the truth is the facts make clear that what is happening now to voters, particularly voters of color, younger voters, seniors, individuals with disabilities, are in fact violations of that fundamental right to vote.

When we deny access to the ballot therein lies the problem. And so we have petitioned Congress, specifically the Senate, to enact new provisions that would help to protect the right to vote.

We are disappointed that earlier this year that effort was not undertaken by the—with the complete bipartisan support of the Senate. But we hope that in the future that will happen.

I remind you that 16 Members—Republican Members—of the Senate who voted for the Voting Rights Act in 2006 and the reauthorization have so far been silent on this question of whether to move forward on the Act. We hope they have a second opportunity today.

Thank you.

Senator BLUMENTHAL. Thank you. Thanks. Thanks, Mr. Henderson.

I'm going to call on Senator Blackburn.

Senator BLACKBURN. And thank you, Mr. Chairman. I appreciate this very much and the opportunity to have you all before us. This has been really quite a week here in the Senate Judiciary Committee.

Mrs. McCullen, I would like to come to you first. I am so happy that you are with us today and I appreciated your comments.

Mrs. McCULLEN. Thank you.

Senator BLACKBURN. I'm a mother and a grandmother, and I like how you talked about walking with women as they transition from their pregnancies to that motherhood, and realizing the need to continue to support women after they have those babies and to support them as they go through this entire process.

Likewise, I know that you do some good work to support post-abortive women—

Mrs. McCULLEN. Yes, I do.

Senator BLACKBURN [continuing]. Who just have—they grieve, and acquaintances that I know that have been through that process there is a grief that is just many times hard to bear.

Mrs. McCULLEN. It's true.

Senator BLACKBURN. So appreciate your work, and I know you have a card that you give to women.

Mrs. McCULLEN. I do.

Senator BLACKBURN. Talk to me a just a little bit about that, very quickly.

Mrs. McCULLEN. Sure. Well, I have an extra one here, too. And when I'm walking and a young mother comes up to me, as I said earlier, I say, good morning, I'm Eleanor, how can I help you, and I give them the card at the same time.

The card has "Hope, help and love" and my telephone number. I'm not afraid to give that out. It has my website. And then on the back, "A person's a person no matter how small."

Senator BLACKBURN. I love that.

Mrs. McCULLEN. Yes. So I just give that out. It just shows that I'm not—I'm trying not to be a stranger.

Senator BLACKBURN. Yes.

Mrs. McCULLEN. In just a few moments, Senator, I'm building up trust, and at least they have a name and a number and I'm not just out there for no reason. I have a purpose.

Senator BLACKBURN. I appreciate that. Let me ask you this. How did it make you feel in Judge Jackson's brief—

Mrs. McCULLEN. Yes.

Senator BLACKBURN [continuing]. When referred to pro-life women as hostile noisy crowd of in-your-face protesters?

Mrs. McCULLEN. Well, as I said, it made me very sad, extremely sad, and that's not the case at all. In fact, if someone is doing those things—harassing or yelling—the sidewalk is not a place for anger. It's not a place for judgment. Anyone that comes to be a sidewalk counselor should be compassionate, not judgmental, and helpful and kind.

So we have workshops. I run the workshops. If a new person wants to be—

Senator BLACKBURN. Okay. Let me—let me move on just for a minute.

Mrs. McCULLEN. Sure. Yes.

Senator BLACKBURN. But thank you for that work.

Ms. Mascott, may I come to you, please?

Professor MASCOTT. Yes, ma'am.

Senator BLACKBURN. I closed out last night with Judge Jackson reading back to her some of her opening statement. Now, everyone up here, as I've listened to you all—the ABA, their witnesses that were with us earlier—you talk about preserving our form of government. You talk about preserving equal access, equal justice.

And there was a comment in Judge Jackson's opening that I read back to her because she left out something very important. I'm going to read this to you and I'd like your comment.

"I've been a judge for nearly a decade now and I take that responsibility and my duty to be independent very seriously. I decide cases from a neutral posture. I evaluate the facts and I interpret and apply the law to the facts of the case before me without fear or favor, consistent with my judicial oath."

And I told her there was a word missing from that that I thought deserved more attention and that was it should have been there that it should be consistent with the Constitution because that should be where a Justice goes first. Is that not correct?

Professor MASCOTT. That is correct, Senator, and I think, largely, because the Constitution, of course, gives the Federal Government only limited enumerated powers, and so to be able to have a context for interpreting relevant statutory text one first needs to think about whether Congress—the Federal Government is authorized to take the action in the first place and where the text then falls within the constitutional structure and the judge's role in interpreting it.

Senator BLACKBURN. And, you know, we had a very difficult time. Never got her to nail down her judicial authority—her judicial philosophy. That concerned us.

There's another thing I want to ask you about. This is where she talked about CRT in sentencing. This was from a 2015 speech, and I felt like this was really inappropriate.

"I also try to convince my students that sentencing is just plain interesting on an intellectual level, in part because it melds together myriad types of law—criminal law, of course, but also administrative law, constitutional law, Critical Race Theory."

Is Critical Race Theory a type of law, Ms. Mascott?

Professor MASCOTT. Well, Senator Blackburn, I teach a number of courses at Scalia Law School and none involve Critical Race Theory. So I would not be the best expert on that.

As far as sentencing, though, I think, again, in that areas and all, it's important to focus on the text of law and, of course, Congress at the Federal level would have the largest role in terms of establishing the range of appropriate sentences for a crime.

And so folks applying that, of course, always will be looking to the text of the laws put in place by Congress. Congress has, over the years, given a lot of discretion but could narrow it if it decided that judges were not applying the role properly.

Senator BLACKBURN. Thank you. Thank you.

Mr. Chairman, before I—I want to ask you, some of us have wanted those presentencing memos. Are we going to be able to

have access to those memos? I know we sent a letter to you. Where do we stand with that?

Chair DURBIN [presiding]. Well, we've consulted with prosecutors and with victims' rights organizations and they share my concern. This is very confidential, sensitive information which is usually only seen by a judge, and to run the risk of bringing it to this Committee and jeopardizing, or worse, innocent—

Senator BLACKBURN. Is there no way we can—

Chair DURBIN. I'd like to finish.

Senator BLACKBURN. Okay.

Chair DURBIN [continuing]. Jeopardizing, or worse, innocent third parties—our children—who have been victimized.

I'm sorry, Senator. I'm not going to be party to that. I would not want that on my conscience that we did this for some political exercise here, which I think is totally unnecessary, and someone was harmed as a result of it.

I'm going to resist it every step of the way.

Senator BLACKBURN. No one wants to harm children. What we want to do—

Chair DURBIN. Then leave the reports concealed. Leave the reports concealed.

Senator BLACKBURN. And there's—well, what is in the reports that we cannot go into a classified setting and see these?

Chair DURBIN. I want to tell you something. If you are a parent of some child who has been exploited and you recognize this judge's name as perhaps have presided at the trial, and realize that now the report, the report that has been kept in confidence all these years, is now going to be handed over to the United States Senate Judiciary Committee, what would you think as a mother if it were your daughter or your child?

I would think this is an act that is reckless, and to do this in the name of some political, well, we're going to pursue this one more step and request information that has never been requested before by the Senate Judiciary Committee, unacceptable. On my watch, I won't be party to it. I do not want this on my conscience and I hope you don't either.

Senator BLACKBURN. I want to make certain that we protect children and that we continue to do our best effort to protect children. I also want to make certain that we're going to have judges on the Federal bench and Justices that are going to protect those rights of children.

Chair DURBIN. Well, you have—

Senator BLACKBURN. The fact that you all have seen these—

Chair DURBIN. No. No, you're wrong, Senator.

Senator BLACKBURN [continuing]. We haven't, the fact that even Judge Jackson referred—

Chair DURBIN. Senator, you're wrong. I can't see them. I don't want to see them.

Senator BLACKBURN. Okay.

Chair DURBIN. And I want to make that clear.

Senator BLACKBURN. Okay.

Chair DURBIN. So it has not been given to the White House nor has it been given to any Member of the Judiciary Committee that

I know, and I am not going to be party to any effort for political——

Senator BLACKBURN. Mr. Chairman, nobody——

Senator COONS. Mr. Chairman?

Senator BLACKBURN. There is no one that wants to do anything that is going to harm children.

Chair DURBIN. Good. Then join me. Join me.

Senator BLACKBURN. We want to make certain that we do our due diligence, and I know you have gotten frustrated with us with asking tough questions but that is our job to do that.

Chair DURBIN. You may ask a tough question as long as it is fair and that's all we ask.

Senator COONS. Mr. Chairman, if I might.

Senator BLACKBURN. Every question we have asked has been fair.

Chair DURBIN. Senator Coons.

Senator COONS. Mr. Chairman, if—could you just clarify, for those who may not be familiar with the procedure and practice of prosecution and sentencing? These PSRs they were not, in any case, written by Judge Jackson. Is that correct?

Chair DURBIN. That is correct.

Senator COONS. And they are not about Judge Jackson in any way.

Chair DURBIN. That is correct.

Senator COONS. They are uniformly or nearly uniformly sealed by court action.

Chair DURBIN. Yes.

Senator COONS. And involve detailed and thorough interviews of the whole ecosystem around a crime—the victim, the perpetrator, families—and are described to those interviewed as something that will be confidential and sealed.

Chair DURBIN. Confidential.

Senator COONS. Thank you.

Chair DURBIN. And let me just say that I cannot imagine that we think we have to explore this area at the risk of innocent third parties and children. I will not be party to it.

Senator BOOKER. Mr. Chairman?

Chair DURBIN. I'm just not going to do it.

Senator Booker.

Senator BOOKER. Again, this is new to me and, I'm sorry, I never did criminal law but I've now asked a lot of prosecutors trying to be fair about this—and some of them served on this Committee—to understand, and the kind of confidential information I thought, well, maybe you could redact it and people were saying to me, no, you cannot even redact it. There is so much compromising confidential information that none of us would want out there.

And the Senator, who I have a lot of respect for and have actually thought her—a lot of her questions during this were thoughtful and probing and helped me, frankly—but she's new on the Committee.

But I know this—I've also asked this question—this is a body, this Judiciary Committee, that has for Republican and Democratic Presidents done, am I fair to say, thousands of judges have been put onto Federal benches and this is a new territory.

We have never asked for this kind of confidential information from a third branch of Government. It's just never been done. And when you cross a precedent like this—now, I've seen this having been 8 years in the Senate—what you're going to create now, first of all, this information should never be released to politicians, in my opinion. There's no—there's nothing additive to it.

But what you do when you cross that line is now you're going to create a new precedent. So some performative Democrat, when there's a Republican judge coming before us, is going to demand the same information and use it or exploit it for political purposes.

I don't think we want to cross that line in this body where we've never—this has never come up in hundreds—in the 200 years. Well, I don't know how long this information has been collected in this manner.

It just seems like a really large step that I don't think, as you said yesterday, is going to change the conclusions that have already been drawn by people on either side of the aisle.

If somebody just wants to come forward and say, I'm on the fence on how I'm going to vote—this is the determinative thing—I just don't hear that, and the danger weighing these—the danger is really in terms of changing the way this Committee operates, impeding upon issues of privacy. I think it's—the danger way outweighs any probative value.

Chair DURBIN. I can't imagine for a moment a parent who has been somehow related to a child exploited in this circumstance who lives in fear every day of what's going to be made public, what's going to show up on the internet, would view this as just a routine request for information.

It is so much more than that. And, as I said, on my watch—someone could take this Chair and this gavel over and make a different decision. I'm not going to be party to it. I will not be party to exposing this information to the possibility of disclosure and the harm that can come from it.

Senator Coons.

Senator COONS. Thank you, Chairman. Dean Goluboff, thank you for your testimony today. Like Judge Jackson, you also clerked for Justice Breyer, and you're a well-respected dean of a prominent law school. I just wanted to ask a few quick questions of you and a number of other witnesses, if I might.

Judge Jackson's jurisprudence has been questioned or challenged, in particular with reference to her opinion in *Make the Road New York*. Is it your view that she, either in that case or in other cases you may have considered or reviewed, has overstepped the role of the Court and has engaged in a jurisprudence that gets outside her lane as a judge?

Professor GOLUBOFF. Thank you for the question, Senator. It is absolutely my view that she does not get outside her lane. She, I think, comes down in cases on both sides, depending on what she sees in the facts and how she applies precedents. I think she has been assiduous and conscientious, both in that case and in others, to think about precisely the kinds of questions that Professor Mascott mentions: what is the role of the Court, how much deference to offer to the other branches, how to ensure procedural con-

sistency. She is, I think, quite consistent and very committed to the text and to precedent.

Senator COONS. And given your experience with Justice Breyer, what do you think anyone who's clerked for the Justice might have learned about an even-handed and impartial manner and consensus building on the Court?

Professor GOLUBOFF. Well, I certainly learned, and I think anyone who clerked for him also learned, that exactly what you described is crucial to being a good Justice, to taking every case on its own terms, to asking what the Constitution says about that particular case at hand, which includes the original public meaning, which Judge Jackson has said, but does not end with the original public meaning. Originalism is really a capacious term, and even among originalists, there are a lot of disagreements about how cases should come out. Justice Scalia and Justice Thomas disagreed quite considerably about how much to consider precedent or not in their own decisions.

And the interpretive part of constitutional interpretation is really the first part. You look to original public meaning. That's what Judge Jackson has said she would do. And then the second part is you apply it, and you have to consider the facts of the case and precedent when you do that. And I think Justice Breyer taught all of us that the best way to do that is in conversation with Justices across the Court, and taking the deliberative process very seriously, which he did, creating real relationships across Justices so you can have real conversations and learn from each other as you wrestle with these really hard questions.

I don't think we would spend quite so much time thinking about the judge's approach or qualifications as if the interpretive process were just automatic and mechanical. It requires judgment, it requires discernment, and that's what Justice Breyer taught us.

Senator COONS. To follow up on a previous exchange, do you have any doubt that Joseph Robinette Biden, Jr., is the duly elected President of the United States?

Professor GOLUBOFF. I do not.

Senator COONS. Thank you.

Captain, if I might—Captain Thomas—I was a county executive of a county that had the second-largest police force in my admittedly small State. We had a very active chapter of NOBLE. I have a long working relationship with some NOBLE leadership, and I'm thrilled that you are here as the head of NOBLE, our Nation's largest law enforcement organization of Black law enforcement officers, which has also endorsed Judge Jackson's nomination. How do you view her record, her commitment to public safety, her engagement with the law enforcement community?

Captain THOMAS. Thank you, Senator. With all the information that we have received, different notes from different organizations, I feel very confident in her nomination for this seat. I'd like to make a statement. Her temperament, her fairness, her respect for the law, and her honor of the Constitution make Judge Ketanji Brown Jackson exactly what we should expect from someone who has ruled on matters that would affect our country and judicial system for generations.

Senator COONS. Thank you.

Captain THOMAS. Thank you, sir.

Senator COONS. Thank you very much, Captain, and thank you for the clarity and forcefulness of the endorsement. Congresswoman, I might just ask you a closing question. I've been struck at Judge Jackson's personal story and the central role that the doors of opportunity opened by HBCUs to her parents has played in that impressive arc of her story. I'd just be interested in your sharing with us the role that HBCUs play in our education system, in our Nation, and in providing that remarkable pathway forward.

Representative BEATTY. Thank you for that question. And as an HBCU graduate, as well as all five of my siblings, I can speak to that directly. I had an opportunity to probably attend any university that I wanted to, first generation going to college, but thank goodness for my parents who said to me that I would be more balanced and more grounded as a young girl coming from public school system in an inner-city school, that they thought it was important for me to do that and then later go wherever I wanted to. I think it gives you that extra sense of confidence. I think it also made me value the diversity. I had people from the continent of Africa teaching me. It was the first time in my history that I had seen so many professors and scholars who looked like me.

So it made me soar when I walked into other rooms, I think like Judge Jackson when I heard her tell her story of how she felt that first week or month at Harvard. But it was, I believe, her success, and confidence, and wind beneath her wing, her parents; her parents and that grounding of HBCU universities, and that's what they do for so many of us.

Senator COONS. Thank you.

Representative BEATTY. So I think it plays a valuable role.

Senator COONS. Thank you, Congresswoman. Thank you, Chair.

Chair DURBIN. Thank you, Senator Coons.

Senator Cruz.

Senator CRUZ. Thank you, Mr. Chairman.

Just a moment ago, Senator Coons was having an exchange where he described Judge Jackson's jurisprudence as assiduously fair and evenhanded. Professor Mascott, in *Make the Road New York v. McAleenan*, Judge Jackson found a cause of action to challenge the Department of Homeland Security's determination of the scope of which aliens are subject to expedited removal. In doing so, she disregarded the plain language of the statute that explicitly said the Secretary had, quote, "sole and unreviewable discretion" to set the designation at any time. That decision resulted in a nationwide injunction preventing the Department of Homeland Security from removing illegal aliens from this country. That decision was reversed by the D.C. Circuit unanimously. In your judgment, was her decision in *Make the Road New York v. McAleenan* assiduously fair and evenhanded?

Professor MASCOTT. Well, Senator, I cannot sit and judge motivation of what was driving a particular interpretation.

Senator CRUZ. No, the opinion.

Professor MASCOTT. In terms of the interpretation of the statutory text and structure, the opinion overlooked the clear discretion that was given to the Acting Secretary of Homeland Security in expedited removal context—

Senator CRUZ. The plain and explicit text of the statute, right?

Professor MASCOTT. The plain and explicit text of the statute and actually text of the statute that had been applied several times previously when acting heads of Department of Homeland Security had, using just policy notice, made changes in expedited removal.

Senator CRUZ. Thank you. Let me shift. Ms. Serano, thank you for the work you do with children who are victims of sexual exploitation. The work you do is very, very powerful. As you know, significant concern has been raised by myself and others about Judge Jackson's pattern in sentencing criminal defendants guilty of either possession or distribution of child pornography. In the Harvard Law Review, she wrote a note advocating a new way of examining restrictions on sexual offenders and arguing for a standard that, if applied, would likely result in striking down the sexually violent predator civil commitment laws in States across the country, and could arguably also strike down the sex offender registry laws across the country. Ms. Serano, what would be the effect if the view she articulated in the Harvard Law Review was adopted by the Supreme Court and if those laws, in turn, were struck down?

Ms. SERANO. I'm not familiar with Judge Jackson's writing in the Harvard Law Review, but I can tell you that the sex offender registry plays a critical part in allowing the community to identify where people who have demonstrated, by their conviction, a sexual interest in children or other exploitative behavior, such as rape or that sort of thing. As far as civil commitment, there are certainly State laws. I'm not familiar with all of them, but there is a process in which the due process is done whether someone should be civilly committed because they cannot function in society due to their sexual deviance.

Senator CRUZ. So, Ms. Serano, we've gone over it in some detail. The Democrat talking point is that criticism about this issue is based on cherry-picking. Yesterday, I gave Judge Jackson a chance to explain all of the child porn cases she's ever sentenced in, and that's a universe of 10 cases. Of them, five of them—*Downs*, *Cooper*, *Hess*, *Cain*, and *Buttry*—five of them, she sentenced the statutory mandatory minimum, the absolute lowest sentence that was allowable under law. She has a pattern, when there are prosecutorial recommendations of sentencing, on average, 48 percent less than the prosecutors have asked with regard to those in possession of child porn. And she repeatedly articulates, for example, in the *Cooper* case, but she does this in every case, she articulates that she thinks the sentencing enhancement for the number of images of child porn makes no sense and is invalid. And rather than having a 5-level sentencing enhancement, she reduces it to a 2-level enhancement.

Ms. Serano, does that make any sense to you that there—that there is no difference whatsoever between a defendant who is in possession of a single image versus another defendant who is in possession of hundreds, or, in one of the cases in front of Judge Jackson, someone that had 6,700 images of children, some very, very young children—infants, toddlers? Does it make any sense that she would systematically say those are identical and that she's not going to apply that the enhancement in the guidelines?

Ms. SERANO. Thank you, Senator. I am not familiar with Judge Jackson's sentencing. I apologize. I was doing my day job yesterday, so I wasn't able to watch the hearings as much as I would've liked to. But I can share with you that the increases for the number of images, I think, accurately reflects the type of offender that you're dealing with. Somebody with, you mentioned, 6,700, that's actually on the low side. When I was doing—prosecuting cases, we're talking about people with terabytes or millions of images. And so somebody with that type of collection should conceivably be sentenced more harshly than somebody would with, say, 20 images or 50 images.

Senator CRUZ. Thank you.

Ms. SERANO. Thank you.

Chair DURBIN. Thank you, Senator Cruz.

Senator Booker.

Senator BOOKER. Thank you very much, Mr. Chairman. I actually really love this. I've been through three Supreme Court Justice hearings, and when you have 10 people come forward from all different backgrounds in America and people supporting a candidate and not supporting a candidate, it is always uplifting to me. And I have a lot of respect and honor for everybody on this panel. You all are great Americans who are dedicated to this country's highest ideals as you see them.

And to give you example of why I'm so serious, I had, in a previous panel of a Supreme Court Justice I was dead set against, my constitutional law professor come in and be dead set for them. And I love this professor, still do, and I love him not just because he was a great professor, but also because he passed me.

[Laughter.]

Senator BOOKER. But—but I just want you to know, you may feel partisan tension in this room, but there is a lot of respect for the 10 of you who took time out of your schedule. Many of you traveled a very long way, and so I want to say thank you.

Mr. President—Captain, my questions are for you, but if you don't mind, I'm going to take a quick minute to address the Congresswoman. I just want to say a couple things to her publicly that are really important. First of all, the Congressional Black Caucus, it has been one of the greatest privileges of my life to be a member. Too few Senators have ever been a member of that body. And I want to say publicly, because this is true, I tried for years to get on this Committee, and the Congressional Black Caucus advocated for me for years, went to Chuck Schumer and said, you need to get Senator Booker, not just because you haven't had an African American on there for a long time, but you guys saw faith in me that I could represent well here, and I just want to thank you for that.

The second thing is just very personally to you. I had one the most difficult summers of my life last summer. You know this. My brother had a terrible stroke, and when you see people up here on this panel, you don't know what they all have been through. I did not know that the chairwoman of the Congressional Black Caucus had a horrific stroke at the age of 50 that left her seriously debilitated, to the point where you could not walk. And your story at my time of family crisis to me—talk about tears. You were the one of the best people I spoke to by telling me your story, and I see you

now sitting there, just is tremendous to me who you are and I—my depth of love and respect for you, especially showing up for me at a time I really needed it.

Representative BEATTY. Thank you.

Senator BOOKER. Really quickly, sir. I love NOBLE. They were on my transition team to be mayor of the City of Newark. I learned from your organization, your recommendations to me about a city that was really struggling with crime. And I'm happy to see Honorable Marshall and others who have to live this life of knowing, confronting some of the ugliest parts of our country, which is what happens in communities that are struggling with high rates of crime. I want to say for the record because this often doesn't get said, Chris Murphy's book put this data point in there that there is as much gun violence in inner-city communities as there are in other low-income communities that might be rural and might not have the same ethnic diversity. So I don't want to pick on any communities here that are struggling with crime. Red States have high crime rates. Blue States have high crime rates. This is not a partisan issue. This is a human urgency.

I have—I have shown up before ambulances at sites where young people have been shot. I've seen the horror and have been traumatized. And I have so much respect for police officers because of what they go through every single day on the brink, often in the gap between safety and not safety. I have seen my officers—I remember a shooting where my officers ran in, no situational awareness, upstairs to see woman who had committed suicide and had shot her baby.

Captain THOMAS. Mm-hmm.

Senator BOOKER. And then they go back to work the next day. And so I just want to ask you, then I'm done, this one question because I know what's at stake. And here is a Supreme Court Justice to the highest court in the land, and there have been people casting aspersions that she may not be the Justice that would keep us safe. As a—as a person in this room, I doubt there's anybody more in this room right now that lives in that gap between safety and horrific violence. Why are you so confident, despite all the aspersions have been cast, that this person will be a phenomenal Justice for the safety and security of families in America?

Captain THOMAS. The safety comes along with the law enforcement that have presence throughout the United States now. The Supreme Court Justice is just going to make it more—if it's something that gets before the Supreme Court dealing with law enforcement, they can make a difference, but we got to start at the local level with the law enforcement. So that's why my organization, NOBLE, is so important. We're out there discussing things with high crime, gun violence, but we have a significant program, the law in your community, and it starts by conversations to stop a confrontation.

So everybody get involved. Get the chapter—we've got 50 chapters throughout the Nation. We all try to get on the same page. The crime, it's going to continue, but we can make it better. We're trying to build trust back in the communities with law enforcement. That's our main purpose. Judge Ketanji Jackson, she knows about some of these neighborhoods. She grew up in Miami. Miami

has a high crime rate. She said she saw it firsthand growing up. She saw it firsthand.

So those decisions, when it comes to law enforcement, will be important because we all got to live here in America, but we can start making a difference today by that nomination and not just past the nomination. We talk about the Voting Rights. We talk about everything in this—I'm saying, I've been watching this confirmation hearing, man, since Monday. I was, like, man, I don't believe this because I never been through this. I thought this was a big history class, you know, and civics class. I remember civics.

But she's going to make—she can make a difference, not only her, but she's got eight other associates on that Supreme Court team with her. They all got to sit down and talk and make this better together. One person's not going to solve this problem. One person's not going to make a difference, but she's got eight other Justices on the Supreme Court, and everything is going fine, people. America is doing a great job. I don't get caught up into the politics, the Democrats, Republicans. I'm just being honest; I don't—but I know it's needed, and I know we got to get things done, so everybody's got to work together. Everybody's got to work together. But we do need NOBLE out there in the communities nationwide, so if you need one in your city, contact NOBLE.

[Laughter.]

Senator BOOKER. Amen. Everybody has to work together. Chairman, thank you.

Chair DURBIN. Thank you, Senator Booker and Captain Thomas. The next up is Senator Hawley.

Senator HAWLEY. Thank you, Mr. Chairman. Thanks to all the witnesses for being here.

Ms. Serano, if I could just start with you, I want to say a particular thank you to you for the work—the incredible work that you do when it comes to human trafficking, child trafficking in particular. I know that you were 18 years as a Federal prosecutor handling child pornography and child exploitation offenses. Those are—those are terrible crimes to have to prosecute, and I want to thank you for doing that, and thank you now for the work that you do with Operation Underground Railroad. I mean, it's just incredible.

I wonder if you could speak to us a little bit from your experience, as a prosecutor and now as someone who is working to combat this epidemic of human trafficking, child sex trafficking in this country. It's a global epidemic actually, but it's one, unfortunately, in this country, too. Can you talk to us a little bit about what you have seen in your experience about the connection between human trafficking and child pornography?

Ms. SERANO. So human trafficking is a—is a broad term that covers a bunch of different types of crimes, whether it's forced labor, et cetera, but within that, there's the sexual—sex trafficking. And oftentimes, when you're dealing with sex trafficking of minors, part of the process is to break down the victim or potentially advertise the victim to sex buyers, traffickers, or folks create child pornography, which are sexually explicit pictures of children under the age of 18. Likewise, the flip side is if someone as a young child has been sexually abused as a child, perhaps they were victims of

CSAM—child sexual exploitation material—they may not have gotten the resources or aftercare, for example, that my organization provides, to get them the help that they need, and unfortunately, they've become very vulnerable to become trafficked. So it's kind of like a chicken and the egg problem where sometimes one will influence or increase the other.

Senator HAWLEY. So let me—let me ask you this. In terms of the children who are exploited in these images, is it fair to say that—that many of these children were sex trafficked, that they are trafficking victims themselves?

Ms. SERANO. Of the ones that we can identify, sometimes yes. The children that are depicted in the child pornography or CSAM images, some of them are trafficked, yes.

Senator HAWLEY. And what about the demand side of this, because, unfortunately, the reason that there is human trafficking of any kind, including sex trafficking in children, is because there's a demand for it. And does—in your experience, does child pornography help drive the demand for human trafficking and sex trafficking of children?

Ms. SERANO. It can, yes. An argument that I would routinely make before district judges in my district would be, you know, sometimes you have individuals who are looking at images online of child pornography, and then oftentimes that will not satiate their need for this material, and they'll go out and actually commit an offense. It's no different than you walk by—and this is a very simplistic analogy. You know, you could walk by a bakery and smell the sugary, you know, chocolate cake, but sometimes it gets to you so much, you go in and buy a slice. Again, it's simplistic. I'm not trying to make light of it, but that's a very simple analogy to explain it.

Senator HAWLEY. Yes, thank you. Thank you for that, and, again, thank you for the incredible work that you do. Mr. Marshall—General Marshall, thank you for being here. You're a prosecutor. You have been—even before this role, which is a prosecutorial one, you were a district attorney. Let me just ask you, when you recommended sentences to judges, which you would do in your role as a prosecutor, did you base your recommendation on what you thought was necessary to keep the public safe?

General MARSHALL. Senator, absolutely, and also the egregious nature of the facts that we were dealing with.

Senator HAWLEY. So if you made a recommendation to a judge and that judge went 90 percent or more below your recommendation that you thought was necessary to keep the public safe, would you be worried about the effect that that might have in terms of endangering members of the community?

General MARSHALL. Greatly concerned, not only as it related to the particular case but also the message it sends to the community about how we would hold individuals personally accountable for crimes they commit.

Senator HAWLEY. So, in other words, if you have a judge who consistently sentences, let's say, in an area, let's say child pornography, below what the Government is asking for, what the guidelines are asking for, you're saying that the message that that sends

is that you're not very tough on this, you're not willing to hold these people accountable. Is that—have I got that right?

General MARSHALL. Absolutely.

Senator HAWLEY. So let me ask you this. You said also, you know, you sentence based on the gravity of the crime. When it comes to things like child exploitation and images that exploit children, would you say that the more—if you have an offender who has thousands of images, that that's probably worse than an offender who has one or two, and that you might want to sentence that offender with hundreds and thousands more than the person who has one or two? Is that a fair thing to say?

General MARSHALL. It's fair, and, in fact, it's been my practice. You know, somebody that has tried and convicted those who traffic in child pornography, I've had a chance to be able to see those images because one thing that I also do is advocate for that child that is in that image that has been harmed as a result of what's taken place. And so not only do we want to be able to deter that conduct, but also we want to be able to be that voice for the voiceless in this case, and it's those children whose images are being trafficked.

Senator HAWLEY. Because they often—I mean, the kids who have been trafficked, their images have been used. They often don't have anybody to speak for them, right? I mean, you come into court, the judge has got to do justice. In a way, the judge has got to do justice by them, on behalf of them because there's nobody to speak for them, and it's not like—they don't get to prosecute the case, right? A lot of times, we didn't even know who these kids are. We can't find them. We can't help them. So it's really up to the court to do something on their behalf. Is that fair to say?

General MARSHALL. The court is the ultimate voice.

Senator HAWLEY. Yes. I wish that Judge Jackson shared your perspective, General. Thank you.

Chair DURBIN. Thank you Senator. I want to apologize to Senator Hirono. I recognized Senator Booker, and she was next in line. I hope she will forgive me.

Senator HIRONO. I forgive you.

Chair DURBIN. Thank you.

[Laughter.]

Chair DURBIN. Now I recognize—

Senator BOOKER. Well, if you're asking for forgiveness, I was supposed to read something in the—in to the record, just to ask Senator Hirono. The NAACP Legal Defense Fund asked that we enter their report into the record. May I do that?

Senator HIRONO. Go ahead.

Senator BOOKER. I would like to ask for that to be entered into the record.

Chair DURBIN. Without objection.

Senator BOOKER. Thank you very much.

[The information appears as a submission for the record.]

Senator HIRONO. Thank you very much, Mr. Chairman.

Captain Thomas, NOBLE's support for Judge Jackson is a powerful counter to the false charge that Judge Jackson is soft on crime. I thank all of you for being here.

Congresswoman Beatty, we all know that Judge Jackson is eminently qualified. Her character, her integrity, her humanity, her kindness, her fairness, her leadership, these were qualities that were apparent from a really young age. And I thank Mr. Rosenthal for telling us about what she was as a young girl. It's an incredible story, and I really enjoyed listening to you. Congresswoman Beatty, as you listened to Judge Jackson yesterday, especially when she talked about her experience at Harvard and the need for perseverance, I was going to ask you whether you could relate to that, but clearly you could and so could I. Do you think the message of perseverance is a powerful message, especially to Black women and girls in this country?

Representative BEATTY. First of all, let me just say not only thank you for the question, but thank you for your service and what you represent. I think it is an extremely powerful and needed message that we send out to little girls, all little girls, but specifically those who are of color. And I think what you saw yesterday builds for our children, grandchildren, and those yet unborn, because even today, we are fighting for things that we were fighting for in 1963, 1964, 1965, and 1968. So today could not only be landmark as we do this; it could propel us for the future that every little girl will then believe that she can soar.

Senator HIRONO. And believe me, as an immigrant for a kid, I can relate. It was a very touching moment yesterday.

Representative BEATTY. Let me just quickly say this because we talked about the rule of law. I think you also have to look at judicial temperament, and what you saw yesterday, beyond her talking about her early childhood, was her response to the tough questions, maybe, I think, some unfair questions. You saw judicial temperament.

Senator HIRONO. Exactly. Thank you. Dean Goluboff, we know that many of the Supreme Court decisions are unanimous or pretty close to that, but then we're seeing more and more 5-4 or 6-3 decisions. And as I said, we have a very, in my view, an ideologically divided Court. And you were asked earlier what the impact of these kinds of split decisions, especially in areas of voting rights, LGBTQ+ rights, abortion rights, workers' rights, union rights. These are the most consequential kind of cases where we can expect more split decisions. Judge Jackson was asked repeatedly about her judicial philosophy, and she does have one. It has to do with her methodology. I wanted to ask you, do you think all of our Justices should view themselves as originalists?

Professor GOLUBOFF. I think every Justice has to read the Constitution as they think they should. I think they have to be committed to the Constitution and committed to the judicial role in the constitutional scheme. But I do not personally think that everyone has to have the same approach to the Constitution.

Senator HIRONO. I agree with you because, as an example of an originalist, if we were to follow Justice Scalia's view of originalism, we would not have same-sex marriage in our country because the *Obergefell* case would have been decided very differently under Justice Scalia's view of originalism, and, in fact, Justices Thomas and Alito, also originalists, and in their view. They've already signaled

that they would like to revisit *Obergefell*. I think the LGBTQ+ community is very, very concerned about that.

For Mr. Henderson—excuse me—thank you very much also for being here. You represent an organization deeply committed to protecting the rights and civil liberties of all Americans. What would you tell Americans who want to know if a future Justice Jackson will stand up for them and protect their rights?

Mr. HENDERSON. Thank you for the question, Senator. Let me say, I begin first with Senate—Judge Jackson's preparation for the role that she hopefully is about to assume. And you've heard both in the days that she testified and again today how exemplary her credentials are, how she has prepared herself in a way that was really destined for this moment. She has the embodiment of fairness and judicial temperament. She brings a level of excellence and preparation, unparalleled in the appointment of Supreme Court Justices.

There is a deep sense of commitment to fairness that she exudes, both in her writings as a judge but also in her daily interactions both on and off the court. There is a fundamental sense of inherent fairness that she certainly embodies, and I think all Americans and persons who are not American citizens but are in this country, are guaranteed that she will approach the Constitution with fairness and will approach the individual circumstances of the cases before her. I think that's all we could possibly ask a Justice to do.

Senator HIRONO. Thank you. Thank you, Mr. Chairman.

Chair DURBIN. Senator Padilla.

Senator PADILLA. Thank you, Mr. Chair. You know, over the last 3 days, we've heard over and over again, as we should, about the incredible qualifications that Judge Ketanji Brown Jackson has to serve on the Supreme Court, and I know I've touted them each and every day of this hearing myself. Hopefully you've seen me do it if you've been watching the hearings, and I'm going to do it again here in a minute.

But before I do I'm going to explain why I'm doing it, why I keep doing it. It's because I do believe every American should know Ketanji Brown Jackson the judge, Ketanji Brown Jackson the person, and the fact that she represents the very best of our country; that's she's not just qualified, but extraordinarily qualified to serve on the Supreme Court of the United States. And because of her qualifications, and with her experiences—professional and life experiences—that she brings, she will make the Supreme Court better, and she will make our country better.

So it is my sincere desire that for anybody watching these proceedings from the audience, here in this room, or from home, or online, if you take nothing else away from these last 4 days, it's Judge Jackson's qualifications: a public school education followed by degrees from Harvard College and Harvard Law School, clerkships at the Federal district court, at the Federal court of appeals, and the United States Supreme Court; 2 years as a Federal public defender; 2 years as a staff member of the United States Sentencing Commission and 4 years as its vice chair; three separate confirmations by the United States Senate, each time on a bipartisan basis, including two lifetime judicial appointments; nearly a decade of judicial experience, which is more than the combined

total of four of the currently sitting Justices at the time that they were nominated; and, of course, the life experience as a Black woman, as a working mom, and so much more.

But it's not just her résumé background that makes Judge Jackson so qualified to serve on the Supreme Court. I've seen, we've all seen over the last 3 days how she answered every question and met every unfounded, unfair, and insulting accusation with a level of grace, dignity, and patience that very, very few of us would be able to demonstrate under similar circumstances. And she demonstrated that she's sharp and thoughtful in her responses to legal questions, and clearly has an understanding of and a commitment to the rule of law and the principle of equal justice. Now, based on her background, her experiences, and her qualifications, in my view, Judge Jackson merits strong bipartisan support from this Committee and from the Senate as a whole.

My question is this, and I address it to Congresswoman Beatty and to Mr. Henderson. For those who are concerned about the politicization of the Supreme Court toward one end of the spectrum or the other, what would it say to the country if even someone with Judge Jackson's background, experiences, and qualifications cannot earn bipartisan support from the Senate?

Representative BEATTY. Thank you so much, Senator. I think it would be a sad day in America. As my friend and colleague, Wayne Henderson, said earlier, when we look at this confirmation, and we look at voting rights, and when we look at all the things that you are debating today, it is the fundamental grounding of our society and our communities. So I think today, how can you say, on both sides of the aisle as Senator Tillis looked at me and said he and his colleagues agree that she is exceptionally qualified. Then we have heard about the cases that have been brought before us that have been questioned by some of my colleagues on the other side—10 cases, but it was five—but they were still within the rule of the law that she was given to deal with. So if you look at all the charts that we've seen with all the boxes to be checked, more than any other Justice that some of the same people here have voted for and confirmed when questions about cases in the same vein have appeared, she still is above all of them.

So the answer to that question is, how can we not? And as a Black woman who lived through civil rights and everything else, let's send the right message. Thank you.

Senator PADILLA. Thank you. Mr. Henderson?

Mr. HENDERSON. Senator Padilla, your question is so powerful, particularly after you restated, as you did so eloquently, all of the factors that have brought Judge Jackson to this moment. Her background is absolutely extraordinary, and her demonstration and mastery of the law is second to none. If someone, an American citizen, who has overcome the challenges in one's life that she has overcome, demonstrated her ability beyond any reasonable doubt, and is unable to get the bipartisan support of Members of this Committee, indeed it is a sad day for this country.

The signal that it sends to American—the American people is that, at the end of the day, preparation may not be the standard by which you are measured, and, instead, something else intangible perhaps in this process comes through. That's not what we want

for America. That's not what we in the Civil Rights Movement have struggled for our professional lives to help bring to this country. It would be a sad day.

My hope is that the partisan considerations that may have affected some in the questioning of Judge Jackson will be set aside and that Members of this Committee, out of their love for the country, and its people, and the future of the Court, will do what's right and will make Judge Jackson a unanimously confirmed appointment. Now, I'm dreaming. That's not going to happen, but certainly I think sending a signal to the country that, indeed, we recognize the qualifications that she brings to the table and we lift them up in the name of the American people is something that I hope we can all do. Thank you.

Chair DURBIN. Thank you, Senator Padilla, and thank you to the panel. And I welcome all of you to this room, and thank you for your contribution to this historic occasion.

I said at the outset, and I want to repeat now, my gratitude to my Ranking Republican Member, Senator Grassley, a true gentleman and friend who believes, as I do, that this is one of the most important assignments in a Senate career to be on the Judiciary Committee at this moment in history. I believe that the admonition of the Leader on the Republican side, Senator McConnell, that our hearing be fair and respectful of the nominee was largely upheld by the Members of the Committee, and I hope that we can continue in that vein.

But before we close today, I want to mention those who have helped enable this hearing to run so smoothly. Gratitude starts with the officers of the United States Capitol Police. These officers keep Members and staff safe every single day, but this week we've asked them to take on a greater task: keep us safe, keep our building secure, and ensure that the guests in attendance play by the rules. I can't thank them enough for all the hours they put in toward that mission.

I also want to thank the staff and the Architect of the Capitol, Senate Sergeant-at-Arms, the Senate recording press galleries, and others who worked so hard to set up this room and give access to the public and press and to keep this hearing running.

Finally, a special thanks to the Committee staff, designated and otherwise, who have worked tirelessly on behalf of Members and staff on both sides of the aisle. I'll have more thanks to offer in the weeks ahead, but, again, my deepest gratitude to all who made this hearing a success.

Please note the record will remain open until 5 p.m. next Thursday for the submission of letters, statements for the record, and similar materials.

And with that, the Senate Judiciary Committee stands adjourned.

[Whereupon, at 12:47 p.m., the hearing was adjourned.]

[Additional material submitted for the record for Day 1, Day 2, Day 3, and Day 4 follows.]

A P P E N D I X

ADDITIONAL MATERIAL SUBMITTED FOR THE RECORD

Witness List
Hearing before the
Senate Committee on the Judiciary

“The Nomination of Ketanji Brown Jackson to be an Associate Justice
of the Supreme Court of the United States”

Monday, March 21, 2022
Hart Senate Office Building, Room 216
11:00 a.m.

Introducers

The Honorable Thomas B. Griffith
Judge
U.S. Court of Appeals for the District of Columbia Circuit (2005-2020) (Ret’d)

Ms. Lisa M. Fairfax
Presidential Professor and Co-Director, Institute for Law & Economics
University of Pennsylvania Carey Law School

Panel I

The Honorable Ketanji Brown Jackson
to be an Associate Justice of the Supreme Court of the United States

Panel II

The Honorable Ann Claire Williams
American Bar Association
Standing Committee on the Federal Judiciary

Ms. D. Jean Veta
American Bar Association
Standing Committee on the Federal Judiciary

Mr. Joseph M. Drayton
American Bar Association
Standing Committee on the Federal Judiciary

Panel III Majority

The Honorable Joyce Beatty
United States House of Representatives
State of Ohio – 3rd District

Ms. Risa Goluboff
Dean, Arnold H. Leon Professor of Law, and Professor of History
University of Virginia

Mr. Wade Henderson
President & CEO
The Leadership Conference on Civil and Human Rights

Mr. Richard B. Rosenthal

Captain Frederick Thomas
National President
National Organization of Black Law Enforcement Executives (NOBLE)

Panel III Minority

The Honorable Steve Marshall
Attorney General
State of Alabama

Professor Jennifer Mascott
Assistant Professor of Law & Co-Executive Director of the C. Boyden Gray Center
Antonin Scalia Law School
Arlington, VA

Ms. Eleanor McCullen

Ms. Keisha Russell
First Liberty

Ms. Alessandra Serano
Operation Underground Railroad

UNITED STATES SENATE
COMMITTEE ON THE JUDICIARY

QUESTIONNAIRE FOR NOMINEE TO THE SUPREME COURT

PUBLIC

1. **Name:** State full name (include any former names used).

Ketanji Brown Jackson (née Ketanji Onyika Brown)
2. **Position:** State the position for which you have been nominated.

Associate Justice, United States Supreme Court
3. **Address:** List current office address. If city and state of residence differs from your place of employment, please list the city and state where you currently reside.

United States Court of Appeals for the District of Columbia Circuit
E. Barrett Prettyman United States Courthouse, Room 5700
333 Constitution Avenue, Northwest
Washington, District of Columbia 20001
4. **Birthplace:** State year and place of birth.

1970, Washington, District of Columbia
5. **Education:** List in reverse chronological order each college, law school, or any other institution of higher education attended and indicate for each the dates of attendance, whether a degree was received, and the date each degree was received.

1993 – 1996, Harvard Law School; J.D. (*cum laude*), 1996
1988 – 1992, Harvard University; B.A. (*magna cum laude*), 1992
6. **Employment Record:** List in reverse chronological order all governmental agencies, business or professional corporations, companies, firms, or other enterprises, partnerships, institutions or organizations, non-profit or otherwise, with which you have been affiliated as an officer, director, partner, proprietor, or employee since graduation from college, whether or not you received payment for your services. Include the name and address of the employer and job title or description.

2021 – Present

United States Court of Appeals for the District of Columbia Circuit
E. Barrett Prettyman United States Courthouse, Room 5700
333 Constitution Avenue, Northwest
Washington, District of Columbia 20001
United States Circuit Judge

2013 – 2021

United States District Court for the District of Columbia
E. Barrett Prettyman United States Courthouse, Room 4423
333 Constitution Avenue, Northwest
Washington, District of Columbia 20001
United States District Judge

2010 – 2014

United States Sentencing Commission
One Columbus Circle, Northeast
Washington, District of Columbia 20002
Vice Chair & Commissioner

2007 – 2010

Morrison & Foerster LLP
2000 Pennsylvania Avenue, Northwest, 6th Floor
Washington, District of Columbia 20006
Of Counsel

2005 – 2007

Office of the Federal Public Defender
625 Indiana Avenue, Northwest
Washington, District of Columbia 20004
Assistant Federal Public Defender

2003 – 2005

United States Sentencing Commission
One Columbus Circle, Northeast
Washington, District of Columbia 20002
Assistant Special Counsel

2002 – 2003

The Feinberg Group, LLP (now known as Feinberg Rozen, LLP)
1455 Pennsylvania Avenue, Northwest
Washington, District of Columbia 20004
Associate

2000 – 2002
 Goodwin Procter LLP
 Exchange Place
 53 State Street
 Boston, Massachusetts 02109
 Associate

1999 – 2000
 Supreme Court of the United States
 One First Street, Northeast
 Washington, District of Columbia 20543
 Law Clerk for Associate Justice Stephen G. Breyer

1998 – 1999
 Miller, Cassidy, Larroca & Lewin LLP (now defunct)
 2599 M Street, Northwest
 Washington, District of Columbia 20007
 Associate

1997 – 1998
 United States Court of Appeals for the First Circuit
 1 Exchange Terrace
 Providence, Rhode Island 02903
 Law Clerk for the Honorable Bruce M. Selya

1996 – 1997
 United States District Court for the District of Massachusetts
 1 Courthouse Way
 Boston, Massachusetts 02210
 Law Clerk for the Honorable Patti B. Saris

Summer 1996
 Ropes & Gray LLP
 One International Place
 Boston, Massachusetts 02110
 Summer Associate

Summer 1995
 Miller, Cassidy, Larroca & Lewin LLP (now defunct)
 2599 M Street, Northwest
 Washington, District of Columbia 20007
 Summer Associate

Summer 1994
Kirkland & Ellis LLP
Citigroup Center
153 East 53rd Street
New York, New York 10022
Summer Associate

1992 – 1993
Time Magazine, Inc.
1271 Avenue of the Americas
New York, New York 10020
Staff Reporter/Researcher

Teaching Affiliations

January Terms 2019 and 2018
Harvard Law School
Trial Advocacy Workshop Instructor (uncompensated)
1563 Massachusetts Avenue
Cambridge, Massachusetts 02138

Spring Terms 2014, 2012, and 2011
George Washington University Law School
Professional Lecturer in Law—Federal Sentencing Seminar
2000 H Street, Northwest
Washington, District of Columbia 20052

Other Affiliations (uncompensated)

2019 – Present
Georgetown Day School
4200 Davenport Street, Northwest
Washington, District of Columbia 20016
Board of Trustees

2018 – Present
Supreme Court Fellows Commission
1 First Street, Northeast
Washington, District Columbia 20543
Commissioner

2016 – Present
 Harvard University
 17 Quincy Street
 Cambridge, Massachusetts 02138
 Board of Overseers (2016 – present)
 Executive Committee (2019 – present)

2016 – Present
 American Law Institute
 4025 Chestnut Street
 Philadelphia, Pennsylvania 19104
 Council

2014 – Present
 Edward Bennett Williams Inn of Court
 333 Constitution Avenue, Northwest
 Washington, District of Columbia 20001
 Barrister (2014 – Present)
 Vice President (2016 – Present)

2015 – 2021
 Historical Society of the District of Columbia Circuit
 333 Constitution Avenue, Northwest, Room 4726
 Washington, District of Columbia 20001
 Board of Directors

2013 – 2017
 Council for Court Excellence
 1111 14th Street, Northwest, Suite 500
 Washington, District of Columbia 20005
 Co-Chair, CCE Jury Project: Jury Service in the 21st Century (2013 – 2015)
 Board of Directors (2015 – 2017)

2011 – 2013
 National Institute of Corrections
 320 First Street, Northwest
 Washington, District of Columbia 20534
 Advisory Board (designee of Chair of the Sentencing Commission)

2010 – 2011
 Montrose Christian School (closed 2013)
 5100 Randolph Road
 Rockville, Maryland 20852
 Advisory School Board

2004 – 2007
Harvard Alumni Association
124 Mount Auburn Street, 6th Floor
Cambridge, Massachusetts 02138
Elected Director

7. **Military Service and Draft Status:** Identify any service in the U.S. Military, including dates of service, branch of service, rank or rate, serial number (if different from social security number) and type of discharge received, and whether you have registered for selective service.

I have not served in the military. I was not required to register with the selective service.

8. **Honors and Awards:** List any scholarships, fellowships, honorary degrees, academic or professional honors, honorary society memberships, military awards, and any other special recognition for outstanding service or achievement.

Empowering Women of Color, Columbia Law School,
Constance Baker Motley Award (2021)

Black Law Students Association, University of Chicago Law School,
Distinguished Visiting Jurist, Third Annual Judge James B. Parsons Legacy
Award (2020)

Women's Bar Association of the District of Columbia, Stars of the Bar Award (2019)

The University of Utah, S.J. Quinney College of Law,
David T. Lewis Distinguished Jurist-in-Residence (2019)

NBC News, She Thrives: Black Women Making History (2019)

Keynote Speaker, Harvard Law Review's 130th Spring Banquet (2017)

The University of Chicago Law School,
Edward H. Levi Distinguished Visiting Jurist (2014 – 2015)

Harvard Law Review (Volume 109, Supervising Editor, 1995 – 1996)

Harvard College Scholarship for Academic Achievement (1989 – 1991)

Elizabeth Carey Agassiz Certificate for Academic Achievement (1989 – 1990)

Glamour Magazine's Top Ten College Women Competition, Semi-finalist (1991)

National Catholic Forensic League National Champion in Original Oratory (1988)

National Forensics League National Finalist in Humorous Interpretation (1988)

9. **Bar Associations:** List all bar associations or legal or judicial-related committees, selection panels or conferences of which you are or have been a member, and give the titles and dates of any offices which you have held in such groups.

ABA Criminal Justice Section, Sentencing Task Force (2018 – 2021)

ABA Section on Administrative Law & Regulatory Practice, Ex Officio Council (2021 – Present)

American Law Institute, Council (2016 – Present)

Edward Bennett Williams Inn of Court, Vice President (2014 – Present)

Judicial Conference Committee on Defender Services (2017 – Present)

Magistrate Judge Merit Selection Panel (2005)

Supreme Court Fellows Commission (2019 – Present)

Supreme Court Institute, Georgetown University, Moot Court Jurist (2003 – 2009)

United States District Court for the District of Columbia

D.C. Circuit Judicial Wellness Committee (2018 – 2021)

District Court Admission Review Committee (2015 – 2021)

District Court Jury Committee, Chair (2013 – 2021)

Bankruptcy Judge Merit Selection Panel, Chair (2020)

Art and District Court Public Space Committee (2017 – 2019)

D.C. Circuit Judicial Conference Arrangements Committee (2017)

D.C. Circuit Judicial Council (2014 – 2016)

Women's Bar Association of the District of Columbia, Amicus Committee Co-Chair (2006)

10. **Bar and Court Admission:**

- a. List the date(s) you were admitted to the bar of any state and any lapses in membership. List any state in which you applied for reciprocal admission without taking the bar examination and the date of such admission or refusal of such admission. Please explain the reason for any lapse in membership.

Massachusetts, 1996

District of Columbia, 1998 (reciprocal admission)

There have been no lapses in membership. I have been an inactive member of both bars (judicial status) since my appointment to the bench in 2013.

- b. List all courts in which you have been admitted to practice, including dates of admission and any lapses in membership. Please explain the reason for any lapse in membership. Give the same information for administrative bodies that require special admission to practice.

Supreme Court of the United States, 2000
 United States Court of Appeals for the Fourth Circuit, 2008
 United States Court of Appeals for the District of Columbia Circuit, 2005
 United States Court of Appeals for the First Circuit, 1998
 United States District Court for the District of Columbia, 2009
 United States District Court for the District of Massachusetts, 1997
 United States Court of Federal Claims, 2008
 District of Columbia Court of Appeals, 1998

There have been no lapses in membership.

11. **Memberships:**

- a. List all professional, business, fraternal, scholarly, civic, charitable, or other organizations, other than those listed in response to Questions 9 or 10 to which you belong, or to which you have belonged, or in which you have participated, from the beginning of law school. Provide dates of membership or participation, and indicate any office you held. "Participation" means consistent or repeated involvement in a given organization, membership, or regular attendance at events or meetings. Include clubs, working groups, advisory or editorial boards, panels, committees, conferences, or publications. Describe briefly the nature and objectives of each such organization; the nature of your participation in each such organization; and identify an officer or other person from whom more detailed information may be obtained.

The Cosmos Club (2019 – Present)—The Cosmos Club hosts social events and is a meeting spot for members, both national and international, from a variety of professions. I was elected to membership in 2019. Additional information about the Cosmos Club may be obtained from Joanne Pierre, Cosmos Club Manager for Membership and Administrative Affairs, jpierre@cosmosclub.org.

Harvard Alumni Association (1992 – Present); Elected Director (2004 – 2007)—The Harvard Alumni Association ("HAA") helps alumni connect with the University and fellow graduates. As a Harvard alumna, I am a member of the HAA. I also served as an Elected Director (office holder) of the HAA for three years. Additional information about the HAA may be obtained from Phillip Lovejoy, HAA Associate Vice President and Executive Director, (617) 496-3431.

Harvard Black Alumni Society (2003 – Present)—The Harvard Black Alumni Society (“HBAS”) is a shared interest group of the Harvard Alumni Association. HBAS is a forum for Black Harvard alumni to communicate and convene, in order to contribute to the professional development of its current and future members and the Harvard community at large. HBAS seeks to provide a strong and supportive community of alumni and to enhance the experience of each graduating class. Additional information about HBAS may be obtained from Monica M. Clark, HBAS President, info@hbasonline.org.

Harvard Club of Washington, District of Columbia (2002 – 2016); Local College Interviewer (2004 – 2016)—The Harvard Club of Washington, D.C., is a nonprofit organization that provides cultural, educational, social, and networking events for Harvard alumni in the Washington, D.C. area. The Club also conducts interviews of Harvard College applicants, awards scholarships to local students, and organizes local community service events. I was a member of the Harvard Club from 2002 to 2016, and I also interviewed college applicants from 2004 until 2016. Additional information about the Harvard Club of Washington, D.C. may be obtained from Caren Pauley, Executive Director, (202) 337-1300.

- b. The American Bar Association’s Commentary to its Code of Judicial Conduct states that it is inappropriate for a judge to hold membership in any organization that invidiously discriminates on the basis of race, sex, religion, or national origin. Indicate whether any of these organizations listed in response to 11(a) above currently discriminate or formerly discriminated on the basis of race, sex, religion or national origin either through formal membership requirements or the practical implementation of membership policies. If so, describe any action you have taken to change these policies and practices.

To the best of my knowledge, none of these organizations currently discriminates on the basis of race, sex, religion, or national origin either through formal membership requirements or the practical implementation of membership policies. It is my understanding that, more than 30 years prior to my joining, the Cosmos Club intentionally excluded women from membership. The club terminated that policy in 1988.

- c. List all conferences, symposia, panels, and continuing legal education events you have attended since your appointment to the United States Sentencing Commission. For each event, provide the dates, a description of the subject matters addressed, the sponsors, and whether any funding, gifts or travel reimbursements were provided to you by the sponsors or other organizations.

To my recollection, and through a review of my calendar and searches of publicly available databases by persons acting on my behalf, I have located the events listed below. It is possible that there are a few events that I have no record of and thus was not able to identify.

December 7 – 9, 2021: Orientation Seminar for Newly Appointed Court of Appeals Judges, Federal Judicial Center. This seminar was a virtual training session that covered issues that newly appointed federal judges could face in their roles. I did not receive any funding, gifts, or reimbursements for this event.

October 6, 2021: Unity Webinar, Harvard Alumni Association. This was a virtual discussion with Harvard President Lawrence Bacow about issues facing Harvard University. I did not receive any funding, gifts, or reimbursements for this event.

July 21, 2021: Educational Opportunities Section Effective Writing Series, United States Department of Justice. This was a virtual training session for section attorneys regarding effective legal writing. I did not receive any funding, gifts, or reimbursements for this event.

January 26, 2021: “Raising our Hands: Seeking Appointments in the Biden/Harris Administration,” Women’s White Collar Defense Association. This was a virtual panel question and answer session that covered the panelists’ career paths and general advice for women attorneys seeking to advance their careers through public service. I did not receive any funding, gifts, or reimbursements for this event.

November 18, 2020: Benjamin Cooper Memorial Lecture & 75th Anniversary Speaker Series, Georgetown Day School. This was a virtual panel discussion regarding the legacy of Justice Ruth Bader Ginsburg. I did not receive any funding, gifts, or reimbursements for this event.

November 4, 2020: Annual Meeting of National Asian Pacific American Bar Association. I recorded a video segment regarding my experiences clerking for Justice Breyer for this Annual Meeting, which I did not otherwise attend. I did not receive any funding, gifts, or reimbursements for this event.

October 1, 2020: COVID Conversation Series: Conversations with the Judiciary, University of California Berkeley School of Law. This was a virtual moderated discussion hosted by Professor Amanda Tyler concerning one of my civil procedure cases. I did not receive any funding, gifts, or reimbursements for this event.

August 5, 2020: *Harvard Law Review* Orientation, Harvard Law School. This was a virtual panel featuring Law Review alumni that highlighted panelists’ experiences as editors. I did not receive any funding, gifts, or reimbursements for this event.

June 8 – 12, 2020: Virtual National Convention, American Constitution Society. This virtual convention covered recent developments in constitutional law and

legal issues relating to the pandemic. I did not receive any funding, gifts, or reimbursements for this event.

February 24, 2020: Third Annual Judge James B. Parsons Legacy Dinner, University of Chicago School of Law. I was the Keynote speaker for the Third Annual Judge James B. Parsons Legacy Dinner, “Three Qualities for Success in Law and Life.” The University of Chicago School of Law covered my expenses for the event.

January 19 – 21, 2020: Martin Luther King Jr. Day Celebration, University of Michigan Law School. I was the keynote speaker for the University of Michigan Law School Martin Luther King Jr. Day Celebration, “Courage / Purpose / Authenticity: Black Women Leaders in the Civil Rights Movement Era and Beyond.” The University of Michigan Law School covered my expenses for the event.

October 28 – 30, 2019: Mid-Career Seminar for U.S. District Judges, Federal Judicial Center. This seminar covered issues relating to judicial decision-making. The Federal Judicial Center covered my expenses associated with this event.

October 4, 2019: Clerks at 100: Academic Symposium Featuring Former Supreme Court Clerks, National Constitution Center and George Washington Law Review. This symposium involved three panels of former Supreme Court clerks discussing their experiences during and after their clerkships and the future of the clerkship institution. I did not receive any funding, gifts, or reimbursements for this event.

July 10, 2019: “How to Land a Clerkship: Practical Advice from Judges,” American Constitution Society. This was a panel discussion regarding the value of clerkships and how to be a competitive candidate. I did not receive any funding, gifts, or reimbursements for this event.

June 25 – 28, 2019: Judicial Conference, United States Court of Appeals for the District of Columbia Circuit. This conference covered issues relating to technology, the internet, and the courts. The Court of Appeals for the District of Columbia Circuit covered my expenses associated with this event.

June 8 – 9, 2019: Mock Trial Program, National Institute of Trial Advocacy. I judged a two-day mock trial program that NITA held at the District of Columbia Superior Court. I did not receive any funding, gifts, or reimbursements for this event.

June 6, 2019: Judges’ Convening, American Constitution Society National Convention. In connection with ACS’s annual convention, I attended a session to which judges were invited. I did not receive any funding, gifts, or reimbursements for this event.

May 1, 2019: Colloquium on Courts and the Legal Process, Columbia Law School. This was a workshop that brought together judges, scholars, and students to discuss current research on courts and judging. Columbia University covered my expenses associated with this event.

April 9 – 10, 2019: David T. Lewis Distinguished Jurist-in-Residence, The University of Utah, S.J. Quinney College of Law. I visited classes, participated in a question and answer session about my career that was sponsored by the Minority Bar Association, and presided over the Traynor moot court competition. The University of Utah covered my expenses associated with this visit.

February 8, 2019: “Judicial Independence and Criminal Law,” Stanford Law Review Symposium on The Independence of the American Judicial System. This was a moderated panel discussion, conducted as part of a Stanford Law Review Symposium, that compared the experiences of elected state judicial officers and life-tenured federal judges. Stanford University covered my expenses associated with this event.

November 15, 2018: “Hamilton: The Man, the Musical, and the Law,” National Constitution Center and Drexel University Thomas R. Kline School of Law. This was a panel discussion about Alexander Hamilton, the Constitution, and the law. Drexel University covered my expenses associated with this event.

November 8, 2018: “Sentencing,” National Association of Criminal Defense Lawyers 14th Annual White Collar Seminar: Defending the White Collar Case. This was a panel discussion, held as part of a white collar crime seminar, that addressed how judges approach sentencing determinations based on hypothetical scenarios involving white collar defendants. I did not receive any funding, gifts, or reimbursements for this event.

October 29 – 31, 2018: Transferee Judges’ Conference, Judicial Panel on Multi-District Litigation. The conference covered the multidistrict litigation system and the issues transferee judges face in handling such matters. The Administrative Office of the United States Courts covered my expenses associated with this event.

March 10, 2018: “The Power of Protest and Legal Responses to Threats to Assembly,” American Constitution Society 2018 National Student Convention. This was a moderated panel discussion, held as part of the American Constitution Society National Student Convention, regarding the right to assembly and the regulation of peaceful public protests. The American Constitution Society covered my expenses associated with this event.

January 25 – 26, 2018: Keedy Cup Moot Court, University of Pennsylvania. I was one of three judges who presided over the final round of Penn Law’s internal

moot court competition. The University of Pennsylvania covered my expenses associated with this event.

October 30 – November 1, 2017: Transferee Judges' Conference, Judicial Panel on Multi-District Litigation. The conference covered the multidistrict litigation system and the issues transferee judges face in handling such matters. The Administrative Office of the United States Courts covered my expenses associated with this event.

October 27, 2017: "Looking Forward: Criminal Justice Policy and Reform," George Washington University Law Review. This was a moderated panel, held as part of a symposium entitled, "The Challenge of Crime in Free Society: 50 Years Later." I did not receive any funding, gifts, or reimbursements for this event.

June 27 – 30, 2017: Judicial Conference, United States Court of Appeals for the District of Columbia Circuit. This conference covered issues relating to the history and future of forensic science in the courts. The Court of Appeals for the District of Columbia Circuit covered my expenses associated with this event.

June 8, 2017: "A Conversation with Associate Justice Stephen Breyer," American Constitution Society Annual National Convention. This convention covered a variety of constitutional law issues, and I introduced Justice Breyer at one session. I did not receive any funding, gifts, or reimbursements for this event.

June 2, 2017: "Tips from the District Court Bench," United States Sentencing Commission National Seminar. This was a moderated panel, held as part of the Sentencing Commission's National Seminar, regarding how district court judges prepare for sentencing and how counsel can be most effective during sentencing proceedings. The United States Sentencing Commission covered my expenses associated with this event.

May 27, 2017: "'92 World Challenges—A Lesson Learned and Action Moving Forward," Harvard and Radcliffe Class of 1992 25th Reunion. This was a public-service panel discussion at my 25th college reunion. I did not receive any funding, gifts, or reimbursements for this event.

April 8 – 9, 2017: Harvard Law Review Spring Banquet, Harvard University. I attended a Spring Banquet hosted by the Harvard Law Review. Harvard University covered my expenses associated with this event.

March 9, 2017: "Sentencing and Its Collateral Consequences Impact," American Bar Association White Collar Section 31st Annual National Institute on White Collar Crime. This was a moderated panel, held during a white collar crime conference, regarding theories of sentencing reform and the ways in which

counsel can be most effective during sentencing proceedings. The American Bar Association covered my expenses associated with this event.

March 2 – 3, 2017: Edith House Lecture, University of Georgia. I presented a lecture titled “Reflections on my Journey as a Mother and a Judge.” The University of Georgia covered my expenses associated with this event.

November 16 – 18, 2016: Yale Moot Court Competition, Yale Law School. I was one of three judges who presided over the final round of Yale Law School’s internal moot court competition. Yale Law School covered my expenses associated with this event.

October 31 – November 3, 2016: Transferee Judges’ Conference, Judicial Panel on Multi-District Litigation. The conference covered the multidistrict litigation system and the issues transferee judges face in handling such matters. The Administrative Office of the United States Courts covered my expenses associated with this event.

September 15, 2016: 2016 National Conference, Just the Beginning – A Pipeline Organization. The conference addressed issues relating to race and legal education, the legal profession, and society. I did not receive any funding, gifts, or reimbursements for this event.

July 20, 2016: “Perspectives on the Role of Courts in the Continuing Quest for Equality,” 2016 NAACP National Convention. This was a moderated panel discussion, held during the NAACP’s national convention, regarding the historical role of the federal courts in protecting civil rights and legal issues that impact communities of color. The NAACP covered my expenses associated with this event.

July 5 – 11, 2016: Justice and Society Seminar, The Aspen Institute. This seminar focused on issues related to law and justice. The Aspen Institute did not charge me a program fee and covered my room and board costs.

June 24, 2016: Mock Trial, American Law Institute. I served as a mock trial judge for an environmental litigation mock trial sponsored by the American Law Institute. I did not receive any funding, gifts, or reimbursements for this event.

April 25 – 28, 2016: Annual National Workshop for District Judges, Federal Judicial Center. This workshop covered legal writing, recent legal developments, and issues that arise in federal court litigation. The Federal Judicial Center covered my expenses associated with this event.

February 12 – 14, 2016: Moot Court Judge, William & Mary Law School. I served as a moot court judge for the Spong National Moot Court Tournament. William & Mary Law School covered my expenses associated with this event.

November 18, 2015: United States Sentencing Guideline Training, United States Probation Office for the District of Columbia. This training session covered how to calculate sentences under the federal Sentencing Guidelines. I did not receive any funding, gifts, or reimbursements for this event.

October 27, 2015: Mock Arbitration, ChIPs Network. I served as a judge for a mock intellectual property arbitration conducted as part of the ChIPs Network Global Summit. I did not receive any funding, gifts, or reimbursements for this event.

October 23, 2015: Conference & Career Fair, Equal Justice Works. This was a moderated question and answer panel presentation, conducted as part of a conference and career fair for public interest lawyers, where I discussed my experiences as an attorney and judge, and provided advice for young attorneys. I did not receive any funding, gifts, or reimbursements for this event.

October 20, 2015: Panel Discussion, District of Columbia Office of the Attorney General. This was a panel discussion in which D.C. federal trial court judges addressed best practices for litigating in federal court and our experiences as judges. I did not receive any funding, gifts, or reimbursements for this event.

September 16 – 18, 2015: Panelist, United States Sentencing Commission Annual National Seminar on the Federal Sentencing Guidelines. This was a panel discussion, held during the Sentencing Commission's Annual National Seminar, regarding the application of the Sentencing Guidelines to drug offenses, and the retroactivity of recent Guideline amendments. The United States Sentencing Commission covered my expenses associated with this event.

September 9, 2015: National Conference for Pro Se Law Clerks, Federal Judicial Center. I attended this conference to deliver a speech entitled, "Fairness in Sentencing: An Examination." I did not otherwise attend the conference. The Federal Judicial Center covered my expenses associated with this event.

June 23 – 26, 2015: Judicial Conference, United States Court of Appeals for the District of Columbia Circuit. This conference covered issues relating to technology, current legal developments, and the state of the judiciary. The Court of Appeals for the District of Columbia Circuit covered my expenses associated with this event.

April 13 – 15, 2015: Law and Society Seminar, Federal Judicial Center. This seminar examined social issues that affect the law and considered how those issues may influence the role of judging in society. The Federal Judicial Center covered my expenses associated with this event.

April 2 – 3, 2015: Edward H. Levi Distinguished Visiting Jurist, University of Chicago Law School. I spoke with various student groups about diversity in the legal profession, attended classes, answered student questions, and gave a lunch talk. The University of Chicago Law School covered my expenses associated with this visit.

March 26, 2015: 12th Annual Federal Judges Panel, Penn Law American Constitution Society. This was a panel discussion regarding criminal justice system reforms, including proposed changes to the federal sentencing system. The University of Pennsylvania covered my expenses associated with this event.

February 25, 2015: “A Conversation on Judging – Then and Now,” District of Columbia Circuit Historical Society. This was a panel discussion on how judging has changed over time. I did not receive any funding, gifts, or reimbursements for this event.

February 17, 2015: Career Offender Categorical Approach Training, United States Probation Office for the District of Columbia. This training session covered how to apply the categorical approach in determining career offender status under the Sentencing Guidelines. I did not receive any funding, gifts, or reimbursements for this event.

January 4, 2015: Panel Discussion, Association of American Law Schools Annual Meeting, Washington, District of Columbia. This was a panel discussion, held as a part of the Association of American Law Schools’ Annual Meeting, regarding the importance of academic curricula aimed at teaching legal writing and research. I did not receive any funding, gifts, or reimbursements for this event.

December 3, 2014: “An Insider Look at the United States Sentencing Commission,” United States Sentencing Commission Knowledge Seminar. This was a webinar regarding the role and function of the United States Sentencing Commission. I did not receive any funding, gifts, or reimbursements for this event.

October 28, 2014: Panel Discussion, University of California, Berkeley School of Law. During a visit to Berkeley Law, I participated in a panel discussion about the judicial nomination process and my experiences as a judge. The University of California covered my expenses associated with this event.

September 17, 2014: United States Sentencing Commission Annual National Seminar on the Sentencing Guidelines. This was the Sentencing Commission’s annual seminar on the Sentencing Guidelines. The United States Sentencing Commission covered my expenses associated with this event.

June 16, 2014: Reentry Panel, United States Department of Justice Smart on Crime Implementation Workshop. This was an expert discussion of innovative pretrial programs aimed at certain categories of criminal defendants that I moderated, which was held during a Department of Justice workshop on “smart on crime” strategies. I did not receive any funding, gifts, or reimbursements for this event.

May 4 – 6, 2014: Eighth Quadrennial Conference, Federal Judges Association. This conference addressed best practices for federal judges. I did not receive any funding, gifts, or reimbursements for this event.

May 1 – 3, 2014: Annual National Workshop for District Judges, Federal Judicial Center. This workshop broadly covered legal writing, recent legal developments, and issues that arise in federal court litigation. The Federal Judicial Center covered my expenses associated with this event.

April 4, 2014: *Arguendo* Discussion, Woolly Mammoth Theater. This was a post-performance panel discussion of the play *Arguendo* and its legal themes. I did not receive any funding, gifts, or reimbursements for this event.

March 19 – 21, 2014: Seventeenth Annual NYU Workshop on Employment Law for Federal Judges, Federal Judicial Center. This workshop covered issues that federal judges confront in employment law cases. The Federal Judicial Center covered my expenses associated with this event.

March 6, 2014: “Sentencing Strategies in White Collar Cases,” American Bar Association 28th National Institute on White Collar Crime. This was a panel discussion, held as part of a white collar crime conference, regarding the sentencing guideline that governs economic crimes. The United States Sentencing Commission covered my expenses associated with this event.

February 24 – 28, 2014: Phase II Orientation for Newly Appointed U.S. District Judges, Federal Judicial Center. This was the second part of the Federal Judicial Center’s annual orientation program, which provided new district judges with guidance for their new roles. The Federal Judicial Center covered my expenses associated with this event.

February 22, 2014: William Minor Lile Moot Court Competition, University of Virginia School of Law. I judged the semifinal round of UVA’s internal moot court competition. The University of Virginia covered my expenses associated with this event.

February 17, 2014: “Perspectives on the Criminal Justice System,” Stanford Black Alumni Association. This was a moderated panel discussion concerning African Americans in the criminal justice system and proposals for sentencing reforms. I did not receive any funding, gifts, or reimbursements for this event.

November 1, 2013: "Update on Federal Sentencing Law and Policy," American Bar Association 6th Annual Fall Institute. This was a panel discussion, held as part of an ABA institute, that addressed recent developments in federal sentencing law and policy. I did not receive any funding, gifts, or reimbursements for this event.

October 23 – 24, 2013: Symposium on Recidivism, United States Sentencing Commission. This was a symposium regarding the Sentencing Commission's research on recidivism among federal offenders. I did not receive any funding, gifts, or reimbursements for this event.

September 18 – 19, 2013: Symposium on Economic Crime, United States Sentencing Commission. This was a symposium regarding the Sentencing Commission's research on economic crimes. The Sentencing Commission covered my expenses associated with this event.

September 4, 2013: Plenary Panel, United States Sentencing Commission Regional Training Seminar. This was a panel discussion, held as part of a Sentencing Commission's training seminar, that addressed recent developments in sentencing law and the Sentencing Guidelines. The United States Sentencing Commission covered my expenses associated with this event.

August 2, 2013: Plenary Panel, United States Sentencing Commission Regional Training Seminar. This was a panel discussion, held as part of a Sentencing Commission's training seminar, that addressed recent developments in sentencing law and the Sentencing Guidelines. I did not receive any funding, gifts, or reimbursements for this event.

July 9 – 10, 2013: Judge-to-Judge IT Workshop, Federal Judicial Center. This workshop covered information technology issues in the federal judiciary. I did not receive any funding, gifts, or reimbursements for this event.

June 23 – 28, 2013: Phase I Orientation for Newly Appointed U.S. District Judges, Federal Judicial Center. This was the first part of the Federal Judicial Center's annual orientation program, which provided new district judges with guidance for their new roles. The Federal Judicial Center covered my expenses for this event.

April 30, 2013: Guest Speaker, New York University School of Law, Judge John Gleeson's Sentencing Seminar, New York, New York. I was a guest of Judge Gleeson at his sentencing seminar and answered questions from students about the Commission and sentencing in general. The United States Sentencing Commission covered my expenses associated with this event.

March 7, 2013: "Sentencing Strategy: Advocacy in White Collar Cases," American Bar Association 27th Annual National Institute on White Collar Crime. This was a moderated panel, held as part of a criminal law conference, that addressed sentencing issues in white collar crime cases. The United States Sentencing Commission covered my expenses associated with this event.

October 26, 2012: "Update on Federal Sentencing Law: Supreme Court, Appellate, and Legislation," American Bar Association Criminal Justice Section Fifth Annual Fall Institute. This was a panel discussion, held as part of a criminal law conference, that addressed recent developments in sentencing law and the Sentencing Guidelines. I did not receive any funding, gifts, or reimbursements for this event.

October 23, 2012: Health Ethics Trust's 2012 Healthcare Best Compliance Practices Forum. I attended a forum and gave a speech to compliance officers in the healthcare industry about the historical development of the federal sentencing guidelines applicable to organizations, and the ways in which the guidelines have led to beneficial compliance and ethics standards in industries such as healthcare. I did not receive any funding, gifts, or reimbursements for this event.

October 2, 2012: "USSC Plenary Panel: Mandatory Minimum Report," Federal Judicial Center National Sentencing Institute. I participated in a panel discussion, held as part of a conference on federal sentencing, that addressed recent developments in sentencing law and the Sentencing Guidelines. The United States Sentencing Commission covered my expenses associated with this event.

July 26, 2012: Panel Discussion, National Association of Black Narcotic Agents 35th Annual Training Conference. I participated in a panel discussion, held as part of a training seminar for narcotics officers, regarding sentencing for cocaine powder and crack cocaine offenses. I did not receive any funding, gifts, or reimbursements for this event.

June 13 – 15, 2012: United States Sentencing Commission Annual National Seminar on the Sentencing Guidelines. This was the Sentencing Commission's annual seminar on the Sentencing Guidelines. The United States Sentencing Commission covered my expenses associated with this event.

May 24, 2012: "The Presentence Report and Departures/Variances," Tampa Bay Chapter of the Federal Bar Association 21st Annual National Seminar on the Federal Sentencing Guidelines. I participated in a panel discussion, held as part of a seminar on the Sentencing Guidelines, regarding the analysis of departures and variances in presentence reports. The United States Sentencing Commission covered my expenses associated with this event.

April 30, 2012: "State of the Sentencing Guidelines," Health Care Compliance Association Annual Compliance Institute. I spoke at a health care compliance

conference. The United States Sentencing Commission covered my expenses associated with this event.

April 17, 2012: “New Frontiers in Race and Criminal Justice,” NYU Center on the Administration of Criminal Law. I participated in a panel discussion held as part of a criminal law conference. The United States Sentencing Commission covered my expenses associated with this event.

October 28, 2011: Panel Discussion, American Bar Association Fourth Annual Sentencing & Reentry Institute and Criminal Justice Legal Educators Colloquium. This was a panel discussion, held as part of a conference regarding sentencing and reentry, that addressed recent developments in federal sentencing law. I did not receive any funding, gifts, or reimbursements for this event.

October 24, 2011: Health Ethics Trust’s 2011 Healthcare Best Compliance Practices Forum. During a healthcare compliance conference, I gave a speech to compliance officers in the health care industry about the U.S. Sentencing Commission, its role in developing the federal sentencing guidelines applicable to organizations, and the ways in which the guidelines have led to the development of beneficial compliance and ethics standards in industries such as healthcare. I did not receive any funding, gifts, or reimbursements for this event.

September 28, 2011: United States Sentencing Commission Training Program for the probation officers and United States District Judges of the Northern District of Illinois. During the course of a training program, I made presentations that provided data, training, and information about guideline amendments made pursuant to the Fair Sentencing Act and the procedures related to retroactive application of those amendments. The United States Sentencing Commission covered my expenses associated with this event.

June 15, 2011: “Sentencing in the Sixth Circuit,” Sixth Circuit Judicial Conference. This was a panel discussion, held during a Circuit Judicial Conference, regarding the sentencing practices in that Circuit. The United States Sentencing Commission covered my expenses associated with this event.

June 14, 2011: “Update on Key Issues Before the United States Sentencing Commission and Criminal Rules Committee,” Ninth Circuit Federal Defenders Retreat. This was a panel discussion, held during a conference for Federal Defenders, regarding current issues before the Sentencing Commission and the Criminal Rules Committee. The United States Sentencing Commission covered my expenses associated with this event.

May 18 – 20, 2011: United States Sentencing Commission Annual National Seminar on the Sentencing Guidelines. During the Sentencing Commission’s annual seminar on the Sentencing Guidelines, I participated in a panel discussion entitled, “United States Sentencing Commission: A Year in Review” and

moderated a session entitled, "Sentencing Forum: Hot Topics in Federal Sentencing." The United States Sentencing Commission covered my expenses associated with this event.

May 6, 2011: "Update on Federal Sentencing Law," Tampa Bay Chapter of the Federal Bar Association Annual National Seminar on the Federal Sentencing Guidelines. This was a panel discussion, held as part of a sentencing seminar, that addressed recent developments in federal sentencing law. The United States Sentencing Commission covered my expenses associated with this event.

February 11, 2011: Training program for federal judges, prosecutors, defense attorneys, and probation officers, United States Sentencing Commission. I gave introductory remarks for a Guidelines training program and also answered questions and assisted Commission staff in training participants on how to use the Guidelines Manual. The United States Sentencing Commission covered my expenses associated with this event.

November 20, 2010: "Bootcamp: Real World Training for Future Success," Women's Bar Association of D.C. This was a panel discussion on professional advancement that addressed work-family balance issues, career development, and professional ethics. I did not receive any funding, gifts, or reimbursements for this event.

November 5, 2010: "United States Sentencing Commission: A Year in Review" and "Update on Sentencing Law," American Bar Association Criminal Justice Section Sentencing and Reentry Institute. These were panel discussions, held as part of a sentencing and reentry conference, that provided updates on recent developments in sentencing law and policy. I did not receive any funding, gifts, or reimbursements for this event.

October 20, 2010: Training program for federal judges, prosecutors, defense attorneys, and probation officers, United States Sentencing Commission. This was a Guidelines training program at which I gave introductory remarks, answered questions, and assisted Commission staff in training participants on how to use the Guidelines Manual. The United States Sentencing Commission covered my expenses associated with this event.

September 22, 2010: Training program for the law clerks and Staff Attorneys of the United States Court of Appeals for the Fourth Circuit, United States Sentencing Commission. This was a Guidelines training program at which I gave introductory remarks, answered questions, and assisted Commission staff in training participants on how to use the Guidelines Manual. The United States Sentencing Commission covered my expenses associated with this event.

August 4, 2010: "Rehabilitation or Restoration in Criminal Punishment: Dead End or Realistic Imperative?" Southeastern Association of Law Schools

(SEALS), Annual Meeting and Conference. This was a panel discussion, held as part of a conference for law schools, regarding sentencing policy and rehabilitation. The United States Sentencing Commission covered my expenses associated with this event.

June 17, 2010: Panel Discussion, United States Sentencing Commission Annual National Seminar on the Federal Sentencing Guidelines. This was a panel discussion, held as part of the Sentencing Commission's annual seminar, that covered the latest developments in federal sentencing law. The United States Sentencing Commission covered my expenses associated with this event.

May 14, 2010: "Update on Federal Sentencing Law: Supreme Court, Appellate, and Legislation," Tampa Bay Chapter of the Federal Bar Association Annual National Seminar on the Federal Sentencing Guidelines. This was a panel discussion, held as part of a sentencing seminar, that covered recent developments in federal sentencing law. The United States Sentencing Commission covered my expenses associated with this event.

12. Published Writings and Public Statements:

- a. List the titles, publishers, and dates of books, articles, reports, letters to the editor, editorial pieces, or other published material you have written or edited, including material published only on the Internet, regardless of whether it was published in your name, another name, or anonymously. Supply four (4) copies of all published material to the Committee.

Judging A Book: Jackson Reviews "When Should Law Forgive?," Law 360 (Sept. 24, 2019). Copy supplied.

With Kathleen Cooper Grilli, "*Carrot and Stick*" *Philosophy: The History of the Organizational Sentencing Guidelines and the Emergence of Effective Compliance and Ethics Programs*, THE COMPLETE COMPLIANCE AND ETHICS MANUAL (Soc'y of Corporate Compliance & Ethics), Aug. 2012, at 1.25. (Updated and republished annually.) Copy supplied.

Section 10(b) and Rule 10b-5: The U.S. Courts of Appeals Apply Different Legal Tests for Assessing the Primary Liability of Secondary Actors, Securities Litigation, Enforcement, and White Collar Criminal Defense Newsletter (Morrison & Foerster LLP), Spring 2009, at 10–12. Copy supplied.

With Seth Whitelaw, Michael Josephson & Kathleen Cooper Grilli, *Healthcare Compliance Programs: From Murky Beginnings to Established Expectation*, COMPLETE HEALTHCARE COMPLIANCE MANUAL (Cosmos), date unknown. Copy supplied.

Letter to the Editor, *Feder's as Racist as Those He Condemns*, Bos. Herald, Apr. 10, 1997, at 36. Copy of letter and underlying editorial supplied.

Note, *Prevention Versus Punishment: Toward a Principled Distinction in the Restraint of Released Sex Offenders*, 109 Harv. L. Rev. 1711 (1996). Copy supplied.

Recent Case, *Racketeer Influenced and Corrupt Organizations Act (RICO)—Scope of Liability After Reves v. Ernst & Young*, 108 Harv. L. Rev. 1405 (1995). Copy supplied.

Guinier: "The First Lesson of Democracy is Dialogue," Harv. L. Rec., Apr. 22, 1994, at 1.

"The Hand Of Oppression": *Plea Bargaining Processes and the Coercion of Criminal Defendants* (March 1992) (senior thesis on file with the Harvard College Archives). Copy supplied. (Because my thesis was unpublished, it is not responsive to this question but I am including it because it was inadvertently listed in my 2012 Senate Judiciary Questionnaire.)

It's About Time, 4 Progressive Forensics 1, 18 (1987). Copy supplied. (Because this article is from when I was in high school, it is not responsive to this question but I am including it because it was inadvertently listed in my 2012 Senate Judiciary Questionnaire.)

I assisted with the reporting of the following articles but did not write or edit them, and so they were not responsive to prior Committee questionnaires. They are provided here out of an abundance of caution.

Richard N. Ostling, *A.C.L.U.—Not All That Civil*, Time Mag., Apr. 26, 1993, at 31. Copy supplied.

John Greenwald, *Ouch! Which hurts more, the shot or the bill?*, Time Mag., March 8, 1993, at 53. Copy supplied.

Janice Castro, *Hollywood Rocks Madison Avenue*, Time Mag., Feb. 22, 1993, at 65. Copy supplied.

John Greenwald, *The Job Freeze*, Time Mag., Feb. 1, 1993, at 52. Copy supplied.

- b. Supply four (4) copies of any reports, memoranda, policy statements, minutes, agendas, legal filings, or other materials you prepared or contributed in the preparation of on behalf of any bar association, committee, conference, or organization of which you were or are a member or in which you have participated as defined in 11(a). Include reports, memoranda, policy statements, or legal filings of any advisory board on which you served or working group of

any bar association, committee, or conference which produced a report, memorandum, policy statement, or legal filing even where you did not contribute to it. If you do not have a copy of a report, memorandum, policy statement, or legal filing, give the name and address of the organization that issued it, the date of the document, and a summary of its subject matter.

I have not prepared or contributed in the preparation of any minutes, agendas, legal filings, or other materials on behalf of any bar association, committee, conference, or organization of which I was or am a member or in which I have participated as defined in 11(a). The reports, memoranda, policy statements, and legal filings of the advisory boards on which I served, during the period of my service, are listed below.

Council for Court Excellence, Strategic Plan 2017 – 2021 (Dec. 14, 2016). Copy supplied.

Council for Court Excellence, Jury Service Revisited: Upgrades for the 21st Century (Dec. 2015). Copy supplied.

During the time that I served as a Commissioner on the United States Sentencing Commission, the Commission issued, on an annual basis, federal sentencing guidelines manuals, sourcebooks of federal sentencing statistics, and yearly reports. The Commission also issued, on a periodic basis, reports on federal sentencing statistics. It is important to note that while members of the Commission contribute to these reports, they are representative of the Commission as a whole and not of any single Commissioner.

To my recollection, and through a review of my files and searches of publicly available databases by persons acting on my behalf, I have located the following reports, memoranda, and policy statements that are responsive to this question. It is possible that there are a few documents that I have no record of and thus was not able to identify.

United States Sentencing Commission, Final Fair Sentencing Act Amendment Retroactivity Data Report (Dec. 2014). Available at http://www.ussc.gov/sites/default/files/pdf/research-and-publications/retroactivity-analyses/fair-sentencing-act/Final_USSC_Crack_Retro_Data_Report_FSA.pdf.

United States Sentencing Commission, FY 2013 Annual Report and Sourcebook of Federal Sentencing Statistics. Available at <https://www.ussc.gov/research/sourcebook/archive/sourcebook-2013>.

United States Sentencing Commission, Guidelines Manual (Nov. 2014). Available at <http://www.ussc.gov/guidelines-manual/2014/2014-ussc-guidelines-manual>.

United States Sentencing Commission, Overview of Federal Criminal Cases, Fiscal Year 2013 (Aug. 2014). Available at http://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2014/FY13_Overview_Federal_Criminal_Cases.pdf.

United States Sentencing Commission, Recidivism Among Offenders Receiving Retroactive Sentence Reductions: The 2007 Crack Cocaine Amendment (May 2014). Available at https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-projects-and-surveys/miscellaneous/20140527_Recidivism_2007_Crack_Cocaine_Amendment.pdf.

United States Sentencing Commission, FY 2012 Annual Report and Sourcebook of Federal Sentencing Statistics. Available at <https://www.ussc.gov/research/sourcebook/archive/sourcebook-2012>.

United States Sentencing Commission, Guidelines Manual (Nov. 2013). Available at <http://www.ussc.gov/guidelines-manual/2013/2013-ussc-guidelines-manual>.

United States Sentencing Commission, Overview of Federal Criminal Cases, Fiscal Year 2012 (July 2013). Available at http://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2013/FY12_Overview_Federal_Criminal_Cases.pdf.

United States Sentencing Commission, Report to Congress: The Continuing Impact of *United States v. Booker* on Federal Sentencing (Dec. 2012). Available at <http://www.ussc.gov/news/congressional-testimony-and-reports/booker-reports/report-continuing-impact-united-states-v-booker-federal-sentencing>.

United States Sentencing Commission, Report to Congress: Federal Child Pornography Offenses (Dec. 2012). Available at <http://www.ussc.gov/news/congressional-testimony-and-reports/sex-offense-topics/report-congress-federal-child-pornography-offenses>.

United States Sentencing Commission, Guidelines Manual (Nov. 2012). Available at <http://www.ussc.gov/guidelines-manual/2012/2012-ussc-guidelines-manual>.

United States Sentencing Commission, Overview of Federal Criminal Cases, Fiscal Year 2011 (Sept. 2012). Available at http://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2012/FY11_Overview_Federal_Criminal_Cases.pdf.

United States Sentencing Commission, Overview of Federal Criminal Cases, Fiscal Year 2010 (July 2012). Available at https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2012/FY10_Overview_Federal_Criminal_Cases.pdf.

United States Sentencing Commission, FY 2011 Annual Report and Sourcebook of Federal Sentencing Statistics. Available at <https://www.ussc.gov/research/sourcebook/archive/sourcebook-2011>.

United States Sentencing Commission, Report to Congress Regarding the Comprehensive Iran Sanctions Accountability and Divestment Act of 2010 (Dec. 14, 2011). Report available at https://www.ussc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/submissions/20111214_Iran_Sanctions_Transmission_0.pdf.

United States Sentencing Commission, Guidelines Manual (Nov. 2011). Available at <https://www.ussc.gov/guidelines/archive/2011-federal-sentencing-guidelines-manual>.

United States Sentencing Commission, Report to Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System (Oct. 2011). Available at <https://www.ussc.gov/research/congressional-reports/2011-report-congress-mandatory-minimum-penalties-federal-criminal-justice-system>.

National Institute of Corrections, Report to the Nation FY 2010 (June 2011). Available at <https://s3.amazonaws.com/static.nicic.gov/Library/024837.pdf>.

United States Sentencing Commission, FY 2010 Annual Report and Sourcebook of Federal Sentencing Statistics. Available at <https://www.ussc.gov/research/sourcebook/archive/sourcebook-2010>.

United States Sentencing Commission, Overview of Federal Criminal Cases, Fiscal Year 2009 (Dec. 2010). Available at https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2010/20101230_FY09_Overview_Federal_Criminal_Cases.pdf.

United States Sentencing Commission, Guidelines Manual (Nov. 2010). Available at <https://www.ussc.gov/guidelines/archive/2010-federal-sentencing-guidelines-manual>.

United States Sentencing Commission, Computation of “Recency” Criminal History Points Under USSG §4A1.1(e) (Aug. 2010). Available at https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2010/20100818_Recency_Report.pdf.

United States Sentencing Commission, Federal Offenders Sentenced to Supervised Release (July 2010). Available at https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2010/20100722_Supervised_Release.pdf.

United States Sentencing Commission, Results of Survey of United States District Judges, January 2010 through March 2010 (June 2010). Available at https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-projects-and-surveys/surveys/20100608_Judge_Survey.pdf.

United States Sentencing Commission, Demographic Differences in Federal Sentencing Practices: An Update of the *Booker* Report's Multivariate Regression Analysis (Mar. 2010). Available at https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2010/20100311_Multivariate_Regression_Analysis_Report.pdf.

The American Law Institute (“ALI”) has released numerous publications, including Restatements of Law, model statutes, and Principles of the Law, a listing of which is available on ALI’s website at <https://www.ali.org/publications>.

- c. Supply four (4) copies of any testimony, official statements or other communications relating, in whole or in part, to matters of public policy or legal interpretation, that you have issued or provided or that others presented on your behalf to public bodies or public officials.

On April 28, 2021, I testified before the United States Senate Judiciary Committee as a nominee to be a Circuit Judge on the United States Court of Appeals for the District of Columbia Circuit. Responses to questions for the record supplied; video available at <https://www.judiciary.senate.gov/meetings/04/21/2021/nominations>.

On December 12, 2012, I testified before the United States Senate Judiciary Committee as a nominee to be a District Judge on the United States District Court for the District of Columbia. Testimony and responses to questions for the record supplied.

On October 7, 2009, I testified before the United States Senate Judiciary Committee as a nominee to be a Member of the United States Sentencing Commission. Testimony and responses to questions for the record supplied.

From 2010 until 2014, I served as a Vice Chair and Commissioner of the United States Sentencing Commission and made various public statements at Commission meetings in that capacity. The Sentencing Commission conducts public meetings and holds public hearings as a part of its annual amendment cycle. Congress also periodically requests information from the Commission, and the Commission provides letters or written statements in response. In addition,

the Chair of the Commission periodically testifies on behalf of the Commission before various Congressional committees, and the Commission sometimes files amicus briefs in court. While members of the Commission contribute to the briefs, letters, and other statements of the Commission, such statements are representative of the Commission as a whole and not of any single Commissioner.

To my recollection, and through a review of my files and searches of publicly available databases by persons acting on my behalf, I have located the testimony, official statements, or other communications listed below. It is possible that there are a few instances of testimony, official statements, and other communications that I have no record of and thus was not able to identify.

United States Sentencing Commission, Public Meeting (Aug. 14, 2014). Notice of meeting and minutes available at <http://www.ussc.gov/amendment-process/public-hearings-and-meetings/20140814/august-14-2014>.

United States Sentencing Commission, Public Meeting (July 18, 2014). Video available at <http://www.ussc.gov/videos/public-meeting-july-18-2014> and minutes available at <http://www.ussc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20140718/meeting-minutes.pdf>.

Prepared Statement of Patti B. Saris, Chair of the United States Sentencing Commission, before the House Committee on the Judiciary (July 11, 2014). Testimony available at http://www.ussc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/testimony/20140711_Saris_Testimony.pdf.

United States Sentencing Commission, Public Hearing on Retroactivity of 2014 Drug Amendment (June 10, 2014). Video available at <http://www.ussc.gov/videos/public-hearing-june-10-2014> and transcript available at <http://www.ussc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20140610/transcript.pdf>.

United States Sentencing Commission, Public Meeting (Apr. 10, 2014). Video available at <http://www.ussc.gov/videos/public-meeting-april-10-2014> and minutes available at <http://www.ussc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20140410/meeting-minutes.pdf>.

United States Sentencing Commission, Public Hearing regarding proposed amendments to the federal sentencing guidelines (Mar. 13, 2014). Video available at <http://www.ussc.gov/videos/public-hearing-march-13-2014> and transcript available at <http://www.ussc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20140313/transcript.pdf>.

United States Sentencing Commission, Public Hearing on Implementing the Violence Against Women Reauthorization Act of 2013 (Feb. 13, 2014).

Transcript available at <http://www.ussc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20140213/Transcript.pdf>.

United States Sentencing Commission, Public Meeting (Jan. 9, 2014). Video available at <http://www.ussc.gov/videos/webcast-analysis-drug-trafficking-offenders-and-guidelines> and minutes available at <http://www.ussc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20140109/meeting-minutes.pdf>.

United States Sentencing Commission, Letter to Senate Judiciary Committee (Nov. 26, 2013). Available at <http://www.ussc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/submissions/20131126-Letter-Senate-Judiciary-Committee.pdf>.

Prepared Statement of Patti B. Saris, Chair of the United States Sentencing Commission, before the Senate Committee on the Judiciary (Sept. 18, 2013). Testimony available at http://www.ussc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/submissions/20130918_SJC_Mandatory_Minimums.pdf.

United States Sentencing Commission, Public Meeting (Aug. 15, 2013). Minutes available at <http://www.ussc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20130815/meeting-minutes.pdf>.

United States Sentencing Commission, Public Meeting (Apr. 10, 2013). Minutes available at http://www.ussc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20130410/Meeting_Minutes.pdf.

United States Sentencing Commission, Public Hearing (Mar. 13, 2013). Transcript available at <http://www.ussc.gov/sites/default/files/Transcript.pdf>.

United States Sentencing Commission, Public Meeting (Jan. 11, 2013). Minutes available at http://www.ussc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20130111/Meeting_Minutes.pdf.

United States Sentencing Commission, Letter to Senate Judiciary Committee (Aug. 7, 2012). Available at https://www.ussc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/submissions/20120807_StC_Prison_Costs.pdf.

United States Sentencing Commission, Public Meeting (Apr. 13, 2012). Minutes available at https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20120413/Meeting_Minutes.pdf.

United States Sentencing Commission, Public Hearing on Proposed Amendments to the Federal Sentencing Guidelines (Mar. 14, 2012). Notice of meeting and

transcript available at <https://www.ussc.gov/policymaking/meetings-hearings/march-14-2012>.

United States Sentencing Commission, Public Hearing on Federal Sentencing Options after *Booker* (Feb. 16, 2012). Notice of meeting and transcript available at <https://www.ussc.gov/policymaking/meetings-hearings/february-16-2012>.

United States Sentencing Commission, Public Hearing on Federal Child Pornography Crimes (Feb. 15, 2012). Notice of meeting and transcript available at <https://www.ussc.gov/policymaking/meetings-hearings/february-15-2012>.

United States Sentencing Commission, Public Meeting (Jan. 10, 2012). Notice of meeting and minutes available at <https://www.ussc.gov/policymaking/meetings-hearings/january-10-2012>.

Prepared Statement of Patti B. Saris, Chair of the United States Sentencing Commission, before the House Committee on the Judiciary Subcommittee on Crime, Terrorism, and Homeland Security (Oct. 12, 2011). Testimony available at https://www.ussc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/testimony/20111012_Saris_Testimony.pdf.

United States Sentencing Commission, Public Meeting (Sept. 15, 2011). Notice of meeting and minutes available at <https://www.ussc.gov/policymaking/meetings-hearings/september-15-2011>.

United States Sentencing Commission, Public Meeting (June 30, 2011). Notice of meeting, minutes, and transcript available at <https://www.ussc.gov/policymaking/meetings-hearings/june-30-2011>. Video available at <http://www.c-spanvideo.org/program/300289-1>.

United States Sentencing Commission, Public Hearing on the Possible Retroactivity of the New Guideline Amendments Implementing the Fair Sentencing Act of 2010 (June 1, 2011). Notice of meeting, agenda, and transcript available at <https://www.ussc.gov/policymaking/meetings-hearings/june-1-2011>.

United States Sentencing Commission, Public Meeting (Apr. 6, 2011). Notice of meeting and minutes available at <https://www.ussc.gov/policymaking/meetings-hearings/april-6-2011>.

United States Sentencing Commission, Public Hearing on Proposed Amendments to the Federal Sentencing Guidelines (Mar. 17, 2011). Notice of meeting and transcript available at <https://www.ussc.gov/policymaking/meetings-hearings/march-17-2011>.

United States Sentencing Commission, Public Hearing on Proposed Amendments to the Federal Sentencing Guidelines (Feb. 16, 2011). Notice of meeting and

transcript available at <https://www.ussc.gov/policymaking/meetings-hearings/february-16-2011>.

United States Sentencing Commission, Public Meeting (Jan. 11, 2011). Notice of meeting and minutes available at <https://www.ussc.gov/policymaking/meetings-hearings/january-11-2011>.

United States Sentencing Commission, Public Meeting (Oct. 15, 2010). Notice of meeting and minutes available at <https://www.ussc.gov/policymaking/meetings-hearings/notice-october-15-2010>.

United States Sentencing Commission, Public Meeting (Sept. 16, 2010). Notice of meeting and minutes available at <https://www.ussc.gov/policymaking/meetings-hearings/notice-september-16-2010>.

United States Sentencing Commission, Public Meeting (Sept. 1, 2010). Notice of meeting and minutes available at <https://www.ussc.gov/policymaking/meetings-hearings/notice-september-1-2010>.

United States Sentencing Commission, Public Hearing on the Issue of Statutory Mandatory Minimum Penalties in Federal Sentencing (May 27, 2010). Notice of meeting, agenda, and transcript available at <https://www.ussc.gov/policymaking/meetings-hearings/notice-may-27-2010>.

United States Sentencing Commission, Public Meeting (Apr. 13, 2010). Notice of meeting and minutes available at <https://www.ussc.gov/policymaking/meetings-hearings/notice-april-13-2010>.

United States Sentencing Commission, Public Meeting (Apr. 7, 2010). Notice of meeting and minutes available at <https://www.ussc.gov/policymaking/meetings-hearings/notice-april-7-2010>.

United States Sentencing Commission, Public Hearing on Proposed Amendments to the Federal Sentencing Guidelines (Mar. 17, 2010). Notice of hearing, agenda, and transcript available at <https://www.ussc.gov/policymaking/meetings-hearings/notice-march-17-2010>.

United States Sentencing Commission, Brief for the Commission as amicus curiae filed in the Supreme Court of the United States in the case of *Percy v. Dillon*, No. 09-6338 (Mar. 2010). Brief supplied.

- d. Supply four (4) copies, transcripts or event-sponsored recordings of all speeches or talks delivered by you including commencement speeches, remarks, lectures, panel discussions, conferences, political speeches, symposia, panels, continuing legal education events, and question-and-answer sessions. Include the date and

place where they were delivered, and readily available non-duplicative press reports about the speech or talk. If you do not have a copy of the speech or a transcript or recording of your remarks, give the name and address of the group before whom the speech was given, the date of the speech, and a summary of its subject matter. If you did not speak from a prepared text, furnish a copy of any outline or notes from which you spoke.

To my recollection, and through a review of my calendar and searches of publicly available databases by persons acting on my behalf, I have located the speeches or talks listed below. It is possible that there are a few speeches or talks that I have no record of and thus was not able to identify.

February 25, 2022: Speaker, Announcement of nomination of Judge Ketanji Brown Jackson to United States Supreme Court, Washington, District of Columbia. Video available at <https://www.youtube.com/watch?v=CUCdRJWKGvY>.

October 6, 2021: Moderator, Harvard Alumni Association, Unity Webinar, Washington, District of Columbia (via Zoom). Notes supplied.

July 21, 2021: Panelist, United States Department of Justice, Civil Rights Division, Educational Opportunities Section, EOS Effective Writing Series, Washington, District of Columbia (via Zoom). I participated in a training session for section attorneys regarding effective legal writing. I have no notes, transcript, or recording. The address for the Department of Justice is 950 Pennsylvania Avenue, Northwest, Washington, District of Columbia 20530.

May 16, 2021: Commencement Speaker, University of Pennsylvania Carey Law School, Washington, District of Columbia (pre-recorded). Video available at <https://www.youtube.com/watch?v=-Bb-iLaBYBA>.

March 12, 2021: Honoree, Empowering Women of Color, Columbia Law School, Sixth Annual Constance Baker Motley Gala, Washington, District of Columbia (via Zoom). Copy of speech as prepared supplied.

January 26, 2021: Panelist, "Raising our Hands: Seeking Appointments in the Biden/Harris Administration," Women's White Collar Defense Association, Washington, District of Columbia (via Zoom). I participated in a question and answer session regarding the panelists' career paths and general advice for women attorneys seeking to advance their careers through public service. I have no notes, transcript, or recording. The address for the Women's White Collar Defense Association is 1501 K Street, Northwest, Washington, District of Columbia 20005.

November 18, 2020: Guest Speaker, Harvard Law School, Professor Jonathan Wroblewski's "Government Lawyer" Class, Washington, District of Columbia

(via Zoom). I participated in a question and answer session about my experiences with prosecutors as a federal public defender and a district judge. I have no notes, transcript, or recording. The address for Harvard Law School is 1563 Massachusetts Avenue, Cambridge, Massachusetts 02138.

November 18, 2020: Panelist, Georgetown Day School, Benjamin Cooper Memorial Lecture & 75th Anniversary Speaker Series, Washington, District of Columbia (via Zoom). Video available at <https://vimeo.com/491257244>.

November 17, 2020: Guest Speaker, George Washington University Law School, Professor Roger Fairfax's Adjudicatory Criminal Procedure Class, Washington, District of Columbia (via Zoom). I served as the judge for a mock sentencing exercise in Professor Fairfax's class and participated in a question and answer session about my legal career. I have no notes, transcript, or recording. The address for George Washington University Law School is 2000 H Street, Northwest, Washington, District of Columbia 20052.

November 12, 2020: Guest Speaker, University of Virginia School of Law, Professor Kimberly Robinson's Seminar in Ethical Values: Women of the Court, Washington, District of Columbia (via Zoom). I spoke to students in Professor Robinson's seminar regarding my legal career. I have no notes, transcript, or recording. The address for the University of Virginia School of Law is 580 Massie Road, Charlottesville, Virginia 22903.

November 10, 2020: Presiding Judge, Naturalization Ceremony, United States District Court for the District of Columbia, Washington, District of Columbia. Notes supplied.

November 4, 2020: Participant, Fireside Chat with Associate Justice Stephen Breyer, Annual Meeting of National Asian Pacific American Bar Association, Washington, District of Columbia (pre-recorded). Video available at <https://www.cand.uscourts.gov/about/interview-with-justice-breyer>.

October 30, 2020: Speaker, Judges' Forum, United States District Court for the District of Columbia, Washington, District of Columbia (via Zoom). I participated in a question and answer session about my legal career with D.D.C. clerks and interns. I have no notes, transcript, or recording. The address of the Court is 333 Constitution Avenue, Northwest, Washington, District of Columbia 20001.

October 1, 2020: Guest Speaker, COVID Conversation Series: Conversations with the Judiciary, University of California Berkeley School of Law, Washington, District of Columbia (via Zoom). I participated in a moderated discussion hosted by Professor Amanda Tyler concerning one of my civil procedure cases, and answered questions about my career path and clerking. I have no notes,

transcript, or recording. The address for the University of California Berkeley School of Law is 225 Bancroft Way, Berkeley, California 94720.

August 5, 2020: Panelist, *Harvard Law Review* Orientation, Harvard Law School, Cape Cod, Massachusetts (via Zoom). I participated in a panel of Law Review alums that highlighted panelists' experiences as editors. I have no notes, transcript, or recording. The address for Harvard Law School is 1563 Massachusetts Avenue, Cambridge, Massachusetts 02138.

June 17, 2020: Guest Speaker, Boies Schiller Flexner LLP, Washington, District of Columbia (via Zoom). I participated in a question and answer session with the firm's summer associates regarding my career. I have no notes, transcript, or recording. The address for Boies Schiller Flexner is 1401 New York Avenue, Northwest, Washington, District of Columbia 20005.

April 22, 2020: Special Guest, University of Kentucky Rosenberg College of Law, Professor Joshua Douglas's Constitutional Law Class, Washington, District of Columbia (via Zoom). I spoke briefly with Professor Douglas's students, who were preparing for final examinations, to provide encouragement and reflections. I have no notes, transcript, or recording. The address for the Rosenberg College of Law is 620 South Limestone, Lexington, Kentucky 40506.

March 6, 2020: Mock Court Judge, District of Columbia Circuit Historical Society Mock Court Program, Washington, District of Columbia. I judged a high school mock court competition, and answered questions from participants regarding my background. I have no notes, transcript, or recording, but press coverage is supplied. The address of the Historical Society is 333 Constitution Avenue, Northwest, Room 4726, Washington, District of Columbia 20001.

February 24, 2020: Keynote Speaker, Third Annual Judge James B. Parsons Legacy Dinner, "Three Qualities for Success in Law and Life," Black Law Students Association of the University of Chicago School of Law, Chicago, Illinois. Copy of speech as prepared and press coverage supplied.

February 21, 2020: Speaker, Portrait Ceremony for former Chair of the United States Sentencing Commission, Judge Patti B. Saris, United States Sentencing Commission, Washington, District of Columbia. Copy of speech as prepared supplied.

February 10, 2020: Guest Speaker, Harvard Law School Black Law Students Association, Cambridge, Massachusetts. I participated in a question and answer session with students regarding my career. I have no notes, transcript, or recording. The address for Harvard Law School is 1563 Massachusetts Avenue, Cambridge, Massachusetts 02138.

January 20, 2020: Keynote Speaker, University of Michigan Law School, Martin Luther King Jr. Day Celebration, "Courage / Purpose / Authenticity: Black Women Leaders in the Civil Rights Movement Era and Beyond," University of Michigan Law School, Ann Arbor, Michigan. Copy of speech as prepared, slide deck, and press coverage supplied.

January 20, 2020: Guest Speaker, "Coffee and Clerkships," University of Michigan Law School, Ann Arbor, Michigan. I participated in a small group question and answer session with law students interested in clerking following graduation. I have no notes, transcript, or recording. The address for the University of Michigan Law School is 625 South State Street, Ann Arbor, Michigan 48109.

December 18, 2019: Participant, Reenactment of Supreme Court case *New Jersey v. TLO* for local area high school students, District of Columbia Circuit Historical Society, Washington, District of Columbia. I have no notes, transcript, or recording, but press coverage is supplied. The address of the Historical Society is 333 Constitution Avenue, Northwest, Room 4726, Washington, District of Columbia 20001.

October 10, 2019: Keynote Speaker, "Rising Through the Ranks: A Tale of Hard Work, Big Breaks & Tough Skin," Husch Blackwell Diversity Retreat, Washington, District of Columbia. Copy of speech as prepared supplied.

September 10, 2019: Presiding Judge, Naturalization Ceremony, United States District Court for the District of Columbia, Washington, District of Columbia. Notes supplied.

September 9, 2019: Presiding Judge, Attorney Admission Ceremony, United States District Court for the District of Columbia, Washington, District of Columbia. Notes supplied.

July 10, 2019: Panelist, "How to Land a Clerkship: Practical Advice from Judges," American Constitution Society, Washington, District of Columbia. I participated in a panel discussion regarding the value of clerkships and how to be a competitive candidate. I have no notes, transcript, or recording. The address for the American Constitution Society is 1899 L Street, Northwest, Suite 200, Washington, District of Columbia 20036.

July 8, 2019: Guest Speaker, US-Asia Institute, Szymanski Rule of Law Program, Washington, District of Columbia. I had a discussion with Chinese law students enrolled in this program, who were visiting the District Court, regarding the functioning of the United States federal court system. I have no notes, transcript, or recording. The address for the US-Asia Institute is 232 East Capitol Street, Northeast, Washington, District of Columbia 20003.

June 24, 2019: Mock Argument Judge, “Murder in Mycenae: Did Electra Hold the Knife?,” Shakespeare Theatre Company, Washington, District of Columbia. Video available at <https://www.c-span.org/video/?462003-1/justices-breyer-ginsburg-participate-the-oresteia-mock-trial>.

June 8 – 9, 2019: Mock Trial Program Judge, National Institute of Trial Advocacy, Washington, District of Columbia. I was a judge for a two-day mock trial program that NITA held at the District of Columbia Superior Court. I have no notes, transcript, or recording. The address for the NITA is 1685 38th Street, Suite 200, Boulder, Colorado 80301-2735.

May 1, 2019: Workshop Participant, Colloquium on Courts and the Legal Process, Columbia Law School, New York, New York. Notes supplied.

May 1, 2019: Guest Speaker, Columbia Law School, New York, New York. I participated in a moderated question and answer session with students interested in my career and clerking on the District Court for the District of Columbia. I have no notes, transcript, or recording. The address for Columbia Law School is 435 West 116th Street, New York, New York 10027.

April 9 – 10, 2019: Guest, David T. Lewis Distinguished Jurist-in-Residence, The University of Utah, S.J. Quinney College of Law, Salt Lake City, Utah. As the jurist-in-residence, I visited classes, participated in a question and answer session about my career that was sponsored by the Minority Bar Association and presided over the Traynor moot court competition. I have no notes, transcript, or recording of the class meetings or question and answer session. Video of the moot court argument is available at <https://www.youtube.com/watch?v=08NAICZJxns&feature=youtu.be>. The address for the University of Utah, S.J. Quinney College of Law is 383 South University Street East, Salt Lake City, Utah 84112.

April 3, 2019: Guest Speaker, United States Sentencing Commission, Washington, District of Columbia. I met with a delegation from Taiwan that was visiting the District Court and United States Sentencing Commission, and answered questions about the federal sentencing system. I have no notes, transcript, or recording. The address for the Sentencing Commission is One Columbus Circle, Northeast, Suite 2-500, South Lobby, Washington, District of Columbia 20002.

March 15, 2019: Speaker, Judges’ Forum, United States District Court for the District of Columbia, Washington, District of Columbia. I participated in a question and answer session about my legal career with D.D.C. clerks and interns. I have no notes, transcript, or recording. The address of the Court is 333 Constitution Avenue, Northwest, Washington, District of Columbia 20001.

March 7, 2019: Guest Speaker, “Path to the Bench,” Harvard Chapter of the American Constitution Society, Harvard Law School, Cambridge, Massachusetts. I participated in a question and answer session with students about my path to the bench. I have no notes, transcript, or recording. The address for Harvard Law School is 1563 Massachusetts Avenue, Cambridge, Massachusetts 02138.

February 8, 2019: Symposium Panelist, “Judicial Independence and Criminal Law,” Stanford Law Review, Symposium on The Independence of the American Judicial System, Stanford, California. I participated in a moderated panel that compared the experiences of elected state judicial officers and life-tenured federal judges as part of a symposium concerning judicial independence. I have no notes, transcript, or recording. The address for Stanford Law School is 559 Nathan Abbott Way, Stanford, California 94305-8610.

February 7, 2019: Guest Speaker, Stanford Law School Black Law Student Association, Stanford, California. I participated in a question and answer session with students regarding my career and clerking. I have no notes, transcript, or recording. The address for Stanford Law School is 559 Nathan Abbott Way, Stanford, California 94305-8610.

January 11, 2019: Guest Speaker, Harvard Law School Black Law Student Association, Cambridge, Massachusetts. I participated in a question and answer session with BLSA members regarding my career path and career planning. I have no notes, transcript, or recording. The address for Harvard Law School is 1563 Massachusetts Avenue, Cambridge, Massachusetts 02138.

November 27, 2018: Guest Speaker, George Washington University Law School, Professor Roger Fairfax’s Adjudicatory Criminal Procedure Class, Washington, District of Columbia. I served as the judge for a mock sentencing exercise in Professor Fairfax’s class and participated in a question and answer session about my legal career. I have no notes, transcript, or recording. The address for George Washington University Law School is 2000 H Street Northwest, Washington, District of Columbia 20052.

November 15, 2018: Panelist, “Hamilton: The Man, the Musical, and the Law,” National Constitution Center and Drexel University Kline School of Law, Philadelphia, Pennsylvania. Video available at <https://constitutioncenter.org/interactive-constitution/town-hall-video/hamilton-the-man-the-musical-and-the-law>.

November 15, 2018: Presiding Judge, “Hamilton & Burr: A Legal Duel,” Drexel University Kline School of Law, Philadelphia, Pennsylvania. I presided over a mock trial of Aaron Burr for the murder of Alexander Hamilton. I have no notes, transcript, or recording, but press coverage is supplied. The address for Drexel University Kline School of Law is 3320 Market Street, Philadelphia, Pennsylvania 19104.

November 8, 2018: Panelist, "Sentencing," National Association of Criminal Defense Lawyers, 14th Annual White Collar Seminar: Defending the White Collar Case, Washington, District of Columbia. I participated in a panel discussion regarding how judges approach sentencing determinations based on hypothetical scenarios involving white collar defendants. I have no notes, transcript, or recording. The address for the National Association of Criminal Defense Lawyers is 1660 L Street, Northwest, 12th Floor, Washington, District of Columbia 20036.

October 9, 2018: Presiding Judge, Naturalization Ceremony, United States District Court for the District of Columbia, Washington, District of Columbia. Notes supplied.

October 1, 2018: Presiding Judge, Attorney Admission Ceremony, United States District Court for the District of Columbia, Washington, District of Columbia. Notes supplied. I also used the same pro bono notes that were provided for the attorney admission ceremony on September 9, 2019.

June 28, 2018: Guest Speaker, Teachers for National Judicial History, Federal Judicial Center, Washington, District of Columbia. I participated in a question and answer session with teachers who had observed a court proceeding as part of a Federal Judicial Center Program. I have no notes, transcript, or recording. The address for the Federal Judicial Center is Thurgood Marshall Federal Judiciary Building, One Columbus Circle, Northeast, Washington, District of Columbia 20002.

June 27, 2018: Guest Speaker, Federal Judicial Center Interns, Federal Judicial Center, Washington, District of Columbia. I participated in a question and answer session with interns who had observed a court proceeding as part of a Federal Judicial Center Program. I have no notes, transcript, or recording. The address for the Federal Judicial Center is Thurgood Marshall Federal Judiciary Building, One Columbus Circle, Northeast, Washington, District of Columbia 20002.

June 14, 2018: Guest Speaker, Metropolitan Police Department Cadets, Metropolitan Police Department of the District of Columbia, Washington, District of Columbia. I participated in a question and answer session in my courtroom with cadets training to be police officers regarding the federal judicial system. I have no notes, transcript, or recording. The address for the Metropolitan Police Department is 300 Indiana Avenue, Northwest, Room 5059, Washington, District of Columbia 20001.

May 3, 2018: Lunchtime Speaker, "Musings at the Midway Point: Reflections on My Journey as a Mother and a Judge," Washington Council of Lawyers' Litigation Skills Training Program, Washington, District of Columbia. Copy of speech as prepared supplied.

March 23, 2018: Speaker, All-School Assembly at Edmund Burke School, Washington, District of Columbia. Notes supplied.

March 16, 2018: Guest Speaker, Florida International University College of Law, Washington, District of Columbia. I participated in a question and answer session with law students who had observed a court proceeding. I have no notes, transcript, or recording. The address for FIU College of Law is 11200 Southwest 8th Street, Rafael Diaz Balart Hall, Miami, Florida 33199.

March 10, 2018: Moderator, Panel on “The Power of Protest and Legal Responses to Threats to Assembly,” American Constitution Society 2018 National Student Convention at Northwestern Law School, Chicago, Illinois. I moderated a panel discussion regarding the right to assembly and the regulation of peaceful public protests. I have no notes, transcript, or recording. The address for Northwestern Law School is 375 East Chicago Avenue, Chicago, Illinois 60611.

January 26, 2018: Speaker, Judges’ Forum, United States District Court for the District of Columbia, Washington, District of Columbia. I participated in a question and answer session about my legal career with D.D.C. clerks and interns. I have no notes, transcript, or recording. The address of the Court is 333 Constitution Avenue, Northwest, Washington, District of Columbia 20001.

January 25, 2018: Moot Court Judge, Penn Law Keedy Cup Competition, University of Pennsylvania Carey Law School, Philadelphia, Pennsylvania. I was one of three judges who presided over the final round of Penn Law’s internal moot court competition. I have no notes, transcript, or recording. The address for Penn Law is 3501 Sansom Street, Philadelphia, Pennsylvania 19104.

December 14, 2017: Participant, *Tinker v. Des Moines* Reenactment, District of Columbia Circuit Historical Society, Washington, District of Columbia. Video available at <https://dcchs.org/tinker-v-des-moines-independent-community-school-district-video-2>.

December 11, 2017: Mock Argument Judge, “How Am I Beguiled? The Case of Olivia & Sebastian (*Twelfth Night*),” Shakespeare Theatre Company, Washington, District of Columbia. Video available at <https://www.c-span.org/video/?438341-1/shakespeare-theatre-company-presents-twelfth-night-mock-trial>.

November 15, 2017: Moot Court Judge, Leahy Moot Court Tournament, Georgetown University Law Center, Washington, District of Columbia. I was one of the judges for the final round of GULC’s internal moot court competition. I have no notes, transcript, or recording. The address for GULC is 600 New Jersey Avenue, Northwest, Washington, District of Columbia 20001.

October 27, 2017: Symposium Panel Moderator, “Looking Forward: Criminal Justice Policy and Reform,” George Washington University Law Review, Washington, District of Columbia. Video available at <https://www.gwlr.org/symposium-2017-the-challenge-of-crime-in-a-free-society-50-years-later/symposium-2017-looking-forward-criminal-justice-policy-and-reform>. (This entry has been updated from my 2021 Senate Judiciary Questionnaire to accurately reflect the title of the panel I moderated.)

October 19, 2017: Dinner Speaker, “Four Lessons My Mother Taught Me,” Council Meeting of the American Law Institute, Washington, District of Columbia. Copy of speech as prepared supplied.

October 8, 2017: Speaker, “The Concept of Justice,” Bradley Hills Presbyterian Church Adult Education Program, Bethesda, Maryland. Copy of speech as prepared supplied.

July 16, 2017: Guest Speaker, Urban Squash Citizenship Tour, National Urban Squash + Education Association, Washington, District of Columbia. I participated in a question and answer session with a group of high school students regarding my career and the courts. I have no notes, transcript, or recording. The address for the National Urban Squash + Education Association is 555 Eighth Avenue, Suite 1102, New York, New York 10018.

July 11, 2017: Guest Speaker, US-Asia Institute, Szymanski Rule of Law Program, Washington, District of Columbia. I had an informal discussion with Chinese law students enrolled in this program regarding the functioning of the United States federal court system. I have no notes, transcript, or recording. The address for the US-Asia Institute is 232 East Capitol Street, Northeast, Washington, District of Columbia 20003.

July 10, 2017: Presiding Judge, Attorney Admission Ceremony, United States District Court for the District of Columbia, Washington, District of Columbia. Notes supplied. I also used the same pro bono notes that were provided for the attorney admission ceremony on September 9, 2019.

June 16, 2017: Guest Speaker, Wilkinson Walsh & Eskovitz Summer Speaker Series, Washington, District of Columbia. I participated in a question and answer session with the firm’s summer associates regarding my career and work as a judge. I have no notes, transcript, or recording. The address for Wilkinson Walsh & Eskovitz (now Wilkinson Stekloff) is 1900 M Street, Northwest, Suite 800, Washington, District of Columbia 20036.

June 8, 2017: Introductory Speaker, “A Conversation with Associate Justice Stephen Breyer,” American Constitution Society Annual National Convention, Washington, District of Columbia. Video available at <https://www.acslaw.org/video/united-states-supreme-court-justice-stephen-breyer->

in-conversation-with-dean-alan-morrison-introduced-by-judge-ketanji-brown-jackson.

June 2, 2017: Panelist, “Tips from the District Court Bench,” United States Sentencing Commission National Seminar, Baltimore, Maryland. I participated in a moderated panel regarding how district court judges prepare for sentencing and how counsel can be most effective during sentencing proceedings. I have no notes, transcript, or recording. The address for the Sentencing Commission is One Columbus Circle, Northeast, Suite 2-500, South Lobby, Washington, District of Columbia 20002.

May 27, 2017: Panelist, “‘92 World Challenges—A Lesson Learned and Action Moving Forward,” Harvard and Radcliffe Class of 1992 25th Reunion, Harvard University, Cambridge, Massachusetts. I participated in a public-service panel discussion at my 25th college reunion about my career choices and challenges. I have no notes, transcript, or recording. The address for Harvard College is University Hall, Cambridge, Massachusetts, 02138.

May 9, 2017: Presiding Judge, Naturalization Ceremony, United States District Court for the District of Columbia, Washington, District of Columbia. Notes and press coverage supplied.

May 1, 2017: Presiding Judge, Attorney Admission Ceremony, United States District Court for the District of Columbia, Washington, District of Columbia. Notes supplied. I also used the same pro bono notes that were provided for the attorney admission ceremony on September 9, 2019.

April 19, 2017: Mock Argument Judge, Georgetown University Law Center, Judge Patricia Millett’s Supreme Court Advocacy course, Washington, District of Columbia. I served as the judge for mock student oral arguments. I have no notes, transcript, or recording. The address of GULC is 600 New Jersey Avenue, Northwest, Washington, District of Columbia 20001.

April 13, 2017: Guest Speaker, George Washington University Law School, Professor Roger Fairfax’s Adjudicatory Criminal Procedure Class, Washington, District of Columbia. I served as the judge for a mock sentencing exercise in Professor Fairfax’s class and participated in a question and answer session about my legal career. I have no notes, transcript, or recording. The address for George Washington University Law School is 2000 H Street, Northwest, Washington, District of Columbia 20052.

April 10, 2017: Guest Lecturer on Federal Sentencing Statistics and Processes, George Washington University Law School, Professor Kimberly Robinson’s Race, Racism, and American Law Class, Washington, District of Columbia. Notes supplied.

April 8, 2017: Keynote Speaker, Harvard Law Review's 130th Spring Banquet, "Disparity, Discretion, and Debate: Understanding the Federal Sentencing Dilemma," Harvard Club of Boston, Boston, Massachusetts. Copy of speech as prepared supplied.

March 22, 2017: Participant, *Tinker v. Des Moines* Reenactment, District of Columbia Circuit Historical Society, Washington, District of Columbia. I played the role of one of the justices in a reenactment of a Supreme Court oral argument for D.C. public high school students. This event was the same reenactment as the event held on December 14, 2017, the video of which is available at <https://dcchs.org/tinker-v-des-moines-independent-community-school-district-video-2>.

March 10, 2017: Mock Court Judge, District of Columbia Circuit Historical Society Mock Court Program, Washington, District of Columbia. I judged a high school mock court competition and answered questions from participants regarding my background and being a judge. I have no notes, transcript, or recording. The address of the Historical Society is 333 Constitution Avenue, Northwest, Room 4726, Washington, District of Columbia 20001.

March 9, 2017: Panelist, "Sentencing and Its Collateral Consequences Impact," 31st Annual National Institute on White Collar Crime, American Bar Association White Collar Section, Miami Beach, Florida. I participated in a moderated panel regarding theories of sentencing reform and the ways in which counsel can be most effective during sentencing proceedings. I have no notes, transcript, or recording. The address for the ABA is 321 North Clark Street, Chicago, Illinois 60654.

March 2, 2017: Edith House Lecturer, "Reflections on my Journey as a Mother and a Judge," University of Georgia School of Law, Athens, Georgia. Video available at https://digitalcommons.law.uga.edu/lectures_pre_arch_lectures_house/41.

January 6, 2017: Guest Speaker, Judges' Forum, United States District Court for the District of Columbia, Washington, District of Columbia. I participated in a question and answer session about my legal career with D.D.C. clerks and interns. I have no notes, transcript, or recording. The address of the Court is 333 Constitution Avenue, Northwest, Washington, District of Columbia 20001.

December 12, 2016: Mock Argument Judge, "Law and *Romeo and Juliet*," Shakespeare Theatre Company, Washington, District of Columbia. Video available at <https://www.c-span.org/video/?419930-1/federal-judges-discuss-romeo-juliet>.

November 17, 2016: Moot Court Judge, Morris Tyler Moot Court of Appeals Harlan Fiske Stone Prize Moot Court Finals, Yale Law School, New Haven,

Connecticut. I was one of three judges who presided over the final round of Yale Law School's internal moot court competition. I have no notes, transcript, or recording. The address for Yale Law School is 127 Wall Street, New Haven, Connecticut 06511.

November 17, 2016: Guest Speaker, Yale Law Women, Yale BLSA, and Yale American Constitution Society, New Haven, Connecticut. I participated in career and clerking question and answer sessions with these groups while on campus at Yale Law School to judge the moot court competition. I have no notes, transcript, or recording. The address of Yale Law School is 127 Wall Street, New Haven, Connecticut 06511.

July 20, 2016: Panelist, "Perspectives on the Role of Courts in the Continuing Quest for Equality," 2016 NAACP National Convention, Cincinnati, Ohio. I participated in a moderated panel discussion regarding the historical role of the federal courts in protecting civil rights and legal issues that impact communities of color. I have no notes, transcript, or recording. The address for the NAACP is 4805 Mount Hope Drive, Baltimore, Maryland 21215.

June 24, 2016: Mock Trial Judge, American Law Institute, Washington, District of Columbia. I served as a mock trial judge for an environmental litigation mock trial sponsored by the American Law Institute. I have no notes, transcript, or recording. The address of the American Law Institute is 4025 Chestnut Street, Philadelphia, Pennsylvania 19104.

May 10, 2016: Presiding Judge, Naturalization Ceremony, United States District Court for the District of Columbia, Washington, District of Columbia. Notes supplied.

April 10, 2016: Moot Court Judge, Marshall-Brennan National Moot Court Competition, American University Washington College of Law Marshall-Brennan Constitutional Literacy Project, Washington, District of Columbia. I served as a judge for the final round of a national high school moot court competition. I have no notes, transcript, or recording. The address of the AUWCL is 4300 Nebraska Avenue, Northwest, Washington, District of Columbia 20016.

April 4, 2016: Presiding Judge, Attorney Admission Ceremony, United States District Court for the District of Columbia, Washington, District of Columbia. Notes supplied. I also used the same pro bono notes that were provided for the attorney admission ceremony on September 9, 2019.

March 17, 2016: Keynote Speaker, Women's History Month Celebration, "Musings at the Midway Point: Reflections on My Journey as a Mother and a Judge," Administrative Office of United States Courts, Washington, District of Columbia. Copy of speech as prepared supplied.

March 11, 2016: Mock Court Judge, District of Columbia Circuit Historical Society Mock Court Program, Washington, District of Columbia. I judged a high school mock court competition, and answered questions from participants regarding my background and being a judge. I have no notes, transcript, or recording, but press coverage is supplied. The address of the Historical Society is 333 Constitution Avenue, Northwest, Room 4726, Washington, District of Columbia 20001.

February 22, 2016: Guest Speaker, Morrison and Foerster LLP, Washington, District of Columbia. As an alumna of the firm, I participated in a moderated question-and-answer presentation for a Black History Month luncheon. I have no notes, transcript, or recording. The address of the firm is 2100 L Street, Northwest, Washington, District of Columbia 20037.

February 13, 2016: Moot Court Judge, William B. Spong, Jr. Moot Court, Tournament, William & Mary Law School, Williamsburg, Virginia. I served as a moot court judge for the Spong National Moot Court Tournament. I have no notes, transcript, or recording. The address of William & Mary Law School is 613 South Henry Street, Williamsburg, Virginia 23185.

October 27, 2015: Judge, Mock Arbitration, ChIPs Network Global Summit, Washington, District of Columbia. I served as a judge for a mock intellectual property arbitration. I have no notes, transcript, or recording. The address of ChIPs Network, Inc. is 660 4th Street, PMB 350, San Francisco, California 94107.

October 23, 2015: Guest Speaker, Equal Justice Works Conference & Career Fair, Washington, District of Columbia. Along with two other federal judges, I participated in a moderated question and answer panel presentation regarding my experiences as an attorney and judge, and provided advice for young attorneys, at a career fair for public interest lawyers. I have no notes, transcript, or recording. The address for Equal Justice Works is 1730 M Street, Northwest #800, Washington, District of Columbia 20036.

October 20, 2015: Panelist, District of Columbia Office of the Attorney General, Washington, District of Columbia. I participated in a panel of D.C. federal trial court judges attended by employees of the District of Columbia Office of the Attorney General. The panel addressed best practices for litigating in federal court and our experiences as judges. I have no notes, transcript, or recording. The address for the DCOAG is 441 Fourth Street, Northwest, Washington, District of Columbia 20001.

September 17, 2015: Panelist, United States Sentencing Commission Annual National Seminar on the Federal Sentencing Guidelines, New Orleans, Louisiana. I participated in a panel discussion regarding the application of the Sentencing Guidelines to drug offenses, and the retroactivity of recent Guideline

amendments. I have no notes, transcript, or recording. The address for the Sentencing Commission is One Columbus Circle, Northeast, Suite 2-500, South Lobby, Washington, District of Columbia 20002.

September 9, 2015: Speaker, “Fairness in Sentencing: An Examination,” Federal Judicial Center National Conference for Pro Se Law Clerks, Santa Fe, New Mexico. Copy of speech as prepared supplied.

May 15, 2015: Guest Speaker, Judges’ Forum, United States District Court for the District of Columbia, Washington, District of Columbia. I participated in a question and answer session about my legal career with D.D.C. clerks and interns. I have no notes, transcript, or recording. The address of the Court is 333 Constitution Avenue, Northwest, Washington, District of Columbia 20001.

April 3, 2015: Distinguished Visiting Jurist, The University of Chicago Law School, Chicago, Illinois. I visited the University of Chicago Law School, where I spoke with various student groups about diversity in the legal profession, attended classes, answered student questions, and gave a lunch talk entitled, “Fairness in Sentencing: An Examination.” Copy of speech as prepared supplied.

March 26, 2015: Panelist, Penn Law American Constitution Society, 12th Annual Federal Judges Panel, University of Pennsylvania Carey Law School, Philadelphia, Pennsylvania. I participated in a panel discussion regarding criminal justice system reforms, including proposed changes to the federal sentencing system. I have no notes, transcript, or recording. The address of Penn Law is 3501 Sansom Street, Philadelphia, Pennsylvania 19104.

March 20, 2015: Mock Court Judge, District of Columbia Circuit Historical Society Mock Court Program, Washington, District of Columbia. I judged a high school mock court competition, and answered questions from participants regarding my background and being a judge. I have no notes, transcript, or recording. The address of the Historical Society is 333 Constitution Avenue, Northwest, Room 4726, Washington, District of Columbia 20001.

February 25, 2015: Panelist, “A Conversation on Judging – Then and Now,” District of Columbia Circuit Historical Society, Washington, District of Columbia. Video available at <https://www.youtube.com/watch?v=QuWMe0IAdv8>.

January 4, 2015: Panelist, Association of American Law Schools Annual Meeting, Washington, District of Columbia. I participated in a panel regarding the importance of academic curricula aimed at teaching legal writing and research. I have no notes, transcript, or recording, but press coverage is supplied. The address of the Association of American Law Schools is 1614 20th Street, Northwest, Washington, District of Columbia 20009.

December 9, 2014: Presiding Judge, United States District Court for the District of Columbia, Naturalization Ceremony, Washington, District of Columbia. Notes supplied.

December 3, 2014: Webinar Panelist, United States Sentencing Commission Knowledge Seminar, Washington, District of Columbia. Video available at <https://www.youtube.com/watch?v=BaDn3MqIHVA&feature=youtu.be>.

December 1, 2014: Presiding Judge, United States District Court for the District of Columbia, Attorney Admission Ceremony, Washington, District of Columbia. Notes supplied. I also used the same pro bono notes that were provided for the attorney admission ceremony on September 9, 2019.

October 27 – 28, 2014: Panelist and Participant, Berkeley Law School Judge Visit, Berkeley, California. I visited Berkeley Law, where I spoke with various student groups about diversity in the legal profession, attended classes, answered student questions, and participated in a panel discussion about the judicial nomination process and my experiences as a judge. I have no notes, transcript, or recording. The address for Berkeley Law is 225 Bancroft Way, Berkeley, California 94720.

September 17, 2014: Panelist, “United States Sentencing Commission: A Year in Review” and Moderator, “Sentencing Forum: Hot Topics in Federal Sentencing,” United States Sentencing Commission, Annual National Seminar on the Sentencing Guidelines, Philadelphia, Pennsylvania. Materials available at <http://www.ussc.gov/training/annual-national-training-seminar/2014-annual-national-seminar#two>.

June 16, 2014: Moderator, Reentry Panel, United States Department of Justice, Smart on Crime Implementation Workshop, Washington, District of Columbia. I moderated an expert discussion of innovative pretrial programs aimed at certain categories of criminal defendants. I have no notes, transcript, or recording. The address for the Department of Justice is 950 Pennsylvania Avenue, Northwest, Washington, District of Columbia 20530.

June 6, 2014: Speaker, Presentation of the Portrait of Chief Judge Patti B. Saris, United States District Court for the District of Massachusetts, Boston, Massachusetts. Copy of speech as prepared supplied.

May 17, 2014: Speaker, Twentieth Anniversary Celebration of Justice Stephen Breyer, Washington, District of Columbia. Copy of speech as prepared supplied.

April 25, 2014: Mock Court Judge, District of Columbia Circuit Historical Society Mock Court Program, Washington, District of Columbia. I judged a high school mock court competition, and answered questions from participants regarding my background and being a judge. I have no notes, transcript, or

recording. The address of the Historical Society is 333 Constitution Avenue, Northwest, Room 4726, Washington, District of Columbia 20001.

April 25, 2014: Guest Speaker, Goodwin Procter LLP, Washington, District of Columbia. I gave informal remarks and professional recommendations to a group of minority and women associates and partners during a luncheon sponsored by Goodwin Procter's Diversity Committee. I have no notes, transcript, or recording. The address of Goodwin Procter is 901 New York Avenue, Northwest, Washington, District of Columbia 20001.

April 4, 2014: Panelist, *Arguendo* Discussion, Woolly Mammoth Theater, Washington, District of Columbia. I participated in a post-performance panel discussion of the play and its legal themes. I have no notes, transcript, or recording. The address of the Woolly Mammoth Theater is 641 D Street, Northwest, Washington, District of Columbia 20004.

March 6, 2014: Panelist, "Sentencing Strategies in White Collar Cases," American Bar Association, 28th National Institute on White Collar Crime, Miami, Florida. I participated in a panel discussion regarding the sentencing guideline that governs economic crimes. I have no notes, transcript, or recording. The address for the ABA is 321 North Clark Street, Chicago, Illinois 60654.

February 26, 2014: Speaker, Phase II Orientation Supreme Court Reception, Federal Judicial Center, Washington, District of Columbia. Copy of speech as prepared supplied.

February 22, 2014: Moot Court Judge, William Minor Lile Moot Court Competition, University of Virginia School of Law, Charlottesville, Virginia. I judged the semifinal round of UVA's internal moot court competition. I have no notes, transcript, or recording. The address of the UVA School of Law is 580 Massie Road, Charlottesville, Virginia 22903.

February 20, 2014: Guest Speaker, Close Up Foundation, Juveniles and Life-Without-Parole Sentences Program, Washington, District of Columbia. I participated in a question and answer session with high school students participating in the program regarding my career and sentencing. I have no notes, transcript, or recording. The address for the Close Up Foundation is 1330 Braddock Place #400, Alexandria, Virginia 22314.

February 17, 2014: Panelist, "Perspectives on the Criminal Justice System," Stanford Black Alumni Association, Washington, District of Columbia. I participated in a moderated panel discussion concerning African Americans in the criminal justice system and proposals for sentencing reforms. I have no notes, transcript, or recording. The address for Stanford in Washington is 2661 Connecticut Avenue, Northwest, Washington, District of Columbia 20008.

February 14, 2014: Guest Speaker, Judges' Forum/Fall & Winter Speaker Series, United States District Court for the District of Columbia, Washington, District of Columbia. I participated in a question and answer session about my legal career with D.D.C. clerks and interns. I have no notes, transcript, or recording. The address of the Court is 333 Constitution Avenue, Northwest, Washington, District of Columbia 20001.

November 21, 2013: Guest Lecturer, George Washington University Law School, Professor Roger Fairfax's Adjudicatory Criminal Procedure Class, Washington, District of Columbia. I used the same notes supplied in relation to the similar lecture on April 2, 2009.

November 1, 2013: Panelist, "Update on Federal Sentencing Law and Policy," American Bar Association, 6th Annual Fall Institute, Washington, District of Columbia. Notes supplied.

October 8, 2013: Presiding Judge, Naturalization Ceremony, United States District Court for the District of Columbia, Washington, District of Columbia. Notes supplied.

October 7, 2013: Presiding Judge, Attorney Admission Ceremony, United States District Court for the District of Columbia, Washington, District of Columbia. I used the same pro bono notes that were provided for the attorney admission ceremony on September 9, 2019.

September 18 – 19, 2013: Panelist, Symposium on Economic Crime, United States Sentencing Commission, Washington, District of Columbia. I participated in a panel discussion of sentencing factors for fraud and other economic crimes. I have no notes, transcript, or recording. The address of the United States Sentencing Commission is One Columbus Circle, Northeast, Suite 2-500, South Lobby, Washington, District of Columbia 20002.

September 10, 2013: Presiding Judge, Naturalization Ceremony, United States District Court for the District of Columbia, Washington, District of Columbia. I have no notes, transcript, or recording. The address of the District Court is 333 Constitution Avenue, Northwest, Washington, District of Columbia 20001.

September 9, 2013: Presiding Judge, Attorney Admission Ceremony, United States District Court for the District of Columbia, Washington, District of Columbia. I used the same pro bono notes that were provided for the attorney admission ceremony on September 9, 2019.

September 4, 2013: Panelist, Plenary Panel, United States Sentencing Commission, Regional Training Seminar, Miami, Florida. Notes supplied.

August 2, 2013: Panelist, Plenary Panel, United States Sentencing Commission, Regional Training Seminar, Washington, District of Columbia. Notes supplied.

May 15, 2013: Guest Speaker, Reception Honoring Women Judges in the DC Metropolitan Area, Greater Washington Area Chapter, Women Lawyers Division, National Bar Association, Washington, District of Columbia. I gave brief remarks at an evening reception regarding my background, position as a judge, and professional recommendations. I have no notes, transcript, or recording. The address of the Greater Washington Area Chapter, Women Lawyers Division, National Bar Association is P.O. Box 77254, Washington, District of Columbia 20013.

May 9, 2013: Speaker, Investiture of Judge Ketanji Brown Jackson, Washington, District of Columbia. Transcript supplied.

April 30, 2013: Guest Speaker, New York University School of Law, Judge John Gleeson's Sentencing Seminar, New York, New York. I was a guest of Judge Gleeson at his sentencing seminar and answered questions from students about the Commission and sentencing in general. I have no notes, transcript, or recording. The address of NYU School of Law is 40 Washington Square South, New York, New York 10012.

April 4, 2013: Guest Lecturer, George Washington University Law School, Professor Roger Fairfax's Adjudicatory Criminal Procedure Class, Washington, District of Columbia. I used the same notes supplied in relation to the similar lecture on April 2, 2009.

March 11, 2013: Guest Lecturer, George Washington University Law School, Professors Aitan Goelman and Adam Hoffinger's Role of the Federal Prosecutor Class, Washington, District of Columbia. I used the same notes supplied in relation to the similar lecture on March 14, 2011.

March 7, 2013: Panel Moderator, "Sentencing Strategy: Advocacy in White Collar Cases," American Bar Association, 27th Annual National Institute on White Collar Crime, Las Vegas, Nevada. I moderated a panel discussion regarding sentencing issues in white collar crime cases. I have no notes, transcript, or recording. The address of the American Bar Association is 321 North Clark Street, Chicago, Illinois 60654.

October 26, 2012: Panelist, "Update on Federal Sentencing Law: Supreme Court, Appellate, and Legislation," American Bar Association, Criminal Justice Section, Fifth Annual Fall Institute, Washington, District of Columbia. Notes and press coverage supplied.

October 23, 2012: Speaker, Health Ethics Trust's 2012 Healthcare Best Compliance Practices Forum, Alexandria, Virginia. I gave a speech to

compliance officers in the health care industry about the historical development of the federal sentencing guidelines applicable to organizations, and the ways in which the guidelines have led to beneficial compliance and ethics standards in industries such as healthcare. Notes supplied.

October 2, 2012: Speaker, "USSC Plenary Panel: Mandatory Minimum Report," Federal Judicial Center, National Sentencing Institute, Memphis, Tennessee. Notes supplied.

July 26, 2012: Panelist, 35th Annual Training Conference, National Association of Black Narcotic Agents, Washington, District of Columbia. Notes supplied.

June 13 – 15, 2012: Panelist, "United States Sentencing Commission: A Year in Review" and Moderator, "Sentencing Forum: Hot Topics in Federal Sentencing," United States Sentencing Commission, Annual National Seminar on the Sentencing Guidelines, New Orleans, Louisiana. Notes supplied.

May 24, 2012: Panelist, Plenary Session, "The Presentence Report and Departures/Variances," Tampa Bay Chapter of the Federal Bar Association, 21st Annual National Seminar on the Federal Sentencing Guidelines, Saint Petersburg, Florida. Outline supplied.

April 30, 2012: Speaker, "State of the Sentencing Guidelines," Health Care Compliance Association, Annual Compliance Institute, Las Vegas, Nevada. Video available at <http://youtu.be/XFQ9DvKqH20>.

April 17, 2012: Panelist, "New Frontiers in Race and Criminal Justice," NYU Center on the Administration of Criminal Law, New York, New York. Video available at <http://www.youtube.com/watch?v=QSxZd10HovU>.

March 12, 2012: Guest Lecturer, George Washington University Law School, Professors Aitan Goelman and Adam Hoffinger's Role of the Federal Prosecutor Class, Washington, District of Columbia. I used the same notes supplied in relation to the similar lecture on March 14, 2011.

February 28, 2012: Guest presenter, D.C. Class Field Trip sponsored by Professor Lisa McElroy of the Earl Mack School of Law at Drexel University, Washington, District of Columbia. I met with approximately 15 students in Professor McElroy's Supreme Court seminar to discuss my career and work-family balance issues. I have no notes, transcript, or recording. The address of the School of Law is 3141 Chestnut Street, Philadelphia, Pennsylvania 19104.

October 28, 2011: Panelist, American Bar Association, Fourth Annual Sentencing & Reentry Institute and Criminal Justice Legal Educators Colloquium, Washington, District of Columbia. I participated in a panel that provided legislative and case law updates about the state of federal sentencing. I provided

data and information regarding recent amendments to the Guidelines Manual (including the guideline amendments made pursuant to the Fair Sentencing Act) and the proposed priorities of the Commission. Notes supplied.

October 24, 2011: Speaker, Health Ethics Trust's 2011 Healthcare Best Compliance Practices Forum, Washington, District of Columbia. I gave a speech to compliance officers in the health care industry about the U.S. Sentencing Commission, its role in developing the federal sentencing guidelines applicable to organizations, and the ways in which the guidelines have led to the development of beneficial compliance and ethics standards in industries such as healthcare. Notes supplied.

September 28, 2011: Presenter, United States Sentencing Commission, Training Program for the probation officers and United States District Judges of the Northern District of Illinois, Chicago, Illinois. I provided data, training, and information about the guideline amendments made pursuant to the Fair Sentencing Act and the procedures related to retroactive application of those amendments. I met informally with Commission staff and the district's chief probation officers to answer questions about the anticipated impact of the guideline changes. I gave a more formal lunchtime presentation to the judges of the United States District Court. Notes supplied.

June 15, 2011: Panelist, "Sentencing in the Sixth Circuit," Sixth Circuit Judicial Conference, Acme, Michigan. Notes supplied.

June 14, 2011: Panelist, "Update on Key Issues Before the United States Sentencing Commission and Criminal Rules Committee," Ninth Circuit Federal Defenders Retreat, Big Fork, Montana. Notes supplied.

May 27, 2011: Commencement Speaker, Montrose Christian School, Rockville, Maryland. Copy of speech as prepared supplied.

May 23, 2011: Guest Speaker, D.C. Attorneys of Color Workshop, Morrison and Foerster LLP, Washington, District of Columbia. Notes supplied.

May 18 – 20, 2011: Panelist, "United States Sentencing Commission: A Year in Review" and Moderator, "Sentencing Forum: Current Issues and the Future of Federal Sentencing," United States Sentencing Commission, Annual National Seminar on the Sentencing Guidelines, San Diego, California. Notes supplied.

May 6, 2011: Panelist, "Update on Federal Sentencing Law," Tampa Bay Chapter of the Federal Bar Association, Annual National Seminar on the Federal Sentencing Guidelines, Orlando, Florida. Notes supplied.

March 14, 2011: Guest Lecturer, George Washington University Law School, Professors Aitan Goelman and Adam Hoffinger's Role of the Federal Prosecutor Class, Washington, District of Columbia. Notes supplied.

March 1, 2011: Guest presenter, D.C. Class Field Trip sponsored by Professor Lisa McElroy of the Earl Mack School of Law at Drexel University, Washington, District of Columbia. I met with approximately 15 students in Professor McElroy's Supreme Court seminar to discuss my career and work-family balance issues. I have no notes, transcript, or recording. The address of the School of Law is 3141 Chestnut Street, Philadelphia, Pennsylvania 19104.

February 11, 2011: Speaker, training program for federal judges, prosecutors, defense attorneys, and probation officers, United States Sentencing Commission, Macon, Georgia. I gave introductory remarks at the beginning of the guidelines training program. I also answered questions and assisted Commission staff in training participants on how to use the Guidelines Manual. Notes supplied.

November 20, 2010: Panelist, "Bootcamp: Real World Training for Future Success," Women's Bar Association of D.C., Diversity Committee, Washington, District of Columbia. I participated in a panel on professional advancement. I discussed work-family balance issues and provided advice about career development and professional ethics. I have no notes, transcript, or recording. The Women's Bar Association is located at 2020 Pennsylvania Avenue, Northwest, Suite 446, Washington, District of Columbia 20006.

November 5, 2010: Panelist, "United States Sentencing Commission: A Year in Review" and "Update on Sentencing Law," American Bar Association Criminal Justice Section, Sentencing and Reentry Institute, Washington, District of Columbia. Notes supplied.

October 20, 2010: Speaker, training program for federal judges, prosecutors, defense attorneys, and probation officers, United States Sentencing Commission, Saint Thomas, Virgin Islands. I gave introductory remarks at the beginning of the guidelines training program. I also answered questions and assisted Commission staff in training participants on how to use the Guidelines Manual. Notes and brochure supplied.

September 22, 2010: Speaker, training program for the law clerks and Staff Attorneys of the United States Court of Appeals for the Fourth Circuit, United States Sentencing Commission, Richmond, Virginia. I gave introductory remarks at the beginning of the guidelines training program. I also answered questions and assisted Commission staff in training participants on how to use the Guidelines Manual. Notes supplied.

August 4, 2010: Panelist, "Rehabilitation or Restoration in Criminal Punishment: Dead End or Realistic Imperative?" Southeastern Association of Law Schools

(SEALS), Annual Meeting and Conference, Palm Beach, Florida. Notes and PowerPoint slides supplied.

June 17, 2010: Panelist, United States Sentencing Commission, Annual National Seminar on the Federal Sentencing Guidelines, New Orleans, Louisiana. I was part of a plenary “year in review” panel featuring the Commissioners of the United States Sentencing Commission. I have no notes, transcript, or recording. The United States Sentencing Commission is located at One Columbus Avenue, Northeast, Suite 2-500, South Lobby, Washington, District of Columbia 20002.

May 14, 2010: Panelist, “Update on Federal Sentencing Law: Supreme Court, Appellate, and Legislation,” Tampa Bay Chapter of the Federal Bar Association, Annual National Seminar on the Federal Sentencing Guidelines, Saint Petersburg, Florida. Notes supplied.

November 10, 2009: Co-Presenter, Parent Encouragement Project, Kensington, Maryland. PowerPoint slides and notes supplied.

April 2, 2009: Guest Lecturer, Professor Roger Fairfax’s Adjudicatory Criminal Procedure Class, George Washington University Law School, Washington, District of Columbia. I provided an overview of the content and structure of the Sentencing Guidelines and the Supreme Court’s recent jurisprudence on sentencing, from *Booker* to *Kimbrough*. Notes supplied.

March 19, 2009: Faculty, Minority Corporate Counsel Association, 8th Annual CLE Expo, Chicago, Illinois. I gave a PowerPoint presentation entitled, “Inside the Supreme Court of the United States: An Overview.” I also participated in a related panel discussion regarding recent and pending Supreme Court cases of particular interest to business. PowerPoint presentation supplied.

January 9, 2008: Guest Speaker, American University, Professor Carolyn Cox Cohan’s course on Women, The Law, & Litigating For Social Change, Washington, District of Columbia. Notes supplied.

December 5, 2007: Panelist, American Constitution Society event at Jones Day, Washington, District of Columbia. I participated in a panel discussion regarding the representation of Guantanamo detainees and amici in cases before the Supreme Court. Video available at <https://www.youtube.com/watch?v=eC2I00IcR3w>.

November 6 – 10, 2006: Presenter, “Recidivist Enhancements: ACCA, Shepard, and Related Issues,” Federal Defender Orientation Program, Santa Fe, New Mexico. Outline supplied.

November 26, 2001: Guest Lecturer, “Supreme Court As Gatekeeper: Screening Petitions for Original Writs of Habeas Corpus In The Wake of The AEDPA,” Suffolk University Law School, Boston, Massachusetts. Notes supplied.

October 11 – 12, 1987: Original Orator, Sixth Annual William Faulkner Invitational High School Forensics Tournament (Oxford, MI). I delivered “*It’s About Time*” in the first of many high school forensics tournaments at a local and national level as a senior member of the Miami Palmetto Senior High School speech and debate team. Copy of speech as prepared supplied in response to Question 12a.

- i. In 2019, the Committee on Codes of Conduct of the Judicial Conference of the United States issued “Advisory Opinion No. 116: Participation in Educational Seminars Sponsored by Research Institutes, Think Tanks, Associations, Public Interest Groups, or Other Organizations Engaged in Public Policy Debates.” Advisory Opinion No. 116 states: “Where the funding sources are unknown or likely to be from sources engaged in litigation or political advocacy, judges and judicial employees should not participate. The Committee has cautioned that, if there is insufficient information for the judge to decide whether to attend a seminar, then the judge should decline the invitation or take reasonable steps to obtain additional information.” Advisory Opinion No. 116 also states: “where the sources of the funding for the event are unknown, judges and law clerks should inquire as to the specific sources to ensure that there is no actual or potential conflict or appearance of impropriety.”

The Advisory Opinion purports to interpret the Code of Conduct for United States Judges, which is binding on all federal Circuit Court judges (among others). Canon 4(H) of the Code of Conduct states in relevant part that “[a] judge may accept compensation and reimbursement of expenses for the law-related and extrajudicial activities permitted by this Code if the source of the payments does not give the appearance of influencing the judge in the judge’s judicial duties or otherwise give the appearance of impropriety.” Please identify what steps you have taken to comply with the Code of Conduct for United States Judges in attending any such covered seminars since the promulgation of Advisory Opinion No. 116.

I have not attended any covered seminars since the promulgation of Advisory Opinion No. 116.

- e. List all interviews you have given to newspapers, magazines or other publications, or radio or television stations, providing the dates of these interviews and four (4) copies of the clips or transcripts of these interviews where they are available to you.

On November 16, 2020, I provided written answers to interview questions for an alumnae profile that Morrison & Foerster released in connection with the firm's 2021 Black History Month celebration. Copy supplied.

On March 10, 2020, I gave a telephone interview to Colleen Walsh of the Harvard Gazette, in connection with Gazette profiles of selected members of the Harvard Board of Overseers. I do not have a transcript; the resulting article is: Colleen Walsh, *Eight Current Overseers Share Their Unique Stories*, Harvard Gazette (June 16, 2020). Copy supplied.

In the winter of 2019, I answered questions posed by a Georgetown Day School staff member for a profile that was published in the school's magazine in connection with my appointment as a GDS trustee. I do not have a transcript; the resulting article is: *Meet the Trustees 2019–2020*, Georgetown Days Magazine, Winter 2019/20, at 48. Copy supplied.

On January 11, 2019, I gave a telephone interview to Janell Ross of NBC News in connection with a profile of my career for the NBCBLK series *She Thrives: Black Women Making History*. I do not have a transcript; the resulting article is: Adrian Bellet, *Ketanji Brown Jackson: A decisive force applying rules to any and all*, NBC News (Jan. 31, 2019). Copy supplied.

In early 2016, in connection with my candidacy for a position on the Harvard Board of Overseers, I responded to a questionnaire that an advocacy group called "Coalition for a Diverse Harvard" sent to all candidates. On March 28, 2016, Harvard Magazine published an article regarding the election, *Contested Harvard Overseer Election Begins*, Harvard Magazine (Mar. 28, 2016), which quoted my response to the questionnaire. I did not give any interview in connection with the article. Copy supplied.

On April 30, 2012, I was interviewed during a live radio RACMonitor program broadcast from the Health Care Compliance Association's Compliance Institute in Las Vegas and answered prepared questions regarding the United States Sentencing Commission's role in developing the federal sentencing guidelines for organizations. Notes supplied.

On November 19, 2008, I gave a telephone interview to Mark Sherman of the Associated Press regarding *Al-Marri v. Pucciarelli*. To my knowledge, there was no resulting article, and I do not have a transcript.

In the summer of 2008, I gave an interview to Elinor J. Brecher in connection with an article that she was writing about the death of my former speech and debate coach. I do not have a transcript; the resulting article is: Elinor J. Brecher, *Dedicated Debate Legend Was an 'Unforgettable Hero,'* Miami Herald (Aug. 7, 2008). Copy supplied.

In the spring of 2007, I gave an interview to Kevin Merida and Michael A. Fletcher in connection with an article that they were writing about Justice Thomas. I do not have a transcript; the resulting article is: Kevin Merida & Michael A. Fletcher, *Justice Thomas's Life: A Tangle of Poverty, Privilege and Race*, Wash. Post (Apr. 22, 2007). Copy supplied. My comments were also included in Kevin Merida & Michael A. Fletcher, *SUPREME DISCOMFORT: THE DIVIDED SOUL OF CLARENCE THOMAS* (2007).

On December 11, 2000, I was interviewed by CNN host Leon Harris after the United States Supreme Court stayed the Florida state supreme court's order requiring a statewide manual recount of the ballots cast in Florida during the Presidential election. Recording supplied.

In the fall of 1990, I gave an interview to Boston Globe reporter in connection with the newspaper's coverage of a sit-in at Harvard University. I do not have a transcript; the resulting article is: *Harvard Students End Sit-In Protest, Demand More Afro-American Faculty*, Bos. Globe (Nov. 17, 1990). Copy supplied.

In the spring of 1988, Jonathan Karp published an article regarding a program that took place at my high school and quoted statements that I made during the program. I do not recall giving him an interview; the article he wrote is: Jonathan Karp, *Palmetto Students Examine Their Values*, Miami Herald (Apr. 17, 1988). Copy supplied. (Because this article is from when I was in high school, it is not responsive to this question but I am including it because it was inadvertently listed in my 2012 Senate Judiciary Questionnaire.)

In the fall of 1987, Teresa Smith published an article regarding a visit that the Secretary of the Interior made to my high school and quoted a statement that I made during a question-and-answer session with the Secretary. I do not recall giving her an interview; the article she wrote is: Teresa Smith, *Secretary is Grilled on Policies*, Miami Herald (Oct. 4, 1987). Copy supplied. (Because this article is from when I was in high school, it is not responsive to this question but I am including it because it was inadvertently listed in my 2012 Senate Judiciary Questionnaire.)

- f. If, in connection with any public office you have held, there were any reports, memoranda, or policy statements prepared or produced with your participation, supply four (4) copies of these materials. Also provide four (4) copies of any resolutions, motions, legislation, nominations, or other matters on which you voted as an elected official, the corresponding votes and minutes, as well as any speeches or statements you made with regard to policy decisions or positions taken. "Participation" includes, but is not limited to, membership in any subcommittee, working group, or other such group, which produced a report, memorandum, or policy statement, even where you did not contribute to it. If any of these materials are not available to you, please give the name of the document,

the date of the document, a summary of its subject matter, and where it can be found.

I have not participated in the preparation of any such materials other than those listed in response to Questions 12b and 12c.

13. **Judicial Office:** State (chronologically) any judicial offices you have held, including positions as an administrative law judge, whether such position was elected or appointed, and a description of the jurisdiction of each such court.

2013 – 2021: United States District Judge, United States District Court for the District of Columbia. This is an appointed position. The district court has jurisdiction that is provided to it by Congress, as set forth in Title 28 of the United States Code, sections 1330 to 1369, which includes cases arising under the Constitution or federal laws, certain cases between citizens of different states, actions against foreign states, and bankruptcy appeals. The district court also has jurisdiction over federal crimes and related violations of the D.C. Code.

2021 – Present: United States Circuit Judge, United States Court of Appeals for the District of Columbia Circuit. This is an appointed position. The court of appeals has jurisdiction that is provided to it by Congress, as set forth in Title 28 of the United States Code, sections 1291 to 1296, which includes appeals of final decisions of district courts and of certain interlocutory orders, and well as petitions seeking review of certain agency actions.

- a. Approximately how many cases have you presided over that have gone to verdict or judgment? ____

During my time as a United States District Judge, I presided over twelve trials: nine jury trials and three bench trials (two of the bench trials involved the same case). The breakdown of the types of trials over which I presided appears below.

Of these, approximately what percent were:

- | | | |
|-----|-----------------------|-----|
| i. | jury trials: | 75% |
| | bench trials: | 25% |
| ii. | civil proceedings: | 50% |
| | criminal proceedings: | 50% |
- b. Provide citations for all opinions, dispositive orders, and orders affecting injunctive relief you have written, published and unpublished, including concurrences and dissents. If any of the opinions listed are not available on Westlaw, provide copies of the opinions.

To my recollection, and through a review of my files and court records and searches of publicly available databases by persons acting on my behalf, I have located the following opinions, dispositive orders, and orders affecting injunctive relief that I have written. It is possible that a few opinions, dispositive orders, and orders affecting injunctive relief were not captured by these searches, and thus are not listed below.

I found two opinions that I have written and issued, to date, in my time as a Circuit Judge:

Wye Oak Tech., Inc. v. Republic of Iraq, 24 F.4th 686 (D.C. Cir. 2022)

Am. Fed'n of Gov't Emps., AFL-CIO v. Fed. Lab. Rels. Auth., No. 20-1396, 2022 WL 287906 (D.C. Cir. Feb. 1, 2022)

In addition, I issued a statement concurring in the court's *per curiam* order in *I.A. v. Garland*, No. 20-5271 (D.C. Cir. Feb. 24, 2022). Copy supplied.

I found a total of 578 opinions, dispositive orders, and orders affecting injunctive relief that I issued as a District Judge: 436 of those were in cases that were assigned to me through the district court's random assignment system, and 142 related to screening matters that I was assigned to handle while I was on duty as the Motions Judge. Opinions, dispositive orders, and orders affecting injunctive relief not available on Westlaw are supplied.

The citations that follow are the opinions, dispositive orders, and orders affecting injunctive relief that I wrote in cases that were randomly assigned to me for decision. Where such opinions, dispositive orders, and orders affecting injunctive relief are not available on Westlaw, copies are supplied.

Consumers for Auto Reliability & Safety v. Fed. Trade Comm'n, No. 17-cv-0540, 2021 WL 4050876 (D.D.C. Sept. 6, 2021)

Tyson v. DeJoy, No. 16-cv-2087, 2021 WL 4131603 (D.D.C. Aug. 27, 2021)

Youssef v. Embassy of United Arab Emirates, No. 17-cv-2638, 2021 WL 3722742 (D.D.C. Aug. 23, 2021)

Amobi v. Brown, No. 08-cv-1501, 2021 WL 3722710 (D.D.C. Aug. 23, 2021)

Kovalevich v. U.S. Dep't of Just. Exec. Off. for U.S. Att'ys, No. 18-cv-1671, 2021 WL 3616890 (D.D.C. Aug. 16, 2021)

Env't Integrity Project v. Gen. Servs. Admin., No. 18-cv-0042, 2021 WL 3464337 (D.D.C. Aug. 6, 2021)

Est. of Mickens v. U.S. Bank Nat'l Ass'n, No. 18-cv-928, 2021 WL 3418955, (D.D.C. Aug. 5, 2021)

Sourgoutsis v. U.S. Capitol Police, No. 16-cv-1096, 2021 WL 3053388 (D.D.C. July 20, 2021)

Fredericks v. U.S. Dep't of the Interior, No. 20-cv-2458, 2021 WL 2778575 (D.D.C. July 2, 2021)

Davis v. Yellen, No. 08-cv-447, 2021 WL 2566763 (D.D.C. June 22, 2021)

Kovalevich v. Bureau of Indian Affs., No. 18-cv-0610, 2021 WL 2417348 (D.D.C. June 14, 2021)

CapitalKeys, LLC v. Democratic Republic of Congo, No. 15-cv-2079, 2021 WL 2255362 (D.D.C. June 3, 2021)

PSV Enters., LLC v. U.S. Citizenship & Immigr. Servs., No. 20-cv-2287, 2021 WL 2115251 (D.D.C. May 25, 2021)

Calderon-Lopez v. Saul, No. 19-cv-1851, 2021 WL 2103224 (D.D.C. May 25, 2021)

Martins Okoro v. Pompeo, No. 20-cv-2451, Mem. Op., ECF No. 16 (D.D.C. May 5, 2021)

Osvatics v. Lyft, Inc., 535 F. Supp. 3d 1 (D.D.C. 2021)

Equal Rights Ctr. v. Uber Techs., Inc., 17-cv-1272, 2021 WL 981011 (D.D.C. March 15, 2021)

Raja v. FDIC, 16-cv-0511, 2021 WL 508578 (D.D.C. Feb. 11, 2021)

United States v. Greene, 71-cr-1913, 2021 WL 354446 (D.D.C. Feb. 2, 2021)

United States v. Terry, 14-cr-00009, 2020 WL 7773389 (D.D.C. Dec. 29, 2020)

Maryland v. U.S. Dep't of Educ., 17-cv-2139, 2020 WL 7773390 (D.D.C. Dec. 29, 2020)

Rae v. Child.'s Nat'l Med. Ctr., 15-cv-0736, 2020 WL 7693612 (D.D.C. Dec. 28, 2020)

Snowden v. Zinke, 15-cv-1382, 2020 WL 7248349 (D.D.C. Dec. 9, 2020)

Lewis v. Allstate Ins. Co., 19-cv-2628, Mem. Op., ECF No. 28 (D.D.C. Nov. 30, 2020)

Las Americas Immigrant Advoc. Ctr. v. Wolf, 507 F. Supp. 3d 1 (D.D.C. 2020)

Sourgoutsis v. U.S. Capitol Police, 16-cv-1096, 2020 WL 6887782 (D.D.C. Nov. 24, 2020)

W.S. v. District of Columbia, 502 F. Supp. 3d 102 (D.D.C. 2020)

Kiakombua v. Wolf, 498 F. Supp. 3d 1 (D.D.C. 2020)

Dockery v. Maidrana, 16-cv-0308, Mem. Op. & Order, ECF No. 41 (D.D.C. Oct. 23, 2020)

United States v. Becton, 07-cr-131-01, Mem. Op. & Order, ECF No. 592 (D.D.C. Oct. 23, 2020)

Baisden v. Barr, 19-cv-3105, 2020 WL 6118181 (D.D.C. Oct. 16, 2020)

Calderón-López v. Wash. Metro. Area Transit Auth., 20-cv-0087, Mem. Op., ECF No. 11 (D.D.C. Oct. 14, 2020)

Yanofsky v. U.S. Dep't of Com., 19-cv-2290, 2020 WL 5944448 (D.D.C. Oct. 6, 2020)

Stotter v. U.S. Agency for Int'l Dev., 14-cv-2156, 2020 WL 5878033 (D.D.C. Oct. 3, 2020)

MVP Sports, Inc. v. Cissna, 19-cv-00742, 2020 WL 5816239 (D.D.C. Sept. 30, 2020)

Raja v. Fed. Deposit Ins. Corp., 16-cv-0511, 2020 WL 5834889 (D.D.C. Sept. 30, 2020)

United States v. Greer, 18-cv-2497, 2020 WL 5834840 (D.D.C. Sept. 30, 2020)

SNH Med. Off. Props. Tr. v. A Bloomin' Sandwich Café, Inc., 19-cv-745, 2020 WL 5834858 (D.D.C. Sept. 30, 2020)

James Madison Project v. CIA, 18-cv-03112, 2020 WL 5653577 (D.D.C. Sept. 23, 2020)

Sickle v. Torres Advanced Enter. Sols., LLC, 11-cv-2224, 2020 WL 5530357 (D.D.C. Sept. 14, 2020)

Salha v. U.S. Dep't of Homeland Sec., 20-cv-1102, 2020 WL 5505350 (D.D.C. Sept. 11, 2020)

Campaign for Accountability v. U.S. Dep't of Just., 486 F. Supp. 3d 424 (D.D.C. 2020)

Doe v. Syrian Arab Republic, 18-cv-0066, 2020 WL 5422844 (D.D.C. Sept. 10, 2020)

Pendergrass v. U.S. Dep't of Def., 17-cv-0546, 2020 WL 5406043 (D.D.C. Sept. 9, 2020)

United States v. Dunlap, 485 F. Supp. 3d 129 (D.D.C. 2020)

United States v. Holland, 14-cr-080, Mem. Op. & Order, ECF No. 58 (D.D.C. Aug. 24, 2020)

Whiteru v. Wash. Metro. Area Transit Auth., 480 F. Supp. 3d 185 (D.D.C. 2020)

Bird v. Barr, 19-cv-1581, 2020 WL 4219784 (D.D.C. July 23, 2020)

CEF Energia, B.V. v. Italian Republic, 19-cv-3443, 2020 WL 4219786 (D.D.C. July 23, 2020)

Ross v. Lockheed Martin Corp., 16-cv-2508, 2020 WL 4192566 (D.D.C. July 21, 2020)

Maryland v. U.S. Dep't of Educ., 474 F. Supp. 3d 13 (D.D.C. 2020)

Las Americas Immigrant Advoc. Ctr. v. Wolf, 19-cv-3640, 2020 WL 7319297 (D.D.C. July 8, 2020)

AFL-CIO v. NLRB, 471 F. Supp. 3d 228 (D.D.C. 2020)

United States v. Leake, 19-cr-194, 2020 WL 3489523 (D.D.C. June 26, 2020)

Rogers v. Lumina Solar, Inc., 18-cv-2128, 2020 WL 3402360 (D.D.C. June 19, 2020)

United States v. Sears, 19-cr-21, 2020 WL 3250717 (D.D.C. June 16, 2020)

Evans v. United States, 17-cv-01731, 2020 WL 3250730 (D.D.C. June 15, 2020)

AFL-CIO v. NLRB, 466 F. Supp. 3d 68 (D.D.C. 2020)

Edwards v. United States, 18-cv-2560, 2020 WL 2800605 (D.D.C. May 29, 2020)

Glawson v. Exec. Off. for U.S. Att'ys, 18-cv-2673, 2020 WL 2735615 (D.D.C. May 26, 2020)

Buchanan v. Sony Music Ent., 18-cv-3028, 2020 WL 2735592 (D.D.C. May 26, 2020)

Manus v. Hayden, 18-cv-1146, 2020 WL 2615539 (D.D.C. May 23, 2020)

United States v. Johnson, 464 F. Supp. 3d 22 (D.D.C. 2020)

United States v. Leake, 19-cr-194, 2020 WL 2331918 (D.D.C. May 10, 2020)

United States v. Leake, 19-cr-194, 2020 WL 1905150 (D.D.C. Apr. 17, 2020)

United States v. Dabney, 20-cr-27, 2020 WL 1867750 (D.D.C. Apr. 13, 2020)

United States v. Wiggins, 19-cr-258, --- F. Supp. 3d ---, 2020 WL 1868891 (D.D.C. Apr. 10, 2020)

United States v. Lee, 451 F. Supp. 3d 1 (D.D.C. 2020)

Mohammad Hilmi Nassif & Partners v. Republic of Iraq, 17-cv-2193, 2020 WL 1444918 (D.D.C. Mar. 25, 2020)

Doe v. Wash. Metro. Area Transit Auth., 453 F. Supp. 3d 354 (D.D.C. 2020)

Tomasello v. Greenzweig, 19-cv-0384, 2020 WL 1236645 (D.D.C. Mar. 13, 2020)

Willis v. Gray, 14-cv-1746, 2020 WL 805659 (D.D.C. Feb. 18, 2020)

CapitalKeys, LLC v. Democratic Republic of Congo, 15-cv-2079, Mem. Op. & Order, ECF No. 62 (D.D.C. Feb. 14, 2020)

Sourgoutsis v. U.S. Capitol Police, 16-cv-1096, 2020 WL 109055 (D.D.C. Jan. 9, 2020)

United States v. Fields, 99-cr-0286, 2020 WL 32990 (D.D.C. Jan. 2, 2020)

In re Salas, 18-cv-2318, 2020 WL 32567 (D.D.C. Jan. 2, 2020)

Hammond v. Dep't of Def., 16-cv-0421, Mem. Op. & Order, ECF No. 57 (D.D.C. Dec. 31, 2019)

Brightwell Dispensers Ltd. v. Dongguan ISCE Sanitary Ware Indus. Co. Ltd., 17-cv-1783, 2019 WL 7037493 (D.D.C. Dec. 20, 2019)

Pavement Coatings Tech. Council v. U.S. States Geo. Surv., 436 F. Supp. 3d 115 (D.D.C. 2019)

Comm. on the Judiciary v. McGahn, 407 F. Supp. 3d 35 (D.D.C. 2019)

Comm. on the Judiciary v. McGahn, 415 F. Supp. 3d 148 (D.D.C. 2019)

Schiff v. District of Columbia, 18-cv-1382, 2019 WL 5683903 (D.D.C. Nov. 1, 2019)

Taylor v. Berryhill, 18-cv-0316, 2019 WL 5538560 (D.D.C. Oct. 25, 2019)

Keister v. AARP Benefits Comm., 410 F. Supp. 3d 244 (D.D.C. 2019)

Raja v. Fed. Deposit Ins. Corp., 16-cv-0511, Mem. Op. & Order, ECF No. 103 (D.D.C. Oct. 2, 2019)

Make the Rd. N.Y. v. McAleenan, 405 F. Supp. 3d 1 (D.D.C. 2019)

Ctr. for Biological Diversity v. McAleenan, 404 F. Supp. 3d 218 (D.D.C. 2019)

Kiakombua v. McAleenan, 19-cv-1872, 2019 WL 4051021 (D.D.C. Aug. 27, 2019)

United States v. Johnson, 15-cr-125, 2019 WL 3842082 (D.D.C. Aug. 15, 2019)

Barber v. District of Columbia Gov't, 394 F. Supp. 3d 49 (D.D.C. 2019)

Amos v. Saul, 17-cv-1707, 2019 WL 3451313 (D.D.C. July 31, 2019)

Petition of United States, on behalf of Smithsonian Inst., 13-mc-1454, 2019 WL 3451394 (D.D.C. July 31, 2019)

Horsey v. U.S. Dep't of State, 387 F. Supp. 3d 97 (D.D.C. 2019)

Cause of Action Inst. v. IRS, 390 F. Supp. 3d 84 (D.D.C. 2019)

In re Salas, 18-cv-2318, 2019 WL 2870132 (D.D.C. July 3, 2019)

Huntington Ingalls Inc. v. Ministry of Def. of Bolivarian Republic of Venezuela, 18-cv-0469, 2019 WL 2476629 (D.D.C. June 13, 2019)

Brown v. Gov't of District of Columbia, 390 F. Supp. 3d 114 (D.D.C. 2019)

Willis v. FBI, 17-cv-1959, 2019 WL 2138036 (D.D.C. May 16, 2019)

Lizalde v. Goldberg, 19-cv-0956, 2019 WL 2010640 (D.D.C. May 7, 2019)

Jackson v. Bowser, 18-cv-1378, 2019 WL 1981041 (D.D.C. May 3, 2019)

Willis v. Nat'l Sec. Agency, 17-cv-2038, 2019 WL 1924249 (D.D.C. Apr. 30, 2019)

Gilberti v. Fed. Rsrv. Sys., 19-cv-0738, 2019 WL 1901293 (D.D.C. Apr. 29, 2019)

Yanofsky v. Dep't of Com., 16-cv-951, 2019 WL 5110502 (D.D.C. Apr. 25, 2019)

Mitchell v. Pompeo, 15-cv-1849, 2019 WL 1440126 (D.D.C. Mar. 31, 2019)

Univ. Legal Servs., Inc. v. District of Columbia, 18-cv-0301, 2019 WL 1430045 (D.D.C. Mar. 30, 2019)

Serv. Emps. Int'l Union Nat'l Indus. Pension Fund v. LTP Generations, LLC, 17-cv-0942, 2019 WL 1423686 (D.D.C. Mar. 29, 2019)

Gov't of Guam v. United States, 17-cv-2487, 2019 WL 1003606 (D.D.C. Feb. 28, 2019)

Porter v. U.S. Agency for Int'l Dev., 17-cv-2616, 2019 WL 954812 (D.D.C. Feb. 27, 2019)

Brick v. Dep't of Just., 358 F. Supp. 3d 37 (D.D.C. 2019)

Eagle Tr. Fund v. U.S. Postal Serv., 365 F. Supp. 3d 57 (D.D.C. 2019)

Grigsby v. Thomas, 18-cv-2221, Mem. Op., ECF No. 3 (D.D.C. Jan. 31, 2019)

Markel Am. Ins. Co. v. Metcor Ltd., 14-cv-1899, 2019 WL 396890 (D.D.C. Jan. 31, 2019)

Southerland v. SOC, LLC, 15-cv-0443, 2019 WL 250971 (D.D.C. Jan. 16, 2019)

SEIU Pension Fund v. Palisades Operations, LLC, 17-cv-1664, 2019 WL 211391 (D.D.C. Jan. 16, 2019)

Yoo v. District of Columbia, 17-cv-0184, 2019 WL 117606 (D.D.C. Jan. 7, 2019)

Milner v. U.S. Sup. Ct., 18-cv-2782, 2018 WL 6699744 (D.D.C. Dec. 20, 2018)

Whiteru v. Wash. Metro. Area Transit Auth., 15-cv-0844, 2018 WL 6605427 (D.D.C. Dec. 17, 2018)

Grigsby v. Thomas, 16-cv-1918, Mem. Op., ECF No. 2 (D.D.C. Dec. 14, 2018)

United States v. Fajardo Campos, 16-cr-00154, 2018 WL 6448633 (D.D.C. Dec. 10, 2018)

Graphic Commc'ns Conf. / Int'l Brotherhood of Teamsters, Local 285M v. McDonald & Eudy Printers, Inc., 18-cv-727, 2018 WL 6251009 (D.D.C. Nov. 29, 2018)

In re Air Crash Over S. Indian Ocean, 352 F. Supp. 3d 19 (D.D.C. 2018)

Am. Fed'n of Gov't Emps., AFL-CIO v. Trump, 18-cv-1475, Mem. Op., ECF No. 12 (D.D.C. Nov. 16, 2018)

Azima v. RAK Inv. Auth., 16-cv-1948, 2018 WL 7982473 (D.D.C. Nov. 5, 2018)

Betz v. Aidnest, 18-cv-0292, 2018 WL 5307375 (D.D.C. Oct. 26, 2018)

HealthAlliance Hosps., Inc. v. Azar, 346 F. Supp. 3d 43 (D.D.C. 2018)

Metro. Life Ins. Co. v. Thrower-Clarke, 17-cv-2552, 2018 WL 5122288 (D.D.C. Oct. 22, 2018)

Gov't of Guam v. United States, 341 F. Supp. 3d 74 (D.D.C. 2018)

Miller v. D.C. Water & Sewer Auth., 17-cv-0840, 2018 WL 4762261 (D.D.C. Oct. 2, 2018)

Nagi v. Chao, 16-cv-2152, 2018 WL 4680272 (D.D.C. Sept. 28, 2018)

Limnia, Inc. v. U.S. Dep't of Energy, 347 F. Supp. 3d 25 (D.D.C. 2018)

J & J Sports Prods., Inc. v. Micherie, LLC, 17-cv-1150, 2018 WL 4629301 (D.D.C. Sept. 27, 2018)

Otay Mesa Prop., L.P. v. U.S. Dep't of the Interior, 344 F. Supp. 3d 355 (D.D.C. 2018)

United States v. Young, 330 F. Supp. 3d 424 (D.D.C. 2018)

Azima v. RAK Inv. Auth., 325 F. Supp. 3d 30 (D.D.C. 2018)

Azadeh v. Gov't of Islamic Republic of Iran, 16-cv-1467, 2018 WL 4232913 (D.D.C. Sept. 5, 2018)

Turner v. Fed. Bureau of Prisons, 18-cv-0273, Mem. Op., ECF No. 9 (D.D.C. Aug. 31, 2018)

In re Gemma Calliste, 17-cv-0329, Mem. Op., ECF No. 10 (D.D.C. Aug. 31, 2018)

Am. Fed'n of Gov't Emps., AFL-CIO v. Trump, 318 F. Supp. 3d 370 (D.D.C. 2018)

United States v. \$1,071,251.44 of Funds Associated with Mingzheng Int'l Trading Ltd., 324 F. Supp. 3d 38 (D.D.C. 2018)

Inst. for Truth in Marketing v. Total Health Network Corp., 321 F. Supp. 3d 76 (D.D.C. 2018)

Von Drasek v. Azar, 13-cv-0847, 2018 WL 8754165 (D.D.C. Aug. 3, 2018)

Murphy v. Dep't of Air Force, 326 F.R.D. 47 (D.D.C. 2018)

Azadeh v. Gov't of Islamic Republic of Iran, 318 F. Supp. 3d 90 (D.D.C. 2018)

Amobi v. Brown, 317 F. Supp. 3d 29 (D.D.C. 2018)

Healthy Futures of Tex. v. Dep't of Health & Hum. Servs., 315 F. Supp. 3d 339 (D.D.C. 2018)

Healthy Futures of Tex. v. Dep't of Health & Hum. Servs., 326 F.R.D. 1 (D.D.C. 2018)

Feldman v. Bowser, 315 F. Supp. 3d 299 (D.D.C. 2018)

Hall & Assocs. LLC v. U.S. Env't Prot. Agency, 315 F. Supp. 3d 519 (D.D.C. 2018)

Policy & Rsch., LLC v. U.S. Dep't of Health & Hum. Servs., 313 F. Supp. 3d 62 (D.D.C. 2018)

Judicial Watch, Inc. v. CIA, 310 F. Supp. 3d 34 (D.D.C. 2018)

Donato v. Exec. Off. for U.S. Att'ys, 308 F. Supp. 3d 294 (D.D.C. 2018)

Cnty. In-Power & Dev. Ass'n, Inc. v. Pruitt, 304 F. Supp. 3d 212 (D.D.C. 2018)

Williams v. Verizon Wash., D.C. Inc., 304 F. Supp. 3d 183 (D.D.C. 2018)

Yanofsky v. U.S. Dep't of Com., 306 F. Supp. 3d 292 (D.D.C. 2018)

Azima v. RAK Inv. Auth., 305 F. Supp. 3d 149 (D.D.C. 2018)

Lawson v. Sessions, 15-cv-1723, Mem. Op., ECF No. 37 (D.D.C. May 24, 2018)

All. of Artists & Recording Cos., Inc. v. Gen. Motors Co., 306 F. Supp. 3d 422 (D.D.C. 2018)

Cruz v. House of Representatives of U.S.A., 301 F. Supp. 3d 75 (D.D.C. 2018)

Ferebee v. United Med. Ctr., 300 F. Supp. 3d 271 (D.D.C. 2018)

Hudson v. Am. Fed'n of Gov't Emps., 17-cv-2543, 2018 WL 1143172 (D.D.C. Mar. 2, 2018)

Ryan v. District of Columbia, 306 F. Supp. 3d 334 (D.D.C. 2018)

Muckrock, LLC v. CIA, 300 F. Supp. 3d 108 (D.D.C. 2018)

Yah Kai World Wide Enters., Inc. v. Napper, 292 F. Supp. 3d 337 (D.D.C. 2018)

Raja v. Fed. Deposit Ins. Corp., 16-cv-0511, 2018 WL 818393 (D.D.C. Feb. 12, 2018)

Kubicki on behalf of Kubicki v. Medtronic, Inc., 293 F. Supp. 3d 129 (D.D.C. 2018)

United States v. Hillie, 289 F. Supp. 3d 188 (D.D.C. 2018)

Maher v. Pension Benefit Guar. Corp., 16-cv-01646, 2017 WL 7689634 (D.D.C. Dec. 1, 2017)

Keeping Gov't Beholden v. Dep't of Justice, 17-cv-1569, Mem. Op. & Order, ECF No. 18 (D.D.C. Dec. 1, 2017)

Campaign for Accountability v. U.S. Dep't of Just., 280 F. Supp. 3d 112 (D.D.C. 2017)

W. Watersheds Proj. v. Tidwell, 306 F. Supp. 3d 350 (D.D.C. 2017)

Brick v. Dep't of Just., 293 F. Supp. 3d 9 (D.D.C. 2017)

Nat'l Indus. for Blind v. Dep't of Veterans Affairs, 296 F. Supp. 3d 131 (D.D.C. 2017)

Elec. Privacy Info. Ctr. v. Dep't of Just., 296 F. Supp. 3d 109 (D.D.C. 2017)

Campaign for Accountability v. U.S. Dep't of Just., 278 F. Supp. 3d 303 (D.D.C. 2017)

CapitalKeys, LLC v. Democratic Republic of Congo, 278 F. Supp. 3d 265 (D.D.C. 2017)

Nicksolat v. U.S. Dep't of Transp., 277 F. Supp. 3d 122 (D.D.C. 2017)

Tyson v. Brennan, 277 F. Supp. 3d 28 (D.D.C. 2017)

Salak v. Pruitt, 277 F. Supp. 3d 11 (D.D.C. 2017)

Sheridan v. U.S. Off. of Pers. Mgmt., 278 F. Supp. 3d 11 (D.D.C. 2017)

Tyson v. Brennan, 306 F. Supp. 3d 365 (D.D.C. 2017)

Maher v. Pension Benefit Guar. Corp., 271 F. Supp. 3d 296 (D.D.C. 2017)

Lawson v. Sessions, 271 F. Supp. 3d 119 (D.D.C. 2017)

MacLeod v. U.S. Dep't of Homeland Sec., 15-cv-1792, 2017 WL 4220398 (D.D.C. Sept. 21, 2017)

Friedler v. Gen. Servs. Admin., 271 F. Supp. 3d 40 (D.D.C. 2017)

Robinson v. Farley, 264 F. Supp. 3d 154 (D.D.C. 2017)

Williams v. Verizon Wash., D.C. Inc., 322 F.R.D. 145 (D.D.C. 2017)

Ferebee v. Retina Grp. of Wash., 16-cv-1916, 2017 WL 4844640 (D.D.C. Aug. 7, 2017)

McKinley v. Fed. Dep. Ins. Corp., 268 F. Supp. 3d 234 (D.D.C. 2017)

Clean Water Action v. Pruitt, 17-cv-0817, 2017 WL 8292486 (D.D.C. Aug. 4, 2017)

Wash. Metro. Area Transit Auth. v. Ark Union Station, Inc., 268 F. Supp. 3d 196 (D.D.C. 2017)

Leopold v. Dep't of Treasury, 16-cv-1827, 2017 WL 8222153 (D.D.C. Aug. 1, 2017)

Ross v. Lockheed Martin Corp., 267 F. Supp. 3d 174 (D.D.C. 2017)

Gawker Media, LLC v. U.S. Dep't of State, 263 F. Supp. 3d 226 (D.D.C. 2017)

Cho v. Mallon & McCool, LLC, 17-cv-0453, Mem. Op., ECF No. 16 (D.D.C. July 11, 2017)

Whiteru v. Wash. Metro. Area. Transit Auth., 15-cv-0844, Mem. Op., ECF No. 34 (D.D.C. July 7, 2017)

DCH Reg'l Med. Ctr. v. Price, 257 F. Supp. 3d 91 (D.D.C. 2017)

Johnson v. Berryhill, 16-cv-0603, 2017 WL 2841211 (D.D.C. July 3, 2017)

Mannina v. District of Columbia, 15-cv-0931, Mem. Op. & Order, ECF No. 39 (D.D.C. June 6, 2017)

Dorsey v. Dist. of Columbia Superior Ct., 17-cv-521, 2017 WL 6271564 (D.D.C. June 12, 2017)

El v. U.S. Dep't of Hous. & Urb. Dev., 16-cv-1886, 2017 WL 2533347 (D.D.C. June 9, 2017)

Branch v. Att'y Gen. of the U.S., 17-cv-00971, 2017 WL 4765721 (D.D.C. May 23, 2017)

In re Disposable Contact Lens Antitrust Litig., 306 F. Supp. 3d 372 (D.D.C. 2017)

Doss v. U.S. Probation Off., 17-cv-0093, Mem. Op., ECF No. 4 (D.D.C. May 12, 2017)

Quiroz v. Moran, 17-cv-00886, 2017 WL 7796208 (D.D.C. May 12, 2017)

Cognitive Pro. Servs. Inc. v. U.S. Small Bus. Admin., 254 F. Supp. 3d 22 (D.D.C. 2017)

Ctr. for Biological Diversity v. Zinke, 260 F. Supp. 3d 11 (D.D.C. 2017)

United States v. Crummy, 249 F. Supp. 3d 475 (D.D.C. 2017)

Burno v. D.C. Dep't of Corr., 15-cv-1369, Mem. Op., ECF No. 15 (D.D.C. Mar. 31, 2017)

Untalasco v. Lockheed Martin Corp., 249 F. Supp. 3d 318 (D.D.C. 2017)

Nat'l Ass'n of Mfrs. v. U.S. Secs. & Exch. Comm'n, 13-cv-00635, 2017 WL 3503370 (D.D.C. Apr. 3, 2017)

Poitras v. Dep't of Homeland Sec., 15-cv-1091, 2017 WL 7053929 (D.D.C. Mar. 31, 2017)

M.G. v. District of Columbia, 246 F. Supp. 3d 1 (D.D.C. 2017)

Nucor Steel-Ark v. Pruitt, 246 F. Supp. 3d 288 (D.D.C. 2017)

Zimmerman v. Al Jazeera Am., LLC, 246 F. Supp. 3d 257 (D.D.C. 2017)

Baloun v. Tillerson, 16-cv-0111, 2017 WL 6271267 (D.D.C. Mar. 30, 2017)

SACE S.p.A. v. Republic of Paraguay, 243 F. Supp. 3d 21 (D.D.C. 2017)

Eley v. Stadium Grp., LLC, 236 F. Supp. 3d 59 (D.D.C. 2017)

Rodriguez v. Dep't of Def., 236 F. Supp. 3d 26 (D.D.C. 2017)

Apton v. Volkswagen Grp. of Am., Inc., 233 F. Supp. 3d 4 (D.D.C. 2017)

Jiggetts v. District of Columbia, 319 F.R.D. 408 (D.D.C. 2017)

Dowell v. Colvin, 232 F. Supp. 3d 1 (D.D.C. 2017)

United States v. Hillie, 227 F. Supp. 3d 57 (D.D.C. 2017)

Liberman v. U.S. Dep't of Transp., 227 F. Supp. 3d 1 (D.D.C. 2016)

Campfield v. Comm'r of Soc. Sec., 228 F. Supp. 3d 87 (D.D.C. 2016)

Rhodes v. FBI, 16-cv-1111, 2016 WL 8738418 (D.D.C. Dec. 15, 2016)

Han v. Lynch, 223 F. Supp. 3d 95 (D.D.C. 2016)

Serv. Emps. Int'l Union Nat'l Indus. Pension Fund v. Palisades Health Care Ctr., 15-cv-0626, Mem. Op. & Order, ECF No. 28 (D.D.C. Nov. 18, 2016)

Reid v. Joint Session of the U.S. Congress, 16-mc-2255, Mem. Op., ECF No. 3 (D.D.C. Nov. 18, 2016)

United States v. Miller, 16-cr-0072, 2016 WL 8416761 (D.D.C. Nov. 11, 2016)

Abington Mem. Hosp. v. Burwell, 216 F. Supp. 3d 110 (D.D.C. 2016)

Hedrick v. FBI, 216 F. Supp. 3d 84 (D.D.C. 2016)

Williams v. Wash. D.C. Eviction Marshals, 15-cv-1801, 2016 WL 6082019 (D.D.C. Oct. 17, 2016)

Tapp v. Wash. Metro. Area Transit Auth., 306 F. Supp. 3d 383 (D.D.C. 2016)

Hernandez v. DOJ, 15-cv-0944, Mem. Op. & Order, ECF No. 25 (D.D.C. Sept. 30, 2016)

Pacific Ranger, LLC v. Pritzker, 211 F. Supp. 3d 196 (D.D.C. 2016)

Pike v. U.S. Dep't of Just., 306 F. Supp. 3d 400 (D.D.C. 2016)

Thigpen v. Colvin, 208 F. Supp. 3d 129 (D.D.C. 2016)

New England Anti-Vivisection Soc'y v. U.S. Fish & Wildlife Serv., 208 F. Supp. 3d 142 (D.D.C. 2016)

Boling v. U.S. Parole Comm'n, 15-cv-1623, 2016 WL 11717277 (D.D.C. Aug. 30, 2016)

Ceccone v. Equifax Info. Servs., LLC, 13-cv-1314, Mem. Op., ECF No. 63 (D.D.C. Aug. 29, 2016)

Clarian Health W., LLC v. Burwell, 206 F. Supp. 3d 393 (D.D.C. 2016)

Gov't Accountability Proj. v. FDA, 206 F. Supp. 3d 420 (D.D.C. 2016)

All. of Artists & Recording Cos., Inc. v. Gen. Motors Co., 306 F. Supp. 3d 413 (D.D.C. 2016)

Yah Kai World Wide Enters., Inc. v. Napper, 11-cv-2174, 2016 WL 11129787 (D.D.C. Aug. 12, 2016)

Otsuka Pharm. Co., Ltd. v. Burwell, 302 F. Supp. 3d 375 (D.D.C. 2016)

Serrano v. Chicken-Out Inc., 209 F. Supp. 3d 179 (D.D.C. 2016)

XP Vehicles, Inc. v. U.S. Dep't of Energy, 13-cv-0037, 2016 WL 11066678 (D.D.C. July 21, 2016)

Robinson v. Obama, 16-cv-0920, 2016 WL 3813087 (D.D.C. July 13, 2016)

Huff v. Vilsack, 195 F. Supp. 3d 343 (D.D.C. 2016)

Yah Kai World Wide Enters., Inc. v. Napper, 195 F. Supp. 3d 287 (D.D.C. 2016)

Ross v. U.S. Capitol Police, 195 F. Supp. 3d 180 (D.D.C. 2016)

Pollard v. District of Columbia, 191 F. Supp. 3d 58 (D.D.C. 2016)

Njang v. Whitestone Grp., Inc., 187 F. Supp. 3d 172 (D.D.C. 2016)

Mobarez v. Kerry, 187 F. Supp. 3d 85 (D.D.C. 2016)

New England Anti-Vivisection Soc'y v. U.S. Fish & Wildlife Serv., 16-cv-149, 2016 WL 10839560 (D.D.C. Apr. 29, 2016)

Morgan v. U.S. Parole Comm'n, 304 F. Supp. 3d 240 (D.D.C. 2016)

Kyle v. Bedlion, 177 F. Supp. 3d 380 (D.D.C. 2016)

Mount v. Johnson, 174 F. Supp. 3d 553 (D.D.C. 2016)

Globe Metallurgical, Inc. v. Rima Indus. S.A., 177 F. Supp. 3d 317 (D.D.C. 2016)

Horsey v. U.S. Dep't of State, 170 F. Supp. 3d 256 (D.D.C. 2016)

Neville v. Yang, 15-cv-1032, 2016 WL 11050573 (D.D.C. Mar. 18, 2016)

Dalley v. Mitchell Rubenstein & Assocs., P.C., 172 F. Supp. 3d 6 (D.D.C. 2016)

Crawford v. Johnson, 166 F. Supp. 3d 1 (D.D.C. 2016)

Alliance of Artists & Recording Cos., Inc. v. Gen. Motors Co., 162 F. Supp. 3d 8 (D.D.C. 2016)

Alma v. Bowser, 159 F. Supp. 3d 1 (D.D.C. 2016)

Perry v. Colvin, 159 F. Supp. 3d 64 (D.D.C. 2016)

Conservation Force v. Jewell, 160 F. Supp. 3d 194 (D.D.C. 2016)

Elec. Privacy Info. Ctr. v. Dep't of Justice, 13-cv-1961, 2016 WL 447426 (D.D.C. Feb. 4, 2016)

Dougherty v. United States, 156 F. Supp. 3d 222 (D.D.C. 2016)

XP Vehicles, Inc. v. U.S. Dep't of Energy, 156 F. Supp. 3d 185 (D.D.C. 2016)

Lawrence v. Lew, 156 F. Supp. 3d 149 (D.D.C. 2016)

Harris v. United States, 148 F. Supp. 3d 1 (D.D.C. 2015)

Unite Here Local 23 v. I.L. Creations of Maryland Inc., 148 F. Supp. 3d 12 (D.D.C. 2015)

Collins v. District of Columbia, 146 F. Supp. 3d 32 (D.D.C. 2015)

Pierce v. District of Columbia, 146 F. Supp. 3d 197 (D.D.C. 2015)

Coal River Mountain Watch v. U.S. Dep't of the Interior, 146 F. Supp. 3d 17 (D.D.C. 2015)

Otay Mesa Prop., L.P. v. U.S. Dep't of the Interior, 144 F. Supp. 3d 35 (D.D.C. 2015)

Suarez v. Colvin, 140 F. Supp. 3d 94 (D.D.C. 2015)

AquaAlliance v. U.S. Bureau of Reclamation, 139 F. Supp. 3d 203 (D.D.C. 2015)

Rochon v. Lynch, 139 F. Supp. 3d 394 (D.D.C. 2015)

Francis v. Fed. Housing Fin. Agency, 134 F. Supp. 3d 518 (D.D.C. 2015)

Unrow Human Rights Impact Litig. Clinic v. U.S. Dep't of State, 134 F. Supp. 3d 263 (D.D.C. 2015)

Badwal v. Bd. of Trustees of Univ. of Dist. of Columbia, 139 F. Supp. 3d 295 (D.D.C. 2015)

Bigwood v. U.S. Dep't of Def., 132 F. Supp. 3d 124 (D.D.C. 2015)

Eley v. Stadium Grp., LLC, 14-cv-1594, 2015 WL 5611331 (D.D.C. Sept. 22, 2015)

R.J. Reynolds Tobacco Co. v. U.S. Dep't of Agric., 130 F. Supp. 3d 356 (D.D.C. 2015)

Huff v. Vilsack, 15-cv-438, 2015 WL 13672465 (D.D.C. Sept. 14, 2015)

Picur v. Kerry, 128 F. Supp. 3d 302 (D.D.C. 2015)

Pierce v. District of Columbia, 128 F. Supp. 3d 250 (D.D.C. 2015)

Von Kahl v. Bureau of Nat'l Affairs, Inc., 09-cv-635, 2015 WL 13546450 (D.D.C. Aug. 21, 2015)

Shaw v. Ocwen Loan Servicing, LLC, 14-cv-2203, 2015 WL 4932204 (D.D.C. Aug. 8, 2015)

Von Drasek v. Burwell, 121 F. Supp. 3d 143 (D.D.C. 2015)

Smith v. United States, 121 F. Supp. 3d 112 (D.D.C. 2015)

Econ. Rsch. Servs., Inc. v. Resolution Econ., LLC, 15-cv-1282 (RJI), 2015 WL 12564163 (D.D.C. Aug. 13, 2015)

Adamski v. McHugh, 304 F. Supp. 3d 227 (D.D.C. 2015)

Am. Fed'n of Gov't Emps., AFL-CIO v. Vilsack, 118 F. Supp. 3d 292 (D.D.C. 2015)

Custis v. CIA, 118 F. Supp. 3d 252 (D.D.C. 2015)

Austin-Spearman v. AARP & AARP Servs. Inc., 119 F. Supp. 3d 1 (D.D.C. 2015) (duplicate citation at 113 F. Supp. 3d 130 (D.D.C. 2015))

Lattisaw v. District of Columbia, 118 F. Supp. 3d 142 (D.D.C. 2015)

XP Vehicles, Inc. v. Dep't of Energy, 118 F. Supp. 3d 38 (D.D.C. 2015)

Pauling v. District of Columbia, 13-cv-943, 2015 WL 13891312 (D.D.C. June 15, 2015)

Rothe Dev., Inc. v. Dep't of Def., 107 F. Supp. 3d 183 (D.D.C. 2015)

Neuman v. United States, 227 F. Supp. 3d 86 (D.D.C. 2015)

Brewer v. District of Columbia, 105 F. Supp. 3d 74 (D.D.C. 2015)

Cal. Clinical Lab'y Ass'n v. Sec'y of Health & Human Servs., 104 F. Supp. 3d 66 (D.D.C. 2015)

Meriwether v. Colvin, 12-cv-0067, Mem. Op., ECF No. 12 (D.D.C. May 19, 2015)

REO Acquisition Grp. v. Fed. Nat'l Mortgage Ass'n, 13-cv-1953, 2015 WL 5472493 (D.D.C. May 15, 2015)

REO Acquisition Grp. v. Fed. Nat'l Mortgage Ass'n, 104 F. Supp. 3d 22 (D.D.C. 2015)

Breakfield v. Holder, 15-mc-313, 2015 WL 2197977 (D.D.C. May 11, 2015)

Odemns v. Wal-Mart Stores, Inc., 14-cv-1790, 2015 WL 2120634 (D.D.C. May 6, 2015)

Fed. Forest Res. Coalition v. Vilsack, 100 F. Supp. 3d 21 (D.D.C. 2015)

United States v. Georgieff, 100 F. Supp. 3d 15 (D.D.C. 2015)

Parker v. Bank of Am., N.A., 99 F. Supp. 3d 69 (D.D.C. 2015)

Branch v. Clark, 13-cv-2005, 2015 WL 1469733 (D.D.C. Mar. 31, 2015)

Abiodun v. Holder, 86 F. Supp. 3d 11 (D.D.C. 2015)

Mackinac Tribe v. Jewell, 87 F. Supp. 3d 127 (D.D.C. 2015)

Brooks v. Goodwill of Greater Wash., 14-cv-419, 2015 WL 1345837 (D.D.C. Mar. 25, 2015)

Gov't Accountability Proj. v. FDA, 181 F. Supp. 3d 94 (D.D.C. 2015)

FiberLight, LLC v. Nat'l R.R. Passenger Corp., 81 F. Supp. 3d 93 (D.D.C. 2015)

Bowe-Connor v. McDonald, 15-cv-269, 2015 WL 807537 (D.D.C. Feb. 25, 2015)

Leopold v. Nat'l Sec. Agency, 14-cv-919, 2015 WL 12964654 (D.D.C. Feb. 20, 2015)

REO Acquisition Grp. v. Fed. Nat'l Mortgage Ass'n, 80 F. Supp. 3d 203 (D.D.C. 2015)

Reed v. Gray, 14-cv-2134, 2015 WL 732726 (D.D.C. Feb. 19, 2015)

Food & Water Watch, Inc. v. Vilsack, 79 F. Supp. 3d 174 (D.D.C. 2015)

Newborn v. Nat'l Gov't Servs., Inc., 14-cv-1120, 2015 WL 344343 (D.D.C. Jan. 27, 2015)

Takeda Pharms., U.S.A., Inc. v. Burwell, 78 F. Supp. 3d 65 (D.D.C. 2015)

Cofield v. U.S. Dep't of Justice, 14-cv-0746, Mem. Op. & Order, ECF No. 11 (D.D.C. Dec. 31, 2014)

Davenport v. District of Columbia, 13-cv-1014, Mem. Op., ECF No. 22 (D.D.C. Dec. 19, 2014)

Dist. No. 1, Pac. Coast Dist. Marine Eng'rs' Beneficial Ass'n, AFL-CIO v. Am. Maritime Officers, 75 F. Supp. 3d 294 (D.D.C. 2014)

Gosen v. U.S. Citizenship & Immigration Servs., 75 F. Supp. 3d 279 (D.D.C. 2014)

Hemby v. Fairfax Village Condo. IV Ass'n, Inc., 14-cv-2038, Mem. Op. & Order, ECF No. 4 (Dec. 8, 2014)

Gagnon v. FBI, 12-cv-1433, 2014 WL 6805027 (D.D.C. Dec. 3, 2014)

United States v. Turner, 73 F. Supp. 3d 122 (D.D.C. 2014)

Kyle v. Bedlion, 12-cv-1572, 2014 WL 12539324 (D.D.C. Nov. 12, 2014)

R-Lotus v. United States, 14-cv-1631, 2014 WL 5801487 (D.D.C. Nov. 7, 2014)

Steel-Ark v. McCarthy, 14-cv-199, 2014 WL 10999271 (D.D.C. Oct. 24, 2014)

Pencheng Si v. Laogai Rsch. Found., 71 F. Supp. 3d 73 (D.D.C. 2014)

Nat. Resources Def. Council v. Nat'l Marine Fisheries Serv., 71 F. Supp. 3d 35 (D.D.C. 2014)

Dominquez v. Dir. of FBI, 14-cv-1469, 2014 WL 4956668 (D.D.C. Oct. 3, 2014)

Sciacca v. FBI, 08-cv-2030, Mem. Op., ECF No. 41 (D.D.C. Oct. 2, 2014)

Von Kahl v. Bureau of Nat'l Affairs, Inc., 09-cv-0635, Mem. Op. & Order, ECF No. 87 (D.D.C. Sept. 30, 2014)

Neuman v. United States, 70 F. Supp. 3d 416 (D.D.C. 2014)

Dist. No. 1, Pac. Coast Dist. Marine Eng'rs' Beneficial Ass'n, AFL-CIO v. Liberty Maritime Corp., 70 F. Supp. 3d 327 (D.D.C. 2014)

A Love of Food I, LLC v. Maoz Vegetarian USA, Inc., 70 F. Supp. 3d 376 (D.D.C. 2014)

Alibalogun v. First Coast Sec. Sols., Inc., 67 F. Supp. 3d 211 (D.D.C. 2014)

Depomed, Inc. v. U.S. Dep't of Health & Human Servs., 66 F. Supp. 3d 217 (D.D.C. 2014)

Johnson v. Perez, 66 F. Supp. 3d 30 (D.D.C. 2014)

Conservation Force v. Jewell, 66 F. Supp. 3d 46 (D.D.C. 2014)

Brown v. District of Columbia, 13-cv-1560, Mem. Op., ECF No. 21 (D.D.C. Aug. 26, 2014)

Cofield v. United States, 64 F. Supp. 3d 206 (D.D.C. 2014)

Sierra Club v. U.S. Army Corps of Eng'rs, 64 F. Supp. 3d 128 (D.D.C. 2014)

Sierra Club v. U.S. Army Corps of Eng'rs, 13-cv-1239, 2014 WL 12803265 (D.D.C. Aug. 18, 2014)

Williams v. Fanning, 63 F. Supp. 3d 88 (D.D.C. 2014)

Blackstone v. Brink, 63 F. Supp. 3d 68 (D.D.C. 2014)

Sledge v. District of Columbia, 63 F. Supp. 3d 1 (D.D.C. 2014)

Haughton v. District of Columbia, 161 F. Supp. 3d 100 (D.D.C. 2014)

Unrow Human Rights Impact Litig. Clinic v. U.S. Dep't of State, 13-cv-1573, 2014 WL 12810521 (D.D.C. July 25, 2014)

Alford v. Providence Hosp., 60 F. Supp. 3d 118 (D.D.C. 2014)

SEIU Pension Fund v. Crystal Cleaning Sys., Inc., 13-cv-1350, Mem. Op., ECF No. 13 (D.D.C. July 22, 2014)

Watervale Marine Co., Ltd. v. U.S. Dep't of Homeland Sec., 55 F. Supp. 3d 124 (D.D.C. 2014)

United States ex rel. Tran v. Computer Scis. Corp., 53 F. Supp. 3d 104 (D.D.C. 2014)

Dyson v. Hagel, 14-cv-663, 2014 WL 2959108 (D.D.C. July 2, 2014)

Kretchmar v. FBI, 12-cv-1551, 2014 WL 12783199 (D.D.C. June 26, 2014)

Raymond v. Architect of Capitol, 49 F. Supp. 3d 99 (D.D.C. 2014)

Weaver v. Pettiford, 13-cv-1622, 2014 WL 2782359 (D.D.C. June 19, 2014)

Cofield v. Anthem Blue Cross Blue Shield, 14-cv-494, 2014 WL 2807245 (D.D.C. June 19, 2014)

James v. United States, 48 F. Supp. 3d 58 (D.D.C. 2014)

Boland v. Providence Constr. Corp., 304 F.R.D. 31 (D.D.C. 2014)

Z Sireet, Inc. v. Koskinen, 44 F. Supp. 3d 48 (D.D.C. 2014)

Smith v. Scalia, 44 F. Supp. 3d 28 (D.D.C. 2014)

Fontaine v. Bank of Am., N.A., 43 F. Supp. 3d 1 (D.D.C. 2014)

Fontaine v. JPMorgan Chase Bank, N.A., 42 F. Supp. 3d 102 (D.D.C. 2014)

Bennett v. U.S. Parole Comm'n, 41 F. Supp. 3d 47 (D.D.C. 2014)

Wortham v. United States Parole Comm'n, 13-cv-1385, 2014 WL 1710518 (D.D.C. May 1, 2014)

United States v. Richardson, 36 F. Supp. 3d 120 (D.D.C. 2014)

Alvarez v. Keystone Plus Constr. Corp., 303 F.R.D. 152 (D.D.C. 2014)

Mount v. Johnson, 36 F. Supp. 3d 74 (D.D.C. 2014)

Jessup v. Progressive Funding, 35 F. Supp. 3d 25 (D.D.C. 2014)

Kretchmar v. FBI, 32 F. Supp. 3d 49 (D.D.C. 2014)

Riccardi v. U.S. Dep't of Justice, 32 F. Supp. 3d 59 (D.D.C. 2014)

Alkanani v. Aegis Def. Servs., LLC, 976 F. Supp. 2d 13 (D.D.C. 2014)

Brustein & Manasevit, PLLC v. U.S. Dep't of Educ., 30 F. Supp. 3d 1 (D.D.C. 2014)

Mizell v. SunTrust Bank, 26 F. Supp. 3d 80 (D.D.C. 2014)

Judicial Watch, Inc. v. Dep't of the Navy, 25 F. Supp. 3d 131 (D.D.C. 2014)

Sciacca v. FBI, 23 F. Supp. 3d 17 (D.D.C. 2014)

Martin v. U.S. Equal Emp. Opportunity Comm'n, 19 F. Supp. 3d 291 (D.D.C. 2014)

Elec. Privacy Info. Ctr. v. Dep't of Justice, 15 F. Supp. 3d 32 (D.D.C. 2014)

United States v. Murphy, 13-cr-285, 2014 WL 444220 (D.D.C. Feb. 4, 2014)

Jones v. Listen Vision LLC, 12-cv-833, 2014 WL 357087 (D.D.C. Feb. 3, 2014)

Tefera v. Wells Fargo Bank, N.A., 19 F. Supp. 3d 212 (D.D.C. 2014)

Tefera v. OneWest Bank, FSB, 19 F. Supp. 3d 215 (D.D.C. 2014)

Reilly v. Sec'y of Navy, 12 F. Supp. 3d 125 (D.D.C. 2014)

Sperling v. Off. of Info. Pol'y, 12-cv-605, 2014 WL 272336 (D.D.C. Jan. 24, 2014)

Ward v. District of Columbia, 13-cv-98, 2014 WL 272413 (D.D.C. Jan. 24, 2014)

Friedman v. U.S. Secret Serv., 06-cv-2125, 2014 WL 23428 (D.D.C. Jan. 2, 2014)

Kubicki ex rel. Kubicki v. Medtronic, 12-cv-734, 2014 WL 12787706 (D.D.C. Jan. 2, 2014)

Sickle v. Torres Advanced Enter. Sols., LLC, 17 F. Supp. 3d 10 (D.D.C. 2013)

Patterson v. United States, 999 F. Supp. 2d 300 (D.D.C. 2013)

United States v. Weekes, 13-cr-187, 2013 WL 6571598 (D.D.C. Dec. 13, 2013)

Page v. Mancuso, 999 F. Supp. 2d 269 (D.D.C. 2013)

Squire v. Fulwood, 13-cv-202, 2013 WL 6171594 (D.D.C. Nov. 26, 2013)

Sierra Club v. U.S. Army Corps of Eng'rs, 990 F. Supp. 2d 9 (D.D.C. 2013)

Ratley v. U.S. Postal Serv., 13-cv-756, 2013 WL 5936644 (D.D.C. Nov. 6, 2013)

Holston v. Vance-Cooks, 12-cv-1536, 2013 WL 5912475 (D.D.C. Nov. 5, 2013)

Smith v. Tacha, 13-cv-1610, 2013 WL 5820495 (D.D.C. Oct. 23, 2013)

Prince George's Hosp. Ctr. v. Advantage Healthplan Inc., 985 F. Supp. 2d 38 (D.D.C. 2013)

Conservation Force v. Ashe, 979 F. Supp. 2d 90 (D.D.C. 2013)

Charles v. Off. of the Armed Forces Med. Exam'r, 979 F. Supp. 2d 35 (D.D.C. 2013)

Jalloh v. District of Columbia, 968 F. Supp. 2d 203 (D.D.C. 2013)

Garnes v. Colvin, 12-cv-1090, 2013 WL 5218532 (D.D.C. Sept. 16, 2013)

Alkanani v. Aegis Def. Servs., LLC, 976 F. Supp. 2d 1 (D.D.C. 2013)

Fanning v. C & L Serv. Corp., 297 F.R.D. 162 (D.D.C. 2013)

Am. Meat Inst. v. U.S. Dept. of Agric., 968 F. Supp. 2d 38 (D.D.C. 2013)

Pencheng Si v. Laogai Rsch. Found., 09-cv-2388, 2013 WL 4478953 (D.D.C. Aug. 21, 2013)

Herndon v. U.S. Parole Comm'n, 961 F. Supp. 2d 138 (D.D.C. 2013)

Love v. U.S. Dep't. of Homeland Sec., 960 F. Supp. 2d 254 (D.D.C. 2013)

Beshir v. Jewell, 961 F. Supp. 2d 114 (D.D.C. 2013)

Njang v. Whitestone Grp. Inc., 12-cv-153, 2013 WL 3984607 (D.D.C. Aug. 2, 2013)

Jones v. Hagel, 956 F. Supp. 2d 284 (D.D.C. 2013)

Morgan v. Futch, 13-cv-816, 2013 WL 3871442 (D.D.C. July 29, 2013)

Parker v. BAC Home Loans Servicing Grp., 11-cv-0520, Mem. Op. & Order, ECF No. 58 (D.D.C. July 24, 2013)

A Love of Food I, LLC v. Maoz Vegetarian USA, Inc., 292 F.R.D. 142 (D.D.C. 2013)

Ratley v. U.S. Postal Serv., 953 F. Supp. 2d 270 (D.D.C. 2013)

United States ex rel. Carrington v. House of Ruth, 12-cv-1775, Mem. Op. & Order, ECF No. 8 (D.D.C. July 10, 2013)

Quainoo v. Holder, 13-cv-75, 2013 WL 3466734 (D.D.C. July 10, 2013)

United States v. House of Ruth, 983 F. Supp. 2d 43 (D.D.C. 2013)

Ng v. Lahood, 952 F. Supp. 2d 85 (D.D.C. 2013)

Jenkins v. Holder, 949 F. Supp. 2d 262 (D.D.C. 2013)

Martin v. U.S. Equal Emp. Opportunity Comm'n, 12-cv-1281, Mem. Op. & Order, ECF No. 33 (D.D.C. June 10, 2013)

United States v. United Techs. Corp., 12-cv-1230, 2013 WL 12303363 (D.D.C. May 29, 2013)

Ling Yuan Hu v. Dep't of Def., 12-cv-1640, Mem. Op., ECF. No. 26 (D.D.C. May 16, 2013)

Ling Yuan Hu v. Dep't of Def., 12-cv-1640, 2013 WL 1968497 (D.D.C. May 13, 2013)

Charles v. Off. of the Armed Forces Med. Exam'r, 09-cv-199, 2013 WL 12332949 (D.D.C. May 9, 2013)

* * *

The citations that follow are the opinions, dispositive orders, and orders affecting injunctive relief in matters that I handled while on duty as the Motions Judge.

Clark v. Peru, 20-cv-3111 (UNA), Mem. Op., ECF No. 6 (D.D.C. Nov. 30, 2020)

Duran v. U.S. Congress, 20-cv-2548 (UNA), 2020 WL 7705714 (D.D.C. Nov. 30, 2020)

Salinas v. Fed. Election Comm'n, 20-cv-2192 (UNA), Mem. Op., ECF No. 7 (D.D.C. Nov. 27, 2020)

Bralich v. Republican Nat'l Comm., 20-cv-3248 (UNA), Mem. Op., ECF No. 4 (D.D.C. Nov. 19, 2020)

Kirkland v. Barr, 20-cv-2945 (UNA), Mem. Op., ECF No. 3 (D.D.C. Nov. 16, 2020)

Adams v. McConnell, 20-cv-3072 (UNA), Mem. Op., ECF No. 4 (D.D.C. Nov. 16, 2020)

Naillieux v. U.S. Chain of Command, 20-cv-3265 (UNA), Mem. Op., ECF No. 3 (D.D.C. Nov. 16, 2020)

Ruiz v. Pompeo, No. 20-cv-3224 (UNA), 2020 WL 8371439 (D.D.C. Nov. 19, 2020)

Prince v. Kobach, 20-cv-3264 (UNA), 2020 WL 7485191 (D.D.C. Nov. 16, 2020)

Adams v. McConnell, 20-cv-3072 (UNA), 2020 WL 7135590 (D.D.C. Nov. 16, 2020)

Boyd v. Johnson, 20-cv-3167 (UNA), Mem. Op., ECF No. 4 (D.D.C. Nov. 6, 2020)

Bradin v. Carvajal, 20-cv-3104 (UNA), 2020 WL 6701092 (D.D.C. Nov. 5, 2020)

Robertson v. Jeff. Co. Att'ys Off., 20-cv-3168 (UNA), Mem. Op., ECF No. 3 (D.D.C. Nov. 5, 2020)

Connor v. Virginia, 20-cv-3014 (UNA), Mem. Op., ECF No. 4 (D.D.C. Nov. 4, 2020)

Flete-Garcia v. United States, 19-cv-2547 (UNA), Mem. Op., ECF No. 8 (D.D.C. Oct. 8, 2019)

Hunt v. United States, Inc., 19-cv-2544 (UNA), Mem. Op., ECF No. 4 (D.D.C. Oct. 8, 2019)

Cerruti v. Trump, 19-cv-2107 (UNA), Mem. Op., ECF No. 5 (D.D.C. Oct. 8, 2019)

Smith v. Shirey, 19-cv-2043 (UNA), Mem. Op., ECF No. 6 (D.D.C. Sept. 19, 2019)

Juste v. Circuit Ct., 19-cv-2170 (UNA), Mem. Op., ECF No. 7 (D.D.C. Sept. 19, 2019)

Bush v. Clerk of the Ct., 19-cv-2186 (UNA), Mem. Op., ECF No. 4 (D.D.C. Sept. 19, 2019)

Coleman v. Trump, 19-cv-2187 (UNA), Mem. Op., ECF No. 4 (D.D.C. Sept. 19, 2019)

Thomas v. U.S. Gov't, 19-cv-2260 (UNA), Mem. Op., ECF No. 3 (D.D.C. Sept. 19, 2019)

Downey v. United States, 19-cv-2309 (UNA), Mem. Op., ECF No. 4 (D.D.C. Sept. 19, 2019)

Green v. U.S. Merit Sys. Prot. Bd., 19-cv-2454 (UNA), Mem. Op., ECF No. 5 (D.D.C. Sept. 19, 2019)

Tiffer v. Nobu DC LLC, 19-cv-2627 (UNA), Mem. Op., ECF No. 3 (D.D.C. Sept. 19, 2019)

Jones v. United States, 19-mc-57 (UNA), 2019 WL 7667103 (D.D.C. Sept. 19, 2019)

Ceaser v. Obama, 18-cv-2017 (UNA), 2018 WL 5817355 (D.D.C. Nov. 5, 2018)

Hebert v. United States, 18-cv-2331 (UNA), 2018 WL 5817070 (D.D.C. Nov. 5, 2018)

Miller v. Library of Congress, 18-cv-02144 (UNA), 2018 WL 5817365 (D.D.C. Nov. 5, 2018)

Ruiz v. El Paso Processing Ctr., 18-cv-2323 (UNA), 2018 WL 5817362 (D.D.C. Nov. 5, 2018)

Moore v. U.S. Dep't of Justice, 18-cv-2321 (UNA), Mem. Op., ECF No. 3 (D.D.C. Nov. 5, 2018) (copy unavailable)

David Abiodun K.G.B. Onafeko v. Google, LLC, 18-cv-2241 (UNA), 2018 WL 5817361 (D.D.C. Nov. 5, 2018)

Holloway v. Howard Univ., 18-cv-2193 (UNA), 2018 WL 5817360 (D.D.C. Nov. 5, 2018)

Fletcher v. Fletcher, 18-cv-2162 (UNA), 2018 WL 5817367 (D.D.C. Nov. 5, 2018)

Clark v. Cueva, 18-cv-1460 (UNA), Mem. Op., ECF No. 21 (D.D.C. Nov. 5, 2018)

Bartelho v. Fed. Bureau of Prisons, 17-cv-2627 (UNA), 2018 WL 5817353 (D.D.C. Nov. 5, 2018)

Young v. Levitan, 18-cv-2045 (UNA), 2018 WL 5817356 (D.D.C. Nov. 5, 2018)

Gallagher v. United States, 18-cv-2153 (UNA), 2018 WL 5817357 (D.D.C. Nov. 5, 2018)

Fletcher v. Jones, 18-cv-2179 (UNA), 2018 WL 5817358 (D.D.C. Nov. 5, 2018)

Nelson v. Florida, 18-cv-2319 (UNA), 2018 WL 10550300 (D.D.C. Oct. 24, 2018)

Carlton v. Smith, 18-cv-2330 (UNA), Mem. Op., ECF No. 7 (D.D.C. Oct. 24, 2018)

Hebert v. United States, 18-cv-2332 (UNA), Mem. Op., ECF No. 4 (D.D.C. Oct. 24, 2018)

Grimes v. Nat'l Enquirer, Inc., 18-cv-2306 (UNA), Mem. Op., ECF No. 3 (D.D.C. Oct. 24, 2018)

Lewis v. U.S. Dep't of Justice, 18-cv-2322 (UNA), Mem. Op., ECF No. 4 (D.D.C. Oct. 24, 2018)

Gallagher v. Congress, 18-cv-2327 (UNA), Mem. Op., ECF No. 3 (D.D.C. Oct. 24, 2018)

Fletcher v. UPS, 18-cv-2163 (UNA), Mem. Op., ECF No. 3 (D.D.C. Oct. 22, 2018)

Porter v. Exec. Off. of U.S. Att'ys, 18-cv-2122 (UNA), Mem. Op., ECF No. 4 (D.D.C. Oct. 22, 2018)

Montes v. Roc-A-Fella, 18-cv-2081 (UNA), Mem. Op., ECF No. 13 (D.D.C. Oct. 22, 2018)

Bahrampour v. Microsoft Corp., 18-cv-2059 (UNA), Mem. Op., ECF No. 4 (Oct. 22, 2018)

Allen v. Becker, 18-cv-2054 (UNA), Mem. Op., ECF No. 3 (D.D.C. Oct. 22, 2018)

Pierre v. Clinton Found., 18-cv-1649 (UNA), Mem. Op., ECF No. 3 (D.D.C. Oct. 22, 2018)

Aviles-Rothchild v. Trump, 18-cv-2196 (UNA), Mem. Op., ECF No. 4 (D.D.C. Oct. 22, 2018)

Hebert v. United States, 18-cv-2190 (UNA), Mem. Op., ECF No. 3 (D.D.C. Oct. 10, 2018)

Duckett v. United States, 18-cv-2185 (UNA), 2018 WL 4954151 (D.D.C. Oct. 10, 2018)

Perkins v. Ashcroft, 17-cv-0963 (UNA), Mem. Op., ECF No. 3 (D.D.C. June 16, 2017)

Ackers v. DNC Servs. Corp., 17-cv-0990 (UNA), Mem. Op., ECF No. 3 (D.D.C. May 24, 2017)

Nunnally v. Admin. Office of the U.S. Courts Dir., 17-cv-0972 (UNA), Mem. Op., ECF No. 4 (D.D.C. May 23, 2017)

Branch v. Att'y Gen., 17-cv-0971 (UNA), Mem. Op., ECF No. 3 (D.D.C. May 23, 2017)

Villanueva v. United States, 17-cv-0938 (UNA), Mem. Op., ECF No. 3 (D.D.C. May 19, 2017)

Mumin v. Holder, 17-cv-0726 (UNA), Mem. Op., ECF No. 6 (D.D.C. May 19, 2017)

Jones v. Bowser, 16-cv-2261 (UNA), Mem. Op., ECF No. 6 (D.D.C. May 19, 2017)

In re Sealed Adoption Record, 19-ad-0011 (RMM), Mem. Op., ECF No. 12 (D.D.C. May 12, 2017)

Moore v. U.S. Justice Dep't, 17-cv-0899 (UNA), Mem. Op., ECF No. 3 (D.D.C. May 12, 2017)

Watford v. Fossum, 17-cv-0897 (UNA), Mem. Op., ECF No. 4 (D.D.C. May 12, 2017)

Tiburcio v. United States, 17-cv-0893 (UNA), Mem. Op., ECF No. 3 (D.D.C. May 12, 2017)

Smith v. United States, 17-cv-0889 (UNA), Mem. Op., ECF No. 4 (D.D.C. May 12, 2017)

Quiroz v. Moran, 17-cv-0886 (UNA), Mem. Op., ECF No. 3 (D.D.C. May 12, 2017)

Navon v. United States, 17-cv-0879 (UNA), Mem. Op., ECF No. 3 (D.D.C. May 12, 2017)

Doss v. U.S. Probation Office, 17-cv-0093 (UNA), Mem. Op., ECF No. 4 (D.D.C. May 12, 2017)

Haas v. Trump, 17-cv-0861 (UNA), Mem. Op., ECF No. 4 (D.D.C. May 9, 2017)

Hutchins v. U.S. Dep't of Disability, 16-cv-1705 (UNA), 2016 WL 9456348 (D.D.C. Aug. 22, 2016)

Esposito v. U.S. Ct., 16-cv-1699 (UNA), Mem. Op., ECF No. 4 (D.D.C. Aug. 22, 2016)

Malone v. Dist. Hosp. Partners, L.P., 16-cv-1685 (UNA), Mem. Op., ECF No. 3 (D.D.C. Aug. 18, 2016)

Schweigert v. U.S. Elections, 16-cv-1706 (UNA), Mem. Op., ECF No. 3 (D.D.C. Aug. 22, 2016)

Malone v. D.C. Housing Auth., 16-cv-1686 (UNA), 2016 WL 9456347 (D.D.C. Aug. 18, 2016)

Brown v. Carter, 16-cv-1025 (BAH), Mem. Op., ECF No. 4 (D.D.C. May 31, 2016)

Baker v. U.S. Housing Auth., 16-cv-1017 (UNA), Mem. Op., ECF No. 3 (D.D.C. May 31, 2016)

Beers v. Lynch, 16-cv-1016 (UNA), Mem. Op., ECF No. 4 (D.D.C. May 31, 2016)

Wedington v. United States, No. 16-cv-1014 (UNA), Mem. Op., ECF No. 5 (D.D.C. May 31, 2016)

Reed v. Lynch, 16-cv-0682 (UNA), Mem. Op., ECF No. 5 (D.D.C. May 31, 2016)

Nero v. United States, 16-cv-0984 (UNA), Mem. Op., ECF No. 4 (D.D.C. May 24, 2016)

Grant v. Danville Mem. Hosp., 16-cv-0983 (UNA), Mem. Op., ECF No. 3 (D.D.C. May 24, 2016)

Berry v. Lynch, 16-cv-0982 (UNA), Mem. Op., ECF No. 3 (D.D.C. May 24, 2016)

Edmunds v. Bush, 16-cv-0979 (UNA), Mem. Op., ECF No. 3 (D.D.C. May 24, 2016)

Ballard v. United States, 16-cv-0973 (UNA), Mem. Op., ECF No. 3 (D.D.C. May 24, 2016)

Guar v. World Bank Grp., 16-cv-0948 (UNA), Mem. Op., ECF No. 3 (D.D.C. May 19, 2016)

Heard v. U.S. Att'y Gen., 16-cv-0944 (UNA), Mem. Op., ECF No. 3 (D.D.C. May 19, 2016)

Rowe v. Deutsche Bank, 16-cv-0897 (UNA), Mem. Op., ECF No. 3 (D.D.C. May 11, 2016)

Reynolds v. Hodges, 16-cv-0895 (UNA), Mem. Op., ECF No. 3 (D.D.C. May 11, 2016)

Reynolds v. Morrison, 16-cv-0894 (UNA), Mem. Op., ECF No. 3 (D.D.C. May 11, 2016)

Carroll v. Florida, 16-cv-0837 (UNA), Mem. Op., ECF No. 3 (D.D.C. May 11, 2016)

Modrall v. Starr, 224 F. Supp. 3d 62 (D.D.C. 2016)

Hemby v. Fairfax Village Condo. IV Ass'n, Inc., 15-cv-1337 (UNA), Mem. Op., ECF No. 3 (Aug. 18, 2015)

Miller v. New Salem Baptist Church, 15-cv-1332 (UNA), Mem. Op., ECF No. 3 (D.D.C. Aug. 17, 2015)

Rossman v. United States, 14-cv-2205 (UNA), Mem. Op., ECF No. 3 (D.D.C. Dec. 30, 2014)

Quartey v. Bush, 14-cv-2169 (UNA), 2014 WL 7372739 (D.D.C. Dec. 19, 2014)

Quinn v. Dep't of Human Servs., 14-cv-2166 (UNA), 2014 WL 7345152 (D.D.C. Dec. 19, 2014)

Quartey v. Obama, 14-cv-2168 (UNA), 2014 WL 7372840 (D.D.C. Dec. 19, 2014)

Miller v. Lipscombs, 14-cv-2171 (UNA), 2014 WL 7350699 (D.D.C. Dec. 19, 2014)

Martinez v. Weinstein, 14-cv-2164 (UNA), 2014 WL 7372720 (D.D.C. Dec. 19, 2014)

Ahmed v. Riaz, 14-cv-2207 (UNA), 2014 WL 7463860 (D.D.C. Dec. 19, 2014)

Swindler v. United States, 14-cv-2179 (UNA), 2014 WL 7372830 (D.D.C. Dec. 19, 2014)

Murray v. Bush, 14-cv-2172 (UNA), 2014 WL 7372818 (D.D.C. Dec. 19, 2014)

Burnell v. Off. of Att'y Gen. of U.S., 14-cv-2206 (UNA), 2014 WL 7411036 (D.D.C. Dec. 19, 2014)

Becton v. United States, 14-cv-2176 (UNA), 2014 WL 7372823 (D.D.C. Dec. 19, 2014)

Cobble v. Blalock, 14-cv-2177 (UNA), 2014 WL 7372835 (D.D.C. Dec. 19, 2014)

Greely v. Leefer, 14-cv-1852 (UNA), 2014 WL 7183811 (D.D.C. Dec. 17, 2014)

Branch v. United States, 14-cv-1939 (UNA), 2014 WL 7183633 (D.D.C. Dec. 17, 2014)

Dunlap v. Superior Court, 14-cv-1699 (UNA), 2014 WL 7191048 (D.D.C. Dec. 17, 2014)

Amin-Bey v. United States, 14-cv-1111 (UNA), 2014 WL 7183610 (D.D.C. Dec. 17, 2014)

Williams v. Frost, 14-cv-1731 (UNA), 2014 WL 7191235 (D.D.C. Dec. 17, 2014)

Montes v. Economus, 14-cv-2145 (UNA), 2014 WL 7284304 (D.D.C. Dec. 12, 2014)

Saunders v. Flowers-Conti, 14-cv-870 (UNA), 2014 WL 7172209 (D.D.C. Dec. 12, 2014)

Thomas v. District of Columbia, 14-cv-2146 (UNA), 2014 WL 7240535 (D.D.C. Dec. 12, 2014)

Higgins v. D.C. Civil Actions Small Claims, 14-cv-2091 (UNA), Mem. Op., ECF No. 3 (D.D.C. Dec. 12, 2014)

De La Cruz v. United States, 14-cv-2120 (UNA), 2014 WL 7171971 (D.D.C. Dec. 8, 2014)

Higgins v. King, 14-cv-2121 (UNA), 2014 WL 7391130 (D.D.C. Dec. 8, 2014)

Hughes v. United States, 14-cv-2122 (UNA), 2014 WL 7172208 (D.D.C. Dec. 8, 2014)

Karr v. Kerry, 14-cv-2099 (UNA), 2014 WL 7139660 (D.D.C. Dec. 5, 2014)

Higgins v. FBI, 14-cv-2092 (UNA), 2014 WL 7156833 (D.D.C. Dec. 5, 2014)

Matthews v. Samuels, 14-cv-1565 (UNA), 2014 WL 4555694 (D.D.C. Sept. 15, 2014)

Gbikpi v. U.S. Att'y Gen., 14-cv-1564 (UNA), 2014 WL 4626231 (D.D.C. Sept. 15, 2014)

Fletcher v. Dep't. of Educ., 14-cv-1560 (UNA), 2014 WL 4555695 (D.D.C. Sept. 12, 2014)

Griffith v. Inouye, 13-cv-1915 (UNA), 2013 WL 6327828 (D.D.C. Dec. 4, 2013)

Rowland v. Civil Division, 13-cv-1925 (UNA), 2013 WL 6570950 (D.D.C. Dec. 4, 2013)

Rowland v. Army Nat'l Guard, 13-cv-1927 (UNA), Mem. Op., ECF No. 3 (D.D.C. Dec. 4, 2013)

Ray v. Olender, 13-cv-1834 (UNA), 2013 WL 6124280 (D.D.C. Nov. 21, 2013)

Holiday v. United States, 13-cv-1165 (UNA), 2013 WL 5786589 (D.D.C. Oct. 28, 2013)

Scott v. Parole Comm'n, 13-cv-1683 (UNA), 2013 WL 5817577 (D.D.C. Oct. 28, 2013)

Butler v. Cal. State Disbursement Unit, 990 F. Supp. 2d 8 (D.D.C. 2013)

Bey v. Wash. Cnty. Sheriff's Off., 13-cv-1687 (UNA), 2013 WL 6115774 (D.D.C. Oct. 28, 2013)

Gonzalez v. Stone, 13-cv-1647 (UNA), 2013 WL 5811775 (D.D.C. Oct. 25, 2013)

White v. Obama, 13-cv-1659 (UNA), 2013 WL 5817472 (D.D.C. Oct. 25, 2013)

Rowland v. Judge in Chambers, 13-cv-1657 (UNA), 2013 WL 5817031 (D.D.C. Oct. 25, 2013)

Idrogo v. Foxx, 990 F. Supp. 2d 5 (D.D.C. 2013)

Rowland v. U.S. Superior Ct., 13-cv-1658 (UNA), 2013 WL 5817007 (D.D.C. Oct. 25, 2013)

Gonzalez v. Stone, 13-cv-1647 (ABJ), Mem. Op., ECF No. 4 (D.D.C. Oct. 25, 2013)

Barnett v. United States, 987 F. Supp. 2d 62 (D.D.C. 2013)

Brodzki v. United States, 13-cv-1634 (UNA), 2013 WL 5778329 (D.D.C. Oct. 24, 2013)

Brodzki v. United States, 13-cv-1630 (UNA), 2013 WL 5777833 (D.D.C. Oct. 24, 2013)

Heffernan v. Eisner, 13-cv-1369 (UNA), 2013 WL 4832790 (D.D.C. Sept. 9, 2013)

- c. Provide citations to all cases in which you were a panel member, but did not write an opinion. If any of the opinions listed are not available on Westlaw, provide copies of the opinions.

To my recollection, and through a review of my files and court records and searches of publicly available databases by persons acting on my behalf, I have located the following 38 cases where I was a panel member, but did not write the opinion. It is possible that a few cases were not captured by these searches, and thus are not listed below.

In re NTE Connecticut, LLC, No. 22-1011, 2022 WL 552060 (D.C. Cir. Feb. 24, 2022)

Williams v. Romarm, SA, Mfr., Imp. & Distrib. of Semiautomatic Assault Weapon WASR10, Ser. No. CA4367-70, No. 21-7010, 2022 WL 412449 (D.C. Cir. Feb. 3, 2022)

Berka v. U.S. Nuclear Regul. Comm'n, No. 21-1134, 2022 WL 412470 (D.C. Cir. Feb. 3, 2022)

Horton v. U.S. Att'y Gen., No. 21-5084, 2022 WL 412448 (D.C. Cir. Feb. 3, 2022)

Nelson v. Burgemeister, No. 21-7058, 2022 WL 412473 (D.C. Cir. Feb. 3, 2022)

United States v. Bauer, No. 21-3068, 2022 WL 298923 (D.C. Cir. Jan. 24, 2022)

Toomer v. Austin, No. 20-5184, 2022 WL 301561 (D.C. Cir. Jan. 21, 2022)

Klayman v. Blackburne-Rigsby, No. 21-7069, 2022 WL 298933 (D.C. Cir. Jan. 20, 2022)

Thompson v. Garland, No. 21-5146, 2022 WL 298931 (D.C. Cir. Jan. 20, 2022)

Weidrick v. Biden, No. 21-5247, 2022 WL 190758 (D.C. Cir. Jan. 18, 2022)

RICU LLC v. U.S. Dep't of Health & Hum. Servs., 22 F.4th 1031 (D.C. Cir. 2022)

Am. Pub. Gas Ass'n v. U.S. Dep't of Energy, 22 F.4th 1018 (D.C. Cir. 2022)

United States v. Lang, No. 21-3066, 2022 WL 127437 (D.C. Cir. Jan. 12, 2022)

Ball v. U.S. Dep't of State, No. 21-5184, 2022 WL 102562 (D.C. Cir. Jan. 6, 2022)

Welenc v. U.S. Dep't of Just., No. 20-5025, 2022 WL 363815 (D.C. Cir. Jan. 6, 2022)

Weissman v. Nat'l R.R. Passenger Corp., 21 F.4th 854 (D.C. Cir. 2021)

Karr v. Fed. Commc'ns Comm'n, No. 20-1288, 2021 WL 6102442 (D.C. Cir. Dec. 22, 2021)

Webster v. Del Toro, No. 21-5040, 2021 WL 6102269 (D.C. Cir. Dec. 15, 2021)

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

Louisiana Pub. Serv. Comm'n v. FERC, 20 F.4th 1 (D.C. Cir. 2021)

Burnett v. Dep't of Just., No. 21-5092, 2021 WL 6102268 (D.C. Cir. Dec. 3, 2021)

Kline v. Ahuja, No. 20-5220, 2021 WL 5537701 (D.C. Cir. Nov. 23, 2021)

United States v. Miller, No. 20-3079, 2021 WL 5537694 (D.C. Cir. Nov. 22, 2021)

Cunningham v. Wright, No. 21-5173, 2021 WL 5537749 (D.C. Cir. Nov. 18, 2021)

Panarello v. Haaland, No. 21-5035, 2021 WL 5537743 (D.C. Cir. Nov. 18, 2021)

United States v. Johnson, No. 21-3061, 2021 WL 5537704 (D.C. Cir. Nov. 17, 2021)

United States v. Brown, No. 21-3063, 2021 WL 5537705 (D.C. Cir. Nov. 17, 2021)

Al Seraji v. Mayorkas, No. 21-5007, 2021 WL 5537735 (D.C. Cir. Nov. 16, 2021)

Marcus v. Transp. Sec. Admin., No. 21-1225, 2021 WL 5537742 (D.C. Cir. Nov. 12, 2021)

Faris v. Transp. Sec. Admin., No. 21-1221, 2021 WL 5537740 (D.C. Cir. Nov. 12, 2021)

Wall v. Transp. Sec. Admin., No. 21-1220, 2021 WL 6502226 (D.C. Cir. Nov. 10, 2021)

Schindler Elevator Corp. v. Wash. Metro. Area Transit Auth., 16 F.4th 294 (D.C. Cir. 2021)

United States v. Jin, No. 20-3008, 2021 WL 5262542 (D.C. Cir. Oct. 15, 2021)

Gallardo v. Trump, No. 20-5366, 2021 WL 4768373 (D.C. Cir. Sept. 23, 2021)

United States v. Perkins, 857 F. App'x 663 (D.C. Cir. 2021)

Alabama Ass'n of Realtors v. U.S. Dep't of Health & Hum. Servs., No. 21-5093, 2021 WL 3721431 (D.C. Cir. Aug. 20, 2021)

Mnyandu El v. Van der Bellen, 856 F. App'x 324 (D.C. Cir. 2021)

United States v. Khater, 856 F. App'x 322 (D.C. Cir. 2021)

- d. For each of the 10 most significant cases over which you sat, provide: (1) a capsule summary of the nature the case; (2) the outcome of the case; (3) the name and contact information for counsel of record, designating which counsel was principal counsel; and (4) the citation of the case (if reported) or the docket number and a copy of the opinion or judgment (if not reported and not available on Westlaw).

1. *Am. Fed'n of Gov't Emps., AFL-CIO v. Fed. Lab. Rels. Auth.*, No. 20-1396, 2022 WL 287906 (D.C. Cir. Feb. 1, 2022)

Public-sector labor unions filed a petition seeking review of a policy statement issued by the Federal Labor Relations Authority ("FLRA"), which raised 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. I wrote for a unanimous panel, granting the petition for review and vacating the challenged policy statement, holding that the FLRA's decision to abandon a longstanding policy in favor of the new threshold was insufficiently reasoned and thus was arbitrary and capricious in violation of the Administrative Procedure Act.

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2. *Committee on the Judiciary v. McGahn*, 415 F. Supp. 3d 148 (D.D.C. 2019), *vacated and remanded*, 951 F.3d 510 (D.C. Cir. 2020), *reh'g en banc granted, opinion vacated sub nom. United States House of Representatives v. Mnuchin*, No. 19-5176, 2020 WL 1228477 (D.C. Cir. Mar. 13, 2020), *and on reh'g en banc*, 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 banc granted, opinion vacated* (Oct. 15, 2020)

The Committee on the Judiciary of the House of Representatives filed a lawsuit to compel former White House Counsel Don McGahn to comply with a subpoena to appear and testify before the Committee in connection with the Committee's investigation of foreign interference during the 2016 presidential election. I granted the Committee's motion for partial summary judgment and denied the Department of Justice's cross-motion for summary judgment, finding that the inter-branch subpoena dispute was a justiciable matter that the Committee had Article III standing to pursue in federal court; that the Committee had a cause of action to seek enforcement of its subpoena; and that the President does not have the power to prevent his aides from responding to legislative subpoenas on the

basis of absolute testimonial immunity. On appellate review, over the course of two opinions, a divided panel of the D.C. Circuit reversed my rulings on standing and cause of action, but the entire D.C. Circuit granted en banc review twice, and has now vacated both panel reversals. The en banc D.C. Circuit affirmed my conclusion that the Judiciary Committee has standing to adjudicate its subpoena enforcement claims in federal court notwithstanding the inter-branch nature of the dispute. 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.

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3. *Am. Meat Inst. v. U.S. Dep't of Agric.*, 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)

Various meat industry trade associations sought a preliminary injunction to prevent enforcement of a 2013 Agricultural Marketing Service regulation that required country-of-origin labeling on certain meats. I denied the motion, finding that the plaintiffs had failed to demonstrate a likelihood of success on the merits of their claims that the agency's labeling requirements violated their rights under the First Amendment, the Agricultural Marketing Act, and the Administrative Procedure Act, and that the plaintiffs had also failed to establish irreparable harm. A unanimous panel of the D.C. Circuit affirmed my decision on appeal, after which the full court ordered rehearing en banc. The full D.C. Circuit affirmed my judgment after en banc review.

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4. *Am. Fed. 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)

Federal employee unions challenged three executive orders that President Donald J. Trump issued, alleging that those orders interfered with the statutorily protected rights of federal employees to engage in collective bargaining. I 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. A panel of the D.C. Circuit determined that the Act required the unions' legal claims to be channeled through administrative processes rather than being brought into federal district court, and vacated my judgment for lack of subject matter jurisdiction.

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5. *In re Air Crash over S. Indian Ocean*, 352 F. Supp. 3d 19 (D.D.C. 2018), *aff'd*, 946 F.3d 607 (D.C. Cir.), *cert. denied sub nom. Wood v. Boeing Co.*, 141 S. Ct. 451 (2020)

The Judicial Panel on Multidistrict Litigation consolidated forty individual lawsuits that had been filed in federal courts across the United States and assigned them to me for coordinated resolution of the pre-trial proceedings in those matters. The actions arose from the disappearance of Malaysia Airlines Flight MH370 over the Indian Ocean in March 2014, and 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. I granted the defendants' threshold motion to dismiss the plaintiffs' complaints based on *forum non conveniens*, determining that Malaysia was an adequate and more convenient forum than the United States for litigation of the claims at issue. The D.C. Circuit affirmed my judgment, and the plaintiffs' petition for certiorari was denied.

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6. *Make the Rd. N.Y. 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)

Immigrant-rights organizations sued the U.S. Department of Homeland Security and sought a preliminary injunction challenging the agency's decision to expand the categories of non-citizens that may be subjected to expedited removal procedures. I granted the preliminary injunction and enjoined the agency from enforcing the expedited removal expansion, finding that the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 likely did not preclude the Court from exercising jurisdiction over the plaintiffs' Administrative Procedure Act ("APA") claims; that the APA likely provided a cause of action for the plaintiffs' claims concerning the procedural defectiveness of DHS's expansion decision; and that the plaintiffs were likely to succeed on the merits of their APA claims. The D.C. Circuit agreed that the Court properly exercised jurisdiction over the plaintiffs' claims, but reversed on the grounds that the expedited removal designation is committed to agency discretion by law, and is thus not reviewable for arbitrary and capricious decision making under the APA or subject to the APA's notice-and-comment rulemaking requirements.

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7. *Ctr. for Biological Diversity v. McAleenan*, 404 F. Supp. 3d 218 (D.D.C. 2019), *cert. denied sub nom. Ctr. for Biological Diversity v. Wolf*, 141 S. Ct. 128 (2020)

Environmental groups challenged the Department of Homeland Security's invocation of the Illegal Immigration Reform and Immigrant Responsibility Act to waive the application of numerous environmental laws in order to facilitate swift construction of a physical barrier along the New Mexico border. The plaintiffs claimed that DHS's actions were ultra vires and unconstitutional, but I denied the plaintiffs' motion for summary judgment, and granted the defendants' cross-motion to dismiss, or in the alternative, for summary judgment, on the

grounds that Congress had precluded judicial review of the plaintiffs' ultra vires claims, and that the plaintiffs had failed to state plausible constitutional claims regarding the Presentment Clause, the nondelegation doctrine, and the Take Care Clause. The plaintiffs' petition for certiorari was denied.

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

Guam filed a lawsuit against the United States under the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), seeking to recover the costs that Guam had incurred in closing and remediating a hazardous waste landfill created by the U.S. Navy. I denied the United States' motion to dismiss Guam's complaint, concluding that an earlier consent decree between the parties did not preclude Guam from maintaining its cost-recovery claim against the United States, based on a reading of the CERCLA that the Sixth and Seventh Circuits had adopted and the Ninth Circuit had rejected. Siding with the Ninth Circuit's interpretation, the D.C. Circuit reversed, and ordered that Guam's complaint be dismissed. Guam sought certiorari, and the United States Supreme Court granted Guam's petition and reversed the D.C. Circuit's decision. On remand from the Supreme Court, the D.C. Circuit issued an order affirming my denial of the motion to dismiss.

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9. *United States v. Welch*, No. 16-CR-232 (D.D.C. 2017)

Edgar Welch traveled from North Carolina to Washington, D.C., motivated by the “Pizzagate” rumors that a child sex-trafficking ring was being perpetrated at the Comet Ping Pong restaurant. Welch walked into the crowded restaurant openly carrying an assault rifle, and he fired the weapon multiple times at a door inside the restaurant while patrons fled. He also pointed the gun at a frightened restaurant employee. Welch pled guilty to interstate transportation of a firearm and ammunition, in violation of 18 U.S.C. § 924(b), and assault with a dangerous weapon, in violation of D.C. Code § 22-402. Based primarily on the psychological and financial impact of the offenses on the victims and the need to deter others from committing similar crimes, I 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 of which were within the applicable federal and D.C. sentencing guidelines ranges.

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10. *Campaign for Accountability v. U.S. Dep't of Just.* (“*Campaign for Accountability I*”), 486 F. Supp. 3d 424 (D.D.C. 2020); *Campaign for Accountability v. U.S. Dep't of Just.* (“*Campaign for Accountability F*”), 278 F. Supp. 3d 303 (D.D.C. 2017)

A government watchdog organization claimed that all written legal opinions of the Department of Justice’s Office of Legal Counsel (“OLC”) that have precedential effect within the Executive Branch must be made automatically available to the public under the Freedom of Information Act’s rarely litigated reading-room provision. I issued an opinion that rejected the plaintiff’s disclosure argument and granted DOJ’s motion to dismiss the complaint, but allowed the plaintiff to amend its pleading to allege that certain specified categories of precedential OLC opinions are subject to automatic disclosure under the FOIA. The plaintiff then filed an amended complaint, and DOJ renewed its dismissal motion, arguing that the FOIA’s reading-room provision is categorically inapplicable to OLC opinions, such that no category of OLC opinions must be disclosed automatically. I wrote a second opinion that granted in part and denied in part DOJ’s motion to dismiss, rejecting DOJ’s contention but holding that only one of the categories of legal opinions that the plaintiff had identified (written opinions relating to inter-agency disputes) was plausibly disclosable under the FOIA’s reading-room provision. Following my elevation to the D.C. Circuit, the matter was reassigned to another district judge and is still pending.

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- e. For each of the 10 most significant opinions you have written, provide: (1) citations for those decisions that were published; (2) a copy of those decisions that were not published (if not available on Westlaw); and (3) the names and contact information for counsel of record.

1. *Am. Fed'n of Gov't Emps., AFL-CIO v. Fed. Lab. Rels. Auth.*, No. 20-1396, 2022 WL 287906 (D.C. Cir. Feb. 1, 2022)

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2. *Kiakombua v. Wolf*, 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. 2021)

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3. *Committee on the Judiciary v. McGahn*, 415 F. Supp. 3d 148 (D.D.C. 2019), *vacated and remanded*, 951 F.3d 510 (D.C. Cir. 2020), *reh'g en banc granted, opinion vacated sub nom. United States House of Representatives v. Mnuchin*, No. 19-5176, 2020 WL 1228477 (D.C. Cir. Mar. 13, 2020), *and on reh'g en banc*, 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 banc granted, opinion vacated* (Oct. 15, 2020)

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4. *Otay Mesa Prop., L.P. v. U.S. Dep't of the Interior*, 344 F. Supp. 3d 355 (D.D.C. 2018)

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5. *United States v. Young*, 330 F. Supp. 3d 424 (D.D.C. 2018)

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7. *Alliance of Artists & Recording Cos. v. Gen. Motors Co.*, 306 F. Supp. 3d 422 (D.D.C. 2018), *aff'd sub nom. All. of Artists & Recording Companies, Inc. v. DENSO Int'l Am., Inc.*, 947 F.3d 849 (D.C. Cir. 2020)

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8. *Pierce v. District of Columbia*, 128 F. Supp. 3d 250 (D.D.C. 2015)

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9. *Sierra Club v. U.S. Army Corps of Eng'rs*, 64 F. Supp. 3d 128 (D.D.C. 2014),
aff'd sub nom. Sierra Club v. U.S. Army Corps of Engineers, 803 F.3d 31
(D.C. Cir. 2015)

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10. *Z St., Inc. v. Koskinen*, 44 F. Supp. 3d 48 (D.D.C. 2014), *aff'd sub nom. Z St. v. Koskinen*, 791 F.3d 24 (D.C. Cir. 2015)

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- f. Provide a list of all cases in which you participated, where certiorari to the Supreme Court of the United States or other relief was requested or granted.

In my court of appeals cases, petitions for certiorari are noted on the docket but I do not receive electronic notifications of such filings. In the district court, petitions for certiorari are not noted on the docket unless there is a direct appeal to the Supreme Court.

To my recollection, and through a review of my files and court records and searches of publicly available databases by persons acting on my behalf, I have located the following two cases in which I sat as a panel member on the Court of Appeals and where a party requested certiorari or other relief. It is possible that a few cases were not captured by these searches, and thus are not listed below.

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)

Wall v. Transp. Sec. Admin., No. 21-1220, 2021 WL 6502226 (D.C. Cir. Nov. 10, 2021), *stay denied*, 142 S. Ct. 860 (2022)

This research has revealed that Supreme Court granted certiorari in one of my district court cases.

Gov't of Guam v. United States, 341 F. Supp. 3d 74, 76 (D.D.C. 2018), *rev'd and remanded*, 950 F.3d 104 (D.C. Cir. 2020), *rev'd and remanded sub nom. Territory of Guam v. United States*, 141 S. Ct. 1608 (2021), and *vacated*, 852 F. App'x 14 (D.C. Cir. 2021), and *aff'd*, 852 F. App'x 14 (D.C. Cir. 2021)

This research has also revealed that a party sought certiorari in the following eight other district court cases of mine. It is possible that a few cases were not captured by these searches, and thus are not listed below.

Buchanan v. Sony Music Ent., No. 18-CV-3028 (KBJ), 2020 WL 2735592 (D.D.C. May 26, 2020), *aff'd sub nom. Buchanan v. Sony Music Ent. Inc.*, 836 F. App'x 16 (D.C. Cir. 2021), *cert. denied*, 142 S. Ct. 465 (2021)

Gilberti v. Fed. Rsr. Sys., No. 19-cv-0738, 2019 WL 1901293 (D.D.C. Apr. 29, 2019), *aff'd*, No. 19-5264, 2020 WL 1487738 (D.C. Cir. Mar. 3, 2020), *cert. denied*, 141 S. Ct. 876 (2020)

Ctr. for Biological Diversity v. McAleenan, 404 F. Supp. 3d 218, *cert. denied*, 141 S. Ct. 158 (2020)

Eagle Tr. Fund v. U.S. Postal Serv., 365 F. Supp. 3d 57 (D.D.C. 2019), *aff'd*, 811 F. App'x 669 (D.C. Cir. 2020), *cert. denied*, 142 S. Ct. 69 (2021)

In re Air Crash over S. Indian Ocean on Mar. 8, 2014, 352 F. Supp. 3d 19 (D.D.C. 2018), *aff'd*, 946 F.3d 607 (D.C. Cir.), *cert. denied sub nom. Wood v. Boeing Co.*, 141 S. Ct. 451 (2020)

Mackinac Tribe v. Jewell, 87 F. Supp. 3d 127 (D.D.C. 2015), *aff'd*, 829 F.3d 754 (D.C. Cir. 2016), *cert. denied*, 137 S. Ct. 638 (2017)

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

Von Kahl v. Bureau of Nat'l Affairs, No. 09-cv-0635, Mem. Op. & Order, ECF No. 87 (D.D.C. Sept. 30, 2014), *rev'd*, 856 F.3d 106 (D.C. Cir.), *cert denied*, 128 S. Ct. 366 (2017)

- g. Provide a brief summary of and citations for all of your opinions where your decisions were reversed by a reviewing court or where your judgment was affirmed with significant criticism of your substantive or procedural rulings. If any of the opinions listed were not officially reported, provide copies of the opinions (if not available on Westlaw).

To my recollection, and through a review of my files and court records and searches of publicly available databases by persons acting on my behalf concerning the 578 opinions that I wrote in cases that were assigned to me when I served on the district court, I have identified ten decisions of mine that the D.C. Circuit reversed, either in whole or in part; four decisions of mine that the D.C. Circuit vacated and remanded; and three decisions of mine in which the D.C. Circuit affirmed my judgment but criticized my substantive rulings. In two other

cases of mine, the D.C. Circuit reversed my ruling but those reversals were later vacated in the course of subsequent proceedings.

1. The D.C. Circuit reversed my rulings in whole or in part in the following ten cases.

Whiteru v. Wash. Metro. Area Transit Auth., 480 F. Supp. 3d 185 (D.D.C. 2020), *rev'd and remanded*, No. 20-7087, 2022 WL 414140 (D.C. Cir. Feb. 11, 2022): I granted summary judgment to WMATA in a case arising from an accidental injury to, and subsequent death of, a passenger inside a WMATA subway station. I found that the decedent was contributorily negligent as a matter of law and thus was barred from any recovery by District of Columbia law, notwithstanding WMATA's duty to render aid as a common carrier. On appeal, the D.C. Circuit held that the decedent's contributory negligence was not a complete bar to recovery under District of Columbia law because of WMATA's status as a common carrier and its duty to render aid to its passengers.

Pavement Coatings Technology Council v. U.S. Geological Survey, 436 F. Supp. 3d 115 (D.D.C. 2019), *aff'd in part, rev'd in part, and remanded*, 995 F.3d 1014 (D.C. Cir. 2021): I granted summary judgment to the USGS in this FOIA case, finding *inter alia* that the agency properly invoked the deliberative process privilege to withhold certain model runs that it had created as part of a study. The D.C. Circuit reversed that aspect of my ruling, holding that because the agency had not established that a USGS decision-maker had considered the models in determining the form in which to publish the final study, USGS failed to meet its burden of showing that the documents at issue were pre-decisional. The D.C. Circuit affirmed my grant of summary judgment to USGS with respect to other documents I found exempt from disclosure.

Make the Rd. N.Y. 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): I granted a motion for a preliminary injunction and preliminarily enjoined a Department of Homeland Security rule that expanded the categories of non-citizens subject to expedited removal from the United States, on the ground that plaintiffs were likely to be able to establish that the agency's decision violated the Administrative Procedure Act ("APA"). The D.C. Circuit held that, while I had jurisdiction to issue such an order, the plaintiffs did not have a cause of action under the APA because the expedited removal designation is committed to agency discretion by law.

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): I granted in part and denied in part the cross-motions for summary judgment that a group of labor unions and the Department of Justice filed, and enjoined implementation of some, but not all, of the provisions of three executive orders that concerned the collective bargaining rights of federal workers. I found that certain provisions of the challenged orders conflicted with the Federal Service Labor-Management Relations Statute ("FSLMRS") and were thus unlawful. The D.C. Circuit reversed on the threshold issue of subject-matter jurisdiction, without reaching the merits of my determination concerning the lawfulness of the orders under the FSLMRS. The Circuit held that the unions could not bring a legal action in federal district court to challenge the executive orders and were instead required to petition the Federal Labor Relations Authority and seek administrative review of their legal claims.

Azima v. RAK Inv. Auth., 305 F. Supp. 3d 149 (D.D.C. 2018), *rev'd*, 926 F.3d 870 (D.C. Cir. 2019): I denied a motion to dismiss that the defendant filed on a variety of grounds, including *forum non conveniens*. The plaintiff was an American citizen and resident who brought a claim for violation of the Computer Fraud and Abuse Act against the defendant (a commercial investment entity that was one of the emirates within the United Arab Emirates), alleging that the defendant had unlawfully hacked his laptop computer. The defendant denied the hacking, and argued in the motion that, in any event, the dispute had to be litigated in England pursuant to a forum-selection clause in a prior settlement agreement between the parties. I found that the prior settlement agreement related to an entirely different dispute, and that the parties did not intend for the forum selection clause to extend to unforeseeable and unrelated future acts such as the alleged hacking activity. The D.C. Circuit reversed, finding that the language of the settlement agreement covered the hacking claims notwithstanding the fact that the agreement was executed in a different context and before the actions that gave rise to the claims at issue, and ruled that the complaint had to be dismissed pursuant to the forum selection clause.

Clarian Health W., LLC v. Burwell, 206 F. Supp. 3d 393 (D.D.C. 2016), *rev'd and remanded sub nom. Clarian Health W., LLC v. Hargan*, 878 F.3d 346 (D.C. Cir. 2017): I granted the plaintiff-hospital's cross-motion for summary judgment, where defendant Centers for Medicare and Medicaid Services ("CMS") had used a newly created reconciliation process to require the hospital to repay more than \$2 million in Medicare reimbursement funds that the hospital had previously received from the government under the Medicare program. I agreed with the hospital that the new reconciliation guidelines that CMS had used to demand the recoupment qualified as a "rule" for the purpose of the Administrative Procedure Act's notice-and-comment rulemaking requirement and vacated the guidelines on the ground that the rule was promulgated in a procedurally defective manner. The D.C. Circuit reversed, and remanded the case for further proceedings, holding that notice-and-comment rulemaking was not necessary for the guidelines at issue.

Crawford v. Johnson, 166 F. Supp. 3d 1 (D.D.C. 2016), *aff'd in part, rev'd in part sub nom. Crawford v. Duke*, 867 F.3d 103 (D.C. Cir. 2017): I granted the Department of Homeland Security's motion to dismiss the plaintiff's employment discrimination claims, finding that the plaintiff had failed to exhaust administrative remedies, as Title VII of the Civil Rights Act requires. The legal claims that plaintiff brought were based upon three alleged instances of discrimination or retaliation that were not listed in the formal EEO complaint that plaintiff filed with the EEOC, and those instances were also not added to plaintiff's administrative complaint when the EEOC gave plaintiff the opportunity to amend the list of alleged discriminatory or retaliatory acts that the agency intended to investigate. I determined that the fact that the three incidents may have been referenced in the attachments to the EEOC complaint was insufficient to alert the agency to those claims under these circumstances, and thus did not qualify as exhaustion. The D.C. Circuit affirmed in part and reversed in part, finding that the references in the attachments to plaintiff's formal administrative complaint with respect to two of the three alleged instances of discrimination or retaliation were sufficient to establish administrative exhaustion despite plaintiff's failure to clarify that those particular claims existed during the administrative complaint-evaluation process.

XP Vehicles, Inc. v. U.S. Dep't of Energy, 156 F. Supp. 3d 185 (D.D.C. 2016), *amended on denial of reconsideration*, No. 13-cv-0037, 2016 WL 11066678 (D.D.C. July 21, 2016), *and rev'd sub nom. Limnia, Inc. v. U.S. Dep't of Energy*, 857 F.3d 379 (D.C. Cir. 2017): I granted the Department of Energy's ("DOE's") motion for a voluntary remand to the agency to facilitate that agency's renewed consideration of applications for loan assistance that plaintiffs had sought to file under a DOE program that made loans available to manufacturers of clean energy vehicles. In the lawsuit, the plaintiffs claimed that agency officials had been motivated by political bias with respect to the agency's treatment of the plaintiffs' loan applications, and when the agency moved for a voluntary remand, I accepted the DOE's representation that, with respect to the Administrative Procedure Act claim, agency officials were presently able to conduct a new and unbiased review of any loan application that plaintiffs sought to file, due to turnover of agency staff and the passage of time. Over the plaintiffs' objection, I remanded the matter to the agency for a renewed evaluation of the plaintiffs' loan request in light of current application requirements. The D.C. Circuit partially reversed, finding that voluntary remand was inappropriate unless the DOE expressed its intention to revisit the precise loan applications that the plaintiffs originally sought to submit, rather than proceeding to evaluate plaintiff's entitlement to a loan based on a new loan application with up-to-date information.

Von Kahl v. Bureau of Nat'l Affairs, Inc., 09-cv-0635, Mem. Op. & Order, ECF No. 87 (D.D.C. Sept. 30, 2014), *rev'd*, 856 F.3d 106 (D.C. Cir. 2017) (copy supplied): The plaintiff in this defamation case (which had been transferred to me after four years of litigation before then-Chief Judge Richard Roberts) was an

inmate who filed a lawsuit against the Bureau of National Affairs (“BNA”), claiming that BNA had defamed him by publishing false and defamatory statements of fact regarding him in a “summary report” about a petition for certiorari that the plaintiff had filed with the Supreme Court. I denied a motion for reconsideration of Chief Judge Roberts’s decision granting BNA’s motion for summary judgment with respect to the plaintiff’s claim for libel per se, and denied the parties’ cross-motions for summary judgment, finding in part that there were issues of material fact regarding whether BNA acted with actual malice. The D.C. Circuit reversed, holding that BNA was entitled to summary judgment with respect to all of the plaintiff’s claims, because the plaintiff had produced insufficient evidence of actual malice.

Sickle v. Torres Advanced Enter. Sols., LLC, 17 F. Supp. 3d 10 (D.D.C. 2013), *aff’d and remanded*, 653 F. App’x 763 (D.C. Cir. 2016), and *aff’d in part, rev’d in part, and remanded*, 884 F.3d 338 (D.C. Cir. 2018): I granted the defendants’ motion to dismiss all of plaintiffs’ claims, which had been brought under a federal workers’ compensation statute for defense contractors known as the Defense Base Act, 33 U.S.C. § 948a, and common law. The plaintiffs alleged that they were improperly terminated from their positions as military contractors in retaliation for one of the plaintiffs having filed a worker’s compensation claim due to an on-the-job injury, which the second plaintiff medically treated and documented. Among other things, I found that plaintiffs had failed to exhaust administrative remedies with respect to their DBA retaliation claims, and that their common law tort and contract claims were preempted by federal law. On appellate review, over the course of two decisions, the D.C. Circuit affirmed my exhaustion determination but partially reversed my conclusions concerning preemption, holding that the injured plaintiff’s tort claims were preempted, but that the DBA did not preempt the contract claims or the tort claims of the non-injured plaintiff.

2. The D.C. Circuit vacated my rulings, in whole or in part, and remanded in the following four cases.

Maryland v. U.S. Dep’t of Educ., 474 F. Supp. 3d 13 (D.D.C. 2020), *vacated and remanded*, 20-5268, 2020 WL 7868112 (D.C. Cir. Dec. 22, 2020), *on remand*, 17-cv-2139, 2020 WL 7773390 (D.D.C. Dec. 29, 2020): I granted the Department of Education’s (“DOE’s”) motion to dismiss claims that had been brought under the Administrative Procedure Act by the attorneys general of eighteen States, finding that the States lacked Article III standing for the legal claims that they sought to assert. The States’ complaint claimed that the DOE and its Secretary Betsy DeVos had unlawfully delayed implementing certain regulations that the prior administration had promulgated to counteract the allegedly deceptive marketing practices of certain for-profit colleges and universities. When the matter was pending before me, the States vigorously disputed that the impending effective date of a rescission rule that DOE had issued would moot their claims. But in the context of their subsequent appeal of my decision regarding standing, the States argued that the matter had become moot as of the effective date of new regulation,

and asked the D.C. Circuit to dismiss the appeal and vacate my judgment. The D.C. Circuit granted the States' *Munsingwear* motion, vacated my opinion summarily on mootness grounds (without specifically addressing mootness or standing), and remanded the case for further proceedings. I explained the circumstances of this vacatur when the matter returned to me on remand, in *Maryland v. U.S. Dep't of Educ.*, No. 17-cv-2139, 2020 WL 7773390 (D.D.C. Dec. 29, 2020).

United States v. Johnson, No. 15-cr-125, 2019 WL 3842082 (D.D.C. Aug. 15, 2019), *aff'd in part, vacated and remanded in part*, 4 F.4th 116 (D.C. Cir. 2021): Following a seven-day jury trial, the defendant was convicted of two federal counts of unlawful receipt or possession of an unregistered firearm and destructive device; two federal counts of unlawful manufacturing of a firearm; two state counts of possession of a weapon of mass destruction; and one federal count of conspiracy to smuggle goods into United States. I denied his motion for a new trial. On appeal, the defendant argued for the first time that some of the counts of conviction were duplicative. The D.C. Circuit agreed and vacated some of the counts of conviction. With respect to the defendant's challenges to certain of my evidentiary rulings, the D.C. Circuit held that I had not abused my discretion.

United States v. Hillie, 289 F. Supp. 3d 188 (D.D.C. 2018), *aff'd in part, vacated and remanded in part*, 14 F.4th 677 (D.C. Cir. 2021): Prior to the commencement of his jury trial for child pornography and child sex abuse offenses, the defendant filed a motion to dismiss all seven of the child pornography counts. He argued that the videos he surreptitiously recorded, which depicted his live-in girlfriend's underage daughter as she exited the shower and engaged in self grooming, did not depict conduct by the minor that could be considered "lascivious" under the law. I denied his motion. At trial, the jury convicted the defendant on each of the seven child pornography counts as well as nine counts charging the defendant with sexual abuse of a minor. A split panel of the D.C. Circuit vacated the defendant's convictions on the child pornography counts, holding that the surreptitiously recorded videos did not depict the minor engaging in sexually explicit conduct, and rejecting the test for determining lasciviousness that I had applied and that seven other circuits had adopted. The D.C. Circuit affirmed the defendant's convictions on the nine child sex abuse counts. A petition for rehearing en banc has been filed and is pending.

Hall & Assocs. LLC v. Env't Prot. Agency, 315 F. Supp. 3d 519 (D.D.C. 2018), *vacated and remanded sub nom. Hall & Assocs. v. Env't Prot. Agency*, 956 F.3d 621 (D.C. Cir. 2020): I granted the Environmental Protection Agency's ("EPA's") motion for summary judgment in this FOIA case, finding that its withholding of documents based on an invocation of the deliberative process privilege was appropriate. The plaintiff had submitted a FOIA request to the EPA seeking records relating to the agency's "nonacquiescence" decision regarding an adverse ruling from the Eighth Circuit (i.e., the agency's decision to not adhere to that ruling outside of the Eighth Circuit). The EPA had invoked the deliberative

process privilege to withhold all records reflecting agency deliberations that predated its announcement of the nonacquiescence decision, and after reviewing the records *in camera*, I concluded that, for purposes of determining whether the withheld records were pre-decisional and thus subject to the privilege, the EPA should be deemed to have made the nonacquiescence determination on the date that the agency announced that decision. A panel of the D.C. Circuit vacated my grant of summary judgment to the agency with respect to the withholdings, and remanded, finding that the EPA must have reached its decision concerning nonacquiescence internally prior to the date of the announcement, and that the timing of its decision was a disputed issue of material fact that could not be determined on summary judgment.

3. The D.C. Circuit affirmed my judgment, while criticizing my substantive rulings, in the three cases below.

Rothe Dev., Inc. v. U.S. Dep't of Def., 107 F. Supp. 3d 183 (D.D.C. 2015), *aff'd*, 836 F.3d 57 (D.C. Cir. 2016): I upheld the facial constitutionality of Section 8(a) of the Small Business Administration Act, which establishes a business-development program that provides technical, financial, and practical assistance to small businesses that qualify as “socially and economically disadvantaged.” 15 U.S.C. § 637(a)(1)(B). The plaintiff claimed that the Section 8 program was an unconstitutional delegation of authority to the Small Business Administration to make racial classifications concerning the program aid, and that the statutory definition of “socially disadvantaged individuals” amounts to a racial classification that violates the equal protection component of the Fifth Amendment’s Due Process Clause. In reaching this conclusion, I adopted the legal analysis of a substantially similar prior case in our district, *Dynalantic Corp. v. Department of Defense*, 885 F. Supp. 2d 237 (D.D.C. 2012), which had applied strict scrutiny to the challenged, seemingly race-conscious provisions of Section 8(a), and, as in *Dynalantic*, I held that the Section 8(a) program is not unconstitutional on its face because it was narrowly tailored to satisfy compelling government interests. The D.C. Circuit affirmed my judgment upholding the constitutionality of the statute, but rejected the application of strict scrutiny, finding that the Small Business Administration Act does not contain a racial classification that warrants application of that heightened legal standard.

United States v. Kaufman, 14-cr-10 (D.D.C.): After the defendant pled guilty to embezzling from an organization that receives federal funds pursuant to a written plea agreement that contained a waiver of his right to appeal, I sentenced him to a term of imprisonment of 24 months. The defendant appealed his sentence, and the D.C. Circuit ruled that certain statements I had made during the plea colloquy, when I was orally explaining the provision of the plea agreement concerning the appeal waiver, changed the scope of the waiver in a manner that authorized the defendant to appeal his sentence notwithstanding the language of the agreement. The D.C. Circuit otherwise affirmed the sentence that I imposed, finding that it was “within-Guidelines, reasonable, and thoroughly explained.” (I did not issue a

written decision in this matter. The D.C. Circuit's opinion on appeal is available at 791 F.3d 86 (D.C. Cir. 2015)).

Watervale Marine Co., Ltd. v. U.S. Dep't of Homeland Sec., 55 F. Supp. 3d 124 (D.D.C. 2014), *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): I granted the Coast Guard's motion for summary judgment with respect to legal claims that the plaintiffs had brought under the Administrative Procedure Act. The plaintiffs alleged that the Coast Guard was not legally authorized to impose non-financial conditions for the release of a foreign-flagged vessel that plaintiffs owned or operated (the agency had detained plaintiffs' vessel at a United States port due to suspected violations of federal and international environmental laws), and I concluded that the statute governing the Coast Guard's detention authority committed entirely to the agency's discretion the matter of when and under what circumstances the Coast Guard may grant departure clearance to a detained vessel, which meant that the plaintiffs' claims were nonjusticiable. The D.C. Circuit disagreed with my ruling regarding non-justiciability, finding that the question of whether the Coast Guard can impose non-financial conditions is suitable for judicial review. Yet, the panel ultimately affirmed my grant of the defendants' motion for summary judgment on the grounds that the governing statute allowed the Coast Guard to impose financial as well as non-financial conditions for the release of ships suspected of violating environmental laws.

* * *

In the following two cases, panels of the D.C. Circuit reversed my ruling but the panel's reversals were later vacated during the course of subsequent proceedings:

Gov't of Guam v. United States, 341 F. Supp. 3d 74, 76 (D.D.C. 2018), *rev'd and remanded*, 950 F.3d 104 (D.C. Cir. 2020), *rev'd and remanded sub nom. Territory of Guam v. United States*, 141 S. Ct. 1608 (2021), and *vacated*, 852 F. App'x 14 (D.C. Cir. 2021), and *aff'd*, 852 F. App'x 14 (D.C. Cir. 2021).

Committee on the Judiciary v. McGahn, 415 F. Supp. 3d 148 (D.D.C. 2019), *vacated and remanded*, 951 F.3d 510 (D.C. Cir. 2020), *reh'g en banc granted, opinion vacated sub nom. United States House of Representatives v. Mnuchin*, No. 19-5176, 2020 WL 1228477 (D.C. Cir. Mar. 13, 2020), and *on reh'g en banc*, 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 banc granted, opinion vacated* (Oct. 15, 2020).

- h. Provide a description of the number and percentage of your decisions in which you issued an unpublished opinion and the manner in which those unpublished opinions are filed and/or stored.

I have issued two published decisions as a Circuit Judge. I have not authored any signed opinions that are unpublished.

As a District Judge, the publication process differs. To my knowledge, when I issued a Memorandum Opinion via the court's electronic filing system (CM/ECF), that opinion was automatically posted on the district court's website as a recently-issued decision, and the publishing services obtained decisions from that website. Those services then made an individualized determination regarding whether to report any such decision in the Federal Supplement, as a "published" case, or merely make the decision available electronically, as an unpublished decision. To the extent that I issued decisions that were not posted and picked up by the publishing services, they are maintained in the Court's CM/ECF system.

- i. Provide citations for significant opinions, dispositive orders, and orders affecting injunctive relief you authored and issued on federal or state constitutional issues, together with the citation to appellate court rulings on such opinions. If any of the opinions listed were not officially reported, provide copies of the opinions.

While on the District Court, I wrote significant opinions, dispositive orders, and orders concerning the separation of powers, Article III standing, due process and equal protection, search and seizure (Fourth Amendment), free speech (First Amendment), and alleged violations of the criminal procedure rights that the Fifth and Sixth Amendments protect. Those cases are listed below.

Maryland v. U.S. Dep't of Educ., 474 F. Supp. 3d 13 (D.D.C. 2020), *vacated and remanded*, 20-5268, 2020 WL 7868112 (D.C. Cir. Dec. 22, 2020), *on remand*, 17-cv-2139, 2020 WL 7773390 (D.D.C. Dec. 29, 2020)

Las Americas Immigrant Advoc. Ctr. v. Wolf, 507 F. Supp. 3d 1 (D.D.C. 2020)

United States v. Leake, No. 19-cr-194, 2020 WL 3489523 (D.D.C. June 26, 2020)

Committee on the Judiciary v. McGahn, 415 F. Supp. 3d 148 (D.D.C. 2019), *vacated and remanded*, 951 F.3d 510 (D.C. Cir. 2020), *reh'g en banc granted, opinion vacated sub nom. United States House of Representatives v. Mnuchin*, No. 19-5176, 2020 WL 1228477 (D.C. Cir. Mar. 13, 2020), *and on reh'g en banc*, 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 banc granted, opinion vacated* (Oct. 15, 2020)

Make the Rd. N.Y. v. McAleenan, 405 F. Supp. 3d 1 (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)

Ctr. for Biological Diversity v. McAleenan, 404 F. Supp. 3d 218 (D.D.C. 2019)

Barber v. D.C. Gov't, 394 F. Supp. 3d 49 (D.D.C. 2019)

Brown v. Gov't of District of Columbia, 390 F. Supp. 3d 114 (D.D.C. 2019)

Eagle Tr. Fund v. U.S. Postal Serv., 365 F. Supp. 3d 57 (D.D.C. 2019), *aff'd*, 811 F. App'x 669 (D.C. Cir. 2020)

Jackson v. Bowser, No. 1:18-cv-1378, 2019 WL 1981041 (D.D.C. May 3, 2019)

United States v. Fajardo Campos, 16-cr-00154, 2018 WL 6448633 (D.D.C. Dec. 10, 2018)

Miller v. D.C. Water & Sewer Auth., No. 17-cv-0840, 2018 WL 4762261 (D.D.C. Oct. 2, 2018), *aff'd*, 790 F. App'x 218 (D.C. Cir. 2019)

Am. Fed. 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)

Feldman v. Bowser, 315 F. Supp. 3d 299 (D.D.C. 2018)

Tapp v. Wash. Metro. Area Transit Auth., 306 F. Supp. 3d 383 (D.D.C. 2016)

Robinson v. Farley, 264 F. Supp. 3d 154 (D.D.C. 2017)

Nucor Steel-Ark. v. Pruitt, 246 F. Supp. 3d 288 (D.D.C. 2017)

United States v. Hillie, 227 F. Supp. 3d 57 (D.D.C. 2017)

Pollard v. District of Columbia, 191 F. Supp. 3d 58 (D.D.C. 2016), *aff'd*, 698 F. App'x 616 (D.C. Cir. 2017)

New England Anti-Vivisection Soc'y v. U.S. Fish & Wildlife Serv., 208 F. Supp. 3d 142 (D.D.C. 2016)

Mobarez v. Kerry, 187 F. Supp. 3d 85 (D.D.C. 2016)

Kyle v. Bedlion, 177 F. Supp. 3d 380 (D.D.C. 2016)

United States v. Miller, No. 16-cr-0072, 2016 WL 8416761 (D.D.C. Nov. 11, 2016), *aff'd*, 739 F. App'x 6 (D.C. Cir. 2018)

Otay Mesa Prop., L.P. v. U.S. Dep't of the Interior, 144 F. Supp. 3d 35 (D.D.C. 2015)

Smith v. United States, 121 F. Supp. 3d 112 (D.D.C. 2015), *aff'd*, 843 F.3d 509 (D.C. Cir. 2016)

Austin-Spearman v. AARP & AARP Servs. Inc., 119 F. Supp. 3d 1 (D.D.C. 2015) (duplicate citation at 113 F. Supp. 3d 1 (D.D.C. 2015))

Am. Fed'n of Gov't Employees, AFL-CIO v. Vilsack, 118 F. Supp. 3d 292 (D.D.C. 2015), *aff'd*, 672 F. App'x 36 (D.C. Cir. 2016)

XP Vehicles, Inc. v. Dep't of Energy, 118 F. Supp. 3d 38 (D.D.C. 2015)

Rothe Dev., Inc. v. Dep't of Def., 107 F. Supp. 3d 183 (D.D.C. 2015), *aff'd on other grounds*, 836 F.3d 57 (D.C. Cir. 2016)

Brewer v. District of Columbia, 105 F. Supp. 3d 74 (D.D.C. 2015)

Cal. Clinical Lab'y Ass'n v. Sec'y of Health & Human Servs., 104 F. Supp. 3d 66 (D.D.C. 2015)

Fed. Forest Res. Coal. v. Vilsack, 100 F. Supp. 3d 21 (D.D.C. 2015)

FiberLight, LLC v. Nat'l R.R. Passenger Corp., 81 F. Supp. 3d 93 (D.D.C. 2015)

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)

United States v. Richardson, 36 F. Supp. 3d 120 (D.D.C. 2014)

Kretchmar v. F.B.I., 32 F. Supp. 3d 49 (D.D.C. 2014), *aff'd*, No. 14-5178 (D.C. Cir. Jan. 16, 2015)

Patterson v. United States, 999 F. Supp. 2d 300 (D.D.C. 2013)

Page v. Mancuso, 999 F. Supp. 2d 269 (D.D.C. 2013)

Am. Meat Inst. v. U.S. Dept. of Agric., 968 F. Supp. 2d 38 (D.D.C. 2013), *aff'd*, 746 F.3d 1065 (D.C. Cir. 2014), *reh'g en banc granted*, No. 13-5281, 2014 WL 2619836 (D.C. Cir. Apr. 4, 2014), *judgment reinstated*, 760 F.3d 18 (D.C. Cir. 2014) (en banc)

- j. Provide citations to all cases in which you sat by designation on a federal court of appeals, including a brief summary of any opinions you authored, whether majority, dissenting, or concurring, and any dissenting opinions you joined.

I have not sat by designation on any federal court of appeals.

14. **Recusal:** Identify the basis by which as a judge you have assessed the necessity or propriety of recusal. (If your court employs an "automatic" recusal system by which you may be recused without your knowledge, please include a general description of that system and a list of cases from which you were recused.) Provide a list of any cases, motions or matters that have come before you in which a litigant or party has requested that you recuse yourself due to an asserted conflict of interest or in which you have recused yourself sua sponte.

- a. Identify each such case, and for each provide the following information:
- i. whether your recusal was requested by a motion or other suggestion by a litigant or a party to the proceeding or by any other person or interested party; or if you recused yourself *sua sponte*;
 - ii. a brief description of the asserted conflict of interest or other ground for recusal;
 - iii. the procedure you followed in determining whether or not to recuse yourself;
 - iv. your reason for recusing or declining to recuse yourself, including any action taken to remove the real, apparent or asserted conflict of interest or to cure any other ground for recusal.

The United States Court of Appeals for the District of Columbia Circuit has an electronic case-assignment system pursuant to which each judge submits to the Clerk's Office a list of self-identified conflicts. The computer assignment system does not assign a matter to the pre-established panel if any judge on that panel has a conflict as identified per the submitted list. In addition, I analyze each case that is assigned to me individually in order to determine if there are any conflicts. I am also automatically recused from hearing any appeal from a ruling that I issued as a district judge.

The United States District Court for the District of Columbia assigns cases to district judges randomly, but also flags such newly assigned cases for the judge's conflict review, based on recusal criteria that each judge identifies. This system permits a judge to decide whether to recuse *sua sponte* in a newly assigned case.

I recused myself *sua sponte* in the following twelve cases while I was sitting on the District Court, for the reasons described below.

I recused myself from *Jacobs v. Reliance Standard Life Insurance Co.*, 21-cv-0323, because the plaintiff in the case was previously employed as a doctor at Medstar Georgetown University Hospital, and the complaint asserted that the plaintiff's claim for disability benefits under a group plan that the hospital provides was improperly denied. My husband is a surgeon who is employed by Medstar Georgetown University Hospital. After reviewing the Code of Conduct for United States Judges, I determined that my impartiality might reasonably be questioned and that this issue was incurable. I therefore returned the case to the Calendar Committee for reassignment.

I recused myself from *Clark v. Environmental Protection Agency*, 18-cv-0075, because the case arose from EPA's failure to respond to a FOIA request that the

plaintiff, a university research librarian, had submitted. At the time the matter was assigned to me, I was a member of the board of the university that employed the plaintiff, and after reviewing the Code of Conduct for United States Judges, I determined that my impartiality might reasonably be questioned and that this issue was incurable. I therefore returned the case to the Calendar Committee for reassignment.

I recused myself from *Pulphus v. Ayers*, 17-cv-310, because I have a personal and familial relationship with a material witness named in the complaint whose actions were challenged in the complaint. After reviewing the Code of Conduct for United States Judges, I determined that my impartiality might reasonably be questioned and that this issue was incurable. I therefore returned the case to the Calendar Committee for reassignment.

I recused myself from *Callas v. Callas*, 17-mc-127, because it involved a motion to quash a non-party subpoena, and I have a personal and familial relationship with the lawyer who was representing the movant. After reviewing the Code of Conduct for United States Judges, I determined that my impartiality might reasonably be questioned and that this issue was incurable. I therefore returned the case to the Calendar Committee for reassignment.

I recused myself from *Van Allen v. Gibson*, 16-cv-1426, because the plaintiff filed an amended complaint that named as defendants all judges who had been appointed by President Barack Obama, including me.

I recused myself from *Doe v. Lhamon*, 16-cv-1158, because the complaint challenged the Department of Education's sexual assault guidelines for colleges and universities, and at the time that the matter was assigned to me, I was serving on the board of a university that was evaluating its own potential response to those guidelines. After reviewing the Code of Conduct for United States Judges, I determined that my impartiality might reasonably be questioned and that this issue was incurable. I therefore returned the case to the Calendar Committee for reassignment.

I recused myself from *National Railroad Passenger Corp. v. 3.44 Acres More or Less of Land and Building*, No. 15-cv-1088, and two related cases, *National Railroad Passenger Corp. v. Casco Second Street, LLC*, No. 15-cv-1020 and *National Railroad Passenger Corp. v. 1.45 Acres More or Less of Air Space Above Land Located at 900 2nd Street NE*, 15-cv-1021, because these are civil cases that involve potential money damages, and my husband's brother is an equity partner at a law firm that had entered its appearance as counsel for one of the defendants. Canon 3(C)(1)(d)(ii) of the Code of Conduct for United States Judges appears to require recusal in such circumstances.

I recused myself from *Sandza v. Barclays Bank PLC*, 15-cv-0732, because these are civil cases that involve potential money damages, and my husband's brother is

an equity partner at a law firm that represented defendants in this matter. After reviewing the Code of Conduct for United States Judges, I determined that my impartiality might reasonably be questioned in light of this connection with defense counsel, and that this issue was incurable. I therefore returned the case to the Calendar Committee for reassignment.

I recused myself from *Williams v. United States of America*, 15-mc-0283, because the firm representing the petitioner had previously represented my husband in two civil matters arising out of his employment as a surgeon, and had also consulted with my husband regarding medical matters and medical legal matters over time. After reviewing the Code of Conduct for United States Judges, I determined that my impartiality might reasonably be questioned, and that this issue was incurable. I therefore returned the case to the Calendar Committee for reassignment.

I recused myself from *Arrington v. Federal Public Defender of the District of Columbia*, 14-cv-1557, because I previously worked for the Federal Public Defender of the District of Columbia, and because one of the named defendants was my supervisor when I worked in that office and remains a personal friend of mine. After reviewing the Code of Conduct for United States Judges, I determined that my impartiality might reasonably be questioned in light of my personal relationship with one of the parties, and that this issue was incurable. I therefore returned the case to the Calendar Committee for reassignment.

I recused myself from *Zaidi v. United States Sentencing Commission*, 14-cv-1308, because the plaintiff in this case alleged that certain policies that the United States Sentencing Commission had promulgated were unlawful and unconstitutional. I was serving as Vice Chair of the Sentencing Commission at the time this matter came before me. After reviewing the Code of Conduct for United States Judges, I determined that my impartiality might reasonably be questioned and that this issue was incurable. I therefore returned the case to the Calendar Committee for reassignment.

I recused myself from *Chenari v. George Washington University*, 14-cv-0929, because the plaintiff alleged that George Washington University improperly terminated his enrollment at the school for honor code violations, and at the time this matter came before me, I was affiliated with George Washington University Law School as an adjunct professor. Given G.W.U. Law School's relationship to the University—the defendant in this matter—I reviewed the Code of Conduct for United States Judges, and I determined both that my impartiality might reasonably be questioned and that this issue was incurable. I therefore returned the case to the Calendar Committee for reassignment.

I recused myself from the following case when the matter was assigned to me, after being asked to do so by the parties.

Defense counsel in *Wilson v. Cope*, No. 14-cv-1434, filed a consent motion asking me to transfer this matter to another judge because his firm had previously represented my husband in two civil matters arising out of his employment as a surgeon, and had also consulted with my husband regarding medical matters and medical legal matters over time. I was not aware of this relationship before the parties brought it to my attention by filing the motion. After reviewing the Code of Conduct for United States Judges, I determined that my impartiality might reasonably be questioned and that this issue was incurable. I therefore granted the motion and returned the case to the Calendar Committee for reassignment.

I denied motions for recusal, and did not recuse myself, in the following cases.

The pro se plaintiff in *Cannady v. Hogan*, 20-cv-2141, requested that I recuse myself because of a ruling I had made and an order I had issued in his case. Before taking any action on the merits, I transferred the case to another district for improper venue and, as a result, I denied the plaintiff's recusal request as moot.

The pro se plaintiff in *Humphries v. Newman*, 18-cv-2036, requested that I recuse myself primarily because she believed that my husband was the son of the founder of the firm representing defendant Children's National Medical Center ("CNMC"), and that my husband was employed by CNMC. Her assertions about my husband were factually incorrect. The plaintiff also sought recusal because of certain rulings I had made concerning her case; however, adverse rulings in a matter are not an appropriate reason to seek recusal. I denied her recusal request.

- b. Explain whether you will follow the same procedures for recusal if you are confirmed to the Supreme Court as you have followed on the Circuit Court. If not, please explain the procedure you will follow in determining whether to recuse yourself from matters coming before the Supreme Court, if confirmed.

If confirmed to the Supreme Court, I will continue my present practice of using a recusal list to identify and avoid potential conflicts. In addition, I would also recuse myself from matters that were assigned to me as a circuit or district judge.

15. **Public Office, Political Activities and Affiliations:**

- a. List chronologically any public offices you have held, other than judicial offices, including the terms of service and whether such positions were elected or appointed. If appointed, please include the name of the individual who appointed you. Also, state chronologically any unsuccessful candidacies you have had for elective office or unsuccessful nominations for appointed office.

In September 2005, I was appointed to the Commission on Juvenile Justice in Montgomery County, Maryland by then-Montgomery County Executive Douglas Duncan and approved by the Montgomery County Council. I withdrew from the

Commission shortly after my appointment due to a health issue involving a family member and never served.

On July 23, 2009, President Barack Obama nominated me to be a Commissioner on the United States Sentencing Commission. On February 12, 2010, following my confirmation by the United States Senate, President Obama appointed me to be a Vice Chair of the Commission.

I have had no unsuccessful candidacies for elective office or unsuccessful nominations for appointed office.

- b. List all memberships and offices held in and services rendered, whether compensated or not, to any political party, election committee, or President-elect transition team. If you have ever held a position or played a role in a political campaign, identify the particulars of the campaign, including the candidate, dates of the campaign, your title and responsibilities. Please supply four (4) copies of any memoranda analyzing issues of law or public policy that you wrote on behalf of or in connection with a President-elect transition team.

In 2008, I was an election poll monitor for both the primary and general elections on behalf of Lawyers for Change, Obama for America Presidential Campaign.

- c. List all political events for which you were on the host committee, including the date, location, which candidate or organization it benefitted, and how much was raised at the event.

I have not been on the host committee for any political event.

16. **Legal Career:** Answer each part separately.

- a. Describe in reverse chronological order your law practice and legal experience after graduation from law school including:
- i. whether you served as clerk to a judge, and if so, the name of the judge, the court and the dates of the period you were a clerk;

I served as a law clerk to three federal judges:

Associate Justice Stephen G. Breyer
Supreme Court of the United States
1999 – 2000

Hon. Bruce M. Selya
United States Court of Appeals for the First Circuit
1997 – 1998

Hon. Patti B. Saris
United States District Court for the District of Massachusetts
1996 – 1997

- ii. whether you practiced alone, and if so, the addresses and dates;

I have never practiced law alone.

- iii. the dates, names and addresses of law firms or offices, companies or governmental agencies with which you have been affiliated, and the nature of your affiliation with each.

2021 – Present
United States Court of Appeals for the District of Columbia Circuit
E. Barrett Prettyman United States Courthouse, Room 5700
333 Constitution Avenue, Northwest
Washington, District of Columbia 20001
United States Circuit Judge

2013 – 2021
United States District Court for the District of Columbia
E. Barrett Prettyman United States Courthouse, Room 6309
333 Constitution Avenue, Northwest
Washington, District of Columbia 20001
United States District Judge

2010 – 2014
United States Sentencing Commission
One Columbus Avenue, Northeast
Washington, District of Columbia 20002
Vice Chair & Commissioner

2007 – 2010
Morrison & Foerster, LLP
2000 Pennsylvania Avenue, Northwest, 6th Floor
Washington, District of Columbia 20006
Of Counsel

2005 – 2007
Office of the Federal Public Defender
625 Indiana Avenue, Northwest
Washington, District of Columbia 20004
Assistant Federal Public Defender

2003 – 2005
United States Sentencing Commission

One Columbus Circle, Northeast
Washington, District of Columbia 20002
Assistant Special Counsel

2002 – 2003
The Feinberg Group, LLP (now known as Feinberg Rozen, LLP)
1455 Pennsylvania Avenue, Northwest
Washington, District of Columbia 20004
Associate

2000 – 2002
Goodwin Procter, LLP
Exchange Place
53 State Street
Boston, Massachusetts 02109
Associate

1998 – 1999
Miller, Cassidy, Larroca & Lewin, LLP (now defunct)
2599 M Street, Northwest
Washington, District of Columbia 20007
Associate

- iv. whether you served as a mediator or arbitrator in alternative dispute resolution proceedings and, if so, a description of the 10 most significant matters with which you were involved in that capacity.

I have not served as a mediator or arbitrator.

b. Describe:

- i. the general character of your law practice and indicate by date when its character has changed over the years.

The nature of my law practice has varied widely over the years. From 1998 to 1999, I worked as a litigation associate at Miller, Cassidy, Larroca & Lewin LLP, a trial litigation boutique firm in the District of Columbia. My work there involved a variety of civil subject matters, including commercial breach of contract actions, bankruptcy litigation, just compensation, and defense of corporate employment discrimination and retaliation claims.

In 2000, after my Supreme Court clerkship, I moved to Boston, Massachusetts and returned to private practice, joining Goodwin Procter LLP's litigation department as an associate. While at Goodwin, I worked on a variety of trial-stage litigation matters, drafting pleadings and

handling discovery in cases involving federal securities fraud allegations, personal injury claims, breach of contract actions, and alleged violations of the Anti-Kickback statute. I also did pro bono work that involved assisting an organization in investigating and challenging high stakes testing in education, and drafting an amicus brief in a free speech case in the First Circuit.

In 2002, I returned to the District of Columbia and joined The Feinberg Group, a small arbitration and mediation practice, as an associate. While at the Feinberg Group, I assisted in the negotiated (non-litigation) resolution of mass tort claims. I attended arbitration proceedings and advised client corporations regarding trust payment structures for resolving mass-tort liability, such as asbestos claims.

From 2003 to 2007, I focused primarily on criminal law and criminal justice related issues. As an Assistant Special Counsel to the United States Sentencing Commission from 2003 to 2005, I drafted proposed amendments to the Sentencing Guidelines Manual, analyzed federal law and sentencing policies in regard to certain crimes, and worked on the development of various guideline-sentencing proposals prior to, and in anticipation of, *Booker*. Then, from 2005 to 2007, I served as an Assistant Federal Public Defender in the District of Columbia, during which I represented indigent criminal appellants in the United States Court of Appeals for the District of Columbia Circuit. I filed briefs and motions in the court of appeals, argued cases, and monitored criminal law developments nationwide.

In 2007, I joined Morrison & Foerster LLP in the District of Columbia and worked as an appellate litigator with a practice that can generally be characterized as a national appellate practice involving a wide range of legal issues. I drafted and filed briefs and petitions in the Supreme Court and in other appellate courts around the country. The cases that I worked on involved such matters as statutory interpretation, federal preemption, personal injury claims, federal wiretapping and fraud prosecutions, and civil contempt sanctions imposed by an administrative body. I also worked on pro bono matters involving complex legal issues, including an asylum application and briefs regarding the Fourth Amendment, federal habeas, and the right to an attorney in civil cases under state constitutional law.

My practice on the Sentencing Commission from 2010 to 2014 can generally be characterized as criminal justice policy. As a Commissioner of the federal agency that develops sentencing policy for the federal courts, I evaluated, drafted, and enacted proposed changes to the federal sentencing guidelines. I also participated in administrative hearings and meetings to assess the operation of the federal sentencing system.

From 2013 to 2021, I served as a district judge on the United States District Court for the District of Columbia. Since 2021, I have served as a circuit judge on the United States Court of Appeals for the District of Columbia Circuit.

- ii. your typical clients and the areas at each period of your legal career, if any, in which you have specialized.

During my years in private practice at Miller, Cassidy, Larroca & Lewin, from 1998 to 1999, and Goodwin Procter, from 2000 to 2002, my clients were typically United States corporations, corporate executives, and non-profit organizations. I specialized in civil litigation, including trial-stage practice and procedure such as pleadings, motions practice, and discovery. My cases involved a variety of subject matters, including securities fraud, mortgage fraud, product liability, breach of contract, property law, the Fifth Amendment's takings clause, and Title VII.

When I was at The Feinberg Group from 2002 to 2003, my typical clients were large corporations facing mass tort liability. I specialized in mediation and arbitration procedures and in the evaluation of trust structures for the settlement of current and potential (future) tort claims.

As an Assistant Federal Public Defender from 2005 to 2007, I represented indigent individuals who had been convicted of federal crimes. I specialized in criminal law and procedure, the Fourth and Fifth Amendments, and federal appellate practice.

While at Morrison & Foerster from 2007 to 2010, I represented corporations, non-profit organizations, and a few individuals, all of whom were making legal arguments in state and federal courts of appeals. Typically, my clients were corporations or organizations that filed briefs on the merits of a case as parties to an appeal or amicus briefs in support of a party in a case. I had the opportunity to work on both civil and criminal appeals, and appeals in courts throughout the country, including the Supreme Court of the United States.

In my work as a Commissioner on the United States Sentencing Commission from 2010 to 2014, I represented the federal criminal justice system as a whole. The same is true of my former work as a Commission staffer from 2003 to 2005. I did not have clients, but I regularly consulted with federal judges, members of Congress, prosecutors, defense counsel, and other criminal justice stakeholders nationwide about the structure and operation of the federal sentencing system. I specialized in criminal law and in the procedures of a federal district court judge during sentencing proceedings. I also developed expertise in administrative procedure and

the specific regulations (the federal sentencing guidelines) that federal district court judges use at sentencing.

I did not have any clients in my role as a United States District Judge, nor do I have any clients in my role as a United States Circuit Judge.

- c. Describe the percentage of your practice that has been in litigation and whether you appeared in court frequently, occasionally, or not at all. If the frequency of your appearances in court varied, describe such variance, providing dates.

At Miller, Cassidy, Larroca & Lewin, from 1998 to 1999, and Goodwin Procter, from 2000 to 2002, my practice was entirely civil litigation, but I did not appear in court. I appeared in court on a few occasions while at Morrison & Foerster from 2007 to 2010, including to argue a motion for summary judgment in a case in the United States Court of Federal Claims in 2009, to argue an appeal in the District of Columbia Court of Appeals in 2008, and to argue an appeal in the United States Court of Appeals for the District of Columbia Circuit in 2007.

As an Assistant Federal Public Defender, my practice was entirely criminal litigation in federal court. I appeared in court approximately ten times from 2005 to 2007, arguing appeals in the United States Court of Appeals for the District of Columbia Circuit.

At The Feinberg Group from 2002 to 2003, I assisted with mediations and arbitrations but did not appear in court. Likewise, as a Commissioner on the United States Sentencing Commission, from 2010 to 2014, I did not appear in court, nor did I appear in court in my work as a Commission staffer from 2003 to 2005.

While I was a United States District Judge from 2013 to 2021, I appeared in court frequently, as I routinely presided over motion and plea hearings, status conferences, sentencings, and trials.

As a United States Circuit Judge, I typically appear in court two to three times a month for scheduled sittings.

- i. Indicate the percentage of your practice in:

- | | |
|-----------------------------|-----|
| 1. federal courts: | 95% |
| 2. state courts of record: | 5% |
| 3. other courts: | 0% |
| 4. administrative agencies: | 0% |

- ii. Indicate the percentage of your practice in:

- | | |
|--------------------------|-----|
| 1. civil proceedings: | 60% |
| 2. criminal proceedings: | 40% |

- d. List, by case name, all cases in courts of record, including cases before administrative law judges, you tried or litigated to verdict, judgment or final decision (rather than settled), indicating whether you were sole counsel, chief counsel, or associate counsel. For each such case, include the docket number and provide any opinions and filings available to you.

When I was in private practice, I was not primarily responsible for trying cases and did not handle any matters that were tried to verdict while I worked on them. From 1998 to 1999 and from 2000 to 2002, I was associate counsel in approximately 15 cases being litigated in state and federal courts. My responsibilities included pre-trial preparation (e.g., managing discovery, taking depositions, and drafting pre-trial pleadings and dispositive motions), and I also assisted with drafting motions in limine, proposed jury instructions, and proposed findings of fact and conclusions of law for cases that were scheduled to be tried.

- i. What percentage of these trials were:

- | | |
|--------------|---|
| 1. jury: | % |
| 2. non-jury: | % |

Not applicable

- e. Describe your practice, if any, before the Supreme Court of the United States, the highest court of any state, or any state or federal courts of appeals. Supply four (4) copies of any briefs, amicus or otherwise, and, if applicable, any oral argument transcripts before the Supreme Court in connection with your practice. Give a detailed summary of the substance of each case, outlining briefly the factual and legal issues involved, the party or parties whom you represented, the nature of your participation in the litigation, and the final disposition of the case. Also provide the individual names, addresses, and telephone numbers of co-counsel of record and principal counsel of record for each of the other parties.

During my time as a Federal Public Defender, I was assigned to the appellate division and appeared mainly before the United States Court of Appeals for the District of Columbia Circuit.

During my time in private practice, I worked on both civil and criminal appeals, and appeared in federal and state appellate courts throughout the country.

I have not argued before the Supreme Court, but I filed petitions for certiorari or served as co-counsel for merits or amicus briefs in the following Supreme Court cases:

Bloate v. United States, 559 U.S. 196 (2010): I submitted an amicus brief on behalf of my client, the National Association of Criminal Defense Lawyers, in support of petitioner (available at 2009 WL 1864008). In this criminal case, the petitioner appealed the denial of his motion to dismiss the indictment for failure to

meet the 70-day deadline that the Speedy Trial Act imposes on the time to commence trial. The Supreme Court ultimately ruled in favor of the petitioner, finding that courts cannot automatically exclude time that is granted to a party to prepare pretrial motions in a criminal case.

Petitioner's Counsel

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(202) 775-4500

Respondent's Counsel

Hon. Elena Kagan
Matthew D. Roberts
U.S. Department of Justice
950 Pennsylvania Avenue, Northwest
Washington, DC 20530
(202) 514-2217

Arizona v. Gant, 556 U.S. 332 (2009): I co-authored an amicus brief on behalf of my client, the National Association of Federal Defenders, in support of the defendant (available at 2008 WL 2958118). In this criminal matter, the defendant brought a Fourth Amendment challenge to the lawfulness of a warrantless search of his vehicle incident to his arrest, which took place after he had been handcuffed and detained in the arresting officer's patrol car. The Supreme Court held that that the vehicle search violated the Fourth Amendment, and that police may not search a vehicle incident to a recent occupant's arrest unless either the arrestee is within reaching distance of the passenger compartment or it is reasonable to believe the vehicle contains evidence of the offense.

Co-Counsel

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Al-Marri v. Spagone, No. 08-368, *cert. granted*, 555 U.S. 1066 (2009), *cert. dismissed as moot*, 555 U.S. 1220 (2009): I co-authored two amicus briefs regarding this appeal, which challenged the Executive's alleged authority to detain lawful residents of the United States without charge or trial under the Authorization for Use of Military Force, 115 Stat. 244, on suspicion of their having engaged in terrorism-related activities. First, in October 2008 I submitted an amicus brief on behalf of our clients the Constitution Project and the Rutherford Institute (available at 2008 WL 4735243) arguing that certiorari was warranted to review the divided en banc decision of the Fourth Circuit, which had held that the Executive had such authority. In January 2009, after the Supreme Court granted the petition for certiorari, I submitted an amicus brief on behalf of the same parties and also the Cato Institute (available at 2009 WL 230960), arguing that Congress had not authorized the challenged detention and that the Constitution likewise did not authorize it. The Supreme Court did not rule in the case; it dismissed the appeal as moot after the Executive agreed to release the petitioner.

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Boumediene v. Bush and *Al-Odah v. United States*, 553 U.S. 723 (2008): I co-authored an amicus brief on behalf of my clients, twenty retired federal judges (available at 2007 WL 2441585), related to these consolidated appeals that challenged the detention review system that United States Department of Defense

had created for Guantanamo Bay detainees in the wake of the Supreme Court's decision in *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004). Petitioners argued that detention determinations made by Combatant Status Review Tribunals (CSRTs) under the Detainee Treatment Act impermissibly suspended the writ of habeas corpus in violation of the Constitution's Suspension Clause, U.S. Const. Art. 1, § 9, cl. 2. In the amicus brief I submitted, the former judges argued that judicial review of a CSRT's detention determination under the DTA was an inadequate substitute for the common law writ of habeas corpus because the Act appeared not to permit assessment of whether the CSRT had relied on statements extracted by torture or other impermissible coercion. The Supreme Court ultimately ruled in favor of the petitioners, holding that the relevant provision of the Detainee Treatment Act unconstitutionally suspended the writ of habeas corpus.

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Quanta Computer, Inc., et al. v. LG Electronics, Inc., 553 U.S. 617 (2008): I co-authored an amicus brief on behalf of my client, Gen Probe, Inc., a biotechnology company, in support of petitioners (available at 2007 WL 3407025). The issue in this patent case was whether the longstanding doctrine of patent exhaustion applies to “method” patents that describe how an item is made or used. The Federal Circuit had held that exhaustion did not apply, and petitioners argued that that ruling was erroneous. In a unanimous decision, the Supreme Court reversed the Federal Circuit’s ruling.

Co-Counsel

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United States v. Bussell, 555 U.S. 812 (2008): I authored a petition for certiorari (available at 2008 WL 960667), and a reply brief in support of the petition for certiorari (available at 2008 WL 2472925) in this criminal case, which involved a conviction for the concealment of assets and alleged false statements, and a sentence that relied in part on acquitted conduct. The Supreme Court denied certiorari.

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Hall Street Associates LLC v. Mattel Inc., 552 U.S. 576 (2008): I was part of a team that represented the respondent in this Federal Arbitration Act (FAA) case, and in that capacity, I co-authored a merits brief (available at 2007 WL 2731409), a supplemental brief (available at 2007 WL 4244685), and a reply brief (available at 2007 WL 4254419). The primary issue presented was whether the statutory grounds for judicial review that the FAA provides are the sole bases for review of an arbitration award or whether the parties' arbitration agreement can identify

additional grounds for judicial review. The Supreme Court held that an arbitration agreement cannot expand judicial review of arbitration awards beyond the FAA's statutory bases for review.

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Clark County, Nevada v. Vacation Village, Inc., 554 U.S. 917 (2008): I co-authored an amicus brief on behalf of five air transportation industry associations in support of a petition for certiorari (available at 2007 WL 4142597). The primary issue in the case was whether the Ninth Circuit erred when it held that federal law did not preempt state law concerning local zoning ordinances that regulated land near airports; under state law, such ordinances constituted *per se* regulatory takings. The Supreme Court denied the petition.

Co-Counsel

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Kosh v. United States, 549 U.S. 940 (2006): I authored and submitted a petition for certiorari in this criminal case. Copy supplied. Upon revocation of supervised release, the district court had sentenced my client to a term of incarceration that was twice the recommended guideline range in order to make him eligible for a particular prison facility that provided mental health and substance abuse treatment. On appeal before the D.C. Circuit, I argued that the imposition of a longer prison term in order to facilitate his access to treatment in the Bureau of Prisons violated 18 U.S.C. § 3582(a). I reiterated that argument in the petition for certiorari, which the Supreme Court ultimately denied.

Petitioner's Co-Counsel

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17. **Litigation:** Describe the ten (10) most significant litigated matters which you personally handled, whether or not you were the attorney of record. Give the citations, if the cases were reported, and the docket number and date if unreported. Give a capsule summary of the substance of each case. Identify the party or parties whom you represented; describe in detail the nature of your participation in the litigation and the final disposition of the case. Also state as to each case:

- a. the date of representation;

- b. the name of the court and the name of the judge or judges before whom the case was litigated; and
- c. the individual name, addresses, and telephone numbers of co-counsel and of principal counsel for each of the other parties.

1. *Washington Gas Light Co. v. Public Service Commission of D.C.*, 982 A.2d 691 (D.C. 2009) (Farrell, Glickman, Kramer, JJ.)

I successfully represented Washington Gas Light Company with respect to a petition to the District of Columbia Court of Appeals seeking review of a \$350,000 civil forfeiture sanction that the Public Service Commission of the District of Columbia had imposed during the discovery phase of a rate proceeding as punishment for Washington Gas's alleged refusal to disclose documents as ordered by the Commission. I wrote the brief for petitioner and the reply brief, as well as two supplemental briefs after oral argument. I also argued the case before a panel of judges on the District of Columbia Court of Appeals. The court concluded that the exhaustion requirements of the District of Columbia Code did not prevent its exercise of jurisdiction, and it reversed the Public Service Commission's forfeiture order on the ground that the agency lacked the statutory authority to adjudicate and impose the forfeiture penalty.

Co-counsel

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2. *Ladd v. United States*, No. 1:07-cv-271 (Fed. Cl., Oct. 14, 2009) (Hodges, J.)

I represented non-profit Rails-to-Trails Conservancy at a hearing on cross motions for summary judgment in a physical takings case in which the plaintiff landowners sought a legal declaration of ownership with respect to an abandoned railroad corridor. After being granted leave to participate, I prepared detailed exhibits and demonstratives and argued the motion for summary judgment on behalf of Rails-to-Trails as an amicus in

support of the federal government. The court granted the government's motion for summary judgment, and denied the plaintiffs' cross motion, ruling that the railroad may negotiate with trail operators to transfer the corridor for public use pursuant to federal "railbanking" statutes without effecting a physical taking of plaintiff's reversionary rights in the property.

Co-counsel

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3. *United States v. Littlejohn*, No. 05-3081, 489 F.3d 1335 (D.C. Cir. 2007) (Sentelle, Tatel, Brown, JJ.)

I successfully represented an individual defendant convicted of unlawful possession of a firearm in violation of 18 U.S.C. § 922(g) in an appeal in the United States Court of Appeals for the District of Columbia Circuit. I argued, *inter alia*, that the evidence presented at trial was legally insufficient to support the conviction and that the trial court had conducted an improper and prejudicial jury *voir dire*. I wrote the brief for appellant and the reply brief and argued the case before a panel of judges on the D.C. Circuit. The judgment was vacated as a result of the district court's improper use of compound questions during *voir dire* and the case was remanded for a new trial.

Opposing counsel

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4. *United States v. Ponds*, Nos. 03-3134, 03-3135, 454 F.3d 313 (D.C. Cir. 2006) (Rogers, Tatel, Brown, JJ.)

I successfully represented a former attorney convicted of tax evasion in an appeal that argued that the government's use of documents that it had compelled from the defendant pursuant to a subpoena and a grant of act-of-production immunity was improper under *United States v. Hubbell*, 530 U.S. 27 (2000). I wrote the brief for appellant and the reply brief, and I argued the case before a panel of judges on the United States Court of Appeals for the District of Columbia Circuit. The court vacated the judgment of conviction on the ground that my client's document production was sufficiently testimonial to implicate his Fifth Amendment rights, and remanded the case to the district court for a determination of the extent of the government's impermissible use of the immunized material.

Opposing counsel

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5. *Khiali-Gul v. Bush*, No. 1:05-cv-877 (D.D.C., 2005) (Robertson, J.)

From 2005 to 2007, I 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. I drafted the petition for a writ of habeas corpus and filed it on behalf of the detainee. I also drafted and filed a series of substantive and procedural motions related to the matter, including a motion for a protective order, an opposition to the government's motion seeking permission to review privileged materials seized from detainees, and a motion for reconsideration of the court's order dismissing the case for lack of subject matter jurisdiction. I applied for and was granted Secret security clearance and reviewed classified documents related to this representation at a secure facility. The case was ultimately consolidated with other similar habeas actions and transferred to a different district court judge for coordination and management.

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6. *Council of the District of Columbia v. Washington Development Group*, No. 1998 CA 009875 (D.C. Super. Ct., 1998) (Mize, J.)

I co-defended a District of Columbia property developer and his development company in an action brought by the City Council of the District of Columbia to enjoin the planned build-out of an historic building that the Council had leased as part of a real-estate development deal. I drafted pleadings, including the defendants' opposition to the plaintiff's motion for a preliminary injunction, and prepared related affidavits. I managed discovery, including witness statements and deposition testimony, and deposed a D.C. Councilmember during the discovery period. The parties ultimately settled and the case was dismissed with prejudice.

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7. *Rattley-Lewis v. National Public Radio*, No. 1997 CA 006678 (D.C. Super. Ct., 1998) (Gardner, J.)

I was on a litigation team that defended National Public Radio in an action brought in the Superior Court of the District of Columbia by a former senior-level executive of the company who claimed discriminatory and retaliatory treatment in violation of the District of Columbia Human Rights Act. I assisted with managing fact and expert discovery. I also drafted the memorandum of law and supporting affidavits that were filed in support of defendant's motion for summary judgment. The case ultimately settled during trial.

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8. *United States v. McCants*, No. 04-3064, 434 F.3d 557 (D.C. Cir. 2006) (Randolph, Griffith, Edwards, JJ.)

I successfully represented an individual fraud defendant in an appeal in the United States Court of Appeals for the District of Columbia Circuit that challenged the district court's failure to make findings on contested factual issues at sentencing. I authored the brief for appellant and the reply brief and argued the case before a panel of judges on the D.C. Circuit. The judgment was reversed on the grounds that the district court's sentencing judgment failed to adhere to the requirements of the Federal Rules of Criminal Procedure and the case was remanded for resentencing.

Opposing counsel

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9. *Hall Street Associates LLC v. Mattel Inc.*, 552 U.S. 576 (2008) (Souter, J., wrote the opinion for the Court)

From 2007 to 2008, I was part of a litigation team that represented respondent Mattel in a Supreme Court case involving the section of the Federal Arbitration Act that grants expedited judicial review to confirm, vacate, or modify an arbitration award. I was responsible for reviewing the factual record related to the subject matter of the underlying arbitration, and I drafted parts of both the primary brief for respondent and two supplemental briefs on specified issues the Supreme Court ordered. I also assisted in the preparation of oral argument counsel. The Supreme Court ultimately agreed with Mattel's argument that the Act's grounds for vacatur and modification of arbitration awards are exclusive for parties seeking expedited review under the FAA, but remanded the case for a determination regarding whether the parties did, in fact, intend for the arbitration proceeding at issue to be governed by the FAA.

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10. *Salvini v. Ski Lifts, Inc.*, 147 Wash. App. 1005 (Oct. 20, 2008) (Lau, Appelwick, Cox, JJ.)

I assisted in the representation of a defendant ski-area operator in its appeal of a \$14 million personal injury judgment won by a plaintiff who was injured while ski jumping in the operator's terrain park. I drafted parts of the brief for appellant and the reply brief, which argued, *inter alia*, that the trial court had improperly admitted prejudicial evidence of prior accidents and had erred in instructing the jury regarding the operator's duty, inherent risk, and adequate warnings. The judgment was affirmed.

Co-counsel

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18. **Legal Activities:** Describe the most significant legal activities you have pursued, including significant litigation which did not progress to trial or legal matters that did not involve litigation. Describe fully the nature of your participation in these activities. List any client(s) or organization(s) for whom you performed lobbying activities and describe the lobbying activities you performed on behalf of such client(s) or organizations(s). (Note: As to any facts requested in this question, please omit any information protected by the attorney-client privilege.)

The most significant legal activities that I have pursued are my service as a United States Circuit Judge from 2021 to the present, a United States District Judge from 2013 to 2021, and my work at the United States Sentencing Commission, both as an Assistant Special Counsel on the staff from 2003 to 2005, and as Vice Chair and Commissioner from 2010 to 2014.

As a United States Circuit Judge, I am responsible for hearing appeals of final orders of the district court in both civil and criminal cases, as well as certain interlocutory orders that district courts issue. I am also responsible for resolving petitions for review of certain agency actions. My work involves considering motions, participating in panel arguments on the merits of appeals, conferring with other panel members on the matters

to which we are assigned, writing opinions, voting on petitions for rehearing and rehearing en banc, and providing comments to other judges regarding their draft decisions.

As a United States District Judge, I was responsible for resolving a wide range of disputes concerning criminal and civil matters that are assigned to me through the court's random case assignment system. My work involved hearing and considering motions (including requests for emergency relief), addressing discovery disputes, holding settlement conferences, managing a criminal case docket, writing opinions, and presiding over bench and jury trials. I also entered guilty pleas and imposed sentences on defendants who were convicted of criminal offenses.

As a Vice Chair and Commissioner of the United States Sentencing Commission, I worked with Commission staff to evaluate, draft, and enact proposed changes to the federal sentencing guidelines that federal district court judges use to impose sentences on defendants in federal court. I prepared and delivered speeches and presentations about the federal sentencing system for criminal justice conferences and sentencing-related meetings, and I received feedback from United States district judges, federal probation officers, and prosecutors and defense counsel regarding operation of the guidelines as applied. I also questioned witnesses at Commission hearings based on my review of submitted testimony, and analyzed data regarding operation of the guidelines system, including judicial guideline compliance and variance rates.

As an Assistant Special Counsel on the United States Sentencing Commission, my primary role was to draft specific legislative proposals for amending the Sentencing Guidelines Manual and to prepare drafts of the reports and statements that the Commission published in the Federal Register. I met regularly with other Commission staff members as a member of various policy development teams that evaluated potential guideline amendments related to crimes involving hazardous materials, unsolicited commercial e-mail, and controlled substances. I attended the Commission's public meetings and assisted in the preparation of materials for the Commissioners. I also evaluated case law developments and crafted a series of alternative guideline-sentencing proposals prior to, and in anticipation of, the Supreme Court's decision in *Booker v. United States*, 543 U.S. 220 (2005).

I have not performed lobbying activity on behalf of any client or organization, and I am not and have never been a registered lobbyist.

19. **Teaching:** What courses have you taught? For each course, state the title, the institution at which you taught the course, the years in which you taught the course, compensation received for courses taught since confirmation to the United States District Court for the District of Columbia, and describe briefly the subject matter of the course and the major topics taught. If you have a syllabus for each year or term the course was taught, provide four (4) copies to the committee

I have served as part of a team of instructors who teach a one-week Trial Advocacy Workshop at Harvard Law School. I taught this course during the Law School's Winter Terms in 2018 and 2019. Syllabi supplied. I did not receive any compensation for teaching this course.

I created and taught a Federal Sentencing Seminar at the George Washington University Law School in the Spring of 2011, 2012, and 2014. This course examines various aspects of federal sentencing policy and procedure. Syllabi supplied. I was paid \$1,765 for teaching this course in 2014.

20. **Deferred Income/ Future Benefits:** List the sources, amounts and dates of all anticipated receipts from deferred income arrangements, stock, options, uncompleted contracts and other future benefits which you expect to derive from previous business relationships, professional services, firm memberships, former employers, clients or customers. Describe the arrangements you have made to be compensated in the future for any financial or business interest.

I have no anticipated receipts or expected future benefits or compensation of any kind.

21. **Outside Commitments During Court Service:** Do you have any plans, commitments, or agreements to pursue outside employment, with or without compensation, during your service with the court? If so, explain.

If confirmed, I do not have any plans, commitments, or agreements to pursue outside employment.

22. **Sources of Income:** List sources and amounts of all income received during the calendar year preceding your nomination and for the current calendar year, including all salaries, fees, dividends, interest, gifts, rents, royalties, licensing fees, honoraria, and other items exceeding \$500 or more (if you prefer to do so, copies of the financial disclosure report, required by the Ethics in Government Act of 1978, may be substituted here).

When my nomination is formally submitted to the Senate, I will file my Financial Disclosure Report and will supplement this Questionnaire with a copy of that Report.

23. **Statement of Net Worth:** Please complete the attached financial net worth statement in detail (add schedules as called for).

See attached Net Worth Statement.

24. **Potential Conflicts of Interest:**

- a. Identify the family members or other persons, parties, categories of litigation, and financial arrangements that are likely to present potential conflicts-of-interest when you first assume the position to which you have been nominated. Explain how you would address any such conflict if it were to arise.

No family members or other persons, parties, categories of litigation or financial arrangements are likely to present potential conflicts of interest for me.

- b. Explain how you will resolve any potential conflict of interest, including the procedure you will follow in determining these areas of concern.

If confirmed, I would resolve any conflict of interest by looking to the Code of Conduct for United States Judges (although it is not formally binding on members of the Supreme Court of the United States); the Ethics Reform Act of 1989, 28 U.S.C. § 455; and any other relevant prescriptions. I would seek guidance from judicial ethics officials to structure my limited financial investments to minimize the potential for conflicts. And I would recuse myself from matters in which I participated while a judge on the district court and the court of appeals.

25. **Pro Bono Work:** An ethical consideration under Canon 2 of the American Bar Association's Code of Professional Responsibility calls for "every lawyer, regardless of professional prominence or professional work load, to find some time to participate in serving the disadvantaged." Describe what you have done to fulfill these responsibilities, listing specific instances and the amount of time devoted to each.

From 2005 to 2007, I served as an Assistant Federal Public Defender, and as such, 100% of my time was devoted to the disadvantaged. In addition, approximately 15 to 20% of the time that I spent at each of the general litigation firms that I have been affiliated with involved pro bono litigation work or services. As an example, I represented the American Bar Association in the filing of an amicus brief in a state supreme court case involving an indigent parent's right to counsel in child custody proceedings. I also successfully assisted in the preparation of an asylum petition for a pregnant juvenile who was a victim of sexual assault and illegal human trafficking, represented a civil rights organization in its evaluation of the effects and implications of high-stakes testing on the educational opportunities of students in low-income communities, and represented an indigent criminal defendant in filing appeal-related motions in the United States Court of Appeals for the Fourth Circuit.

26. **Selection Process:**

- a. Describe your experience in the entire judicial selection process, from beginning to end (including the circumstances which led to your nomination and any interviews in which you participated). List all interviews or communications you had with anyone in the Executive Office of the President, Justice Department, President-elect transition team, or presidential campaign. Additionally, list all interviews or communications you or an individual known to you to be acting on your behalf had regarding your nomination or your potential nomination by the current President with outside organizations or individuals at the behest of anyone in the Executive Office of the President, Justice Department, President-elect transition team, or presidential campaign. List all persons present, participating,

or otherwise involved in such interviews or communications. Do not include any contacts with Federal Bureau of Investigation personnel concerning your nomination.

On January 30, 2022, White House Counsel Dana Remus contacted me concerning my potential nomination to the Supreme Court to fill the anticipated vacancy that would arise from Justice Breyer's announced retirement. Since that date, I have been in contact with Dana Remus, White House Chief of Staff Ronald Klain, and officials from the White House Counsel's Office and the White House Office of Presidential Personnel regarding my potential nomination and the nominations process. On February 11, 2022, I met with the Vice President on Zoom concerning the nomination. On February 14, 2022, I met with President Biden and Ms. Remus at the White House concerning the nomination. On February 24, 2022, the President offered me the nomination, and I accepted, and he announced his intent to nominate me on February 25, 2022.

- b. Has anyone involved in the process of selecting you for this nomination (including, but not limited to anyone in the Executive Office of the President, the Justice Department, the President-elect transition team, presidential campaign, or the Senate and its staff) ever discussed with you any currently pending or specific case, legal issue, or question in a manner that could reasonably be interpreted as seeking any express or implied assurances concerning your position on such case, issue, or question? If so, explain fully. Identify each communication you had prior to the announcement of your nomination with anyone in the Executive Office of the President, the Justice Department, the President-elect transition team or presidential campaign, outside organization or individual (at the behest of anyone working in the Executive Office of the President, the Justice Department, President-elect transition, or presidential campaign), or the Senate or its staff referring or relating to your views on any case, issue, or subject that could come before the Supreme Court of the United States, state who was present or participated in such communication, and describe briefly what transpired.

No.

- c. Did you make any representations to any individuals or organizations as to how you might rule as a Justice, if confirmed? If you know of any such representations made by the White House or individuals acting on behalf of the White House, please describe them, and if any materials memorializing those communications are available to you, please provide four (4) copies.

No.

United States Senate
Committee on the Judiciary

Questionnaire for Judicial Nominees
Attachments to Question 12(a)

Ketanji Brown Jackson
Nominee to be Associate Justice
of the Supreme Court of the United States

Judging A Book: Jackson Reviews 'When Should Law Forgive?'

By **U.S. District Judge Ketanji Brown Jackson** (September 24, 2019, 4:41 PM EDT)

This article is part of an Expert Analysis series of book reviews from judges.

If law is the mechanism through which a just society resolves the inevitable conflicts that arise between individuals in a variety of contexts, Harvard Law School professor and former Dean Martha Minow's new book thoroughly explores one enduring means of conflict resolution that is far too often overlooked: forgiveness.

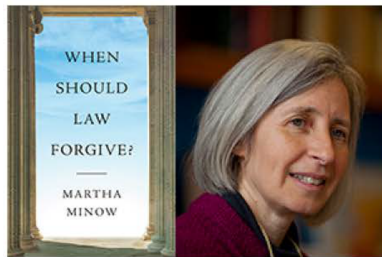
In "When Should Law Forgive?," Minow dabbles in legal theory, philosophy, history, sociology and psychology to ask insightful questions, such as "[w]hen can and should legal officials and institutions promote forgiveness between individuals?" and "[w]hen can law itself be forgiving?"

Minow's provocative juxtaposition of child soldiers with drug-dealing youths and established bankruptcy procedures with the treatment of student-loan debtors suggests that forgiveness is already currently employed in modern legal settings, but unevenly so.

And, while the book acknowledges that forgiveness and the law inhabit different domains — "forgiveness operates in the interpersonal realm; the legal system depends on impersonal processes" — it also effectively highlights numerous examples in which legal structures presently provide absolution for some individuals in some circumstances and not for similarly situated others. Along the way, Minow's readers are exposed to a refreshingly robust vision of justice that transcends myopic perspectives of wrongdoing and punishment.



Judge Ketanji Brown Jackson
 (photo credit: Jason Putsche
 Photography)



"When Should Law Forgive?," by Martha Minow, W. W. Norton & Company, 256 pages.

One of the most interesting aspects of Minow's treatment of the subject of forgiveness is the framing. From the outset, Minow makes quite clear what forgiveness is and what it is not, and in so doing, skillfully introduces readers to many paradoxes that appear throughout her somewhat ambivalent analysis of the benefits and drawbacks of forgiveness under law. As Minow sees it, forgiveness is "a

conscious, deliberate decision to forgo rightful grounds for grievance against those who have committed a wrong or harm."

The rightfulness of the claim of wrongdoing is key, i.e., forgiveness is properly provided only when there is an acknowledgment of wrongful behavior. But, of course, acknowledgments of wrongdoing often stir up calls for vengeance and punitive consequences, which ultimately makes forgiveness far less likely. Similarly, Minow notes that forgiveness "creates the opportunity for moral self-improvement" precisely because wrongdoers do not get what they deserve; however, such forbearance (the decision not to give wrongdoers what they deserve) undercuts deterrence, which can pave the way for more wrongful behavior.

Thus, Minow seems acutely aware that, quite paradoxically, forgiveness in law creates opportunities for both moral self-improvement and moral degradation.

While exploring these and other conundrums, Minow takes readers across the globe and through the ages. She explains that "[f]orgiveness, tolerance, mercy, and kindness figure prominently in philosophical and religious traditions, including humanism, Christianity, Judaism, Islam, Buddhism, Baha'i, Hinduism and Confucianism," as well as "in ancient practices of native peoples in Hawai'i, Canada, New Zealand, Sierra Leone and elsewhere."

Debt-forgiveness was apparently featured in Hammurabi's Code, and places as distinct and as far flung as 14th century England, 20th century Cambodia and 21st century Tajikistan have, at times, adopted forms of amnesty rooted in the divine right of kings to counter the rigidity of law. Minow also spots the relinquishment of justified grievances in popular cross-cultural touchstones, such as Victor Hugo's mid-19th century novel *"Les Misérables"* and its 1980 musical adaption.

South Africa's Truth and Reconciliation Commission, or TRC, is one prominent example of forgiveness codified by law that Minow draws upon repeatedly throughout the book. According to Minow, "[o]ver the three years of its operation, the TRC invited victims" of wrongs perpetrated during the apartheid era "to tell their stories" and also "invited perpetrators to apply for [conditional] amnesty." The attendant hearings received mixed reviews, but Minow touts the public reconciliation process that President Nelson Mandela and Archbishop Desmond Tutu sponsored as "offering inspiring narratives and images to communities thirsty for hope."

The book contains other significant examples of legally endorsed forgiveness mechanisms that countries have occasionally adopted to end cycles of revenge and violence, such as the peace agreement that the Colombian government recently negotiated with the guerrilla movement known as the FARC.

But Minow also thoughtfully examines at least one international circumstance in which forgiveness could be, but has not been, employed to generate hope for humanity: the treatment of governmental debt by foreign creditors. When countries are struggling to repay debts that far outpace their national economies, why is it, Minow asks, that "debt forgiveness is often unavailable for governmental debts," which are treated like "consumer and student debts" and are not made eligible for the restructuring plans that some countries provide for private debtors in bankruptcy?

Closer to home, Minow focuses on standard bankruptcy procedures as one accepted means of forgiveness under law, and she helpfully observes that "bankruptcy law acknowledges that debt has a societal dimension beyond the lender-borrower relationship" and "looks to the future of the broader community, not just at a specific past problem."

Minow characterizes executive pardons and clemency proceedings, the immigration amnesty orders of the Reagan and Obama administrations, and the expungement and/or sealing of criminal records as other prime examples of forgiveness that has been incorporated into the laws of the United States.

By contrast, Minow ably asserts that, somehow, forgiveness has not been afforded to indebted consumers, students with loans and most criminal defendants, even though the choices and circumstances of many youths on rough inner-city streets resemble those of the child soldiers who receive conditional amnesty in the postwar aftermath of modern armed conflicts.

Minow points to other contrasting examples from different contexts, and discusses them in rapid succession, leading readers not only to compare the different legal structures and consequences, but also to think both about the appropriateness of forgiveness where it has been employed and about the policy choices that underlie the decision not to forgive, as a matter of law.

To be sure, Minow does not suggest that the law that is applied to child soldiers versus gang members, or private debtors versus indebted governments, was developed intentionally or linearly, or with these similar circumstances in mind. And that is precisely why the perspective that Minow's book offers is so valuable. Her queries force readers to grapple with the difficult and seemingly unanswerable questions of who is worthy of forgiveness, for what conduct and under which circumstances should the law provide it?

Minow's book is also quite candid about the limits of the forgiveness paradigm that she appears to champion. Beyond the philosophical hurdles, practical challenges abound, and she identifies them. Pardons might offer the cleansing benefit of second chances and a fresh start for criminal defendants, for example, but how does a society that provides forgiveness in this fashion prevent the corrupting influence of quid-pro-quo exchanges or self-dealing, and is the risk of encouraging subsequent wrongdoing too great?

Minow also homes in on the persistent problem of a legal scheme that puts pressure on victims who are not ready to forgive. To her credit, Minow recognizes that vengeance is an innately human desire, and that many people who have been wrongfully harmed find it extraordinarily difficult to set those feelings aside. In this regard, she insightfully notes that "[f]or some, choosing not to forgive is a source of strength and integrity." Still, the book is replete with examples of victims who "express their faith and reclaim their dignity and power over the burdens of grief and victimhood" through forgiveness.

In one such example, Minow discusses the varied victim responses to the horrific massacre of nine black parishioners during a prayer meeting in a church in Charleston, South Carolina, in 2015. Some family members were reluctant to express forgiveness for the unrepentant white supremacist who had murdered their loved ones, while others spoke to him directly, saying that "God forgives you" so "I forgive you," and "[w]e have no room for hating, so we have to forgive."

Minow appears to conclude that "[m]aking legal room for individuals to forgive those who have harmed them should not mean pressuring them to forgive," and that, on balance, modern legal systems should "create space for wronged individuals to consider whether and when to forgive," by incorporating restorative justice mechanisms and other forgiveness options, and by encouraging personal absolution, to coincide with punishment, as another lever for influencing human behavior.

Minow's effort to examine forgiveness under law in all of its various forms is ambitious and generally successful, although, at times, the book has the stream of consciousness quality of a thought piece, rather than a carefully crafted, well-organized exposition. Similarly, Minow presents and then reiterates many of the same examples to illustrate different points in different contexts (South Africa's experience is one that is relentlessly re-referenced), and at each mention, the primary plot points are reintroduced anew, without any acknowledgement that the reader has heard this one before.

Thus, it sometimes feels like just at a moment of full engagement, just when the book's analysis is starting to gather steam, the narrative sputters and gets bogged down with repetition — like a catchy song that persistently returns to a rhyming refrain — and when this happens, it takes effort to find one's place again.

Ultimately, however, Minow's readers will be glad they stayed the course. To read this book from beginning to end is to discover the answer to her tome's title question; in Minow's view, the law should offer opportunities for forgiveness whenever the wronged individual or group feels the need to relinquish their pain and/or whenever the broader societal goal of complete restoration outweighs the short-term benefit of imposing and maintaining isolating sanctions.

Consequently, Minow's statements and examples consistently emphasize that "[f]orgiveness encourages people to take the perspectives of others, to understand the larger pressures and structures affecting others' actions, and to prioritize creating a shared future over holding on to

resentments from the past.” And Minow demonstrates that such a release permits transformational healing for victims. As one reflector, Ishmael Beah, puts it: “you forgive and forget so you can transform your experiences, not necessarily forget them but transform them, so that they don’t haunt you or handicap you or kill you.”

Another, Jodi Picoult, memorably remarks that “[f]orgiving isn’t something you do for someone else. It’s something you do for yourself. It’s saying, ‘You’re not important enough to have a stranglehold on me.’ It’s saying, ‘You don’t get to trap me in the past. I am worthy of a future.’”

To Minow, the benefits of forgiveness appear to extend well beyond the “physical, emotional, and spiritual well-being” of the person who forgives; indeed, they radiate outward, to the forgiver’s community and to society at large. And, in a closing passage, she eloquently summarizes these broader hopes and aims: “Making more opportunities for forgiveness within law might help law grow toward justice; it might also nudge individuals and societies toward the respect and generosity expressed through apology, restitution, and forbearance from law’s most stringent demands.” Accordingly, Minow strongly urges “designers and agents of the law” to “consider how and when law can usefully express forgiveness and let go of grievances.”

“When Should Law Forgive?” thus reminds us that “[l]aw, in one way or another, affects emotions,” and that it can “support forgiveness as much as it can support revenge.” Minow suggests that systems of justice that are truly future-facing and that seek to help their members live life freely, released from the bondage of past hurts, offer means of providing forgiveness.

Thus, from a bird’s-eye view, the book’s real revelation is that forgiveness in law is not simply emblematic of a society’s treatment of wrongdoers; instead, it reflects a society’s own broader vision of itself. And in the end, Minow teaches what many who have suffered wrongfully eventually come to learn: that for one’s own sake, one must let go of the past in order to be able to turn fully and embrace the future.

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“Carrot and Stick” Philosophy: The History of the Organizational Sentencing Guidelines and the Emergence of Effective Compliance and Ethics Programs

By Ketanji Brown Jackson and Kathleen Cooper Grilli¹

On November 1, 1991, the Federal Sentencing Guidelines for Organizations (found in Chapter Eight of the *Guidelines Manual*) went into effect. The United States Sentencing Commission (hereinafter referred to as the Commission) promulgated the original set of organizational guidelines after several years of study, and the organizational guidelines have been amended comprehensively only twice in their 20-year history.²

This paper traces the historical development of the organizational guidelines, with particular emphasis on the development of organizational sentencing policy relating to effective compliance and ethics programs. The “carrot and stick” philosophy that undergirds the organizational guidelines rests on the realization that corporations can, and should, be incentivized to self-police, and with respect to compliance and ethics, the organizational guidelines have ushered in an unprecedented era of corporate responsibility. Moreover, over time, compliance programs have had an impact that extends well beyond the criminal justice arena. A fundamental understanding of the historical development of the organizational guidelines not only provides a foundation for the consideration of future changes to those guidelines, it also aids organizations in the adoption of standards for effective compliance and ethics programs.

Part I of this paper provides a brief discussion of the events leading to the creation of the Commission and its statutory mandates from Congress. Parts II, III, and IV document three distinct stages in the Commission’s efforts to promulgate the initial set of organizational guidelines. Part V discusses the events leading to the comprehensive guideline changes made to Chapter Eight in 2004, including the elevation of the criteria for an effective compliance and ethics program from the commentary into a separate guideline. Part VI discusses the next set of comprehensive changes made in 2010. Finally, Part VII summarizes the organizational guidelines’ impact outside the criminal justice arena.

¹ Ketanji Brown Jackson, Esq. is the Vice Chair of the United States Sentencing Commission (hereinafter referred to as the Commission) and Kathleen Cooper Grilli, Esq. is the Deputy General Counsel. The views expressed herein are the authors’ own and do not necessarily represent the official position of the Commission. The authors gratefully acknowledge the assistance of Linda Baltrusch, James Strawley and Tobias Dorsey. Any Commission materials cited herein are available to the public according to the terms of the Commission’s public access policy. See http://www.ussc.gov/Publications/19891213_Public_Access_Documents_Data.pdf.

² See USSG, App. C, amend. 673 (eff. Nov. 1, 2004); amend. 744 (eff. Nov. 1, 2010).

I. Enactment of the Sentencing Reform Act and Creation of the Commission

The Commission authored the original organizational guidelines amidst calls for general sentencing reform and in the wake of significant statutory changes regarding the manner in which federal judges sentence defendants in criminal cases. Prior to the Sentencing Reform Act of 1984,³ federal district court judges possessed almost unlimited authority to fashion a sentence within a broad statutorily prescribed range. In each case, sentencing was limited only by the statutory minimum and maximum, and each individual district court judge exercised discretion to determine “the various goals of sentencing, the relevant aggravating and mitigating circumstances, and the way in which these factors would be combined in determining a specific sentence.”⁴ Because each judge was “left to apply his own notions of the purposes of sentencing,” sentences for similar criminal conduct varied dramatically, and it was widely believed that the federal sentencing system exhibited “an unjustifiably wide range of sentences [for] offenders convicted of similar crimes.”⁵

The Sentencing Reform Act of 1984 (hereinafter referred to as the Act), which was the culmination of lengthy bipartisan efforts, sought to eliminate unwarranted disparity in sentencing and to address the inequalities that unregulated sentencing had created.⁶ To this end, as part of the Act, Congress created the Commission as an independent agency within the judicial branch of the federal government and tasked it with the responsibility of developing federal sentencing policy.⁷ By statute, the Commission is comprised of seven voting members (including the Chair) that the President appoints “by and with the advice and consent of the Senate.”⁸ The Act provides that “[a]t least three of the [Commission’s] members shall be Federal judges” and that no more than four members of the Commission can be members of

³ Chapter II of the *Comprehensive Crime Control Act of 1984*, Pub. L. 98–473, Title II (Oct. 12, 1984).

⁴ U.S. Sent’g Comm’n, *The Federal Sentencing Guidelines: A Report on the Operation of the Guidelines System and Short-Term Impacts on Disparity in Sentencing, Use of Incarceration, and Prosecutorial Discretion and Plea Bargaining*, at 9 (1991).

⁵ S. Rep. NO. 97–307, at 955 (1981); *See also* S. Rep. NO. 97–307, at 956 (1981) (“glaring disparities . . . can be traced directly to the unfettered discretion the law confers on those judges and parole authorities [that implement] the sentence); H.R. Rep. NO. 98–1017, at 34 (1984) (“The absence of Congressional guidance to the judiciary has all but guaranteed that . . . similarly situated offenders . . . will receive different sentences.”).

⁶ *See* S. Rep. NO. 97–307 (1981); H.R. Rep. NO. 98–1017 (1984); 28 U.S.C. §§ 991(b)(1)(B), 994(f).

⁷ The purposes of sentencing were set forth in the Act and served as the Commission’s north star. Congress expressly determined that federal sentencing should be tailored:

(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense; (B) to afford adequate deterrence to criminal conduct; (C) to protect the public from further crimes of the defendant; and (D) to provide the defendant with needed educational or vocational training, medical care or other correctional treatment in the most effective manner. 18 U.S.C. § 3553(a)(2).

⁸ *See* 28 U.S.C. § 991(a).

the same political party.⁹ Moreover, the Attorney General (or his designee)¹⁰ and the Chair of the United States Parole Commission¹¹ are designated as *ex officio* non-voting members of the Commission.

In addition to establishing the Commission itself, the Act directed the Commission to promulgate guidelines that federal judges would use for selecting sentences within the prescribed statutory range.¹² The statutory purposes of the Commission, among others, are to

establish sentencing policies and practices for the Federal criminal justice system that –

- (A) assure the meeting of the purposes of sentencing as set forth in section 3553(a)(2) of title 18, United States Code;
- (B) provide certainty and fairness in meeting the purposes of sentencing, avoiding unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar criminal conduct while maintaining sufficient flexibility to permit individualized sentences when warranted by mitigating or aggravating factors not taken into account in the establishment of general sentencing practices; and
- (C) reflect, to the extent practicable, advancement in knowledge of human behavior as it relates to the criminal justice process.¹³

Although enactment of the Act appears to have been largely motivated by concerns about disparities in the sentencing of *individual* defendants, the Act also made changes that impacted the sentencing of organizations.¹⁴ The Act specified that an organization may be sentenced to a term of probation or a fine, or a combination of these sanctions,¹⁵ and required that “[a]t least one of such sentences must be imposed.”¹⁶ Additionally, the Act made clear that an organization could “be made subject to an order of criminal forfeiture, an order of notice to victims, or an order of restitution.”¹⁷

⁹ *See id.*

¹⁰ *See id.*

¹¹ *See* Pub. L. 98-473, § 235(5) (Oct. 12, 1984), as amended by Pub. L. 112-44, § 2 (Oct. 21, 2011).

¹² *See* 28 U.S.C. §§ 991, 994, and 995(a)(1).

¹³ *See* 28 U.S.C. § 991(b)(1).

¹⁴ For purposes of Title 18, United States Code, the term “organization” means “a person other than an individual.” *See* 18 U.S.C. § 18.

¹⁵ 18 U.S.C. § 3551(c).

¹⁶ *See* S. Rep. No. 98-225, at 68 (1984).

¹⁷ *See id.*; 18 U.S.C. §§ 3551(c), 3554, 3555, 3556.

The Senate report accompanying the Act explained Congress's intent regarding the sentencing of organizations. It stated that "[c]urrent law . . . rarely distinguishes between individuals and organizations for sentencing purposes; thus, present law fails to recognize the usual differences in the financial resources of these two categories of defendants and fails to take into account the greater financial harm to victims and the greater financial gain to the criminal that characterizes offenses typically perpetrated by organizations."¹⁸ The report also noted concerns that white collar criminals were being sentenced to minimal fines, creating "the impression that certain offenses are punishable only by a small fine that can be written off as a cost of doing business."¹⁹

In its statutory direction to the Commission, Congress placed no limitations on the Commission's authority to act in the arena of organizational sentencing. Indeed, Congress expected that the Commission would "include in the guidelines any matters it considers pertinent to satisfy the purposes of sentencing."²⁰

II. The Commission's Early Efforts to Develop Organizational Sentencing Policy

1986 Public Hearing on Organizational Sanctions

Although the primary focus of the Commission's early work was the development of guidelines to be used in sentencing individual offenders, the Commission nevertheless included consideration of appropriate organizational sanctions in its deliberations. On June 10, 1986, one year after the appointment of the first members of the Commission, the Commission held a public hearing devoted exclusively to consideration of organizational sanctions.²¹ Witnesses included representatives from the Department of Justice and the American Bar Association, corporate defense attorneys specializing in tax and antitrust offenses, and a law professor.²² The institution of compliance programs was not the subject of this hearing. Rather, the testimony at the hearing "focus[ed] on the sanctions available and appropriate for the corporation, business, union or other organization convicted of a federal crime."²³ Notably, the witnesses recognized the significance of "tone from the top," and many specifically asserted that criminal misconduct manifested itself in organizations where "[the

¹⁸ See S. Rep. NO. 98-225, at 66-7 (1984).

¹⁹ See *id.* at 76.

²⁰ See *id.* at 169.

²¹ See Notice of Hearing, 51 Fed. Reg. 19918 (June 3, 1986).

²² For a complete list of the witnesses, see U.S. Sent'g Comm'n, *Supplementary Report On Sentencing Guidelines For Organizations*, App. B (Aug. 1991).

²³ 51 Fed. Reg. 19918. A transcript of the hearing is on file with the Commission.

upper management] created an atmosphere in which they encouraged this type of behavior, and they absolutely looked the other way when it was going on.”²⁴

Witnesses raised the subject of compliance programs only in the context of the role of probation as an organizational sanction. Several witnesses mentioned the institution of compliance programs as a condition of probation for an organization convicted of an antitrust violation.²⁵ Another expressed his “tremendous respect” for antitrust compliance programs and the belief that such programs have an impact on deterring future violations.²⁶ No one yet expressed the view that compliance programs should be adopted as a prospective means of preventing criminal misconduct by organizations. Nor did anyone identify the presence of a pre-existing compliance program as a factor to consider in mitigation of punishment.

Following the June 1986 hearing, the Commission continued to receive and consider public comment about the guidelines generally, including organizational sanctions. The Commission also established advisory and working groups to assist in the development of sentencing guidelines.²⁷ The Commission invited representatives of each group to participate in working sessions with commissioners and staff to examine early drafts of guidelines and air many of the important issues facing the Commission. In addition, the Commission received written comments and critiques from the members of these groups.²⁸

The Commission obtained feedback about the guidelines as a whole—including organizational sanctions—from other sources as well. The Commission solicited information from federal agencies about the specific nature and number of offenses occurring within their areas of responsibility.²⁹ Commissioners and staff traveled across the country to obtain information relevant to development of the guidelines and also to give presentations regarding the efforts

²⁴ See Testimony of Stephen S. Trott, Assistant Attorney General, Criminal Division, Department of Justice, to the Commission, at 62 (June 10, 1986) (on behalf of the U.S. Department of Justice).

²⁵ See, e.g., Testimony of William M. Brodsky, American Bar Association, to the Commission, at 30 (June 10, 1986); Testimony of Mark Crane, Corporate Defense Attorney, Antitrust, to the Commission, at 77 (June 10, 1986).

²⁶ See Testimony of John C. Coffee, Jr., Columbia University School of Law, to the Commission, at 90 (June 10, 1986). Professor Coffee did not offer any details about the elements of an antitrust compliance program.

²⁷ These groups included United States Attorneys, state district attorneys, federal probation officers, defense attorneys, researchers, and federal judges. See *Preliminary Draft of Sentencing Guidelines for United States Courts*, 51 Fed. Reg. 35080, 35082 (Oct. 1, 1986). The work of these advisory groups was not limited to organizational sanctions. For a discussion of those advisory groups focused exclusively on organizational sanctions, see U.S. Sent’g Comm’n, *Supplementary Report on Sentencing Guidelines for Organizations*, at 2 (Aug. 1991).

²⁸ See 51 Fed. Reg. at 35082.

²⁹ The Department of Justice, the Department of the Treasury, the Departments of Defense, Education, Health and Human Services, Interior, and Labor, the Federal Deposit Insurance Corporation, the Postal Service, and the Securities and Exchange Commission provided information to the Commission. *Id.* at 35083.

of the Commission.³⁰ For example, commission representatives met with United States probation officers at ten regional seminars and district-wide staff meetings. Through these meetings, the Commission received input and advice from officers in the majority of federal judicial districts.³¹

The Commission also conducted regular meetings about guideline development, which were open to the public. "Although most of the work involved in drafting the preliminary guidelines necessarily was accomplished in informal working groups, the Commission . . . used its meetings to set an overall agenda and direction for the development of the guidelines, as well as to discuss, revise, and approve working group drafts."³² The Commission established a research program to assist in the development of the guidelines, including organizational sanctions, and the research staff collected detailed information on past sentencing and correctional practices and conducted empirical research. In addition, the research staff reviewed criminal justice research and advised the Commission about the application of scientific theory and knowledge to sentencing practices.³³

Commission staff also visited a number of states and communities in which a variety of sentencing options other than imprisonment were being used. The Commission studied the fine collection and community service programs of a number of state probation departments. Moreover, "[i]n its efforts to establish reasonable and collectable fines and to determine an offender's likelihood and ability to pay fines, Commission staff met with officials of several banking and financial institutions."³⁴

1986 Release of the Preliminary Draft

On October 1, 1986, the Commission published in the Federal Register the *Preliminary Draft of the Sentencing Guidelines*.³⁵ In the *Preliminary Draft*, which contained guidelines for the sentencing

³⁰ *Id.*

³¹ *Id.*

³² *Id.* at 35082-83.

³³ *Id.* at 35083.

³⁴ *Id.*

³⁵ *Id.* at 35080. The draft presented "an approach currently being considered by the U.S. Sentencing Commission in developing guidelines and policy statements for use by the federal courts in determining the sentences to be imposed in criminal cases." *Id.* The Commission made clear that "[t]he preliminary draft published for public comment seeks to accomplish several goals. The first is to focus public attention on a proposed format, a possible structure and suggested sentencing ranges. The format, structure, and suggested terms of imprisonment will all be reconsidered by the Commission before the final draft is written in light of further deliberation, continued empirical research, and the receipt of written and oral comment."

of individual defendants, the Commission specifically requested “comment on the appropriate sentencing of organizational offenders.” The Commission identified for public comment “key questions it has yet to resolve in this area.” The first was the “appropriate role of fines as organizational sanctions.” The Commission noted the competing concerns raised by two of the statutory purposes of sentencing: just punishment and deterrence.³⁶ Just punishment concerns might compel imposition of a fine based on a percentage of the organization’s wealth or income, thereby possibly leading to different fine amounts for organizations of differing sizes and income who committed similar offenses. By contrast, deterrence concerns might result in a fine being calculated based upon the injury resulting from the criminal offense and the difficulty in discovering the crime. The Commission sought public comments on “whether its approach to fines should emphasize the organization’s culpability and ability to pay, or the harmfulness of its conduct and the likelihood of detection.”³⁷ The Commission also asked for the public to comment on how the “size of an organization” should be considered in sentencing.³⁸

The second key question raised in the Commission’s early deliberations about organizational sanctions related to the proper use of a term of probation as part of an organizational sentence. The Commission sought public input on the circumstances justifying the use of a term of probation in lieu of a fine and those justifying imposition of both types of sanctions. The Commission also identified the mandatory and discretionary conditions of probation authorized by statute,³⁹ and it sought comment about the types of probation conditions that might be imposed on an organization and the circumstances justifying their imposition. The early list of possible conditions of probation did not specifically include development of a compliance program; rather, the identified conditions included “the use of internal audits and disciplinary actions; the appointment of outside directors or supervisors; recommendations for

“The publication also highlights a series of difficult policy issues that remain unresolved. The Commission underscores these policy issues for public comment because their resolution will determine, to a great extent, the final guidelines.” *Id.* at 35081.

³⁶ The Commission grappled with the “differing perceptions of the purposes of criminal punishment” as it drafted both the individual and organizational guidelines. See U.S. Sent’g Comm’n, *Guidelines Manual*, Ch.1, Pt.A, intro. comment. (Nov. 2011). The Commission ultimately resolved the philosophical dilemma by “dr[awing] especially strong guidance” from the statutory purposes of sentencing set out in 18 U.S.C. § 3553. U.S. Sent’g Comm’n, *Supplementary Report on Sentencing Guidelines for Organizations*, at 5 (Aug. 1991).

³⁷ 51 Fed. Reg. at 35128.

³⁸ That term is used in 18 U.S.C. § 3572(a)(8).

³⁹ The mandatory conditions of probation that court must impose on an organizational offender are: (1) the organization must not commit another federal, state, or local crime while on probation; and (2) the organization must either pay a fine, make restitution, or perform community service. See 18 U.S.C. § 3563(a). The only mandatory condition imposed upon probationers convicted of a misdemeanor or an infraction is the requirement that they commit no further crimes while on probation. Discretionary conditions of probation are listed in 18 U.S.C. § 3563(b).

debarment or ineligibility for federal contracts, grants, or subsidies; charitable contributions; community service; and publicity about the organization's misdeeds and subsequent corrective action."⁴⁰

The *Preliminary Draft* then laid out two possible approaches to the development of organizational sanctions based on the just punishment and deterrence philosophies. The just punishment approach emphasized an organization's culpability⁴¹ and its ability to pay a fine, while the deterrence approach focused on the harmfulness of an organization's conduct and the likelihood of detection of the crime. Although neither approach specifically identified the existence of a compliance program as a possible mitigating factor to be considered in fashioning punishment, each seemed to recognize that steps taken by an organization in response to a criminal offense might lead to mitigation of punishment. For example, the just punishment approach provided that adjustments to the established offense value could be made if "the organization took steps to discipline responsible employees prior to indictment."⁴² The deterrence approach also permitted for the lowering of any applicable fine if "the organization notified authorities immediately upon learning of the crime," and if "the responsible employees had been identified and punished."⁴³

The complexity of the subject matter and tight deadlines imposed by the Act⁴⁴ led the Commission to decide "in 1986 to defer the drafting of organizational guidelines for offenses . . . until after it had developed and implemented the first iteration of guidelines for individual defendants."⁴⁵ Although the public discussion of organizational sanctions ceased until 1988, the Commission continued to work behind the scenes on the issue, by "conducting empirical research and analysis on organizational sentencing practices."⁴⁶

⁴⁰ 51 Fed. Reg. at 35128-29.

⁴¹ Culpability would be measured by factors, such as "whether the crime resulted from a conscious plan of top management or by the independent actions of lower echelon employees or whether the organization took steps to discipline responsible employees prior to indictment." *Id.* at 35129.

⁴² *Id.* at 35128.

⁴³ *Id.* at 35129.

⁴⁴ The Commission was required to deliver the first set of guidelines for individual defendants to Congress by April, 1987. *See* Pub. L. 98-473, § 235 (Oct. 12, 1984), *as amended by* Pub. L. 99-217 (Dec. 26, 1985) ("[T]he United States Sentencing Commission shall submit the initial sentencing guidelines promulgated under section 994(a)(1) of title 28 to the Congress within 30 months of the [date of enactment of this Act].").

⁴⁵ U.S. Sent'g Comm'n, *Supplementary Report on Sentencing Guidelines for Organizations*, at 1 (Aug. 1991). The one exception was offenses involving antitrust violations. Section 2R1.1 of the initial guidelines included a special instruction for computing fines for organizations. *See* USSG §2R1.1 (Nov. 1987) ("The fine range for an organization is from 20 to 50 percent of the volume of commerce, but not less than \$100,000.').

⁴⁶ U.S. Sent'g Comm'n, *Supplementary Report on Sentencing Guidelines for Organizations*, at 1 (Aug. 1991). Notably, when conducting its early research, the Commission considered the existence of a compliance program to be a relevant factor in evaluating organizational sanctions, but it classified a compliance program as effective based on only two

III. The Commission's Renewed Focus on Organizational Sentencing Policy

On April 13, 1987, the Commission submitted the initial Sentencing Guidelines and Policy Statements for individual defendants to Congress.⁴⁷ In early 1988, the Commission once again turned its attention to corporate sanctions. The Commission “generally agreed that the staff should collect data and report on areas of difficulty,” and that those reports “should include public comment, actual cases and background law.”⁴⁸ The Commission directed the staff not to present revised guideline proposals “until an adequate amount of information has been collected,”⁴⁹ and in the following months, the Commission decided to devote additional time to the consideration of the theories and principles underlying a staff draft proposal. The Commission ultimately decided to release the proposals regarding organizational sanctions to the public and to set hearings on the proposals. Thereafter, Commission staff continued developing a staff working paper on sentencing policy for organizations, a report on current organizational sentencing practices, and a simplified proposal for organizational guidelines. In addition, one commissioner was working to develop an alternative proposal for probation, with the assistance of a law professor with an expertise in corporate governance.⁵⁰

Public Release of Discussion Materials on Organizational Sanctions

The Commission continued its consideration of an internal working draft of guidelines for organizational defendants in the summer of 1988.⁵¹ The Commission also debated “the appropriate length of the guidelines for organizational defendants.”⁵² In July 1988, the Commission publicly released the *Discussion Materials on Organizational Sanctions* “to encourage public analysis and comment on the development of sentencing standards for organizations convicted of federal crimes.”⁵³ The Commission explained that it had not yet

criteria: if “(1) high-level management was not involved in the offense; and 2) the organization did not obstruction justice during the investigation.” *Id.* at D-7.

⁴⁷ See U.S. Sent’g Comm’n, *Supplementary Report on the Initial Sentencing Guidelines and Policy Statements*, at i (June 18, 1987).

⁴⁸ See U.S. Sent’g Comm’n, Public Meeting Minutes (Jan. 5, 1988) (on file with the Commission).

⁴⁹ *Id.*

⁵⁰ See U.S. Sent’g Comm’n, Public Meeting Minutes (May 19, 1988) (on file with the Commission).

⁵¹ See U.S. Sent’g Comm’n, Public Meeting Minutes (June 13, 1988) (on file with the Commission) (reflecting the Commission’s agreement to review the staff’s newest draft and make comments and suggestions thereon).

⁵² *Id.*

⁵³ See Introductory Letter from the Commission, U.S. Sent’g Comm’n, *Discussion Materials on Organizational Sanctions* (July 1988). See also Notice of Public Hearings on Organizational Sanctions and Request for Public Comment on Discussion Materials, 53 Fed. Reg. 32815 (Aug. 26, 1988). Working groups of scholars and experts from various government agencies helped shape these materials. See U.S. Sent’g Comm’n, *Supplementary Report on Sentencing Guidelines for Organizations*, at 2 (Aug. 1991).

had a detailed discussion of any particular approach to the sentencing of organizations, including those suggested by the materials, nor had it arrived at any agreement upon a particular approach. Rather, the Commission intended to “provide a vehicle for stimulating the broadest range of public input” with the release of these materials.⁵⁴ The Commission noted that its work had “benefitted greatly from extensive public input” up to that point, and it “look[ed] forward to a continuation of that tradition as the Commission move[d] ahead with its deliberations on the important subject of organizational sanctions.”⁵⁵ The discussion materials included a discussion draft of sentencing guidelines and policy statements for organizations, a draft proposal on standards for organizational probation, a preliminary report to the Commission on sentencing of organizations in the federal courts from 1984-1987, and a Commission staff working paper on criminal sentencing policy for organizations.

Approaches to Organizational Sentences Set Forth in the Discussion Materials on Organizational Sanctions

The discussion draft of sentencing guidelines and policy statements for organizations computed applicable fines based upon the “offense loss” (or total harm) caused by the offense multiplied by the “offense multiple,” which was intended to approximate the “difficulty of detecting and punishing the offender.”⁵⁶ Although this approach did not identify the existence of a compliance program as a mitigating factor to reduce the monetary sanction, the “reasonable, good faith efforts by the organization’s management to prevent an occurrence of the type of offense involved” was an offense characteristic that would decrease the “offense multiple.”⁵⁷

Unlike the Preliminary Draft of the Guidelines released in 1986, the discussion draft included a compliance plan as a condition of probation. Development of a compliance plan was a required condition of probation for certain felony offenses if “the senior management of the organization participated in or encouraged the offenses,” and “the organization or its senior management had a criminal history of one or more felony convictions of the same or similar type” and “the organization was unlikely to avoid a recurrence of the criminal conduct despite imposition of a fine.”⁵⁸ In such an instance, the organization would be required “to develop and submit for approval by the court a plan for avoiding a recurrence of the type of felony offense or offenses of which it was convicted in the instant case or appearing in the criminal

⁵⁴ See Introductory Letter from the Commission, U.S. Sent’g Comm’n, *Discussion Materials on Organizational Sanctions* (July 1988).

⁵⁵ *Id.*

⁵⁶ See “Discussion Draft of Sentencing Guidelines and Policy Statements for Organizations,” U.S. Sent’g Comm’n, *Discussion Materials on Organizational Sanctions*, Pt. I, at 8.2 (July 1988).

⁵⁷ *Id.* at 8.27.

⁵⁸ *Id.* at 8.43, 8.46.

history of the organization or its senior management.”⁵⁹ Thus, to a limited extent, this discussion draft recognized compliance programs as a possible measure to prevent additional criminal misconduct by organizations. However, the draft also suggested that such preventative probation “must be approached with caution” and that the court should determine that “the preventative benefits of the sentence outweigh the obvious costs of judicial oversight of private business operations.”⁶⁰

The draft proposal on standards for organizational probation suggested that probation should be used “to minimize the prospect of a repetition of the same or similar criminal behavior.”⁶¹ In advocating for this role for probation, the drafters recognized that the organization, rather than the court, would be better positioned to identify the necessary internal controls to prevent criminal behavior. They explained that:

The central aim of these guidelines is to improve the corporation’s own monitoring controls and to increase the probability that internal warning systems will detect future criminal behavior. Voluntary compliance is encouraged, and it is anticipated that the corporation will normally take a leading role in proposing the probation conditions and internal controls that should be imposed.⁶²

This draft proposal authorized imposition of a term of probation in several instances, including where the “management policies or practices of the organization, including any inadequacies in its internal controls, encouraged, facilitated, or otherwise substantially contributed to the criminal behavior or delayed its detection, and such policies or practices have not been corrected in a manner that makes repetition of the same or similar criminal behavior highly unlikely.”⁶³ If probation was imposed under such circumstances, this approach also provided that, as a special condition of probation, the court could order the organization to develop a compliance plan. That plan might require:

- (A) The conduct of a special audit or other internal investigation or inspections, which may be required periodically during the term of probation;

⁵⁹ *Id.* at 8.46.

⁶⁰ *Id.* at 8.5.

⁶¹ See John C. Coffee, Jr., Richard Gruner, and Christopher Stone, “Draft Proposal on Standards for Organizational Probation,” U.S. Sent’g Comm’n, *Discussion Materials on Organizational Sanctions, Pt. II*, at 4 (July 1988).

⁶² *Id.* at 7.

⁶³ *Id.* at 10.

- (B) The appointment of independent counsel or the use, if available, of a special committee of independent directors;
- (C) The hiring and use of special consultants;
- (D) The adoption of new or revised information gathering procedures and the preservation and centralization of such records or of any other information gathered by the organization;
- (E) The designation of a special compliance officer with responsibility for supervising organizational activities related to the criminal offenses;
- (F) The revision or adoption of formal corporate policies, including those expressed in employee manuals and other written procedures, including notification procedures for the reporting of specific transactions or events to specified personnel with the organization, including board of directors.⁶⁴

This draft proposal also required that any proposed compliance plan identify “the names of the organizational officers responsible for its preparation and describe the investigation or other procedures employed in its development.”⁶⁵ The plan should also “be signed by the chief executive, the chief legal officer, and the appropriate vice-president of the organization, who should undertake to disseminate [its terms] to all organizational members whose conduct is affected thereby.”⁶⁶ Finally, the plan should be presented to the board of directors.⁶⁷

The Commission’s staff working paper on criminal sentencing policy for organizations recognized that internal organizational controls on employee behavior are crucial because of the unique nature of the organizational crime (which involves a principal-agent relationship).⁶⁸ Thus, the paper maintained that the penalty system needed to “provide organizations with

⁶⁴ *Id.* at 24-5.

⁶⁵ *Id.* at 35.

⁶⁶ *Id.* at 35-36.

⁶⁷ *Id.* at 36.

⁶⁸ Under U.S. law, a corporation can be held criminally responsible for the illegal conduct of its employees. Corporate criminal responsibility arises when an employee or agent commits a crime while acting within the scope of his employment. *See generally* Sarah Kelly-Kilgore & Emily M. Smith, *Corporate Criminal Liability*, 48 Am. Crim. L. Rev. 421, 422 (2011) (“The nature of incorporeal legal entities requires courts to look to employees of the corporation as a means of imputing intent, or *mens rea*, as well as the guilty act, or *actus reus*, to the corporation). Because an organization can be held liable even for actions undertaken without management’s knowledge or participation, an organization has an inherent incentive to monitor and prevent corporate wrongdoing. To be effective, organizational sentencing policy needed to further incentivize self-policing by rewarding such efforts.

incentives for compliance expenditures.”⁶⁹ Accordingly, the paper put forward the premise that “[t]he key to an effective organizational sentencing system lies in selecting penalty rules that will provide organizations with the most desirable incentives for their compliance efforts.”⁷⁰

1988 Public Hearings on Organizational Sanctions

Following the public release of the *Discussion Materials*, the Commission conducted two public hearings. The first was held on October 11, 1988 in New York City.⁷¹ At the hearing, the Commission announced that it was in “the very preliminary stages of debating, working out, and discussing the appropriate approach to organizational sanctions, and that [it] intend[ed] to follow the same process . . . [as] in the past and that is to receive as much public input as is possible on each issue we must resolve before we promulgate the guideline for organizations and submit them to Congress.”⁷² The witnesses at the hearing included representatives from the President’s Council of Economic Advisors, staff from the Securities and Exchange Commission, academics, and others.⁷³

During this hearing, an underlying theme developed through the witnesses’ testimony: the importance of internal corporate monitoring as a means of deterring organizational crime. One witness opined that “there is a strong argument for prosecuting a corporation because the organization can best monitor its own agents than can the state, at lower cost.”⁷⁴ Others agreed that internal corporate monitoring could be an effective means to prevent criminal behavior by employees.⁷⁵ Yet another agreed that internal controls were important because “deterrence in a corporate environment comes more from making the environment at the top one that calls out for law enforcement rather than, as in some corporations recently, creating an atmosphere where low-level employees feel that it would be welcome by its higher-ups to cheat or bribe or get extra percentage points by kiting money, things of that sort.”⁷⁶

⁶⁹ See Jeffrey A. Parker, “Staff Working Paper on Criminal Sentencing Policy for Organizations” (May 1988), U.S. Sent’g Comm’n, *Discussion Materials on Organizational Sanctions, Pt. IV*, at 9 (July 1988).

⁷⁰ *Id.*

⁷¹ See Notice of Public Hearing on Organizational Sanctions, 53 Fed. Reg. 35407 (Sept. 13, 1988).

⁷² See Opening Statement of William Wilkins, Chair, at 2 (Oct. 11, 1988). A transcript of the hearing is on file with the Commission.

⁷³ For a complete list of the witnesses, see U.S. Sent’g Comm’n, *Supplementary Report on Sentencing Guidelines for Organizations*, App. B (Aug. 1991).

⁷⁴ See Testimony of John Coffee, Jr., Columbia University School of Law, to the Commission, at 161 (Oct. 11, 1988).

⁷⁵ See Testimony of Thomas Moore, President’s Council of Economic Advisors, to the Commission, at 16 (Oct. 11, 1988); Testimony of Samuel J. Buffone at 70-71 (Oct. 11, 1988); Testimony of Professor Jonathan Baker, Dartmouth University, to the Commission, at 245 (Oct. 11, 1988).

⁷⁶ See Testimony of Samuel J. Buffone, Asbill, Junkin, Myers & Buffone, to the Commission, at 69 (Oct. 11, 1988).

The Commission continued the public discussion about the development of guidelines for sentencing organizations with another public hearing in Pasadena, California on December 2, 1988.⁷⁷ The witnesses at this hearing represented a broad spectrum of stakeholders interested in organizational sentencing policy, including federal and state agencies, probation officers, academics, the corporate sector, and special interest groups.⁷⁸ Compliance programs in the context of probation continued to be a topic of discussion at this hearing.⁷⁹ For the most part, the witnesses favored involving the organization in the development of a compliance plan. At least one expressed doubts, however, about the utility of such involvement: “[o]ne of the central aims of the guidelines is to encourage voluntary compliance and you indicate it is anticipated that the corporation will normally take a leading role in proposing the conditions and internal controls that should be imposed. In my opinion, this is an overly optimistic view.”⁸⁰

This hearing marked the first public discussion of compliance programs as a factor that should be considered in mitigation of punishment. One witness suggested that in considering sentences “there should be taken into account the extent to which a corporation through its internal governance processes has taken on the responsibility at the highest level to forestall criminal activity.”⁸¹ This witness also talked about creating “a value system within the corporation that says it is more important to stop criminal activity than it is to maximize profits.”⁸² The commissioners’ comments and follow up questions in response to this testimony indicated considerable interest in these ideas.⁸³ Another witness agreed that there should be a difference in the sanction for a corporation who instituted a compliance program

⁷⁷ See Notice of Public Hearing on Organizational Sanctions and Request for public Comment on Discussion Materials, 53 Fed. Reg. 41644 (Oct. 24, 1988).

⁷⁸ For a complete list of the witnesses, see U.S. Sent’g Comm’n, *Supplementary Report on Sentencing Guidelines for Organizations*, App. B (Aug. 1991).

⁷⁹ See Testimony of Jan Chatten-Brown, Special Assistant to the District Attorney, Los Angeles County, to the Commission, at 43 (Dec. 2, 1988); Testimony of Christopher Stone, University of Southern California Law Center, to the Commission, at 100 (Dec. 2, 1988). A transcript of the hearing is on file with the Commission.

⁸⁰ See Testimony of Robert M. Latta, Chief U.S. Probation Officer, Central District of California, to the Commission, at 60 (Dec. 2, 1988).

⁸¹ See Testimony of Robert A.G. Monks, President, Institutional Shareholders Services, to the Commission, at 71 (Dec. 2, 1988).

⁸² *Id.* at 74.

⁸³ See U.S. Sent’g Comm’n, Transcript of Public Hearing on Organizational Sanctions, Pasadena, CA at 73, 83-91 (Dec. 2, 1988) (on file with the Commission). See, e.g., Statement by Hon. William W. Wilkins, Jr., at 73 (“The points you make are very interesting.”); Statement by Hon. Stephen G. Breyer, at 83 (“[I]t’s a very interesting proposal, and I think perhaps practical.”); Statement by Commissioner Helen G. Corrothers, at 83 (“I think the idea is a marvelous one, and I would like to encourage you and do anything I can to help promote it, too.”).

with internal audits and internal accounting procedures that were state of the art, conducted surprise audits and inspections to ensure that the procedures were followed, and had no reason to believe that they were not, compared to the sanction for a corporation that did none of those things.⁸⁴ This witness also thought that penalties should distinguish between a situation where an employee covered his criminal activity to avoid discipline versus one where the employee acted pursuant to company policy and practice.⁸⁵

Another witness agreed with the notion that having instituted a compliance program should be recognized in the sentencing process, and he testified that such recognition would provide an incentive for organizations to adopt compliance programs.⁸⁶ This witness's written statement went even further, providing a framework for analyzing the key objectives and elements of a compliance program (factors that would render such a program *effective* and thus, in his view, worthy of mitigation credit). He laid out four program objectives: (1) regular, timely and uniform reporting from the operating line through senior management to the board of directors; (2) prompt identification and resolution of environmental issues; (3) establishment of preventive programs and procedures; and (4) identification of developing issues or trends.⁸⁷

Public Comment and Working Group Materials

The Commission continued to receive public comment on the issue of compliance programs in the months following publication of the *Discussion Materials*. One of the witnesses from the December 2, 1988 public hearing submitted two proposals for incorporating "affirmative governance" factors into the guidelines:

[The first] would entitle a convicted corporation to a one-level reduction in the applicable fine range for having had an affirmative governance program and internal controls in place at the time of the criminal conduct at issue. The second proposal would permit the court to impose strict conditions of probation on a corporation whose criminal conduct was found to have been encouraged or facilitated by the lack of a compliance program and internal controls.⁸⁸

⁸⁴ See Testimony of Charles B. Renfrew, President, Chevron, to the Commission, at 166 (Dec. 2, 1988).

⁸⁵ *Id.* at 150-51.

⁸⁶ See Testimony of Jerome Wilkenfeld, Health, Environmental & Safety Department, Occidental Petroleum, to the Commission, at 172 (Dec. 2, 1988).

⁸⁷ See Written Statement of Jerome Wilkenfeld to the Commission at 2 (Dec. 2, 1988) (on file with the Commission). In addition, the key elements of an effective program were identified as: a computerized information and issue management system; a facility assessment program; an internal planning document and timetable; a capital expenditure review system and a legislative and regulatory action program. *Id.*

⁸⁸ See Letter from Robert A.G. Monks, President, Institutional Shareholders Services to Hon. William W. Wilkins, Jr., App. B (February 22, 1989) (on file with the Commission).

Additional public comment agreed with the idea that corporate compliance efforts should operate to mitigate punishment.⁸⁹ At least one commentator contended that “[s]ubstantial mitigation should be provided for a corporation that has a meaningful compliance program.”⁹⁰ Others suggested that probation should be readily available as a sentencing option in cases where “a corporate culture . . . encourages the maximization of profits through the payment of bonuses without establishing legally acceptable guidelines for obtaining such profits,”⁹¹ and that such probation should include a requirement to institute a system of “management controls” designed to promote high standards.⁹²

Late in 1988, the Commission formed a working group of private defense attorneys “to develop for the Commission’s consideration a set of practical principles for sentencing organizations.”⁹³ This attorney working group met biweekly and attended commission meetings and briefings.⁹⁴ In May of 1989, the attorney working group “submitted to the

⁸⁹ See Letter from John D. Ong, Chairman, Business Roundtable Antitrust and Government Regulation Task Force, to the Commission (November 30, 1988); Preliminary Comments of General Electric Company on the United States Sentencing Commission’s Proposed Organizational Sanctions (Sept. 11, 1989) (on file with the Commission) (stating that the Commission “should, in the end, encourage and reward good corporate governance, not penalize or ignore it.”).

⁹⁰ See Preliminary Comments of General Electric Company on the United States Sentencing Commission’s Proposed Organizational Sanctions, at 12 (Sept. 11, 1989) (on file with the Commission). General Electric Company’s comments also identified three steps toward developing a meaningful compliance program: “[develop] company policies defining and discussing the standards, rules and procedures to be followed by employees,” “communicate[policy] to its employees through training, publication or other effective means,” and have “internal audits, disciplinary mechanisms and some other effective means to report possible wrongdoing, such as ombudspersons or hotlines.” *Id.*

⁹¹ See Letter from Morris B. Silverstein, Assistant Inspector General for Criminal Investigations Policy and Oversight, Department of Defense, to Paul K. Martin, Communications Director, Commission, at 4 (Dec. 29, 1988) (on file with the Commission).

⁹² The management controls were described as a written code of business ethics and conduct and an ethics training program for all employees; periodic reviews of company business practices, procedures, policies, and internal controls for compliance with standards of conduct and the special requirements of government contracting; a mechanism, such as a hotline, by which employees may report suspected instance of improper conduct, and instructions that encourage employees to make such reports; internal and/or external audits, as appropriate; disciplinary action for improper conduct; timely reporting to appropriate government official of any suspected or possible violations of law in connection with government contracts or other irregularities in connection with such contracts; and full cooperation with any government agencies responsible for either investigation or corrective actions.

⁹³ See U.S. Sent’g Comm’n, *Supplementary Report on Sentencing Guidelines for Organizations*, at 2 (Aug. 1991).

⁹⁴ See U.S. Sent’g Comm’n, Public Meeting Minutes (Dec. 13, 1988) (on file with the Commission); U.S. Sent’g Comm’n, Public Meeting Minutes (May 23, 1989) (on file with the Commission).

Commission its '*Recommendations Regarding Criminal Penalties for Organizations*.'"⁹⁵ The working group asserted that "organizational sanctions should serve dual purposes": "to punish for violations of societal norms" and to "serve a deterrence purpose . . . [by] provid[ing] incentives for organizations to take optimal steps to prevent crimes."⁹⁶ As a result, the working group identified a number of factors that should ameliorate the criminal fine amount, including "if an organization maintained and enforced effective policies and practices reasonably designed to prevent crimes and if the illegal conduct was unknown (and reasonably unknown) by high-level management."⁹⁷

The 1989 Draft of Proposed Organizational Guidelines

The Commission's work on organizational sanctions continued throughout 1989. The Commission received several briefings from the Department of Justice⁹⁸ and its internal staff working group.⁹⁹ Informed by these briefings, public comment, and its empirical research, the Commission continued to debate the underlying principles while generating another draft of proposed guidelines for organizations.¹⁰⁰ In October, the Commission unanimously agreed to "distribute the revised organizational sanctions draft to judges and other interested parties" and to publish the draft in the Federal Register with a minimum of sixty days for public comment.¹⁰¹

⁹⁵ See U.S. Sent'g Comm'n, *Supplementary Report on Sentencing Guidelines for Organizations*, at 2 (Aug. 1991).

⁹⁶ See *Working Group Recommendations Regarding Criminal Penalties for Organizations to the Commission*, at 2 (May 19, 1989) (on file with the Commission). Notably, the group recommended that the Commission limit itself to the promulgation of "flexible policy statements rather than rigid and binding guidelines." *Id.* at 4.

⁹⁷ *Id.* at 3. Other reductions suggested by the Working Group included steps taken by the organization "to discipline the responsible individuals" and to "make it easier for the criminal justice system to identify and punish responsible individuals," or "if an organization takes appropriate steps to prevent a recurrence of similar offenses." *Id.*

⁹⁸ See U.S. Sent'g Comm'n, *Public Meeting Minutes* (Dec. 13, 1988) (on file with the Commission); U.S. Sent'g Comm'n, *Public Meeting Minutes* (June 27, 1989) (on file with the Commission); U.S. Sent'g Comm'n, *Public Meeting Minutes* (July, 11, 1989) (on file with the Commission).

⁹⁹ See U.S. Sent'g Comm'n, *Public Meeting Minutes* (June 14, 1989) (on file with the Commission); U.S. Sent'g Comm'n, *Public Meeting Minutes* (June 26, 1989) (on file with the Commission); U.S. Sent'g Comm'n, *Public Meeting Minutes* (July 10, 1989) (on file with the Commission); U.S. Sent'g Comm'n, *Public Meeting Minutes* (July 18, 1989) (on file with the Commission).

¹⁰⁰ See U.S. Sent'g Comm'n, *Public Meeting Minutes* (June 26 1989) (on file with the Commission); U.S. Sent'g Comm'n, *Public Meeting Minutes* (July 18, 1989) (on file with the Commission); U.S. Sent'g Comm'n, *Public Meeting Minutes* (July 25, 1989) (on file with the Commission); U.S. Sent'g Comm'n, *Public Meeting Minutes*, at 1 (Aug. 1, 1989) (on file with the Commission); U.S. Sent'g Comm'n, *Public Meeting Minutes* (Aug. 22, 1989) (on file with the Commission); U.S. Sent'g Comm'n, *Public Meeting Minutes*, at 2 (Sept. 12, 1989) (on file with the Commission); U.S. Sent'g Comm'n, *Public Meeting Minutes*, at 2 (Sept. 26, 1989) (on file with the Commission); U.S. Sent'g Comm'n, *Public Meeting Minutes*, at 2 (Oct. 19, 1989) (on file with the Commission).

¹⁰¹ See U.S. Sent'g Comm'n, *Public Meeting Minutes*, at 2-3 (Oct. 19, 1989) (on file with the Commission).

On November 8, 1989, the Commission published the proposed guidelines, policy statements, and accompanying commentary and requested public comment “on these proposals and any other aspect of the sentencing guidelines, policy statements, and commentary as they apply to the sentencing of organizations.”¹⁰² The Federal Register notice indicated that the Commission was considering the submission of these amendments to Congress on or before May 1, 1990, and explained that the proposal was “the culmination of an extended period of analysis, consultation, and public comment.”¹⁰³ The proposed guidelines were “presented as a new chapter to the *United States Sentencing Commission Guidelines Manual: Chapter Eight—Sentencing of Organizations*” and included two options for the guideline section that would determine the guideline fine range for most organizational defendants (§8C2.1).¹⁰⁴

“Option I would base the guideline fine range on the greater of loss, gain, or an amount specified based upon the applicable offense level, with percentage adjustments based upon applicable aggravating or mitigating factors.”¹⁰⁵ Option I also provided for specified fine reductions for compliance efforts under one of the following two circumstances. “If the offense represented an isolated incident of criminal activity that was committed notwithstanding bona fide policies and programs of the organization reflecting a substantial effort to prevent conduct of the type that constituted the offense,” then the sentencing judge was directed to “subtract 20%” of the previously determined fine amount.” Alternatively, the proposed guideline required the judge to “subtract 10%” “[i]f the organization has taken substantial steps to prevent a recurrence of similar offenses, such as, implementing appropriate monitoring procedures or disciplining any officer, director, employee, or agent of the organization responsible for the offense.”¹⁰⁶ Option I did not include any commentary defining the types of policies or procedures that would qualify for these reductions.

Option II proposed that the guideline fine range be based “entirely upon the applicable offense level, with offense level adjustments based upon applicable aggravating or mitigating factors.”¹⁰⁷ Option II provided for fine reductions based upon the same two compliance effort criteria set out for Option I, with the judge directed to “subtract 1 level” in either event.¹⁰⁸

¹⁰² See Notice of Proposed Additions to Sentencing Guidelines, Policy Statements and Commentary and Request for Public Comment, 54 Fed. Reg. 47056 (Nov. 8, 1989) (hereinafter referred to as the 1989 *Draft of Proposed Organizational Guidelines*).

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* at 47059.

¹⁰⁷ *Id.* at 47056.

¹⁰⁸ *Id.* at 47060.

Option II also did not include any commentary defining the types of policies or procedures that would qualify for these reductions. The Commission noted that “the two options may result in substantially different fine levels” and encouraged commentators “to evaluate and comment upon these two options or to suggest an alternative.”¹⁰⁹

Similar to provisions in the earlier discussion materials, the 1989 *Draft of Proposed Organizational Guidelines* also mentioned compliance programs in the context of conditions of probation. One proposed guideline required a sentence of probation if the offense occurred after “the organization or a member of its high-level management had a criminal conviction within the previous five years for [similar mis]conduct” or “the offense indicated a significant problem with the organization’s policies or procedures for preventing crimes.”¹¹⁰ The proposed guideline also stated that problems with the organization’s policies and procedures might be evidenced by “(A) high-level management involvement in, or encouragement or countenance of, the offense; (B) inadequate internal accounting or monitoring controls; or (C) a sustained or pervasive pattern of criminal behavior.”¹¹¹

If the court decided to impose a term of probation under such circumstances, then the proposed guideline recommended that the court impose special conditions requiring the organization to “develop and submit for approval by the court a compliance plan for avoiding a recurrence of the criminal behavior for which it was convicted,”¹¹² and upon approval of such compliance plan, to “notify its employees and shareholders of the criminal behavior and the compliance plan.”¹¹³ The proposed guideline authorized the court to “employ appropriate experts to assess the efficacy of a submitted plan, if necessary,” and required approval of “any plan that appears reasonably calculated to avoid recurrence of the criminal behavior.”¹¹⁴ The proposed guideline further provided that “[t]he organization shall not be required to adopt any compliance measure unless such measure is reasonably necessary to avoid a recurrence of the type of criminal behavior involved in the offense.”¹¹⁵ This proposed guideline did not include any commentary identifying the elements of an effective compliance program.

¹⁰⁹ *Id.* at 47056. The difference between the two options is best illustrated by an example. Assuming an offense level of 27, the fine range under Option I would be \$2,000,000 - \$3,000,000. This fine range would be reduced by 20% if the organization had a compliance program, resulting in a fine range of \$1,600,000 - \$2,400,000. By contrast, under Option II, the existence of a program would lead to a one-level reduction in the offense level of 27. The resulting offense level of 26 yielded a fine range of \$80,000,000 - \$170,000,000.

¹¹⁰ *Id.* at 47062.

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ *Id.* at 47062-63.

¹¹⁴ *Id.* at 47062.

¹¹⁵ *Id.*

February 14, 1990 Public Hearing

The Commission continued to seek public input to inform the development of the organizational sentencing guidelines. On February 14, 1990, the Commission conducted a public hearing on “the proposals and any other aspect of the sentencing guidelines, policy statements, and commentary as they apply to the sentencing of organizations.”¹¹⁶ Seventeen witnesses, with a diversity of backgrounds and interests, testified before the Commission about organizational sentencing policy.¹¹⁷ Among the special interest groups represented were the National Association of Manufacturers, the American Corporate Council Association, the U.S. Chamber of Commerce, and the American Bar Association. Representatives from several federal agencies, academics, and the general counsels of various private businesses also appeared. The chair of the Commission’s attorney working group presented testimony on behalf of the working group.

The testimony covered many topics, including compliance programs. Many witnesses urged the Commission to postpone issuing organizational guidelines, and instead issue non-binding policy statements.¹¹⁸ At least one described probation as a “death sentence” for small to medium organizations.¹¹⁹ Nevertheless, even witnesses opposing the issuance of organizational guidelines expressed the opinion that organizational sanctions should account for corporate compliance programs by providing for a substantial decrease in the fine amount imposed on an organization with an effective compliance program.¹²⁰ One witness thought that by striking the proper balance in the guidelines to account for such programs, the Commission could

¹¹⁶ See Notice of Public Hearing, 55 Fed. Reg. 4045 (Feb. 6, 1990). A transcript of the hearing is on file with the Commission.

¹¹⁷ For a complete list of the witnesses, see U.S. Sent’g Comm’n, *Supplementary Report on Sentencing Guidelines for Organizations*, App. B (Aug. 1991).

¹¹⁸ See, e.g., Testimony of Earlyn Church, Superior Technical Ceramic Corporation (representing National Association of Manufacturers), to the Commission, at 33 (Feb. 14, 1990); Joseph E. diGenova, Defense Attorney Advisory Group on Organizational Sanctions, to the Commission, at 71 (Feb. 14, 1990); Frank McFadden, Senior Vice President, General Counsel, Blount, Inc. (representing American Corporate Council Association), to the Commission, at 164 (Feb. 14, 1990). At the time, guidelines issued by the Commission were binding on the courts pursuant to 18 U.S.C. § 3553(b). By contrast, the courts were only required to “consider” the Commission’s policy statements. See 18 U.S.C. § 3553(a)(5).

¹¹⁹ See Testimony of Earlyn Church, Superior Technical Ceramic Corporation (representing National Association of Manufacturers), to the Commission, at 33 (Feb. 14, 1990).

¹²⁰ See Testimony of Earlyn Church, Superior Technical Ceramic Corporation (representing National Association of Manufacturers), to the Commission, at 38 (Feb. 14, 1990) (“A substantial program should receive a substantial reduction in fines”); Joseph E. diGenova, Attorney Working Group on Organizational Sanctions, to the Commission, at 86 (Feb. 14, 1990) (stating that the guidelines should account for compliance programs); Frank McFadden, Senior Vice President, General Counsel, Blount, Inc. (representing American Corporate Council Association), to the Commission, at 170-71 (Feb. 14, 1990) (arguing that the guidelines should provide for more than a 20 percent reduction in the applicable fine amount for aggressive compliance programs).

incentivize corporations to develop meaningful compliance programs.¹²¹ He reasoned that “corporations themselves are probably better equipped to deal with wrongdoing if in fact they have the proper incentives to do so.”¹²² The testimony also touched on various elements that should be included in a successful compliance program, such as the audit function, an ombudsman or other program to protect employees who report corporation wrongdoing, support of upper management¹²³ and managers to monitor and execute the program.¹²⁴

Immediately following the February 14, 1990 public hearing, the Commission conducted a business meeting and discussed the organizational guidelines.¹²⁵ Members of the attorney working group were present and expressed their views and concerns about organizational sanctions. “The Commission questioned the working group on how to structure the guidelines to provide incentives for corporations to cooperate.”¹²⁶ After hearing the group’s views, the chair of the Commission announced that the “first goal of the guidelines should be to provide sufficient incentives so that self-policing becomes a reality,” and suggested that “the Commission investigate the possibility of beginning with a presumptively high fine range and work downward to zero for a ‘good citizen’ corporation.”¹²⁷ The Commission then came to the consensus that “staff should develop draft guidelines to reflect self-policing through economic incentives as a possible alternative to the current options.”¹²⁸

Unforeseen Delay in Implementation of Organizational Guidelines

Throughout the 1989-90 amendment cycle, the Commission had publicly indicated that it would likely deliver the organizational guidelines, policy statements and accompanying

¹²¹ See Testimony of Frank H. Menaker, Jr., Vice President, General Counsel, Martin Marietta Corporation, to the Commission, at 114 (Feb. 14, 1990).

¹²² *Id.*

¹²³ *Id.* at 116-17, 120; Testimony of Frank McFadden, Senior Vice President, General Counsel, Blount, Inc. (representing American Corporate Council Association), to the Commission, at 171 (Feb. 14, 1990).

¹²⁴ See Testimony of Frank McFadden, Senior Vice President, General Counsel, Blount, Inc. (representing American Corporate Council Association), to the Commission, at 171 (Feb. 14, 1990).

¹²⁵ See U.S. Sent’g Comm’n, Public Meeting Minutes (Feb. 15, 1990) (on file with the Commission).

¹²⁶ *Id.*

¹²⁷ *Id.* In the 1989 Draft, the fine amounts in the fine table started relatively low, at either \$250 or \$500, respectively. See 54 Fed. Reg. at 47058, 47060. By contrast, in the draft proposed guidelines released in 1990, the starting fines were higher (the three published options started at \$3300, \$4150 or \$5000). See Notice of Proposed Additions to Sentencing Guidelines, Policy Statements and Commentary Relating to Sentencing of Organizations, Request for Public Comment and Notice of Public Hearing, 55 Fed. Reg. 46600, 46603 (Nov. 5, 1990). The Attorney Working Group also advocated for use of a high presumptive fine. See Working Group Recommendations Regarding Criminal Penalties for Organizations to the Commission, at 3 (May 19, 1989) (on file with the Commission).

¹²⁸ *Id.*

commentary to Congress by May 1, 1990,¹²⁹ and it diligently worked toward that deadline.¹³⁰ Ultimately, however, a series of unrelated events transpired to derail the planned delivery of the organizational guidelines.

First, two of the seven original commissioners resigned before the end of their terms.¹³¹ Additionally, the four-year term of a third expired in October of 1989.¹³² Consequently, as of November of 1989, the Commission had only four voting members remaining and, by statute, all four had to vote in favor of any guidelines submitted to Congress.¹³³ Nevertheless, the Commission continued to work on the organizational guidelines, as evidenced by release of the draft guidelines in November, 1989 and the public hearing held in February of 1990.

Shortly after the February public hearing, representatives of the Business Round Table publicly urged the Commission to “take more time to consider the draft guidelines because of the potential impact on the corporate sector” and to adopt policy statements instead of binding guidelines.¹³⁴ In addition to these public statements to the Commission, members of the Business Round Table were allegedly exerting pressure behind the scenes to delay implementation of the organizational guidelines.¹³⁵

The Commission met on April 10, 1990, to vote on new amendments to the *Guidelines Manual*, including the potential inclusion of organizational guidelines. No new commissioners had been confirmed by the Senate at that point, leaving only four commissioners to promulgate the

¹²⁹ See, e.g., 54 Fed. Reg. 47056; 55 Fed. Reg. 4045.

¹³⁰ See U.S. Sent’g Comm’n, Public Meeting Minutes (Sept. 26, 1989) (outlining the process for delivery of the organizational guidelines, which included “adoption of guidelines for presentation to Congress in the spring.”) (on file with the Commission).

¹³¹ See Former Commissioner Information, available on the Commission’s website at http://www.ussc.gov/About_the_Commission/About_the_Commissioners/Former_Commissioners.cfm; Commissioner Paul Robinson resigned on February 1, 1988, and Commissioner Michael K. Block resigned on September 1, 1989. Their terms ended October 31, 1989.

¹³² See *id.* Judge (later Justice) Stephen G. Breyer’s term expired in October, 1989.

¹³³ See 28 U.S.C. § 994(a); see also Rule 2.2 of the Commission’s Rules of Practice and Procedure (“Promulgation of guidelines, policy statements, official commentary, and amendments thereto shall require the affirmative vote of at least four members at a public meeting.”).

¹³⁴ See U.S. Sent’g Comm’n, Public Meeting Minutes (Feb. 27, 1990) (on file with the Commission). The Commission received much public comment urging it to refrain from promulgating guidelines for organizations, and suggesting that the Commission had no statutory authority to do so. For further discussion of this issue, see Ilene H. Nagel & Winthrop M. Swenson, *The Federal Sentencing Guidelines for Corporations: Their Development, Theoretical Underpinnings, and Some Thoughts about Their Future*, 71 Wash. U. L. Q. 205, 212-14 (Summer, 1993).

¹³⁵ See *Oversight on the U.S. Sentencing Commission and Guidelines for Organizational Sanctions: Hearing before the Subcomm. On Criminal Justice of the House Comm. On the Judiciary*, 101st Cong. 173 (May 24, 1990) (Opening statement of Hon. John Conyers, Jr.).

organizational guidelines if the May 1, 1990, delivery to Congress was to be met. At the April 10 meeting, one of the four voting commissioners, Judge George E. MacKinnon, announced that he would “not vote to adopt organizational sanction guidelines during this amendment cycle.”¹³⁶ Judge MacKinnon explained this decision as follows:

The issuance of Organizational Sanctions is our most difficult task. It requires the Commission with no precedent to write guidelines on a completely new slate for every corporation in the nation. In my opinion such sentencing guidelines are much too important and far reaching to be adopted while there are three vacancies on our seven member Commission. I expressed this concern some weeks ago to representatives of the Department of Justice and had hoped that the vacancies would be filled by now. However, this has not occurred.

Accordingly, because of the extraordinary nationwide importance of the matter, and the three vacancies in the Commission, I will not vote to adopt any proposal for corporate sentences during this current amendment cycle.¹³⁷

After the May 1 deadline passed, the Subcommittee on Criminal Justice of the Judiciary Committee of the House of Representatives conducted an oversight hearing regarding guidelines for organizations. At the hearing, several congressmen made statements evidencing their support for promulgation of organizational guidelines. For example, the chairman of the subcommittee conducting the hearing stated that “[t]he evidence of corporate fraud and abuse that continues to [mount] in the S&L industry most notably in the last several months, makes the establishment of new sentencing guidelines imperative.”¹³⁸ Another congressman echoed these concerns, noting that when the “Sentencing Reform Act was passed a number of years ago, the intent of Congress was to send a message that corporate criminality would be attacked more vigorously than it ever [w]as before;” however, events that had transpired in the preceding months, including the Commission’s decision not to promulgate organizational guidelines, “[raise] the appearance of the Justice Department caving in to the big business

¹³⁶ See U.S. Sent’g Comm’n, Public Meeting Minutes (April 10 and 11, 1990) (on file with the Commission).

¹³⁷ *Id.* The Commission is required to deliver guideline amendments to Congress no later than May 1, in order for such guideline amendments to take effect by November 1, see 28 U.S.C. § 994(p), and their promulgation requires an “affirmative vote of at least four members of the Commission.” See 28 U.S.C. § 994(a). In light of Judge MacKinnon’s announcement, the chair did not call for a vote at the April 10, 1990 meeting. See U.S. Sent’g Comm’n, Public Meeting Minutes (April 10 and 11, 1990).

¹³⁸ See *Oversight on the U.S. Sentencing Commission and Guidelines for Organizational Sanctions: Hearing before the Subcomm. On Criminal Justice of the House Comm. On the Judiciary*, 101st Cong. 172 (May 24, 1990) (opening statement of Hon. Charles E. Schumer).

demands at the expense of Congress' clear mandate to issue guidelines that bring corporate criminals to justice."¹³⁹

Judge William W. Wilkins, Jr., a judge on Fourth Circuit Court of Appeals and then chairman of the Commission, testified on behalf of the Commission at the hearing. He reported that the President had nominated three individuals to fill the vacancies on the Commission.¹⁴⁰ He briefed the subcommittee on the work that the Commission had already undertaken to develop the organizational guidelines.¹⁴¹ He also reported that there was "general agreement among the four Commissioners who have been debating and working on this area on many of the issues that have to be resolved."¹⁴² According to his testimony, the issues upon which there was agreement included that the individual actors responsible for the criminal act should be prosecuted and sentenced along with the organization, that criminal purpose organizations should forfeit all of their assets, that the guidelines should require full restitution to any victim of organizational crime, and that any sanction on organizations should include complete disgorgement of any illegal gain.¹⁴³ Judge Wilkins noted, however, that "there are other important issues yet to be resolved."¹⁴⁴ One example of such an issue was whether "a distinction [should] be made between a corporation that had a strong and meaningful compliance program prior to an employee committing a crime in the name of the corporation . . . and a corporation that has no such compliance program."¹⁴⁵ Judge Wilkins concluded his remarks by assuring the subcommittee members that he was confident that the Commission would promulgate organizational guidelines and that those guidelines "[would] fairly and adequately and appropriately punish organizations which violate our Federal law."¹⁴⁶

During the question and answer period following Judge Wilkins' testimony, two commissioners (Judge Wilkins and Judge MacKinnon) discussed concerns about public acceptance of the organizational guidelines.¹⁴⁷ Judge MacKinnon explained that the Commission's consideration of corporate guidelines has been "vigorously, if not viscusly (sic), opposed by the corporations at practically every meeting we had."¹⁴⁸ In light of that

¹³⁹ *Id.* at 173 (Opening statement of Hon. John Conyers, Jr.).

¹⁴⁰ *Id.* at 174 (Testimony of Hon. William W. Wilkins, Jr., Chairman, U.S. Sentencing Commission).

¹⁴¹ *Id.* at 175.

¹⁴² *Id.* at 176.

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ *Id.* at 177.

¹⁴⁶ *Id.*

¹⁴⁷ *Id.* at 197-98. Judge MacKinnon did not testify at the hearing but was asked by Congressman Schumer to come forward and explain his decision. *Id.* at 198.

¹⁴⁸ *Id.*

opposition, it was his view that guidelines passed “by a minimal Commission that was 57 percent at strength” would be subject to attack.¹⁴⁹ Judge MacKinnon assured the congressmen that it was this concern, and not any external pressure brought to bear, that motivated his decision to abstain from a vote on the organizational guidelines until the new commissioners assumed office.¹⁵⁰

Judge Wilkins also advised the subcommittee that the Commission had been moving in the direction of a vote on the organizational guidelines and had been engaged in ongoing discussions of the topic. He described the process involved in developing those guidelines:

[V]arious drafts were being prepared by staff. The Commission had met, for example, and talked about some issues we had learned from the recent public hearing and a draft had been put together, combining generally the thoughts of the four Commissioners that had been discussed at that session.

Other staff members with ideas were working with the staff director to develop various approaches. This thing is a fluid process. You write and draft. You study and you move and reject and move to a different [draft]. [S]o I don’t know what the draft would have looked like, but we were moving forward with the documents that had been disseminated, as well as those that were being generated internally by the staff.¹⁵¹

Judge Wilkins assured the subcommittee members that the Commission would “not [defer] readying itself so that once the new Commissioners are on board it may efficiently renew deliberations. . . . when we have our vacancies filled we will be in a position to move expeditiously.”¹⁵²

IV. The Commission’s Promulgation of Organizational Guidelines

General Drafting Principles of Proposed Organizational Guidelines

At the Commission’s direction, the staff working group on organizational sanctions continued its work, and received feedback from the Commission, along with a renewed commitment to

¹⁴⁹ *Id.*

¹⁵⁰ *Id.* at 203.

¹⁵¹ *Id.* at 201.

¹⁵² *Id.* at 186 (Written Statement of Hon. William W. Wilkins, Jr., Chairman, U.S. Sentencing Commission).

schedule another public hearing once new commissioners were appointed.¹⁵³ Three new commissioners were sworn in on July 24, 1990. At the first meeting attended by all members of the now fully constituted Commission, the Commission agreed on a set of general principles to be used in drafting guidelines on organizational sanctions.¹⁵⁴ These principles included a provision that “mitigating factors should be designed to provide incentives for organizations to take steps to minimize the likelihood of criminal behavior and to assure that when such conduct does occur, it is detected and reported by the organizations.”¹⁵⁵ The Commission also discussed agenda items during this meeting, including the “weight to be given such mitigating factors as compliance program and . . . incentives to corporations. . . .”¹⁵⁶

In addition to drafting the organizational guidelines in accordance with the newly established principles, the Commission’s staff continued to conduct empirical research concerning organizational sanctions during this period.¹⁵⁷ The Commission also decided to create a working group of judges to advise the agency on the development of organizational sanctions.¹⁵⁸ After making various changes to a set of draft guidelines, the Commission agreed to publish both the Commission’s draft and a proposal from the Department of Justice.¹⁵⁹

November 1990 Draft of Proposed Organizational Guidelines

On November 5, 1990, the Commission published guidelines, policy statements, and accompanying commentary relating to the sentencing of organizations and sought public comment “on these proposals and any other aspect of the sentencing guidelines, policy statements, and commentary as they apply to the sentencing of organizations.”¹⁶⁰ The Commission also solicited public comment on “the suggested organizational guidelines prepared by the U.S. Department of Justice.”¹⁶¹

¹⁵³ See U.S. Sent’g Comm’n, Public Meeting Minutes (June 14, 1990) (on file with the Commission); U.S. Sent’g Comm’n, Public Meeting Minutes, at 3 (July 10, 1990) (on file with the Commission).

¹⁵⁴ See U.S. Sent’g Comm’n, Public Meeting Minutes (Aug. 28, 1990) (on file with the Commission).

¹⁵⁵ See U.S. Sent’g Comm’n, *Supplementary Report on Sentencing Guidelines for Organizations*, App. A (Aug. 1991).

¹⁵⁶ See U.S. Sent’g Comm’n, Public Meeting Minutes (Aug. 28, 1990) (on file with the Commission).

¹⁵⁷ See U.S. Sent’g Comm’n, Public Meeting Minutes (Aug. 28, 1990) (on file with the Commission); U.S. Sent’g Comm’n, Public Meeting Minutes (Sept. 11, 1990) (on file with the Commission).

¹⁵⁸ See U.S. Sent’g Comm’n, Public Meeting Minutes (Sept. 25, 1990) (on file with the Commission).

¹⁵⁹ See U.S. Sent’g Comm’n, Public Meeting Minutes, at 3 (Oct. 23, 1990) (on file with the Commission).

¹⁶⁰ See Notice of Proposed Additions to Sentencing Guidelines, Policy Statements and Commentary Relating to Sentencing of Organizations, Request for Public Comment and Notice of Public Hearing, 55 Fed. Reg. 46600, 46601 (Nov. 5, 1990).

¹⁶¹ *Id.* The Department of Justice’s proposal included both aggravating and mitigating factors that would increase or decrease the offense level used for determining the fine level. Notably, the Department’s proposal did not identify the existence of an effective program to prevent and detect violations of law as a mitigating factor but allowed for a one level reduction in the offense level if “the offense represented an isolated incident of criminal

In the published Commission draft, compliance programs were recognized as a mitigating factor that should lead to a reduction of the applicable fine range. Two options were included in the Commission's proposal with respect to the compliance program mitigator. Under the first, having "an effective program to prevent and detect violations of law" added three points to the mitigation score.¹⁶² The second option added two points to the mitigation score if

the organization prior to the offense had, and after the offense continues to maintain, an effective program to prevent and detect violations of law, and no policy-setting or legal compliance official within the organization or other person who exercised substantial managerial authority in carrying out the policies of the organization had knowledge of the offense, or would have had such knowledge had such person performed his or her responsibilities as contemplated by the compliance plan[.]¹⁶³

With respect to both options, the published commentary defined "an effective program to prevent and detect violations of law" as "a program that has been reasonably designed, implemented, and enforced so that it will generally be effective in preventing and detecting criminal conduct" and further provided that "[f]ailure to prevent or to detect the instant offense does not, by itself, mean that the program was not effective."¹⁶⁴ It also made clear that "[t]he hallmark of [such a program] is that the organization exercised, prior to the offense, and continues to exercise due diligence in seeking to prevent and detect criminal conduct by its agents. Due diligence requires at a minimum that the organization has taken at least seven general types of steps to assure compliance with the law."¹⁶⁵ Those steps were:

activity that was committed notwithstanding bona fide policies and programs of the organization reflecting a substantial effort to prevent conduct of the type that constituted the offense" or "the organization substantially cooperated in the investigation, or if the organization has taken substantial steps to prevent a recurrence of similar offenses, such as implementing appropriate monitoring procedures." *Id.* at 46612. The Department's proposed commentary did not contain language explaining any of the terms used, such as "bona fide policies and programs" or "substantial steps to prevent recurrence."

¹⁶² *Id.* at 46604. In the published Commission draft, this mitigation score was used to determine the minimum and maximum multipliers used to compute the applicable guideline fine range. It operated much like the culpability score in the current version of the guidelines. *See* USSG §8C2.5. Unlike the culpability score, however, the Commission's draft proposals did not include increases in the multipliers based upon aggravating factors.

¹⁶³ *Id.* at 46606.

¹⁶⁴ *Id.* at 46605.

¹⁶⁵ *Id.*

- 1) “[T]he organization must have had policies defining the standards and procedures to be followed by its agents and employees;”¹⁶⁶
- 2) “[A] specific high-level person within the organization must have been designated and assigned ultimate responsibility to ensure compliance with those standards and procedures;”¹⁶⁷
- 3) “[T]he organization must have used due care not to delegate significant discretionary authority to persons whom the organization knew, or should have known, had a propensity to engage in illegal activities;”¹⁶⁸
- 4) “[T]he organization must have effectively communicated its standards and procedures to agents and employees, e.g., by requiring participation in training programs and by the dissemination of publications;”¹⁶⁹
- 5) “[T]he organization must have taken reasonable steps to achieve compliance with its standards, e.g., by utilizing monitoring and auditing systems reasonably designed to ferret out criminal conduct by its agents and employees and by having in place and publicizing a reporting system whereby agents and employees can report criminal conduct within the organization without fear of retribution;”¹⁷⁰
- 6) “[T]he standards must have been consistently enforced through appropriate disciplinary mechanisms;”¹⁷¹ and
- 7) “[A]fter an offense has been detected, the organization must have taken all reasonable steps to prevent further similar offenses.”¹⁷²

The published commentary also stated that an organization would not “ordinarily qualify” for the effective compliance program mitigating factor unless it also qualified for the mitigating factor requiring that no compliance personnel or person with “substantial managerial authority” knew about the violation.¹⁷³ Credit for the “no knowledge” mitigating factor would be disallowed “if any person who held a policy-setting or legal compliance position within the organization or who exercised substantial managerial authority in carrying out the policies of the organization became aware of the offense [or through the exercise of due diligence should have known about the offense] and the organization subsequently failed to make a timely report of the offense to appropriate government authorities.”¹⁷⁴ Persons holding legal

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

¹⁷² *Id.*

¹⁷³ *Id.* at 46604.

¹⁷⁴ *Id.*

compliance positions were broadly defined to include “inside counsel and any other person who has significant responsibility for ensuring that the organization complies with requirements imposed by law.”¹⁷⁵

As in earlier drafts, the November 5, 1990 draft also included implementation of a compliance plan as a possible condition of probation.¹⁷⁶ The Commission requested that public comment on the draft be received no later than December 10, 1990, and announced that it would conduct a public hearing on organizational sanctions on December 13, 1990, in Washington, D.C.¹⁷⁷ On December 3, 1990, the Commission extended the public comment period through January 10, 1991.¹⁷⁸

December 13, 1990 Public Hearing

The Commission held the final hearing on the organizational guidelines, as planned, on December 13, 1990, in Washington, D.C. Thirteen witnesses with varied backgrounds offered testimony.¹⁷⁹ The witnesses, including those who opposed promulgation of guidelines, generally favored including an effective compliance program as one of the mitigating factors. One witness told the Commission that “[e]ncouraging corporations to have effective compliance programs should be the highest priority of this Commission.”¹⁸⁰ Witnesses expressed the view that giving credit for an effective compliance program would deter future criminal activity¹⁸¹ and would lead to widespread acceptance of compliance programs.¹⁸² Others agreed, but expressed concerns that compliance programs were not receiving sufficient credit under the proposed guidelines as drafted.¹⁸³ Still others expressed the view that an

¹⁷⁵ *Id.* at 46605.

¹⁷⁶ *Id.* at 46610.

¹⁷⁷ *Id.* at 46600.

¹⁷⁸ See Notice of Extension of Public Comment Period for Draft Sentencing Guidelines for Organizational Defendants, 55 Fed. Reg. 49971 (Dec. 3, 1990).

¹⁷⁹ For a complete list of the witnesses, see Commission, *Supplementary Report on Sentencing Guidelines for Organizations*, App. B (Aug. 1991). A transcript of the hearing is on file at the Commission.

¹⁸⁰ See Testimony of Griffin Bell, King & Spaulding, to the Commission, at 7 (Dec. 13, 1990).

¹⁸¹ *Id.* at 17.

¹⁸² See Testimony of Roger W. Langsdorf, Senior Counsel, Director of Antitrust Compliance, ITT Corporation, to the Commission, at 131 (Dec. 13, 1990) (if the guidelines give credit for compliance programs every “major or minor corporation in the country will adopt every one of these points.”).

¹⁸³ See Testimony of Stephen S. Cowen, Steptoe & Johnson, to the Commission, at 69-71 (Dec. 13, 1990); Richard R. Rogers, Associate Counsel, Ford Motor Credit Company (on behalf of National Association of Manufacturers), to the Commission, at 90 (Dec. 13, 1990); Testimony of Jonathan C. Waller, Assistant General Counsel, Sun Company (on behalf of American Corporate Counsel Association), to the Commission, at 245 (Dec. 13, 1990).

effective program and voluntary disclosure to authorities should not be linked, but rather each should be given separate credit.¹⁸⁴

Several witnesses thought that the Commission correctly identified the essential elements of an effective compliance program in the published commentary.¹⁸⁵ A few offered suggestions for strengthening the definition: programs should be adequately funded; should have enough teeth to be enforced; should have widespread publication within an organization; should not be simply paid lip service;¹⁸⁶ and should develop and publicize a system for reporting criminal conduct without retribution.¹⁸⁷ At least one witness expressed some concern that the definitions in the commentary regarding “persons holding legal compliance positions” might include corporate counsel, thereby having a possible impact on the attorney–client privilege.¹⁸⁸

Final Efforts to Refine the Organizational Guidelines Draft Proposal

Following the public hearing, the Commission continued to meet to discuss the organizational guidelines. On December 17, 1990, the Commission met with the judges’ working group on organizational sanctions to solicit their input on the draft proposals.¹⁸⁹ The Commission directed its staff to meet with representatives of the Department of Justice “to discuss issues and rationales” in the respective drafts.¹⁹⁰ Following those meetings, the Commission considered and discussed a revised draft prepared by its staff, after which it directed the staff “to take the most recent draft and make every effort to simplify from an application perspective.”¹⁹¹ The Commission also agreed to have a group of federal probation officers apply the draft guidelines and submit written comments on their application.¹⁹²

¹⁸⁴ See Testimony of Roger W. Langsdorf, Senior Counsel, Director of Antitrust Compliance, ITT Corporation, to the Commission, at 133-34 (Dec. 13, 1990); Testimony of Andrew L. Frey, Mayer, Brown & Platt, to the Commission, at 194 (Dec. 13, 1990); Testimony of Jonathan C. Waller, Assistant General Counsel, Sun Company (on behalf of American Corporate Counsel Association), to the Commission, at 245 (Dec. 13, 1990).

¹⁸⁵ See Testimony of Stephen S. Cowen, Steptoe & Johnson, to the Commission, at 78-79 (Dec. 13, 1990); Testimony of Roger W. Langsdorf, Senior Counsel, Director of Antitrust Compliance, ITT Corporation, to the Commission, at 130 (Dec. 13, 1990); Richard R. Rogers, Associate Counsel, Ford Motor Credit Company (on behalf of National Association of Manufacturers), to the Commission, at 99 (Dec. 13, 1990).

¹⁸⁶ See Testimony of Stephen S. Cowen, Steptoe & Johnson, to the Commission, at 79-80 (Dec. 13, 1990).

¹⁸⁷ See Testimony of Roger W. Langsdorf, Senior Counsel, Director of Antitrust Compliance, ITT Corporation, to the Commission, at 130 (Dec. 13, 1990).

¹⁸⁸ See Testimony of Jonathan C. Waller, Assistant General Counsel, Sun Company (on behalf of American Corporate Counsel Association), to the Commission, at 249 (Dec. 13, 1990).

¹⁸⁹ See U.S. Sent’g Comm’n, Public Meeting Minutes (Nov. 27, 1990) (announcing meeting with judges’ working group) (on file with the Commission).

¹⁹⁰ See U.S. Sent’g Comm’n, Public Meeting Minutes, at 5 (Jan. 3, 1991) (on file with the Commission).

¹⁹¹ See U.S. Sent’g Comm’n, Public Meeting Minutes, at 3 (Mar. 12, 1991) (on file with the Commission).

¹⁹² *Id.*

The Commission also continued to receive and consider public comment on the draft guidelines. Some public comment echoed the concerns expressed at the public hearing about the weight given to compliance programs and the linkage to voluntary disclosure.¹⁹³ While receiving and considering the public comment, the Commission continued to refine the proposed guidelines.¹⁹⁴

Vote to Promulgate Organizational Guidelines and Resulting Guideline Provisions

On April 26, 1991, the Commission resumed its consideration of proposed organizational guidelines. At this meeting, Judge MacKinnon highlighted a piece of public comment received from the National Association of Manufacturers recognizing “that a statutory imperative for mandatory guidelines exists in 28 U.S.C. § 994(b)(1).”¹⁹⁵ Judge Wilkins briefed the Commission on an inquiry from the House Committee on the Judiciary about the organizational guidelines.¹⁹⁶ He advised the Commission that in his response to the inquiry, he had noted that “the Commission’s efforts in this area have been deliberate and thorough: requesting and receiving input from interested members of the business community, government and academia, holding public hearings and conducting extensive empirical research.”¹⁹⁷ His response to the inquiry also had mentioned “the pledge from the Commission to promulgate organizational guidelines during the 1991 cycle and the Commission’s intent to adhere to this schedule.”¹⁹⁸

¹⁹³ See, e.g. Letter from James W. Crowley, Vice President, Secretary and General Counsel, and Gary L. Hopkins, Deputy General Counsel, E-Systems, to the United States Sentencing Commission (Dec. 7, 1990); Letter from Paul A. Rancour, Senior Vice-President and General Counsel, American Brands Inc. to Hon. William W. Wilkins, Jr., Chairman, United States Sentencing Commission (April 23, 1991); Letter from Charles A. Tausche, Sears, Roebuck and Co., to Hon. William W. Wilkins, Jr., Chairman, and Members of the U.S. Sentencing Commission (April 25, 1991); Letter from Arthur Levine, Department of Health and Human Services, to the Commission (undated); Letter from David R. Bergerson, Vice President and General Counsel, Honeywell Inc. to the Commission (April 23, 1991); Letter from J. Bruce Ipe, Vice President and General Counsel, First Brands Corporation, to Hon. William W. Wilkins, Jr., Chairman, United States Sentencing Commission (April 20, 1991).

¹⁹⁴ See U.S. Sent’g Comm’n, Public Meeting Minutes, at 3 (April 9, 1991) (reflecting discussion of a revised senior staff draft on organizational sanctions) (on file with the Commission); U.S. Sent’g Comm’n, Public Meeting Minutes, at 2 (Apr. 16, 1991) (reflecting discussion of an April 12 draft on organizational sanctions and approval of wording changes) (on file with the Commission).

¹⁹⁵ See U.S. Sent’g Comm’n, Public Meeting Minutes, at 2 (April 26, 1991) (on file with the Commission). As previously noted, the Commission had received public comment suggesting that it lacked the authority to issue guidelines for organizational offenses. See Ilene H. Nagel & Winthrop M. Swenson, *supra* note 134.

¹⁹⁶ The House Committee on the Judiciary requested consultation with the Commission prior to Commission action on the organizational guidelines.

¹⁹⁷ See U.S. Sent’g Comm’n, Public Meeting Minutes, at 2 (Apr. 26, 1991) (on file with the Commission).

¹⁹⁸ *Id.*

Following this discussion, the Commission resumed deliberations about the proposed guidelines. The Commission voted on language changes, additions, and deletions to various sections of Chapter Eight. Judge Wilkins then moved to promulgate “the Organizational Sanction guidelines as amended and submit to Congress.”¹⁹⁹ The motion passed unanimously.²⁰⁰ Judge Wilkins concluded the meeting by expressing “appreciation to the staff and all outside parties who contributed to the production of these guidelines.”²⁰¹

The newly promulgated Chapter Eight, titled “Sentencing of Organizations,” took effect on November 1, 1991. The guidelines reflected the general principles and approach that the Commission had settled on over many months of deliberation. Among other things, the fine range would be based on the seriousness of the offense and the culpability of the organization. The seriousness of the offense generally would be reflected by the highest of the pecuniary gain, the pecuniary loss, or the amount in a guideline offense level fine table and culpability generally would be determined by the steps taken by the organization prior to the offense to prevent and detect criminal conduct, the level and extent of involvement in or tolerance of the offense by certain personnel, and the organization’s actions after an offense has been committed.²⁰² Additionally, based upon the feedback and discussion regarding the impact of an effective compliance program, the guidelines also authorized a three point reduction in the culpability score, resulting in a reduced final fine range, if “the offense occurred despite an effective program to prevent and detect violations of law.”²⁰³

The commentary in Chapter Eight defined an effective program to prevent and detect violations of law as “a program that has been reasonably designed, implemented, and enforced so that it generally will be effective in preventing and detecting criminal conduct.”²⁰⁴ The commentary further noted that the “[f]ailure to prevent or detect the instant offense, by itself, does not mean that the program was not effective.”²⁰⁵ The commentary described the “hallmark of an effective program to prevent and detect violations of law” as the organization’s exercise of “due diligence in seeking to prevent and detect criminal conduct by its employees and other agents.”²⁰⁶ The commentary further provided:

¹⁹⁹ *Id.* at 6.

²⁰⁰ *Id.* Although the motion passed unanimously, two commissioners made statements following the vote indicating disagreement with certain policy decisions reflected in Chapter Eight. Nevertheless, “the corporate sanctions draft was the workproduct of all Commissioners.” *See id.* (reflecting comments by Commissioners MacKinnon, Nagel and Mazzone) (on file with the Commission).

²⁰¹ *Id.* at 7.

²⁰² *See* USSG, Ch. 8, intro. comment. (Nov. 1, 1991).

²⁰³ *See* USSG §8C2.5(f) (Nov. 1991).

²⁰⁴ *See* USSG §8A1.2, comment (n.3(k)) (Nov. 1991).

²⁰⁵ *Id.*

²⁰⁶ *Id.*

Due diligence requires at a minimum that the organization must have taken the following types of steps:

- (1) The organization must have established compliance standards and procedures to be followed by its employees and other agents that are reasonably capable of reducing the prospect of criminal conduct.
- (2) Specific individual(s) within high-level personnel of the organization must have been assigned overall responsibility to oversee compliance with such standards and procedures.
- (3) The organization must have used due care not to delegate substantial discretionary authority to individuals whom the organization knew, or should have known through the exercise of due diligence, had a propensity to engage in illegal activities.
- (4) The organization must have taken steps to communicate effectively its standards and procedures to all employees and other agents, *e.g.*, by requiring participation in training programs or by disseminating publications that explain in a practical manner what is required.
- (5) The organization must have taken reasonable steps to achieve compliance with its standards, *e.g.*, by utilizing monitoring and auditing systems reasonably designed to detect criminal conduct by its employees and other agents and by having in place and publicizing a reporting system whereby employees and other agents could report criminal conduct by others within the organization without fear of retribution.
- (6) The standards must have been consistently enforced through appropriate disciplinary mechanisms, including, as appropriate, discipline of individuals responsible for the failure to detect an offense. Adequate discipline of individuals responsible for an offense is a necessary component of enforcement; however, the form of discipline that will be appropriate will be case specific.

- (7) After an offense has been detected, the organization must have taken all reasonable steps to respond appropriately to the offense and to prevent further similar offenses — including any necessary modifications to its program to prevent and detect violations of law.²⁰⁷

Because of the wide variety of organizations potentially covered by the guidelines, both in size and type, the Commission recognized that a determination of whether a particular organization had an effective program to prevent and detect violations of law would depend on certain factors, including “the size of the organization,” “the likelihood that certain offenses may occur because of the nature of its business,” and the organization’s prior history.²⁰⁸ The Commission also accounted for the existence of applicable industry practices or standards called for by any applicable governmental regulation.²⁰⁹ The failure to incorporate or follow such practices or standards would “[weigh] against a finding of an effective program to prevent and detect violations of law.”²¹⁰

The guidelines further recognized the importance of an effective program to prevent and detect violations of law by requiring the court to impose a term of probation “if, at the time of sentencing, an organization having 50 or more employees does not have an effective program to prevent and detect violations of law.”²¹¹ Finally, the guidelines provided that development and implementation of such a program could also be ordered as a condition of probation.²¹²

Under the promulgated guideline scheme, even if an organization had instituted an effective program to prevent and detect violations of law, it would nevertheless be ineligible for the culpability score reduction if

an individual within high-level personnel of the organization, a person within high-level personnel of the unit of the organization within which the offense was committed where the unit had 200 or more employees, or an individual responsible for the administration or

²⁰⁷ *Id.* The Commission retained the seven steps reflected in the November 5, 1990 draft, but refined and added language to the descriptions of those steps.

²⁰⁸ *Id.*

²⁰⁹ *Id.*

²¹⁰ *Id.*

²¹¹ *See* USSG §8D1.1(a)(3) (Nov. 1991).

²¹² *See* USSG §8D1.4(c)(1) (Nov. 1991).

enforcement of a program to prevent and detect violations of law participated in, condoned, or was willfully ignorant of the offense.²¹³

In addition to this automatic bar for the involvement of high-level personnel, the guidelines provided that “[p]articipation of an individual within substantial authority personnel in an offense results in a rebuttable presumption that the organization did not have an effective program to prevent and detect violations of law.”²¹⁴ An unreasonable delay in reporting the offense to appropriate governmental authorities once the organization became aware of it would also bar application of the culpability score reduction for having an effective program to prevent and detect violations of law.²¹⁵

The Commission expressed the aspiration that “organizations would come to view this guideline scheme as a powerful financial reason for instituting effective internal compliance programs that, in turn, would minimize the likelihood that the organization would run afoul of the law in the first instance.”²¹⁶ Moreover, if a corporate crime was committed, “the sentencing guideline incentives would drive the corporate actor toward swift and effective disclosure and other remedial actions.”²¹⁷ The Commission also “hoped this punishment

²¹³ See USSG §8C2.5(f) (Nov. 1991). The term “high-level personnel” was defined as “individuals who have substantial control over the organization or who have a substantial role in the making of policy within the organization,” and specifically included “a director; an executive officer; an individual in charge of a major business or functional unit of the organization, such as sales, administration, or finance; and an individual with a substantial ownership interest.” See USSG §8A1.2, comment (n.3(b)). “High-level personnel of the unit of the organization” was defined as “agents within the unit who set the policy for or control that unit. For example, if the managing agent of a unit with 200 employees participated in an offense, three points would be added under subsection (b)(3); if that organization had 1,000 employees and the managing agent of the unit with 200 employees were also within high level personnel of the entire organization, four points (rather than three) would be added under subsection (b)(2).” See USSG §8C2.5, comment. (n.3) (Nov. 1991).

²¹⁴ See USSG §8C2.5(f) (Nov. 1991). The term “substantial authority personnel” was defined as “individuals who within the scope of their authority exercise a substantial measure of discretion in acting on behalf of an organization. It includes high-level personnel, individuals who exercise substantial supervisory authority (e.g., a plant manager, a sales manager), and any other individuals who, although not a part of an organization’s management, nevertheless exercise substantial discretion when acting within the scope of their authority (e.g., an individual with authority in an organization to negotiate or set price levels or an individual authorized to negotiate or approve significant contracts). The Commission concluded that whether “an individual falls within this category must be determined on a case-by-case basis.” See USSG §8A1.2, comment (n.3(c)).

²¹⁵ See USSG §8C2.5(f) (Nov. 1991).

²¹⁶ See John R. Steer, *Changing Organizational Behavior—The Federal Sentencing Guidelines Experiment Begins to Bear Fruit* (unpublished paper presented at the Twenty-Ninth Annual Conference on Value Inquiry, Tulsa, Oklahoma, at 8 (April 26, 2001)), available at http://www.ussc.gov/Guidelines/Organizational_Guidelines/Selected_Articles/corpbbehavior2.pdf.

²¹⁷ *Id.*

scheme initiative would help contribute over time, to a more healthy, values-based way of doing business in America.”²¹⁸

V. The 2004 Amendments to the Organizational Guidelines

A Decade of Post-Promulgation Activities Relating to the Organizational Guidelines

Following promulgation of the organizational guidelines in 1991, the Commission continued to consider the issue of guideline fine provisions for organizations with respect to food and drug²¹⁹ and environmental offenses.²²⁰ Although the Commission had previously agreed to publish the proposal submitted by the advisory group on environmental sanctions,²²¹ in 1994, it deferred further action on organizational guidelines for both food and drug and environmental offenses until after the appointment of new commissioners.²²² To inform further consideration of the organizational guidelines, the Commission voted to hold a symposium on corporate crime, which would be designed to focus on four major issue areas: “(i) how companies and industries are responding to [Commission] incentives to establish compliance programs; (ii) how collateral penalties can affect guideline incentives; (iii) complementary government policies that can strengthen good corporation citizenship; and (iv) different models demonstrating how government can be helpful.”²²³

In late 1994, four new commissioners joined the Commission.²²⁴ Thereafter, the Commission decided to “[engage] in a [two year] comprehensive guideline assessment and simplification effort.”²²⁵ In light of these efforts, the Commission opted to forego promulgating any new

²¹⁸ *Id.* at 8-9.

²¹⁹ See, e.g., Food and Drug Working Group Final Report, available at http://www.ussc.gov/Guidelines/Organizational_Guidelines/Special_Reports/food.htm.

²²⁰ See Report from Advisory Group on Environmental Sanctions, available at http://www.ussc.gov/Guidelines/Organizational_Guidelines/Special_Reports/ENVIRON.pdf.

²²¹ See U.S. Sent’g Comm’n, Public Meeting Minutes, at 2 (Nov. 30, 1993), available at http://www.ussc.gov/Legislative_and_Public_Affairs/Public_Hearings_and_Meetings/19931130/cnov293.htm.

²²² See U.S. Sent’g Comm’n, Public Meeting Minutes, at 2 (May 3, 1994), available at http://www.ussc.gov/Legislative_and_Public_Affairs/Public_Hearings_and_Meetings/19940503/cmav94.htm.

The terms of Judge William W. Wilkins, Jr. and Ilene H. Nagel expired that year and there were two additional vacancies.

²²³ See U.S. Sent’g Comm’n, Public Meeting Minutes (July 26, 1994), available at http://www.ussc.gov/Legislative_and_Public_Affairs/Public_Hearings_and_Meetings/19940726/cjul94.htm.

²²⁴ In November, 1994, Judge Richard P. Conaboy assumed the chairmanship of the Commission, joined by three other new commissioners: Judge Deanell R. Tacha, Michael Goldsmith, and Wayne A. Budd.

²²⁵ See Notice of Proposed Amendments to the Sentencing Guidelines, Policy Statements, and Commentary, and Request for Public Comment, 61 Fed. Reg. 79 (Jan. 2, 1996).

guideline amendments for one year,²²⁶ and it also tabled any discussion of the organizational guidelines.²²⁷ The Commission nevertheless continued with plans to conduct the corporate crime symposium, which was held in September of 1995.²²⁸

At the symposium, the Commission explained that the organizational guidelines embodied a “carrot and stick” approach that had emerged from the Commission’s acceptance of three facts: 1) vicarious liability means not all corporate defendants are alike; 2) responsible corporate actions can foster crime control; and 3) sentencing guidelines are rules that can incentivize good conduct. Moreover, the Commission’s stated objectives for structuring the guidelines as it did were not only to define a model for good corporate citizenship but also to use the model to make corporate sentencing fair and to create incentives for companies to take crime controlling action.²²⁹

Senator Edward M. Kennedy, a keynote speaker at the symposium, noted the significance of the organizational guidelines. Although asserting that the “guidelines are largely untested,” he agreed that “commendable efforts are underway to help ensure that companies doing business in this country are, in fact, good corporate citizens.”²³⁰ Other panelists discussed various

²²⁶ *Id.*

²²⁷ See U.S. Sent’g Comm’n, Public Meeting Minutes, at 2 (May 8, 1995) (reflecting request to give environmental organizational guidelines lower priority because of guideline simplification efforts), available at http://www.ussc.gov/Legislative_and_Public_Affairs/Public_Hearings_and_Meetings/19950508/cmey95.htm; see also U.S. Sent’g Comm’n, *Proceedings of the Second Symposium on Crime and Punishment in the United States, Corporate Crime in America: Strengthening the “Good Citizen” Corporation* (Sept. 1995), available at http://www.ussc.gov/Guidelines/Organizational_Guidelines/Special_Reports/wcsympo.pdf.

²²⁸ The Commission held the symposium in Washington, D.C., and 450 participants attended, including “a wide range of federal enforcement officials, representatives of Fortune 500 as well as smaller corporations, private attorneys and other consultants who advise organizations, and academics who focus on business ethics and crime.” see U.S. Sent’g Comm’n, *Proceedings of the Second Symposium on Crime and Punishment in the United States, Corporate Crime in America: Strengthening the “Good Citizen” Corporation*, at i (Sept. 1995). The agenda included panels discussing corporate experiences in developing “effective” compliance programs, “best practices,” and evolving compliance standards.

²²⁹ See Win Swenson (Moderator), *The Organizational Guidelines’ “Carrot and Stick” Philosophy, and Their Focus on “Effective” Compliance*, U.S. Sent’g Comm’n, *Proceedings of the Second Symposium on Crime and Punishment in the United States, Corporate Crime in America: Strengthening the “Good Citizen” Corporation*, at 33-34 (Sept. 1995), available at http://www.ussc.gov/Guidelines/Organizational_Guidelines/Special_Reports/wcsympo.pdf.

²³⁰ See Edward M. Kennedy, *Keynote Address*, U.S. Sent’g Comm’n, *Proceedings of the Second Symposium on Crime and Punishment in the United States, Corporate Crime in America: Strengthening the “Good Citizen” Corporation*, at 119 (Sept. 1995).

survey results, which suggested that the guidelines were beginning to impact organizations' efforts to prevent and detect violations of law.²³¹

Among other things, the symposium included a discussion of the role of ethics as a component of effective compliance programs.²³² The discussions at the symposium led to various suggestions for future commission action in this area.²³³ In light of other policy priorities, however, the Commission did not immediately promulgate amendments to Chapter Eight of the *Guidelines Manual* in response to those suggestions.²³⁴

Rekindled Interest in Possible Amendments to the Organizational Guidelines

Between 1996 and 1998, the terms of three commissioners expired and two others resigned, leaving the agency to operate without commissioners for a period of 13 months. The President nominated seven new commissioners to serve staggered terms, and the slate was confirmed by the Senate on November 10, 1999. Judge Diana E. Murphy, the new chair of the Commission, and the other commissioners "became aware of the wide impact the [organizational] Guidelines have on organizations ...extend[ing] far beyond their use in the context of criminal cases."²³⁵ Not only did the organizational guidelines influence the prosecutorial policy of the

²³¹ See generally, Cameron Counters (Moderator), *A Presentation of Empirical Research on Compliance Practices: What Companies Say they Are Doing – What Employees Hear*, U.S. Sent'g Comm'n, *Proceedings of the Second Symposium on Crime and Punishment in the United States, Corporate Crime in America: Strengthening the "Good Citizen" Corporation*, at 123-191 (Sept. 1995).

²³² See Mary E. Didier (Moderator), *Bringing Carrots and Sticks in House: The Role of Ethics, Incentives, and Private "Inspectors General" in Achieving "Effective" Compliance*, in U.S. Sent'g Comm'n, *Proceedings of the Second Symposium on Crime and Punishment in the United States, Corporate Crime in America: Strengthening the "Good Citizen" Corporation*, at 217-240 (1995) (transcript of panelists' discussion on the role of ethics in compliance programs); Win Swenson (Moderator), *Symposium Wrap-Up: Commentary on Ideas and Issues Raised During the Conference*, in U.S. Sent'g Comm'n, *Proceedings of the Second Symposium on Crime and Punishment in the United States, Corporate Crime in America: Strengthening the "Good Citizen" Corporation*, at 417-436 (Sept. 1995) (transcript of panelists' discussion on role of ethics in compliance programs).

²³³ See U.S. Sent'g Comm'n, Public Meeting Minutes (Oct. 11, 1995), available at http://www.ussc.gov/Legislative_and_Public_Affairs/Public_Hearings_and_Meetings/19951011/cocr95.htm.

²³⁴ The symposium did lead to increased training efforts. See U.S. Sent'g Comm'n, Public Meeting Minutes, at 1 (Nov. 21, 2000) ("Commissioner Steer stated that the previous Commission had entered into a partnership with the [Ethics Officer Association] to hold a series of regional program featuring the organizational guidelines."), available at http://www.ussc.gov/Legislative_and_Public_Affairs/Public_Hearings_and_Meetings/20001121/11-21-00.htm. Moreover, the Commission continued to collect and report on organizational sentencing data. See, e.g., U.S. Sent'g Comm'n, *1996-2001 Sourcebook of Federal Sentencing Statistics*, available at http://www.ussc.gov/Data_and_Statistics/archives.cfm.

²³⁵ See Diana E. Murphy, *The Federal Sentencing Guidelines for Organizations: A Decade of Promoting Compliance and Ethics*, 87 Iowa L. Rev. 697, 698 (2002). See also *In re Caremark International Inc. Derivative Litigation*, Del. Chancery C.A. 13670, 698 A.2d 959, 969 (Sept. 25, 1996) (noting that "[t]he Guidelines offer powerful incentives for

Department of Justice, they also influenced the policies of other regulatory agencies.²³⁶ In addition, the organizational guidelines were “credited with helping to create an entirely new job description: the Ethics and Compliance Officer.”²³⁷

The Commission began to consider whether ethics was “an *implicit* component of effective compliance programs, or whether ethics should now *explicitly* be incorporated into the compliance program criteria in the organizational guidelines.”²³⁸ Commentators offered the new commissioners additional suggestions for amendments to Chapter Eight.²³⁹

Shortly after the tenth anniversary of the organizational guidelines and in response to feedback on the operation of the guidelines,²⁴⁰ the Commission solicited public input on the scope, potential membership, and possible formation of an ad hoc advisory group to consider any “viable methods to improve the operation of these guidelines.”²⁴¹ At the time, one commissioner remarked that although the organizational guidelines had been an “overwhelming success,” they could still be improved.²⁴²

corporations today to have in place compliance programs to detect violations of law promptly and to report violations to appropriate public officials when discovered, and to take voluntary remedial efforts.”).

²³⁶ See Diana E. Murphy, *supra* note 235, at 712 (internal citations omitted).

²³⁷ *Id.* at 713 (internal citations omitted).

²³⁸ *Id.* at 714 (emphasis supplied). Judge Murphy cited authorities that defined a good compliance program as one that “emphasizes values and moral responsibility” while a good ethics program “must help employees to know and obey the law.” *Id.* at 714 (internal citations omitted). See also Win Swenson (Moderator), *Symposium Wrap-Up: Commentary on Ideas and Issues Raised During the Conference*, in U.S. Sent’g Comm’n, PROCEEDINGS OF THE SECOND SYMPOSIUM ON CRIME AND PUNISHMENT IN THE UNITED STATES, CORPORATE CRIME IN AMERICA: STRENGTHENING THE “GOOD CITIZEN” CORPORATION, at 425 (Sept. 1995) (“A compliance program sets basic rules and procedures and can be summed up in a checklist. An ethics program addresses values and decisions in grey areas.”)

²³⁹ Commentators included the Health Care Compliance Association, the Practising Law Institute, and the Alliance for Health Care Integrity, among others. Comments were made in writing and orally to the Commission. For a more detailed discussion of these suggestions, see Diana E. Murphy, *supra* note 235, at 716-18.

²⁴⁰ See U.S. Sent’g Comm’n, Public Meeting Minutes (Nov. 21, 2000), available at http://www.ussc.gov/Legislative_and_Public_Affairs/Public_Hearings_and_Meetings/20001121/11-21-00.htm; U.S. Sent’g Comm’n, Public Meeting Minutes (Aug. 28, 2001), available at http://www.ussc.gov/Legislative_and_Public_Affairs/Public_Hearings_and_Meetings/20010828/8-28-01.htm. See also Diana E. Murphy, *supra* note 235, at 716-718.

²⁴¹ See Notice of Policy Priorities for Amendment Cycle Ending May 1, 2002; Request for Public Comment on the Possible Formation of an Ad Hoc Advisory Group on Organizational Guidelines; and Request for Public Comment on the Possible Formation of an Ad Hoc Advisory Group on Issues Related to the Impact of the Sentencing Guidelines on Native Americans in Indian Country, 66 Fed. Reg. 48306 (Sept. 19, 2001).

²⁴² See U.S. Sent’g Comm’n, Public Meeting Minutes (Sept. 10, 2001) (reflecting statement made by Judge Ruben Castillo), available at

On February 21, 2002, the Commission announced “the formation of an ad hoc advisory group to review the general effectiveness of the federal sentencing guidelines for organizations,” and it asked the group to “place particular emphasis on examining the criteria for an effective program to ensure an organization’s compliance with the law.”²⁴³ The fifteen member group was “composed of industry representatives, scholars, and experts in compliance and business ethics.”²⁴⁴ The Commission formed the advisory group for a term of 18 months “to foster dialogue about possible refinements to the organizational guidelines.”²⁴⁵

The Commission’s decision to form this advisory group turned out to be a prescient one. Five months after the formation of the advisory group, Congress passed the Sarbanes-Oxley Act of 2002.²⁴⁶ Section 805 of the Sarbanes-Oxley Act directed the Commission to “review and amend, as appropriate, the Federal Sentencing Guidelines and related policy statements to ensure that . . . the guidelines that apply to organizations in United States Sentencing Guidelines, [C]hapter 8, are sufficient to deter and punish organizational criminal misconduct.” The Commission used the advisory group’s work, as discussed below, to inform its response to that directive.

The Work of the Ad Hoc Advisory Group on the Organizational Sentencing Guidelines

The advisory group immediately convened and decided, among other things, to solicit public comment “on the nature and scope of issues which [it] might wish to address during its (18) eighteen-month term.”²⁴⁷ The advisory group informed the public that it did “not intend to consider fines for environmental crimes committed by organizations, nor the structure of the

http://www.ussc.gov/Legislative_and_Public_Affairs/Public_Hearings_and_Meetings/20010910/meeting_minutes.htm.

²⁴³ See U.S. Sent’g Comm’n, News Release (Feb. 21, 2002), available at

http://www.ussc.gov/Legislative_and_Public_Affairs/Newsroom/Press_Releases/20020221_Press_Release.htm.

²⁴⁴ See U.S. Sent’g Comm’n, News Release (Feb. 21, 2002), available at

http://www.ussc.gov/Legislative_and_Public_Affairs/Newsroom/Press_Releases/20020221_Press_Release.htm.

The chair of that advisory group, B. Todd Jones, Esq., currently serves as both the United States Attorney for the District of Minnesota and the Acting Director of the Bureau of Alcohol, Tobacco and Firearms. The other members of the advisory group included both the current Attorney General, Eric Holder, Esq., and the current Inspector General for the Department of Justice, Michael Horowitz, Esq. For a complete list of Advisory Group members and relevant backgrounds, see U.S. Sent’g Comm’n, *Report of the Ad Hoc Advisory Group on the Organizational Sentencing Guidelines*, App. A (Oct. 7, 2003), available at

http://www.ussc.gov/Guidelines/Organizational_Guidelines/advgrp rpt/AppA.pdf.

²⁴⁵ See U.S. Sent’g Comm’n, News Release (Feb. 21, 2002), available at

http://www.ussc.gov/Legislative_and_Public_Affairs/Newsroom/Press_Releases/20020221_Press_Release.htm.

²⁴⁶ Pub. L. 107–204, 116 Stat. 745 (July 30, 2002).

²⁴⁷ See Advisory Group for Organizational Sentencing Guidelines, Request for Public Comment (March 19, 2012), available at http://www.ussc.gov/Guidelines/Organizational_Guidelines/RPC_3_02.htm.

fine tables generally.”²⁴⁸ Rather, its primary focus would be “on the application of the criteria for an effective compliance program, as listed in Application Note 3(k) to §8A1.2 of the Sentencing Guidelines, and the ways in which those criteria affect the operation of Chapter Eight as a whole.”²⁴⁹ Nonetheless, the advisory group made clear that it would “also consider whether there are other features of the organizational guidelines that merit review or change.”²⁵⁰

In response to this inquiry, the advisory group received public comment from a variety of sources.²⁵¹ This public comment and “its own initial evaluation of both the terminology and the application of Chapter Eight of the Guidelines” led the advisory group to issue an additional request for public comment.²⁵² The advisory group explained that it had “identified several specific areas of concern and generated a list of key questions in an effort to focus and stimulate additional public comment prior to preparing its report to the United States Sentencing Commission.” Among the specific questions asked was:

Should Chapter Eight of the Sentencing Guidelines encourage organizations to foster ethical cultures to ensure compliance with the intent of regulatory schemes as opposed to technical compliance that can potentially circumvent the purpose of the law or regulation? If so, how would an organization’s performance in this regard be measured or evaluated? How would that be incorporated into the structure of Chapter Eight? ²⁵³

The advisory group received a robust response to the request for additional public comment.²⁵⁴ At a full day public hearing held on November 14, 2002, “invited representatives with a broad range of perspectives submitted oral and written testimony,”²⁵⁵ which further

²⁴⁸ *Id.*

²⁴⁹ *Id.*

²⁵⁰ *Id.*

²⁵¹ See Public Comment Received by Advisory Group for Organizational Sentencing Guidelines in Response to Request for Public Comment (March 19, 2012), available at http://www.ussc.gov/Guidelines/Organizational_Guidelines/pubcom_302/PC_302.htm.

²⁵² See Advisory Group for Organizational Sentencing Guidelines, Request for Additional Public Comment Regarding the U.S. Sentencing Guidelines for Organizations (August 21, 2012), available at http://www.ussc.gov/Guidelines/Organizational_Guidelines/pubcom8_02.pdf.

²⁵³ *Id.*, Question 6.

²⁵⁴ See Public Comment Received in Response to Additional Public Comment Requested (Oct. 15, 2002), available at http://www.ussc.gov/Guidelines/Organizational_Guidelines/pubcom_1002/PC_1002.htm.

²⁵⁵ See U.S. Sent’g Comm’n, *Report of the Ad Hoc Advisory Group on the Organizational Sentencing Guidelines*, at 1 (Oct. 7, 2003). The written testimony submitted and a transcript of the hearing is available at

informed the advisory group's work. The advisory group announced that the public comment period would close on December 1, 2002, after which it would begin work on deciding what, if anything, should be amended in Chapter Eight.²⁵⁶ The advisory group's work also involved "extensively canvass[ing] the practice commentary and scholarly literature, survey[ing] current representatives of the U.S. Department of Justice regarding prosecutorial decision making, and familiariz[ing] itself with the policies of a variety of other governmental agencies and departments."²⁵⁷ The advisory group "continuously kept abreast of Congress's response to [high-profile] corporate scandals, most notably in the Sarbanes-Oxley Act of 2002, as well as the relevant output of public and private regulators."²⁵⁸

On October 7, 2003, the advisory group presented a comprehensive report to the Commission "intended to assist the [Commission] in its future consideration of potential amendments to Chapter Eight of the federal sentencing guidelines."²⁵⁹ The report concluded that "the organizational sentencing guidelines have been successful in inducing many organizations, both directly and indirectly, to focus on compliance and to create programs to prevent and detect violations of law."²⁶⁰ Notwithstanding this success, the advisory group also maintained that "changes can and should be made to give organizations greater guidance regarding the factors that are likely to result in *effective* programs to prevent and detect violations of law."²⁶¹ Among other things, the advisory group believed that the organizational guidelines should "better address the role of organizational leadership in ensuring that compliance programs are valued, supported, periodically re-evaluated, and operate for their intended purpose," and should be updated to reflect the "best practices" in the compliance field.²⁶²

http://www.ussc.gov/Guidelines/Organizational_Guidelines/Special_Reports/Advisory_Group_Organizational_Guidelines.cfm.

²⁵⁶ Transcript, Public Hearing held by the Ad Hoc Advisory Group on Organizational Sentencing Guidelines, Plenary Session I, at 6-7 (Nov. 14, 2002) (Opening Remarks by B. Todd Jones, Chair), available at http://www.ussc.gov/Guidelines/Organizational_Guidelines/ph11_02/plenaryI.pdf.

²⁵⁷ See U.S. Sent'g Comm'n, *Report of the Ad Hoc Advisory Group on the Organizational Sentencing Guidelines*, at 1 (Oct. 7, 2003).

²⁵⁸ See U.S. Sent'g Comm'n, *Report of the Ad Hoc Advisory Group on the Organizational Sentencing Guidelines*, at 2 (Oct. 7, 2003). During the period in which the advisory group was evaluating the efficacy of the organizational guidelines, financial scandals erupted at large public companies such as Enron, WorldCom, Tyco International, and Adelphia Communications. *Id.* at 35-7 (internal citations omitted). The Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745, was enacted partly in response to such events.

²⁵⁹ See U.S. Sent'g Comm'n, *Report of the Ad Hoc Advisory Group on the Organizational Sentencing Guidelines*, at 2 (Oct. 7, 2003). The presentation took place at a public hearing. A transcript of the proceedings is available at http://www.ussc.gov/Guidelines/Organizational_Guidelines/advgrprpt/1007_Brief.pdf.

²⁶⁰ See U.S. Sent'g Comm'n, *Report of the Ad Hoc Advisory Group on the Organizational Sentencing Guidelines*, at 3 (Oct. 7, 2003).

²⁶¹ *Id.* (emphasis in original).

²⁶² *Id.*

The report made several suggestions relating to compliance programs. First, the advisory group recommended that the Commission “promulgate a stand-alone guideline at §8B2.1 defining an ‘effective program to prevent and detect violations of law.’”²⁶³ The advisory group also recommended that, when promulgating the suggested standalone guideline, the Commission make the following modifications and additions to the definition of “effective program to prevent and detect violations of law”:

- Emphasize the importance within the guidelines of an organizational culture that encourages a commitment to compliance with the law
- Provide a definition of “compliance standards and procedures”
- Specify the responsibilities of an organization’s governing authority and organizational leadership for compliance
- Emphasize the importance of adequate resources and authority for individuals within organizations with the responsibility for the implementation of the effective program
- Replace the current terminology of “propensity to engage in violations of law” with language that defines the nature of an organization’s efforts to determine when an individual has a reason to know, or history of engaging in, violations of law
- Include training and the dissemination of training materials and information within the definition of an “effective program”
- Add “periodic evaluation of the effectiveness of a program” to the requirement for monitoring and auditing systems
- Require a mechanism for anonymous reporting
- Include the phrase “seek guidance about potential or actual violations of law” within the criteria in order to more specifically encourage prevention and deterrence of violations of law as part of compliance programs
- Provide for the conduct of ongoing risk assessments as part of the implementation of an “effective program”²⁶⁴

Notable, the advisory group recommended against an increase in the culpability score of sentenced organizations for the *absence* of an “effective program,” reasoning that such an increase might have a disparate impact on small organizations.²⁶⁵

²⁶³ *Id.* at 3-5.

²⁶⁴ *Id.* at 4.

²⁶⁵ *Id.* at 7.

The advisory group proposed specific changes to the language of the guidelines regarding compliance programs, in light of its conclusions. These suggested changes were set out in a proposed amendment, which was included in an appendix to the report.²⁶⁶ The report also included other proposed changes to Chapter Eight.²⁶⁷

Commission's Response to the Ad Hoc Advisory Group's Report on the Organizational Sentencing Guidelines

Upon receipt of the advisory group's report, the Commission immediately began to consider the conclusions and proposed amendments set out in the report.²⁶⁸ The Commission placed the report on its website and made it available to the public through its Public Information Office.²⁶⁹ On November 5, 2003, one month after receiving the advisory group's report, the Commission unanimously voted to "publish for comment a proposed amendment to Chapter 8 to provide greater guidance, emphasis, and clarity regarding effective compliance programs."²⁷⁰ The published proposed amendment "would move the seven minimum steps for a compliance program from their present location in an application note to a new guideline" to emphasize the importance of compliance programs.²⁷¹ In addition, the proposed guideline "would define the obligations and purposes of such programs, add more detail to the seven minimum requirements, and provide definitions throughout the associated commentary."²⁷²

²⁶⁶ *Id.* at App. B.

²⁶⁷ The advisory group's other recommendations to the Commission—which included a recommendation that the Commission add clarifying language regarding the role of waiver of attorney-client privilege and work product protection for purposes of receiving sentencing credit based on cooperation with the government during the investigation and prosecution of an organization, *id.* at 5—are generally beyond the scope of this paper. Notably, although the Commission adopted the attorney-client privilege recommendation when it promulgated the 2004 amendments to Chapter Eight, *see* USSG, App. C, amend. 673 (eff. Nov. 1, 2004), the Commission later deleted the commentary relating to waiver of attorney-client privilege and work product protection. *See* USSG, App. C, amend. 695 (eff. Nov. 1, 2006).

²⁶⁸ *See* U.S. Sent'g Comm'n, Public Meeting Minutes (October 8, 2003), available at http://www.usc.gov/Legislative_and_Public_Affairs/Public_Hearings_and_Meetings/20031007-08/10_8_03.htm.

²⁶⁹ *Id.*

²⁷⁰ *See* U.S. Sent'g Comm'n, Public Meeting Minutes, at 5 (November 5, 2003), available at http://www.usc.gov/Legislative_and_Public_Affairs/Public_Hearings_and_Meetings/20031104-5/11_05_03.htm.

²⁷¹ *Id.*

²⁷² *Id.*

The proposed amendment was published on December 30, 2003.²⁷³ Although the substance of the proposed amendment essentially incorporated the guideline language that the advisory group had suggested, the Commission formulated several issues for comment to accompany the published proposed amendment.²⁷⁴ Among other things, the Commission asked whether there were “factors or considerations that could be incorporated into Chapter Eight (Sentencing of Organizations), particularly §8C1.2, to encourage small and mid-size organizations to develop and maintain compliance programs.”²⁷⁵ The Federal Register notice publishing the proposed amendment also announced that the advisory group’s report was available on the Commission’s website.²⁷⁶

Following publication of the proposed amendment, the Commission followed its usual process for promulgating amendments, which included studying relevant data and information that the Commission staff compiled and reviewing the formal public comment.²⁷⁷ In addition, the Commission held a public hearing in March, 2004, at which two panels of subject matter experts testified about the proposed amendment to Chapter Eight.²⁷⁸ The witnesses agreed with the advisory group’s conclusion that the organizational guidelines had been successful in focusing attention on compliance.²⁷⁹ One described the Commission’s “profound influence on corporate behavior,” asserting that the guidelines had been “incredibly successful in galvanizing [and] inspiring companies to . . . put programs in place.”²⁸⁰ Many agreed, however,

²⁷³ See Notice of Proposed Amendments to Sentencing Guidelines, Policy Statements, and Commentary; Request for Public Comment, including Public Comment Regarding Retroactive Application of any the Proposed Amendments, 68 Fed. Reg. 75340, 75354 (December 30, 2003).

²⁷⁴ *Id.* at 75360. See also U.S. Sent’g Comm’n, Public Meeting Minutes, at 3 (November 5, 2003), available at http://www.uscc.gov/Legislative_and_Public_Affairs/Public_Hearings_and_Meetings/20031104-5/11_05_03.htm.

²⁷⁵ See 68 Fed. Reg. 75340, 75360.

²⁷⁶ See *id.* at 75354.

²⁷⁷ For a more detailed discussion of the Commission’s amendment process, see U.S. Sent’g Comm’n, *The History of the Child Pornography Guidelines* at 4-5 (Oct. 2009).

²⁷⁸ The hearing agenda, written statements submitted by the witnesses and the hearing transcript are available at http://www.uscc.gov/Legislative_and_Public_Affairs/Public_Hearings_and_Meetings/20040317_19/3_17_04.htm.

²⁷⁹ See, e.g., Testimony of Kenneth Johnson, Director, Ethics and Policy Integration Centre, to the Commission, at 38 (March 17, 2004); Testimony of Mary Beth Buchanan, United States Attorney for the Western District of Pennsylvania and Chair, Attorney General’s Advisory Committee, to the Commission, at 59 (March 17, 2004) (on behalf of the Department of Justice); Linda A. Madrid, Managing Director, General Counsel and Corporate Secretary, CarrAmerica Realty, and Member, Board of Directors of the Association of Corporate Counsel, to the Commission, at 93 (March 17, 2004).

²⁸⁰ See Testimony of Dov L. Seidman, Chairman and Chief Executive Officer, LRN, to the Commission, at 24, 39 (March 17, 2004).

that “there is still room for improvement”²⁸¹ and supported the advisory group’s focus on organizational culture and ethics.²⁸²

The Commission received public comment or written testimony from approximately thirty sources, representing a broad spectrum of interests.²⁸³ After close of the public comment period, the Commission refined the proposed amendment in light of the comments and testimony it received. On April 8, 2004, the Commission unanimously voted to promulgate the proposed amendment, making changes to various parts of Chapter Eight of the *Guidelines Manual*.²⁸⁴

In its Reason for Amendment, the Commission explained that the change to Chapter Eight was the “culmination of a multi-year review of the organizational guidelines [that] implements several recommendations issued on October 7, 2003, by the Commission’s Ad Hoc Advisory Group on the Organizational Sentencing Guidelines (Advisory Group), and responds to the Sarbanes-Oxley Act.”²⁸⁵ The amendment elevated the criteria for an effective compliance program from the commentary into a separate guideline, USSG §8B2.1 (Effective Compliance and Ethics Program), which was done “[i]n order to emphasize the importance of compliance and ethics programs and to provide more prominent guidance on the requirements for an effective program.”²⁸⁶ In addition to the existing requirement that an organization exercise due diligence to prevent and detect criminal conduct, the new guideline added a requirement that an organization “otherwise promote an organizational culture that encourages ethical conduct and a commitment to compliance with the law.”²⁸⁷ The Commission “intended [this

²⁸¹ See Testimony of Mary Beth Buchanan, United States Attorney for the Western District of Pennsylvania and Chair, Attorney General’s Advisory Committee, to the Commission, at 65-66 (March 17, 2004) (on behalf of the Department of Justice).

²⁸² See, e.g., Testimony of Kenneth Johnson, Director, Ethics and Policy Integration Centre, to the Commission, at 39 (March 17, 2004) (The focus on culture is “very very important.”); Testimony of Dov L. Seidman, Chairman and Chief Executive Officer, LRN, to the Commission, at 28-9 (March 17, 2004) (“[C]ompanies are increasingly focused on protecting and strengthening their reputation, which in turn focused them on ethics, not just compliance.”).

²⁸³ Commentators included the Department of Justice, the Commission’s Practitioners Advisory Group, academics, corporations, compliance professionals, and various professional organizations, such as the Health Care Compliance Association, the Business Roundtable, and the Association of Corporate Counsel. Some of these commentators had actively participated in the promulgation of the original set of organizational guidelines. The public comment is on file with the Commission.

²⁸⁴ See U.S. Sent’g Comm’n, Public Meeting Minutes (April 8, 2004), available at http://www.ussc.gov/Legislative_and_Public_Affairs/Public_Hearings_and_Meetings/2004/408/4_08_04.htm.

²⁸⁵ See USSG, App. C, amend. 673 (eff. Nov. 1, 2004).

²⁸⁶ See *id.*

²⁸⁷ See USSG, §8B2.1(a)(2) (Nov. 1, 2004).

requirement] to reflect the emphasis on ethical conduct and values incorporated into recent legislative and regulatory reforms.”²⁸⁸

The Commission explained that the amendment also provided “significant additional guidance” about the seven requirements that “are the hallmarks of an effective program that encourages compliance with the law and ethical conduct.”²⁸⁹ The amendment “elaborate[d] upon [these seven requirements], introducing additional rigor generally and imposing significantly greater responsibilities on the organization’s governing authority and executive leadership.”²⁹⁰ As amended, those requirements provided as follows:

- (1) The organization shall establish standards and procedures to prevent and detect criminal conduct.
- (2) (A) The organization’s governing authority shall be knowledgeable about the content and operation of the compliance and ethics program and shall exercise reasonable oversight with respect to the implementation and effectiveness of the compliance and ethics program.
- (B) High-level personnel of the organization shall ensure that the organization has an effective compliance and ethics program, as described in this guideline. Specific individual(s) within high-level personnel shall be assigned overall responsibility for the compliance and ethics program.
- (C) Specific individual(s) within the organization shall be delegated day-to-day operational responsibility for the compliance and ethics program. Individual(s) with operational responsibility shall report periodically to high-level personnel and, as appropriate, to the governing authority, or an appropriate subgroup of the governing authority, on the effectiveness of the compliance and ethics program. To carry out such operational responsibility, such individual(s) shall be given adequate resources, appropriate authority, and direct access to the

²⁸⁸ See USSG, App. C, amend. 673 (eff. Nov. 1, 2004). For a discussion of these legislative and regulatory reforms, see U.S. Sent’g Comm’n, *Report of the Ad Hoc Advisory Group on the Organizational Sentencing Guidelines*, at 35-47 (Oct. 7, 2003).

²⁸⁹ See USSG, App. C, amend. 673 (eff. Nov. 1, 2004). The Commission moved those seven requirements from the commentary in USSG, §8A1.2, comment. (n.3(k)) into the new guideline, USSG §8B2.1.

²⁹⁰ See USSG, App. C, amend. 673 (eff. Nov. 1, 2004).

governing authority or an appropriate subgroup of the governing authority.

- (3) The organization shall use reasonable efforts not to include within the substantial authority personnel of the organization any individual whom the organization knew, or should have known through the exercise of due diligence, has engaged in illegal activities or other conduct inconsistent with an effective compliance and ethics program.
- (4)
 - (A) The organization shall take reasonable steps to communicate periodically and in a practical manner its standards and procedures, and other aspects of the compliance and ethics program, to the individuals referred to in subdivision
 - (B) by conducting effective training programs and otherwise disseminating information appropriate to such individuals' respective roles and responsibilities.
 - (C) The individuals referred to in subdivision (A) are the members of the governing authority, high-level personnel, substantial authority personnel, the organization's employees, and, as appropriate, the organization's agents.
- (5) The organization shall take reasonable steps—
 - (A) to ensure that the organization's compliance and ethics program is followed, including monitoring and auditing to detect criminal conduct;
 - (B) to evaluate periodically the effectiveness of the organization's compliance and ethics program; and
 - (C) to have and publicize a system, which may include mechanisms that allow for anonymity or confidentiality, whereby the organization's employees and agents may report or seek guidance regarding potential or actual criminal conduct without fear of retaliation.
- (6) The organization's compliance and ethics program shall be promoted and enforced consistently throughout the organization through (A) appropriate incentives to perform in accordance with the compliance and ethics program; and (B) appropriate disciplinary measures for engaging in criminal conduct and for failing to take reasonable steps to prevent or detect criminal conduct.
- (7) After criminal conduct has been detected, the organization shall take reasonable steps to respond appropriately to the

criminal conduct and to prevent further similar criminal conduct, including making any necessary modifications to the organization's compliance and ethics program.²⁹¹

In addition to the changes made to the seven requirements for an effective compliance and ethics program, the Commission added a new provision requiring that "as an essential component of the design, implementation, and modification of an effective program, an organization must periodically assess the risk of the occurrence of criminal conduct."²⁹² The commentary lists factors that should be considered when making the required risk assessment.²⁹³ The Commission explained that "organizations should evaluate the nature and seriousness of potential criminal conduct, the likelihood that certain criminal conduct may occur because of the nature of the organization's business, and the prior history of the organization."²⁹⁴ Moreover, the guideline commentary establishes that "[t]o be effective, this process must be ongoing. Organizations must periodically prioritize their compliance and ethics resources to target those potential criminal activities that pose the greatest threat in light of the risks identified."²⁹⁵

The Commission further highlighted the role of ethics by amending the introductory commentary to Chapter Eight. Among other things, the amended commentary stated that:

These guidelines offer incentives to organizations to reduce and ultimately eliminate criminal conduct by providing a structural foundation from which an organization may self-police its own conduct through an effective compliance and ethics program. The prevention and detection of criminal conduct, as facilitated by an effective compliance *and ethics* program, will assist an organization in *encouraging ethical conduct* and in complying fully with all applicable laws.²⁹⁶

The Commission also took several additional steps to address concerns regarding the lack of incentives for small organizations²⁹⁷ to develop compliance programs. First, through

²⁹¹ See USSG, §8B2.1(b)(1)-(7) (Nov. 1, 2004).

²⁹² See USSG, App. C, amend. 673 (eff. Nov. 1, 2004); see also USSG §8B2.1(c) (eff. Nov. 1, 2004).

²⁹³ See USSG, §8B2.1, comment. (n.6) (Nov. 1, 2004).

²⁹⁴ See USSG, App. C, amend. 673 (eff. Nov. 1, 2004); USSG, §8B2.1, comment. (n.6) (Nov. 1, 2004).

²⁹⁵ See USSG, App. C, amend. 673 (eff. Nov. 1, 2004); USSG, §8B2.1, comment. (n.6) (Nov. 1, 2004).

²⁹⁶ See USSG, Chapter Eight, intro. comment (Nov. 1, 2004) (emphasis supplied). See also USSG, App. C, amend. 673 (eff. Nov. 1, 2004).

²⁹⁷ The Commission defined small organization as an organization having fewer than 200 employees. See USSG, §8C2.5, comment. (n.1) (Nov. 1, 2004).

commentary and illustrations, the Commission “provide[d] additional guidance with respect to the implementation of compliance and ethics programs by small organizations.”²⁹⁸ Next, the commentary encouraged “larger organizations to promote the adoption of compliance and ethics programs by smaller organizations, including those with which they conduct or seek to conduct business.”²⁹⁹ Finally, the Commission changed “the automatic preclusion for compliance program credit provided in §8C2.5(f) (Culpability Score),” so as to “assist smaller organizations that previously may have been automatically precluded, because of their size [and the involvement of high level personnel], from arguing for a culpability score reduction based upon an effective compliance and ethics program that fulfills all of the guideline requirements.”³⁰⁰ The amendment replaced the automatic preclusion with a rebuttable presumption, allowing a small organization to rebut the presumption in order to receive credit for having an effective compliance and ethics program.³⁰¹

Finally, just as with the original implementation of the organizational guidelines, the Commission again deliberately decided not to offer precise details for implementation of an effective compliance and ethics program “in order to encourage flexibility and independence by organizations in designing programs that are best suited to their particular circumstances.”³⁰² The Commission expected, however, that the amended organizational guidelines would “provide an important roadmap for compliance officers and corporate officials throughout the country” and “encourage compliance among corporations.”³⁰³ By promulgating these changes to Chapter Eight, the Commission intended to send the clear message that “good corporate conduct means above all else ethical conduct.”³⁰⁴

²⁹⁸ See USSG, App. C, amend. 673 (eff. Nov. 1, 2004).

²⁹⁹ *Id.*

³⁰⁰ *Id.*

³⁰¹ *Id.* See also USSG, §8C2.5(f)(3)(B). A motion to allow the rebuttable presumption to extend to all organizations, both large and small, failed by vote of 2 to 4. See U.S. Sent’g Comm’n, Public Meeting Minutes (April 4, 2008), available at

http://www.ussc.gov/Legislative_and_Public_Affairs/Public_Hearings_and_Meetings/20040408/4_08_04.htm.

³⁰² See Paula Desio, *An Overview of the Organizational Guidelines*, available at

http://www.ussc.gov/Guidelines/Organizational_Guidelines/ORGOVERVIEW.pdf.

³⁰³ See U.S. Sent’g Comm’n, Public Meeting Minutes (April 8, 2004) (reflecting statement made by Commissioner Michael Horowitz), available at

http://www.ussc.gov/Legislative_and_Public_Affairs/Public_Hearings_and_Meetings/20040408/4_08_04.htm.

³⁰⁴ *Id.* (reflecting statement made by Judge Ruben Castillo).

VI. The 2010 Amendments to the Organizational Guidelines

Changes in the Federal Sentencing Landscape

Two months after the Commission voted to promulgate the 2004 amendments to Chapter Eight of the *Guidelines Manual*, the United States Supreme Court decided *Blakely v. Washington*,³⁰⁵ holding that the State of Washington's sentencing guidelines violated the right to trial by jury under the Sixth Amendment of the United States Constitution. Although the Court stated that it expressed no opinion on the federal sentencing guidelines,³⁰⁶ the decision had an immediate impact on the federal criminal justice system.³⁰⁷ "[C]ourts voiced varying opinions on the implication of the decision for federal sentencing and no longer uniformly applied the guidelines."³⁰⁸ Assuming a central role in the debate concerning the validity of the federal guideline system, the Commission "worked intensively with Congress, the Department of Justice, representatives of the federal judiciary, and other interested persons to analyze the impact of the Supreme Court's decision and help guide the discussion concerning the future of the federal sentencing guidelines system."³⁰⁹

On January 12, 2005, the Supreme Court decided *United States v. Booker*,³¹⁰ which held that mandatory application of the federal sentencing guidelines violated the right to trial by jury under the Sixth Amendment. "The Court remedied the violation by excising the provisions in the Sentencing Reform Act that made the federal sentencing guidelines mandatory, thereby converting the mandatory system that existed for almost 20 years into an advisory one."³¹¹ The *Booker* opinion "maintain[ed] all of the Sentencing Commission's statutory obligations under

³⁰⁵ 542 U.S. 296 (2004).

³⁰⁶ *Id.* at 305, n.9.

³⁰⁷ U.S. Sent'g Comm'n, *Final Report on the Impact of United States v. Booker on Federal Sentencing*, at iv (March 2006), available at http://www.ussc.gov/Legislative_and_Public_Affairs/Congressional_Testimony_and_Reports/Submissions/200603_Booker/Booker_Report.pdf.

³⁰⁸ *Id.*

³⁰⁹ See Testimony of Commissioner John R. Steer and Judge William K. Sessions, III, before the Senate Committee on the Judiciary, *Blakely v. Washington and the Future of the Federal Sentencing Guidelines* (July 13, 2004) at 1, available at http://www.ussc.gov/Legislative_and_Public_Affairs/Congressional_Testimony_and_Reports/Testimony/20040716_Sessions_Steer_Testimony.pdf.

³¹⁰ 543 U.S. 220 (2005).

³¹¹ See U.S. Sent'g Comm'n, *Final Report on the Impact of United States v. Booker on Federal Sentencing*, at iv (March 2006), available at http://www.ussc.gov/Legislative_and_Public_Affairs/Congressional_Testimony_and_Reports/Submissions/200603_Booker/Booker_Report.pdf.

the Act,”³¹² stating specifically that “the Sentencing Commission remains in place, writing Guidelines, collecting information and actual district court sentencing decisions, undertaking research, and revising the Guidelines accordingly.”³¹³

Following *Booker*, “[t]he Commission and other actors in the criminal justice system took immediate steps to implement the advisory system.”³¹⁴ As far as the organizational guidelines were concerned, the Commission continued to conduct training programs with respect to Chapter Eight³¹⁵ and to report on organizational data³¹⁶ without substantially revisiting the 2004 amendment.³¹⁷ This continued until the Commission’s 2009-2010 amendment cycle.³¹⁸

The Evolution of a Miscellaneous Policy Priority

On September 9, 2009, the Commission published a notice of final priorities for the amendment cycle ending May 1, 2010.³¹⁹ The Commission did not specifically identify

³¹² See Prepared Statement of Ricardo H. Hinojosa, Chair, United States Sentencing Commission before the House Committee on the Judiciary Subcommittee on Crime, Terrorism, and Homeland Security (Feb. 10, 2005) at 1, available at http://www.ussc.gov/Legislative_and_Public_Affairs/Congressional_Testimony_and_Reports/Testimony/20050210_Hinojosa_Testimony.pdf (emphasis in original).

³¹³ 543 U.S. at 264.

³¹⁴ See, U.S. Sent’g Comm’n *Final Report on the Impact of United States v. Booker on Federal Sentencing*, at 37 (March 2006), available at http://www.ussc.gov/Legislative_and_Public_Affairs/Congressional_Testimony_and_Reports/Submissions/200603_Booker/Booker_Report.pdf.

³¹⁵ Commissioners and staff lectured on the organizational guidelines at conferences sponsored by the Society of Corporate Compliance and Ethics, the Ethics and Compliance Officers Association, and the Practising Law Institute, among others. In addition, national seminars sponsored by the Commission included at least one session on the organizational guidelines. See, e.g. http://www.ussc.gov/Education_and_Training/Annual_National_Training_Seminar/2009/2009_Agenda_Annual_National_Seminar.pdf.

³¹⁶ See U.S. Sent’g Comm’n, 2004-2011 SOURCEBOOKS ON FEDERAL SENTENCING STATISTICS, available at http://www.ussc.gov/Data_and_Statistics/Archives.cfm.

³¹⁷ As noted, *supra* note 267, the Commission did strike language about the waiver of attorney client privilege from the commentary in USSG §8C2.5. See USSG, App. C, amend. 695 (eff. Nov. 1, 2006). In the Reason for Amendment, the Commission explained its decision to strike the last sentence of Application Note 12 to §8C2.5 (Culpability Score). “The Commission added this sentence to address some concerns regarding the relationship between waivers and §8C2.5(g), and at the time stated that “[t]he Commission expects that such waivers will be required on a limited basis.” See Supplement to Appendix C (Amendment 673, effective November 1, 2004). Subsequently, the Commission received public comment and heard testimony at public hearings on November 15, 2005, and March 15, 2006, that the sentence at issue could be misinterpreted to encourage waivers.”

³¹⁸ On October 21, 2009, the Senate confirmed Chief Judge William K. Sessions, III as chair of the Commission. See http://www.ussc.gov/Legislative_and_Public_Affairs/Newsroom/Press_Releases/20091021_Press_Release.htm.

³¹⁹ See Notice of Final Priorities, 74 Fed. Reg. 46478 (Sept. 9, 2009).

consideration of changes to Chapter Eight as a possible priority. However, the priorities list included a provision allowing for consideration of “miscellaneous guideline application issues, including . . . (C) other miscellaneous issues coming to the Commission’s attention from case law and other sources.”³²⁰ As the amendment cycle progressed, consideration of certain changes to Chapter Eight evolved as one of the “miscellaneous” issues under consideration. The commissioner who spearheaded this endeavor explained that “Chapter Eight is an important deterrent to criminal activity, and. . . the Commission must remain abreast of current industry practice in order to ensure that this deterrent effect continues.”³²¹

On January 12, 2010, the Commission voted to publish proposed guidelines changes,³²² including a proposed amendment that made “several changes to Chapter Eight of the Guidelines Manual regarding the sentencing of organizations.”³²³ Several of the proposed changes related to effective compliance and ethics programs, as discussed in §8B2.1 (Effective Compliance and Ethics Program). First, the proposed amendment added a new application note to that guideline describing the reasonable steps that an organization should take to respond appropriately after criminal conduct is detected. The note provided as follows:

The seventh minimal requirement for an effective compliance and ethics program provides guidance on the reasonable steps that an organization should take after detection of criminal conduct. First, the organization should respond appropriately to the criminal conduct. In the event the criminal conduct has an identifiable victim or victims the organization should take reasonable steps to provide restitution and otherwise remedy the harm resulting from the criminal conduct. Other appropriate responses may include self-reporting, cooperation with authorities, and other forms of remediation. Second, to prevent further similar criminal conduct, the organization should assess the compliance and ethics program and make modifications necessary to ensure the program is more effective. The organization may take the additional

³²⁰ *Id.* at 46479.

³²¹ See U.S. Sent’g Comm’n, Public Meeting Minutes, at 4 (Jan. 12, 2010) (reflecting statement made by Commissioner Beryl A. Howell), available at http://www.ussc.gov/Legislative_and_Public_Affairs/Public_Hearings_and_Meetings/20100112/20100112_Minutes.pdf.

³²² *Id.* at 3-4.

³²³ See Notice of Proposed Amendments to Sentencing Guidelines, Policy Statements, and Commentary; Request for Public Comment, including Public Comment Regarding Retroactive Application of any the Proposed Amendments; and Notice of Public Hearing, 75 Fed. Reg. 3525, 3534 (Jan. 21, 2010).

step of retaining an independent monitor to ensure adequate assessment and implementation of the modifications.³²⁴

The proposed amendment also bracketed two proposed additions to the commentary of §8B2.1. The first bracketed addition proposed to amend Application Note 3 to include a new paragraph requiring high-level and substantial authority personnel to be “aware of the organization’s document retention policies” and conform those policies “to meet the goals of an effective compliance program.”³²⁵ The second bracketed addition proposed to amend Application Note 6 to provide more guidance on the requirement relating to periodic risk assessment. As proposed, the matters assessed in a periodic risk assessment should include the “nature and operations of the organization with regard to particular ethics and compliance functions” and identified the organization’s document retention policies as an example of the operations to be included in such assessment.³²⁶

Finally, the Commission decided to reconsider the automatic preclusion for compliance program credit provided in §8C2.5(f) (Culpability Score) when high-level personnel are involved in the criminal conduct.³²⁷ Accordingly, the Commission included an issue for comment, asking whether the Commission should “amend §8C2.5(f)(3) (Culpability Score) to allow an organization to receive the three level mitigation for an effective compliance program even when high-level personnel are involved in the offense” if certain conditions were met.³²⁸ The first potential condition was that “the individual(s) with operational responsibility for compliance in the organization [must] have direct reporting authority to the board level (e.g. an audit committee of the board).”³²⁹ Second, “the compliance program [must have been] successful in detecting the offense prior to discovery or reasonable likelihood of discovery outside of the organization.”³³⁰ Finally, “the organization [must have] promptly reported the violation to the appropriate authorities.”³³¹

³²⁴ *Id.* at 3535.

³²⁵ *Id.* at 3534-35.

³²⁶ *Id.* at 3535.

³²⁷ As amended in 2004, USSG §8C2.5 included a rebuttable presumption allowing small organizations to receive credit for having an effective compliance and ethics program under specified circumstances. *See supra* notes 300-301 and accompanying text. During the discussions of potential changes to the organizational guidelines in 2004, two commissioners sought to extend this rebuttable presumption to *all* organizations, regardless of size. Those efforts were unsuccessful. *See* U.S. Sent’g Comm’n, Public Meeting Minutes (April 8, 2004), available at http://www.ussc.gov/Legislative_and_Public_Affairs/Public_Hearings_and_Meetings/20040408/4_08_04.htm.

³²⁸ *See* 75 Fed. Reg. 3525, 3535.

³²⁹ *Id.*

³³⁰ *Id.*

³³¹ *Id.*

Mindful of the fact that “even modest changes to the Guidelines can have a huge impact on the compliance and ethics activities in virtually every organization,”³³² the Commission actively solicited input on the proposed amendment from groups known to have an interest in Chapter Eight. As a result of these efforts, the Chapter Eight proposed amendment received more public comment than any other proposed amendment in 2010.³³³ Commentators included several government agencies,³³⁴ the Commission’s standing advisory groups,³³⁵ ethics and compliance industry professionals,³³⁶ and non-profit research organizations.³³⁷

In March, 2010, the Commission conducted a public hearing on all of the guideline amendments that were being considered that year. Two panels at that hearing were devoted to a discussion of the proposed Chapter Eight amendments.³³⁸ The witnesses unanimously favored expanding the culpability score reduction,³³⁹ while offering suggestions on refinement

³³² See Letter from Daniel R. Roach, Co-Chair, Society of Corporate Compliance and Ethics, to the Commission (March 19, 2010), available at

http://www.usssc.gov/Meetings_and_Rulemaking/Public_Comment/20100317/SCCE.pdf.

³³³ All public comment received on the 2010 proposed amendments is available at

http://www.usssc.gov/Meetings_and_Rulemaking/Public_Comment/20100317/index.cfm.

³³⁴ The Department of Justice, the Department of Health and Human Services, the Department of Commerce, National Oceanic and Atmospheric Administration, and the Environmental Protection Agency submitted comment.

³³⁵ Those standing advisory groups are the Probation Officers Advisory Group, the Practitioners Advisory Group and the Victims Advisory Group.

³³⁶ The Society of Corporate Compliance and Ethics, the Ethics and Compliance Officers Association, Ethisphere Institute, the Defense Industry Initiative on Business Ethics and Conduct, the Association of Corporate Counsel, and the Open Compliance and Ethics Group were among those commentators. In addition, a former Vice Chair of the Commission, John Steer, and a member of the ad hoc advisory group, Win Swenson, also submitted public comment. Both of these commentators were Commission staff members when the organizational guidelines were promulgated in 1991.

³³⁷ The Ethics Resource Center, the RAND Center for Corporate Ethics and Governance, and the Washington Legal Foundation commented on the proposed amendment.

³³⁸ The hearing agenda and witness statements are available at

http://www.usssc.gov/Legislative_and_Public_Affairs/Public_Hearings_and_Meetings/20100317/Agenda.htm.

The transcript of the hearing is available at

http://www.usssc.gov/Legislative_and_Public_Affairs/Public_Hearings_and_Meetings/20100317/Hearing_Transcript.pdf.

³³⁹ See Testimony of David Debold, Chair, Practitioners Advisory Group, to the Commission, at 257 (March 17, 2010) (“We applaud the Commission for its efforts to make this three-point reduction in the culpability score available in more cases.”); Testimony of Susan Hackett, Senior Vice-President and General Counsel, Association of Corporate Counsel, to the Commission, at 275 (March 17, 2010) (“ACC supports efforts by the Commission to make the three-level mitigation more available in more cases.”); Testimony of Karen Harned, Executive Director of the Small Business Legal Center, National Federation of Independent Business, to the Commission, at 290 (March 17, 2010) (“We support the idea of allowing sentence mitigation in these types of cases.”); Testimony of

to the language proposed by the Commission.³⁴⁰ Likewise, the witnesses generally favored the addition of commentary describing remediation, but expressed concerns about the published language.³⁴¹ Finally, most of the witnesses voiced objections to the proposed commentary mentioning document retention policies.³⁴²

After considering the comments and testimony it received, the Commission made refinements to the language that had been published. Additionally, the Commission struck certain provisions from the proposed amendment and added new language.

Tim C. Mazur, Chief Operating Officer, Ethics & Compliance Officer Association, to the Commission, at 212 (March 17, 2010) (indicating ECOA members “overwhelmingly support” expansion of the culpability score reduction); Testimony of Patricia J. Harned, President, Ethics Resource Center, to the Commission, at 321-23 (March 17, 2010) (suggesting language changes to the proposed three-point mitigation for an effective program when high-level personnel are involved); Testimony of Joseph E. Murphy, Director of Public Policy, Society of Corporate Compliance and Ethics, to the Commission, at 326 (March 17, 2010) (stating that the proposed culpability score amendment is “an excellent and important change.”).

³⁴⁰ *See, e.g.*, Testimony of David Debold, Chair, Practitioners Advisory Group, to the Commission, at 261 (March 17, 2010) (suggesting language changes to the proposal); Testimony of Patricia J. Harned, President, Ethics Resource Center, to the Commission, at 321-23 (March 17, 2010) (same); Testimony of Susan Hackett, Senior Vice-President and General Counsel, Association of Corporate Counsel, to the Commission, at 275 (March 17, 2010) (“The term ‘directing reporting relationship’ is not well defined and is subject to broad misinterpretation in the corporate context...”); Testimony of Joseph E. Murphy, Director of Public Policy, Society of Corporate Compliance and Ethics, to the Commission, at 327 (March 17, 2010) (“[T]he reference to the compliance officer’s reporting authority to the highest governing authority needs to be clarified and enhanced.”).

³⁴¹ *See, e.g.*, Testimony of Susan Hackett, Senior Vice-President and General Counsel, Association of Corporate Counsel, to the Commission, at 269-270 (March 17, 2010) (suggesting that the Commission add language indicating that the need for and extent of remedial measures will vary according to the circumstances, and also suggesting that the Commission strike the language about retaining an independent monitor); Testimony of Karen Harned, Executive Director of the Small Business Legal Center, National Federation of Independent Business, to the Commission, at 285-86 (March 17, 2010) (expressing concerns that additional language would undermine the existing flexibility to adopt an appropriate response to potential violations); Testimony of Tim C. Mazur, Chief Operating Officer, Ethics & Compliance Officer Association, to the Commission, at 310 (March 17, 2010) (opposing language regarding monitors).

³⁴² *See, e.g.* Statement of David Debold, Chair, Practitioners Advisory Group, to the Commission, at 3-4; Statement of Susan Hackett, Senior Vice-President and General Counsel, Association of Corporate Counsel, to the Commission, at 3-4; Statement of Karen Harned, Executive Director of the Small Business Legal Center, National Federation of Independent Business, to the Commission, at 2-4; Statement of Tim C. Mazur, Chief Operating Officer, Ethics & Compliance Officer Association, to the Commission, at 2-3. Much of the public comment that the Commission received voiced similar opinions about the Commission’s proposed amendments. *See generally* Public Comment Letters Received by the United States Sentencing Commission in Response to Request for Public Comment (*see* 75 Fed. Reg. 3525), available at http://www.ussc.gov/Meetings_and_Rulemaking/Public_Comment/20100317/index.cfm.

Promulgated Changes to Chapter Eight

On April 7, 2010, the Commission voted to promulgate an amendment making changes to Chapter Eight.³⁴³ First, the amendment added a new application note to the commentary to USSG §8B2.1 (Effective Compliance and Ethics Program). The application note clarifies the remediation efforts required to satisfy the seventh minimal requirement for an effective compliance and ethics program under subsection (b)(7). Subsection (b)(7) has two aspects:

First, the organization should respond appropriately to the criminal conduct. The organization should take reasonable steps, as warranted under the circumstances, to remedy the harm resulting from the criminal conduct. These steps may include, where appropriate, providing restitution to identifiable victims, as well as other forms of remediation. Other reasonable steps to respond appropriately to the criminal conduct may include self-reporting and cooperation with authorities.

Second, the organization should act appropriately to prevent further similar criminal conduct, including assessing the compliance and ethics program and making modifications necessary to ensure the program is effective. The steps taken should be consistent with subsections (b)(5) and (c) and may include the use of an outside professional advisor to ensure adequate assessment and implementation of any modifications.³⁴⁴

The Commission explained that “[t]his application note was added in response to public comment and testimony suggesting that further guidance regarding subsection (b)(7) may encourage organizations to take reasonable steps upon discovery of criminal conduct.”³⁴⁵ The Commission also noted that “[t]he steps outlined by the application note are consistent with factors considered by enforcement agencies in evaluating organizational compliance and ethics practices.”³⁴⁶

The Commission also amended “subsection (f) of USSG §8C2.5 (Culpability Score) to create a limited exception to the general prohibition against applying the 3-level decrease for having an

³⁴³ See U.S. Sent’g Comm’n, Public Meeting Minutes, at 3 (Apr. 7, 2010), available at http://www.ussc.gov/Legislative_and_Public_Affairs/Public_Hearings_and_Meetings/20100407/20100407_Minutes.pdf.

³⁴⁴ See USSG §8B2.1, comment. (n.6) (Nov. 1, 2010).

³⁴⁵ See USSG, App. C, amend. 744 (eff. Nov. 1, 2010).

³⁴⁶ See *id.*

effective compliance and ethics program when an organization's high-level or substantial authority personnel are involved in the offense."³⁴⁷ An organization may receive the decrease for having an effective compliance and ethics program, if the organization meets four criteria:

- (1) the individual or individuals with operational responsibility for the compliance and ethics program have direct reporting obligations to the organization's governing authority or appropriate subgroup thereof;
- (2) the compliance and ethics program detected the offense before discovery outside the organization or before such discovery was reasonably likely;
- (3) the organization promptly reported the offense to the appropriate governmental authorities; and
- (4) no individual with operational responsibility for the compliance and ethics program participated in, condoned, or was willfully ignorant of the offense.³⁴⁸

This change responded to "concerns expressed in public comment and testimony that the general prohibition in §8C2.5(f)(3) operates too broadly and that internal and external reporting of criminal conduct could be better encouraged by providing an exception to that general prohibition in appropriate cases."³⁴⁹

The Commission added an application note that describes the "direct reporting obligations" necessary to meet the first criterion under §8C2.5(f)(3)(C). The application note provides that an individual has "direct reporting obligations" if the individual has "express authority to communicate personally to the governing authority or appropriate subgroup thereof (A) promptly on any matter involving criminal conduct or potential criminal conduct, and (B) no less than annually on the implementation and effectiveness of the compliance and ethics program."³⁵⁰ The Commission added this application note in response to "public comment and testimony regarding the challenges operational compliance personnel may face when seeking to report criminal conduct to the governing authority of an organization and

³⁴⁷ *See id.*

³⁴⁸ *See* USSG §8C2.5(f)(3)(C) (Nov. 1, 2010).

³⁴⁹ *See* USSG, App. C, amend. 744 (eff. Nov. 1, 2010). Commission data indicates that only five of the 3,593 organizations sentenced under the organizational guidelines since inception have received the culpability score reduction for having an effective compliance and ethics program from the effective date of the organizational guidelines through the most recent fiscal year (FY2011). *See* U.S. Sentencing Commission, 1992-2011 Datafiles, USSCFY92-USSCFY12.

³⁵⁰ *See* USSG §8C2.5, comment. (n.11) (Nov.1, 2010).

encourages compliance and ethics policies that provide operational compliance personnel with access to the governing authority when necessary.”³⁵¹

Finally, the Commission amended USSG §8D1.4 (Recommended Conditions of Probation – Organizations (Policy Statement)) to augment and simplify the recommended conditions of probation for organizations. Notably, the Commission retained the condition that would require an organization to “develop and submit to the court an effective compliance and ethics program consistent with §8B2.1 (Effective Compliance and Ethics Program).”³⁵² As noted in the Reason for Amendment, the “amendment remove[d] the distinction between conditions of probation imposed solely to enforce a monetary penalty and conditions of probation imposed for any other reason so that all conditional probation terms are available for consideration by the court in determining an appropriate sentence.”³⁵³ The Commission expected the amendment would further incentivize corporate self-policing by “[promoting] compliance by organizations, [encouraging] early reporting when criminal activity is detected, and [encouraging] the remediation of harm caused by criminal activity.”³⁵⁴

VII. Conclusion

The organizational guidelines have now celebrated their 20th anniversary and have been credited with “achiev[ing] significant success in reducing workplace misconduct by nurturing a vast compliance and ethics movement and enlisting business organizations in a self-policing effort to deter law-breaking at every level of their business.”³⁵⁵ Since the promulgation of the organizational guidelines in 1991, “the development of comprehensive ethics and compliance management practices has mushroomed” and the seven minimal steps for an effective compliance and ethics program “have become the de facto framework used to design such programs in the United States — and to some extent around the world.”³⁵⁶

Although lauded as “one of the indisputable success stories of the Commission,”³⁵⁷ the Commission has a continuing duty to review and revise the guidelines, in consideration of

³⁵¹ See USSG, App. C, amend. 744 (eff. Nov. 1, 2010).

³⁵² See USSG §8D1.4(b)(1).

³⁵³ See USSG, App. C, amend. 744 (eff. Nov. 1, 2010).

³⁵⁴ See U.S. Sent’g Comm’n, Public Meeting Minutes (Apr. 7, 2010), available at http://www.ussc.gov/Legislative_and_Public_Affairs/Public_Hearings_and_Meetings/20100407/20100407_Minutes.pdf.

³⁵⁵ See Ethics Res. Ctr., *The Federal Sentencing Guidelines for Organizations at Twenty Years: a Call to Action for More Effective Promotion and Recognition of Effective Compliance and Ethics Programs*, at i (May 2012).

³⁵⁶ *Id.* at 29-30.

³⁵⁷ See U.S. Sent’g Comm’n, Public Meeting Minutes (Jan. 10, 2012) (reflecting statement made by Judge Beryl A. Howell), available at

comments and data coming to its attention³⁵⁸ and to reflect “advancement in the knowledge of human behavior.”³⁵⁹ As the best practices for the compliance and ethics profession continue to evolve, the Commission will give careful consideration to the need for guideline changes in light of the input received from industry professionals. Consequently, new chapters in the history of the organizational guidelines remain to be written.

http://www.ussc.gov/Legislative_and_Public_Affairs/Public_Hearings_and_Meetings/20120110/Meeting_Minutes.pdf.

³⁵⁸ See 28 U.S.C. § 994(o).

³⁵⁹ See 28 U.S.C. § 991.

Section 10(b) and Rule 10b-5: The U.S. Courts of Appeals Apply Different Legal Tests for Assessing the Primary Liability of Secondary Actors

By Renanji Brown Jackson and Karen Escalante

In *Stoneridge Investment Partners, LLC v. Scientific Atlanta, Inc.*, the Supreme Court reaffirmed its prior holding that, while secondary actors in securities markets (e.g., attorneys, accountants, and underwriters) cannot be held liable in a private action for aiding and abetting violations of Section 10(b) of the Securities Exchange Act of 1934, such actors can be subject to liability for their own primary violations of the Act. See 128 S. Ct. 761, 773-774 (2008). The Court has recognized such secondary actor liability for primary violations of Section 10(b) and Rule 10b-5 for the past 15 years. See *Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 191 (1994).

No single standard for determining the scope of conduct for which a secondary actor may be held primarily liable, however, has emerged among the lower courts. The federal courts of appeals have established distinctly different tests, including a new standard that the Tenth Circuit has applied in the context of an SEC enforcement action.

Counsel for secondary actors in securities fraud cases should be aware of the federal courts' different legal tests of secondary actor liability under Section 10(b). The different tests increase the potential that liability for secondary actors will vary based on where the securities fraud action is litigated and whether the action brought is a private suit or an SEC enforcement action.

THE "BRIGHT-LINE" AND "SUBSTANTIAL PARTICIPATION" TESTS

The different tests that the circuits employ are primarily based on different views as to whether the secondary actor

Counsel for secondary actors in securities fraud cases should be aware of the federal courts' different legal tests of secondary actor liability under Section 10(b).

"must make the material misstatement or omission in order to be a primary violator." *Wright v. Ernst & Young*, 152 F.3d 169, 174 (2d Cir. 1998).

The "bright-line" test adopted by the Second and Eleventh Circuits requires that, "in order for the defendant to be primarily liable under [Section] 10(b) and Rule 10b-5, the alleged misstatement or omission upon which a plaintiff relied must have been publicly attributable to the defendant at the time that the plaintiff's investment decision was made." *Ziemba v. Cascade Int'l, Inc.*, 256 F.3d 1194, 1205 (11th Cir. 2001); see also *Wright*, 152 F.3d at 175 (finding that accounting firm was not primarily liable because it merely reviewed and approved material misstatements and did not communicate a misstatement to investors).

In essence, the bright-line test requires a plaintiff to demonstrate that (1) the secondary actor actually made a false or misleading statement or omission, and (2) the statement or omission has been publicly attributed to that specific actor. Public attribution is a key component of the "bright-line" test because a plaintiff in a private Section 10(b) action can claim detrimental reliance on a material misstatement made

Continued on Page 11

Section 10(b) and Rule 10b-5: The U.S. Courts of Appeals Apply Different Legal Tests for Assessing the Primary Liability of Secondary Actors

Continued from page 10

by a secondary actor only if such a statement was known to have been made by that actor when the investment was made. *Wright*, 152 F.3d at 175.

In contrast to the "bright-line" test applied in the Second and Eleventh Circuits, the Ninth Circuit permits secondary actor liability even if the secondary actor did not make the statement. Under the Ninth Circuit's "substantial participation" test, a plaintiff must demonstrate only that the secondary actor substantially participated or was intricately involved in the making of the fraudulent statement. See *Howard v. Everex Systems, Inc.*, 228 F.3d 1057, 1061 n.5 (9th Cir. 2000) ("[W]e have held that substantial participation or intricate involvement in the preparation of fraudulent statements is grounds for primary liability even though that participation might not lead to the actor's actual making of the statements."); accord *In re Software Toolworks, Inc. Sec. Litig.*, 50 F.3d 615, 628 n.3 (9th Cir. 1994) (holding that an accounting firm may be primarily liable for its "significant role in drafting and editing" a fraudulent letter sent to the SEC).

To the extent that the "substantial participation" test permits a secondary actor, who has not actually made a fraudulent statement or omission, to be held liable as a primary violator of Section 10(b) based solely on his assistance with the preparation of such a statement, "the substantial participation test has been criticized as inconsistent with [the Supreme Court's] prohibition of private aiding and abetting." *SEC v. Tambone*, 550 F.3d 106, 139 (1st Cir. 2008).

THE "CAUSATION" STANDARD FOR SEC ENFORCEMENT ACTIONS

The Tenth Circuit recently rejected both the "bright-line"

and "substantial participation" tests in the context of an SEC enforcement action. See *SEC v. Wolfson*, 539 F.3d 1249, 1259 (10th Cir. 2008). The First Circuit, too, has rejected both the "bright-line" test and the "substantial participation" test when a Section 10(b) action is brought by the government. See *Tambone*, 550 F.3d at 138-140 (critiquing the tests as "irrelevant" in the SEC enforcement context). In private Section 10(b) actions, the Tenth Circuit has required a plaintiff to demonstrate that the secondary actor actually made a false or misleading statement that he or she knew or should have known would reach potential investors, see *Anixter v. Home-Stake Prod. Co.*, 77 F.3d 1215, 1227 (10th Cir. 1996), but that court has promulgated a different standard for establishing the primary liability of secondary actors under Section 10(b) in government suits.

Under the Tenth Circuit's new test, a secondary actor is primarily liable in an SEC enforcement action when it "can fairly be said" that he or she "caused" the company "to make the relevant statements, and . . . knew or should have known that the statements would reach investors." *Wolfson*, 539 F.3d at 1261 (emphasis added). The Tenth Circuit reasoned that a consultant who had drafted the relevant filings on behalf of the company "made" the statements for Section 10(b) purposes, and thus should be treated as a primary violator of the securities laws, despite the fact that the misstatements appeared without attribution to the consultant in documents filed by the company.

The Tenth Circuit rejected the conclusion that the "bright-line" test should be applied in the SEC enforcement context because, in its view, the requirement that the statement be publicly attributed to the secondary actor was derived from

Continued on Page 12

Section 10(b) and Rule 10b-5: The U.S. Courts of Appeals Apply Different Legal Tests for Assessing the Primary Liability of Secondary Actors

Continued from page 11

the reliance element that must be proved only in private actions. *Id.* at 1259-1260. The Tenth Circuit also distinguished its new rule from the Ninth Circuit's "substantial participation" test by making clear that, "[u]nder the rule articulated today, a defendant must do more than substantially participate in creating an actionable misstatement (or omission)"; rather, he or she must "be so involved in creating or communicating the offending misstatement (or omission) that he or she can fairly be said to have caused it to be made." *Id.* at 1261 n.18.

The Tenth Circuit's "causation" test expands secondary actor liability beyond what is allowed in the Second, Ninth, and

Eleventh Circuits. While it appears to hinge primarily on the distinction between private actions and civil actions brought by the SEC, the Tenth Circuit's standard for government enforcement actions is nonetheless important to consider when an action for violations of Section 10(b) is brought against a secondary actor. ■

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Complete Healthcare Compliance Manual

Healthcare Compliance Programs: From Murky Beginnings to Established Expectation

By Seth Whitelaw, JD, LLM, SJD;^[1] Michael Josephson, JD; Ketanji Brown Jackson, Esq.;^[2] and Kathleen Cooper Grilli, Esq.^[3]

"If you don't know where you've come from, you don't know where you're going."^[4] — Maya Angelou

Understanding the expectations and operation of current healthcare compliance programs is very difficult without a fundamental grounding in how these programs have evolved over the past three decades. Like many things in life, the history of healthcare compliance is both complex and convoluted, involving multiple stakeholders with differing interests. Although healthcare compliance began as a response to the corporate and healthcare environment and rampant, unchecked fraud, healthcare compliance programs have emerged to become a societal expectation that also gave rise to an entirely new profession.

The Murky Origins of Healthcare Compliance

Pinpointing an exact date compliance programs and the profession came into existence is difficult. Some scholars and practitioners believe the true origin of the compliance program is traceable to the enactment of the Foreign Corrupt Practices Act (FCPA) in 1977.^{[5][6]} However, the consensus is that the origins of compliance programs date to a series of procurement scandals in the mid-1980s involving the Department of Defense, the Pentagon, and various defense contractors.

Of the various procurement defense department scandals in 1980s, the so-called "spare parts scandal" in 1985 became the major driving force for reform. It was a scandal that captured the attention of both Congress and the public with the revelation of the incredible prices the Pentagon often paid for basic equipment, such as a \$435 hammer and the infamous \$600 toilet seat.^[7] In response to growing public outrage over the abuse of taxpayer funds, President Ronald Reagan appointed the President's Blue Ribbon Commission on Defense Management to review the situation and recommend reforms.^[8]

The Packard Commission, as the group was more informally known, issued an interim report in February 1986.^[9] For compliance history, the crucial recommendation by the Blue Ribbon Commission was that:

To assure that their houses are in order, defense contractors must promulgate and vigilantly enforce codes of ethics that address the unique problems and procedures incident to defense procurement. They must also develop and implement internal controls to monitor these codes of ethics and sensitive aspects of contract compliance. [emphasis added]^[10]

The Blue Ribbon Commission also stressed that "[g]overnment actions should foster contractor self-governance," urging the Defense Department not to routinely subpoena internal audit materials to avoid

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discouraging “aggressive self-review.”^[11]

In response to the interim report, 18 of the country’s top defense contractors formed the Defense Industry Initiative on Business Ethics and Conduct (DII).^[12] Under the leadership of Jack Welch, then-CEO of General Electric, the DII developed five core principles, which 32 defense contractors signed onto by July 1986.

The central tenet of the principles, which still exist, is a commitment to “act honestly in all business dealings with the U.S. government.”^[13] To achieve this objective, DII members agreed to:

- Establish written codes of business conduct.
- Reinforce an ethical culture through communications and training.
- Encourage employee reporting of suspected misconduct and prohibit retaliation against reporters.
- Share business ethics and compliance best practices.
- Transparently and publicly report on individual company progress to establish an ethical culture.^[14]

It was the formation of the DII and its principles that set the stage for the next major leap in the evolution of compliance programs.

In the Beginning—The U.S. Federal Sentencing Commission

Prior to the Sentencing Reform Act of 1984, federal district court judges possessed almost unlimited authority to fashion a sentence for criminal defendants within a broad statutorily prescribed minimum and maximum range.^[15] Thus, individual judges exercised broad discretion to determine “the various goals of sentencing, the relevant aggravating and mitigating circumstances, and the way in which these factors would be combined in determining a specific sentence.”^[16] As a result of this unregulated discretion, the sentences for similar criminal conduct varied dramatically, creating the justifiable perception that the federal sentencing system resulted in “an unjustifiably wide range of sentences [for] offenders convicted of similar crimes.”^[17]

With the enactment of the Sentencing Reform Act of 1984, Congress sought to address the apparent inequities caused by discretionary judicial sentencing.^[18] Rather than remove all judicial discretion, Congress chose instead to create the independent U.S. Sentencing Commission (the Commission) tasked with establishing “sentencing policies and practices for the Federal criminal justice system.”^[19] However, Congress also tasked the Commission with maintaining “sufficient flexibility to permit individualized sentences when warranted by [evaluating individual] mitigating or aggravating factors.”^[20] Thus, Congress expressly charged the Commission to pay “particular attention” to “providing certainty and fairness in sentencing and reducing unwarranted sentence disparities.”^[21]

To accomplish this purpose, Congress directed the Commission to establish a set of guidelines that federal judges must use for selecting sentences within the prescribed statutory ranges.^[22]

As laid out by the Sentencing Reform Act, the Commission’s guidelines needed to consider:

- The seriousness of the offense while promoting respect for the law and providing a just punishment.
- Whether the punishment would create an adequate deterrence of criminal conduct and protect the public

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from further crimes of the criminal defendant.

- Whether the punishment provides the defendant with educational or vocational training, medical care, or other correctional treatment in the most effective manner.^[23]

The primary focus of the Sentencing Reform Act involved sentencing disparities for individual criminal defendants. For example, Congress noted that:

Major white collar criminals often are sentenced to small fines and little or no imprisonment. Unfortunately, this creates the impression that certain offenses are punishable only by a small fine that can be written off as a cost of doing business.^[24]

However, Congress also granted the Commission broad latitude to “include in the guidelines any matters it considers pertinent to satisfy the purposes of sentencing.”^[25] Thus, the Sentencing Reform Act also addressed the sentencing of organizations, which are defined as “a person other than an individual.”^[26] As the Senate Report outlining the legislative history of the Sentencing Reform Act stated:

Current law...rarely distinguishes between individuals and organizations for sentencing purposes. Thus, present law fails to recognize the usual differences in the financial resources of these two categories of defendants and fails to take into account the greater financial harm to victims and the greater financial gain to the criminal that characterizes offenses typically perpetrated by organizations.^[27]

Therefore, it is not surprising that the Commission ultimately addressed the sentencing of organizations, as well as individuals, in its set of guidelines.

Compliance Programs and the Federal Sentencing Guidelines

Although the Commission was organized in late 1985 and published its initial set of guidelines in November 1987, it took until 1991 for the Commission to publish chapter eight of its guidelines—the Federal Sentencing Guidelines for Organizations (FSGO).^[28] With the publication of the organizational guidelines and its seven elements of an effective compliance program, healthcare compliance programs were born.^[29]

As conceived by the Commission, the new chapter eight was intended as a “mechanical structure [that] determines an appropriate monetary fine through means of a mathematical formula: assigning a dollar figure to the seriousness of the offense and multiplying that number by a figure representing the culpability level of the organization.”^[30]

Thus, the Commission employed a carrot-and-stick approach allowing judges to consider a series of aggravating and mitigating factors that they could use to determine the final sentence for an organization (i.e., the culpability score).

Calculating Culpability

Under the FSGO, an organization's final penalty is calculated using this formula:

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$$\text{Statutory Base Fine} \times (\text{Aggravating Factors} - \text{Mitigating Factors}) = \text{Final Fine}$$

Consequently, the intent of the FSGO was not only to “encourage corporations to exemplify ‘good corporate citizenship’ but also provide a means to ‘rehabilitate’ corporations that have engaged in criminal conduct.”¹³¹ The Commission hoped that:

[O]rganizations would come to view this guideline scheme as a powerful financial reason for instituting effective internal compliance programs that, in turn, would minimize the likelihood that the organization would run afoul of the law in the first instance.”¹³²

In other words, organizations would implement compliance programs proactively before any illegal activities occurred.

Where an organization could prove it had an effective compliance program in place, the FSGO allowed a three-point reduction in the culpability score if “the offense occurred despite an effective program to prevent and detect violations of law.”¹³³ Therefore, according to the Commission, “[t]he hallmark of an effective [compliance] program...is that the organization exercises due diligence in seeking to prevent and detect criminal conduct by its employees and other agents.”¹³⁴ This statement by the Commission, however, makes clear that compliance programs were never intended as an absolute guarantee that criminal conduct would not occur.

To guide organizations wishing to implement a compliance program, the Commission defined within an application section comment the seven criteria for a compliance program to qualify as “effective” and receive mitigation credits. This comment launched the now famous seven elements of an effective compliance program.¹³⁵

Summarizing the application comment, an effective compliance program requires that an organization:

- Appoint someone with sufficient authority in the organization to oversee the compliance program (e.g., a compliance officer).
- Develop compliance standards that employees and others working on behalf of the organization can follow to reduce the likelihood of breaking the law (e.g., policies and procedures).
- Communicate those compliance standards to employees and others working on behalf of the organization (e.g., training or publications).
- Create steps to ensure compliance standards are working as intended (e.g., monitoring and auditing).
- Create a mechanism for anyone to report suspected misconduct without retribution (e.g., the hotline) and enforce compliance standards with appropriate sanctions (e.g., discipline).
- Avoid granting substantial discretionary authority to anyone the organization knew or should have known would commit illegal activities (e.g., bad actors).
- Take the necessary steps to correct any misconduct detected to prevent it from reoccurring (e.g., corrective actions).¹³⁶

These elements, however, were not industry specific, but were intended to apply to all organizations across industries.^[37] As the Commission explicitly recognized, any determination of whether an organization's compliance program was effective required considering several factors, including "the size of the organization," "the likelihood that certain offenses may occur because of the nature of its business," and the organization's prior history.^[38]

The mere existence of a program that on paper contains the seven elements does not automatically guarantee that an organization will receive the mitigation credits. Various actions, or inactions, by the organization can invalidate any potential benefits of having a compliance program. For example, the Commission also recognized the importance of industry practices or standards and determined that the failure to apply those practices and standards would weigh against "a finding of an effective program to prevent and detect violations of law."^[39] Other factors that could invalidate the possibility of receiving credit for the compliance program included the participation of high-level company personnel in the misconduct or their willful blindness to its existence.^[40]

Defining High-Level Personnel

According to the 1991 version of the FSGO, "high-level personnel" meant "individuals who have substantial control over the organization or who have a substantial role in the making of policy within the organization." Therefore, the term specifically included "a director; an executive officer; an individual in charge of a major business or functional unit of the organization, such as sales, administration, or finance; and an individual with a substantial ownership interest." It also included agents within a business unit who set the policy for or control that business unit.^[41]

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Letters: 'Til death do them part?; Feder's as racist as those..., 1997 WLN 258556

NewsRoom

4/10/97 Boston Herald 36
1997 WLN 258556

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April 10, 1997

Section: Editorial

Letters: 'Til death do them part?; Feder's as racist as those he condemns;
'Life is fragile, handle with prayer'; Mass. state colleges mold model citizens;
Playing politics with hypocrisy; Preserve judiciary: Justice for Amiraunts

I read with disgust on April 8 about the Catholic Church's decision to grant Rep. Joe Kennedy an annulment ("Joe K's ex to pursue appeal of annulment").

A man and woman who engage in a marriage for more than 12 years and have two children fulfill all the church's qualifications of a marriage and therefore an annulment can't be allowed.

This is just another example of how the church treats regular lay people and how it treats the Kennedys.

There is a reason why church attendance is dreadful and the number of priests and nuns has fallen dramatically in the last 10 to 15 years: It's because of the incompetent, pompous church leadership.

The church's granting to Kennedy an annulment is an insult to all married couples who stood before God and vowed to each other to be as one until death do them part.

Stephen J. Irons, Quincy

Feder's as racist as those he condemns

For someone who claims not to consider certain groups morally or intellectually inferior to his own, Don Feder spends much of his column, "Despite liberals race does matter" (March 31), spewing out disagreeable facts about the high-crime rate in the black community and denouncing black voters for selecting incompetent, incorrigible or inebriated leaders.

By his own definition, Feder is a racist.

To my mind, he's also like the liberal's purported view of American history - irredeemably evil.

Ketanji Brown Jackson, Boston

'Life is fragile, handle with prayer'

The Boston Herald is to be commended for featuring columnists Joe Fitzgerald and Don Feder. Both of them bring a positive moral dimension to the paper.

NewsRoom 4/10/97 The Boston Herald, No. 258556, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000

Despite liberals race does matter, 1997 WLNR 256347

NewsRoom

3/31/97 Boston Herald 23
1997 WLNR 256347

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March 31, 1997

Section: Editorial

Despite liberals race does matter

Don Feder

What is the liberal's favorite ad hominem, a smear to which they are deeply addicted? Racist. But ask one for a definition, and nine times out of 10 he'll be reduced to babbling incoherence.

In a column on immigration, I suggested the fact that our open-borders policy would take this nation's white population from 74 percent today to 53 percent by the middle of the next century to be a cause for concern. This elicited the usual cries of xenophobia and comparisons to the CEO of the Third Reich.

Typical was an encounter with Pat Lamarche on WGAN in Portland, Maine. Fifteen seconds into her show, Pat informed me that I am the kosher equivalent of the imperial grand wizard.

"Could you define 'racist'?" I inquired. Lamarche was evasive. ("What do you think it means?") I told her that was irrelevant, since I wasn't calling her one. She changed the subject.

To my understanding, a racist is one who either: automatically hates members of a given race, or assumes that certain groups are morally or intellectually inferior to his own. I do neither.

Would that in the 30-odd years since his death, Dr. Martin Luther King's vision of a colorblind America had become a reality. That it has not is the fault of liberals intent on sowing division and race-hustlers intent on exploitation.

Would that America hadn't become a place where justice is colorized and juries can free vicious killers and would-be killers (O.J., Lemrick Nelson, Demien Williams) as a show of racial solidarity.

I'd sleep a bit easier if Louis Farrakhan wasn't the most admired man in the black community. I wish minority voters didn't feel compelled to elect a gonif (the late Harold Washington), a total incompetent (David Dinkins) or a coke-head (Marion Barry) to high public office because he's a brother.

These are all realities of an increasingly race-conscious America.

Here are a few more disagreeable facts: Blacks constitute 12 percent of the population but comprise 39 percent of those arrested for aggravated assault, 55 percent of arrests for murder and 61 percent of arrests for armed robbery.

Despite liberals race does matter, 1997 WLNR 256347

According to figures published in U.S. News in 1989, when whites are violent, they target blacks 2.4 percent of the time. When blacks are violent, they target whites more than half the time. In New York, initiation in the Bloods street gang entails slashing a Caucasian's face with a straight razor.

Of course, the coin has another side. There are blacks who also agonize over this situation - some lead lives of quiet decency, others of nobility. There are black writers, ministers and politicians who are making significant contributions to the reclamation of our civilization. On the day when the community looks to them for leadership - and not an Al Sharpton or a Jesse Jackson - race will no longer matter.

Still, in light of the afore-cited statistics, should we view America's declining white population with indifference, optimism or elation?

The vast majority of white liberals who declare that race is irrelevant somehow end up not living in black neighborhoods or sending their children to predominantly black schools. Apparently, it's all right to act on racial assumptions as long as they are left unspoken.

Why must we exacerbate these social ills through unrestrained immigration? Is racial strife, crime and poverty in such short supply that we must import more? With 5 percent of the world's population, why must we take half of all immigration to industrialized nations?

If the alien inundation is as good for America as utopians insist, why then the more the merrier. Why stop at 1 million legal immigrants and another 500,000 illegals each year? Why not immediately open our doors to 20 million or 30 million? Why opt for slow suicide when we could go out with a glorious bang?

Why is it that of all peoples on earth, only Americans are not entitled to preserve their culture and national identity?

Let's say that the United Nations proposed to transfer 10 million war refugees from Albania to Rwanda. If Rwandans objected, would that mark them as racists and xenophobes? Might not a Rwandan reasonably observe that while he bears no animus toward Albanians, let enough of them in and Rwanda will cease to be Rwanda?

At last we arrive at liberalism's ugliest secret - liberals hate America (our history and heritage, which they deem irredeemably evil) and long for the day when our nation will sink into a great multicultural ooze.

Race and immigration are their tools for achieving those ends. Which is why skeptics are attacked with such fury.

Don Feder is a member of the Herald staff. His column appears Monday and Wednesday.

— Index References —

News Subject: (Violent Crime (1VI27); Crime (1CR87); Race Relations (1RA49); Social Issues (1SO05); Forecasts (1FO11); Population Demographics (1PO77); Minority & Ethnic Groups (1MI43))

Region: (Albania (1AL95); Europe (1EU83); Africa (1AF90); USA (1US73); Americas (1AM92); Eastern Europe (1EA48); East Africa (1EA80); North America (1NO39); Rwanda (1RW02))

Language: EN

Other Indexing: (CAUCASIAN; DAMIEN; DAVID; FEDER; JESSE JACKSON; LAMARCHE; LOUIS FARRAKHAN; PAT; PAT LAMARCHE; RWANDANS; UNITED NATIONS; WGAN; WILLIAMS) (Al Sharpton; Apparently; Fifteen; Martin Luther; O.J., Lemrick Nelson; Typical)

KETANJI O. BROWN

NOTE

PREVENTION VERSUS PUNISHMENT: TOWARD A PRINCIPLED
DISTINCTION IN THE RESTRAINT OF RELEASED SEX OFFENDERS

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PREVENTION VERSUS PUNISHMENT:
TOWARD A PRINCIPLED DISTINCTION IN THE
RESTRAINT OF RELEASED SEX OFFENDERS

The American criminal justice system has two dichotomous objectives — to punish wrongdoers and to prevent future harm.¹ Because the Constitution assumes that the exercise of legislative power in pursuit of punishment represents a greater threat to individual liberty than does preventive state regulation,² courts must determine which statutes serve each goal. In theory, the distinction is easily drawn.³ In practice, however, innovative statutory responses to the burgeoning crime problem have "reopened the complex and often times highly emotional debate as to the correct boundary between legislative regulation and punishment."⁴

A recent spate of legislation purports to regulate released sex offenders by requiring them to register with local law enforcement officials,⁵ notify community members of their presence,⁶ undergo DNA testing,⁷ and submit to civil commitment for an indefinite term.⁸ Although many courts and commentators herald these laws as valid regulatory measures,⁹ others reject them as punitive enactments that violate the rights of individuals who already have been sanctioned for

¹ See HERBERT L. PACKER, *THE LIMITS OF THE CRIMINAL SANCTION* 9 (1968); Mary M. Cheh, *Constitutional Limits on Using Civil Remedies to Achieve Criminal Law Objectives: Understanding and Transcending the Criminal-Civil Law Distinction*, 42 HASTINGS L.J. 1325, 1332 (1991).

² See Note, *Punishment: Its Meaning in Relation to Separation of Power and Substantive Constitutional Restrictions and Its Use in the Lovett, Trop, Perez, and Spelser Cases*, 34 IND. L.J. 231, 237 (1959) [hereinafter *Punishment*].

³ Cf. Cheh, *supra* note 1, at 1536 n.170 ("Government's capacity to punish is thought to be distinct from its efforts to treat illness, provide compensation, or administer regulatory programs.").

⁴ *Punishment*, *supra* note 2, at 231. "Countless examples could be given in which a major question . . . is whether what is being done is punishment or something else." PACKER, *supra* note 1, at 20; see, e.g., *De Veau v. Braisted*, 363 U.S. 144, 160 (1960) (finding that a state law prohibiting convicted felons from holding union offices is not punitive); *Barsky v. Board of Regents*, 347 U.S. 442, 449 (1954) (rendering a state's suspension of a physician's medical license as a result of his misdemeanor conviction regulatory); *Allen v. Attorney Gen.*, No. 95-2057, 1996 WL 124668, at *3 (1st Cir. Mar. 26, 1996) (holding that a state's suspension of an intoxicated driver's license "furthers a quintessentially remedial goal (public safety)").

⁵ See, e.g., N.J. STAT. ANN. §§ 2C:7-1 to -5 (West 1995); WASH. REV. CODE ANN. § 9A.44.130 (West Supp. 1996).

⁶ See, e.g., LA. REV. STAT. ANN. § 15:542(B)(1) (West Supp. 1996).

⁷ See, e.g., 1995 Me. Legis. Serv. 1391 (West); 46 PA. CONS. STAT. ANN. § 7651.306 (1995).

⁸ See, e.g., ARIZ. REV. STAT. ANN. § 13-4606 (Supp. 1995); ILL. ANN. STAT. ch. 725, para. 205/1.01-13.01 (Smith-Hurd 1993); WASH. REV. CODE ANN. § 71.09.060 (West 1992 & Supp. 1996).

⁹ See, e.g., *Doe v. Poritz*, 662 A.2d 367, 372-73 (N.J. 1995) (asserting that New Jersey's community notification law is a reasonable, regulatory option); Ryan A. Boland, Note, *Sex Offender Registration and Community Notification: Protection, Not Punishment*, 30 NEW ENG. L. REV. 183, 225 (1995).

their crimes.¹⁰ Under existing doctrine, the constitutionality of sex offender statutes depends upon their characterization as essentially "preventive" rather than "punitive,"¹¹ yet courts have been unable to devise a consistent, coherent, and principled means of making this determination.

This Note critiques current judicial approaches to characterizing sex offender statutes and suggests a more principled framework for making the distinction between prevention and punishment. Part I outlines the range of sex offender statutes currently in force in several states. Part II examines the prevention/punishment jurisprudence that has developed both in general and in relation to specific sex offender laws. Part III argues that current attempts at differentiation in the context of sex offender legislation are misguided. Finally, Part IV offers a more principled basis for determining how sex offender statutes should be characterized. This Note maintains that, even in the face of understandable public outrage over repeat sexual predators, a principled prevention/punishment analysis evaluates the effect of the challenged legislation in a manner that reinforces constitutional safeguards against unfair and unnecessarily burdensome legislative action.

I. SEX OFFENDER STATUTES

A. The Laws

State legislators¹² these days have little tolerance for sex convicts. In the wake of several widely-publicized crimes at the hands of serial sex offenders, states have enacted numerous measures that burden released sex criminals for the good of society.¹³ A convicted sex offender

¹⁰ See, e.g., *Doe v. Pataki*, No. 96 CIV.1657(DC), 1996 WL 131859, at *9-*11 (S.D.N.Y. Mar. 21, 1996); *Artway v. Attorney Gen.*, 876 F. Supp. 666, 688-92 (D.N.J. 1995); Michelle P. Jerusalem, Note, *A Framework for Post-Sentence Sex Offender Legislation: Perspectives on Prevention, Registration, and the Public's "Right" to Know*, 48 VAND. L. REV. 219, 245-50 (1995).

¹¹ The framework for analyzing challenges under the Eighth Amendment, Ex Post Facto Clause, Double Jeopardy Clause, and Bill of Attainder Clause requires courts to determine whether such laws impose "punishment" within the meaning of the Constitution. See, e.g., *United States v. Halper*, 490 U.S. 435, 440 (1980) (Double Jeopardy Clause); *Trop v. Dulles*, 356 U.S. 86, 95-96, 98-99 (1958) (Eighth Amendment and Ex Post Facto Clause); *U.S. v. Lovett*, 328 U.S. 303, 315 (1946) (Bill of Attainder Clause). If sex offender statutes are regulations, then these constitutional provisions present no bar to their enactment or enforcement.

¹² This Note focuses on state legislation. For a discussion of federal laws that affect released sex offenders, see Tracy L. Silva, *Dial "1-900-PERVERT" and Other Statutory Measures that Provide Public Notification of Sex Offenders*, 48 SMU L. REV. 1961, 1969 (1995); and Boland, cited above in note 9, at 188, 196-97.

¹³ Seven year-old Megan Kanka's rape and murder, which was committed by her twice-convicted pedophile neighbor, sparked campaigns to enact community notification statutes in her home state of New Jersey and elsewhere. See Lisa Anderson, *Demand Grows to ID Molesters*, CHI. TRIB., Aug. 15, 1994, at 1; *A Rush to Respond*, PHILA. INQUIRER, Sept. 2, 1994, at A26. Other heinous crimes were the impetus for other state sex offender statutes. See, e.g., Julia A. Houston, Note, *Sex Offender Registration Acts: An Added Dimension to the War on Crime*, 28 GA. L. REV. 729, 735 (1994) (Washington statute); Clayton C. Skaggs, Note, *Kansas' Sexual*

today can expect to encounter four major restraints upon release from prison or parole: registration, community notification, DNA testing, and civil commitment.¹⁴

State registration statutes, which have been enacted in forty-seven states,¹⁵ oblige convicted sex criminals to provide local law enforcement officials with photographs, fingerprints, and such information as their home addresses, social security numbers, dates and places of birth, crimes, and dates and places of conviction.¹⁶ Armed with this valuable information, officials can "create a list of potential suspects . . . to pursue whenever a child [is] harmed or missing."¹⁷

Community notification statutes, which have been enacted in twenty states,¹⁸ authorize law enforcement agents to distribute registration information to the general public.¹⁹ Supporters of the public's right to know argue that notification "help[s] deter sex offenders from repeating their crimes by keeping a spotlight on them and by giving nearby residents the ability to warn and protect their families."²⁰

Several states also require sex offenders to provide blood samples that are subsequently DNA tested, screened, and filed in the state's criminal justice data bank.²¹ Because "investigations of murders and

Predator Act and the Impact of Expert Predictions: Psyched Out by the Daubert Test, 34 WASH. BURN L.J. 320, 320 (1995) (Kansas statute).

¹⁴ Sex offender statutes vary widely across jurisdictions. For a detailed analysis, see Silva, cited above in note 12, at 1970-73; Boland, cited above in note 9, at 189-98; and Houston, cited above in note 13, at 734-46.

¹⁵ See Don Van Natta Jr., *U.S. Judge Blocks State's Plan to Release Names and Addresses of Sex Offenders*, N.Y. TIMES, Mar. 8, 1996, at B6.

¹⁶ See, e.g., WASH. REV. CODE ANN. § 9A.44.130(2) (West Supp. 1996); see also Abril R. Bedarf, *Examining Sex Offender Community Notification Laws*, 83 CAL. L. REV. 885, 890-91 (1995) (describing the typical registration statute). In some states, sex offenders are required to update this information annually for a number of years after conviction or release. See, e.g., N.J. STAT. ANN. §§ 2C:7-2e, -7-2f (West 1995); N.H. REV. STAT. ANN. § 632-A:14 (Supp. 1994).

¹⁷ Michele L. Earl-Hubbard, *The Child Sex Offender Registration Laws: The Punishment, Liberty Deprivation, and Unintended Results Associated with the Scarlet Letter Laws of the 1990s*, 90 NW. U. L. REV. 788, 795 (1996).

¹⁸ See Van Natta, *supra* note 15, at B6.

¹⁹ See, e.g., FLA. STAT. ch. 775.225 (1995). Although the form and content of community notification laws vary, several notification provisions are modeled after New Jersey's "Megan's Law," which requires authorities to publicize registration data to particular segments of the community based on a given offender's risk of recidivism. See N.J. STAT. ANN. §§ 2C:7-6 to -11 (West 1995). Under this law, three tiers of notification correspond to three levels of risk: if the prosecutor finds that the individual offender's risk of recidivism is low, the law enforcement agencies that are likely to come into contact with the offender are notified; if the risk is moderate, community organizations such as schools, youth groups, and religious groups are given notice; and if the risk is high, everyone who is likely to encounter the offender is made aware of the registration information. See *id.* at § 2C:7-8(c)-(d).

²⁰ Robin Schimminger, *Law Would Publicize Sex Predators*, BUFFALO NEWS, Sept. 16, 1994, at 2 (statement by New York state legislator Schimminger seeking support for a proposed bill); accord Recent Legislation, 108 HARV. L. REV. 787, 787, 791 (1995).

²¹ See, e.g., CONN. GEN. STAT. § 54-102g (1995); OR. REV. STAT. §§ 137.076, 181.085 (Supp. 1994); VA. CODE ANN. § 19.2-310.2 (Michie 1995).

sexual offenses are . . . likely to yield the type of evidence from which DNA information can be derived,²² DNA fingerprinting laws purportedly aid in the identification, apprehension, and prosecution of repeat sex predators.²³ In addition, because "sex offenders will be reluctant to commit other offenses out of fear that they will leave behind incriminating evidence that could be linked back to them," a DNA data bank may serve as a specific deterrent to the commission of future sex crimes.²⁴

Finally, civil commitment statutes allow state officials to identify potentially dangerous sex offenders — whether they are in prison or in the community — and to commence proceedings to have them involuntarily and indefinitely confined.²⁵ By "permit[ting] child molesters and rapists to be held after their prison terms [expire] under civil court procedures like those used to commit the insane,"²⁶ commitment legislation literally immobilizes dangerous sexual deviants and, thus, presumably promotes both immediate and long-term public safety.

B. The Critics

Despite the potential public safety benefits of restrictive sex offender statutes, opponents argue that these laws are more punitive than preventive. In jurisdictions that have registration or DNA statutes, sex offenders have an affirmative obligation to surrender personal information to the state for years after they have been convicted, sentenced, and released.²⁷ Community notification subjects ex-convicts to stigmatization and ostracism, and puts them at the mercy of a public that is outraged by sex crimes.²⁸ Civil commitment sacrifices a funda-

²² *Rise v. Oregon*, 59 F.3d 1556, 1561 (9th Cir. 1995).

²³ See James P. O'Brien, Jr., Note, *DNA Fingerprinting: The Virginia Approach*, 35 WM. & MARY L. REV. 767, 796-98 (1994).

²⁴ *Rise*, 59 F.3d at 1561.

²⁵ See, e.g., WASH. REV. CODE ANN. §§ 71.09.030-.060 (West 1992 & Supp. 1996). In several states, officials file a petition of commitment at the conclusion of an offender's sentence and, if "dangerousness" is found at a separate hearing or trial, a court may order a convicted sex offender to be re-confined as a "sexually violent predator." *Id.*; see, e.g., TENN. CODE ANN. § 33-6-305 (1984 & Supp. 1995); WIS. STAT. §§ 980.02-.06 (1993-1994).

²⁶ Barry Meier, "Sexual Predators" Finding Sentence May Last Past Jail, N.Y. TIMES, Feb. 27, 1995, at B8.

²⁷ The intrusion extends beyond the state's initial acquisition of data: on the basis of registration information, sex offenders are "continuous[ly] subject[] to questioning and 'command performances at lineups.'" Earl-Hubbard, *supra* note 17, at 818 (quoting *In re Reed*, 663 P.2d 216, 218 (Cal. 1983)).

²⁸ See Edward Martone, *No: Mere Illusion of Safety Creates Climate of Vigilante Justice*, A.B.A. J., Mar. 1995, at 39 (asserting that "arson, death threats, slashed tires and loss of employment" are "inevitable and unavoidable" consequences of community notification); G. Scott Rafshoon, Note, *Community Notification of Sex Offenders: Issues of Punishment, Privacy, and Due Process*, 44 EMORY L.J. 1633, 1658-59 (1995); Monte Williams, *Sex Offenders Law Prompts Privacy Debate in New York*, N.Y. TIMES, Feb. 24, 1996, at A1 *passim*.

mental right — freedom — *indefinitely*, based solely upon unreliable assessments of the convict's predilection to commit future sex crimes.²⁹

The controversy over the characterization of sex offender statutes has enormous constitutional implications.³⁰ "Although pragmatically a detainee may care little whether he is [restrained] for punishment or to prevent future harm, jurisprudentially the difference is profound."³¹ The next Part considers the profound jurisprudential difference between regulatory and punitive legislation and examines lower courts' specific attempts to distinguish prevention and punishment when reviewing sex offender statutes.

II. PREVENTION/PUNISHMENT DISTINCTION

A. "The Jurisprudence of Prevention"³²

States have long been considered the primary promoters of the general health, safety, and welfare of American citizens.³³ A state legislature's prerogatives unquestionably extend to enacting laws that seek to prevent harm to the general public, even if such statutes effectively restrict individual liberty.³⁴ Because states often exercise their "police power" in pursuit of public safety, courts "have developed consistent standards for what is an acceptable exercise of public health authority".³⁵ A state is generally free to impose restrictions that are rationally related to the public safety goal.³⁶

Recently, states have begun to enact and enforce public-safety measures that seek to prevent *crime* by "regulating" criminal defendants. Employing traditional public health analysis, the Supreme Court has established the "jurisprudence of prevention" — a deferential view of quasi-criminal efforts to restrain potentially dangerous individuals for

²⁹ The touchstone of civil commitment is a prediction of "dangerousness," a judgment that is scientifically unreliable, see Robert C. Boruchowitz, *Sexual Predator Law—The Nightmare in the Halls of Justice*, 15 U. PUGET SOUND L. REV. 827, 835–36 (1992); Skaggs, *supra* note 13, at 330–31, and grounded in an assertion of abnormal behavior as evidenced by the convict's prior misconduct, see James D. Reardon, M.D., *Sexual Predators: Mental Illness or Abnormality? A Psychiatrist's Perspective*, 15 U. PUGET SOUND L. REV. 849, 852 (1992).

³⁰ See *infra* pp. 1716–17.

³¹ Edward P. Richards, *The Jurisprudence of Prevention: The Right of Societal Self-Defense Against Dangerous Individuals*, 16 HASTINGS CONST. L.Q. 329, 330 (1989).

³² *Id.* at 329.

³³ See *In re Slaughterhouse*, 83 U.S. 36, 62 (1872); *Gibbons v. Ogden*, 22 U.S. (9 Wheat) 1, 203 (1824).

³⁴ See *Robinson v. California*, 370 U.S. 660, 666 (1962) (asserting that a state may impose "a compulsory treatment, involving quarantine, confinement, or sequestration" to promote the general welfare); *Barsky v. Board of Regents of the Univ. of State of N.Y.*, 347 U.S. 442, 449 (1954); *Whipple v. Martinson*, 256 U.S. 41, 45 (1921).

³⁵ Richards, *supra* note 31, at 338.

³⁶ See, e.g., *Williamson v. Lee Optical Co.*, 348 U.S. 483, 486–88 (1955); see also LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 8-7, at 582 (2d. ed. 1988) (describing the Court's deferential approach to regulatory enactments "in furtherance of public goals").

the good of society.³⁷ In *Schall v. Martin*,³⁸ for example, the Court upheld a New York law authorizing pretrial detention for juveniles when there is a "serious risk" that the juvenile, if released, would commit a crime prior to his next court appearance.³⁹ Similarly, in *United States v. Salerno*,⁴⁰ the Court upheld a federal law allowing judges to deny pre-trial bail to incarcerated suspects when "no release conditions will reasonably assure . . . the safety of . . . the community."⁴¹ Rejecting the notion that detention is necessarily punitive,⁴² the Supreme Court has adopted the view that liberty restrictions based on predictions of future dangerousness may "fall[] on the regulatory side of the dichotomy" between prevention and punishment.⁴³

B. The Prevailing View of Punishment

Although states generally may regulate individuals (even criminally culpable ones) for the good of society, the U.S. Constitution places formidable constraints on each state's ability to *punish* its citizens. For example, the constitutional prohibition against bills of attainder⁴⁴ prevents state legislatures from acting adjudicatively by passing laws that punish specified individuals.⁴⁵ Similarly, the Constitution prohibits ex post facto legislation,⁴⁶ including legislative enactments that impose new punishments for old crimes.⁴⁷ Moreover, the Fifth and Sixth Amendments catalog a number of procedural hurdles that states must overcome before they may punish culpable persons,⁴⁸ and the Eighth Amendment protects individuals from punishments that, although im-

³⁷ Richards, *supra* note 31, at 330.

³⁸ 467 U.S. 253 (1983).

³⁹ *Id.* at 278.

⁴⁰ 481 U.S. 739 (1987).

⁴¹ *Id.* at 741.

⁴² *See id.* at 745.

⁴³ *Id.* at 747. "Central to all the prevention decisions is the unbundling of punishment and deprivation of liberty in ostensibly criminal law cases." Richards, *supra* note 31, at 338. Although "the Supreme Court has allowed the disassociation of punishment and prevention in criminal law," *id.* at 331, it has not developed clear criteria by which to determine in the first instance whether a particular law should be characterized as "punitive" or "preventive."

⁴⁴ *See* U.S. CONST. art. I, § 10, cl. 1.

⁴⁵ *See Punishment*, *supra* note 2, at 236.

⁴⁶ *See* U.S. CONST. art. I, § 10, cl. 1.

⁴⁷ In *Calder v. Bull*, 3 U.S. (3 Dall.) 386 (1798), the Supreme Court established that a law violates the Ex Post Facto Clause when it "changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed." *Id.* at 390. Thus, if sex offender statutes are deemed "punitive," their application to previously-convicted offenders violates the Ex Post Facto Clause.

⁴⁸ The Fifth and Sixth Amendments apply to "criminal" cases. *See* U.S. CONST. amends. V, VI. Although the nature of the proceeding cannot be ascertained solely from an evaluation of the sanction, *see* *U.S. v. Halper*, 490 U.S. 435, 447-448 (1989), the Supreme Court has established that at least in the Fifth Amendment context, a constitutional violation "can be identified [solely] by assessing the character of the actual sanctions imposed." *id.* at 447.

posed by the judiciary in accordance with due process, are nonetheless "cruel and unusual."⁴⁹

Because "[t]he state may not punish a person under its public health police powers,"⁵⁰ courts must determine whether challenged legislation imposes "punishment" within the meaning of the Constitution. The prevailing method of making the prevention/punishment determination derives from the Supreme Court's opinion in *Kennedy v. Mendoza-Martinez*.⁵¹ In *Kennedy*, the Court held that federal statutes that divested draft-dodgers of national citizenship for departing the United States during a time of war were unconstitutionally punitive.⁵² Writing for the majority, Justice Goldberg reasoned that "[t]he punitive nature of the sanction here is evident under the tests traditionally applied to determine whether an Act of Congress is penal or regulatory in character."⁵³ The tests traditionally applied were:

Whether the sanction involves an affirmative disability or restraint, whether it has historically been regarded as a punishment, whether it comes into play only on a finding of *scienter*, whether its operation will promote the traditional aims of punishment — retribution and deterrence, whether the behavior to which it applies is already a crime, whether an alternative purpose to which it may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned.⁵⁴

Although many lower courts use the *Kennedy* factors, great disagreement persists about when and how to apply them in evaluating laws that burden released sex offenders.⁵⁵ Several courts have chosen to use means other than the *Kennedy* analysis to characterize such legislation.

C. Sex Offender Statutes: Prevention or Punishment?

The growing demand for more stringent sex offender regulation challenges both lawmakers and courts: legislatures must "devise a solu-

⁴⁹ U.S. CONST. amend. VIII.

⁵⁰ Richards, *supra* note 31, at 338.

⁵¹ 372 U.S. 144 (1963).

⁵² See *id.* at 165-66.

⁵³ *Id.* at 168.

⁵⁴ *Id.* at 168-69 (citations omitted). The *Kennedy* Court did not rely on these factors in reaching its decision. Instead, the Court found, "[t]he objective manifestations of congressional purpose indicate conclusively that the provisions in question can only be interpreted as punitive," and concluded that a "detailed examination" of the factors was unnecessary. *Id.* at 169. Thus, although the *Kennedy* Court set forth criteria for distinguishing punitive from regulatory enactments, it also established that they need only be considered "[a]bsent conclusive evidence of congressional intent as to the penal nature of a statute." *Id.*

⁵⁵ In the absence of a clear legislative admission that a law punishes, there is considerable judicial discord over how to make the prevention-or-punishment determination. See *infra* part II.C; cf. Maria Foscarinis, Note, *Toward a Constitutional Definition of Punishment*, 80 COLUM. L. REV. 1667, 1667, 1670-78 (1980) (examining the various ways that courts have sought "to determine what punishment is").

tion generally designed to remedy the [sex crime] problem without unnecessarily penalizing those who are its source,"⁵⁶ and courts must review that legislative response, necessarily deciding how to differentiate punitive and regulatory enactments.⁵⁷ The few courts that have characterized sex offender laws have taken different approaches and, not surprisingly, have reached different conclusions. Consider the following examples.

In *Rise v. Oregon*,⁵⁸ the Ninth Circuit upheld an Oregon law requiring convicted murderers and sex offenders to surrender blood samples for the state's DNA data bank.⁵⁹ Felons subject to the law brought a lawsuit alleging that the forced blood submissions violated, inter alia, the constitutional prohibition against ex post facto punishments.⁶⁰ In determining whether the statute was punitive or preventive, the federal court focused only on the legislature's regulatory intent⁶¹ and concluded that, because the "obvious purpose" of the Oregon statute was to aid law enforcement officials, the statute was constitutional.⁶²

In *Artway v. Attorney General*,⁶³ a federal district court assessed several constitutional challenges to New Jersey's registration and community notification statute.⁶⁴ Artway argued that the statute violated the Constitution's prohibitions against cruel and unusual punishment, ex post facto laws, and bills of attainder, among others.⁶⁵ Although the legislature claimed a regulatory purpose for the act, the court found that judges should "reach an independent conclusion as to its true nature"⁶⁶ by engaging in an "analysis . . . in the manner prescribed by the Supreme Court in *Kennedy*."⁶⁷ Applying the *Kennedy*

⁵⁶ Doe v. Poritz, 662 A.2d 367, 387 (N.J. 1995).

⁵⁷ See *supra* note 11 and accompanying text. Courts may also seek to determine whether sex offender legislation comports with constitutional provisions that do not rely on a "punitive" or "regulatory" characterization, such as the Due Process Clause of the Fourteenth Amendment. See, e.g., *In re Hendricks*, No. 73,039, 1996 WL 87472, at *5 (Kan. Mar. 1, 1996).

⁵⁸ 59 F.3d 1556 (9th Cir. 1995).

⁵⁹ See *id.* at 1564.

⁶⁰ See *id.* at 1558.

⁶¹ See *id.* at 1562 ("Legislation may lawfully impose new requirements on convicted persons if the statute's 'overall design and effect' indicates a 'non-punitive intent.'" (quoting *United States v. Huss*, 7 F.3d 1444, 1447 (9th Cir. 1993))).

⁶² *Id.* It is unclear from the opinion whether the court looked at the text of the statute, legislative history, or some other source in making its determination that the law's purpose is "to assist in the identification, arrest, and prosecution of criminals, not to punish." *Id.*

⁶³ 876 F. Supp. 666 (D.N.J. 1995).

⁶⁴ See *id.* at 668.

⁶⁵ See *id.*

⁶⁶ *Id.* at 673.

⁶⁷ *Id.*

factors, the court concluded that the public notification provisions of the statute were unconstitutional.⁶⁸

The Supreme Court of New Jersey examined the same registration and community notification law in *Doe v. Poritz*.⁶⁹ Instead of deferring to legislative intent or employing the *Kennedy* factors,⁷⁰ however, the court set forth yet another test for determining whether the statute was punitive. Under the *Poritz* court's reasoning, "a statute that can fairly be characterized as remedial"⁷¹ only constitutes punishment if the punitive impact of the law is "excessive."⁷² Though the statute may "affect, potentially severely, some of those subject to its provisions,"⁷³ only if the law contains provisions that "cannot be justified as regulatory" will it be deemed punishment for the purpose of the constitutional inquiry.⁷⁴ Applying its regulatory-unless-excessively-punitive test to Megan's Law, the *Poritz* court upheld the statute as a valid exercise of the state's power to prevent public harm.⁷⁵

III. THE DISTINCTION DISSECTED

The *Rise*, *Artway*, and *Poritz* opinions are generally representative of the analyses of the few courts that have evaluated sex offender laws.⁷⁶ Although each approach squarely confronts the prevention/punishment dilemma, the analyses offer incoherent and unprincipled explanations for the courts' conclusions. Courts have relied too heavily on the legislatures' intent, have mistakenly applied the *Kennedy* factors, and have erroneously emphasized "excessiveness" in assessing the nature of sex offender statutes for constitutional purposes.

A. The Rise Rationale: Relying on Legislative Intent

In *Rise*, the Ninth Circuit suggested that a "non-punitive intent" is the benchmark for determining whether a legislature seeking to estab-

⁶⁸ See *id.* at 692. The court found that public notification involves an affirmative disability, has historically been regarded as punishment, and furthers one of the traditional aims of punishment. See *id.* at 688-91. Even though in the court's opinion the scienter factor "weighs in favor" of a regulatory characterization, *id.* at 690, the court reasoned that the law applies only to behavior that constitutes a crime, does not further regulatory objectives, and appears excessive in relation to its stated goals, see *id.* at 691-92.

⁶⁹ 662 A.2d 367 (N.J. 1995).

⁷⁰ The court rejected the *Kennedy* factors as inapposite because they are "useful only in determining the underlying nature of the proceeding, not the question of whether punishment is imposed by a civil sanction." *Id.* at 402.

⁷¹ *Id.* at 388.

⁷² See *id.* at 390.

⁷³ *Id.* at 388.

⁷⁴ *Id.* at 390.

⁷⁵ See *id.* at 422-23.

⁷⁶ See, e.g., *Rowe v. Burton*, 884 F. Supp. 1372, 1378-79 (D. Alaska 1994) (applying the *Kennedy* factors); *State v. Carpenter*, 541 N.W.2d 105, 112-13 (Wis. 1995) (looking for extraneous, punitive effects); *State v. Costello*, 643 A.2d 531, 533 (N.H. 1994) (relying on legislative intent).

lish a DNA data bank can act to "impose new requirements on convicted persons."⁷⁷ Other jurists have also found the purported purpose of a sex offender statute dispositive of its nature. For example, in *People v. Adams*,⁷⁸ the Illinois Supreme Court decided that a detailed analysis of the "severity of the disability" imposed by the registration statute is necessary only "when conclusive evidence of legislative intent is unavailable."⁷⁹

Fastidiously focusing on legislative intent when characterizing sex offender statutes is problematic for two primary reasons. First, it may not be possible to discern the true intentions of a legislative body.⁸⁰ Although the legislature may announce that its intent is merely to protect the community, the actual motivations of elected officials who enact burdensome provisions may be difficult to ascertain.⁸¹ Moreover, the legislative history of a statute is often indeterminate,⁸² and savvy politicians may "inject statements intended solely to influence later interpretations of the statute."⁸³

Second, even if the statements accompanying the passage of a sex offender law express the lawmakers' true motivations, making those intentions dispositive "encourage[s] hypocrisy and unconscious self-deception."⁸⁴ The prevention/punishment dilemma is a constitutional conflict between the state and the burdened individual. "A definition of punishment that render[s] an individual's constitutional rights dependent on the subjective motive of his punisher [is] inconsistent with the function of the Constitution in protecting individual rights."⁸⁵ It makes little sense for a court to fixate on the state's interest in regulating sex convicts when the real issue is whether a particular provision can rightly be deemed "regulation" at all.

B. The Artway Approach: Overvaluing the Kennedy Factors

Some judges eschew in depth examinations of the legislature's intent and instead purport to "focus on the practical purpose and effect of the statute"⁸⁶ by applying the factors that the Supreme Court identified in *Kennedy*.⁸⁷ Although the attempt to focus on effects is com-

⁷⁷ *Rise v. Oregon*, 59 F.3d 1556, 1562 (9th Cir. 1995) (internal quotation marks omitted).

⁷⁸ 581 N.E.2d 637 (Ill. 1991).

⁷⁹ *Id.* at 640-41; accord *Costello*, 643 A.2d at 533.

⁸⁰ See Foscarinis, *supra* note 55, at 1672.

⁸¹ See Bedarf, *supra* note 16, at 923.

⁸² Various legislators may express different intentions with respect to the proposed legislation. See Note, *Why Learned Hand Would Never Consult Legislative History Today*, 105 HARV. L. REV. 1005, 1019 (1992).

⁸³ *Id.* at 1016.

⁸⁴ PACKER, *supra* note 1, at 33.

⁸⁵ Foscarinis, *supra* note 55, at 1673.

⁸⁶ *Artway v. Attorney Gen.*, 876 F. Supp. 666, 673 (D.N.J. 1995).

⁸⁷ For a listing of the *Kennedy* factors, see page 1717 above.

mendable,⁸⁸ courts have attached far too much significance to the *Kennedy* factors in assessing sex offender laws.

In the first place, there is little evidence in the *Kennedy* opinion that the Supreme Court intended the factors to be applied as a litmus test by which to characterize legislation. In *Kennedy*, the Court:

simply listed various factors, the tests, each of which had been used by itself in reaching a determination of whether a statute was penal (criminal) or regulatory (civil), and each of which therefore might be relevant in the future in making that determination, whether alone or in conjunction with the others.⁸⁹

Moreover, the Supreme Court's post-*Kennedy* opinions indicate that the Justices did not view *Kennedy* as a means of determining the punitive or regulatory nature of a law.⁹⁰

Second, even if *Kennedy* sets forth the seven elements of a punitive enactment, the list is far too open-ended to yield consistent results, especially as applied to sex offender statutes.⁹¹ For example, the Supreme Court of Arizona used the *Kennedy* factors to uphold Arizona's registration provision as regulatory,⁹² while the Supreme Court of California employed the same criteria to strike down a substantially similar version of the California registration statute as unconstitutionally punitive.⁹³ Further, using the *Kennedy* factors, federal courts in Alaska and New Jersey have found that community notification laws

⁸⁸ See *infra* part IV.

⁸⁹ Doe v. Poritz, 662 A.2d 367, 399 (N.J. 1995).

⁹⁰ Cases subsequent to *Kennedy* reveal that the Court views the seven-factor analysis as applicable only when the nature of the proceeding (i.e., criminal versus civil) is at issue, and not when the nature of the sanction (i.e., punitive or regulatory) is in question. See e.g., Austin v. United States, 113 S. Ct. 2801, 2806 n.6 (1993) (considering the criminal or civil nature of forfeiture proceedings and finding that "[i]n addressing the separate question whether punishment is being imposed, the Court has not employed the tests articulated in [*Kennedy*]") (emphasis added); see also Simeon Schopf, "Megan's Law": Community Notification and the Constitution, 29 COLUM. J.L. & SOC. PROBS. 117, 132 (1995) (arguing that "the bulk of recent case law suggests" that application of the *Kennedy* criteria to determine whether community notification constitutes punishment would be "inappropriate"). Because the criminal/civil distinction is different from the punitive/regulatory determination, see United States v. Halper, 490 U.S. 435, 447-48 (1989), *Kennedy*'s significance in making the former determination does not ensure its appropriateness in making the latter.

⁹¹ The *Kennedy* Court itself admitted that the factors "may often point in differing directions," *Kennedy*, 372 U.S. at 169, and comparative analysis of court evaluations suggests that, in the context of sex offender statutes, they most certainly have. See Bedarf, *supra* note 16, at 913-14 (finding that "despite [judges'] use of the same seven-factor test, courts are split fairly evenly in the conclusions they reach").

⁹² See State v. Noble, 829 P.2d 1217, 1221-24 (Ariz. 1992).

⁹³ See *In re Reed*, 663 P.2d 216, 218-20 (Cal. 1983). Although the California Supreme Court invalidated the registration law only as applied to sex offenders convicted of misdemeanor disorderly conduct, see *id.* at 222-23, it used the *Kennedy* analysis to conclude that the general practice of registering sex offenders constitutes punishment, see *id.* at 218-20.

constitute "punishment,"⁹⁴ while the Supreme Court of Washington has found that the Washington registration and notification statute is a regulation.⁹⁵ Whatever the reason for the disparate outcomes when various courts apply the same *Kennedy* factors to similar sex offender laws,⁹⁶ such differences suggest that the test does not provide a consistent means of making the prevention/punishment determination.

Finally, because some of the *Kennedy* concerns are patently inapplicable to sex offender laws, the *Kennedy* "test" is not well-suited to the evaluation of sex offender statutes. For example, *Kennedy* requires an evaluation of "whether [the sanction] comes into play only on a finding of scienter."⁹⁷ Scienter is ambiguous in the context of sex offender statutes, however, because although the sex offender laws themselves do not require criminal culpability, they apply only to individuals who have been found criminally culpable for sexual misconduct.⁹⁸ Considering "whether the behavior to which [the sanction] applies is already a crime"⁹⁹ presents a similar difficulty. Although the underlying sexual offense is certainly criminal, "one could argue that the . . . statutes only relate to the behavior of moving from place to place and entering a city's borders, behavior that is *not* a crime for most individuals."¹⁰⁰ Such ambiguities should preclude casual reliance on the *Kennedy* factors in evaluating sex offender statutes.

C. The Poritz Position: Erroneously Emphasizing "Excessive" Effects

The New Jersey Supreme Court has found that the proper inquiry in determining whether Megan's Law should be deemed "punitive" is whether the statute's "punitive impact comes from aspects of the law unnecessary to accomplish its regulatory purposes."¹⁰¹ The *Poritz* ra-

⁹⁴ See *Artway v. Attorney Gen.*, 876 F. Supp. 666, 688-92 (D.N.J. 1995); *Rowe v. Burton*, 884 F. Supp. 1372, 1377-80 (D. Alaska 1994).

⁹⁵ See *State v. Ward*, 869 P.2d 1062, 1069 (Wash. 1994).

⁹⁶ Some of the discrepancy is substantive. Compare *Reed*, 663 P.2d at 218, 219-20 (finding that sex offender registration imposes an affirmative disability, that it has not been historically regarded as punishment, and that it is excessive vis-à-vis its nonpunitive purposes) with *Noble*, 829 P.2d at 1222, 1224 (concluding that sex offender registration does not impose a disability, has been traditionally regarded as punishment, and is not excessive). The remainder may be the result of differences in the application of the factors. Compare *Noble*, 829 P.2d at 1224 (asserting that "our task is not simply to count the factors on each side, but to weigh them" based on their significance) with *Artway*, 876 F. Supp. at 692 (finding that most of the factors lead toward a punitive characterization).

⁹⁷ *Kennedy*, 372 U.S. at 168 (emphasis omitted).

⁹⁸ In applying the *Kennedy* criteria, some courts simply ignore the scienter criteria, see, e.g., *Noble*, 829 P.2d at 1221-24, while others attempt to make sense of it, see, e.g., *Artway*, 876 F. Supp. at 689-90.

⁹⁹ *Kennedy*, 372 U.S. at 168.

¹⁰⁰ Earl-Hubbard, *supra* note 17, at 819-20.

¹⁰¹ *Doe v. Poritz*, 662 A.2d 367, 390 (N.J. 1995). This approach follows the Supreme Court's analysis in cases such as *United States v. Salerno*, 481 U.S. 739 (1987), which collapses the multi-

tionale requires the judge to find a regulatory purpose, to discern the law's punitive effects, and to evaluate the "excessiveness" of the punitive effects of the sex offender statute in relation to the statute's remedial goals.¹⁰² Although the *Poritz* position attempts to balance the punitive and preventive aspects of sex offender statutes, it also invites unwarranted and illogical deference to legislative desires, is difficult to apply in the sex offender context, and ignores the crux of the prevention/punishment determination.

Like the prevention/punishment analysis that considers legislative intent dispositive, the excessive-punitive-effects rationale maintains that "the purpose and the intent of the . . . sanction is the touchstone that determines the sanction's characterization."¹⁰³ In the *Poritz* court's view, if the state has a legitimate regulatory purpose for its sex offender statute and the statutory burden bears some reasonable relationship to that purpose, then its effects are not excessive, and the law should be characterized as a "regulation." This reliance on regulatory intent not only unwisely assumes that a clear legislative purpose is ascertainable,¹⁰⁴ but also allows the legislature to justify arguably punitive statutory provisions by selecting sweeping regulatory goals.¹⁰⁵ Because "[a]lmost any restriction on a [convict's] liberty interests can be found to have some rational relation to the legislative interest in promoting community safety,"¹⁰⁶ the excessive-punitive-effects rationale is a "toothless standard" that defers almost entirely to the will of the legislature and "provid[es] the [sex convict] with virtually no protection against the 'punitive effect[s]'" of the legislation.¹⁰⁷

Even if one overlooks the problems associated with relying on legislative intent, the "excessiveness" rationale is difficult to apply when

factor *Kennedy* analysis into two considerations: "whether an alternative purpose to which [the restriction] may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned." *Id.* at 747 (quoting *Kennedy*, 372 U.S. at 168-69) (alterations in original) (internal quotation marks omitted).

¹⁰² See *Poritz*, 662 A.2d at 390.

¹⁰³ *Id.* at 394.

¹⁰⁴ See *supra* part III.A.

¹⁰⁵ Consider Justice Marshall's hypothetical example which posits a congressional intent to reduce violent crime:

After investigation, Congress determines (not unrealistically) that a large proportion of violent crime is perpetrated by persons who are unemployed. It also determines, equally reasonably, that much violent crime is committed at night. From amongst the panoply of "potential solutions," Congress chooses a statute which permits, after judicial proceedings, the imposition of a dusk-to-dawn curfew on anyone who is unemployed. Since this is not a measure enacted for the purpose of punishing the unemployed, and since the majority finds that preventing danger to the community is a legitimate regulatory goal, the curfew statute would, according to the majority's analysis, be a mere "regulatory" detention statute

Salerno, 481 U.S. at 760 (Marshall, J., dissenting).

¹⁰⁶ Thomas C. French, Note, *Is It Punitive or Is It Regulatory?* *United States v. Salerno*, 20 U. Tol. L. Rev. 189, 225 (1988) (emphasis added).

¹⁰⁷ *Id.*

the challenged statute imposes a nonpecuniary burden. "Excessiveness" evaluations most effectively assess the character of statutes that impose monetary compensation for past harms.¹⁰⁸ To the extent that sex offender statutes are not compensatory, and the burden they impose is not quantifiable, the attempt to evaluate the "excessiveness" of the punitive effects of such statutes is both unavailing and misleading.¹⁰⁹

Most importantly, by focusing on the extent to which the punitive effects of the statute exceed the state's regulatory purpose, the excessive-effects rationale ignores the fact that, at its core, the prevention/punishment evaluation considers whether sex offender laws are a constitutionally appropriate means of pursuing concededly legitimate state ends. The "excessive burden" analysis characterizes statutes based on the *fit* between means and end,¹¹⁰ rather than on the properties of legislation that should be deemed to make it more or less "punitive" within the meaning of the Constitution. Whether the state is doing what it must (and thus the punitive effects are not "excessive" in relation to the law's purpose) simply does not address whether what the state is doing should be deemed "punishment."¹¹¹ In making the prevention/punishment determination, judges must ask whether the law should be characterized as "punitive," not whether the state must act punitively to accomplish its regulatory goals.

A critical examination of sex offender statute jurisprudence "illustrate[s] the complexities, intricacies, and contradictions involved when courts attempt to set standards or evolve a formula to differentiate between punishment and regulation."¹¹² Admittedly, "[t]he distinction between unconstitutional punishment and permissible state regulatory actions is a fine one."¹¹³ Nevertheless, courts should recognize the

¹⁰⁸ See Cheh, *supra* note 1, at 1378 (concluding that "[f]or monetary penalties" the excessive-effects approach "gives us a useful albeit broad formula: the government is entitled to rough remedial justice" and "[a]nything beyond this generously phrased allowance will be equivalent to [punishment]").

¹⁰⁹ See *id.* (suggesting that applying "excessiveness" analysis to "adverse actions that are not measured in currency" is problematic).

¹¹⁰ The *Poritz* court upheld Megan's Law because "that which is allegedly punitive, the knowledge of the offender's record and identity, is precisely that which is needed for the protection of the public." *Doe v. Poritz*, 662 A.2d 367, 404 (N.J. 1995).

¹¹¹ An evaluation of the state's *need* for a particular course of action is fundamentally different from a determination of the *character* of its conduct. Consider the constitutional prohibition against unreasonable searches and seizures. See U.S. CONST. amend. IV. Whether the police have affected a "seizure" within the meaning of the Constitution is assessed without regard to the state's interest in detaining the individual. See, e.g., *California v. Hodari D.*, 499 U.S. 621, 626 (1991); *Michigan v. Chesternut*, 486 U.S. 567, 573 (1988). Similarly, whether a law imposes "punishment" should not be determined by focusing on the state's interest in burdening the individual. Although constitutional analysis may ultimately reveal that the state's end justifies the means, the character of the means cannot be ascertained with reference to the legitimacy of the end.

¹¹² *Punishment*, *supra* note 2, at 287.

¹¹³ French, *supra* note 106, at 218.

flaws in the current analytic framework and move toward developing a more principled means of distinguishing prevention and punishment when evaluating sex offender laws.

IV. TOWARD A MORE PRINCIPLED POSITION

Two major premises underlie a more principled approach to making the prevention/punishment determination. First, a principled analysis recognizes that there is no *inherent* property that makes a statute, by nature, "punitive" or "preventive." Unquestionably punitive statutes share traits with laws that are universally accepted as regulatory.¹¹⁴ A particular statute may have both punitive and nonpunitive attributes;¹¹⁵ and, to some extent, whether a law is "punitive" or "regulatory" depends upon one's vantage point.¹¹⁶ Rather than adhering to the notion that punishments and regulations are inherently distinguishable in any meaningful sense, the principled judiciary thus seeks to identify statutory traits that *should* serve as the basis for classification within the meaning of the Constitution.¹¹⁷

Second, the principled approach postulates that the normative determination of which characteristics should make a statute "punitive" within the meaning of the Constitution should be tied to the constitutional foundations that give rise to the prevention/punishment problem. The current analyses of sex offender statutes are unprincipled precisely because the statutory criteria selected — legislative intent, the state's prevailing interest in enacting the law, and to a lesser extent, the *Kennedy* factors — are unrelated to the interests that the Constitution is designed to protect. Courts determine the "punitive" or "regulatory" nature of a statute, not as an isolated inquiry, but against the backdrop of a system of government in which state interests are subordinate to individual rights. Because the Constitution stands as a bulwark against government encroachment on individual liberty, courts should employ a classification standard that "safeguards the humane interests for the protection of which the [Constitution] was written."¹¹⁸ This Note argues that "[i]n a democracy, where safeguards are

¹¹⁴ For example, both imprisonment and quarantine statutes involve forced restraint of the targeted individuals.

¹¹⁵ See *Trop v. Dulles*, 356 U.S. 86, 96 (1958); Rafshoon, *supra* note 28, at 1667.

¹¹⁶ See *United States v. Halper*, 490 U.S. 435, 447 n.7 (1989) ("[F]or the defendant even remedial sanctions carry the sting of punishment.")

¹¹⁷ The courts' task is normative rather than descriptive. For example, instead of finding as a descriptive matter that "punitive" laws impose burdens and "regulatory" ones do not, courts must determine whether, given the existence of a burden, a particular law *should* be deemed "punitive" for the purpose of constitutional analysis.

¹¹⁸ *Marcus v. Hess*, 317 U.S. 537, 554 (1943) (Frankfurter, J., concurring).

built in to protect human dignity, the *effect* of the sanction rather than the reason for imposing it must necessarily be [that] criterion."¹¹⁹

Once it is established that the courts' function is to make a normative assessment of the "punitive" or "regulatory" character of the legislation, and that "the relevant criteria . . . should be the concerns of individuals threatened with criminal sanctions" rather than the purpose or intentions of the state,¹²⁰ judicial classification of sex offender laws will turn in a more principled direction: toward evaluating the *impact* of the challenged legislation in a manner that is consistent with constitutional protections against government encroachment on individual rights. Although courts will have to develop precise, objective criteria by which to evaluate the effects of sex offender laws over time, this Note suggests that judges focus, first, on the nature of the disability imposed, and second, on whether the statute has retributive or general deterrent effects. Simply stated, if a sex offender statute deprives an offender of an otherwise-established legal right and primarily operates to affect retribution or general deterrence, it should be deemed "punitive" for constitutional purposes.

Focusing on the nature of the disability — and reserving the "punitive" classification for burdens that amount to "a deprivation or suspension of civil or political rights"¹²¹ — emphasizes the effect of sex offender legislation as the constitutional touchstone for the characterization of such statutes. Because citizens face myriad civil disabilities imposed by the states (many of which undoubtedly seem punitive to those who must endure them), requiring that "punitive" statutes amount to a deprivation of rights promotes consistency by giving judges a "standard for determining the degree of hardship necessary to render an action punitive."¹²² Moreover, because only statutes that infringe upon the rights of citizens implicate constitutional provisions, only a deprivation of such rights should give rise to the constitutional protections associated with a "punitive" characterization.

The second inquiry — whether the sex offender statute has retributive¹²³ or general-deterrent effects — requires judges to consider the

¹¹⁹ Victor S. Navasky, *Deportation as Punishment*, 27 U. KAN. CITY L. REV. 213, 217-21 (1959) (emphasis added); see also *Doe v. Pataki*, No. 96 CIV.1657(DC), 1996 WL 131859, at *1 (S.D.N.Y. Mar. 21, 1996) ("[N]o matter how compelling the reasons, no matter how pure the motive, constitutional protections for individuals — even unsympathetic ones — cannot be cast aside in the name of the greater good.")

¹²⁰ Comment, *The Concept of Punitive Legislation and the Sixth Amendment: A New Look*, 32 U. CHI. L. REV. 290, 299 (1965).

¹²¹ *Cummings v. Missouri*, 71 U.S. (4 Wall.) 277, 322 (1867). The *Cummings* Court found that "[t]he deprivation of any rights, civil or political, previously enjoyed, may be punishment." *Id.* at 322.

¹²² Foscarinis, *supra* note 55, at 1675.

¹²³ Properly conceived, retribution is both "naked vengeance," *Kennedy*, 372 U.S. at 189 (Brennan, J., concurring), and "a moral condemnation by society of an offender's behavior," *Bedau*, *supra* note 16, at 925. It should be noted that a statute may be retributive in spite of — rather

impact of the statute on the targeted individuals and society. Acknowledging that sex offender statutes are likely both to influence individual behavior *and* to promote societal interests in retribution and general deterrence, the judge would determine whether the legislation serves *primarily* to facilitate individual reformation or rehabilitation, on the one hand, or to display moral opprobrium or make an example of the offender, on the other. Of course, the question of which effects predominate "is not ordinarily answered through an analysis that suggests precision and consequently that results in certainty."¹²⁴ Nevertheless, because individuals need constitutional protection far more when state actions achieve retribution or general deterrence than when its acts accomplish individual reformation or rehabilitation, an analysis that classifies sex offender statutes accordingly is a principled means of evaluating these laws.¹²⁵

The characterization of any particular sex offender law depends upon the statute's particular provisions and, thus, is beyond the scope of this Note. Nevertheless, illustrating the application of the proposed principles in the context for which they are offered is informative. Thus, in a jurisdiction in which sex offenders have no privacy right in registration information or blood samples, and therefore, no political or civil right is infringed by the state's registration or DNA data bank requirements, a court would find that sex offender registration and DNA data bank laws are "regulations" for constitutional purposes. If, on the other hand, a community notification statute deprives the offender of his right to mobility or bodily integrity, and if it makes him the "target of widespread community rejection, antipathy, and scorn"¹²⁶ in a manner that is more retributive than rehabilitative, then it should be considered "punishment." Commitment legislation must be examined carefully, for although it clearly sacrifices the offender's fundamental right to freedom, courts must determine whether its primary effect is treatment of the affected individual, or satisfaction of the societal interest in locking sex offenders up and throwing away the key.¹²⁷

In each case, "the Court's task is to predict fairly the actual effect of the statutory requirements"¹²⁸ in terms of the nature and severity of

than because of — the legislature's purpose in enacting it. See *Kennedy*, 372 U.S. at 189 (Brennan, J., concurring) (arguing that "an exaction of retribution would not lose that quality because it was undertaken" for regulatory reasons).

¹²⁴ *Doe v. Poritz*, 662 A.2d 367, 398 (N.J. 1995).

¹²⁵ When legislation primarily satisfies societal interests in retributive or deterrent "justice," individual rights are most in jeopardy, and a "punitive" characterization is most warranted.

¹²⁶ *Poritz*, 662 A.2d at 439-40 (Stein, J., dissenting). Although individual retaliation may not be considered government action for the purpose of the Constitution, notification "exposes [offenders] to society's disapprobation," and the resulting stigma may amount to "state-induced condemnation," which is a significant retributive effect. Bedarf, *supra* note 16, at 925.

¹²⁷ See, e.g., *Young v. Weston*, 898 F. Supp. 744, 753 (W.D. Wash. 1995).

¹²⁸ *Poritz*, 662 A.2d at 438.

the deprivation and the impact on the individual and the society at large. Though far from perfect, this approach to making the prevention/punishment distinction is principled because it "places primary emphasis on the 'punished' individuals"¹²⁹ and stresses the constitutional safeguards that should be the basis for judicial judgments about the "punitive" or "regulatory" nature of state sex offender laws.

V. CONCLUSION

In the current climate of fear, hatred, and revenge associated with the release of convicted sex criminals, courts must be especially attentive to legislative enactments that "use[] public health and safety rhetoric to justify procedures that are, in essence, punishment and detention."¹³⁰ Judges should abandon the prevention/punishment analyses that rely on legislative intent, that routinely apply the *Kennedy* factors, and that assess the "excessiveness" of a sex offender statute's punitive effects in favor of a more principled approach to characterization. Although "[a precise] analytical solution is almost impossible to construct,"¹³¹ this Note suggests that such a principled approach involves assessing the impact of sex offender statutes and deeming the laws "punitive" to the extent that they operate to deprive sex criminals of a legal right in a manner that primarily has retributive or general-deterrent effects.

¹²⁹ Foscarnis, *supra* note 55, at 1682.

¹³⁰ Richards, *supra* note 31, at 386.

¹³¹ *Punishment*, *supra* note 2, at 273.

RECENT CASE

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 — *United States v. Viola*, 35 F.3d 37 (2d Cir. 1994); *United States v. Oreto*, 37 F.3d 739 (1st Cir. 1994).

The Racketeer Influenced and Corrupt Organizations Act (RICO)¹ is not just for racketeer-influenced and corrupt organizations anymore. Section 1962(c), which makes it unlawful for "any person employed by or associated with any enterprise" to "conduct or participate . . . in the conduct of such enterprise's affairs through a pattern of racketeering activity,"² lately has been used against the accountants,³ attorneys,⁴ and affiliates of prohibited establishments, exposing these "deep pockets" to severe statutory penalties.⁵ In *Reves v. Ernst & Young*,⁶ the Supreme Court recently narrowed the scope of section 1962(c) liability. Asserting that Congress did not intend RICO to be used to penalize parties with minimal involvement in racketeering activities, the Court held that only those who take part in the "operation or management" of an enterprise "conduct or participate . . . in the conduct of such enterprise's affairs" for the purpose of section 1962(c).⁷

Although *Reves* limits enterprise affiliate liability under RICO, the circuits disagree about the nature and extent of that limitation.⁸ Last

¹ 18 U.S.C. §§ 1961-1968 (1988 & Supp. IV 1992).

² *Id.* § 1962(c).

³ See, e.g., *Bank of America v. Touche Ross & Co.*, 782 F.2d 966, 968 (11th Cir. 1986); *Gilmore v. Berg*, 761 F. Supp. 358, 361 (D.N.J. 1991).

⁴ See, e.g., *Blake v. Dierdorff*, 856 F.2d 1365, 1371-72 (9th Cir. 1988); *Odesser v. Continental Bank*, 676 F. Supp. 1305, 1308, 1311 (E.D. Pa. 1987).

⁵ See 18 U.S.C. § 1964 (allowing a person who is injured by a § 1962 violation to recover treble damages and attorney's fees).

⁶ 113 S. Ct. 1163 (1993).

⁷ *Id.* at 1172-73; see also S. REP. NO. 269, 101st Cong., 2d Sess. 2 (1990) ("The use of civil RICO in sexual harassment cases, landlord-tenant disputes, wrongful discharge cases, against unions in labor disputes, and in contract and commercial disputes is not what Congress had in mind when it was debating RICO as a tool to fight organized crime.").

⁸ Lower courts have found it difficult to reconcile the narrow interpretation of § 1962(c) liability in *Reves* with Congress's instruction that the statute be "liberally construed to effectuate its remedial purposes." 18 U.S.C. § 1961 note (1988). Because the same § 1962 violation gives rise to both criminal (§ 1963) and civil (§ 1964) liability, courts that wish to interpret § 1962's prohibitions narrowly in civil cases (in order to curb expansion of the RICO statute) yet broadly in criminal cases (in order to effectuate RICO's purposes) are on the horns of a dilemma. See David O. Stewart, *RICO's Reach: Supreme Court Identifies Limit to Statute's Application*, A.B.A. J., May 1993, at 48, 50. But see Brian T. Camp, *Dual Construction of RICO: The Road Not Taken in Reves*, 51 WASH. & LEE L. REV. 61, 81 (1994) ("Courts should not hesitate to interpret the same language strictly in some cases and liberally in others.").

year, in *United States v. Viola*,⁹ the Second Circuit ruled that *Reves* prohibits the prosecution of low-level employees who are not involved in the management of the enterprise.¹⁰ In *United States v. Oreto*,¹¹ however, the First Circuit held that under *Reves*, every enterprise employee who is within the "chain of command" — either making management decisions or knowingly implementing them — can be prosecuted under section 1962(c).¹² Although *Oreto* arguably implements legislative intent regarding the use of RICO in criminal cases, the First Circuit's analysis contravenes the structure of section 1962(c) and establishes an unworkable double standard of liability. *Viola*'s strict application of *Reves*'s narrow construction, on the other hand, highlights RICO's structural defects in a manner that, if adopted by other circuits, is likely to precipitate long-awaited congressional clarification of the RICO statute.¹³

Anthony Viola, owner of Blue Chip Coffee company, headed a drug and contraband trafficking operation.¹⁴ Michael Formisano, Viola's maintenance person, was among seventeen Blue Chip affiliates who were indicted in 1991 after the government uncovered the illegal scheme.¹⁵ After the trial judge instructed the jury that "[a] person may participate in the conduct of an enterprise even though he had no part in the management or control of the enterprise and no share in any profits,"¹⁶ Viola, Formisano, and two of the other defendants were convicted under RICO.¹⁷ On appeal, Formisano challenged the district court's jury instruction and argued that under *Reves*, his performance of "light clean-up and maintenance work"¹⁸ for the enterprise did not amount to "operation or management" as required for section 1962(c) liability.¹⁹

The Court of Appeals for the Second Circuit agreed. Writing for a unanimous panel, Judge Walker held that *Reves* invalidated the Second Circuit's previous rule that "a defendant did not have to operate

⁹ 35 F.3d 37 (2d Cir. 1994).

¹⁰ See *id.* at 41.

¹¹ 37 F.3d 739 (1st Cir. 1994).

¹² *Id.* at 750.

¹³ Advocates of RICO reform have argued that Congress has done little to guide the statute's application. Because of the current controversy in the wake of *Reves*, the legislature may finally reform RICO. Cf. William N. Eskridge, Jr. & Philip P. Frickey, *The Supreme Court, 1993 Term — Foreword: Law as Equilibrium*, 108 HARV. L. REV. 27, 44 n.71 (1994) ("If the Court interprets a statute in a constricted fashion, Congress may be institutionally offended at the defiling of the statute That is the lesson of the override of the 1989 Supreme Court decisions in the Civil Rights Act of 1991.").

¹⁴ See *Viola*, 35 F.3d at 39.

¹⁵ See *id.* at 39-40.

¹⁶ *Id.* at 41 (internal quotation marks omitted).

¹⁷ See *id.* at 40.

¹⁸ *Id.* at 39.

¹⁹ See *id.* at 40.

or manage a RICO enterprise" to be liable under section 1962(c).²⁰ Though the Supreme Court had declined to determine "how far § 1962 extends down the ladder of operation,"²¹ the circuit court reasoned that under *Reves*, "the simple taking of directions and performance of tasks that are 'necessary or helpful' to the enterprise, without more, is insufficient to bring a defendant within the scope of § 1962(c)."²² The court concluded that Formisano's RICO conviction should be reversed because "the district court's instruction . . . cannot be reconciled with the *Reves* requirement that the defendant have 'some part in directing the enterprise's affairs.'"²³

In *Oreto*, the First Circuit characterized the *Reves* requirement differently. Frank Oretto, Sr. was the head of a lucrative loansharking enterprise that made loans to over three hundred borrowers at annual interest rates of 156 to 364%.²⁴ Frank Oretto, Jr. and Dennis Petrosino, collectors for the enterprise, allegedly used threats and violence to intimidate the borrowers into repayment.²⁵ Oretto Sr., Oretto Jr., and Petrosino stood trial as joint defendants. The district court instructed the jury that a criminal defendant may be liable under RICO section 1962(c) "even though he is a mere employee having no part in the management or control of the enterprise and no share in the profits";²⁶ the three defendants were convicted and sentenced to lengthy prison terms. On appeal, Oretto Jr. and Petrosino argued that, in light of *Reves*, the trial court's instruction regarding the scope of section 1962(c) liability constituted reversible error.²⁷

The First Circuit disagreed.²⁸ Writing for a unanimous court, Judge Boudin recognized that *Reves* bars section 1962(c) liability unless the defendant "participate[d] in the operation or management of the enterprise itself."²⁹ The court argued, however, that "[s]pecial care is required in translating *Reves*' concern with 'horizontal' connections — focusing on the liability of an *outside* adviser — into the 'vertical' question of how far RICO liability may extend *within* the enterprise

²⁰ *Id.* at 40. Overruling *United States v. Scotto*, 641 F.2d 47 (2d Cir. 1980), the court held that the "operation or management" standard is the proper gauge of "whether a defendant had a sufficient connection to the enterprise to warrant imposing liability under § 1962(c)." *Viola*, 35 F.3d at 40.

²¹ *Viola*, 35 F.3d at 41 (quoting *Reves*, 113 S. Ct. at 1173 & n.9).

²² *Id.*

²³ *Id.* (quoting *Reves*, 113 S. Ct. at 1170).

²⁴ See *Oreto*, 37 F.3d at 743. Twenty percent was the maximum legal rate in the state. See *id.*

²⁵ See *id.*

²⁶ *Id.* at 750 (internal quotation marks omitted).

²⁷ See *id.*

²⁸ It is unclear from the opinion whether the First Circuit thought that the jury instruction was legally sufficient or whether it found that any irregularities in the charge were harmless error.

²⁹ *Oreto*, 37 F.3d at 750 (quoting *Reves*, 113 S. Ct. at 1173) (internal quotation marks omitted).

but down the organizational ladder.³⁰ In order to be deemed a participant in the "operation or management" of the enterprise, the court reasoned, a defendant must be within "the chain of command through which the enterprise's affairs [are] conducted."³¹ The court concluded that low-level enterprise employees like Oreto Jr. and Petrosino could be convicted under section 1962(c) because one can operate or manage an enterprise "by knowingly implementing decisions, as well as by making them. . . . We think that Congress intended to reach all who participate in the conduct of [an] enterprise, whether they are generals or foot soldiers."³²

The *Viola* court took *Reves*'s operation or management standard literally; the *Oreto* court, by contrast, redefined the standard in order to allow RICO prosecution of non-managerial employees who are within the enterprise.³³ One reason for the First Circuit's reluctance to apply *Reves*'s liability limitation strictly may be that the Supreme Court adopted the operation or management standard in a case that raised the specter of expansive *civil* RICO abuse.³⁴ Yet, because "the same provisions and terms that form the basis of criminal liability [under RICO] also form the basis for civil suits,"³⁵ *Reves* limits not only a private plaintiff's ability to target "deep-pocket" defendants, but also the government's power to punish low-level enterprise employees. Although the First Circuit's impulse to uphold the convictions of loan-sharks under RICO is understandable,³⁶ *Oreto*'s horizontal-vertical ("chain of command") dichotomy is an implausible reading of section 1962(c) and an indeterminate double standard. The best way to confront "the forest of thorny RICO issues that remain" after *Reves*³⁷ is to await the congressional guidance that may result from widespread *Vi-*

³⁰ *Id.* (emphasis added).

³¹ *Id.*

³² *Id.* at 750-51. This analysis is grounded in the Supreme Court's acknowledgement that "[a]n enterprise is 'operated' not just by upper management but also by lower-rung participants . . . under the direction of upper management." *Reves*, 133 S. Ct. at 1173.

³³ Of course, factual differences may have affected *Reves*'s application in each of the cases. The Second Circuit might not have required decision-making authority had it been reviewing the prosecution of *Oreto*'s thugs. Similarly, the First Circuit might not have found the maintenance person in *Viola* to be within the "chain of command" for § 1962(c) liability.

³⁴ The plaintiffs in *Reves* sued to extract civil damages from an accounting firm that allegedly participated in the affairs of a fraudulent enterprise. See *Reves*, 133 S. Ct. at 1168.

³⁵ Camp, *supra* note 8, at 63.

³⁶ The First Circuit's redefinition of "operation or management" suggests a concern that liability limitations in civil RICO cases will also exculpate guilty criminal defendants. See Stewart, *supra* note 8, at 50 (noting that courts "have had a hard time narrowing the gates for civil RICO without doing it for criminal cases as well" (internal quotation marks omitted)). Although the *Oreto* court does not make an explicit criminal-civil distinction, it is plausible that the opinion was fueled by a desire to extend § 1962(c) criminal liability to all undisputed members of an unlawful enterprise.

³⁷ Camp, *supra* note 8, at 62.

ola-like application of the "operation and management" standard in criminal cases.

Oreto's solution is problematic, in the first place, because it is not easily derived from RICO's language. Section 1962(c) makes it unlawful for *both* employees and associates of an enterprise to "conduct or participate" in the enterprise's racketeering affairs.³⁸ To the extent that the Supreme Court has interpreted "conduct or participate" to mean that one has "some part in directing the enterprise's affairs,"³⁹ there is no statutory basis for *Oreto's* assertion that employees (as vertical links) do not have to be involved in the direction of the enterprise to be liable but that associates (as horizontal consultants) do. Because the statute does not distinguish between the level of involvement required of employees and the level required of associates — the two relationships are seemingly interchangeable — *Oreto's* horizontal-vertical analysis is a spurious reading of the RICO statute.

Second, because *Oreto* suggests that a different level of conduct is required for those "inside" and those "outside" the chain of command, the decision "creates the spectre of a double standard."⁴⁰ Under *Oreto*, though an associate and an employee of an enterprise may perform the same necessary (but non-managerial) tasks, only the employee is liable under section 1962(c). This liability distinction "can prove pernicious,"⁴¹ not only when there is a punishment differential between high-priced consultants and low-level employees, but also when there is a distinction between professional employees and professional affiliates.⁴² Moreover, to the extent that *Oreto's* horizontal-vertical distinction bases liability on one's legal relationship to the enterprise rather than on one's conduct, it disregards notions of equal treatment and fundamental tenets of just criminal punishment.⁴³

Finally, *Oreto's* horizontal-vertical dichotomy is flawed because it may not be possible legitimately to distinguish between "outsiders" and those who work "within" the enterprise. The modern racketeering enterprise is such a structurally complex establishment that merely iden-

³⁸ See 18 U.S.C. § 1962(c).

³⁹ *Reves*, 113 S. Ct. at 1170.

⁴⁰ Harvey L. Pitt & Dixie L. Johnson, *Freeing Corporate Professional Advisers From the Threat of RICO Liability*, N.Y. L.J., Mar. 15, 1993, at 1, 33.

⁴¹ *Id.* at 33.

⁴² See *id.* ("There is little justification in law or policy to treat an auditor or attorney differently merely because he or she performed a professional function from within, rather than from without, the enterprise.")

⁴³ It is unconstitutional (and unfair) to punish individuals because of their "status." See, e.g., *Robinson v. California*, 370 U.S. 660, 666-68 (1962). Although RICO has survived constitutional scrutiny, its application often implicates the status doctrine in that liability "demand[s] a . . . global judgment about a defendant's character and loyalties." Gerard E. Lynch, *RICO: The Crime of Being a Criminal, Parts III & IV*, 87 COLUM. L. REV. 920, 945 (1987). Under *Oreto's* analysis, for example, the consequences of engaging in similar activities may differ solely because of the actor's legal relationship to the enterprise.

tifying a recognizable "chain of command" may prove difficult.⁴⁴ In *Oreto*, the First Circuit asserted that, although the accountants in *Reves* were "undeniably involved in the enterprise's decisions," they were "outside the chain of command through which the enterprise's affairs were conducted."⁴⁵ It is possible, however, to have construed the *Reves* accountants' participation as an integral part of the overall structure of racketeering affairs.⁴⁶ Technical outsiders often "knowingly implement[] decisions" of management.⁴⁷ Nominal insiders sometimes "neither [make] those decisions nor [carry] them out."⁴⁸ Because the "insider" and "outsider" labels are indeterminate, an analysis of section 1962(c) liability that depends upon these constructs can be easily manipulated to achieve the desired outcome.⁴⁹

Rather than attempting to use *Oreto*'s precarious "chain of command" analysis to circumvent *Reves*'s narrow construction of section 1962(c) liability, lower courts deciding criminal RICO cases should follow *Viola* and require that all section 1962(c) defendants have some part in the direction of the enterprise. If severely limited RICO liability becomes the norm in criminal cases, Congress may be forced to address the statutory defect that results in "the inability of the courts to limit the private civil side without also limiting the criminal side."⁵⁰ At long last, a legislature whose original aim was to "seek the eradication of organized crime"⁵¹ may seize the opportunity to clarify RICO's intended target.

⁴⁴ See, e.g., *United States v. Elliot*, 571 F.2d 880, 884 (1978); see also MODEL PENAL CODE § 5.03 cmt. 3 (1985) ("Much of the most perplexing litigation . . . has been concerned . . . with the scope to be accorded to a combination, i.e., the singleness or multiplicity of the conspiratorial relationships in a large, complex, and sprawling network of crime.").

⁴⁵ *Oreto*, 37 F.3d at 750.

⁴⁶ See *Reves*, 113 S. Ct. at 1175-76 (Souter, J., dissenting).

⁴⁷ *Oreto*, 37 F.3d at 750.

⁴⁸ *Id.*

⁴⁹ Judicial discretion arguably could resolve the problem of insiders being held to a different standard of liability than outsiders. However, ad hoc application of vague criminal laws is an unacceptable approach to criminal adjudication. See *United States v. Reese*, 92 U.S. 214, 221 (1876) ("It would certainly be dangerous if the Legislature could set a net large enough to catch all possible offenders and leave it to the courts to step inside and say who could rightfully be detained . . ."). In its application, "RICO . . . must 'possess the degree of certainty required for criminal laws.'" *Yellow Bus Lines, Inc. v. Drivers Local Union 639*, 913 F.2d 948, 956 (D.C. Cir. 1990) (quoting *H.J. Inc. v. Northwestern Bell Tel. Co.*, 492 U.S. 229, 235 (1989) (Scalia, J., concurring)).

⁵⁰ Camp, *supra* note 8, at 72. RICO's peculiar construction, see *supra* note 8, may make it necessary (if not desirable) to await legislative clarification rather than resorting to new judicial interpretations.

⁵¹ 18 U.S.C. § 1961 note (1988).



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1Ls Spur Major Changes in WLA Structure

By Victoria Kuohung

The Women's Law Association this week dramatically revamped this year's two-chair system into a governing board of about 20 members, following a proposal initiated by several 1L women.

The board, which oversees WLA's eight new committees, replaces outgoing Co-chairs Tamara Jones '95 and Cindy Chandler '95.

The committees include Academic Affairs, Alumnae and Professional Relations, Social Programming, Outreach, Political Action, RECORD Liaison, 1L Coordinators, and Administrative Coordinators. 1L representatives drawn from each section of the incoming class will also join the board next fall.

According to Elizabeth Brown '96—one of three chairs of Alumnae and Professional Relations Committee—about 15 to 20 1L women helped plan WLA's new structure. She said those involved in reorganizing WLA were motivated by the alienation they felt from the group this year, and thought a committee system would increase participation in WLA. "[We] wanted women to feel more comfortable in the school," she said. "[The reorganization] wasn't meant to be an attack on WLA. For 1Ls, WLA didn't seem like it played a part in our lives as much as we wanted it to."

"The main way to change the administrative structure

please see WLA, page 10

Faculty Recommends Tenure for White; HLS Offers Post to '93 Grad

By Greg Stohr

The HLS faculty has voted to extend a tenure offer to Visiting Prof. Lucie White '81, and an associate professorship offer to another woman, Christine Jolls '93, has received final University approval.

The offer to White, currently a tenured professor at UCLA Law School, awaits final approval by the University's governing board. That process is usually a formality, although on occasion the University has failed to extend offers to candi-



Lucie E. White '81

dates approved by school faculty. Sources predicted that White's candidacy would face few if any difficulties in securing board approval.

The sources added that White easily received the necessary two-thirds faculty vote.

Dean Clark '72 would not confirm the faculty vote on White, citing his "longstanding rule" not to discuss appointments until they have been formally extended.

White said Wednesday that she had not yet decided whether she would accept an official offer. She said she would decide in the



University of Pennsylvania Law Professor Lani Guinier gave the keynote address at BLSA's spring conference last Friday.

Guinier: "The First Lesson of Democracy is Dialogue"

By Ketanji O. Brown

The woman whose heavily criticized writings cost her a job as the assistant attorney general for civil rights "finally" had a chance to speak last Friday. Lani Guinier, professor at the University of Pennsylvania Law School, addressed a crowd of nearly 800 in a Kennedy School Forum as the keynote speaker of BLSA's Eleventh Annual Spring Conference.

"I was explicitly admonished not to speak as a courtesy to the Senate prior to the confirmation hearings," the former nominee said. "While I remained silent, the media and those who opposed my nomination took control over my image. Like the welfare queen, the 'quota queen' was a racial stereotype and an easy headline looking for a person."

Guinier, whose nomination was made and then withdrawn

by President Clinton in the spring of 1993, is a graduate of Yale Law School who has worked as special counsel for both the Civil Rights Division of the Justice Department and the NAACP Legal Defense & Education Fund. As a tenured law professor, she has written several articles that challenge the electoral system and advocate restructuring voting rights.

Guinier said her seemingly "radical" ideas about proportional representation in a democracy are actually rooted in a traditional, Madisonian fear of tyranny of the majority. The current system of winner-take-all majority rule is "a zero sum solution," she said, that discourages participation by minority groups and turns government into a self-interested and unaccountable monopoly. The underlying principle, Guinier said, is that "fair play in a multiracial democ-

please see GUINIER, page 11

Wolfson Wins \$201 in Suit Against LSC

By April Rockstead

The Law School Council owes Tina Wolfson '94 \$201 for books it failed to return to her and \$14 in court costs, according to a ruling issued last week by a small claims court magistrate.

Although Wolfson originally filed suit for \$500, she used that amount because she wanted to file quickly and it was the maximum she could ask for in her small claims suit, she said. After first revising the claim to a "rough estimate" of \$363, Wolfson said she agreed with a final LSC evaluation of a list she presented them in the fall that valued the books at about \$280.

"They're still \$80 up on me," Wolfson said of the judgment for \$201, but she added she was pleased with the outcome for the most part.

"It's a triumph of truth and justice over the forces of evil," she said, adding, "I still have to enforce the judgment, though."

The Law School Council voted this week to investigate appealing the judgment, said John Bates '95, a council representative.

"We didn't find a valid basis for the magistrate's decision," he said.

The council is also concerned that if the outcome is not challenged, it will "set bad precedent," Bates said.

"Too many judgments like this and we couldn't afford to have a book exchange," he said. "Anyone could walk up and say, 'I gave you \$500 worth of books.'"

No decision has been made to discontinue the book sale, Bates said, but the council has discussed having the sale run by a professional used-book company that would buy books from

students at the outset and then resell them.

"The Law School Council wouldn't make as much money, nor would students," Bates said. "I think we're going to be looking into that, but it's too soon to say we're going to be looking into it for the fall."

Wolfson said she knew the magistrate was going to rule for her when he asked council representatives whether they had attempted to negotiate with her. "I would have been amenable to looking for my books, but they blew me off," she said.

The council's argument to the magistrate relied on Adviser notices instructing those who dropped off books for the sale to pick up their books or cede ownership to the council, Wolfson said.

"There weren't any surprises," she said. "Their theory was because they published the notices, they could keep the books."

There was initially some confusion as to whether Enu Mainiggi '94, the former LSC president, had been named personally in the suit, but Wolfson said Mainiggi's name only appeared because the clerk had originally asked her to list a contact person for the organization.

The magistrate entered judgment against the Law School Council as an entity, even though it is not a corporation, Bates said.

"We have a bank account in the name of the council, so it's a rational assumption we could be sued as an entity," he said.

Wolfson said she welcomed an appeal by the council.

"If they appeal, it goes to a jury," she said. "I'd love to get some jury experience."

Temporary Fiscal Trouble Hits Basketball League

By Ray Kahler and

Greg Stohr

A cash-flow snafu threatened to derail the HLS intramural basketball playoffs this week, but student leaders say the administrative difficulties that held up the distribution of funds have now been resolved.

"Paperwork" problems delayed the distribution of funds allocated by the Dormitory and Student Affairs Council, according to outgoing DSAC Vice President Heather White '95. Student leaders, including league organizer

Kirby Lewis '94, met with Law School officials throughout the week to ensure that the money would be available for playoff games. Late Wednesday, White said the group had resolved the difficulties, and that the games should proceed on schedule.

"All's well in basketball-land, at least for now," she said.

The Law School implemented a new administrative system for distributing DSAC funds this year, and the funds allocated for intramural basketball had not yet reached the league as of the early part of

please see LEAGUE, page 10



Kirby Lewis '94

Guinier Gives Lecture

continued from GUINIER, page 1

racy" cannot be achieved in a system in which "51 percent of the people always enjoy 100 percent of the power."

"I am a democratic idealist," she said. "I think that politics need not be seen exclusively as I win, you lose. We all can win something. We can learn to take turns."

One of Guinier's major proposals for an alternative to majority rule is cumulative voting, a system in which an individual voter gets a number of votes that he can "cumulate in any combination to express the intensity of his preferences." Under a cumulative voting system, she said, minority groups that are now consistently shut out of majority-rule political contests would have the chance to elect officials who represent their interests.

"We are facing the problems of a democracy in which people of color have a vote but no voice," Guinier said. "No one should be consistently silenced. Everyone should enjoy some access to the forum."

According to Guinier, cumulative voting is a race-neutral system that is not anti-democratic because all voters get the same number of votes and "it emphasizes the importance of voter choice." The system, she said, is also not particularly liberal. It has helped the Republican minority gain seats in local elections throughout the Democrat-dominated South and has been utilized by corporations in 38 states to elect boards of directors while protecting the interests of minority shareholders.

"I have tried to explore decision-making rules that might work in a multiracial society to ensure that majority rule does not become majority tyranny," she said. "Real democracy is strengthened by including those who have been left out. Our gift is to turn silence into insight and to make

a chorus of many voices contending."

Guinier gave no direct response to a plea by BLSA President Linda Dunn '94 that she accept the Law School's invitation to become a visiting professor. She did note, however, that she had rejected an invitation extended by Dean Clark '72 two years ago because, given the controversy surrounding Harvard in recent years with regard to its lack of women professors of color, she was "not ready to become a martyr."

Despite probing questions from some skeptical audience members, Guinier defended her proposed solutions, calling them just a few of many possible ways of addressing the dilemma of majority rule in a multicultural society. She emphasized the need for an open dialogue and challenged her critics to join in the discussion.

"Let us lead knowing that it is better to be vaguely right than precisely wrong," she said. "The first lesson of democracy is dialogue. We shall speak until all people gain a voice."

Guinier's address, which was also sponsored by the Program on Ethics and the Legal Profession, Reconstruction Magazine and the WEB DuBois Institute, was entitled, "The New Civil Rights: What I Would Have Said."

Guinier was one of several African-American leaders who participated in BLSA's spring conference this year. The discussions focused on the future of African-Americans in education in the wake of the 40-year-old landmark desegregation case *Brown v. Board of Education*. Other prominent speakers and alumni in attendance included the Rev. Dr. Joseph E. Lowery, co-founder of the Southern Christian Leadership Conference; Dr. Franklin Jenifer, president of Howard University; and Deval Patrick '92, the recently confirmed assistant attorney general for civil rights.

Pornography Opposed

continued from PORN, page 2

law."

The question-and-answer session that followed the presentations was often boisterous and confrontational. When a student implied that the anti-porn speakers might have done better to engage the other side face-to-face, Giobbe responded angrily, labeling the earlier panel "sexually exploitative," and adding, "People went to get the porn queen's autograph, not to listen."

"I don't think it's debatable," said Giobbe. "I'm not some ACLU groupie. I wouldn't debate with Nazis or Holocaust 'revisionists,' and I'm not going to debate with pornographers."

Later, when a student wondered whether the "chilling effect" that would flow from the MacKinnon/Dworkin ordinance would approximate censorship, Giobbe's answer was harsh and bitter. "Prostitution and pornography are not going to go away in this lifetime," she said. "You're going to have a bazillion pictures to jerk off to, so give us a break."

Catherine Caporusso '95, who helped organize the event for WLA, said she was "very glad Giobbe could be there as a sort of counterweight to Nina Hartley (the anti-censorship porn actress who appeared on the Feb. 18 panel)."

Caporusso acknowledged the panelists "used a lot of Marxist language, which might have spoken to some people." "In any event," she added, "it shows they're not working for Pat Robertson, which they sometimes get accused of."

Although pleased with the event, Caporusso was "upset that we didn't arrive at any common ground. A lot of the students really wanted to see both sides together, and it's hard for me to think that there couldn't be some middle

ground."

Caporusso echoed the views of many students by recognizing that "the panelists weren't really there to persuade people," and attributed the speakers' confrontational tone to "ten years of warfare. For someone who's been abused as a prostitute, it's enough to say what happened, and it's understandably very difficult to talk calmly about chilling effects."

Still, alluding to the contentious discussion regarding an example offered by Giobbe, Caporusso admitted to being "frustrated" that "people couldn't even agree on a presumption that it's not consensual when a black woman gets tied up by a white cop who violates her with a gun."

Outgoing WLA co-chair Cindy Chandler '95 agreed that the panel failed to hammer out a compromise solution. "Neither panel was persuasive," she said, "because neither speaks to each other and actually tries to convince the other side."

Chandler said "the speakers were really hostile to sympathetic people asking questions in good faith, which could be enough to turn people away." She said that the two sides "have to start talking to each other" instead of setting up "straw men" for their opponents.

"The anti-porn people say that the opposition denies the fact that women are victimized, which isn't true," according to Chandler, "and the anti-anti-porn people accuse their opponents of not liking men or sex, which is very insulting and alienates them."

Norma Ramos, an attorney and activist scheduled to appear in the panel, canceled because of illness.

The panel was titled "Pornography, Inequality, and Civil Rights: The Racism and Sexism of Pornography."



Catherine Caporusso '95

No, This Is Not the School Play...

Dean Clark, Opera Man



Dean Clark '72 displayed his creativity and musical talents when he performed in Prof. Kraakman's corporations class last Thursday. Clark's repertoire included a little ditty about proxy rules sung to the tune of "Onward Christian Soldiers."



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**"THE HAND OF OPPRESSION":
PLEA BARGAINING PROCESSES AND
THE COERCION OF CRIMINAL DEFENDANTS**

A thesis presented

by

Ketanji Onyika Brown

to

**The Department of Government
in partial fulfillment of the requirements
for the degree with honors
of the Bachelor of Arts
Harvard College
March 1992**

CONTENTS

<u>CHAPTER ONE:</u>	INTRODUCTION	<i>1</i>
<u>CHAPTER TWO:</u>	"WITHOUT MEANING"	
	<i>UNDERSTANDING PLEA BARGAINING</i>	<i>7</i>
<u>CHAPTER THREE:</u>	"NOTHING NEGOTIABLE"	
	<i>IDENTIFYING PRESSURES</i>	<i>24</i>
<u>CHAPTER FOUR:</u>	"HIDDEN AGENDA"	
	<i>EXAMINING INTENT</i>	<i>51</i>
<u>CHAPTER FIVE:</u>	"FUNDAMENTAL EVIL"	
	<i>ASSESSING COERCIVENESS</i>	<i>73</i>
<u>CHAPTER SIX:</u>	"INDISCRIMINATE MANIPULATION"	
	<i>EVALUATING ACCEPTABILITY</i>	<i>92</i>
<u>CHAPTER SEVEN:</u>	CONCLUSION	<i>120</i>

CASES

Bordenkircher v. Hayes (1978)--pp. 56, 88, 96, 97, 98, 110

Brady v. United States (1969)--pp. 27, 56, 76, 94, 96, 97

Frost & Frost Trucking Co. v. Railroad Commissioner (1920)--p. 111

Garrity v. New Jersey (1967)--pp. 112, 113

Korematsu v. United States (1944)--pp. 104, 105

Machibroda v. United States (1962)--p. 94

North Carolina v. Alford (1970)--pp. 96, 97

North Carolina v. Pearce (1969)--pp. 55, 97

Roe v. Wade (1973)--p. 105

Santobello v. New York (1971)--pp. 18, 56, 95

State v. Byrd (1973)--pp. 31, 32

United States v. Jackson (1968)--pp. 82, 83, 96

United States v. O'Brien (1968)--p. 52

Von Moltke v. Gilles (1948)--p. 94

"The quality of a nation's civilization can be largely measured by the methods it uses in the enforcement of its criminal law."

Sir. Winston Churchill

CHAPTER ONE

INTRODUCTION

We have the right to remain silent. We have the right to an attorney. We have the rights to due process and a speedy trial, and the privileges against forced confession and self-incrimination. Because of the numerous Fourth, Fifth and Sixth Amendment protections granted by the United States Constitution, "American citizens tend to . . . assume that throughout history the law has afforded *increasing* dignity to persons who are accused of crimes."¹ Certainly, over the last two hundred years, "the lash, the rack, and the thumbscrew have given way to *Miranda* warnings, and lynchings and blood feuds have become rare."² Nevertheless, our historical progression into the twentieth century has failed to bring criminal defendants significantly greater protection against certain forms of government compulsion than they had during the earliest stages of American history. While the devices may have changed, "the mounting pressure for self-incrimination" remains the same.³

Plea bargaining. In 1974, approximately 85 percent of all persons accused of crimes in the United States pled guilty in exchange for some form of concession from the government.⁴ By 1991, that number had risen to 95 percent in some areas, and there is reason to believe that by the turn of the century less than three percent of all the arrests that take place annually in this country will result in a jury trial.⁵ While some may argue that guilty plea negotiations are an innocuous form of criminal case disposition and are "beneficial to all concerned,"⁶ it is possible that defendants are being coerced into relinquishing their constitutional rights as a prerequisite for sentencing consideration. There is a chance that the very institution

which is designed to dispense justice and to protect individual rights could be the most guilty of creating injustices in its effort to make criminal adjudication economical and efficient. This thesis will examine guilty plea negotiations in modern criminal courts in the United States, and will argue that, as they currently operate, plea bargaining processes are both coercive and unacceptable.

It is no easy task to attempt to *understand* modern criminal case disposition, not to mention to *argue* that plea bargaining processes as they are currently being administered are unacceptably coercive. It is important to keep in mind that "given the complexity of the controversy, no single study is likely to address all the issues involved or even be definitive on a sample of issues."⁷ Rather, in inquiring, first, whether criminal defendants are being coerced into waiving their constitutional rights, and secondly, whether this coercion is unacceptable, we must

content [ourselves] with the nonillustrious task of retracing old paths . . . [Our] joy must be the muted satisfaction of confirming or challenging established truths; revising some beliefs; extending others; and occasionally adding new insights, clarifications, and perspectives.⁸

To this end, **Chapter Two** gives background information, definitions and descriptions of various plea bargaining systems. It briefly traces the origins and history of plea negotiations, and reviews the major arguments put forth by legal theorists on all sides of the general debate over the legitimacy of plea bargaining practices. **Chapter Three** begins to address the issue of coercion more specifically by looking at the ways in which defendants are typically pressured into waiving their Fifth and Sixth Amendment Rights. Through an analysis of judicial participation, prosecutorial discretion and defense attorney manipulation, we are able to assess the type and extent of the pressures that are placed upon the accused. **Chapter Four** examines the interests of the state and the reasons why court officials often feel the

need to pressure defendants into pleading guilty. In this chapter, we are primarily concerned with exploring the intentions of court administrators and with identifying their motivations for engaging in plea bargaining pressures.

Chapters Five and Six--the main argument--evaluate the extent to which the state's interests justify the government's use of pressure within the plea bargaining process. Dealing specifically with the issue of coercion, Chapter Five is primarily a theoretical analysis of plea bargains as coercive forces. Chapter Six completes our initial inquiry by assuming that plea bargains are a manifestation of the state's coercive power, and by determining the extent to which the use of coercion is improper under our system of legal rules and our standards for moral justification.

Most of the arguments that are contained within this thesis are the result of both literary research and empirical observation. During the summer of 1991, I interned at the Neighborhood Defender Service of Harlem, a public defender's office which serves the residents of the Harlem community. I gained valuable insight into the workings of the Manhattan criminal justice system by accompanying the attorneys to court, interviewing clients and witnesses, and conducting investigations. It was through this experience that I was first alerted to the problems and complexities of plea bargaining in America's criminal courts.

As will soon become apparent, much of the argument that defendants are being coerced into relinquishing their rights and that this coercion is improper depends upon knowledge of the perspectives of defendants. Any study that purports to look at coercion but which fails to adequately address the viewpoint of the coerced is problematic. Unfortunately, I was unable to speak with any defendants regarding their experiences in the criminal justice system, primarily for legal reasons. I concede that this is an unfortunate, if necessary, omission. Some of the studies of defendants which have been conducted by political scientists in the

field will serve our purposes here, and my personal knowledge of the accused persons with whom I came into contact during my summer experience may lend credibility to the assertions of coerciveness.

With regard to this research project, I interviewed twenty-five judges, prosecutors and defense attorneys who work in the Boston, Miami and Manhattan criminal justice jurisdictions.⁹ I chose these areas partly for convenience, but primarily because these cities are presently experiencing the types of legal and ethical difficulties regarding plea bargaining that are occurring in most major metropolitan areas throughout the United States. I was pleasantly surprised at how willing court professionals were to speak with me about their perspectives of the plea bargaining process. Judges managed to fit me into otherwise hectic schedules, and both defense attorneys and prosecutors alike allotted time between court appointments. I was even asked on two separate occasions to accompany judges as they sat on the bench, and as a result, I was able to listen in on bench conference negotiations and to speak privately with the magistrates about their personal views of the issues at hand. When the expected half hour interview expired, several of the court professionals even asked if I had the time to stay longer because, as Miami defense attorney Yale Freeman disclosed, "plea bargaining is something that I think about regularly." Indeed, guilty plea negotiations are such a prevalent part of the modern criminal process that I would be surprised if, in the course of their work day, criminal court professionals thought of anything else.

It is about time that American citizens in general (not only those who work within the justice system) begin to think regularly about criminal case disposition, if for no other reason than as a measure of our society's "commitment to limits in the state's authority over the citizen."¹⁰ It has long been established that a fundamental tenet of democracy is that the government is largely restricted from using its powers to force its citizens to act against their will. In On Liberty, John Stewart Mill asserts

that the concept of liberty itself is inextricably tied to "the nature and limits of the power which can be legitimately exercised by society over the individual."¹¹ The Fourth, Fifth and Sixth Amendments of the United States Constitution speak specifically to state limitations when dealing with the accused, and it is this very notion of restricting the state's coercive power through the implementation of jury trials that both federalists and anti-federalists alike agreed upon and advocated over two hundred years ago. Patrick Henry, a staunch anti-federalist who is best known for his oratorical aphorism "give me liberty or give me death!", frequently gave speeches about individual protection from government intrusion. "Why do we love this trial by jury?" he once asked rhetorically. And then answered: "it prevents the hand of oppression from cutting you off." ¹²

Of course, in modern times, there are those who support liberty and democracy, and yet whose immediate response is indifference to the rights of the accused. As Diana Gordon asserts in The Justice Juggernaut: Fighting Street Crime and Controlling Citizens,

[m]any will undoubtedly argue that we have little reason to care about the repression of those who have already proved themselves to be bad apples infecting others in the barrel, that they have given up their civil liberties by their own depravations. But a harsh, expansive criminal justice system tars many who are not the criminals we fear. ¹³

It is most important, when considering defendant's rights, that we keep in mind that the people who are faced with the coercive pressures of the criminal justice system in terms of plea bargaining *have not yet been convicted of any crime* . It is entirely possible that, as the criminal justice system is currently operating, innocent people are being gripped in the vise of state power when they are involved in plea negotiations. Nevertheless, even if every criminal defendant were guilty, *all*

persons --whether guilty of a crime or not--have the right to certain procedural protections from government abuse. We must refrain from mentally separating the accused from every other citizen when contemplating constitutional rights, for if we insist upon drawing a distinction between those citizens who are accused of wrong doing and those who are not, we leave the power to confer or deny rights entirely in the hands of the very institutions that rights exist to protect us from. Since the government determines who to accuse, it would also necessarily determine who to oppress. Ms. Gordon continues:

[The] fundamental significance of due process lies in the protection provided to *all of us , innocent or guilty* , when our interests do not coincide with those of the majority. In that sense, the rights of the accused are also the rights of students, employees, tenants, and everyone else who is ever in a position to be coerced by the exercise of government power over individuals. ¹⁴

We must commit ourselves, as free citizens of a democratic government, to insisting that the criminal justice system be as fair as possible--for all of our sakes. And fairness necessarily means ridding the system of unnecessary and unacceptable forms of coercion, at almost all cost. "The trouble about fighting for human freedom," H.L. Mencken is quoted as saying, "is that you have to spend much of your life defending [criminals]; for oppressive laws are always aimed at them originally, and oppression must be stopped in the beginning if it is to be stopped at all."¹⁵ As concerned American citizens, we have the power to stop "the hand of oppression" from stripping our society (via the accused) of its fundamental liberties. This thesis will hopefully engage the interests of those of us who are willing to try.

CHAPTER TWO
"WITHOUT MEANING":
UNDERSTANDING PLEA BARGAINING

The average citizen knows very little about the criminal justice system generally, and less about plea bargaining specifically. To most people, plea bargaining is a controversy without much substantive meaning. . . . [It] has come to resemble a candidate running for public office--one public official says it is good while another says it is bad. Who's right?

David A. Jones, Crime Without Punishment

For years, plea bargaining "escaped scrutiny" because it was a process practiced clandestinely--"carried on by professionals in their offices, in hallways, and over the telephone."¹ Over the past half century, however, guilty plea negotiations have emerged from being strictly "off of the record," and now take place frequently in courtrooms nationwide. Although the public still knows relatively little about the intricacies of guilty plea negotiations, a debate over the legitimacy of plea bargaining practices currently rages in legal and academic arenas throughout the United States. Points of contention among scholars range anywhere from the definition of the process to its application to its effects. In order to address the specific concern of plea bargaining processes as coercive forces, we must first understand the debate over the general structure, function, and history of guilty plea negotiations. Before embarking on our quest to determine the extent and acceptability of pressures on criminal defendants, we must look initially at the varying definitions, descriptions, interpretations, denunciations and justifications of plea bargaining processes in America.

Definitions

Generally speaking, *plea bargaining* refers to an agreement between a criminal defendant and the government in which the accused pleads guilty in exchange for some sort of state consideration. Oddly enough, the term plea bargaining itself is controversial. While critics of the process are satisfied that the name adequately captures the "bazaar-like atmosphere"² of most criminal courtrooms, supporters assert that it "invokes negative images inasmuch as the system is viewed as 'bargaining with criminals.'"³ In "A Historical Sketch of Plea Bargaining," Joseph B. Sanborn, Jr. claims that "finding a proper title is a task in itself. No name seems totally fitting."⁴ At present, the most widely used terms for the process are "guilty plea negotiations" and "plea bargains," both of which are used synonymously in this thesis. It is important to note, however, that "neither term [accurately] captures the extreme cases that are frequently present: the routine deal and the coerced bargain."⁵

The definition of plea bargaining is no less controversial than the terminology. Advocates of the process conceptualize it as a type of "*bargain justice*" in which defendants and prosecutors reach a *mutually acceptable settlement* through negotiations.⁶ Critics assert that plea bargaining is a "*non trial mode of procedure*" in which the state places a *substantial burden* on defendants by making it "costly for the accused to claim his constitutional rights."⁷ There are, however, certain procedural elements that are widely identified with the plea bargaining process and are said to define it. Both supporters and critics generally agree that in order for there to be a plea bargain, first, an actual guilty plea must be entered and, secondly, the defendant must have reason to expect some form of concession in exchange. In Plea Bargaining: Critical Issues and Common

Practices, William F. McDonald, deputy director of the Institute of Criminal Procedure at Georgetown University, asserts that:

the test is of whether there has been a "plea bargain" is whether the defendant has reasonable grounds to believe that he or she will receive some perceived benefit from the state by pleading guilty. . . . [I]t underscores the point that it is the perception of the defendant which influences his or her decisions. . . . [O]ur definition is somewhat open ended . . . but this reflects the reality it attempts to define. ⁸

That a defendant *perceives* that she will receive some form of concession from the state if she pleads guilty is the primary factor that distinguishes plea bargaining from a merely entering a guilty plea. There are certainly instances in which defendants plead guilty for reasons that have nothing to do with an expected pay-off, but more often than not, a plea of guilty is the result of a reasonable expectation of leniency and is therefore a part of the process of plea bargaining. ⁹

We should also note here a few other terms which will be used throughout this study and warrant some explanation. The *criminal justice system* usually labels the mechanism which the government uses to adjudicate criminal cases. For our purposes, however,

[r]ather than being a system, criminal justice should . . . be referred to as a process that encompasses many individuals who work their wills within the confines of broad, and often ambiguous statutes and bureaucratic regulations.¹⁰

In other words, the criminal justice system is the process by which judges, prosecutors and defense attorneys exercise their discretionary powers to effectuate criminal case disposition. In this regard, the "system" is actually defined by the actions of the individuals who comprise it.

In that all prosecutors and public defense attorneys and most judges are, in a sense, government officials (who are elected by the people or are appointed by their representatives), these court actors can be and are occasionally referred to throughout this study as *the state* or as *government officials*. In truth, it is through all three professions that the government is able to exercise its will over the lives of defendants. It is important to remember that "the state" as it is used in this paper is not confined to the prosecution, but extends to the other court professionals as well. Likewise, the use of the phrase *court administrators* refers to those actors listed above who are engaged in administering justice and not, as elsewhere, to the agents who oversee the criminal court system in general.

Types of Plea Bargaining Systems

There are four basic types of plea bargaining processes which can be distinguished by two general characteristics: form and substance. The "form" distinction describes the way in which the exchanges happen within a given criminal system, that is, it indicates whether the negotiations are *explicit* or *implicit*. Explicit plea negotiations are characterized by a specified concession from the state. The prosecutor or judge offers the defendant a specific benefit if he agrees to plead guilty, and there is little doubt that the state is seeking to negotiate a settlement. On the other hand, when bargaining is implicit, there is no state sanctioned negotiation, but "defendants learn they will be more severely punished for going to trial."¹¹ In jurisdictions in which implicit plea bargaining is the norm, judges may establish a pattern of giving more lenient sentences to those defendants who waive their rights, and over time, defendants may develop a reasonable expectation of a benefit for pleading guilty. In courts in which implicit plea bargaining occurs, "defendants are

simply informed that they have a choice: they can either plead guilty and get mercy or go to trial and get justice." ¹²

The two other basic types of plea bargaining systems are related to the "substance" of the negotiation and can best be understood in terms of the types of concessions that a defendant is offered. Generally, if a defendant pleads guilty and waives her right to a trial, the state will agree to either 1) change or lower the charges, or 2) recommend to the court that the defendant receive a specific sentence. Accordingly, the two types of plea negotiations which have these results are termed *charge bargaining* and *sentence bargaining*. According to Norman Lefstein, professor of law at the University of North Carolina, "the most common type of plea agreement . . . is a plea to a lesser offense or to one of several charges, with the prosecutor agreeing to waive or dismiss all of the remaining charges." ¹³ Usually, in a charge bargaining jurisdiction, prosecutors will give defendants the opportunity to avoid having an extensive criminal record by allowing them to plead to only one charge or to only one count. As will become apparent in Chapter Three, state prosecutors have a good deal of discretion when deciding what to charge defendants with and whether to "bargain" and, as a result, have tremendous leverage in most plea negotiations.

Despite the prevalence of charge bargaining, Professor Milton Heumann, professor of political science at Rutgers University and author of Plea Bargaining: The Experience of Prosecutors, Judges and Defense Attorneys, asserts that "sentence bargaining is the key to superior court plea bargaining." ¹⁴ Sentence bargaining varies from system to system, but generally speaking, it involves the state's agreement to recommend to the judge that a defendant receive a lesser sentence than she would have been given otherwise. In most sentence bargaining situations, the state is bound by its agreement once the defendant has waived his trial rights, and the prosecutor must suggest to the court that a defendant receive the

predetermined sentence. While a judge may decide to sentence a defendant to a punishment that is not in line with the prosecutor's recommendation, more often than not, the judge will accept the state's suggestion. According to Professor Heumann, "despite the perfunctory though mandatory warnings [the judge] gives that he is not bound by any recommendation, . . . the judge almost always rubber stamps the agreement."¹⁵

For the purposes of this thesis, plea bargaining processes can be thought to involve an implicit or explicit exchange of a guilty plea for a lighter sentence or a lesser charge.¹⁶ Despite this apparent limitation on the scope of the bargains that fall within our definition, plea bargaining is by no means a restricted phenomenon. There may be as many different ways to conduct a plea bargain (within the general perimeters of our definition) as there are federal and state criminal justice jurisdictions in the United States. And while it is important that the differences between explicit charge bargaining systems in which judges participate, for example, and implicit sentence bargaining systems with prosecutorial guidelines, are acknowledged, it is not necessary to enumerate the distinctions at this point. It will become clear in Chapters Three and Four that the most effective way of conceptualizing the subtle variations among specific plea bargaining techniques is to present them in tandem with an analysis of their effects on defendants in the plea bargaining process as a whole.

History

The current controversy over plea negotiations manifests itself in the historical accounts of the emergence of the process. As with many debatable policies, plea bargaining's historical origins are often used by modern scholars and theorists as a way of either legitimating or undermining the validity of negotiations

in criminal justice. Historians who support plea bargaining often assert that guilty plea negotiations are as old as the criminal justice system itself. Conversely, those who oppose the practice argue that negotiated guilty pleas are a relatively new phenomenon that did not arise until the latter half of the nineteenth century. As Joseph Sanborn, Jr. asserts in his article "A Historical Sketch of Plea Bargaining,"

plea bargaining is one of the most emotional and controversial topics in the field of criminal justice. Not only is it defined and documented poorly, its origins also are much disputed. Pro-plea bargainers like to trace plea bargaining to Cain and Able's classic struggle. Anti-plea bargainers cite the post-American Civil War era as the beginning point of plea negotiation. The truth lies somewhere in between.¹⁷

In attempting to get at "the truth," we must briefly examine the origins of plea bargaining from the vantage points of those who support and those who oppose the practice, and who thus "rival each other for the claim that their positions are traditional."¹⁸ The necessity of a historical overview will become apparent in Chapter Four, for only after examining the origins of the plea bargaining process and the factors that have given rise to negotiations in our modern courts can we even attempt to address the state's interest in pressuring defendants to waive their constitutional rights.

Donald J. Newman, author of the book Conviction: The Determination of Guilt or Innocence Without Trial, has been quoted as commenting, "in all probability, [plea] bargaining has gone on as long as there have been criminal courts. . . . [I]t wouldn't surprise many court observers to learn that Cain had pleaded to a lesser charge after having murdered Able."¹⁹ While most supporters of the plea bargaining process do not assert that its roots extend back to biblical times, some historians claim to have found evidence of forms of plea negotiation as

early as the eleventh century primarily in the principles of variable guilt and punishment bargaining.²⁰ Trials by ordeal and confessions through torture, which arose during the medieval era, are also argued to have been a historical impetus for the emergence of modern plea processes. When England established jury trials in the early thirteenth century as a way of avoiding the medieval "law of torture," British adjudicators ran into an even greater difficulty: inexperienced jurors who were apt to give the "wrong" verdict in order to spare the life of the accused. "The state devised two remedies" one that controlled and a second that by-passed the jury decision."²¹ Thus, according to some legal historians, the modern plea bargain was born.

While several legal historians argue that the processes of fifteenth and sixteenth century England are the historical antecedents of plea bargaining practices, others protest the assertion that pre-revolutionary trial procedures have any bearing on the plea bargaining of today. In his article, "Plea Bargaining and its History," Professor Albert Alschuler, professor of law at the University of Colorado and one of the most noted legal scholars in this field, categorically denies any evidence of plea bargaining practices before the nineteenth century. He points to the very absence of documentation of plea bargaining as possible proof for his claim that guilty plea negotiations did not exist in ancient times. Furthermore, Alschuler cites numerous common law treatises which "indicate that for many centuries Anglo-American courts did not encourage guilty pleas but actively discouraged them."²² Blackstone's *Commentaries on the Law of England* which were published in the eighteenth century, for example, are quoted as stating that the courts are "very backward in receiving and recording [a guilty plea] . . . and generally advise the prisoner to retract it."²³

Like Alschuler, Lawrence M. Friedman doubts that plea bargaining's history dates back any further than the nineteenth century. He notes that allusions to the

practice appear in various documents from the 1860s, just prior to the Civil War. Apparently, in the mid-nineteenth century, district attorneys from New York City were encouraging defendants to "plead guilty to lesser offenses," as had some of their counterparts in England. Even in the 1800's, though, there was controversy over emerging plea bargaining processes:

A letter from the Home Office to a magistrate in [England] complain[s] about the practice. Offenders (the letter said) were . . . pleading guilty to the charge of 'stealing from the person' in order to avoid the charge of robbery, which carried a heavier penalty. "Permission to plead guilty followed by a trifling sentence," said the Home Office sternly, was no deterrent to crime at all.²⁴

Despite the continuing debate over the historical time period during which plea bargaining first emerged, there is little dispute concerning the fact that by the early twentieth century, plea bargaining was the dominant form of criminal adjudication in the United States. The crime commissions that were established in the 1920s and 30s were among the first systematized studies of the American criminal justice system, and as such, were the first to adequately document the prevalence of plea bargaining. While the "under the table" aspect of many of the early plea bargains limits the accuracy of the statistics regarding such practices, the reports propounded to establish that by 1920, plea bargains accounted for 88 percent of the convictions in all of New York State--up from 22 percent in 1839 and 70 percent in 1869.²⁵ Raymond Moley's statistics in Politics and Criminal Prosecution (1929) confirm the predominance of plea bargaining throughout the country in the early twentieth century:

Guilty pleas in the 1920s accounted for many more convictions than did bench or jury trials: 85 percent in Chicago, 70 percent in Dallas, 86 percent in

Cleveland, 79 percent in Des Moines . . . 74 percent in California, and 58 percent in Georgia. . . . [A]nd the percentage kept rising thereafter.²⁶

Despite the predominance of guilty plea negotiations, the United States Supreme Court did not speak directly to the issue of plea bargaining until the late 1940s. Professor Alschuler attributes this silence to the fact that, until 1889, the Supreme Court's "jurisdiction in criminal cases was extremely limited."²⁷ It can be argued that until the "due process revolution" of the 1960s, there was no real need, politically or otherwise, for the Court to rule upon issues regarding the rights of criminal defendants. In a series of cases beginning in 1959, the Court established its support of plea bargaining processes. An examination of the Court's analysis in some of these cases regarding the voluntariness of guilty plea negotiations appears in Chapter Six. At this point, we need only be concerned with the effect of the Court's favorable opinions on the history of negotiated dispositions. As a result of the Supreme Court's willingness to sustain guilty pleas that were entered in accordance with prosecutorial inducement, pressures on local court systems and individual defendants to accept guilty pleas increased.²⁸ According to Milton Heumann, "court personnel" believed that the Supreme Court was "providing a . . . imprimatur to plea bargaining. No longer did they . . . feel that plea bargaining was a tainted process."²⁹ In the eyes of those who would later push to use plea bargaining to its fullest extent, the Supreme Court's sanction of plea negotiations brought a process that had been "underground" since the turn of the century out into the open.

The history of plea bargaining spans at least a century. In "Plea Bargaining in Historical Perspective," Lawrence Friedman summarizes the chronicle:

We can roughly divide the ninety years between 1880 and 1970 into three distinct periods. Until the first years of the twentieth century, there was a mixed system. Many defendants took a chance on trial by jury; others plea bargained; and still others pleaded guilty and claimed their "reward." In the second period, lasting

until about 1950, the guilty plea was much more dominant. It was plainly worthwhile to plead guilty. Trials were less common. . . . In the most recent period, plea bargaining took center stage.³⁰

In the 1990s, guilty plea negotiations are in the spotlight. Some scholars claim that the fact that plea bargaining processes have become dominant is a natural if not evolutionary testament to social progress. Others argue that plea bargains are an aberration which represent a radical break with (as opposed to a continuation of) the past. Needless to say, plea bargaining's history has been used to bolster arguments about the legitimacy of the process in America's modern courts. It is to these arguments that we now must turn.

The Debate

During the "three main periods of intense research on plea bargaining: the 1920s and 30s, the 1950s and 60s, and the 1970s,"³¹ a number of viewpoints in regards to the validity of negotiated guilty plea processes have developed. At the risk of oversimplifying the complex nature of the plea bargaining controversy, the debate can best be conceptualized as a clash between supporters, abolitionists and reformers. On the one hand, the supporters of plea negotiations are generally content with the way that the process operates--especially in regards to efficiency. On the other hand, the reformers and abolitionists are critical of plea bargaining in practice. The reformers mainly argue that the process by which guilty pleas are being negotiated in various jurisdictions is at present unfair and should be reformed; while the abolitionists assert that there is something inherently unjust about guilty plea negotiations and that plea bargaining should be completely abolished. Before attempting to focus in on the specific issue of coercion in guilty plea dispositions, it is important to first understand the broader context of the attack on plea bargaining

and the fundamental nature of the arguments that have been marshalled to its defense.

The fact that many prosecutors, judges, and defense attorneys are in support of plea bargaining processes is itself one of the strongest arguments in favor of the practice. After interviewing seventy-one members of the criminal justice "work group" in six courts in the state of Connecticut, Professor Milton Heumann concluded that "prosecutors, defense attorneys, and judges share a basic belief that plea bargaining is the appropriate means of disposing of many, if not most, criminal cases."³² Indeed, even the Supreme Court of the United States has joined the ranks on the side of those who argue that plea bargaining is "not only an essential part of the [criminal] process but a highly desirable one for many reasons."³³ In 1971, the Supreme Court summarized many of the arguments in favor of guilty plea negotiations:

[Plea bargaining] leads to prompt and largely final disposition of most criminal cases; it avoids much of the corrosive impact of enforced idleness during pretrial confinement for those who are denied release pending trial; it protects the public from those accused persons who are prone to continue criminal conduct even while on pretrial release; and, by shortening the time between charge and disposition, it enhances whatever may be the rehabilitative prospects of the guilty when they are ultimately imprisoned.³⁴

While the Court may appear to be advancing several arguments (many of which are discussed in Chapter Six) concerning the safety of the community and the rehabilitative advantages of the sentencing that results from a negotiated guilty plea, the single most common consideration that is brought forth by guilty plea supporters is the notion that plea bargaining allows for greater efficiency in the criminal justice system. Quite simply, it is argued that plea bargaining is the only way that the state and federal justice systems can process the unbelievably large number of cases that they are called upon to dispose of. Writing for the Court in *Santobello v. New York*

404 U.S. 261 (1971), Chief Justice Burger comments that "[i]f every criminal charge were subjected to a full scale trial, the States and the Federal Government would need to multiply by many times the number of judges and court facilities." ³⁵ By negotiating at least some of the cases, the argument goes, the courts can save time and money and can "preserve the meaningfulness of the trial process for those cases in which there is a real basis for disputes."³⁶ The arguments related to case pressure and efficiency are examined in detail in Chapter Four. At this point, suffice it to say that administrative interests are the battle cry of many (if not all) of the supporters of the plea bargaining process.

There are some scholars who advocate plea bargaining because they believe that negotiation is actually in the interest of justice. According to Malcolm Feeley, author of Court Reform on Trial, often "a charge reduction facilitates the pursuit of substantive justice in the face of legal inflexibility."³⁷ There are instances, supporters argue, in which mitigating circumstances in a particular case might call for less of a punishment than the law allows. If there was no plea bargaining, there would be no way to address the interests of justice in these cases. Bargaining-as-justice supporters seem to assume that the judges who rule upon cases with mitigating circumstances would somehow be bound to the letter of the law after a trial in a way that they would not be after a guilty plea. Nonetheless, the argument holds that "substantive justice can be facilitated by flexibility in charging and pleading." ³⁸ In the end, supporters assert that plea bargains are best for all concerned--courts save time and money, court personnel save effort and energy, and defendants save themselves from longer prison sentences.

While the "support" side of the plea bargaining debate is comprised mostly of the attorneys, judges, and prosecutors who actually administer justice, the opponents' camp tends to be made up of legal theorists and scholars who criticize both the process and the substance of guilty plea negotiations. Reformers,

including the American Bar Association and the President's Commission on Law Enforcement and the Administration of Justice, seem to "focus on procedural deficiencies of particular bargaining systems: the possibility of broken or misunderstood promises, for example . . . , " ³⁹ while abolitionists like Professor Alschuler argue that plea bargaining negotiations in any form are so prone to prosecutorial abuse that they should be abolished. It is important to review some of the major criticisms that are generally characteristic of the opponents of the plea bargaining process.

The Constitution of the United States guarantees every criminal defendant "the right to a speedy and public trial, by an impartial jury of the State." The most basic objection to plea bargaining processes is that they undermine constitutional protections and threaten the very values on which this country was founded. Many opponents are firm believers in Judge Richard T. Rives's memorable aphorism: "Justice and liberty are not the subjects of bargaining and barter."⁴⁰ In "Understanding the Short History of Plea Bargaining," John H. Langbein spells out an argument that is common in modern plea bargaining debates: "Plea bargaining subverts the design of our Constitution. . . . When an accused is convicted following a jury trial, we punish him twice: once for the crime, and then more severely" for going to trial. ⁴¹ In a sense, guilty plea negotiations undermine an individual's Fifth and Sixth Amendment rights and to leave her defenseless against state prosecution. Says Dean Justin Miller of the Southern California Law Review:

There can be no doubt that [our undercover system of criminal law administration] is dangerous, both to the rights of individuals and to orderly, stable government. . . . The necessity for making a good record may very well result in prosecutors overlooking the rights, privileges and immunities of the poor, ignorant fellow who . . . is induced to

confess crime and plead guilty through hope of
reward or fear of punishment. . . .⁴²

Not every critic of the plea bargaining process opposes it on behalf of the defendant's rights. There are those opponents who argue that plea bargaining should be reformed or abolished because it is too lenient on criminals, and allows too many of them "get away like bandits." To the extent that most of the accused persons with whom the state is bargaining are actually guilty to some degree, the argument goes, the state should seek to maximize justice in the form of punishment and to deny criminals the opportunity to get lighter sentences than they deserve. Theorists such as James Q. Wilson advocate the elimination of plea bargaining for serious offenders "to insure that [they] cannot have the charges against them reduced simply to induce a guilty plea."⁴³ In the long run, these opponents argue, it is the state's duty to punish criminals in accordance with what they deserve, and there is a "societal interest in rational (and appropriately stringent) criminal sentences."⁴⁴

Although the "hawks" of the criminal process--those who view guilty plea negotiations as pandering to criminals--are generally the majority of the opponents of plea bargaining, there are those critics who assert that guilty pleas "fail to provide a full demonstration of guilt and leave the detailed circumstances of the offense undeveloped."⁴⁵ According to this argument, the primary danger of plea negotiations as they presently operate is that they might induce *innocent* defendants to plead guilty. Professor Alschuler is well-known for his belief that "the safeguards of the plea negotiation system" against "false conviction" are "inadequate."⁴⁶ Similarly, most guilty pleas are negotiated based on the prosecution's evidence, which may not legally be enough to convict a defendant before a jury. Those who oppose guilty pleas on this basis also argue that a trial allows for a more thorough examination of the circumstances surrounding a case and

that considerations often emerge during trial procedures that may not have been heard if a defendant were to plead guilty. One of Milton Heumann's interviewees comments:

I think the client should have his trial, have a chance of beating the case completely, and be assured that he'll get a full defense. . . . And, in fact, the trial often brings out facts that are mitigating. . . . [T]here may have been circumstances that are involved, or the witness may prove unreliable. That kind of stuff would come out in a trial that might not otherwise. . . .⁴⁷

The critics' assertion that, in the course of plea bargaining, the state and court personnel coerce the defendant into pleading guilty and into waiving the right to trial and the protection against self-incrimination is the argument that this thesis is designed to investigate. It is said that prosecutors, judges and sometimes even defense attorneys use their status as such to manipulate defendants in a variety of ways for a variety of reasons. Procedural fairness seems to mandate that a defendant should be protected from any threats, pressures or extreme inducements to give up his constitutional rights. Indeed, several State Supreme and Federal Appellate courts have held that "no sort of pressure can be permitted to bring the party to forego any right or advantage however slight. The law will not suffer the least weight to be put in the scale against him."⁴⁸

The plea bargaining debate continues. As we have seen, there is little agreement between the supporters and the opponents, even over such seemingly innocuous factors as the definition and the history of guilty plea negotiations. Indeed,

[t]he controversy over plea bargaining is complex. It involves both matters of fact about how plea bargaining actually does or could work and matters of policy regarding whether plea bargaining should

be allowed to operate and, if so, according to what set of blueprints.⁴⁹

This chapter has been designed to set the stage for the impending analysis of the coercive forces at work in plea negotiations. We must keep in mind that "there is no rank order of importance among the many questions which arise [in an examination of plea bargaining], nor is there any single critical issue that, if settled, would quiet all of the anxieties about" the process.⁵⁰ Nevertheless, the remainder of this study attempts to focus in on what many supporters and opponents deem to be the strongest argument against the practice: its coercive nature.⁵¹ Many criminal defendants who have waived their right to trial later assert that they felt forced to do so. Using the definitions, descriptions and history presented in Chapter One as background, the rest of this thesis attempts to determine the validity of these claims.

CHAPTER THREE

"NOTHING NEGOTIABLE": IDENTIFYING PRESSURES

Some prosecutors will tell you that in their jurisdictions no "plea bargaining" goes on, but readily admit that many cases are settled before trial. Some judges . . . flatly deny that any "plea negotiations" go on in their courts. They are right: in those courts, there is nothing *negotiable* about pleading guilty. . . .

William F. McDonald, "From Plea Bargaining
to Coercive Justice"

The claim of having been "coerced into accepting a plea bargain," is one of the single most common assertions made by imprisoned defendants.¹ While many such complaints may be dismissed as a part of the natural tendency to blame the system for an unpleasant outcome, we must investigate the manner in which the criminal justice participants of various localities utilize their discretionary powers to pressure defendants into relinquishing their rights. The research, observations and interviews that I have conducted seem to suggest that defendants are sometimes strongly encouraged to waive their rights, if not actually pressured into pleading guilty. Within the criminal justice systems of most states, "very explicit pressures . . . are exerted in some measure by all court personnel."²

This chapter is devoted both to exploring the opportunities that exist within the plea bargaining process to actively encourage defendants to relinquish important constitutional protections, and to identifying the types of pressures that are brought to bear upon the accused. It is important to note at the outset that we are concerned here with the potential for abuse, and are in no way implying that all court professionals--even all of the ones who occasionally engage in these activities--are

seeking to pressure pleas. Some of the reasons why those court actors who do endeavor to pressure defendants engage in these activities are discussed in Chapter Four, and whether or not these pressures are coercive and unacceptable is the subject of Chapters Five and Six. At this point, we need only be concerned with

examin[ing] the practice [of plea bargaining] to determine whether it involves a manipulation of the defendant's choice situation by the court, the prosecutor, or the defense counsel in such a manner that the defendant is constrained to plead guilty . . .³

In attempting to recognize the various ways that pressure manifests itself in plea bargaining, we must keep in mind that no single means of inducement is necessarily common to all criminal jurisdictions. According to Lawrence M. Friedman, "high rates of guilty pleas mean *some* form of threat, force, promise or inducement, though the precise mix of carrot and stick varies from place to place."⁴ We may find it helpful to categorize the pressures that we are examining in terms of 1) judicial participation in the plea bargaining process, 2) prosecutorial discretion as it involves the charging decision, and 3) defense attorney manipulation of both the information that is available to defendants and of the advocacy role. While not the only ways of conceptualizing the inducements, all three types of pressures are generally present to different degrees in most criminal systems, and have a significant impact upon a defendant's decision to plead guilty. In The Practice of Law as a Confidence Game, theorist Abraham Blumberg asserts that "all court personnel, including the accused's own lawyer, tend . . . to become agent-mediators who help the accused redefine his situation and restructure his perceptions concomitant with a plea of guilty."⁵ As we will soon discover, the "help" of which Professor Blumberg speaks often takes the form of extreme pressure, force, inducement, implicit promises, and explicit threats. In order to

best evaluate plea bargaining processes, we must be aware of the types of forces that defendants in various criminal justice jurisdictions across the nation encounter every day.

Judicial Participation

On the federal level, judges are prohibited by law from engaging in guilty plea negotiations. Rule #11 of the Federal Rules of Criminal Procedure state definitively that regarding plea negotiations, "the court shall not participate in these discussions." At the state level, however, the rules about judicial participation in plea bargaining are generally less explicit and, though they vary from state to state, generally allow (if not encourage) judges to become actively involved in plea bargaining practices. "In state courts," Miami defense attorney Yale Freeman explained to me, "nearly all of your judges will participate in 'discussions'--not 'plea bargaining,' they hate that word--'*discussions*.' "

Supporters of the plea bargaining process argue that judges and criminal court magistrates at both levels have little (if anything) to do with negotiated guilty pleas. If a judge is involved in plea negotiations, some legal theorists assert, it is only as a neutral overseer of the fairness of the plea bargaining process. In Judicial Process in America, for example, Robert A. Carp argues that

[u]nder plea bargaining the role of the judges in the criminal justice system is much *smaller* than most of us assume. . . . [B]ecause plea bargaining virtually seals the fate of the defendant *before* trial, the role of the judge is simply to ensure that the proper legal and constitutional procedures have been followed.⁶

While Carp's description may be the prescribed function of the judge, in the modern system, I found that the reality of criminal court interactions at both the

federal and state level is that judges are often involved in discussing, encouraging, coordinating, mediating and forcing negotiated guilty plea settlements.

Sentence Differentials

The primary way that judges from both federal and state systems indirectly yet actively exert pressure upon defendants is through the imposition of sentence differentials. By giving defendants who plead guilty and waive their right to trial substantially lighter sentences than those who put the court through "the inconvenience and necessity of a trial,"⁷ judges can pressure the accused into entering a guilty plea. Joe Smith, for example, is a defendant who is accused of armed robbery, which in New York State may carry a statutory penalty of approximately 3 to 6 years. A judge who is interested in promoting a plea bargain lets Smith know in no uncertain terms that if he were to plead guilty, he would receive the minimum penalty. If, however, Smith were to exercise his constitutional right to trial and were to be found guilty, the judge would most certainly give him the maximum sentence that the law allows. In many instances, the difference between the post-trial and the post-plea sentence is so great that the defendant is undoubtedly pressured into waiving his/her right to trial. Says Manhattan defense attorney Diana Maldonado: "It is very difficult to tell defendants 'you can't just exercise your rights. You pay a price.' " In most cases, a judge who consistently gives a more severe sentence to those defendants who are convicted at trial or who grants leniency in punishment to those who plead guilty can effectively pressure the accused into "voluntarily" waiving their rights.

We must keep in mind that the "essential dependence on the *sentence differential* between those who plead guilty and those who are convicted after trial may pressure [defendants] into pleading guilty."⁸ The case of Brady v. United States 397 U.S. 742 (1969), a landmark Supreme Court case regarding plea

negotiations, provides one of the most vivid examples of the possible effects of disparate sentences. Defendant Brady was accused of having been involved in a kidnapping and "faced a maximum penalty of death if the verdict of the jury should so recommend."⁹ If Brady opted to plead guilty, however, the greatest possible punishment would be life imprisonment. Brady chose to plead guilty and was sentenced to 50 years in prison. He then "sought relief . . . claiming that . . . his plea was induced by representations with respect to reduction of sentence and clemency."¹⁰ Although the Supreme Court rejected Brady's claim in this instance, many legal scholars argue that his plea was "coerced" in the sense that the statute allowing for the imposition of the death penalty "made the risk of death the price of a jury trial."¹¹

It is important to note that the sentence differential established in Brady was the result of a state statute, not a judicial pronouncement. The incentive of a sentence reduction if one waives one's rights and the threat of a possible increased sentence if one exercises them can be imposed directly or indirectly by both the legislature and the judiciary. Nonetheless, in most of the cases occurring in lower trial courts, the trial judge generally has the power (within legislative guidelines) to construct sentences in such a manner that the defendant is faced with an offer she will find it difficult to refuse.

Bail

Another way that judges from both the federal and state systems can pressure the accused is through manipulation of the bail decision. While bail procedures vary from state to state, every jurisdiction has some process during which "the magistrate will determine whether or not the accused is to be released on bail, and if so, what the amount of bail is to be."¹² Although it is difficult to provide much concrete evidence of malice in the bail decision, it is plausible (and

even probable in some states) that judges keep certain defendants in jail in order to increase the chance of plea bargaining leverage later on in the criminal process. As one Manhattan attorney (who asked to remain anonymous) asserts:

Being "in" wears you down. You go into jail and you say, "I'm gonna fight this case." And I tell ya, after months and months of coming back to court being woken up in Rikers at 4:00 AM; getting onto a God-forsaken bus; sitting for hours and hours in courtroom pens; getting five minutes with your lawyer and two minutes with a judge, you lose your commitment. . . I have seen clients who should go to trial and intend to go to trial just giving up. They decide to take a plea because they just can't take it anymore.

In the city of Miami, for example, bail is generally set or denied within the first twenty-four hours after an arrest. If a defendant cannot make bail, he or she must remain in jail at least until the day of arraignment.¹³ What often happens, according to Dade County Public Defender Bennett Brummer, is that a judge will offer a defendant in a misdemeanor case "credit time served" if she will plead guilty at arraignment. In other words, a defendant who has been in jail for seven days will be asked to plead guilty to the charge and in return will be sentenced to seven days "credit time served." Thus, in many cases, a defendant who has been kept in jail by a judge's initial bail determination will get released, *if* she pleads guilty and gives up her right to contest the charges.

The amount of pressure that can be placed upon defendants when their immediate release is one of the terms of the plea agreement is almost inconceivable. "Would *you* plead guilty?" Mr. Brummer asked in a recent interview. "Want to go home *today* ? Of course you could stick around a few more months and wait for your trial to come up. You could take the risk that the jury will find you not guilty or that something will get better, but it's hard when they're offering you 'time served.' " It is possible that at least in misdemeanor cases, the judges'

knowledge of the force of "credit time served" factors into the initial bail decision. According to Whitney North Seymour, Jr., former U.S. Attorney and author of the book Why Justice Fails,

[p]lea bargaining is particularly troublesome when it involves a defendant held in custody before trial because he cannot raise enough money to be released on bail. After he has been in custody for several months, an offer to let him be sentenced to the time he has already been in jail makes a total travesty of the whole process. Who wouldn't plead guilty under these circumstances--whether actually guilty or innocent?¹⁴

Direct Intimidation

An even more explicit form of judicial pressure often takes place when, instead of pressuring the defendant by manipulating her choice of sentences or her stay in jail, state judges employ direct intimidation techniques. Some judges may use their power and position to create apprehension in the mind of the defendant regarding the possibility and advisability of exercising the right to trial. For reasons that will be made clear momentarily, it is intimidating to defendants when judges become directly involved with trying to negotiate a settlement. According to the Ohio State Supreme Court, "no matter how well motivated the judge may be, "when she gets involved in plea bargaining, "the accused is subjected to a subtle, but powerful influence to plead guilty." ¹⁵

A trial judge who is actively involved in moving the business of the court through plea bargaining is often perceived of (and I believe rightly so) as having a bias for plea bargaining as a means of case disposition. This bias and the judge's efforts to communicate her preferences to the defendant can often result in the defendant's rendering of a guilty plea, at the expense of her right to trial.

Bonfire of the Vanities, Tom Wolfe's fictional attempt to portray the workings of Manhattan's criminal justice system, gives a rather accurate account of the interaction between some New York City judges and defendants regarding plea bargaining negotiations. In one scene, a Bronx criminal court judge attempts to persuade a young defendant who wishes to exercise his right to trial that it would be "in his best interest" were he to plead guilty. After learning of the details of the case from a bench conference with the attorneys, the judge turns to the defendant and says, "Come on up here, son. I want to talk to you.. . .Whaddaya wanna get involved in all these . . . robberies for?"¹⁶ For the next three pages, the trial judge tries every means possible of "reasoning" with the young man. The judge both complements and belittles the defendant, brings up his family, job, and future, and even analogizes his problem to a "cancer" which needs to be caught early before it "spreads through your whole body and takes over your whole life."¹⁷ Undaunted, Wolfe's defendant holds on to his trial right and, conceivably, to his dignity. Needless to say, however, other less courageous defendants faced with similar situations would probably have given in to the powers of judicial persuasion.

In the case of State v. Byrd 298 N.E.2d 603 (1973), for example, a trial judge from Ohio took the defendant into his chambers without the defense attorney, and told him, among other things, that "he considered the offered concessions to be 'a pretty good deal.' "¹⁸ The judge also met with the defendant's mother and sister and "actively enlist[ed] [their] aid in eliciting a guilty plea from Byrd."¹⁹ As a direct result of the inducements, Byrd relinquished his right to trial. One cannot underestimate the realities of pressure from a trial judge who becomes actively involved in attempting to persuade defendants to plead guilty. When the incredible force of judicial power is used to pressure the accused into opting for one form of case disposition over the other, there is little reason to doubt that defendants feel

overwhelmed and are more likely than not to succumb to the judge's powers of suggestion. Defense attorney Whitney Tymas comments:

One day I was watching a defendant enter a plea while waiting for my case to be called. When the judge asked the perfunctory questions about whether anyone had made any promises or threats . . . she yelled out, "Yes! *You* did! You told me that you would put me in jail for a long time if I didn't plead guilty!" Although the judge looked shocked, I am sure that her claims were true. It happens all of the time.

Direct judicial participation in plea bargaining processes can also lead to the apprehension of judicial vindictiveness if the accused does exercise her right to trial, which in itself can operate as a form of intense pressure. This pressure is not caused by the threat of a larger sentence per se, but by *the fear of an unjust trial* if the accused were to opt to exercise their rights. It has been argued that a judges' participation in a plea bargain might be construed by the defendant as an indication of both the judges' belief in the defendant's guilt, and the judge's predisposition to be less inclined to ensure that the trial process (if it does occur) is fair. The Ohio judge in the Byrd case, for example, not only expressed to the defendant his preference for a negotiated settlement, but also "emphasized that since he would preside at the trial, the sentencing would be subject to his discretion."²⁰ In deciding the case, "the Ohio State Supreme court found that a judge's active participation in plea negotiations should be deemed to be coercive if this conduct could have led the defendant to believe that he would not receive a fair trial."²¹

At this point, there are those who would argue that, to the extent that obvious vindictiveness renders certain cases overturnable on appeal, judges will most likely refrain from abusing their powers during a trial. While this may be true to some extent, we must keep in mind that the issue, again, is not what a judge actually does during a trial, but whether a defendant might *perceive* the opportunity

for judicial misconduct and opt to plead guilty as a result of this reasonable perception. The problem with direct judicial participation seems to be that

whenever a trial judge suggests during plea negotiations that a defendant adopt a particular course of action, the judge abandons his role as a neutral arbiter and instead becomes an advocate for a proffered course of action.²²

When judges appear to advocate plea bargaining, defendants may lose faith in an unbiased trial proceeding and feel forced into entering a guilty plea.

Court-packing

According to the New Jersey Law Journal, a new twist to the relatively old method of pressure through direct intimidation is attempted once a week by Warren County Criminal Presiding Judge Michael Imbriani. To put a "dent [in the] county's case backlog," Judge Imbriani schedules weekly calendar calls for the trial cases that appear on his docket.²³ Thus, every Monday morning, *all at the same time*, defendants and their attorneys have to appear before Judge Imbriani -- even though the judge can hear only a fraction of the cases. Says one defense attorney who is quoted in the paper: "This policy is wreaking havoc on every private practice and on the lives of defendants who have jobs or who must travel from Ohio or California or Hawaii, despite the unlikelihood that their case will proceed to trial."²⁴ If a defendant does not show up, an warrant may be issued for his arrest.

Christina Hollman, a defendant who is accused of cocaine possession before Judge Imbriani and is out on bail, has to drive four hours every week with her mother and three year old daughter in order to make the calendar call. "Yet each week her case is postponed . . . so [they] return home, only to repeat the ordeal the

next Monday." Ms. Hollman apparently makes the trip because she refuses to accept the plea bargains that the prosecutors offer-- "she wants and in fact demands" her right to trial. It goes without saying that other defendants, in a similar situation, may not have the strength to fight to system. Despite Judge Imbriani's claim that the "unusual situation [case backlog] requires a drastic plan of attack," defense attorneys argue that his policy unduly burdens defendants rights. "The weekly ritual, (attorney Pamela Bruase is attributed as saying), is a harassment by a presiding criminal judge trying to move cases by coercing pleas."²⁵

Indirect influences

A judge's influence over the plea bargaining process can often also amount to manipulation of the administrative power of the court in order to pressure attorneys to negotiate a deal and to get their clients to plead guilty. Many of the attorneys that I interviewed--both prosecutors and defenders-- asserted that one of the most effective ways that a judge can "force a plea" is by pressuring them to work something out.

"Ms. Prosecutor, why haven't you plead this case out yet? " According to Dade County Florida District Attorney Janet Reno, when the attorneys in her office are faced with questions like this while in the courtroom and on the record, they often feel compelled to work out a plea bargain--even when to do so is not in the best interest of justice. At the state level, trial judges often engage in open altercations with the attorneys who are involved in cases which have not yet been resolved. Throughout the work day, Miami defense attorney H.T. Smith assured me, judges make it very clear to both attorneys that they need to dispose of a lot of cases, and "the only way to get rid of that many cases in that little time is through plea bargaining." In his study of the new court participant's response to the plea

bargaining process , Professor Milton Heumann acknowledges that, for example, judges may "announce from the bench that they will be available during a specific time to *"pre-try"* cases."²⁶ Some judges use this "pre-trial" opportunity to mediate a settlement and to "encourage counsel to negotiate their cases."²⁷ As a judge who is quoted by Donald Newman comments:

In these pre-trial conferences, I always make it clear to defense counsel that if his client goes to trial and is convicted, I will impose a sentence pretty close to the maximum permitted by statute and will not consider probation. Under such conditions, a guilty plea can usually be worked out.²⁸

Several of the attorneys with whom I spoke also accused judges in their jurisdictions of pressuring pleas by manipulating the timetable so as to make it difficult for a case to be tried effectively. In most criminal justice systems, if a defendant pleads not guilty at arraignment, the judge schedules a trial date for some point generally three to six months later. When judges wish to force guilty plea negotiations, however, they schedule a trial for a much earlier time, often even within one month. In one Miami attorney's opinion: "Judges move cases through fear. Say you have a significant case. If the judge sets it thirty days after arraignment, there is no way you can be ready. What choice do you have?"

Another type of time pressure is occasionally brought to bear upon the attorneys via their personal lives. In a recent case disposition which I observed in New York City, a Superior Court judge attempted to force a plea by refusing to postpone the scheduled trial so that the defense attorney could take her previously planned vacation trip out of town. After being reminded that the attorney was scheduled to take a vacation and needed a continuance until the following week, the judge stated in open court: "If you want to take your vacation tomorrow, counsellor, get your client to plead guilty today." This is but one example of the

way in which some judges attempt to pressure defendants into giving up their rights to trial by "punishing" their attorneys.

According to William McDonald, jurisdictions which allow the trial judge to play an active role in plea bargaining often do so because a judge is thought to be "the key actor in taming the dragon" of manipulative negotiations.²⁹ From my observations, however, it can be asserted that trial judges can become more involved in *inciting* the dragon by forcing guilty pleas than in ensuring the fairness of the plea bargaining process. Through extreme sentence differentials, discretionary bail determinations, direct intimidation, and manipulation of the administrative scheduling power, judges have the power to actively pressure defendants into giving up their rights.

Prosecutorial Discretion

Prosecutors, who are very much an integral part of the actual plea negotiation, have a tremendous amount of discretion in deciding how cases are going to be handled. Before we can adequately address how prosecutors actively pressure defendants into pleading guilty during negotiations, we must first understand the nature of prosecutorial discretion in most criminal justice jurisdictions. A writer for the Southern California Law Review briefly summarizes the status, function, and operation of prosecutorial decision making across the country.

Although officially considered a part of the executive branch of government, in actuality, the district attorney's office is an administrative agency with quasi-judicial and quasi-legislative functions. In performing these functions, the office exercises considerable discretion at many critical stages of criminal prosecution. The most important aspects of this discretion include the power to charge or to refrain from charging an individual with a crime, to reduce charges to a lesser offense prior to trial, to not charge prior offenses, to dismiss or request

court dismissal after trial commences, or to recommend a lighter sentence.³⁰

According to guidelines that Miami District Attorney Janet Reno distributes to the attorneys in her office, "the first objective of a prosecutor should be to make sure that innocent people do not get charged. The second objective should be to convict the guilty according to due process." Certainly, similar ethical standards are posited by chief prosecutors in every criminal justice system in the United States. Nevertheless, as we shall see in a moment, the tremendous amount of discretionary power that is given to individual prosecutors in determining the perimeters of charging and in developing the state's case sometimes leads prosecuting attorneys to act in ways that are fundamentally inconsistent with the aforementioned prosecutorial obligations.

Because of the nature of their discretionary power, prosecutors can pressure guilty pleas in primarily two different ways: overcharging and bluffing. We must keep in mind that the district attorney's office--the embodiment of "The People" in criminal cases--has the sole responsibility for establishing guidelines regarding both the decision to charge and the decision to negotiate. When asked whether or not prosecutors sometimes use their discretionary powers to pressure defendants into accepting their plea offer, a vast majority of the judges and defense attorneys with whom I spoke answered unequivocally in the affirmative. Says Bennett Brummer, the Public Defender for Dade County, "Of course. Certainly. Absolutely. Yes . . . I *know* that they do."

Overcharging

After the initial discretionary decision that prosecutors make--deciding whether or not to prosecute a case--the decision most prosecutors confront is the

determination of what to charge a defendant with. In that it establishes the tone and terms of the treatment of the defendant in every subsequent stage of the criminal process, the charge is undoubtedly one of the single most important stages of the criminal process, especially in regard to plea bargaining. Given that a district attorney is generally not an eyewitness to the crimes she prosecutes and is most likely to be unaware of the true "facts" of the case, she is supposed to base her accusation upon the testimony of police and witnesses in accordance with standards of probable cause. It is argued that prosecutors often "overcharge"--file more or higher charges than are sustainable by the evidence-- for the purposes of plea bargaining. As one Manhattan defense attorney quipped in a recent interview, "it's like a department store sale. Prosecutors mark up the charges so that they can eventually cut them down and appear to be offering a deal."

There are two general types of "overcharging" that have been identified by legal scholars in plea bargaining literature. "Vertical overcharging" occurs when prosecutors "'charge a single offense at a higher level than the circumstances of the case seem to warrant.'" ³¹ The classic example of this type of pressure is the "prosecutor who may have a policy of charging every homicide as a first degree murder even if he initially thinks a particular defendant is guilty of [some other charge] because of the circumstances."³² What is apparently the problem with vertical overcharging, according to some criminal justice participants, is that "prosecutors set their evidentiary threshold at far too low a level when drafting their initial charges,"³³ and use their discretionary powers to claim that the defendant has done something which the evidence does not completely support. The fear that this higher charge instills in innocent individuals (or even persons guilty of a substantially lesser crime) often causes defendants to jump at the opportunity to receive a reduced charge--even one that is still substantially higher than the evidence warrants.

One Manhattan public defender recounted the story of a defendant who had killed someone in self-defense, but was charged with first degree murder. "We took the plea because the risk was too great," she said sadly. "If the D.A. had charged it as it should have been, we wouldn't have had that murder charge and fifteen-to-life hanging over our heads." At a later point she added, "my client would have felt freer to exercise his right to trial." In a sense, vertical overcharging, coupled with the prosecutor's discretion to lower the charge, poses a threat similar to that of judicial and legislative sentence differentials. If a defendant exercises his right to trial, he could be facing a higher charge and substantially more time than he justly deserves.

Members of various district attorneys offices often argue that it is not possible to effectively mark up the charges in the manner that is suggested by "vertical overcharging" claims because a charge which has been completely fabricated will be impossible to sustain before a grand jury. Says Fredrick Watts, of the Manhattan District Attorney's office: "The grand jury is the body that reviews the evidence and the prosecutor's suggested charges, and which determines the indictment. The *grand jury* sets the indictment, not us." Prosecuting attorney Armond Durastanti pointed out that, in addition, "judges review the grand jury minutes for errors" in evidentiary standards, defendants will hardly ever be faced with more serious charges than they deserve. These assertions, while correct in principle, are out of touch with the reality of plea bargaining processes. In the first place, the grand jury and the judges seem to be less of a deterrent to prosecutorial abuse than it is apparently supposed. In speaking with one judge, I discovered that when reviewing the minutes, "judges tend to give The People the benefit of the doubt."

Secondly, a prosecutor's discretionary power to lower the charges at any point will almost always create enough of a charge differential that a defendant will

be forced to give up the trial right sometimes even before the case begins the trial stages. A prosecutor has every incentive to mark up the charges initially because, as a result, in the vast majority of cases, she will never even have to go trial. Third, and most importantly, as long as a defendant *perceives* that the prosecution might try to sustain the greater charge, an element of pressure exists whether the prosecution can carry effectively out its threat or not. Once again, it is the perception of the defendant which is central to determining which state actions are unduly burdensome and how so. Without adequate assistance from a competent defense attorney (a factor which will be addressed later in this chapter) defendants may not be aware of the inflated and unsubstantiated nature of the original charges, and may feel forced into accepting the proposed alternatives.

The other type of "overcharging" of which prosecutors are frequently accused is "horizontal overcharging," and is defined as an instance in which a prosecutor "files numerous accusations against a single defendant."³⁴ If a defendant were guilty of writing bad checks, for example, a prosecutor may decide to charge him with "not only with one, but with three separate offenses: forgery, uttering, and obtaining property by false pretenses."³⁵ In most cases, the prosecutor has little intention of attempting to hold the defendant responsible for each offense, but uses the numerous charges as numerical leverage in plea negotiations. Many defense attorneys assert that horizontal overcharging

gives the prosecutor a tactical advantage in plea negotiations and at trial. It is "dishonest" in that the prosecutor is not really interested in securing convictions to all charges and when he dismisses some charges in exchange for a plea he is giving the defendant a bogus consideration, "the sleeves from his vest."³⁶

Horizontal overcharging occurs in like manner when prosecutors file separate indictments for each count of a crime. If our defendant is accused of writing five bad checks, he may be faced with three different charges for *each* of the *five* counts. This deception is considered to be "corrupt" by some defense attorneys in the sense that the considerations upon which the defendants base their decision have been intentionally manipulated by a prosecutor as a method of increasing the perceived seriousness of the case and, thus, of pressuring defendants to "voluntarily" surrender their rights. As attorney Joel Hirschhorn comments:

I have one case of 75 counts of mail fraud; another of 103 counts of money laundering. What's the difference? The judge is not going to give them more than twenty-five years no matter how many charges are stacked. But it scares the hell out of the client.

Several theorists, William McDonald included, have argued that "the 'overcharging' of prosecutors does not involve unethical or unlawful conduct."³⁷ It is true that in most cases overcharging does not amount to "accusing the defendant of a crime of which he is *clearly innocent* in order to induce him to plead guilty to a 'proper' crime."³⁸ What does seem to happen, though, is that prosecutors inflate the "proper" charge. Professor Heumann notes that

[the] piling on of charges, when combined with mandatory five year minimum sentences for offenses such as sale of heroin, and robbery with violence, and with repeated offender statutes, which double exposure for the second offender in particular crimes, provide ample years for the state's attorney to "play with" in negotiations.³⁹

Miami private attorney Yale Freeman gives an example of one of his actual cases to illustrate this point. A seventeen year old, African American youth was walking down the street in Greater Miami. In response to racial slurs which were being

shouted at him from a gang of boys, he picked up a rock and through it. The rock apparently broke a window, a violation that Mr. Freeman believes should have been charged as "pure criminal mischief." He asks, "Now, what's it get charged as? *Throwing a deadly missile into an occupied building.* [That charge] takes it from a misdemeanor punishable by thirty days in jail tops, to a felony punishable by five years."

In the language of prosecutorial overcharging, a delinquent's "joyride," for example, becomes "grand larceny" punishable by years in prison. "I don't doubt that some overcharging occurs," admitted Paul Shechtman, Chief Counsel to the Manhattan District attorney, in a recent interview. "I just don't know if it's intentional." One anonymous prosecutor seemed to suggest that it is.

Some prosecutors feel we should start out realistically, but my feeling is that for a defense attorney to get his guy to plead, you've gotta give him something. . . . You just file high and then deal down a notch to what it should have been all along and everybody's happy.⁴⁰

The question, however, is whether the defendant--the individual who's life is affected and who's choice is manipulated--is "happy." He no doubt feels compelled to give up his right to contest the state's accusations, and accepts a plea bargain on the basis of benefits which, in actuality, do not exist. In that "charges can be dropped without reducing the realistic range of years within which the defendant will be sentenced,"⁴¹ defendants may sometimes plead guilty to a prosecutor's gamut of charges because they perceive a benefit which they ultimately do not receive. Says Manhattan Supreme Court Justice Richard Andrias: "Often the legislative penalties and D.A.'s stance are really Draconian. There is overcharging, so although the defendant may appear to be getting a 'bargain,' it is really no less than what he'd receive anyway."

Bluffing

When state attorneys seek to force a guilty plea by hiding the weaknesses of the state's case and offering a deal, they are generally accused of "bluffing." The point of their endeavors is often to make a defendant and her attorney believe that the state has a strong case against the accused and, therefore, that it is in the defendant's best interest to plead guilty and to accept the prosecution's terms of the bargain. Comparing her experiences in both New York City and Boston, public defender Diana Maldonado asserts that bluffing occurs far more frequently in New York and accounts for some of the reason why "defendants here just feel cattled through the system." In Manhattan, "the decision to take a plea happens very quickly and often with little knowledge of the case . . . It feels worse to take a decision with less knowledge." While defendants and their attorneys regard bluffing as fundamentally unfair, prosecutors seem to regard bluffing as an integral part of the "gamesmanship" which accompanies plea bargaining in most jurisdictions.⁴² It is possible, however, the deliberate withholding of information and the resulting misinterpretation of the state's ability to secure a conviction is tantamount to "deceptive sales practices" which force the accused into giving up their rights.⁴³

It must be kept in mind that "central to bluffing is the notion of a weak case," and that "[t]he majority of prosecutors are willing to do a certain amount of bluffing . . . *when the state's case has fallen apart*." ⁴⁴ As a result, some defense attorneys argue that bluffing about the evidence has the potential to lead to the conviction of innocent defendants. In a case in which her client was charged with child abuse, Boston attorney Abby Smith did a considerable amount of investigation and found the charge to be unsupportable, even though the prosecutor claimed otherwise. After months of prosecutorial "bluffing" about the case, the

assistant district attorney begin to offer to negotiate as a result of the weakness of the evidence. Instead of dismissing the case entirely, the prosecutor offered Ms. Smith's client two years non-reporting probation in exchange for a guilty plea. Says attorney Smith:

I hit the ceiling.. . This, to me, was an example of a coercive offer. I said to the D.A., "You've put my client in an untenable position. The mother is a single parent with two children. You offer her the opportunity to get rid of the possibility of spending five years in prison and of losing her children for something that she says she didn't do. How is a person supposed to make that decision?! As a defendant?! As a mother?! As an innocent person?! As *what* ? If you think that she did it, then it's a serious crime, so prosecute. But if you have your doubts, don't offer two years non reporting probation. Dismiss the case.

Eventually, all charges were dropped.

In his attempts to show that prosecutorial bluffing does not "undermine . . . legal innocence," William McDonald argues that, although many prosecutors engage in bluffing when their cases fall apart, there is an ethical line which they draw for themselves in most cases. The prosecutors in his study believed that "a factually innocent defendant should [not] be allowed to slip through the . . . system," and they

did not regard bluffing in . . . cases as wrong provided that the bluff did not include withholding exculpatory evidence and (for many of them) provided that it did not require them to cross an imaginary line between legitimate puffery, posturing and gamesmanship, on the one hand; and outright lying, on the other. ⁴⁵

I would argue, however, that in terms of excessive inducements, the line between "gamesmanship" and "lying" is not as clear for the defendant as it apparently is for

the prosecution. The defendant bases her decision to plead guilty partially upon the strength of the state's case, and upon whether her attorney believes that she could win at trial. To the extent that prosecutors generally use puffery in cases in which, for them, the trial outcome is "uncertain" and "unfavorable," then prosecutorial bluffing is utilized to purposely misconstrue the state's ability to convict and, thereby, to pressure the accused into pleading guilty.

In speaking of prosecutorial discretion, I do not mean to imply that prosecutors always intentionally use their discretionary powers in a malicious manner, or to conjure up

the image of prosecutors out to get something from every defendant; exhibiting a remarkable disregard for false conviction; magnifying pressures to plead guilty in cases where the evidence is most dubious; and lying, bribing and filing fraudulent returns in order to convict defendants in cases that are effectively unconvictable.⁴⁶

The attorneys and judges with whom I spoke generally denied that the situation is as extreme as this assessment, although they admitted that some of these activities do occur with alarming frequency in many criminal court jurisdictions. What needs to be remembered is that the prosecutor wields a tremendous amount of power and has every opportunity to manipulate the terms of plea bargaining agreements in order to pressure defendants.

Defense Attorney Manipulation

For many people, the mere possibility that an accused person's own lawyer participates in plea bargain pressures is difficult to accept. In Chapter Four, we will discuss some of the motivations for defense attorney pressures but, before we can

do so, we must first investigate some of the ways that an advocate can encourage (to the point of pressure) defendants into accepting guilty pleas.

According to Professor Abraham Blumberg, "the defense attorney [actually] acts as a double agent, to get the defendant to plead guilty."⁴⁷ While none of the defense attorneys with whom I spoke admitted to having "rolled a client," several told stories of colleagues who "sell their clients down the river" by presenting the options in such a way that defendants believe that they have no choice but to plead guilty. From my observations and interviews, I noted at least three categories of ways that defense attorneys pressure their clients, each of which involves a degree of manipulation. In order to best understand the defense attorney's role as a "double agent," we need to examine each of these types of pressure in turn.

Situation Manipulation

There are many defense attorneys who attempt to manipulate their situation as a personal advisor to defendants. The access that defense attorneys have to defendants who are contemplating their criminal case disposition options allows for the unique opportunity to "lean" on the client. Instead of merely explaining the advantages and disadvantages of each course of action, and making sure that the decision to plead guilty or to opt for trial remains the defendant's, some attorneys yell or belittle or berate their clients into pleading guilty. Says one Boston attorney,

I go a long way to convince my client to plead guilty. I'll yell. I'll fight. I'll double team him by bringing in family and colleagues . . . I don't think that leaning on a client undermines his autonomy. A client who is locked up in jail for ten years out of a foolish, destructive desire to go to trial is not going to feel so autonomous.

A recently released film gives an accurate portrayal of the type of direct pressure scene that I observed while working in Manhattan this summer. A

defendant who was charged with armed robbery and aggravated assault and who was facing up to ten years in prison was offered a plea bargain of three to six. During a private conference, his public defense attorney broke the news of the prosecutor's offer and within moments expected the defendant's decision. As the defendant grappled with what in many ways must have been one of the most difficult decisions of his life--contest the state's accusations or plead guilty and receive a greatly reduced sentence-- his attorney jumped up abruptly and said in a forcefully condescending tone of voice (something to the effect of): "Look, let me put it to you this way. You have a kid. If you take the plea, you can walk your kid to elementary school. If you don't, you *may* be able to see him graduate from college. Think about it. " While the attorney in this story may have been doing his job--laying out the options--his manner of speaking and tone of voice gave the impression that he was much more concerned with getting the defendant to take the plea than with carefully explaining each course of action. There is reason to believe that, especially in cases with indigent defendants who are being represented by overworked public attorneys, this type of pressure occurs all of the time.

An interesting turnabout can occur if, instead of directly pressuring or threatening the defendant, the defense attorney manipulates his situation by doing nothing for or saying nothing to his client. From the bench where I was invited to sit with a Manhattan judge, I witnessed a defendant who was pro se petitioning for a new attorney. He argued that his lawyer would not return his phone calls or talk to him about his options. Though the public defender denied the allegations, the defendant complained bitterly, and asserted that he wanted a new lawyer "because this man won't talk to me." He said "I don't want to plead guilty" but "I don't want this man to be my attorney in a trial." Compounding the already intense pressures to enter a guilty plea, his motion was denied.

Information Manipulation

Perhaps even more frequent is a type of pressure which results from the manipulation of the information that is available to the accused. A defense attorney who is supposed to be counselling her client as to the extent of the charges, the estimated sentence, the relative strength of the state's case, and the chances of acquittal may decide not to tell a defendant facts about his case which would increase the prospect that he may opt to go to trial. An attorney from Utah, with whom I spoke by telephone, noted that one of the most manipulative ways that attorneys in his office pressure clients to plead guilty is by omitting information about the prosecution's tendency to overcharge and the particular judges' trends in sentencing. A defendant who is charged with five counts of a crime, for example, and is offered the option to plead guilty to two of them has nothing to lose by going to trial if the judge would impose roughly the same sentence in either case. "A defender might tell his client that at trial he'd receive three years for each indictment," the attorney explained. "What he *won't* say is that the judge will most likely make the sentences run *concurrently*," and that the sentence would be from three to six years regardless of the form of case disposition.

Defense attorneys can also manipulate the information that defendants receive by giving skewed insight into the relative strength of the state's case and the prospect of the defendant's chances of winning at trial. According to Professor Abraham Blumberg,

lawyers frequently claim to have inside knowledge in connection with information in the hands of the district attorneys, police or probation officials or to have access to these functionaries. Factually, they often do, and need only to exaggerate the nature of their relationships [with other court officials] to obtain the desired effective impression upon the client.⁴⁸

If an attorney asserts that the state's evidence is very strong or that the defense has been able to marshal very little evidence of its own, a defendant can be "persuaded" to plead guilty and to hope for leniency. If the defense attorney applies information manipulation, the accused usually believes that he has no other choice.

System Manipulation

Finally, defense attorneys can find ways to manipulate the court system for plea bargaining purposes. By asking judges for a series of adjournments on a single case, for example, an attorney can increase the length of a defendant's pre-trial detention--a tactic which can effectively wear a defendant down and stifle his desire to fight the system. In a recent interview, acting Manhattan Supreme Court Justice Patricia Williams recounted the story of an attorney who kept asking her for adjournments and delaying the case. His client, who was out on bail, had to take a day off from work and come into the court every time his case was recalled, which was at least twice a month. After four months, the defendant came to court ready to enter a guilty plea because, as much as he wanted to go to trial, his attorney claimed not to be ready, and he "couldn't afford to keep losing jobs." In what she considered to be an act of justice, Justice Williams dismissed the case.

Unfortunately, attorneys who manipulate the situation, or the information, or the court system are not as easy to dismiss, or to disregard. "In his role as a double agent, the criminal lawyer performs an extremely vital and delicate mission . . . There is no other person more strategically located . . . [or] more ideally suited"⁴⁹ to pressuring defendants into accepting guilty pleas. There are some attorneys who make it their business to search for ways to settle every case, and who pressure every client into incriminating himself. In The Best Defense, Professor Alan Dershowitz comments: "They may look like defense attorneys.

They may talk like defense attorneys. They may even have defendants as clients. But they are really prosecutors at heart." 50

Because of considerations which we will explore in the next chapter, many judges, prosecutors and defense attorneys would much rather plea bargain than go to trial, and several of them make their preferences very clear to the accused. These court participants, who themselves comprise the criminal justice system, have what is arguably unlimited access to both the means of inducing guilty pleas and the individuals who are faced with the decision as to whether or not to waive their rights. Thus, through sentence differentials, bail considerations, direct intimidation, court packing, overcharging, bluffing and manipulation, court administrators work their wills and exert their influences over defendants' decisions. Says Miami attorney Joel Hirschhorn: "The system is clearly susceptible to abuse, and there is no question that abuses have the tendency to pressure a significant number of people." We will examine the possible reasons for these pressures in Chapter Four.

CHAPTER FOUR

"HIDDEN AGENDA": *EXAMINING INTENT*

Some observers have described the criminal justice system as a sticky legal and quasi-legal spider web Decisions made by the system in matters dealing with the accused are likely to be weighted down by [a] hidden agenda, which seeks to resolve a case in a decision of guilt for the defendant.

T. Moran, Discretion and the Criminal Justice Process

If it can be argued that court officials in various jurisdictions sometimes act in a manner that pressures criminal defendants, and that the types of pressures that were identified in the previous chapter actually do occur, then it becomes necessary to examine the motivations ("hidden agendas," if you will) which arguably underlie these attempts to get the accused to waive their constitutional rights. Some legal theorists assert that the court actors who actively engage in plea bargaining processes "make decisions that please them personally," and purposely pressure defendants in order to serve their own vested interests.¹ Others argue that much of the pressure in the plea bargaining process "represents rational attempts to achieve worthy goals."² This chapter seeks to explore and to evaluate some of the various reasons that state and court officials often go to great lengths to pressure the accused into giving up their constitutional rights within the context of plea bargaining. It is important to note that the focus here is not necessarily on what accounts for plea bargaining in general, but what accounts for plea bargaining *pressures* (even though some of these factors may be one in the same). Our final analysis is inextricably linked to an examination not only of the means by which

guilty pleas are generally obtained, but also of the ends for which pressure is generally applied. We must endeavor to identify "the motivation of individual decision makers exercising delegated authority" both as support for the assertion that the process is pressure-laden (Chapter Two), and as a premise for the argument that the pressures themselves are unacceptably coercive (Chapters Five and Six).³

Before launching into a full-scale investigation of the major reasons for pressuring defendants into pleading guilty (which are subsequently analyzed in terms of systemic motivations, external motivations, and individual motivations), we must first briefly address two obvious difficulties of the task before us. One is best summarized by Chief Justice Earl Warren who comments in United States v. O'Brien 391 U.S. 367 (1968) that "inquiries into . . . motives or purposes are a hazardous matter," and that "the stakes are sufficiently high for us to eschew guesswork."⁴ We may never know exactly why some judges make threats, some prosecutors overcharge and bluff about the strength of their cases, and some defense attorneys manipulate the information that defendants base their plea bargaining decisions upon. Nevertheless, the type of "guesswork" that we are engaged in in this chapter is supported by concrete data, factual observations, and personal interviews--all of which suggest that those professionals who are pressuring the accused are doing so for specific reasons. Even though we may not be able to identify with any certainty the intentions of various members of the criminal justice community, we can attempt to derive motivation by looking at the goals which are achieved and the advantages which are gained from the state's use of its coercive power.

Likewise, it is important to note that, however difficult assessing motivations may be, identifying motive is indeed much of the business of criminal law and much of the function of judicial courts. When, for example, "a defendant alleges that executive, administrative, or judicial action has penalized him for

asserting a constitutional right," the court before which his claim is made is called upon to "engage in a traditional fact finding inquiry designed to ascertain the decision maker's intent." ⁵ In much the same way, it is possible to inquire about and to identify the motivations of court administrators who are involved in plea bargaining processes when *their* actions appear to burden the exercise of the constitutional rights of the accused.

It is clear that, in this instance, an examination of the motivations of court actors in pressuring defendants presumes intent. In other words, by asserting that there are identifiable reasons for the pressures, this thesis assumes that those who are exerting pressure are purposely doing so in order to achieve the desired result. The second difficulty that needs to be addressed, then, is the assertion that the pressure which defendants feel should not be interpreted as an intentionally imposed means to a desired end, but rather as an unfortunate result of a mutually advantageous plea agreement. Several of the judges with whom I spoke argued, for example, that they do not *intend* to place pressure upon defendants at all. The differential sentences are imposed because defendants who plead guilty show "an indication of remorse," and not because the judges wish to achieve some ultimate goal by coercing pleas. The significance of this argument at this juncture lies in its narrowly construed definition of the term "intent." We must keep in mind that, as Federal law clerk Howard Abrams argues:

"Intent" denotes two distinct concepts. In the first sense ("subjective intent"), it encompasses human desires and goals, and refers to a mental state of being. . . . Subjective intent is independent of all external reality, except insofar as one attempts to effectuate one's desires. . . . Objective intent, [on the other hand], refers to the obvious and inevitable consequences of any human action. ⁶

In this sense, "intent includes those consequences which a) represent the very purpose for which an act is done," and "b) are known to be substantially certain to result (regardless of desire)."⁷ To the extent that intent is often only used to refer to subjective goals rather than to "substantially certain result[s]," it is argued that one cannot *intend* to achieve something unless one acts *for that purpose*. Since pressuring defendants is not necessarily a judge's goal, the argument goes, then there is neither intent nor actual motivation. A definition of intent that also encompasses the obvious outcome of an action, however, satisfactorily overcomes this objection to the search for the reasons which underlie plea bargaining pressure. The judge who methodically imposes sentence differentials which have the *effect* of pressuring defendants *intends* to exert pressure in the objective sense whether or not to do so is her ultimate goal.

The difficulties of identifying motivation and establishing intent aside, we can now turn our attention to assessing the objectives which are intentionally sought by court actors and are ultimately achieved by pressuring defendants into giving up their constitutional rights. For the purposes of clarity, it is necessary to divide the reasons for pressuring the accused into three general categories. By "systemic motivations," I mean those reasons that are primarily related to the actual workings of the criminal justice system itself. Whether the pressure to enter a guilty plea stems from the historical evolution of the various criminal justice processes in the United States, from the administrative crises that characterize the present system, or from the working relationships and legal culture of the criminal justice community, this group of motivations is categorized because they stem from the internal processes of the criminal justice system. "External motivations," by contrast, are primarily the influences of the larger society upon court actors who (in turn) exercise their power over individual defendants. The intersection and interaction of the criminal justice system and American society is largely a political phenomenon

and manifests itself in public sentiment and legislative regulation. Often it is in response to the external political climate that criminal justice administrators place pressure upon the accused. "Individual motivations" are the personal beliefs and individual performances of those who participate in the criminal justice process, and are by far the most difficult to accurately assess. These factors are in many cases specific to individual prosecutors, judges and defense attorneys--if not to each group of professionals as a whole. Examining the reasons for plea bargaining pressures in terms of these categorizations may help us conceptualize the administrative and personal stakes which are often involved in guilty plea negotiations.

Systemic Motivations

[S]tudies . . . have shown that factors fostering plea bargaining are not confined to a few unskilled lawyers, overworked prosecutors, or uncaring judges, but are a *part and parcel of the structure of the criminal court system itself*.⁸

The "Due Process Revolution"

Many legal theorists who have written on the subject of plea bargaining look to historical changes within the criminal justice system as a major rationale for the "mounting pressure for self-incrimination" that characterizes the plea bargaining process today.⁹ One such historical catalyst is the "due process revolution" of the 1960s and 1970s, during which the Supreme Court sought fit to grant a number of procedural protections to criminal defendants.¹⁰ According to one prosecuting attorney, a primary motivation for finding ways to secure guilty pleas has been that "Supreme Court decisions have given defense attorneys an excellent shot at beating us."¹¹ Certainly, before the Court's decisions in cases such as North Carolina v.

Pearce (1969), Brady v. United States (1970), Santobello v. New York (1971), and Bordenkircher v. Hayes (1978), defendants had very little chance of prevailing against the state--trial or no trial-- so there was little need to pressure them into pleading guilty. Indeed, most defendants would either go to trial, without an attorney or procedural protections, or plead guilty without any encouragement whatsoever.

The "due process revolution" finally gave defendants the means and the opportunity to claim their right to make the prosecution prove their guilt before a jury of their peers. It gave them, among other things, an attorney in all criminal proceedings, meaningful protection against forced confessions and self incrimination, and the right to appeal a jury's verdict. It also made state actors accountable for their actions in apprehending a defendant by providing for the exclusion of evidence or the dismissal of the charges in instances of abuse. In short, defendants were given an arsenal with which to fight the state's accusations, and ultimately an increased chance of being acquitted.

As a direct result of the strengthening of a defendant's power vis-a-vis the state, prosecutors and other state officials developed ways to "encourage" defendants to negotiate and to bargain away their newly granted rights. As the risk of losing increased, prosecutors sought to minimize the risk of having to fight at all. Says Paul Shechtman of the Manhattan District Attorney's Office, "we offer a concession in plea negotiations because we are bargaining away the risks that we may lose at trial."

The cause and effect relationship between increased due process protections and plea bargaining pressures is identified by Professors Oaks and Lehman in their study of the new criminal code of procedure which went into effect in Chicago in 1964.

Oaks and Lehman anticipated that defense attorneys would respond to the increased chances of success . . . by taking more cases to trial. They found the reverse instead. The number of guilty pleas *increased* The critical response to procedural developments, the authors concluded was the reaction of prosecutors, not that of defense attorneys. With a declining prospect of winning at trial, prosecutors found additional incentive to bargain for pleas of guilty.¹²

As ironic as it seems, the more protection that defendants were given against the government, the more vulnerable they became to the state's relentless attempts at prosecution. Professors Oaks and Lehman "wondered whether the due process revolution was yielding the antithesis of its objective, and whether procedural reforms were [actually] resulting in the *conviction* of a greater number of defendants."¹³ Whether or not defendants who received procedural protections during the due process revolution were pleading guilty as a direct response to increased state inducement has not been conclusively determined. Nevertheless, it is clear that, as Albert Alschuler asserts, "a major effect of the 'due process revolution' was to augment the pressures for plea negotiation."¹⁴

The Modern Trial

The "due process revolution" is the source of another frequently mentioned systemic motivation for plea bargaining pressure--the costliness and inefficiency of the present trial process. There was once a time when a defendant's right to a trial by a jury of his peers could occur relatively quickly and easily, and without much cost to the state. In his study of patterns of case disposition in Alameda County, California from 1880 until 1980, Lawrence M. Friedman describes the typical trial process of the late nineteenth century as "cut-and-dried--and very short, perhaps a half an hour at most."¹⁵ In contrast to present-day trials, before the turn of the century,

a hastily selected jury [often] heard case after case. The complaining witness told his story; sometimes there was another witness or two; sometimes the defendant brought in witnesses, or made a statement; arguments were made; the jury was charged, retired, voted and returned; [and] the court went immediately into the next case.. . . 16

It is important to note that "the rapid trials of the past plainly lacked safeguards that we consider essential today."¹⁷ While the brief, amateurish and informal nature of the classical trial undoubtedly led to travesties of justice in many cases, it was at the very least a process which could be afforded to defendants and which was not so costly to the state as to necessitate selective utilization. At present, a trial can as much as two weeks take up to a seven days to complete and often requires increased state expenditures to cover the overtime salaries of court personnel, witness transportation and compensation, and jury accommodations if necessary. Unfortunately, the adversarial trial--"a tense, dramatic, knockdown and drag-out battle of lawyers"--costs.¹⁸ And it is a price that most criminal justice jurisdictions are unwilling (and unable) to pay. Professor Alschuler summarizes the trial-expense problem and the resulting motivation for pressuring defendants into giving up the right to trial:

[O]ur system of resolving criminal cases has now become absurd both in the complexity of its trial processes and the summary manner in which it avoids trial in the great majority of cases. For all the praise lavished upon the American jury trial, this fact-finding mechanism has become so cumbersome and expensive that our society refuses to provide it. Rather than reconsider our overly elaborate trial procedures, we press most criminal defendants to forego even the more expeditious form of trial that defendants were once afforded as a matter of right. 19

The Crisis

As we have seen, historical factors like the due process revolution are by no means unrelated to the present-day realities of criminal adjudication in most major metropolitan areas. Partly as a result of history, the criminal justice systems of the United States are terribly understaffed and overworked. Systemic developments coupled with huge increases in the sheer numbers of cases that are being prosecuted have resulted in what can only be described as "an administrative crises of major proportions."²⁰ The process of having to dispose of too many cases with too few resources is cited as the primary reason why most courtroom professionals feel obligated to pressure defendants into pleading guilty. Considering the current administrative crises in our courts, it is suggested that there may be pressure to enter guilty pleas because the maintenance of the system simply requires it.

In a recent report, the New York State Judicial Commission on Minorities argued that a lack of resources and an increase in case load has contributed to the phenomenon of "assembly line justice."

The time spent in obtaining the disposition of a case in one of the [lower] courts may be exceedingly brief. Thus, after enduring deplorable facilities and discourteous and dehumanizing treatment, the [defendant's] "day in court" may amount to no more than 4-5 minutes of the court's attention.²¹

Most of this "exceedingly brief" time in many cases is spent trying to negotiate a deal--to convince defendants to relinquish their rights--instead of discussing the merits of the case. The system must induce defendants to plead guilty in this brief time, some argue, so that it will not have to spend more time--in terms of trial--in the future. Says Joel Hirschhorn, "In many cases, I would bet major deals are struck in less than five minutes. Is that fair?" Maybe not, but as many of Mr.

Hirschhorn's colleagues suggested, under the current administrative crisis--which has become more the national norm than the regional exception -- it is deemed to be *necessary* .

In many cities, the criminal case load has doubled within the past decade, while the size of the criminal bench has remained constant... Only the guilty-plea system has enabled courts to process their case loads with seriously inadequate resources. The invisible hand of Adam Smith is at work. Growing concessions to guilty-plea defendants have almost matched the growing need to avoid the burdensome business of trying cases. ²²

The Culture

Thus far, we have looked at systemic motivations for pressuring defendants to plead guilty which stem from an apparent need to minimize the number of trials due to either historical procedural developments or current administrative deficiencies. Until Professor Milton Heumann's study in 1977, it was assumed by many legal theorists that avoiding the economic expense and procedural risks of going to trial were among the only reasons for actively encouraging defendants to plead guilty. Professor Heumann concluded, after interviewing a number of participants in several criminal justice jurisdictions, that plea bargaining was not solely a function of case pressure. In many instances, he found that adaptation to the criminal court environment and to the attitudes of experienced court actors provided a motivation to actively participate in securing guilty pleas, even in those criminal justice systems where there were relatively few cases and more than adequate resources. ²³

Like Professor Heumann's research, my interviews and observations seem to suggest that in the criminal court environment there is an administrative ethic--a "legal culture" --which encourages and rewards plea bargaining.²⁴ Author Alan Blumberg uses the phrase "court organization" to describe both these values of the

court community and the willingness of some actors to pressure guilty pleas in order to maintain them. He asserts that, in the attempt to account for the actions of criminal justice administrators,

[l]argely overlooked is the variable of the court organization itself, which possesses a thrust, purpose and direction of its own. It is grounded in pragmatic values, bureaucratic priorities and administrative instruments. These exalt maximum production and the particularistic career designs of organizational incumbents, whose occupational and career commitments tend to generate a set of priorities. These priorities exert a higher claim than the stated ideological goals of "due process of law," and are often inconsistent with them.
25

Indeed, prioritized "court organization" values, which provide an impetus to pressure guilty pleas, are prevalent specifically in the criminal justice systems of Miami and Manhattan. In these jurisdictions, I observed that court actors often interacted with each other and with defendants in such a manner as to uphold three basic tenets of administration: 1) efficiency, 2) conformity, and 3) networking. It is important to note that, in themselves, these principles are not antagonistic to the interests of justice. What may be a problem, however, is the extent to which the achievement of these goals causes judges, prosecutors and defense attorneys to pressure defendants into pleading guilty. As will become clear momentarily, securing guilty pleas is a primary way of both maintaining the pervading culture of "courtroom organization" which is embodied by these three tenets, and of ultimately getting one's job done.

The quest for administrative efficiency manifests itself in nearly every process of criminal adjudication from arrest to sentencing. Although criminal justice administrators are sometimes inclined to offer the rationalization that "justice delayed is justice denied," the true goal of a system which adheres to the efficiency ethic is to process as many cases in as little time as possible. Plea bargaining is the

most efficient way to dispose of criminal cases, and if efficiency is a goal of a justice administration, its officials may be inclined to pressure the accused into pleading guilty in order to achieve it. According to Justice Richard Andrias, "there's pressure to be efficient . . . but not on any individual case. You just know that you need to get cases resolved." To be sure, the court organization ethic teaches court actors that "disposing of cases is a valued practice, [and] that plea bargaining provides a means of efficiently moving the business, while at the same time minimizing . . . expenditures."²⁶

To increase efficiency, some criminal justice administrations have instituted subtle systems of rewards and sanctions for criminal court actors who consistently "clear court calendars." According to Professor Heumann,

[t]he rewards that flow from most cases being plea bargained, and the potential sanctions related to trials, contribute to the favorable posture toward plea bargaining evidenced by most judges. Furthermore, . . . judicial behavior with regard to facilitating (coercing) plea bargains can [sometimes] be accounted for in terms of rewards and sanctions felt by the judge.²⁷

Prosecutors, too, are sometimes motivated by their role as court administrators and by their interest in processing cases. As T. Kenneth Moran asserts in Discretion and the Criminal Justice Process, "a prosecutor is foremost an administrator," and as such "he has to be concerned with the the flow of cases that come before him." Although "being efficient may not be the best means for ensuring that justice is being done for the state and for the accused," the court organization ethic holds that the more efficient a judge or prosecutor is, "the better he is doing his job." ²⁸

An air of conformity is also a part of the court organization culture which may affect criminal case disposition. In many criminal justice systems, especially

those in which efficiency is valued and resources are scarce, plea bargaining is predominant, and there is a "strict code of conduct" regarding courtroom behavior which deviates from the norm.²⁹ Lawyers who actively seek trial resolutions by filing motions and requesting hearings despite "reasonable" plea offers are thought to be "swimming against the tide," are perceived as "making trouble," and are sometimes ostracized by the other court professionals. As Boston attorney Abbe Smith disclosed, "believe me, if you don't give a little, [the other court actors] won't do anything to make your life any easier."

Ironically enough, it is sometimes important in an adversarial criminal court environment not to "make waves" so to speak, and not to follow the initial instinct to take every case to trial. Newcomers are taught to conform to the predominant "reality" of the criminal court system and its bureaucratic obsession, and soon "learn that compelling reasons to negotiate cases," and to pressure defendants if need be, "are a part of this reality."³⁰ Within a system that encourages administrative court organization and that "discourages, under risk of penalty, adversarial motions and trials,"³¹ some court actors pressure defendants into plea bargaining partly out of an unwillingness to pay the price for their lack of conformity to the prevailing bureaucratic practices.

The administrative court organization ethic, like the workings of the criminal justice system itself, depends largely upon the interaction of the various court actors. We must keep in mind that "criminal courts are operated by a group of actors who are tied together by a variety of interdependencies and who share a common work place."³² Judges, prosecutors and defense attorneys within the criminal justice system do not act independently of one another, but often "give consideration to each other, to their opposing counsel and to the judge when preparing cases." Arguably in the spirit of the age-old adage that it is "possible to catch more flies with honey than with vinegar," criminal lawyers will often "try to

maintain an air of friendship and comradeship, even when they are on opposing sides of the issue."³³ To this extent, *negotiations* (as opposed to trials) are an important means of resolving cases. Rather than engage in adversarial "combat" and risk jeopardizing an amicable work-group relationship, some attorneys will find ways to induce defendants into entering into a guilty plea settlement. After all,

[a]ccused persons come and go in the court system schema, but the structure and its occupational incumbents remain to carry on their respective career, occupational and organizational enterprises. The individual stridencies, tensions, and conflicts a given accused person's case may present to all the participants are overcome, because the formal and informal relations of all the groups in the court setting require it. ³⁴

While amicable work relationships are and should be a part of any work environment, what is slightly troubling in the case of plea bargaining is the potential for defendants to be pressured into taking a plea because the "work group" participants fear jeopardizing continued interactions. If a defendant's rights are sometimes being compromised because court participants believe that "the probability of future relations must be maintained at all costs," then the work group situation in the criminal courts is highly suspect.³⁵

Two of the Miami attorneys with whom I spoke seemed to believe that in court interactions there is potential for working relationships and networks to impede the "proper" functioning of business. This they found to be the case especially during sessions in which a prosecutor and a public defense attorney are negotiating a number of cases at the one sitting. What occasionally happens, they commented, is something akin to political logrolling--"horsetrading: give me a break on this case and I'll do the same on that one."³⁶ "If I am a public defender," says Miami attorney H.T. Smith, "the prosecutor has to deal with me every day. If I've been reasonable, he understands when I say 'Look, I've got to have this one.'" It is because of this constant contact and networking relationship with prosecutors

that public defenders are seen to have an advantage over private attorneys who only have one or two cases and who thus have less bargaining leverage. "The public defender is often in a better position than we are to negotiate," says one private attorney, "because he's got this attitude, like, you give me this one; I'll give you that one."

Some attorneys argue that developing a "network" within the court system helps their clients in the long run in the sense that prosecutors and judges are sometimes willing to give "bargain basement" deals to attorneys with whom they have working relationships. While this may be the case, Alan Dershowitz asserts that the highest priority for some attorneys is actually their own networking relationships and the resulting career advancements.

No defendant should ever rely on the advice of a lawyer with a hidden agenda. The agenda of a "prosecutor in a defense attorney's clothing" generally includes getting the best possible deal for the client [who wants one], but it may also include a desire to remain in the good graces with the current prosecutor, even at the expense of a particular client.³⁷

As a result of the desire for continued work relationships within a theoretically adversarial environment, attorneys and judges may find themselves pressuring defendants to plead guilty.

External Motivations

It is possible that the sole external motivation for pressure within the criminal justice system is, of course, American politics. Like all other democratic social institutions, most criminal justice systems are responsive to the political climate of the society in which they operate. To the extent that the American

criminal justice system is "an arm of the government" which is responsible for controlling social behavior, it is particularly influenced by public opinion, social sentiment and legislative pronouncement.³⁸ In order to thoroughly examine politics as an external motivation for pressuring the accused to relinquish their rights, we must first understand the political dynamics and ramifications of dealing with crime. Many of the legislative and institutional responses to crime are directly influenced by public sentiment. In the past decade, for example, when there was an epidemic of drug-related criminal activity, the government was called upon to respond to the tremendous "public hue and cry about 'rising crime rates,' the need for greater 'police protection,' and specifically calls for programs to prevent 'street crimes'."³⁹ The mass media played a "subtle" and often undetectable role in fomenting and perpetuating the public outcry, since it was through their portrayals of certain segments of the population that most Americans gained insight into the nation's "crime problem." As we will soon see, the media-induced public attitude toward crime influences the criminal justice administrations of various cities and ultimately creates a political need for pressure to plea bargain.

The claim that one is "tough on crime" becomes a valuable political tool once the American public becomes enraged about criminal activity. Often, as a direct result of rising crime rates and public outcry, elected legislators will seek to enact statutes that restrict judicial discretion and mandate specific minimum sentences for certain offenses. A new government goal for prosecuting accused criminals is born: to put as many convicted criminals in jail for as long as possible. In the 1980s, an era of "get tough" conservatism, "investment in criminal justice rose sharply and legislative attention creating new crimes or making penalties harsher increased."⁴⁰ Ironically, it is to achieve the political end of convicting more criminals that prosecutors sometimes pressure defendants into a plea bargain.

As "a political figure in his own right,"⁴¹ a prosecutor's career depends upon his ability to convict criminals, and there is no more certain way of assuring conviction than by insuring that defendants enter guilty pleas. "Conviction then becomes a primary concern of the prosecution," asserts T. Kenneth Moran, and "this attitude of obtaining a conviction *places the rights of the accused second best to its prosecution effort*."⁴² Indeed, "the political value of a high conviction rate [provides] strong inducements for prosecutors to enter plea agreements," and is one of the most important motivations for all of the elected court officials who attempt to get defendants to plea guilty.⁴³

Along with a high conviction rate and increased popularity, in many jurisdictions, comes more funding for one's office or department. Yale Freeman comments:

Statistics. That's what it's all about. How do you get funding? Why does a prosecutor's office file some of the mist garbage cases? They know [the cases] are going to die in the end. Statistics. Funding. I get more money if I can prove to the legislature that have 1,000 cases instead of 100.

Again, the only way to process 1,000 cases in this time of political pressure and administrative need is, of course, to plea bargain.

We must keep in mind that public sentiment and the political process play significant roles in influencing the internal workings of the criminal justice system. External motivations to pressure defendants into plea bargaining are inherent in our political system and in our society's attempts to balance criminal prosecution on the one hand, with individual rights on the other. It is important to note that while "the public may call for stronger measures against criminals by the justice system, . . . what [it] does not seem to realize is that stronger measures against criminals also means that the system will have greater power over them."⁴⁴ And to the extent that

"any citizen can become an accused," greater power over *them* necessarily means greater power over *us* .

Individual Motivations

This final category of motivations comprises all of the personal motives that court actors sometimes have for wanting to resolve cases by plea bargaining and for acting upon that desire. It is possible that "[t]he people who run the criminal justice process and the decisions that they make are more likely to serve their interest rather than the system's clients."⁴⁵ Within a social institution of such tremendous power and influence, statutorial and ideological concepts have the potential to be manipulated by individuals for personal gain. And though "people can justify their [actions] in the name of the collective good," they may actually be attempting to "disguis[e] a vested interest."⁴⁶ Before we can effectively analyze plea bargaining, we must attempt to identify the personal hidden agendas of various court professionals.

Certainly, an incentive of the first order is the fact that through plea bargaining court actors save a tremendous amount of time and effort. "Trying cases is hard work which prosecutors and defense counsel try to minimize to some extent."⁴⁷ The average defense attorney, for example, would have to engage in investigations, question witnesses, gather evidence and coach her client in preparation for a trial. All of these tasks are virtually eliminated by the acceptance of a guilty plea. Likewise, according to T. Kenneth Moran, "the prosecutor is relieved of the major responsibility of his office. Through plea bargaining he does not have to prove an accused party guilty." A district attorney save time and effort because he "does not have to concern himself with marshalling evidence and persuading juries."⁴⁸ Interestingly enough, judges (who are the least active

participants during the trial process) also find that plea bargaining requires less of them than does a jury trial disposition.

[P]lea bargaining saves the judge some time and effort and, overall, serves to make his job easier. There is no need to prepare for a trial, to write instructions for a jury, to rule on legal issues at stake in a case. Accepting a guilty plea and asking the defendant the checklist of questions on the voluntariness of his plea is a much simpler process. And when an agreed recommendation is part of the negotiated disposition, one of the most vexing problems for a judge--sentencing--is also removed.⁴⁹

As natural as the tendency to want to avoid extra work may seem, there is cause for a certain amount of concern when such a personal interest becomes a motivation to pressure defendants into giving up their rights. Says District Attorney Janet Reno, "I am haunted by what lazy lawyers might do in terms of pleading a client just because they do not want to go to trial--the client may be innocent, or may not necessarily be guilty of the charge."

To a certain extent, fear of going to trial is also a motivating factor to pressure pleas. One prominent attorney with whom I spoke noted the reluctance of many of the younger, less-experienced lawyers to take their cases to trial. He attributed some of this fear to his belief that most law schools do not prepare their graduates for actual litigation. "After graduation, we know all of the theories and terms and the way that a trial looks on paper," the attorney commented, "but we have no idea how to actually try a case." And in certain instances, those in which there is no real training program for newly hired public or private lawyers, the reluctance to take the life and well being of a defendant in one's own inexperienced hands makes some attorneys avoid at all costs the possibility of going to trial.

Some judges, too, fear trials because of the possibility of having their decisions reversed on appeal. "Understandably, judges dislike appellate reversal; it

is certainly not the most pleasurable of experiences to have a higher body produce a publicly available, written reversal of one's decisions."⁵⁰ Since cases that are plea bargained generally have fewer substantial appellate issues than those that are taken to trial, there is an incentive for judges who are "apprehensive about their reputations" to pressure defendants to give up their trial rights.⁵¹

Many court professionals hold personal beliefs which may also motivate plea bargaining pressures. I was frankly surprised at the faith that many of the court actors had in plea bargaining as a proper and just form of criminal case disposition. I noted that judges who were concerned about case load and actively involved in the plea process still asserted their ability to determine in a five minute allocution process if a plea has been entered voluntarily. Defense attorneys argued that there was nothing wrong with "bargaining the odds" of losing at trial as long as their client--with a resulting prison record and possibly violated rights--had (by their calculations) "won." Perhaps most surprising was the unanimous conviction of assistant district attorneys that, "only guilty people plead guilty." No matter how much pressure, how much threatening or overcharging, or how great the sentence differential, prosecutors like Manhattan Assistant District Attorney Hector Gonzalez, tend to believe, as he claimed, that "the guilty plead guilty ; the innocent go to trial."

The notion that plea bargaining is a fair and just means of criminal case disposition is sometimes a corollary to the belief that most "cases are simply not 'worthy' of trial."⁵² While it is understandable that there are some cases with few contestable legal issues--cases which may be resolved by some nontrial mode of criminal procedure--the implications of a determination of which cases are "worthy" and which are not is one of the greatest anathemas underlying the criminal justice process today. In speaking of the reasons for pressuring some defendants into pleading guilty, private defense attorney H.T. Smith asserts that in the current

system, "you are innocent, until you're indigent. . . . A lot of court personnel think that poor people and Black people are animals, and that taking their cases to trial is not worth the trouble."

It is interesting note that the biases that Mr. Smith mentioned surfaced in a subsequent interview with one Manhattan judge. In response to a question about the difference between white collar and street crimes, she commented: "most of the people we are dealing with here in these [street] courts are simply not habituated. Because you and I are middle class," she said to me, "we can predict that if 'I do wrong today, I will go to jail tomorrow.' For the most part, we are dealing with people who do not have these capabilities." Undoubtedly, the belief that only certain defendants are "worthy" and "capable" of exercising their rights is pervasive and, as Mr. Smith remarked, "so many Black people and poor people get forced into a plea because they don't believe (and reasonably so) that anybody gives a damn about them."

Personal gain is an obvious individual motivation for nearly all human actions, and plea bargaining is no exception. Private defense attorneys, of course, stand to make a substantial amount of money by "rolling" their clients. A private attorney in Miami divulged that in a recent white collar case, a lawyer told his client that he would either have to pay a *one million dollar* trial fee up front, or take the plea bargain being offered in the case and "cut his down side liability." The defendant "never thought that he was guilty," says the attorney relating the story, "he just couldn't afford to defend himself."

To the extent that some attorneys charge a flat fee for their services, and do not get paid any more or any less for the form of case disposition, it is advantageous to pressure clients to plea bargain. Although defendants may want to take their cases 'all the way to the Supreme Court,' in some instances "the criminal lawyer develops a vested interest of an entirely different nature in his client's case:

to limit its scope and duration rather than do battle."⁵³ There are even times when private attorneys fail to disclose pertinent information to their clients solely because to do so would jeopardize their fee. "I know of another attorney," my Miami confidant continued, "who took \$100,000 from a client to plead him guilty to a crime on which the statute of limitations had run out." Noting some of the things that his peers are apt to do and some of the pressures that they place upon clients just to increase their retainer, another Florida attorney shook his head sadly and commented, "some people will do anything to make a buck."

We, too, should be saddened by some of the motivations identified in this chapter, and the possibility that defendant's protections are being sacrificed because of them. We have yet, however, to make the specific allegation that plea bargaining pressures are coercive or that the interests identified herein are not enough to justify infringements upon individual rights. At long last, we shall turn to these arguments now.

CHAPTER FIVE
"FUNDAMENTAL EVIL":
ASSESSING COERCIVENESS

The fundamental evil of plea bargaining is the state's
improper use of its coercive power.

William F. McDonald

When asked to identify the point at which the pressures and inducements of the criminal justice system could be rightfully called "coercive," many of the judges, prosecutors and defense attorneys that I interviewed had difficulty giving a concrete response. Some answered with anecdotes describing their interpretation of the differences between allowable pressure and inexcusable coercion. Others drew diagrams and made calculations indicating that a theoretical line could be drawn between the two concepts. By far, the most realistic response was given by Justice Richard Andrias of the New York City Supreme Court. After a bit of thoughtful reflection, he simply asserted: "coercion is like pornography. It's hard to tell you what it is, but you always know it when you see it."

The extent to which the pressures and inducements of the criminal justice system actually operate as coercive forces is, like pornography, a much debated topic among legal scholars. Some theorists assert that plea bargaining pressures are merely inducements which in no way constrain an individual's freedom of choice. Others argue that plea bargains themselves burden the exercise of trial rights, and in doing so, coerce defendants into pleading guilty. In this chapter, we will attempt to assess the coerciveness of the government's plea bargaining pressures. Because "coercion" is an ambiguous term used to define a complex concept, we must examine and evaluate various definitions and theories of coercion, and apply them to

the current situation in our criminal courts. It is important to note at the outset that , for our purposes, coercion is to be viewed not as distinct from pressure but as a certain type of pressure which involves the manipulation of the will of the individual. By, first, identifying the major premises of coercion theory and, secondly, evaluating the most widely held perspectives of coercion, we can attempt to determine whether current plea bargaining practices coerce criminal defendants.

Premises

Most theoretical evaluations of coercion are premised by the notion that "coercion compromises or negates the *voluntariness* of an act," that is, "that we do involuntarily what we are coerced to do."¹ In Coercion, Professor Alan Wertheimer, labels assertions of involuntariness--e.g., "he made me do it"-- coercion claims, and argues that "the distinction between voluntary and involuntary actions is an essential feature of our moral, political, and legal discourse. "² In a broad sense, coercion itself is characterized by a presumption of involuntariness--a coerced act is one in which the agent is not "free from constraints imposed by other persons or social institutions."³ We must be aware when exploring definitions of coercion that the connection between coercion and involuntariness is itself an arguable assumption that is sometimes denied by theorists who believe that a definite distinction can be drawn between the two concepts.⁴ Nevertheless, most theories assume, and I believe rightly so, that an element of involuntariness--defined as social constraint--characterizes coerced actions.

It is important to note that a coerced or involuntary action, by most accounts, is not necessarily one over which an individual has no control. While theorist Michael Philips narrowly describes involuntary acts as those in which one's will is overborn,⁵ Professor Wertheimer identifies three different senses of

involuntariness. In one sense, the term "involuntary" can be applied to the *nonvolitional movements* of the body "such as twitches, seizures, spasms and reflex actions . . . which are autonomic and virtually divorced from a person's will."⁶ Involuntary can also be construed to apply to actions which are characterized by *defects of volition* resulting from some impairment of the will. Such internal conditions as insanity or retardation, or external pressures such as torture or intimidation can be said to be involuntary in the sense that one's will is literally overborne.⁷ The sense of involuntary which seems most useful for our purposes is that of *constrained volition*. In these instances, there is a rational choice among options, but this choice is not free from tremendous constraints which act to burden the will. An individual who, for example, is faced with the demand "your money or your life" at gunpoint, makes a rational determination about which to relinquish, all things considered.⁸ Handing over one's wallet under those circumstances would be an act of will, and yet few philosophers would argue that such an action should be considered voluntary. Instead, as theorist David Hoekema asserts, such an individual is the "victim of coercion" because "he can choose only between the alternatives of complying with the threat and risking the threatened penalty."⁹ We can say at this point, then, that coercion occurs when person (B) is constrained by another person (A) to do act (X) in such a manner that B's choice to do X is involuntary. While this definition is broad and itself insufficient to explain coercion, the following theories may help us come to a better understanding of the ambiguous phenomenon.

Threats/Offers Theory

In its decision in Brady v. United States 397 U.S. 742 (1970), the Supreme Court gives this interpretation of the conditions under which a guilty plea agreement is to be considered voluntary and, therefore, not coerced:

A plea of guilty entered by one fully aware of the direct consequences, including the actual value of any promises made by the court, prosecutor or his own counsel, must stand unless induced by threats, .., misrepresentation (including unfilled or unfillable promises), or perhaps by promises that are by their very nature improper as having no proper relationship to the prosecutor's business (e.g., bribes).

According to this traditional interpretation of coercion, a guilty plea is voluntary (when entered knowingly) "unless induced by threats" or improper promises. The threats/offers theory of coercion, as this perspective might be termed, turns on an analysis of situations based upon a categorization of the means of pressure. If person A *threatens* person B--proposes to worsen B's situation--unless B does action X, and as a result, B does X, then, according to this theory, A has coerced B. The gunman who demands that I choose between my money and my life, for example, *threatens* my well-being. If I hand over my money in response to the threat to my life, this argument goes, I have been coerced into giving up my savings. If, however, A *offers* B an opportunity (or choice) that B would not otherwise have had by proposing X, then A has merely augmented B's freedom by increasing the options available for B's selection. The person who offers to pay my college tuition if I give a speech at her next business association meeting, for example, does not coerce me into delivering an oration under this theory, but rather gives me the opportunity to finance my higher education.

Before we can assess the coerciveness of guilty plea negotiations from a threats/offers perspective, we must first evaluate the theory itself. Two of the major

tenets of the threats/offers theory of coercion are: 1) threats can be distinguished from offers, and 2) only the former coerce. As we analyze each of these principles in turn, it should become apparent that this theory does not allow for an adequate determination of which pressure situations are coercive and which are not. Although we will ultimately test plea bargaining by this traditional theory's standards, it is important to recognize and to understand its weaknesses.

If, as threats/offers theorists assert, an act is voluntary "unless induced by threats," it is important to determine when a proposal is threatening. Unfortunately, in that one man's threat is another man's offer, identifying a threatening (and potentially coercive) proposal and distinguishing it from an offer (tenet #1) is not always an easy task. Threats and offers are "relative terms" which "refer to a change in an agent's condition, a change from some stipulated starting point to a new condition that is better or worse, respectively, from the agent's point of view."¹⁰ It is important to note that, according to threats/offers theorists, a proposal to change B's condition--to do something for or to B if B does X--can be evaluated as a "threat" or an "offer" depending upon whether the proposal *better*s or *worsens* B's situation.

It follows, then, that in order to evaluate coercion from a threats/offers perspective "one must have a stipulated starting point or baseline from which to measure these changes in condition."¹¹ The primary weakness of the threats/offers theory is that the baseline is itself variable. In that B's baseline could be his condition prior to the proposal, or the condition that he is *entitled* to be in regardless of his actual condition, or any number of other vantage points (depending upon the analyst's theoretical preferences), A's proposal could be characterized by two different observers as *both* a threat *and* an offer.

Two of theorist Robert Nozick's hypothetical examples best illustrate the difficulty of distinguishing threats from offers with any certainty. In the first

example, a person (Q) is drowning in the ocean, and another person (P) comes along in a boat. If they both know that there is no other rescue in sight, and if P proposes to save Q only if the latter promises to pay the former \$10,000 within three days of getting ashore, "is P *offering* to take Q to shore if he makes the promise," Nozick asks, "or is he *threatening* to let Q drown if he does not make the promise?"¹² The second example asks us to suppose that a master beats his slave every morning, and that on a particular day, the master tells the slave that he will not beat him if he agrees to do act (A). Is this a threat or an offer?

A determination of threats and offers in each of these cases is dependant upon the baseline. If, Nozick argues, the baseline in the first scenario is a "normal course of events" in which people are expected to help others, then P is threatening Q; if it is not, then P is making an offer. Yet, "the normal course of events" in the slave scenario is a beating--which would make the master's proposal an offer-- even though, Nozick asserts, the "*moral* course of events" would make it a threat. As should be apparent, the distinction between threats and offers, which is the crux of the threats/offers theory of coercion, blurs when we consider the fact that "baselines do not come to us prelabeled. We must decide how a defendant's baseline is best understood, and no particular account of that baseline has an obvious claim to our assent."¹³ In that theorists "have thus far failed to identify any single baseline that adequately distinguishes . . . offers from threats for the purposes of coercion," we must question whether " 'coercion' can indeed be defined as the structuring of an agent's choices by means of threats and [offers]."¹⁴

Throughout the subsequent analysis of plea bargaining pressures, we must keep in mind that we cannot always make a clear distinction between threats and offers, nor can we assert with any certainty, as the second tenet of the threats/offers theory does, that only threats coerce. Professor Nozick advances the argument that "offers of inducement, incentives, rewards, bribes, consideration, remuneration,

recompense, [and] payment do not normally constitute threats," and "the person who accepts them is not normally coerced."¹⁵ The apparent basis for the alignment of coercion with threats (as opposed to offers) is the characterization of a threat as a proposal which stands to worsen an individual's situation. It can be successfully asserted, however, that the effective worsening of one's situation is not a necessary criteria for coercion. In other words, there are instances in which individuals who stand to benefit from a proposal (an offer) can be coerced into accepting its terms. Like Nozick's drowning man, a person can be so circumstanced as to be forced to accept a proposal—even one which may better her situation. If I cannot otherwise afford to go to college and will never be able to acquire the funds to finance my education, the conditional scholarship "offer" in my previous example could be a means by which to effectively constrain my will in such a way as to force me to perform the requested act. It is my contention that, depending upon the situation of the agent, it is possible for an "offer" to be coercive. Professor Wertheimer and Robert Nozick give two examples which I now use to further illustrate this point:

The Lecherous Millionaire. B's child will die unless she receives expensive surgery for which the state will not pay. A, a millionaire, proposes to pay for the surgery if B will agree to become his mistress.¹⁶

Q is a drug addict. P is Q's usual supplier of drugs, and today when he comes to Q he says that he will not sell them to Q, as he normally does, for \$20 dollars, but rather will give them to Q if and only if Q beats up a certain person.¹⁷

In both of these examples, the proposal is most likely an offer under the threats/offers theory, and yet it is arguably coercive. From these examples and others, I would argue that

there are many ways in which one person can manipulate the conditions of another's choice so that his social freedom is infringed upon, without threatening to worsen his condition if he fails to comply with certain demands.¹⁸

Not only is the threats/offers distinction blurred by a variable baseline, but the subsequent assertion that only threats coerce is undermined by manipulative "offers" which are couched in individual circumstances.

Despite the weaknesses of the threats/offers theory of coercion, we will now endeavor to apply the theory to plea bargaining pressures. The first step in evaluating plea bargaining from a threats/offers perspective is to determine a defendant's baseline. According to Tony Honoré, a writer for the Oxford Journal of Legal Studies, "the accused person's base line . . . embodies what [she] is in law *entitled* to expect."¹⁹ Our Constitution affords accused persons the right to "a speedy and public trial by an impartial jury." In the normal course of affairs, the no bargain state, defendants can choose to either take their cases to trial or to plead guilty. After this decision has been made, they can expect to be either acquitted by a jury, or convicted, by plea or trial, and to be sentenced on the merits of their infractions.

The proposal which serves to change the conditions of the defendant's baseline is either a judge's implication that she will give the defendant a markedly lower sentence or a prosecutor's assertion that he will decrease the charges--if the defendant pleads guilty. The threats/offers theory requires that we examine these proposals to determine, on the one hand, if they are operating as threats and are therefore potentially coercive, or on the other, if they can be construed as non-coercive offers which give the defendant benefits that he is otherwise not entitled to receive.

There are few aspects of the plea bargaining process which can be as threatening as a judge's active participation in the negotiations. In many cases, a magistrate may forcefully detail the defendant's options in such a manner as to convey that she intends to worsen the defendant's situation by giving a higher sentence unless he pleads guilty. "Obviously," Manhattan Supreme Court Justice Carol Berkman said in an interview, "the fact that you tell somebody they're going to get the maximum is something that we use here in state court to induce or influence--whatever word you want to use--defendants into pleading guilty." Under the threats/offers theory such 'inducements' operate as a threat and are, thus, coercive. It is interesting to note that a judge's mere participation in a plea settlement, whether sentences are discussed or not, may also be a coercive threat to the accused. It is possible that "the high potential for coercion" is a function of mere judicial authority and "inheres in the 'vastly unequal positions of the judge and the accused, one with the power to commit to prison and the other deeply concerned to avoid prison.'" ²⁰

Those who disagree with this assessment of judicial participation in plea bargaining may argue that judges rarely act in a way that blatantly threatens defendants, and that they hardly, if ever, propose to "punish" defendants for exercising their right to trial. In other words, judges generally present bargains as undue offers of leniency--*discounts* rather than mark-ups. Despite the fact that, according to Judge Andrias, "this a rationalization that we [judges] often use," the truth of the matter is, the method of case disposition often plays a role in the sentencing decision. "People know that if you go to trial you get high end of the sentencing guidelines," says Yale Freeman, "The system *punishes* you."

Even in instances in which judges are actually perceived to be giving more lenient sentences to pleaders (rather than harsher sentences to defendants who go to trial), the Supreme Court has found that such a sentence differential scheme is still

threatening in that it *burdens* a defendant's right to trial. In the case of United States v. Jackson, 390 U.S. 570 (1968), the Court was called upon to evaluate the constitutionality of the Federal Kidnapping Act, a statute which allowed only those defendants convicted by a jury to be executed. "By implication, execution was not permitted if conviction resulted from a guilty plea."²¹ Defendant Jackson was accused of violating this statute, yet refused to plead guilty, and was convicted. A United States district court held on appeal that the portion of the Federal Act which allowed for disparate sentences was unconstitutional because it discouraged a defendant from exercising his right to a trial. The Supreme Court upheld the decision primarily because the resulting sentence-differential placed "an impermissible burden upon the exercise of a constitutional right." Considering that a "burden" is "that with which one threatens a person,"²² the Court's holding in Jackson characterizes sentence differentials as threatening and, thus, inherently coercive. New York City Supreme Court Justice Carol Berkman comments:

I don't know whether our constitution in theory prohibits us from punishing people who exercise their rights, but really, it's like Humpty Dumpty. I can give him a benefit for pleading guilty but that's not punishing him for exercising his rights. But the bottom line is that if you go to trial you get more time. You may in some legalistic theory say you're not punishing them, but what does it feel like?

Although we have considered whether judicial participation and sentence differentials can be considered threatening from a threats/offers perspective, we have yet to determine whether a prosecutor's proposal to *lower* the charges is an "offer" or a "threat." Ardent supporters of the plea bargaining process assert that prosecutors are "offering" to exercise their right to determine the charges in a manner which benefits defendants. In evaluating this claim, it is important to remember that the court is entitled to set a convicted person's sentence in accordance with rules prescribed by the government, and that defendants have no right to be exempt from

trial by jury. Nevertheless, one cannot rightly call the prosecutor's guilty plea proposal an "offer" under the threats/offers theory without assuming that the plea bargain serves to better the defendant's situation. It is my contention that in many instances this is not necessarily the case.

The defendant's baseline entitlement is the right to trial by jury. We must remember when trying to determine whether the prosecutor's proposal is a threat or an offer that a jury trial is not inherently a worse option for the defendant than a plea bargain. It is possible that a defendant who takes his case to a jury may be acquitted, or that the judge may find mitigating circumstances for substantially decreasing the ultimate sentence--both of which are seemingly better consequences than if the defendant pleads guilty. What apparently makes the trial option worse for the defendant is the burden placed upon its exercise--the fact that going to trial may result in a greater penalty than the state agrees to impose if one pleads guilty. Viewed in this light, a prosecutor's "offer" of leniency (like a judge's) seems to threaten the defendant's right to trial in much the same manner as the legislative pronouncements in Jackson. Although a state may have the discretion to set the charge, conditioning a lower charge upon a defendant's agreement to waive her trial right may be no less burdensome--potentially coercive--than the millionaire's condition that, in order to save her child, the mother consent to having intimate relations with him.

It is also possible to construe a prosecutor's plea bargain "offer" as coercive in the sense that it amounts to the manipulation of the undoubtedly desperate situation of the accused. Most defendants' circumstances are such that they desire to avoid severe penalties such as excessive fines or incarceration for substantial amounts of time. Like the aforementioned drug addict, they are desperate for a way of decreasing the foreseeable harm, even if to do so means giving up significant protections from government exploitation. Although it may be argued that a criminal

defendant does not have a *right* to limited punishment any more than a drug addict has a right to illegal hallucinogens, both the prosecutor and the pusher seem to be taking "*unfair advantage* of the circumstances of [the individuals] to get them to choose against their wills and to perform actions that the [proposers] desire."²³ A prosecutor's plea bargaining "offer"--"an offer to a person so circumstanced that he cannot [reasonably] refuse it"--can be coercive, even from a threats/offers analytical perspective.²⁴

We must be aware that, as theorist Conrad Brunk comments, "the problem of coercion and social freedom is more complex than is suggested by a simple distinction between threats and offers."²⁵ Many of the people with whom I spoke agreed. Says Judge Berkman, "when a person is, let's say, faced with 12 to 25 years if convicted at trial and is offered 2 to 4, that is clearly coercive. If we're going to recognize reality. That is clearly coercive. The system is coercive." What is important, in my opinion, is not that a distinction can be drawn between threats and offers "for the purposes of distinguishing noncoercive proposals from coercive ones," but that both concepts be viewed as means of manipulating choice relative to individual situations.²⁶ In this sense, both threats and offers can place significant constraints upon individual freedom of choice, and both can be interpreted as potentially coercive.

Nature of the Act Theory

Unlike the threats/offers theory, nature-of-the-act coercion theory asserts that a proposal's coerciveness depends upon the *kind of act* that an apparently coerced individual is being constrained to perform. It is argued that in order for B to be coerced by A, act X (what B is being asked to do) must itself be undesirable to B. In other words, individuals can only be coerced into performing the actions that they

find undesirable, that they would not otherwise be inclined to perform, and that, according to Robert Dahl, "involve severe deprivation."²⁷ In his article entitled "'Freedom' and 'Coercion'--Virtue Words and Vice Words," Peter Westin puts forth a nature-of-the-act argument by asserting that the term "coercion" only extends to "willed actions" that individuals "would not otherwise have willed."²⁸ Westin looks to the life of Fredrick Douglass, a former African American slave and one of the greatest orators in American history, to illustrate his point:

Fredrick Douglass's master, believing that Douglass wishes to marry Clara and believing that Douglass will welcome the demand that he marry Clara, tells Douglass that he will shoot him on Monday if Douglass does not marry Clara on Sunday. Douglass, having changed his mind about wishing to marry Clara but not wishing to tell his master, marries her anyway for fear of being shot. We might perhaps say in that event that Douglass's master "forced" Douglass into marrying Clara, but we would not say that he coerced [him].²⁹

To the extent that nature-of-the-act theorists argue that "a person has been coerced only if he has done something against his will," plea bargaining pressures may be thought of as coercive only to innocent defendants who would not have otherwise desired to plead guilty.³⁰ Guilty individuals are not coerced according to nature-of-the-act theorists because they may have desired to plead guilty even without government intervention. In other words, for guilty defendants, there is nothing undesirable in the nature of the act being requested--a guilty plea-- therefore, inducements to plead guilty may not be coercive.

Indeed, a common objection to the assertion that plea bargaining is coercive is the belief that defendants actually *want* to plead guilty because it saves them the embarrassment of a public trial, legal fees, and a prolonged battle with the courts. While this may be the case, I take issue with the assertion that undesirableness is a prerequisite for coercion. The fact that I may have chosen to act in one way prior to

the proposal (i.e., the action itself is not undesirable) does not mean that my will is any less constrained by an imposition which *forces* me to act in that way. I may have every desire and intention, for example, to give money to a disadvantaged person who asks me for it when I am walking down the street. Yet, if the person who is soliciting my money pulls out a pistol and demands my wallet, I am just as coerced as I would be if to do so were an onerous task. According to theorist David Hoekema, in order to find that a proposal is coercive

the action which the coercer demands need not involve any deprivation at all. If a highwayman threatens to kill me unless I sing the national anthem, I am coerced to sing--even if singing, far from being a serious harm, is one of my greatest pleasures. . . . As long as I sing out of fear of being killed, I am coerced none the less. Coercion is usually employed as a way of getting people to perform acts they would rather not do; but this is not essential to coercion, nor need the coerced action involve any loss or harm.³¹

Like the singer, many defendants may actually desire to do the very act that they are pressured into doing. They may be coerced regardless, however, because they plead guilty out of fear of a greater sentence after trial. We must keep in mind when attempting to judge the coerciveness of a proposal, that the important issue may not be the nature of the act, but the severity of the threat that constrains one to do an act no matter how desirable. "The question is whether [the defendant's] *choice situation* is coercive"--an inquiry made in the next section--"and not whether the defendant's *will* has been impaired" in the sense that he is being forced to do something that he would rather not do.³²

Choice Situation Theory

A substantially different definition of coercion arises out of a focus upon the defendant's choice situation. Rather than categorizing as a "threat" or an "offer" the

kind of proposal which characterizes a coercive "agreement," or the *kind of act*, choice situation theorists are primarily concerned with evaluating the *kind of choice* an individual faces in a potentially coercive situation. This perspective offers, in my opinion, one of the most convincing defenses of the claim that plea bargaining processes are coercive. We will spend the remainder of this chapter identifying the major arguments of choice situation theory, and evaluating plea bargaining pressures in light of them.

Choice situation theorist Conrad Brunk characterizes a coercive situation--an imposition upon freedom of choice--as one in which "*a person is required by circumstances to perform an action as a means to the achievement of a desired end, and this means is less desirable than some other that will normally achieve the same end.*"³³ While this line of argument is confusing, an evaluation of coercion based upon an individual's choice situation may be broken down into two basic components. First, an individual must be "required by circumstance" to choose to do a particular act; and secondly, the new choice situation must be less desirable than the old. Brunk illustrates this "choice situation" interpretation of coercion with the example of a mother who "tells her son that he cannot play baseball with his friends until he has cleaned up his room." The action of cleaning the room in this case is a *required means* to the end of playing baseball, and a means which is undoubtedly "less desirable to Sonny than the normal means (e.g. cleaning dirt from his spikes)." That Sonny must now choose to clean his room in order to play ball, Brunk argues, "is an imposition on his freedom of choice, brought about by the manipulation of that choice by his mother," and as such, is coercive.³⁴ Sonny's situation meets (what we will call for the purpose of clarity) the "no choice" and "less desirable" requirements for coercion. In order to understand plea bargaining in terms of a defendant's choice situation, we must look at each of these criteria in turn.

According to philosopher Gerald Dworkin, coercion "requires that the victim . . . should have no alternative to submission."³⁵ In understanding the "no choice" prong of the choice situation theory, we must keep in mind that "'no choice' should not be taken literally."³⁶ More than an assertion that there is only one available option, "no choice" describes an instance in which, given the circumstances, there is only one rational alternative. The drowning swimmer, for example, arguably has no choice but to give in to the boater's demands. Likewise, the individual who is forced at gunpoint to choose between his money and his life and who has no hope of avoiding a decision, has but one rational alternative: to hand over his wallet. In this sense, it is possible to assert, as choice situation theorists do, that a coerced individual makes a rational choice, and yet has really has no choice at all. As Professor Hoekema comments, "a person who claims to have been coerced claims to have acted in the only *reasonable* way, not necessarily the only *possible* way."³⁷

In Bordenkircher v. Hayes 434 U.S. 357 (1978), the Supreme Court argues that plea bargaining is not coercive "so long as the accused is free to accept or reject the prosecution's offer." This interpretation of the defendant's choice situation seems to underestimate the extent to which a defendant is actually free to choose between going to trial and pleading guilty. "On the surface it appears that defendant's have a choice," one attorney commented, " but usually they don't . . . usually the penalty for going to trial is so great that they almost have to take the plea bargain." A defendant's choice situation is similar to that of the son's in Brunk's baseball example. If he wants to play ball, Sonny has no choice but to clean his room. In such a situation, Sonny will legitimately feel that he had been coerced into cleaning his room."³⁸ Similarly, the no choice situation of guilty plea negotiations makes many defendants, who plead guilty because they believe that it is the only way to receive a "fair" sentence, feel as though they have been coerced into giving

up their rights. Similarly, if the defendant wishes to receive a "fair" sentence, he is usually made to believe that he must plead guilty.

In that plea bargains are often arguably beneficial to defendants, the second criteria for coercion from a choice situation perspective--that a defendant's choice situation after the state's proposal is *less* preferable than situation before--is not easy to defend. It is commonly argued that defendants would prefer to have the opportunity to trade their guilty plea for a more lenient sentence. While this objection is difficult to overcome, I believe that the key to doing so lies in the distinction between a more desirable *consequence* and a more desirable *choice situation*. As we shall see momentarily, the argument can be made that the choice situation that a defendant is in after the plea bargain proposal is considerably less desirable than the one which results from the state's intervention.

At most arraignment proceedings, defendants are given the opportunity to enter a plea of either "guilty" or "not guilty." At this early stage, prior to plea bargaining pressures other than "time served," a defendant has the theoretical "freedom" to choose either course of action, since both can be expected to produce a similar outcome. A guilty defendant can either go to trial or plead guilty and can expect that his punishment will be roughly the same in either case. Although pleading guilty is not and should not be an option for innocent defendants, prior the state's plea bargain proposal, there is nothing other than inevitable trial risks to constrain an accused person's desire to take his case to trial and to rely upon the jury's acquittal. The normal choice situation in plea bargaining,

is the set of options the defendant would face in a no-bargain prosecutorial system that meets constitutional and critical moral standards and possesses similar statutes, procedures, and protections at trial and similar risks of conviction and punishment.³⁹

Assuming that implicit bargaining does not affect a defendant's expectations, the "no bargain" state is one in which the defendant is free to exercise either his trial right or his right to enter a guilty plea without the influence of burdensome sentence differentials.

After the state intervenes through its plea bargaining proposal, however, a defendant is arguably less free to choose a means of adjudication without penalty. If, as was argued earlier, plea bargaining burdens the exercise of the trial right, then, by definition, the burden makes the exercise of that right less preferable than it otherwise would have been. Choice situation coercion theorists argue, and I believe rightly so, that once the trial option is burdened, so too is there a social constraint placed upon the defendant's freedom to opt for trial. As Brunk emphasizes, "[i]f . . . the prospect of a trial becomes significantly more burdensome to the defendant, then it is likely that the defendant's choice situation is worse than the choice situation presented in the no-bargain system."⁴⁰ Even if it could be argued that a defendant is in a more preferable choice situation after the plea bargain proposal than before, we must remember that a plea bargaining system is "less preferable than the choice situation that the offeree has every reason, even *right*, to expect."⁴¹ Keeping in mind that a defendant has the right to exercise his right to a trial by jury, a situation which compromises this legitimate expectation and which makes the defendant feel as if he has no choice but to plea guilty is less preferable than his basic entitlements. From a choice situation perspective as well, plea bargaining may be labeled coercive.

"It is easy to say that [someone] is coerced in these cases," Professor Wertheimer notes, but "it is less easy to explain what *makes* them coercive."⁴² The closest we can hope to come to an estimation of the true value of coercion claims is a consolidation of the theories and ideas explored in this chapter and elsewhere. Coercion can be said to occur when A threatens to impose some penalty or offers to confer some benefit, the promise of which intentionally and effectively constrains

B's freedom to choose between doing and not doing the requested act X; and as a result, B does X. Generally speaking then, plea bargains, which threaten burdensome sentence differentials and are fueled by incentives that are not a part of our regular adjudication process, can be said to operate in an inherently coercive manner. The very essence of the plea bargaining practice is the manipulation of a defendant's choice situation by the state in order to constrain the defendant's will to exercise his right to trial by jury. Whether it is "fundamentally evil" for the state to do so, is the subject of Chapter Six.

CHAPTER SIX

"INDISCRIMINATE MANIPULATION": EVALUATING ACCEPTABILITY

The indiscriminate manipulation of the powers entrusted to public officials to coerce defendants into yielding important constitutional rights is anathema to those who claim that "steadfast adherence to strict procedural safeguards is our main assurance that there will be equal justice under law." The very possibility of such manipulation breeds contempt and resentment--instead of remorse and resolve--on the part of defendants and undermines the justice system's credibility and legitimacy in the eyes of the public.

Peter Nardulli, *The Tenor of Justice*

If public officials in the criminal courts use the "powers entrusted to [them to coerce defendants into yielding important constitutional rights," it would be easy to immediately conclude that guilty plea negotiations are unacceptable and illegitimate. It would be easy, that is, if we could ignore the fact that "the use of state coercion per se is not enough to justify a ruling to the effect that an act of agreement" is invalid.¹ Certainly, "the power of the government is intrinsically and inescapably a coercive power,"² and "on any plausible account of 'coercion agreements entered into in response to coercion are an inevitability of social life.'" What remains to be established is whether the government should be allowed to use its coercive power to force criminal defendants to waive their rights within the context of plea bargaining. Amid the overwhelming support for plea bargaining processes that has come from the Supreme Court, legal theorists and court administrators, we must determine whether state coercion within guilty plea negotiations is legitimate and acceptable.

This chapter seeks primarily to answer the question: "Under what circumstances is the use of state penal power to obtain convictions . . . an acceptable policy?"⁴ Assuming that plea bargaining is coercive, in order to determine its acceptability we need to understand 1) the legal boundaries of the state's use of its coercive power, and 2) the reasons (if any) that court professionals might be ethically justified in using coercion to obtain convictions. It is important to note at the outset that our inquiry into the acceptability of state coercion within the context of plea bargaining is necessarily limited. Few set standards exist for deciding whether the state is improperly compelling criminal defendants, primarily because legislators and justices have generally denied the possible coerciveness of plea bargaining processes, and have structured legal discourse about plea bargaining in such a way that "involuntariness" presumes unacceptability. Nevertheless, we shall concern ourselves with evaluating the existing interpretations of the impropriety and acceptability of coercive plea bargaining practices. Inferences from analogous legal situations and ethical dilemmas lend support to our final assertion--that coercive plea bargaining practices should not be accepted as a valid part of our criminal justice process.

Legal Boundaries

Supreme Court perceptions

The Supreme Court's interest in preserving the plea bargaining process as an administrative tool has caused it to shy away from interpretations of the law which would in any way proscribe the power of the government to engage in plea bargaining. In several of its most famous cases regarding plea bargaining, the Court acknowledges that guilty pleas are often compelled by the state but finds that such

compulsion does not render the pleas involuntary or invalid. In Brady v. U.S., 397 U.S. 742 (1969), for example, the Court asserts:

All these pleas of guilty are valid in spite of the State's responsibility for some of the factors motivating the pleas; pleas are no more *improperly* compelled than is the decision by a defendant at the close of the State's evidence that he must take the stand or face certain conviction.⁵

Because of the presumption of acceptability concerning compelled guilty pleas that pervades the Supreme Court's decisions, it is difficult to gauge the Court's assessment of the legal limits of coercive plea bargaining. "In ruling that plea bargaining is constitutional," Thomas R. McCoy and Michael Mirra write in an article for Stanford Law Review, "the Court has relied . . . on the requirements that plea bargaining processes conform to certain common standards of commercial fairness."⁶ Through a brief historical sketch of the Court's most famous decisions regarding the voluntariness and acceptability in plea bargaining, we may be able to determine what these "commercial standards" are.

In one of the Supreme Court's earliest cases regarding guilty plea processes, Von Moltke v. Gilles 332 U.S. 708, (1948), the majority held that "if the defendant does not completely, intelligently and with full understanding of the implications waive his or her constitutional right to counsel . . . the guilty plea is invalid."⁷ Although the case dealt specifically with the defendant's decision to give up her right to an attorney, the issue of most importance was the notion that defendants could waive their rights if they did so "*knowingly and voluntarily*." In Machibroda v. United States 368 U.S. 487 (1962), the Court expanded the voluntary-intelligent standard for the validity of rights waivers by giving a defendant the right to contest his conviction by guilty plea on the grounds of voluntariness.

In 1963, the Court held that--even though all criminal defendants did not yet have a right to an attorney--"the preliminary hearing of the state court was a critical stage, and that lack of counsel at the time of a guilty plea vitiates conviction"⁸ In other words, in order for a defendant's plea of guilty to be considered valid, she must have the assistance of *a competent attorney*. By this Court pronouncement, the government was limited in its ability to coerce the accused into accepting a plea bargain without counseling. While there is little disagreement that a competent attorney is a necessary component of any valid plea agreement, the development of the right to counsel doctrine has lead to the implication that the mere presence of an attorney in the course of plea negotiations is enough to validate almost any degree of state compulsion. In other words, coercion in plea bargaining is deemed acceptable not just *if* the defendant has an attorney, but *because* she has one. Considering the fact that some defense attorneys have a stake in compounding (rather than refracting) the pressures that their clients experience, I take issue with this view that the presence of counsel is enough to legitimate the state's use of coercion. An attorney is definitely necessary for the acceptability of a plea, however compelled, but it can be argued that the presence of counsel is not itself sufficient.

"By 1969," according to Professor Loftus E. Becker, Jr., "the Court had considered the requirements for a valid guilty plea in about a half dozen cases . . . [and] there existed a small body of law, generally vague and frequently dicta . . ."⁹ The thrust of the Court's declaration of commercial standards for the impropriety of plea bargaining emerged during the early 1970s. In Santobello v. New York 404 U.S. 257 (1971), the Court first implicitly analogized plea bargaining negotiations to the making of a contract between a defendant and the state. The majority in this case held that the prosecutor could be held to the promise that he had made to the defendant, just as civil litigants may be held to the terms of a contract. Unfortunately, the implicit connection between state and civil court negotiations

seemed to make duress (the standard for voluntariness and acceptability in contract law) applicable to criminal actions. In that duress requires that the government's act be "wrongful"--out of the scope of state power--in order to be considered unacceptable, the Court began to consider "contracts" made between the defendant and the state to be *prime facie* valid, unless certain minimum conditions were *not* satisfied.

Such a stance had been implicitly taken by the Court a couple years early in the case of United States v. Jackson 390 U.S. 570 (1968). Although the Court found that in defendant Jackson's case there was a needless and impermissible burden on the right to trial, the Court held, according to Professor Becker, that "if the particular plea bargaining system . . . was not in itself unconstitutional, then pleas produced by the pressures of the system would, as a general matter, be voluntary and thus valid." ¹⁰

The early 1970s clearly marks the beginning of the diminution of the Court's standards regarding the limits of the government's power to pressure guilty pleas. In Brady v. United States (1970), the Court basically reversed its specific holding in Jackson argued that the fact that one pleads guilty for fear of capital punishment is not enough to render a guilty plea involuntary or invalid. "Plainly it seems to us," says the Court in Brady, "Jackson ruled neither that all pleas of guilty encouraged by the fear of a possible death sentence are involuntary pleas nor that such encouraged pleas are invalid whether involuntary or not." While the Court rejected sentence-differentials and the fear of death as conditions which may in themselves invalidate guilty pleas, it did seem to imply that *face-to-face threats* are unacceptable. The Court noted that [defendant] Brady had not been threatened in 'face-to-face encounters,' suggesting that . . . doing so . . . would be improper." ¹¹

Finally, the Court's decisions in North Carolina v. Alford 400 U.S. 23 (1970) and Bordenkircher v. Hayes (1978), seemed to undermine even its own

implicit boundaries to the state's power to coerce guilty pleas. In Brady, the Court apparently implies that "plea bargaining which induces *innocent defendants* to plead guilty is immoral,"¹² Yet, in its decision in Alford, the Court allows trial courts to accept guilty pleas from defendants who plead guilty even though they proclaim innocence. Defendant Alford, charged with first-degree murder, pleaded guilty to second degree murder even though he refused to admit guilt and steadfastly proclaimed his innocence. The Court nonetheless held that "a plea that refuses to admit commission of the criminal act" can still be considered valid if a "defendant intelligently concludes that his interests require entry of a guilty plea, and [if] the record before the judge contains strong evidence of actual guilt."¹³ Considering that the greatest pressures are inversely proportional to case strength and that Alford eliminates a defendant's own admission of guilt in conjunction with entering a guilty plea, the Court may have made the very instance that they find to be unacceptable—the use of coercion to obtain convictions from innocent defendants—highly possible.

The Court first asserted that *vindictive* uses of state power are inappropriate and unacceptable in North Carolina v. Pearce 395 U.S. 711, (1969). Yet, in Bordenkircher, the Court allows a vindictive prosecutor to bring a defendant up on even greater charges solely because the defendant did not plead guilty to "save the court the inconvenience and necessity of a trial." Indicted for forgery "in the amount of \$88.30," (punishable by a two to ten year jail term), Hayes faced a district attorney who said that if he did not plead guilty and serve five years, he would be reindicted under the Habitual Criminal Act, which would subject him to a mandatory life sentence. Hayes refused to plead guilty, was reindicted, convicted and sentenced to life imprisonment. In one of its most shocking decisions regarding plea bargaining, the Supreme Court upheld the conviction on the grounds that "the prosecutor's decision to indict [Hayes] as a habitual offender was a legitimate use of available leverage in the plea-bargaining process." Justice Stewart writes for the

majority: "by tolerating and encouraging the negotiation of pleas, this Court has necessarily accepted as constitutionally legitimate the simple reality that the prosecutor's interest at the bargaining table is to persuade the defendant to forgo his right to plead not guilty." Despite the vindictiveness limit upon the government's power imposed by the Court in 1969, eleven years later there seemed to be little, if anything, keeping the state from exercising its power to coerce defendants to the fullest extent.

In sum, the Supreme Court implicitly acknowledges the validity of compelled guilty pleas unless such pleas are coerced by face-to-face threats, because of vindictiveness, without the assistance of a competent attorney, or with the effect of false prosecution on a wide scale. The problem with the Court's assessment of the limits of the state's power, according to many legal theorists, is that underlying the Court's opinions is *a presumption of the acceptability of plea bargaining processes* which undermines the Court's own pronouncements and amounts to "a mantle of hypocrisy that characterizes much of our official pronouncements with regard to plea bargaining."¹⁴ As the Court holds in Bordenkircher, "acceptance of the basic legitimacy of plea bargaining necessarily implies rejection of any notion that a guilty plea is involuntary in the constitutional sense." Instead of telling us when and under what circumstances the state is allowed to use compulsion, the Court assumes that compulsion is acceptable *unless* the aforementioned conditions occur. In its analysis of plea bargaining, then, the Supreme Court rejects the opportunity to set definite affirmative limitations on the state's use of coercive power, and instead, indirectly answers only the theoretical question: "when *can't* the state use compulsion to encourage guilty pleas?" We must keep in mind throughout our evaluation of the acceptability of coercive plea bargaining practices that "the question of whether the state may coerce . . . is really a question of what harms the state *may* threaten and carry out for what purposes."¹⁵

The "balancing test"

Indeed, the legal key to a pronouncement about the impropriety of the state's use of its coercive power in the plea bargaining process is an assessment of both the harms that the state's action renders, and the government's reasons for engaging in the coercive behavior. When, as in this instance, there seems to be a fundamental conflict between the interests of the state (to administer justice efficiently) and the interests of the individual (to exercise the right to trial by jury), and the state's actions are viewed as infringing upon or harming individual interests, courts generally conduct a "balancing test" as the legal means of resolving the issue of the limits of state power. According to Professor Patrick McFadden of Loyola University of Chicago, a balancing test

directs a judge to eschew the application of formal rules in deciding a case, and instead to balance the competing interests of the litigants (or the competing interests of society more generally), and to give judgement for the side with the weightier interests.¹⁶

In plea bargaining, as in other legal practices, there are "two or more sets of . . . interests, each set pointing to a different outcome."¹⁷ In our assessment of the acceptability of coercive plea bargaining, we must attempt, as judges do, to "weigh" the competing claims of the state and the defendant. Only by doing so can we determine whether the state's use of coercion to compel defendants to waive their rights is actually "improper" in the legal sense.

While there are different types of balancing tests, there are generally three steps common to most legal attempts to evaluate competing interests. First of all, when employing a balancing test, a judge will "set a balance by describing the elements to be weighed and the legal effect of the outcome." Secondly, a judge will

generally endeavor to "discuss the elements" that she has chosen to weigh in light of important legal considerations; and thirdly, she will "declare the winner based on the results of the weighing procedure."¹⁸ It is important to note that these guidelines leave a tremendous amount of room for judicial discretion, that is, that there is no set procedure for actually determining which interests outweigh others by how much. Nevertheless, through the balancing process, the judge is able to escape the rigid rules of legal formalism, and to "take into account any broader societal interests."¹⁹ In our quest to judge the acceptability of coercion within the plea bargaining practice, we, too, must assess the interests at stake by "deleneat[ing] . . . the factors to be considered" and "call[ing] for the weighing of those factors in reaching the judgement."²⁰ The first step--a description of the interests to be weighed and of the legal outcome of such a balance--necessitates the recognition that we are dealing with the *constitutional rights* of the defendant, on the one hand, and the *administrative interests* of the state on the other. "It is tautological but not trivial," as Professor Wertheimer asserts, "to note that the right to a trial by jury and the right not to be compelled to incriminate oneself are *rights* " which accused persons are often coerced into waiving by criminal justice administrators.²¹ Needless to say, these rights are among those constitutional provisions which are deemed to be the bulwark between the oppressive powers of the state and individual defendants. The following comment from a Harvard Law Review editorial enumerates the rights that are compromised by a coercive plea bargaining process.

The Constitution establishes an accusatorial system of public trials to determine the guilt of persons charged with crimes. The fifth amendment privilege against self-incrimination and the sixth amendment rights to confront one's accusers, to have compulsory process for obtaining witnesses, and to stand trial by jury are available to anyone accused of crime. ²²

The conflict between individual rights and the state's interest arises because "by inducing waiver of the constitutional trial rights, plea bargaining systematically undermines these protections, substituting administrative determination of guilt for the decisions of the judge and jury."²³ Such a substitution may ultimately be deemed proper (and coercive plea bargaining acceptable) if the state's interests in administering justice are found to outweigh an accused person's right to trial. Certainly, in that resources are scarce and trials cannot be provided to all, the government has a legitimate reason to seek nontrial modes of criminal case disposition. What we must determine in the subsequent discussion of the various interests (step 2) is whether one set of concerns can be said to "outweigh" the other.

Interestingly enough, there is a theoretical debate about the "weight" that should be afforded to the right to trial in the "balance" against the state's interest in coercive plea bargaining practices. Says one Manhattan Judge, "there's nothing sacred about a trial. Once you [attorneys and judges] have looked at all of the evidence, what are you going to do . . . give it to twelve strangers?" The prevailing belief in the importance of the jury trial as a constitutional right meets a similar objection from those who argue that the jury trial is of little value outside of its consequences. This assertion holds that the significance of the jury trial is only measurable by the defendant's perception of the jury's verdict. To the extent that defendants are often able to receive "better" sentences at the conclusion of guilty plea negotiations than they would have received after trial, it is argued that the "weight" of the trial procedure as an "inalienable right" which deserves protection is diminished.

While these perceptions are interesting ways to conceive of the American jury trial, they seriously underestimate the value of the trial process in a society in which formal criminal adjudication serves an important function. In determining the theoretical "weight" of the trial procedure, we must keep in mind that

[f]ormal, public condemnation or vindication of an accused benefits society generally by enhancing the legitimacy of the criminal justice system. Trials increase the participation of members of the community as jurors and make the guilt determination process more visible. Trials are also valuable for the public and the accused as "lesson[s] in legal procedure, dignity, fairness, and justice."²⁴

Moreover, in a society in which an accused person is presumed to be legally innocent until *proven* guilty, at trial, unlike with plea bargaining, there is always the possibility of acquittal. In fact, if the defendant is innocent, the formal trial is the only method of case disposition which provides sufficient protection against false conviction. In comparing trials and plea bargains, Albert Alschuler asserts:

A jury is unlikely to seek conviction for the sake of conviction, to respond to a defense attorney's tactical pressures, to penalize a defendant because he has taken an inordinate share of the court's and the prosecutor's time, to do favors for particular defense attorneys in the hope of future cooperation, or to attempt to please victims and policemen for political reasons.. . .²⁵

Even if the defendant is guilty and is convicted by a jury, trials afford the court the opportunity to review all of the evidence and to hear both sides of the story in making a determination of the sentence. In some instances, the judge is informed by testimony which seems to mitigate the seriousness of the crime. "Sometimes," says Manhattan Supreme Court Justice Richard B. Lowe III, "you hear things at trial which give you a more favorable opinion of the defendant . . . some mitigating circumstances that affect sentencing." Likewise, many theorists assert that trials are simply better suited to discovering the truth and to achieving justice than plea bargains. As Kenneth Kipnis asserts:

In contrast to plea bargaining, the disposition of criminal cases by jury trial seems well calculated to avoid internal injustices even if these may sometimes occur. Where participants take their responsibilities seriously we have good reason to believe that the outcome is just, even when this may not be so. In contrast, with plea bargaining we have no reason to believe that the outcome is just even when it is.²⁶

The final point that needs to be made with regard to the trial side of the "balance" is that, whatever interpretive significance we may decide to give to certain rights, in most legal balancing tests, constitutional rights are presumptively paramount. Picture (if you will) the balancing test as actual scales of justice onto which the interests of each side are placed. In a test which involves nonconstitutional government and individual interests, courts have often put each consideration on the scale in turn and have, in many instances, awarded legal legitimacy to the side with the greatest number of important interests. Where constitutional rights are involved, however, the Supreme Court has placed them on the scale first and foremost, and have argued that they are so important that significantly "heavier" state interests are needed to "outweigh" them. In most of its decisions regarding the balancing of individual rights and the public interest, the Court has held that "the public interest must be 'compelling' in order to overcome the individual's constitutional rights."²⁷

The "compelling state interest" requirement is one of two legal considerations that we must keep in mind as we begin to evaluate both the state's reasons for coercing defendants and the relative weights of the competing claims.²⁸ Whether the state's administrative concerns can be said to "outweigh" the defendant's rights depends upon a finding that 1) the state's interest is "compelling," and, if so, that 2) the intrusion upon rights that is caused by the state's action is the least restrictive means of achieving the government's important interest. Only after making this

determination can we move to the third step of the balancing test--the declaration of a winner.

Few theorists have been able to argue successfully that the government does not have a legitimate interest in inducing defendants into waiving their right to trial. In Chapter Four, we examined the administrative crisis that has left many of the criminal justice jurisdictions in major metropolitan areas seriously overworked and understaffed. What we need to address here is the question of whether administrative concerns are "compelling" enough (in the legal sense) to validate the state's forcing defendants to waive their rights to trial. Of course, we cannot even attempt to call the administrative interests that we previously investigated "compelling" without first getting a sense of what a "compelling state interest" actually is.

Even though the Supreme Court has found reason to employ the "compelling state interest" test in some of its recent cases, the Court has not as yet given a concrete definition of which interests it considers to be "compelling" under what circumstances. At present, we can only look briefly at the Court's rulings and make inferences about the types of interests that it found to meet the requirement. For example, in the case of Korematsu v. United States 323 U.S. 214 (1944), one of the most controversial decisions in American jurisprudence, the Court held that Japanese Americans could be interned in camps during World War II as a part of the government's "protection against espionage and against sabotage." The government's "compelling" reason for infringing upon the constitutional liberties of this group of citizens was apparently *national security*: it "decided that the military urgency of the situation demanded that all citizens of Japanese ancestry be segregated from the West Coast temporarily." While I am in no way addressing the merits of this case, I do wish to point out that it is one of the most widely known

examples of a weighing of interests in which the Court implied that the state's reasons were "compelling" enough to legitimate the harm to individual rights.

Another one of the Supreme Court's most controversial decisions, Roe v. Wade 410 U.S. 113 (1973), yields a clear statement of the principle of "compelling state interests" in their application. Writing for the majority, Justice Blackmun explains that "[w]here certain 'fundamental rights' are involved, the Court has held that . . . limiting these rights may be justified only by a 'compelling state interest.' " The majority in Roe, found that the state's interests in both the "*health of the mother*" and in "*protecting the potentiality of human life* " were "important and legitimate," and that each interest became "compelling" during different stages of a woman's pregnancy. While it is unnecessary to go into the details of the Court's trimester plan here, it is important to note that the justices found the aforementioned interests "compelling" enough to justify state intrusions of a woman's apparent right to privacy only during certain periods throughout her term. "This holding, we feel," Justice Blackmun wrote in summary, "is consistent with the relative weights of the respective interests involved."

In Roe, Korematsu and a number of other cases in which a balancing test is employed, the Supreme Court seems to reserve the label "compelling" for state interests which are accompanied by a sense of necessity or urgency, which correspond to the government's obligation to protect the "health, safety and welfare" of its citizens, and which are themselves legitimate. While I hesitate to call these "criteria" for a determination that an interest is "compelling" enough to outweigh individual rights, they are certainly considerations which must be taken into account as we attempt to assess the status of the state's administrative interests with regard to the coerced waiver of rights which we have sometimes found to occur in plea bargaining.

There is no doubt that the desire for efficiency and the need to keep the system from collapsing under the tremendous weight of its case load is an important state interest. If it is indeed true, that as attorney Joel Hirschhorn states "the system would collapse if it were forced to try more than one case in fifty," then the government has a serious problem which it must dedicate itself to addressing. I would argue, however, that the state's administrative interest in coerced plea bargain negotiations is not of the same caliber as those interests which the Court has found to be "compelling" in other instances. Consider, if you will, the distinct differences between the state's restriction of rights for the alleged purposes of national security or for the expressed purposes of the protection of the health of American citizens, on the one hand, and the state's interest in maintaining an efficient and resourceful system of criminal justice on the other. It seems to me that the former set of interests, while maybe no more of a necessity than the latter, are a more direct expression of the government's charter--to "promote the general welfare"--and as such, perhaps are more compelling. The only apparent legal justification for undermining individual rights seems to be that in doing so, the government is directly acting to protect individuals in society in some significant way.

It can be argued that, by making sure that the criminal justice system continues to function at some level, the government is protecting society, and that its interest in maintaining the criminal justice system as "compelling" is an interest in national security or health. This perspective is weakened by a consideration, first of all, of the fact that the protection which is being afforded in the form of the assured punishment of alleged criminals is often illusive. In truth, defendants convicted by a coerced guilty plea are actually receiving less punishment than they otherwise might have and are spending less time incarcerated or on probation. "If plea bargaining weakens the deterrent and incapacitative effects of punishment, it may stimulate the rate of crime . . . and thereby actually increase the quantitative strain on the

system."²⁹ Moreover, there is little reason to believe that defendants who engage in plea bargaining are being rehabilitated before they return to the community. If anything, pressures to plead guilty and to reap the system's benefits may create a revolving door in which defendants--who might have been coerced into waiving their right to trial initially--learn after repeated offenses to use the system to their advantage at the same time the system uses them.

For the government to be allowed to engage in a *prime facie in* justice solely for the purposes of maintaining a system that is supposed to be dispensing justice is, to me, not only paradoxical, but also nonsensical. Unlike the interests in national security or health, the state's administrative interest in plea bargaining amounts to the maintenance of a process *for the process's sake*. Thus, to find the government's interest "compelling" enough to legitimate coerced plea bargains, we would be saying, in effect, that the continuance of the criminal justice system is so important, *regardless of whether the system is actually just*, that we will allow it to create injustices in order to maintain itself. This, to me, is not conceptually distinct from a government's decision to violate the rights of poor citizens in a number of different ways because the cost of supporting them is so great that the national deficit is compounded and the future of the government is itself jeopardized. What good, I am essentially asking, is the continuance of the government *as an interest in itself*, if citizens rights (the reason for the government's existence) are being compromised for the sole purpose of the government's preservation? In a sense, by finding an administrative interest to be "compelling," we would be asserting that the preservation of the criminal justice system (a system designed to protect rights) necessitates the undermining of rights, and that to do so is legally acceptable. To me, a government program which can only be maintained by violating the rights of citizens, and which purports to undermine rights solely for the purpose of its own survival, is actually not worthy of maintenance.

Certainly, the government has the legitimate right and authority to violate individual rights *when to do so furthers a "compelling state interest."* My point here is not to advocate anarchy, but to argue that the efficiency and resourcefulness of the criminal justice system--even to the extent that the system cannot function without these attributes--are not sufficient reasons for undermining individual rights.

Even if we could believe that administrative interests are sufficiently "compelling," there are significant questions about whether coercive plea bargaining is the least restrictive means by which the government could obtain these objectives. If the government were to train and to hire more court personnel, for example, and to build more criminal justice facilities, the state's administrative interests may be met without resorting to infringements upon rights. Similarly, there are theorists who argue that the criminal courtroom is not the proper forum for the conceptualization and implementation of solutions to administrative problems. Ronald Dworkin suggests (and I believe rightly so) that "the proper business of the Courts is to resolve questions of principle. Policies are legislative, not judicial concerns."³⁰ In light of the purpose of the criminal justice system--to ensure that defendants receive just and fair adjudication--the state's administrative cannot be said to outweigh a defendant's Fifth and Sixth Amendment rights. Legally speaking, coercive plea bargaining is, therefore, not acceptable.

I am certain that my argument meets objection from both critics and supporters of plea bargaining. Though plea bargaining's critics may agree with my final assessment--that coercive plea bargaining does not outweigh individual rights and is therefore not acceptable--many of them must consider the formality of balancing constitutional rights against the interests of the state to be improper if not unnecessary. The Fifth Amendment provides a privilege against self incrimination which expressly prohibits government compulsion, and the Sixth Amendment guarantees that "in *all* criminal prosecutions the accused shall enjoy the right to a

speedy and public trial by an impartial jury." It would seem from the mere wording of the constitution that the government's attempts to coerce defendant's into waiving their rights would be unacceptable. As Professor Wertheimer comments:

If a defendant has a right not to be compelled to incriminate himself or waive his right to a trial by jury, and if pleading guilty is incriminating oneself and waiving one's right to a trial by jury than straightforward deduction seems sufficient to show that guilty pleas cannot be compelled.³¹

What we need to remember is that although "the [constitution's] words leave little room for interpretive maneuver," constitutional rights are not absolute.³² Especially in the comparable area of the First Amendment--in which the government "shall make no law . . . abridging freedom of speech"-- the courts have found instances which necessitate exceptions to the rule. Once it is accepted that, regardless of the "readily ascertainable content" of the "protecting language" of the constitution, there will be times that these rights must be suspended in the name of more immediate interests, then the court "will inevitably create *some* limiting principle or principles" for government behavior.³³ The Supreme Court has held that the "balancing" and "compelling state interest" tests are the governing principles concerning limitations on state power, and I believe that they are as good as any other principles which could be conceived of in this regard. In response to those who essentially argue that the liberties of the constitution are diminished by "balancing" them against possibly prevailing government interests, Professor McFadden comments:

[T]he Court must draw lines between permissible and impermissible government action. Any line it draws, upon any ground it wishes to draw it, will diminish fundamental liberties if the "proper"

measure of liberty is "no law" at all infringing the freedom of speech. The real debate concerns the extent of permissible legislation [or state action] not the proper method of constitutional interpretation.³⁴

Plea bargaining's supporters may take issue with the fact that my "balancing" analysis assumes that there is a conflict between the state's interests and the individual's rights, and may argue that no such tension exists if you conceptualize plea bargaining (however coercive) as within the state's legitimate power to sentence defendants according to society's values and needs. Returning to the notion (which I explored at length in Chapter Five) that plea bargains are *benefits* that the government *offers* to the accused, some theorists will undoubtedly assert that, even though the resulting burden on rights is coercive, the government's beneficial actions should be allowable. They may, as the Supreme Court does in Bordenkircher, argue that

[w]hile confronting a defendant with the risk of more severe punishment clearly may have a "discouraging effect on the defendant's assertion of his trial rights, the imposition of these difficult choices [is] an inevitable"--and *permissible* --"attribute of any legitimate system which tolerates and encourages the negotiation of pleas."³⁵

It is in response to the assertion that burdens on the trial rights are "inevitable" and "permissible" because of the perceived benefits of plea bargaining, that I offer the third, and final, legal perspective of determining the acceptability of coercive plea bargaining, and that I attempt to explore the aforementioned critique as an ethical justification for coercive plea bargaining practices.

Unconstitutional conditions doctrine

While there has yet to be established in criminal law a definitive legal usage of what has been termed the "unconstitutional conditions doctrine," legal theorists conceptualize the principle as one which limits a state's power to confer benefits that are conditioned upon the waiver of rights. Frost & Frost Trucking Co. v. Railroad Commissioner 271 U.S. 538 (1926) is one of the first Supreme Court cases in which it was held that "a state *impermissibly* pressures a citizen to forego exercising a constitutional right when it requires the relinquishment of that right as a condition for receipt of an important state benefit." In other words, even though the state's power to pressure its citizens to waive constitutional rights may take the form of *offers* conferred to individuals rather than of *threats* leveraged against them, legally, the effective burdening of rights is not any *less* coercive or any *more* permissible. In "Plea Bargaining and the Supreme Court," Professor Loftus Becker gives a concise explanation of the issue of state benefits and unconstitutional conditions:

Governments frequently want to condition the grant of benefits, or the abatement of burdens, on an agreement to waive, or not to exercise, at least for the time being, some constitutional right. At one extreme this is indispensable to the operation of government. . . . At the other extreme, however, allowing the government to condition receipt of any government benefit on the waiver of every constitutional right would effectively destroy *all* such rights. The doctrine mediating between competing considerations is known as the doctrine of unconstitutional conditions.³⁶

Several of the legal scholars who have written about plea bargaining assert that the unconstitutional conditions doctrine is specifically applicable to the state's act of conditioning leniency upon a defendant's waiver of her right to trial. Supporters of plea bargaining processes (the Supreme Court included) may attempt to cast the results of plea negotiations in a beneficial light, and to assert that the unavoidable

coerciveness of the burden on rights is nonetheless acceptable because the government grants benefits that defendants would not otherwise receive. While this seems to be a reasonable argument, the law holds that--without "a purpose for the waiver that [is] more than a simple desire to prevent the exercise of [constitutional] rights"³⁷--a state cannot make offers that effectively burden those rights no matter how beneficial.

In criminal law, the Supreme Court's most famous application of the unconstitutional conditions doctrine occurs in its decision in Garrity v. New Jersey 385 U.S. 493 (1967). Although in this case, the Court is addressing the state's ability to threaten to *withhold* benefits, the principle of unconstitutional conditions remains the same. Defendant Garrity was a police officer (a government employee) who was asked to testify in court regarding an incident which was under investigation. Although Garrity had the right to remain silent because the information that he was asked to disclose might be used against him at a later trial proceeding, he was also told that if he exercised this right, he would be fired. In other words, the government was conditioning a benefit (Garrity's job) upon his waiver of the privilege against self-incrimination. Placed in this difficult position, Garrity testified, and was later convicted using information that he had disclosed. He appealed his conviction, and the Supreme Court held that "the option to lose [one's] livelihood or to pay the penalty of *self-incrimination is the antithesis of a free choice . . .*" Not only did the Court find the government's scheme to be coercive, but also impermissible--"there are rights of constitutional stature," Justice Douglas writes, "whose exercise a State may not condition by the exaction of a price."

Oddly enough, the Court apparently does not consider the privileges incorporated in the Fifth and Sixth Amendments to be such rights when in the context of plea bargaining. The unconstitutional conditions doctrine, as it is expressed by the Court in Garrity, states that the government cannot threaten to

withhold benefits such as a job on the condition that an individual waive his rights. It seems plausible to apply unconstitutional conditions to plea bargaining, and to assert that a state cannot condition *leniency* --an apparent benefit--upon a constitutional waiver. The effect of the unconstitutional conditions doctrine, which I believe is the same for both jobs and sentence leniency, is to proscribe the government's ability to grant and to threaten to withhold benefits based on the waiver of rights. As Professor Wertheimer acknowledges:

If it is impermissible to induce someone to waive his right not to *testify against himself* by threatening to *fire* him, it must surely be impermissible to induce someone to waive his right to a *jury trial* by threatening a *severe punishment*. The Court need not strike new ground to find bargained guilty pleas involuntary or unconstitutional. It need only be consistent with its own Fifth Amendment decisions.

38

Indeed, the Court laid the foundation in Garrity for a legal standard by which to judge the permissibility of state's power to coerce--even when the coercion may have a beneficial outcome.

In all sincerity, the unconstitutional conditions doctrine is lacking as a complete explanation for the disallowance of state granted benefits within the context of a bargain. Though an individual may be under extreme pressure to negotiate a deal, and though this pressure may even be coercive, we, in American society, tend to shy away from condemnation of any practice if it is perceived to result in a mutually beneficial settlement. While plea bargaining may sometimes result in the punishment of innocent defendants (which is categorically impermissible), in many instances, defendants serve a substantially lesser sentence than they otherwise would have received. Why, then, must the practice be condemned? If, even though plea

bargaining is coercive, some defendants *benefit*, why should we argue that it is improper? These questions are not actually legal but *moral* concerns and can best be addressed within the context of an inquiry into American society's values regarding the extent of benefits as a justification for otherwise improper acts. According to David Hoekema, "to judge whether the state exercises its power properly, we must determine whether other moral considerations outweigh the costs . . ." ³⁹ We shall examine the belief that coercive plea bargaining's ultimate good justifies its use in the following section.

Ethical Justifications

According to Professor Wertheimer, "the [Supreme] Court's principle defense of plea bargaining is consequentialist--'it benefits all concerned.'" ⁴⁰ Indeed, the Court has enthusiastically embraced plea bargaining practices, minimizing important legal objections like the ones raised in the previous section, and heralding the apparent benefits of the process. Few moral theorists would fail to recognize the utilitarian nature of the Court's justification of plea bargaining. The principle of utility, which is inherent in the supportive claims of plea bargaining advocates, holds that "only that which in some way maximizes the . . . happiness, pleasure or satisfactions of human beings . . . is acceptable." ⁴¹

In the tradition of utilitarianism, supporters of the plea bargaining process argue that what justifies coercive plea bargaining practices is that they can be deemed ultimately beneficial. We should accept the process despite the legal illegitimacy of its coerciveness, advocates seem to say, because in the end it is advantageous for the largest number of people. Plea bargaining is, in effect, "the greatest good for the greatest number." In responding to this ethical justification for coercive plea

bargaining, I wish to avoid simply recounting the litany of well known objections to utilitarian principles. While I am persuaded that utility fails to account for differences in judgement, for example, and that therefore, it is not necessarily an appropriate way of judging acceptability, I will attempt here to stay within the framework that supporters of the process have brought forth. In other words, I am attempting to address utilitarian claims from a utilitarian perspective, and to argue that, even from this viewpoint, alleged justifications for coercive plea bargaining fail.

In the first place, since utilitarianism is about "counting heads" (so to speak) and determining whether the policy in question leads to the greatest happiness for the most people, it is important to acknowledge that there are innocent defendants who are swept up in the criminal justice machine and are coerced into pleading guilty. Says Robin Steinberg, a defense attorney in upper Manhattan:

There is no question that some innocent people plead guilty because the offers are low and the risk factor of going to trial is tremendous. I don't think that there is an honest attorney in the City who can tell you that they have not had the experience of knowing someone is not guilty and advising them to plea guilty anyway.

Plea bargaining is obviously not the "greatest good" for innocent defendants, and in assessing whether the policy is acceptable by utilitarian standards, we must discount the number of innocents, who are made unhappy by the process, from the group of defendants for whom plea bargaining is said to be a benefit. What is this number? Considering the fact that most defendants deny guilt initially, that there is a legal distinction between factual guilt and legal guilt, that the system is not inordinately concerned with weeding out the good from the bad in terms of plea bargaining, and that the most pressure to plead guilty is generally placed upon those defendants against whom the government has the weakest cases, it is literally

impossible to be certain. We can only look to the opinions of those court professionals who knowledgeable of the system. In a recent interview, Dade County Public Defender Bennett Brummer commented:

You can't hold people in jail and tell them that they can go home today if they plead guilty and not have innocent people plead guilty. I don't think that there are a lot of them, but they definitely do exist. There may even be a lot of them numerically, not a huge percentage, but it's a sizeable amount of people.

Moreover, because of a defendant's "choice situation" which I discussed in Chapter Five, and the legal benefits of the trial process which were enumerated earlier in this chapter, I have doubts about the notion that plea bargaining is truly the greatest good for defendants in general. One Manhattan attorney stated unequivocally that

as far as my clients are concerned, plea bargaining is a terrible process. There are some people who believe that plea bargaining is a great thing for our clients . . . it benefits the guilty. But it's a terrible system because it basically forces them into certain positions . . . They really have no choices.

To the extent that some defendants may be "happier" with the outcome of a negotiated settlement than they would be with the outcome of a trial, assuming they are guilty, one wonders whether the state's hand in setting sentence differentials nullifies its ability to successfully argue that plea bargains benefit the accused. Bargains are only beneficial *because* the state has structured its justice system so that the outcome of a plea negotiation is "better" than that of a trial. We must keep in mind that, as Kenneth Kipnis asserts, "the state forces a choice between adverse consequences that it imposes."⁴² Coercing the accused into accepting the "beneficial" choice cannot necessarily be justified by the fact that it is "better" than

the other option--one which has been intentionally manipulated by the state so that its outcome is "worse."

Be that as it may, the most significant argument against the utilitarian justifications for coercive plea bargaining practices is that, although the practices may benefit the state and the accused, they are a detriment to society as a whole. If we are truly considering "the greatest good for *the greatest number*," then harms to society cannot be justified even from a utilitarian standpoint. As Professor Wertheimer comments: "it is doubtful that plea bargaining serves . . . society's interests in the criminal justice system."⁴³ I would argue that plea bargaining may even harm society. There are two major detriments which counter and override the benefits of coercive plea bargaining practices. First, as I argued earlier, granting "benefits" to defendants in terms of leniency (a coercive practice) means that a greater number of defendants spend less time incarcerated and little or no time in programs which may help to regulate their behavior, and facilitate their return into the community. "Is it really right," Miami defense attorney Joel Hirschhorn asks, "for society to have to be put in a position of having to welcome out on the street someone who should have been put away for a long time?" Indeed, society would most likely be "happiest" if the accused persons who deserve both punishment and help were actually able to receive them. While the argument that plea bargaining does not punish enough can be interpreted as a strike *against* defendant's rights (the very principle that this thesis upholds), it is offered here as a response to the assertion that coercive plea bargaining practices are justified and acceptable on the basis of utility.

Secondly, and perhaps more importantly, coercive plea bargaining practices "threaten many *values* embodied in the Bill of Rights and, indeed, many *values and interests* of any rational and moral criminal justice system."⁴⁴ While this view is not necessarily a response to utility from within the bounds of utilitarian thought

(i.e., utility argues that there is no value to rights outside of their consequences), it may be argued that the *result* of undermining existing values is that to do so is itself detrimental to our society.

A democratic society is theoretically based upon the liberties of the individual and the limitations of the state. What gives our government legitimacy and our criminal justice system credibility is the basic tenet that the rights of individuals are protected from encroachments by the majority. To accept without question that the "benefits" to the state and to the accused in plea bargaining justify a burden upon a defendant's constitutional rights, is to challenge our faith in the fundamental principles of democracy. It cannot honestly be asserted that policies which admit constitutional violations and abuses on the basis that they are "beneficial" are the greatest good for a society which values individual protection as highly as we do. In this sense, I suppose, utility is actually in conflict with our existing values. If government officials were morally justified in wielding power with an oppressive hand on the basis of utility, then our democratic society would be much worse off--even from a utilitarian viewpoint--because we would be on a slippery slope sliding toward totalitarianism.

Coercive plea bargaining practices are not justifiable or acceptable by our own ethical and legal standards. At present, "a wide variety of coercive devices are employed against an accused-client--couched in a depersonalized, instrumental bureaucratic version of due process of law, which are in reality a perfunctory obeisance to the ideology of due process."⁴⁵ Like Manhattan Justice Carol Berkman, some theorists concede that plea bargaining "forces defendants to make difficult choice," and that "yes, the system is coercive. If you didn't have plea bargaining," Justice Berkman acknowledges, "you would probably have less coercion but you would lose all of the benefits." In a democracy, there are very few "benefits" the acquisition of which properly requires individuals to sacrifice their

constitutional rights. It is my argument that the plea bargaining "alter" destroys the theoretical sanctity of the American criminal justice process.

CHAPTER SEVEN

CONCLUSION

"If they agree on nothing else," Alexander Hamilton asserts in Federalist No. 83, "the friends and adversaries of the plan of the convention . . . concur at least in the value they set upon the trial by jury." As I sat in the criminal courtrooms of Manhattan, Miami, and Boston, I wondered how shocked the framers would be to learn that the venerable trial by jury--that which the federalists called "a valuable safeguard to liberty" and the anti-federalists labeled "the very palladium of free government"--is no longer an integral part of the American criminal justice system.¹ What I witnessed in the summer of 1991 was a process in which the accused are systematically deprived of their right to contest the government's accusations. What I wrote about in this thesis was my attempt to investigate, examine and assess the limits (or lack thereof) of the government's authority over its citizens with regard to plea bargaining processes. What I found, in the end, was that to the extent that guilty plea negotiations involve a certain amount of state coercion and that the government in this instance has no justifiable or "compelling" reason for exerting pressures which burden constitutional rights, "the institutionalized practices by which pleas of guilty are arranged and accepted *corrupt* criminal justice."²

I began my personal inquiry into the coerciveness and acceptability of guilty plea negotiations as we began here--with an overview of the plea bargaining process in general. I felt that until I understood the definitions, history, and major arguments surrounding this widely misunderstood and relatively controversial

issue, I would not be able to make an effective case about what I had observed. After gathering general information about plea bargaining, I set out to speak with some of the court participants of three major metropolitan areas and to identify the various types of pressure that exist in some criminal justice jurisdictions. As is to be expected when discussing the problems of any system or profession, I suppose, I found that judges blamed prosecutors, prosecutors blamed judges and defense attorneys blamed them both. They all agreed, however, that regardless of who was at fault, defendants were being pressured by the system in a variety of different ways. It was at this point that I realized that my idealistic eyes (which had been bred on *L.A. Law*) had not deceived me, and that the problem in America's criminal courts was actually much larger than it had been made to appear in the newspapers and on television. If defendants were, indeed, being pressured into giving up their constitutional protections, I wondered, what was the government's motivation for doing so? Could we theoretically conceive of such pressure as "coercive"? And, if so, to what extent could we continue to accept such an institution as a valid part of our criminal justice process?

With these questions in mind, I began to examine the reasons that my interviewees, legal theorists and the Supreme Court itself gave for why the pressures to plead guilty exist. The administrative crisis in the modern court system--the most frequently used rationalization--was mentioned in some way, shape or form by nearly every court professional with whom I spoke. In addition, I discovered other, more hidden agendas for pushing the accused into a "bargain" with the government--including political success, the administrative culture, and fear of reversal on appeal. It is interesting to note that while the Supreme Court admits that states "encourage" guilty pleas, the Justices--like some of the court professionals whom I interviewed--are generally hesitant to call such pressures "coercive." To "protect the myth of an adversarial trial process," Professor Lloyd

Weinreb argues, the law must conceive of "a plea of guilty [a]s the defendant's independent choice... ." ³

Having already acknowledged the reality of the modern *non*-adversarial system, I turned to literature on the definitions and theories of "coerciveness" in hopes of finding some conclusive way of determining whether or not (as some theorists claimed) the pressures and inducements of the system are actually coercive manipulations of a defendant's will. I found none. In truth, depending upon one's theoretical starting point, which theory one deems to be the proper way of looking at the issue, and which perspective one chooses within any particular theory, "coercive" could apply to almost any action engaged in in response to a another's proposal. By assessing the threats/offers theory, the nature of the act theory, and the choice situation theory, I attempted to point out the strengths and weaknesses of each of these philosophical viewpoints, and to show that despite the relativeness of the concept of coercion, plea bargaining could be deemed "coercive" by almost every standard. Professor Albert Alschuler suggests that it would do us little good to deny the coercive character of the system," for in doing so, "we magnify its injustice as we delude ourselves."⁴

To have ended there--with an identification of the pressures and the reasons for them, and an ambiguous sense of the coerciveness of the process--would not have addressed what, to me, is one of the most important issues underlying the plea bargaining controversy. "Whatever else one thinks about plea bargaining," says John Kaplan in his book Criminal Justice, "the practice makes a statement about the relative power of the citizen and the state." ⁵ An examination of plea bargaining does not only speak to the issue of coercion, but also to legitimacy of "the state's use of its powers to obtain the grounds for punishing some individual or achieving some good."⁶ Assuming that plea bargaining pressures are coercive, it would be

necessary, I thought, to determine the extent to which the government's use of its coercive power could be deemed legally acceptable and ethically justifiable.

Looking at the legal limitations upon the state's power to engage in guilty plea negotiations, I realized that our highest court has found the process to be both "voluntary" and "valid." The Supreme Court apparently asserts that if a defendant enters a plea bargain "knowingly" and accompanied by counsel, and if the state's scheme does not involve vindictiveness, face-to-face threats or the disproportionate coercion of innocent persons, then the process is legally permissible. I found (for reasons discussed at length in Chapter Six) the Court's rationale to be insufficient to yield a realistic standard for determining the acceptability of guilty plea negotiations as they currently operate.

Nevertheless, by conducting my own "balancing test," I was able to argue that plea bargaining processes are legally improper in the sense that the state's administrative interests are not "compelling" enough to outweigh the threat to individual rights. The "unconstitutional conditions doctrine" supported both my conclusion and the notion that "there are some rights of constitutional stature whose exercise the State may not condition by the exaction of a price."⁷ Moreover, the philosophical principle of utility (conceivably a moral justification for coercive plea bargaining) buttressed my seemingly contradictory argument that an individual's Fifth and Sixth Amendment Rights "should not be the subject of bargain and barter," even if to do so seems beneficial to the parties involved. In a country that is founded upon the belief that individual rights should be protected from the forces of a tyrannical majority, there is, in my opinion, no greater threat to society than the institutionalization of the government's power to manipulate the wills and circumstances of individuals. Even if both the defendant and the state benefit, when the hand of oppression reigns, society suffers.

Given that I have argued that plea bargaining is unacceptably coercive, it would seem that the abolition of the process is our only recourse. While I consider the abolition of plea bargaining to be the ultimate goal of any reform that aims at eliminating state coercion in the criminal justice system, at this point in time, I must be realistic. The process as it currently operates is far too prevalent and much too ingrained to be easily dismissed. At present, because complete abolition is unlikely and, arguably, impossible, "the best we can hope for is to purge the taking of guilty pleas of some of the worst features of bargaining."⁸ We must keep in mind that "we are ultimately addressing the question of the state's use of its coercive power [and] . . . systems for the administration of that power can be structured in various ways."⁹

One of the most debatable reforms at present involves the elimination of the judge from plea bargaining negotiations at both the federal and state levels. "The fact is," says Professor Graham Hughes of New York University School of Law,

that while trial judges are permitted to participate in plea negotiations, it will never be possible to dispel suspicion of vindictiveness and thus never will be possible to ensure that unwholesome official threats are not being leveled at the accused.¹⁰

Theorist Conrad Brunk agrees. The involvement of the judge, in his opinion, takes away from "an assurance of full due process at trial if the defendant refuses a bargain and opts for trial." To "guard against this burdening of trial," Brunk asserts, judicial involvement in the plea bargaining process and subsequent presiding over a trial, must be avoided.¹¹ Likewise, the First Circuit Court of Appeals argues that where judicial participation occurs, "the relative equality of bargaining power that characterizes negotiations between the prosecutor and the defense attorney is clearly absent."¹² Although the notion that the prosecution and

the defense have equal bargaining power is itself questionable, the point that is to be made is that some scholars and practitioners view judicial participation in the plea bargaining process as inherently coercive and vindictive, and out of the scope of normal judicial functioning. Says Judge Harry Ackley: "the role of the court must be to stay out of the dispositional process until the question of guilt has been resolved."¹³

On the other hand, there are theorists who argue that judicial participation is the only way to ensure the fairness of a reformed plea bargaining process. Considering our determination that both prosecutors and defense attorneys often have hidden agendas for pressuring defendants into pleading guilty, this argument seems to have at least some merit. Says Professor Alschuler, "judicial bargaining, in an appropriately limited form, is no more coercive than prosecutorial bargaining, and . . . the bargaining process can operate in a fairer, more straightforward manner when judges do take an active part."¹⁴ It may be necessary to include the judge in plea bargaining processes as a check on prosecutorial power, and as a way to "bring to negotiated dispositions some of the attributes of formal trial procedure,"¹⁵ at least until a formal trial becomes more widely available.

It is difficult to decide whether leaving the judge in the plea bargaining process as it presently stands would be more detrimental than removing her from the negotiations altogether and, in truth, such a determination is probably best left to the professional theorists. I can only say that, as the court actor with the power to sentence, the judge is most likely the single individual with the greatest power to threaten defendants and to scare them into relinquishing their rights. Perhaps through the establishment of separate bureaus for judicial plea bargaining, which may be entered at the request of the defendant,¹⁶ we may be able to eliminate the

potential coerciveness of plea bargains entered into both with and without the magistrate.

Considerably less controversial are reforms which call for the elimination of prosecutorial overcharging and the establishment of nearly complete discovery in all criminal justice jurisdictions. If we are to make plea bargaining as acceptable as possible, we need to reduce the opportunity for "distort[ion] of the actual risks involved in exercising the trial option."¹⁷ The charging standards of District Attorney's offices might have to be subject to some sort of judicial review in order to ensure that defendant's are facing charges that are commensurate with the alleged crime. Likewise, prosecutorial bluffing may be curbed by a semi-complete discovery system in which important information and documents which comprise the People's case can be revealed at the request of a defense attorney.¹⁸ As Paul Shechtman, Chief Counsel for the Manhattan District Attorney's Office, commented in a recent interview: "With bargaining, there ought to be more sharing of information."

Of course, no reform is as crucial to the reduction of coercion in the plea bargaining processes of the criminal justice system as one which addresses the specific administrative crisis that has created the apparent need to pressure criminal defendants. "We would need twice as many judges and twice as many courtrooms to make a difference," says one Manhattan attorney. According to Dade County District Attorney Janet Reno, "the problem now is having enough judges in all of the courtrooms to try all of the cases." It is apparent that there will continue to be pressure to get the accused to waive their rights to trial as long as there is not enough time (fueled by a lack of resources) to try them. While coercive plea bargaining would not be completely eliminated with increased funding, we would be at least a little closer to ensuring that due process becomes a reality for those individuals who are accused of crimes.

Our eventual goal in reforming the plea bargaining process should be to make the trial right available to all who desire to exercise it. Of course to do so would require a commitment on behalf of the American government and its citizens that such a goal is worth the financial investment. Getting the resources that are necessary to make sure that there are enough judges, and enough courtrooms, and enough correctional facilities will not be an easy task in this day and age. Says attorney Joel Hirschhorn, "people simply don't want to pay for what its going to take for the system to get better." Indeed, there are a number of people who believe that we already spend too much on the accused. As Manhattan Supreme Court Justice Richard Andrias asserts: "there has been a gross expansion of defendant's rights at the expense of society. We now [attempt to] provide jury trials and lawyers for *everyone* with money that is better spent elsewhere." Certainly, we will pay the price financially for making constitutional protections a reality. However, if we continue to allow the government to force defendants to waive those constitutional protections that exist to keep us all safe from the hand of oppression, it seems that we stand to pay a price in terms of individual sovereignty, which I would argue, is even more costly.

The greatest challenge that we now face in searching for ways to make plea bargaining and other criminal justice processes less unacceptably coercive is overcoming the general hostility and apathy--in both the criminal justice community and the larger society-- toward the rights and privileges of "those people" who are accused of criminal mischief. Says attorney Yale Freeman, "but for a series of circumstances, *I* could be sitting on the other side of the desk just like them. The day that I start calling my clients '*those people*,' it's time for me to get out of the business." Unfortunately, there are too many criminal justice participants who do not share Attorney Freeman's beliefs. Too many court actors are willing, in effect, to "bargain away" our rights by coercing criminal defendants into giving up theirs.

If it is true that, as New York Supreme Court Justice Richard B. Lowe III asserts, "the criminal justice system is only as good as the individuals who comprise it," then it is our responsibility to make sure that the individuals who administer justice are "as good" when dealing with the rights of the accused as we have a right to expect them to be. We must ensure that the scales of justice are not destroyed in the hands of those who have the power to oppress. Our civilization hangs in the balance.

CHAPTER ONE--NOTES

¹Alschuler, Albert W., "Plea Bargaining and its History," 79 Columbia Law Review, 1979, p. 40

²*ibid.*

³*ibid.*

⁴Jones, David A., Crime Without Punishment. Lexington, MA: Lexington Books, 1979., p.75

⁵Report of the New York State Judicial Commission on Minorities. B.Sy James C. Goodale, Chairman. Vol. One, Executive Summary. New York: April, 1991

⁶Blackledge v. Allison 431 U.S. 63 (1977)

⁷McDonald, William, F. Plea Bargaining: Critical Issues and Common Practices. Washington, D.C.: U.S. Department of Justice, 1985, p. 1

⁸*ibid.*

⁹In that all of the interviews took place during the months of December and January and that all of the interviewees are criminal justice participants in these three major metropolitan areas, I have refrained from footnoting each individual interview that is mentioned throughout this study.

¹⁰Gordon, Diana R. The Justice Juggernaut. New Brunswick: Rutgers University Press, 1990, p. 35

¹¹Mill, John Stewart. On Liberty. Edited by David Spitz. New York: W.W. Norton and Company., 1975, p.3

¹²Rosenblatt, Roger, "The Bill of Rights," Life: Bicentennial Issue, Fall Special 1991, p. 21

¹³Gordon, p. 10

¹⁴*ibid.*, p. 35

¹⁵Dershowitz, Alan M., The Best Defense. New York: Random House, 1982, p. 416

CHAPTER TWO--NOTES

- ¹Maynard, Douglas W., Inside Plea Bargaining: The Language of Negotiation. New York: Plenum Press, 1984, p. 1
- ²Nardulli, Peter F., and James Eisenstein, and Roy B. Flemming. Tenor of Justice: Criminal Courts and Guilty Plea. Chicago: University of Illinois Press, 1988, p. 208
- ³Sanborn, Joseph, B. "A Historical Sketch of Plea Bargaining," Justice Quarterly, Vol. 3., no. 2., 1986, p. 111
- ⁴*ibid.*
- ⁵*ibid.*
- ⁶Church, Thomas W., "In Defense of "Bargain Justice," Law and Society Review, Vol. 13, Winter 1979, p. 509
- ⁷Langbein, John. "Understanding the Short History of Plea Bargaining," Law and Society Review, Vol. 13, Winter 1979, p. 261
- ⁸McDonald, William, F., Plea Bargaining: Critical Issues and Common Practices. U.S. Department of Justice, National Institute of Justice, July 1985, p. 6
- ⁹Friedman, Lawrence M., "Plea Bargaining in Historical Perspective," Law and Society Review, Vol. 13, Winter 1979
- ¹⁰Moran, T. Kenneth, and John L. Cooper. Discretion and the Criminal Justice Process. Port Washington: Associated Press Press, 1983, p. preface
- ¹¹Mc Donald, William F., "From Plea Negotiation to Coercive Justice," Law and Society Review, Vol. 13, Winter 1979, p. 386
- ¹²McDonald, "From Plea Negotiation," p. 385
- ¹³Lefstein, Norman, "Plea Bargaining and the Trial Judge, The New ABA Standards, and the Need to Control Judicial Discretion," North Carolina Law Review, Vol. 59, 1981, p. 489
- ¹⁴Heumann, Milton. Plea Bargaining: The Experiences of Prosecutors, Judges, and Defense Attorneys. Chicago: University of Chicago Press, 1978., p. 43
- ¹⁵*ibid.*,
- ¹⁶Other types of bargains, such as those in which lighter sentences are exchanged for information or testimony, are not included in this particular definition of plea negotiations, although they are considered to be a part of plea bargaining generally. These types of plea bargains have been excluded since we are primarily concerned here with a defendant's *self* -incrimination.
- ¹⁷Sanborn, p. 111
- ¹⁸Alschuler, Albert W., "Plea Bargaining and its History," 79 Columbia Law Review, 1979, p. 2
- ¹⁹*ibid.*
- ²⁰It is asserted that before there were even trial procedures, ancient magistrates and governments would sentence the accused based upon the certainty of guilt and upon the defendants ability to "buy" a certain

CHAPTER TWO--NOTES (continued.)

punishment. "The first objects of barter" were money and punishment, not guilty pleas. Sanborn, Joseph, "A Historical Sketch of Plea Bargaining," *Justice Quarterly*, Vol. 3., no. 2, p. 115

²¹*ibid.*, p. 119

²²*ibid.*, p. 5

²³*ibid.*, p. 8

²⁴Friedman, p. 248

²⁵McDonald, Plea Bargaining . . . , p. 3

²⁶Friedman, p. 255

²⁷Alschuler, footnote #128

²⁸*ibid.*

²⁹Heumann, p. 14

³⁰Friedman, p. 256

³¹McDonald, Plea Bargaining . . . , p. 1

³²Heumann, p. 156

³³Santobello v. New York 404 U.S. 257, 261(1971)

³⁴*ibid.*

³⁵*ibid.*, 260

³⁶McDonald, Plea Bargaining . . . , p. 4

³⁷Feeley, p. 201

³⁸*ibid.*, p. 202

³⁹Church, p. 509

⁴⁰ Alschuler, p. 35

⁴¹ Langbein, pp. 261-262

⁴² Alschuler, p. 30

⁴³ Wilson, James Q., Thinking About Crime, Basic Books, Inc., 1975, p. 133

⁴⁴Church, p. 510

⁴⁵Hughes, Graham, Pleas Without Bargains, Rutgers Law Review, Vol. 33, p. 753

⁴⁶McDonald, Plea Bargaining . . . , p. 5. At present in most jurisdictions, judges merely ask defendants a series of questions before accepting the plea. The plea allocution, as the questioning is called, is most often just a meaningless ceremony since defendants are told what to answer by their attorneys and since judges rarely deny the admittance of a guilty plea.

⁴⁷Heumann, p. 160

⁴⁸Alschuler, p. 20

⁴⁹McDonald, Plea Bargaining . . . , p. 1

⁵⁰*Id.*, p. 2

⁵¹see Church, Thomas

CHAPTER THREE--NOTES

¹Heumann, Milton. Plea Bargaining: The Experiences of Prosecutors, Judges, and Defense Attorneys. Chicago: University of Chicago Press, 1978, p. 163

²Kaplan, John and Jerome H. Skolnick. Criminal Justice : Introduction Cases and Materials. Mincola, NY: Foundation Press, 1982, p. p. 464

³Brunk, Conrad, G. "The Problem of Voluntariness and Coercion in the Negotiated Guilty Plea," 13 Law and Society Review. Winter 1979, p. 542

⁴Friedman, Lawrence M., "Perspectives on Plea Bargaining," 13 Law and Society Review, Winter 1979, p. 255

⁵Blumberg, Abraham, S. "The Practice of Law as a Confidence Game: Organization Co-option of a Profession." Criminal Justice Law and Politics. Edited by George F. Cole. Pacific Grove, CA: Brooks/Cole Publishing, 1988, p. 210

⁶Carp, Robert A., and Ronald Stidham. Judicial Process in America. Washington, D.C.: Congressional Quarterly Press, 1990, p. 153, emphasis added

⁷Bordenkircher v. Hayes, 356 U.S. 357, 358 (1978)

⁸Hughes, Graham. "Pleas Without Bargains," 33 Rutgers Law Review, 1981, p. 753

⁹397 U.S. 742, 743

¹⁰*ibid.*, 746

¹¹*ibid.*

¹²Carp, Robert A. and Ronald Stidham. Judicial Process in America. Washington, D.C.: Congressional Quarterly Press, 1990, p. 149

¹³The arraignment is "the first time that a defendant is brought before the judge . . . in order to respond to the prosecutor's bill of information."

Carp, p. 152

¹⁴Seymour, Whitney North, Jr. Why Justice Fails. New York: William Morrow & Company, 1973, p. 88

¹⁵Hiser, Michael. "State v. Byrd: Judicial Participation in Plea Bargaining--Fundamental Fairness?" 8 Ohio Northern University Law Review, 1981, p. 215

¹⁶Wolfe, Tom. Bonfire of the Vanities. New York: Farrar, Straus, Giroux, 1987, p. 117

¹⁷*ibid.*, p. 119

¹⁸Hiser, p. 215

¹⁹*ibid.*, p. 214

²⁰*ibid.*, p. 215

²¹*ibid.*, p. 213

²²Nugent, Paul. "Judicial Participation in Plea Bargaining Which Creates Reasonable Apprehension of Vindictiveness in the Defendant's Mind Violates Due Process," 16 Suffolk University Law Review, 1982, pp. 185-186

CHAPTER THREE--NOTES (continued.)

- 23Riss, Suzanne, "Case Management or Coercion?" New Jersey Law Journal. November 15, 1990, p. 1
- 24*ibid.*
- 25*ibid.*
- 26Heumann, p. 147, emphasis added.
- 27*ibid.*, p. 145
- 28Newman, Donald, "The Negotiated Guilty Process." The Invisible Justice System: Discretion and the Law. Edited by Burton Adkins and Mark Pogrebin. Criminal Justice Series: Anderson Publishing, 1978., 194
- 29McDonald, W., "From Plea Negotiation to Coercive Justice," 13 Law and Society Review, Winter 1979, p.390
- 30"Prosecutorial Discretion and the Initiation of Criminal Complaints," 42 Southern California Law Review. The Invisible Justice System: Discretion and the Law. Edited by Burton Adkins and Mark Pogrebin. Anderson Publishing, 1978., p. 137
- 31McDonald, W., Plea Bargaining . . ., p. 19
- 32*ibid.*
- 33*ibid.*
- 34*ibid.*
- 35Kaplan, p. 453
- 36*ibid.*
- 37*ibid.*, p. v
- 38*ibid.*, p. 19, emphasis added.
- 39Heumann, p. 42
- 40McDonald, Plea Bargaining . . ., p. 20
- 41Heumann, p. 42
- 42McDonald, Plea Bargaining . . ., p. 49
- 43*ibid.*
- 44*ibid.*, pp. 50, 59
- 45*ibid.*, p. 52
- 46*ibid.*, p. 50
- 47Blumberg, p. 207
- 48*ibid.*, p, 217
- 49*ibid.*
- 50Dershowitz, Alan M. The Best Defense. New York: Random House, 1982. p. 400

CHAPTER FOUR--NOTES

¹Moran, Kenneth T., and John Cooper. Discretion and the Criminal Justice Process. Port Washington, NY: Associated Faculty Press, 1983, p. 14

²Abrams, Howard E. "Systemic Coercion: Unconstitutional Conditions in the Criminal Law, 72 Journal of Criminal Law and Criminology. 1981, p. 143

³*ibid.*, p. 144

⁴*ibid.*, It should be noted here that Justice Warren is speaking specifically of determining legislative intent. However, the same difficulties that arise when attempting to determine a legislator's motives occur in the instance at hand as well.

⁵*ibid.*

⁶*ibid.*, pp. 143, 146

⁷*ibid.*

⁸Feeley, Malcolm. "Plea Bargaining and the Structure of the Criminal Process," Criminal Justice Law and Politics. Edited by George Cole. Pacific Grove, CA: Brooks/Cole Publishing, 1988, p. 470

⁹Alschuler, Albert. "Plea Bargaining and its History," 79 Columbia Law Review, 1979, p. 40

¹⁰The earliest cases which can be attributed to the "due process revolution" actually were ruled upon in the late 1950s, but for our purposes, the 1960s and 1970s most accurately connote the time period in which the "revolution" took place.

¹¹Alschuler, p. 38

¹²*ibid.*, p. 39, emphasis added.

¹³*ibid.*

¹⁴*ibid.*, p. 38

¹⁵Friedman, Lawrence, M. "Plea Bargaining in Historical Perspective," 13 Law and Society Review. Winter 1979, p. 257

¹⁶*ibid.*

¹⁷Alschuler, p. 41

¹⁸Friedman, p. 257

¹⁹Alschuler, p. 41

²⁰Kaplan, John, and Jerome H. Skolnick. Criminal Justice: Introductory Cases and Materials. Mineola, NY: Foundation Press, 1982, p. 445

²¹Report of the New York State Judicial Commission on Minorities. By James C. Goodale, Chairman. New York: July, 1991

²²Kaplan, p. 445

²³Heumann, Milton. Plea Bargaining: The experiences of Prosecutors, Judges, and Defense Attorneys. Chicago: University of Chicago Press, 1978, chapter three.

²⁴see T. Kenneth Moran

²⁵Kaplan, pp. 461-462

²⁶Heumann, p. 148

CHAPTER FOUR--NOTES (continued.)

²⁷*ibid.*

²⁸Moran, p. 63

²⁹*ibid.*

³⁰Heumann, p. 154

³¹*ibid.*, p. 163

³²Nardulli, Peter F., James Eisenstein, and Roy B. Flemming. The Tenor of Justice: Criminal Courts and the Guilty Plea. Chicago: University of Illinois Press, 1988, pp. 123-124

³³Moran, p. 63

³⁴Kaplan, p. 462

³⁵*ibid.*

³⁶Feeley, Malcolm, "Perspectives on Plea Bargaining," 13 Law and Society Review, Winter 1979, p.200

³⁷Dershowitz, Alan. The Best Defense. New York: Random House, 1982, p. 402

³⁸ Moran, p. 9

³⁹*ibid.*, p. 11

⁴⁰Gordon, Diana R. The Justice Juggernaut: Fighting Street Crime. Controlling Citizens . New Brunswick, NJ: Rutgers University Press, 1990, p. 16

⁴¹Moran, p. 60

⁴²*ibid.*, p. 61

⁴³Alschuler, p. 31

⁴⁴Moran, p. 32

⁴⁵*ibid.*, p. 14

⁴⁶*ibid.*

⁴⁷McDonald, William F., Plea Bargaining: Critical Issues and Common Practices. Washington, D.C.: U.S. Department of Justice, 1985, p. 68

⁴⁸Moran, p. 59

⁴⁹Heumann, p. 144

⁵⁰*ibid.*

⁵¹*ibid.*

⁵²Heumann, p. 157

⁵³Kaplan, p. 465

CHAPTER FIVE--NOTES

¹Wertheimer, Alan. Coercion. Princeton, NJ: Princeton University Press, 1987, p. 8

²*ibid.*, p. 3

³Brunk, Conrad, G. "The Problem of Voluntariness and Coercion in the Negotiated Guilty Plea," 13 Law and Society Review, Winter 1979, p. 532. Indeed, there are many different types of freedom and "the terms 'freedom' and 'voluntary' can be used in different senses depending upon the constraints and goals that are selected." (B2, 531) For our purposes, freedom is to be defined as the absence of social (rather than psychological) constraints upon both the circumstances and will of the agent.

⁴In "Are Coerced Agreements Involuntary?", Philips argues that an involuntary act is one in which an individual "fails to satisfy some necessary condition of free agency." Free agency requires an expression of the will, so to act involuntarily is to be incapable of making a rational decision. Coercion, by contrast, is to act act rationally (express a will) in the context of "unwanted, unpleasant alternatives." Law and Philosophy, vol. 3, 1984, p. 134

⁵Philips, Michael, "The Question of Voluntariness in the Plea Bargaining Controversy," 16 Law and Society Review, 1981-1982, pp. 133-134

⁶Wertheimer, p. 9

⁷*ibid.*

⁸Kipnis, Kenneth. "Criminal Justice and the Negotiated Plea," Ethics, Vol. 86, 1976. Kipnis's gunman has become the paradigmatic case scenario for coercion.

⁹Hoekema, David A. Rights and Wrongs: Coercion, Punishment and the State. London: Associated University Press, 1986, p. 19

¹⁰Westin, Peter. "'Freedom' and 'Coercion'--Virtue and Vice Words," Duke Law Journal, June-September, 1985, p. 572

¹¹*ibid.*

¹²Nozick, Robert. "Coercion," Philosophy, Science and Method: Essays in Honor of Ernest Nagel. Edited by Sidney Morgenbesser, Patrick Suppes, and Morton White. New York: St. Martin's Press, 1969, p. 449

¹³Wertheimer, p. 136-137

¹⁴Westin, p. 573

¹⁵Nozick, p. 447

¹⁶Wertheimer, p. 229

¹⁷Nozick, p. 447

¹⁸Brunk, p. 539

¹⁹Honoré, Tony. "A Theory of Coercion," Oxford Journal of Legal Studies, Vol. 10, 1990, p. 96

²⁰Hiser, Michael. "State v. Byrd: Judicial Participation in Plea Bargaining--Fundamental Fairness?" Ohio Northern University Law Review, Vol. 8, 1981, p. 215

CHAPTER FIVE--NOTES (continued.)

²¹Wertheimer, p. 131

²²Westin, p. 572

²³Brunk, 539

²⁴*ibid.*

²⁵*ibid.*

²⁶Westin, p. 573

²⁷Hoekema, p. 23

²⁸Westin, p. 566

²⁹*ibid.*, p. 563

³⁰*ibid.*

³¹Hoekema, p. 23

³²Wertheimer, p. 126

³³Brunk, p. 537

³⁴*ibid.*

³⁵Hoekema, p. 36

³⁶Wertheimer, p. 6

³⁷Hoekema, p. 33

³⁸Brunk, p. 537

³⁹*ibid.*, p. 544

⁴⁰*ibid.*, p. 546

⁴¹*ibid.*, p. 540

⁴²Wertheimer, p. 6

CHAPTER SIX--NOTES

- ¹Philips, Michael. "Are Coerced Agreements Involuntary?" Law and Philosophy, Vol. 3, 1984, p. 144
- ²Hoekema, David A. Rights and Wrongs: Coercion, Punishment and the State. London: Associated University Press, 1986, p. 14
- ³Philips, p. 133
- ⁴McDonald, William F., "From Plea Negotiation to Coercive Justice," 13 Law and Society Review, Winter 1979, p. 391
- ⁵397 U.S. 742 at 750, emphasis added
- ⁶McCoy, Thomas and Michael Mirra, "Plea Bargaining as Due Process in Determining Guilt, Stanford Law Review, Vol 32, p. 888
- ⁷Jones, David A, Crime Without Punishment . Lexington, MA:Lexington Books, 1979, p. 138
- ⁸*ibid.*, pg. 139
- ⁹Becker, Loftus E., "Plea Bargaining and the Supreme Court," Loyola of Los Angeles Law Review, Vol. 21, p. 763
- ¹⁰Becker, p. 793
- ¹¹Wertheimer, Alan. "Freedom, Morality, Plea Bargaining, and the Supreme Court," Philosophy and Public Affairs, Vol. 8, 1978-79, p. 228
- ¹²Wertheimer, "Freedom, Morality . . ." p. 229
- ¹³400 U.S. 23,37
- ¹⁴Hughes, Graham, "Plea Without Bargains," Rutgers Law Review, Vol. 33, p. 761
- ¹⁵Hoekema, p. 124, emphasis added.
- ¹⁶McFadden, Patrick M., The Balancing Test, Boston College Law Review, Vol. 29, 1988, p. 586
- ¹⁷*ibid.*, p. 592
- ¹⁸*ibid.*, p. 596
- ¹⁹*ibid.*, p. 586
- ²⁰*ibid.*, p. 595
- ²¹Wertheimer, "Freedom, Coercion . . .", p. 230
- ²²Harvard Law Review, "The Unconstitutionality of Plea Bargaining," Vol. 83, 1970, p. 1395
- ²³*ibid.*
- ²⁴Harvard, p. 1395
- ²⁵Alschuler, Albert . "The Prosecutor's Role in Plea Bargaining," 36 Univ. of Chicago Law Review, p. 30
- ²⁶Kipnis, Kenneth, "Criminal Justice and the Negotiated Guilty Plea," Ethics, vol. 86, 1976, p. 104
- ²⁷McFadden, p. 594
- ²⁸It is important to note here that this is a different sense of "compelling" than they one which is used as a verb--to compel--and is virtually synonymous with coercion. "Compelling state interest" does not refer to coercive state interests but rather to interests of such importance that the state is forced to act upon them.

CHAPTER SIX--NOTES (continued.)

²⁹Wertheimer, "Freedom, Morality . . ." p. 231

³⁰*ibid.*, p. 230

³¹*ibid.*, p. 203

³²McFadden, p. 637

³³*ibid.*, p. 638

³⁴McFadden, p. 638

³⁵43 U.S. 357, 364, emphasis added.

³⁶Becker, p. 788

³⁷*ibid.*, p. 788

³⁸Wertheimer, Alan. Coercion. Princeton, NJ: Princeton University Press, 1987, p. 129

³⁹Wertheimer, Coercion, p. 124

⁴⁰Wertheimer, "Freedom, Morality . . .", p. 230

⁴¹Hodson, John D. The Ethics of Legal Coercion. Boston: D, Reidel Publishing, 1983, p. xi.

⁴²Kipnis, p. 100

⁴³Wertheimer, "Freedom, Morality . . .", p. 232

⁴⁴Hughes, p. 753, emphasis added.

⁴⁵Kaplan, John, and Jerome H. Skolnick. Criminal Justice: Introductory Cases and Materials. Mineola, NY: Foundation Press, 1982, p. 464

CHAPTER SEVEN--NOTES

¹Hamilton, Alexander. The Federalist Papers, No. 83 . Edited by Clinton Rossiter. New York:Mentor, 1961, p. 499

²Weinreb, Lloyd L. Denial of Justice: Criminal Process in the United States. New York: Free Press, 1977, p. 79

³*ibid.*

⁴Wertheimer, Alan. Coercion . Princeton, NJ: Princeton University Press, 1987,p. 125

⁵Kaplan, John, and Jerome Skolnick . Criminal Justice: Introductory Cases and Materials. Mineola, NY: Foundation Press, 1982.

⁶McDonald, William F., "From Plea Bargaining to Coercive Justice," 13 Law and Society Review, Winter 1979 , p. 391

⁷Garrity v. New Jersey, 385 U.S. 493 (1967)

⁸Hughes, Graham. "Pleas Without Bargains," Rutgers Law Review vol. 33, 1981, p. 754

⁹McDonald, p. 391

¹⁰Hughes, p. 761

¹¹Brunk, Conrad, "The Problem of Voluntariness and Coercion in the Negotiated Guilty Plea," 13 Law and Society Review, Winter 1979, p. 546

¹²Nugent, Paul, "Judicial Participation in Plea Bargaining which Creates Reasonable Apprehension of Vindictiveness . . ." Suffolk University Law Review, vol. 16, 1982, p. 187

¹³Ackley, Harry, "Plain Talk About Plea Bargaining," Pepperdine Law Review, vol. 10., p.49

¹⁴Alschuler, Albert, "The Trial Judge's Role in Plea Bargaining," Columbia Law Review, vol. 79, 1979, p. 1060

¹⁵Schlesinger, Steven Malloy and Elizabeth A., "Plea bargaining and the Judiciary: An Argument for Reform," Drake Law Review, vol 30, p. 584

¹⁶Manhattan has just recently implemented a variation of this reform in its criminal justice jurisdiction. At least now defendant's have the opportunity to avoid vindictiveness because they have separate proceedings for pleas, and see a different judge than the one which is scheduled to preside over a trial if there is one.

¹⁷Brunk, p. 549

¹⁸Miami has a policy of almost "complete discovery"--meaning that there defense attorney has a lot greater access to the prosecution's case. As a result, there is little or no bluffing.

BIBLIOGRAPHY

Abrams, Howard E. "Systemic Coercion: Unconstitutional Conditions in the Criminal Law." Journal of Criminal Law and Criminology. Vol. 72, no. 1, 1981.

Ackley, Harry A. "Plain Talk About Plea Bargaining." Pepperdine Law Review. Vol. 10, 1982

Alschuler, Albert W. "The Changing Plea Bargaining Debate." California Law Review. Vol. 69, 1981

Alschuler, Albert W. "Plea Bargaining And Its History." Columbia Law Review. Vol 79., no.1, 1979.

Alschuler, Albert W. "The Trial Judge's Role in Plea Bargaining, Part I", Columbia Law Review, Vol. 76, no.7, 1976.

Becker, Loftus E. "Plea Bargaining and the Supreme Court ." Loyola of Los Angeles Law Review, Vol. 21, 1988.

Blumberg, Abraham S. "The Practice of Law as a Confidence Game: Organization Co-optation of a Profession." Criminal Justice: Law and Politics. Edited by George F. Cole. Pacific Grove California: Brooks/Cole Publishing, 1988.

Brunk, Conrad G. " The Problem of Voluntariness and Coercion in the Negotiated Guilty Plea." Law and Society Review. Vol. 13, Winter 1979.

Carp, Robert A. and Ronald Stidham. Judicial Process in America. Washington, D.C.: Congressional Quarterly Press, 1990.

Casper, Jonathan D. American Criminal Justice: The Defendant's Perspective. Englewood Cliffs, New Jersey: Prentice Hall., 1972

Casper, Jonathan D. "Reformers v. Abolitionists: Some Notes for Further Research on Plea Bargaining." Law and Society Review.

Church, Thomas W., Jr. " In Defense of 'Bargain Justice'." Law and Society Review. Winter 1979.

Dershowitz, Alan. The Best Defense. New York: Random House, 1982.

Feeley, Malcolm M. Court Reform on Trial: Why Simple Solutions Fail. New York: Basic Books, Inc., 1983

Feeley, Malcolm M. "Perspectives on Plea Bargaining. " Law and Society Review. Vol. 13, Winter 1979.

Friedman, Lawrence M., "Plea Bargaining in Perspective." Law and Society Review. Vol. 13, Winter 1979.

Gordon, Diana R., The Justice Juggernaut: Fighting Street Crime. Controlling Citizens. New Brunswick, New Jersey: Rutgers University Press, 1990.

Halberstam, Malvina. "Towards Neutral Principles in the Administration of Criminal Justice: A Critique of Supreme Court Decisions Sanctioning the Plea Bargaining Process." The Journal of Criminal Law and Criminology. Vol. 73, no. 1, 1982.

Haller, Mark H. "Plea Bargaining: The Nineteenth Century Context ." Vol. 13, Law and Society Review. 1979.

Harvard Law Review. "The Unconstitutionality of Plea Bargaining." Vol. 83: 1370, 1970.

Heumann, Milton. Plea Bargaining: The Experiences of Prosecutors, Judges, and Defense Attorneys. Chicago: University of Chicago Press, 1978.

Hiser, Michael. " State v. Byrd: Judicial Participation in Plea Bargaining-- Fundamental Fairness?" Ohio Northern University Law Review, Vol. 8, 1981.

Hodson, John D. The Ethics of Legal Coercion. Boston: D. Reidel Publishing, 1983.

Hoekema, David A. Rights and Wrongs: Coercion, Punishment and the State. London: Associated University Press, 1986.

Honoré, Tony. " A Theory of Coercion ." Oxford Journal of Legal Studies. Vol 10, 1990.

Hughes, Graham. "Pleas Without Bargains." Rutgers Law Review. Vol. 33, 1981.

Jones, David A. Crime Without Punishment. Lexington, MA: Lexington Books, 1979.

Kaplan, John, and Jerome H. Skolnick, Criminal Justice: Introductory Cases and Materials. Mineola, New York: Foundation Press, 1982.

Kipnis, Kenneth. "Criminal Justice and the Negotiated Plea ." Ethics, Vol. 86, 1976.

Langbein, John H. "Understanding the Short History of Plea Bargaining." 13 Law and Society Review, Winter 1979.

Lefstein, Norman. "Plea Bargaining and the Trial Judge, The New ABA Standards, and the Need to Control Judicial Discretion." North Carolina Law Review. Vol. 59, 1981.

MacNamee, Susan. "Judicial Participation in Plea Bargaining." S. Carolina Law Review, Vol. 34, 1982.

Maynard, Douglas W. Inside Plea Bargaining: The Language of Negotiation. New York: Plenum Press, 1984.

McCoy, Thomas and Mirra, Michael. "Plea Bargaining as Due Process in Determining Guilt." Stanford Law Review, Vol. 32:887, 1980.

McDonald, Mark. "Guilty Pleas and the Criminal Process: Encouragement or Coercion?" Cincinnati Law Review . Vol. 48, 1979.

McDonald, William F. "From Plea Negotiation to Coercive Justice: Notes on the Respecification of a Concept " Law and Society Review, Vol. 13, Winter 1979.

McDonald, William F. Plea Bargaining: Critical Issues and Common Practices. Washington, D.C.: U.S. Department of Justice, 1985.

McFadden, Patrick M. "The Balancing Test." Boston College Law Review. Vol. 29, 1988.

Mill, John Stuart. On Liberty. Edited by David Spitz. New York: W. W. Norton and Company, 1975.

Moran, T. Kenneth, and John L. Cooper. Discretion and the Criminal Justice Process. Port Washington: Associated Faculty Press, 1983.

Nardulli, Peter F., James Eisenstein, and Roy B. Flemming. The Tenor of Justice: Criminal Courts and the Guilty Plea. Chicago: University of Illinois Press, 1988.

Newman, Donald. "The Negotiated Plea Process." The Invisible Justice System: Discretion and the Law. Edited by Burton Atkins and Mark Pogrebin. Anderson Publishing, 1978.

Nozick, Robert. "Coercion." Philosophy, Science, and Method: Essays in Honor of Ernest Nagel. Edited by Sidney Morgenbesser, Patrick Suppes, and Morton White. New York: St. Martin's Press, 1969.

Nugent, Paul. "Judicial Participation in Plea Bargaining Which Creates Reasonable Apprehension of Vindictiveness in the Defendant's Mind Violates Due Process." Suffolk University Law Review. Vol. 16, no. 1, 1982.

Philips, Michael. "Are Coerced Agreements Involuntary?" Law and Philosophy. Vol. 3, 1984.

Philips, Michael. "The Question of Voluntariness in the Plea Bargaining Controversy: A Philosophical Clarification." Law and Society Review. Vol. 16.

Report of the New York State Judicial Commission on Minorities. James C. Goodale, Chairman, Volume One, Executive Summary. New York City, April 1991.

Rosenblatt, Roger, "The Bill of Rights," Life: Bicentennial Issue. Fall Special, 1991.

Sanborn, Joseph B. " A Historical Sketch of Plea Bargaining." Justice Quarterly. Vol. 3, no. 2, 1986.

Schlesinger, Steven R. and Malloy, Elizabeth A. " Plea Bargaining and the Judiciary: An Argument for Reform." Drake Law Review. Vol. 30.

Seymour, Whitney North Jr. Why Justice Fails. New York: William Morrow & Company, 1973.

Uviller, H. Richard. The Process of Criminal Justice; Adjudication. St. Paul, Minnesota: West Publishing, 1978.

Weinreb, Lloyd L. The Denial of Justice: Criminal Process in the United States. New York: Free Press, 1977.

Wertheimer, Alan. Coercion. Princeton, New Jersey: Princeton University Press, 1987.

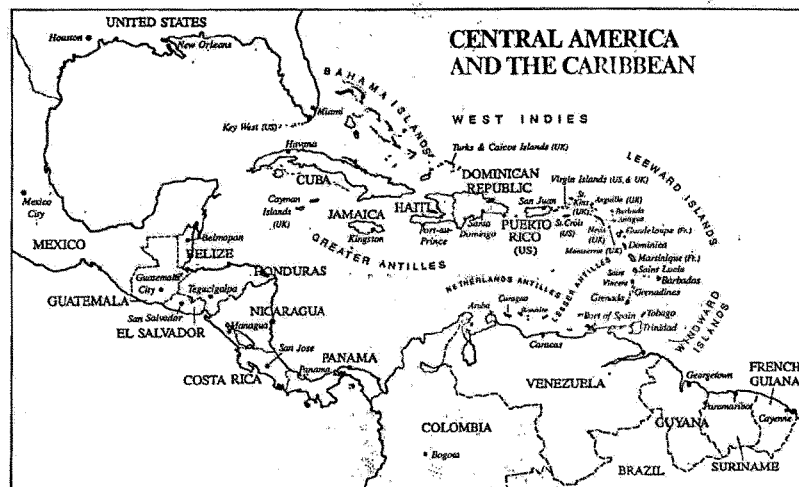
Wertheimer, Alan. " Freedom, Morality, Plea Bargaining, and the Supreme Court ." Philosophy and Public Affairs. Vol. 8 , 1978-1979.

Westin, Peter . "' Freedom and 'Coercion"--Virtue Words and Vice Words." Duke Law Journal , June-September, Volume 1985.

Wilson, James Q. Thinking About Crime. New York: Basic Books, 1983.

PROGRESSIVE FORENSICS

ADDRESSING ISSUES OF PUBLIC CONCERN



**"RESOLVED: THAT THE UNITED STATES
GOVERNMENT SHOULD ADOPT A POLICY TO
INCREASE POLITICAL STABILITY IN
LATIN AMERICA."**

Place Oratory
Invitation

It's About Time

Katani O. Brown
William Faulkner Invitational
Oratory Winner

Coached by Fran Berger

Did you know that it takes .002 of a second for a balloon to pop? Or that it takes .3 of a second to slam a drawer shut? Did you know that in one minute a newborn baby's brain grows 1 to 2 milligrams, and in one week that same baby soils 70 to 90 diapers? Whereas, in 1 minute, the heart of a shrew beats 1,000 times and in 2 minutes a giraffe can run an entire mile, the duration of hypnosis in sheep is only 30 seconds. One second is not only the average time that it takes for an adult to read a 5 syllable word, but it's also the shortest interval of time between windshield wiper strokes of a 1975 Chevelle.

O.K. - be honest. How many of us knew that? How many of us really care? Who would actually stake the time to figure out how much time these things take??? In his book Durations, author Stuart Sandow lists a veritable panorama of events that fill time. While the Guinness book is a record of how long things have taken, Durations is an encyclopedia of how long things take. Although the book itself is a bit unorthodox in its approach, Sandow's focus shouldn't come as a surprise to us -- after all, we are a time-oriented society.

TIME! For all practical purposes, it can be defined as a "stretch of duration in which things happen," and nearly everything we do or say in our modern society is affected by it. Think for a second. In a typical 24-hour day, we are expected to get up early in the morning and arrive at work or school on time. We are given a lunch hour (which is often only 30 minutes long), and a pay-

check or report card, based on hours on the job. At home, we take time out to listen to Bruce Springsteen's "Glory Days" and Cyndi Lauper's "Time After Time" or to watch "Days of Our Lives" and "60 Minutes" or to read Time Magazine and the New York Times. Time is also prevalent in our extracurricular activities. In sports, there are time-outs and half-times. In debate, you have prep time, time cards, and time keepers. In a speech tournament, I'm sure that you have all observed the competitor in a speech tournament who marches confidently to the front of the room and asks, "Is there a time-keeper?"

The truth is -- we are all time-keepers in our everyday lives. And not only do we keep time -- we buy it, spend it, borrow it, save it, kill it, conserve it, use it, and lose it within the course of every day. In his book, Living on the Ragged Edge, Dr. Charles Swindoll asserts that time is our most precious commodity, but unfortunately too few people use it wisely or appreciate its value.

You know, the teenage boy who comes home from school with tons of homework, but his top priorities are snacking, watching T.V., and shooting a few hoops; of course, later that evening he complains that he doesn't have time to complete his assignments. Or the working mother whose time is so tightly scheduled from 6:30 A.M. to 10:00 P.M. with work, children, dancing lessons, little league baseball, cooking, washing, and cleaning that when her son announces on the way home from school that he left his Kermit the Frog lunchbox by the Jungle Gym,

the extra 15 minutes for the return to the school throws her entire schedule off for the rest of the day. Finally, what about the businessman who rushes through the reports to save time then spends more time trying to straighten out the mess he's made than he would have actually saved in the first place. We can all identify with each of these three - because each scenario exemplifies a typical waste of time.

I, for one, am a classic example of wasting time due to my lack of organization. As a result, just like the teenage boy, I wind up struggling to finish a physics lab at 1:30 in the morning and wondering where my time went. Alan Lakein in *How to Get Control of the Time and Your Life* explains "to waste your time is to waste your life." By not organizing your time and completing the most important tasks first, you actually limit the amount of free time available for what you really enjoy doing.

On the other hand, there are those who are so time-conscious that they overschedule themselves. In an attempt to utilize every spare minute. Not only is this type of organization unhealthy, it is, as the mother in the scenario learned, very impractical. Acclaimed artist Andy Warhol once said that "we'd all be famous for 15 minutes," but considering our tightly-arranged schedules, how many of us would ever have the time? Many people still believe that the only way to make the most of their time is to do as much as possible with their time. Although waste-no-time schedules are efficient, Alan Lakein remarks that that kind of efficiency means

taking the thinking out of an activity and reducing it to a series of mechanical routines." Scheduling causes us to focus more on the quantity of time rather than its quality, and places more emphasis on the systematic rather than the humanistic.

In her article "Active Lives '85," Irene Borger summarized the problems of the overschedulers: "Time becomes segmented, both professionally and personally. We must schedule friends into our books, since intimacy is rarely threaded into the day. Schedules are more valued than people, and life proceeds like clockwork."

Although life probably isn't quite so calculated for the majority of us, we have all experienced the "rushing" phenomenon at one time or another. Irene Borger remarks that we hurtle through time trying to see just how many things we can cram into one day. The June 1984 edition of *Health Magazine* explains that as the quantity of self-assignments mount up, we find it necessary to rush in the hopes that the faster we get one thing done, the sooner we can get on to the next. Unfortunately, what generally results is that "the hurrier we go, the behinder we get." And the fact still remains that no matter how we rush, time cannot be saved.

In the early 1970's, famed rock musician Jim Croce wrote a song entitled "Time in a Bottle." Croce wrote the song for his wife, expressing his longing to try and save their times together, since according to the lyrics, "there never seems to be enough time to do the things you want to do." In

September 1973, before he had the time to sing the song to his wife. Jim Croce was killed in a plane crash. Tragically, his death points out what so many of us have yet to understand. We do not know how much time we have, but instead of trying to save it, we should make the most of the time that we are given. In this respect, time is analogous to money: we can spend it any way we want, but we can only spend it once. And just like money, time is much too valuable to lose.

In order to make the most meaningful use of our time, we can't treat it whimsically, schedule it mechanically, or rush through it insanely. The only way to appreciate the value of time is to use it wisely. I need to place less emphasis on the amount of time being devoted to each activity and more on the quality of that time. Although you may have scheduled only half an hour to interact with your children every night, realize that a discussion may take more time, and learn to be flexible, relying less on your log book and more on your instincts. And finally, if you are running a little late, don't rush. You're not really saving any time. In fact, you will have used even more time by the time you've changed your torn stockings and coffee-stained blouse, bandaged your cut finger, and switched your shoe with the broken heel - all caused by your haste.

It's about time that people begin utilizing time wisely and not wasting so much of it, hurrying through it, or getting so wrapped up in it that an entire schedule is ruined just because it takes five minutes to prepare a bowl of minute

rice. Time is very valuable, and although you might not know that it takes ten minutes for air conditioners to blow a cycle of fresh air throughout the Empire State Building, I'm sure you do know that my time is almost up. Ben Franklin once said that time is the stuff life is made of. Maybe by learning to appreciate the time that we are given, we will someday realize what it means to have the time of our lives.

Ketanji O. Brown, a student at Palmetto Senior High School, Miami, Florida, won first place in Oratory at the 6th Annual William Faulkner Invitational High School Forensics Tournament held at the University of Mississippi, October 11 and 12, 1987. Director of Forensics at the University of Mississippi is Joann Edwards.

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THE ECONOMY

THE JOB FREEZE

The most recent economic news is upbeat. There's just one little problem: nobody's hiring.

By JOHN GREENWALD

FOR MORE THAN A YEAR, THE U.S. has been tantalized by tidings of economic recovery. And now those esoteric leading indicators that so hearten the experts are becoming visible to average workers: consumers are buying, and the economy is growing at a steady, if unspectacular, pace. Yet something important is missing as President Clinton prepares his prematurely overdue economic plan: new jobs.

In spite of the good news about the economy as a whole, most large corporations prefer almost any alternative to hiring new full-time employees. Not only do they have painful memories of the recent recession, but they now face runaway costs for health care and other benefits that often make it prohibitively expensive to expand their work force. The same companies are being squeezed even tighter by global competition, which has made cost cutting and downsizing—on a permanent basis—a way of life.

"There is almost a paranoia about creating new jobs in large corporations," says David Orr, a managing partner for the outplacement firm Jannotta, Bray. Concurrs Audrey Freedman, president of the Manpower Plus employment consulting firm: "Companies are about as glad to see a new worker in their ranks as impoverished families are to add another plate to their table."

Even companies who want to hire say they are constrained by doubts about the recovery. "This recession has had nine lives, and we've already seen a number of false starts," says John Roach, chairman of Tandy Corp., which owns the Radio Shack electronics stores. "Actual growth in jobs will require a stronger rebound in the economy than there seems to be right now." At lumber giant Georgia-Pacific, hiring plans have been shelved despite forecasts of increased homebuilding in 1993. "Consumers would have to come back after the Christmas buying binge and show continued confidence," says president A.D. Correll. "We would have to see some real economic growth."

That is particularly alarming because no matter what policies the new Administration pursues, the fate of the recovery will ultimately rest on the willingness of companies to start hiring again. So far, the outlook seems stubbornly dim. A recent American Management Association index of the hiring plans of 785 companies stands at a dismal 9.6 on a scale of 100. A growing economy would normally produce an index at least in the 30s. "This recovery will be limited to fewer jobs and lower incomes than at any other time in the postwar period," says Lawrence Mishel, research director of the Economic Policy Institute in Washington. "Many Americans may not feel they are in a recovery at all."

Instead of hiring, such giants as IBM, General Motors, United Airlines and Eastman Kodak are still slashing their payrolls. And dynamic small start-up firms—which created 20 million jobs in the 1980s—have faced a lending crunch that denies them the capital they need to grow and add new jobs. All that has left the health-care and temporary-help industries as the chief source of hiring since the recession officially ended in March 1991.

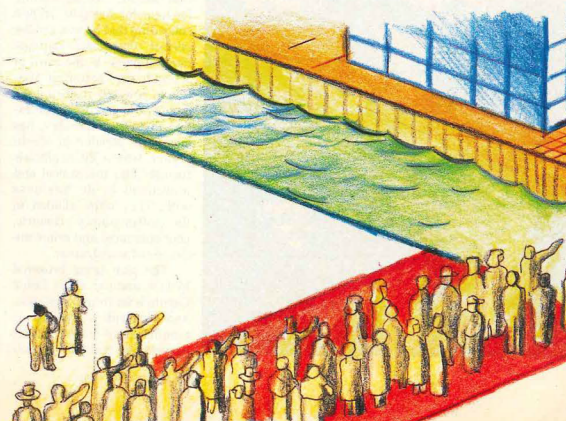
Dreary job prospects have led to a steady drop in campus recruiting. Companies plan to cut their college interviews 6% this year, after a 28% decline in 1992, according to a Michigan State survey. That could force more graduates to settle for short-term jobs rather than entry-level career positions. Fully 43% of workers between 18 and 24 are already stuck in minimum-wage

jobs, up from 23% during the 1981 slump.

Even the health-care industry, the economy's bright spot in recent years, has begun to falter as a source of jobs. Faced with mounting public pressure to restrain runaway prices, drug firms and hospitals have been closing facilities and letting people go. "There's bound to be some sort of fallout as we try to slow the escalating cost of health care," says R. Clayton McWhorter, chief executive of HealthTrust Inc., based in Nashville, Tennessee, which may consolidate several of its 81 hospitals. "Naturally there are going to be personnel reductions."

The result is a Catch-22 dilemma: health-care costs must be contained in order to encourage corporations to take on full-time workers, but the process could curtail growth in the one job sector that has been robust. "Clinton is targeting the health-care industry for reforms, but the effects would be regressive right off the bat," says Ed Yardeni, chief economist for the C.J. Lawrence investment firm. "The first impact of new regulations would be to kill the goose that laid all those golden jobs since the recovery began."

Nor can the economy expect much help from defense contractors, which are still shedding jobs while searching for ways to branch into civilian lines of business. "We'll be down somewhat again this year—a small percentage," says Kent Kresa, chief executive of military-jet builder Northrop, which cut 3,000 jobs, or nearly 10% of its labor force, in 1992. Such layoffs continue to



batter Southern California, the home of the U.S. aerospace industry. "This is akin to what happened when Pittsburgh lost its steel firms and Detroit downsized its auto industry," says Jack Kyser, chief economist for the Economic Development Corp. of Los Angeles County.

Small start-up companies, the main engines of job growth in the 1980s, are in a hiring slump. Unable to get loans from risk-averse banks and burdened by rising health-care costs, small firms last year added jobs at a rate of just 10,000 a month—compared with a peak of 175,000 a month in the 1980s. "If this company had tried to start out in 1991 or 1992, we wouldn't be here today," says Bernard Marcus, chairman of the Home Depot chain, which has grown to 214 household-improvement stores since opening its first one in 1979. "No bank in the U.S. in the past two or three years would have financed this business."

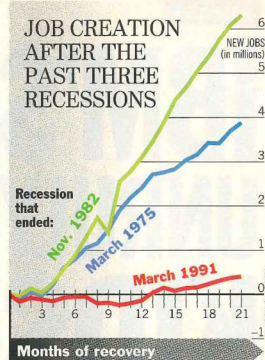
The bleak picture has brightened a bit, as banks, flush with profits, have begun making more business loans. "We have certainly seen an increased tendency to lend," says Richard Syron, president of the Boston Federal Reserve Bank, "and part of this lending goes to small firms, some of which are hiring." But while the number of new small-business jobs has risen to about 50,000 a month, economists say it would take four times that

rate of growth to reduce the U.S. unemployment level from its present 7.3% to a more comfortable 6%.

If companies are reluctant to add full-time workers, they are happy to replace many current employees with consultants and temporary help. That spares firms the cost of health insurance and other benefits and lets them expand or contract their work force as swiftly as business conditions demand. Even as IBM executes plans to lay off 25,000 employees in 1993, it maintains contracts with 300 outside firms to handle tasks ranging from running the computer giant's payrolls to designing software programs. Prodigy Services, a money-losing IBM-Sears venture that provides computerized home-shopping and information networks, is laying off 250 workers while hiring a company to take over its customer-services department.

Such moves are swiftly reshaping U.S. employment practices. Few jobs are too large or too small to be handled by temps or consultants, who can range in skill from fledgling secretaries to surgeons to computer scientists with Ph.D.s. David Lewin, director of the UCLA Institute of Industrial Relations, says contract employees could grow from 24% of the U.S. work force today

JOB CREATION AFTER THE PAST THREE RECESSIONS



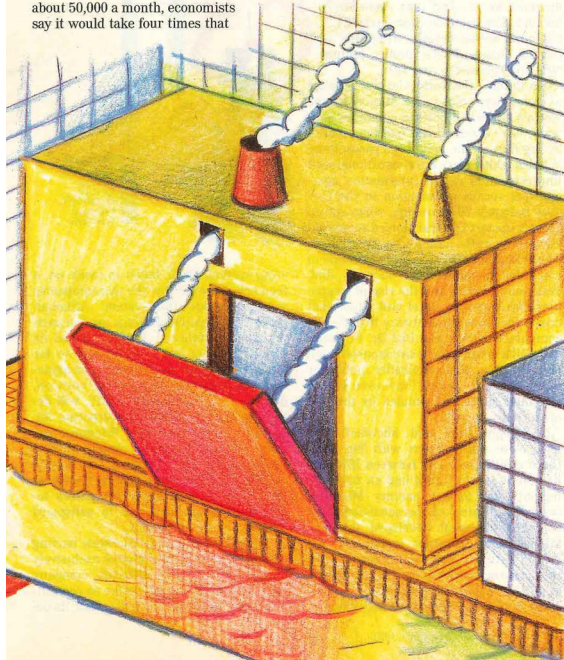
to 40% by the end of the decade as companies continue to replace permanent positions with temporary jobs.

Though the hiring news is mostly bad, it is certainly not all bad. Some companies have gone right on hiring despite the sluggish economy. Andersen Consulting, a four-year-old spin-off of the Arthur Andersen accounting firm, has been recruiting full-time employees at the rate of 2,000 a year. Sara Lee, an aggressive food and apparel maker whose marketing skills have made best sellers of brands like L'eggs hosiery and Hanes underwear, has built 25 U.S. plants and doubled its job rolls since 1989. And Genzyme, a Cambridge, Massachusetts, biotechnology research and marketing firm that is developing drugs for diseases like cystic fibrosis, plans to hire some 200 scientists and technicians for the third straight year, bringing its payroll to nearly 1,700 workers.

But most companies have put their expansion plans on hold while waiting to see how the economy behaves under the new Administration. "We're still overstored, overbanked and overgoverned," says Rex Adams, a vice president of Mobil, which has laid off 13,000 petroleum workers in recent years. "We're still a country of excess capacity. There is going to be job growth, but there will still be fewer manufacturing jobs and fewer secure jobs. People are only going to start hiring in significant numbers when they feel they have a possibility of making some money."

If Bill Clinton hopes to solve all these problems in the long run, he will have to deliver on promises to improve the education and skills of the work force and the strength of the nation's infrastructure. Only that will restore U.S. competitiveness and create new jobs in a global setting in which people and their skills are the resources that really count.

—Reported by
Jordan Bonfante/Los Angeles, Ketanji O. Brown/
New York and William McWhirter/Chicago



2/1/93

ADVERTISING

Hollywood Rocks Madison Avenue

Creative Artists shakes up the ad business with a sparkling new series of commercials for Coca-Cola



By JANICE CASTRO



AT ANY OTHER TIME, THE announcement by Coca-Cola president Donald Keough of a worldwide campaign of 26 new commercials would have been cause for celebration in the advertising industry. Describing just such an occasion last week, a pumped-up Peter Sealey, Coke's director of global marketing, said, "It was a seminal moment, like the first sustainable nuclear reaction." Maybe so, but this time it was Madison Avenue that was feeling the heat. After relying on New York's respected McCann-Erickson advertising agency (est. 1992 billings: \$6 billion) for nearly 40 years, Coca-Cola had taken the unprecedented step of seeking outside help for its new campaign, tapping Creative Artists Agency, the movie industry's top talent shop. To the ad industry's dismay, nearly all the new commercials introduced last week were produced by CAA. Even worse, they are terrific.

Wry, hip and charming, the ads, which will air beginning this week on shows ranging from *The Simpsons* and *Saturday Night Live* to CNN newscasts, deliver the pitch for Coke in a series of vignettes:

► Red Coke signs flash against a rhythmic backdrop of bright colors, all in time to a

Coke's new commercials feature offerings from Hollywood directors like Richard Donner (*Lethal Weapon*)

lilting rock song: "Wherever there's a beat, there's always a drum; wherever there is fun, there is Coca-Cola."

► A polar bear rumbles across the ice pack, joining his family to view the northern lights. Settling down with a grunt, he takes a long swig of Coke. Ahhh.

► Evil scientists try to brainwash a cheerful young man who simply wants a Coke, chanting in unison, "All colas are the same, all colas are the same."

The apparent success of the ads from Hollywood is unsettling for the advertising industry. After all, this is a key account, on which Coke spends about \$600 million a year. "Anytime a major client like Coca-Cola makes a public demonstration of lack of confidence, it's not good for your reputation," says James Dougherty, an advertising specialist at Dean Witter.

Why bring in CAA? During McCann's long and successful partnership with Coca-Cola, the agency has scored with such popular notions as "Things Go Better with Coke" and "It's the Real Thing." But over the past few years, while Michael

Jackson moonwalked and Ray Charles sang "Uh-huh" for archival Pepsi, Coca-Cola Classic's advertising often seemed somewhat flat. Something had to give.

In 1991 Coke surprised McCann by signing CAA for what it vaguely described as media and communications advice. "What is that?" asked a testy McCann executive. "Isn't that what agencies do? Create an image, a media concept?" Before long, the McCann team found out what Coke had in mind: CAA advisers were working alongside them in their New York City offices, suggesting ideas for Coke Classic. Coca-Cola had created an uneasy creative alliance in search of better ideas. They had also created a mild panic in the advertising business, where many executives viewed CAA's new role with alarm. Rumors flew that CAA might even try to capture the Diet Coke account handled by the prominent Lintas agency.

CAA is accustomed to complicated arrangements. Controlling hundreds of leading actors, directors and producers, the agency's chief, Michael Ovitz, has reinvented the meaning of the deal in Hollywood, often representing nearly every major player in top films and selling them as a package. But Ovitz has long yearned to have his firm branch out from being merely talent agents. He got close to Coke executives when he helped arrange Sony's friendly purchase of Columbia Pictures from Coca-Cola in 1989.

In his latest deal, he was able to offer Coke the services of top filmmakers as collaborators on its ads. Film directors Rob Reiner (*When Harry Met Sally*, *A Few Good Men*) and Richard Donner (*Superman*, *Lethal Weapon*), for example, were among those producing the new Coke commercials. "What we do every day," explains Ovitz, "is listen to ideas, encourage them, nurture them. This is no different. Instead of creating a story that is TV or feature-film

length, we shifted to stories that are 30 seconds or 60 seconds long." As for what Coca-Cola paid CAA for its work, no one is saying. Jokes Ovitz: "I only asked for one thing in exchange: the Formula."



Michael Ovitz made it happen

A spokesman for McCann, which came up with the new slogan, "Always Coca-Cola," maintains that the agency is pleased with the new commercials. McCann will remain Coke's agency of record, creating ads and providing a variety of marketing and administrative services in many of the 195 countries where Coca-Cola sold a record 10 billion cases of its regular and diet sodas last year. If the help from Hollywood was cause for anxiety, what really matters for both Coke and McCann is their strong new armory of advertising for the company's flagship brand. —With reporting by Ketanji O. Brown/New York



BUSINESS

OUCH!

Which hurts more, the shot or the bill? Now drug firms also feel the pain as Clinton blasts their prices.

By JOHN GREENWALD

NO WONDER JO HARRIS, 79, IS FURIOUS about the price of prescription drugs. In the past two years the Montana widow has seen the cost of her medications soar, including a 50% jump in the price of the Voltaren tablets she takes for arthritis pain, which rose to \$89.95 for a month's supply of 60 pills. "I feel like they rob me without a gun," Harris says. "When I paid the drugstore clerk, I told him, 'You know Bill Clinton's watching you, don't you?' I believe the guy will try to do something about this. I sure hope he can."

The new team of Clinton & Clinton sure seems to be trying. With concerns about medical costs reaching feverish heights, prescription prices have become

MIRACLE DRUG: ONLY \$350,000 A YEAR

CEREDASE, A BREAKTHROUGH TREATMENT for the crippling and sometimes fatal genetic disorder called Gaucher's disease, is changing lives, even saving them—but not always making them better. For Jeanne Rogal, 29, of Harrisburg, Pennsylvania, Ceredase has reduced the pain from her crumbling bones, removed the lipid deposits choking her liver, and restored her energy so she can enjoy life again. But with it comes a crushing financial burden: Ceredase can cost up to \$350,000 for a year's treatment.

Rogal has already exhausted one health-insurance policy and is whittling down a second. Although Medicaid pays part of the cost of the drug, the government dictates brutally austere terms: if Rogal accepts the payments, she isn't allowed to own major assets or have a bank account with more than \$250 in it. "I finally have this great new life where I can do things," she says, "and I can't even save the money for a vacation."

Ceredase, and the Massachusetts company called Genzyme that makes it, illustrates how some drug companies have turned government research and

regulations into Big Business. The Federal Government financed the discovery of the drug and then paid tax dollars so that entrepreneurs could learn how to manufacture it. Now it is paying as much as 20% of the nation's Ceredase bill



Karen Guth refused the expensive drug

through Medicare and Medicaid. And Ceredase isn't the only high-priced drug that has flowed from government laboratories. The new chemotherapeutic taxol, as well as almost half of all other cancer drugs, owes its existence to government scientists, as do nearly all AIDS drugs.

The story of Ceredase starts with government-sponsored scientists who in 1965 found that Gaucher's disease resulted from the lack of an enzyme. Later another group of government scientists patented a method for harvesting that enzyme, and contracted with researchers at Tufts University to supply the enzyme in large enough quantities for research.

During the 1980s the Tufts researchers gradually spun away from the university and started the biotech firm Genzyme. By then the government had spent nearly \$9 million—fully 20% of all measurable research-and-development costs, according to the Office of Technology Assessment—to aid in developing Ceredase. Genzyme disputes the figure and says the government provided only 14% of the drug's development costs. Still, when the company brought its drug to market, it set the price extraordinarily high, claiming that the process of harvesting the enzyme from human placental tissue is ex-

the first major target of health-care reformers' wrath. The President last month blasted the price of prescription drugs as "shocking" and blamed vaccinemakers for pursuing "profits at the expense of our children." His remarks came a day after Hillary Rodham Clinton denounced the cost of childhood vaccines—which have risen 1,000% in a decade—and suggested that drugmakers would oppose the Administration's forthcoming health-care reforms. The industry's earnings also came under attack; Democratic Congressman Henry Waxman of California last week unveiled a 354-page Office of Technology Assessment report that charged that drug firms raked in \$2 billion of "excess profits" a year and lavished vast sums on "wasteful" campaigns to encourage doctors to prescribe pricey medications.

The attacks stunned the \$75 billion U.S. pharmaceutical industry, long the country's most profitable manufacturing sector and one of its last world leaders in developing new products. On Wall Street, fear of possible government price controls has helped whack 15% from the collective value of pharmaceutical stocks this year. Frightened drug firms have responded with a spirited defense, including full-page newspaper and magazine ads proclaiming the benefits of their products.

The industry's arguments often boil down to a simple concept: developing wonder drugs takes lots of money. "It costs up-

wards of \$200 million just to get a product to market," says a spokesman for Johnson & Johnson. "And for every one that gets there, there are several that fail because of unfavorable side effects, no demonstrable increase in benefits, or a variety of other reasons." Moreover, experts say, costly marketing programs are a vital extension of the companies' research efforts. Declares Boston University economist Laurence Kotlikoff: "What good does it do to discover a health-improving drug and not have anyone know about it?"

FOR SMALLER COMPANIES, THE PRICE of failure can indeed be catastrophic. Shares of the biotech firm Synergen plummeted 68% in a single day last week after the company disclosed that tests of its most promising new drug had been disappointing. Synergen stock closed last Friday at 15¢, down 26% for the week. The debacle followed the January collapse of shares of Centocor, which fell more than 60% when the firm suspended U.S. testing of its bacterial-shock treatment Centoxin.

At stake in the latest attacks on drugmakers, their defenders say, is nothing less than the industry's ability to lead the race to discover new treatments for disease. "If you take away the profits that these companies are able to earn," warns James Fenger, who watches pharmaceutical stocks for Kemper Financial Services

in Chicago, "the incentive to do research will diminish, and our competitive position in the world will decline."

But how much profit do drug firms really need? Thanks to sky-high pricing, as much as 16% of the industry's sales flow straight to the bottom line, or about three times the average for FORTUNE 500 companies. Fueling those profits, wholesale drug prices rose nearly six times as fast as inflation between 1980 and 1992, according to a recent report for the Senate Special Committee on Aging. Moreover, a single successful drug can deliver a bonanza. Merck's Mevacor, the first drug to lower cholesterol levels, arrived in 1987 and now rings up sales of \$1 billion a year. And Merck's patent doesn't expire until 1999.

Prices can swell even more at the retail level as pharmacies and drugstore chains take their cut of profit. For example, Voltaren maker Ciba-Geigy said it raised the wholesale price of its arthritis drug just 5% in the past year. "What happens after that is really out of our control," a corporate spokesman says.

Much of the rest of the world puts strict controls on pharmaceutical prices. So American firms have been recouping research-and-development costs at home that they could not recover abroad. "We're paying a premium because other countries are regulating prices and profits," says Stephen Schondelmeyer, a University of Minnesota health-care economist. "If

pensive, a claim challenged by a growing number of Gaucher's patients. "This is the worst illustration of corporate greed I've seen," says Abbey Meyers, executive director of the National Organization for Rare Disorders. Responding to Meyers, Genzyme's chairman of the board, Henri Termeer, says, "It's not a matter of greed. It's a high-cost product. There is no flexibility on price here."

Genzyme's marketing tactics have also raised eyebrows. Company salesmen use the unusual tactic of contacting Gaucher's victims and their doctors directly, enticing them with videos and publications suggesting that a healthy, pain-free life is at last at hand.

In spite of the aggressive commercial campaign, a mere 800 of the 11,000 Gaucher's patients who need treatment have signed up for Ceredase. One who refused, Denver teacher Karen Guth, estimates she would need to spend \$350,000 for the drug each year. "It's a terrible position to put human beings in," she says.

—By Dick Thompson/
Washington

federal study found that the cost of Upjohn's Halcion sleep-inducing medication rose 110% between 1985 and 1991, while the price of McNeil's Tylenol with Codeine jumped 160% during the same period. McNeil said it had held the price of the drug steady from 1980 to 1985.

Johnson & Johnson stirred outrage last year by charging about \$1,300 for a dose of its colon-cancer treatment Ergamisol, even though another firm sells a veterinary drug with the same active ingredient, levamisole, for just \$14. In its defense, Johnson & Johnson points out that it reformulated its version for human use and the price of its drug is comparable to that of other cancer treatments. But the president of another pharmaceutical company gave the magazine *Business for Central New Jersey* a blunt assessment of the price Johnson & Johnson set for the drug. Said he: "Why in the hell did they do something dumb like that?"

Small wonder that many Americans, who typically must pay 75% of the cost of prescriptions out of their own pockets, have been flocking to Mexico for pharmaceutical bargains. "When you're retired and faced with these humongous medical

prices as "unconscionable," for example, Clinton pointed out that the overall cost of a full series of immunizations has jumped from about \$23 a decade ago to more than \$200 today. But 80% of the increase reflected the addition of two costly vaccines plus an excise tax that Washington began collecting in 1988 to pay for liability insurance for the companies. "The new costs," Schondelmeyer says, "are not driven primarily by the industry's desire to enhance the bottom line." (Cheap vaccines can wind up being costly: Defense Secretary Les Aspin spent four days in the hospital last week after military doctors gave him a 35¢ typhoid shot that aggravated a heart condition instead of using a \$1.90 oral dose with fewer side effects.)

Drug companies argue that the 17-year patents on their drugs force them to try to recoup their investments quickly. Since it can take an average of 12 years for companies to develop new drugs and get federal approval to sell them, firms may have just five years to wring profit from their inventions before generic-drug makers rush in with their own versions. Companies also say profits from successful drugs are often plowed back into new products. Wyeth-Ayerst, for example, insists that the large profits it has made from Premarin and Inderal helped finance the revolutionary Norplant implantable contraceptive that it introduced in 1990.

Faced with a growing political backlash and the looming prospect of price controls, many drug companies have been taking steps to slash their costs and moderate their prices. Bristol-Myers Squibb last year said it was cutting 2,000 of 53,000 jobs; Warner-Lambert expects to eliminate 2,700 of its 35,000 positions.

At the same time, health-maintenance organizations have been driving down prices by buying in bulk and demanding the most cost-effective medications. Thanks to such methods, the level of pharmaceutical prices rose less than 6% in 1992, says Fenger, compared with traditional increases of as much as 10% a year. Adds he: "Companies want to limit their price increases so there is less incentive for the government to put price controls on the industry."

Experts also say drug prices could be better controlled if doctors paid more heed to drug costs and patients had the information they need for comparison shopping. The facts could be readily available through a national computerized data bank for patients and physicians. "Government should not be saying what prices are right or wrong and requiring certain behavior," says M.I.T. medical economist Jonathan Gruber. "Rather, it should be helping to make information available to people. Right now, we know more about the apples we eat than the drugs we use." And the public is paying the price of its ignorance. —Reported

by Ketanji O. Brown and Jane Van Tassel/New York and Dick Thompson/Washington

HOW U.S. PRICES OF SOME BEST-SELLING DRUGS COMPARE WITH CANADA'S				FIVE-YEAR PRICE HIKE IN THE U.S.	
A sampling of pharmaceuticals, their use and manufacturer		1991 WHOLESALE PRICE		1987-1992	
		U.S.	CANADA		
	CECLOR Bacterial infections (Lilly)	\$134.18	\$84.14	+60.1%	
		100 capsules	100 capsules		
	TYLENOL with CODEINE 3 Pain relief (McNeil)	\$19.38	\$3.32	+86.4%	
		100 tablets	100 tablets		
	XANAX Anxiety and nervous tension (Upjohn)	\$47.81	\$16.92	+87.4%	
		100 tablets	100 tablets		
	ZANTAC Ulcers (Glaxo)	\$70.19	\$53.82	+40.6%	
		60 tablets	60 tablets		

Source: Price Institute; University of Minnesota. TIME Graphics by Steve Hart

you squeeze a balloon everywhere but one place, imagine what's going to happen."

There is no shortage of examples of huge increases in prescription prices. According to a 1991 Senate report, Wyeth-Ayerst raised the price of Premarin, an estrogen replacement used during menopause, 131% between 1985 and 1990, and boosted the cost of its Inderal heart medication 112%. (The Consumer Price Index went up 21% during that period.) Another

bill, it about kills you," says Turner Ashby, 64, a former trucker who figures he and his wife saved about \$4,000 last year by driving 1,000 miles from their Idaho home to stock up on medicine in Mexico. "It's a terrible rip-off," Ashby adds. "The government has to go in there and say to these guys, 'The party's over.'"

Such concerns have opened the door to political grandstanding by critics of the industry. In attacking childhood-vaccine

death by a mob of white partygoers while they taunted him for being Asian.

Despite the threat of tougher sentencing, hate crime is increasing. The Anti-Defamation League counted 1,730 anti-Semitic incidents in the U.S. last year, the second highest total in the 14-year history of the ADL's audit. The National Gay and Lesbian Task Force says attacks on homosexuals increased by 172% over the past five years. Klanwatch, a project of the Southern Poverty Law Center in Montgomery, Alabama, reports that 1992 was "the deadliest and most violent year" for bias-related events in more than 10 years. Thirty-one of these were murders.

Despite the growing numbers, Harvard law professor Laurence Tribe believes Wisconsin-style statutes are reasonable and necessary. "The absolute right to think and believe what you want," says Tribe "and to express any viewpoint, however hateful, has nothing to do with some kind of license to target victims of violence based on their race, sex, religion or sexual orientation." If the court struck down these laws, he adds, "the decision would cast a long shadow of doubt over all antidiscrimination measures and much of criminal law because the state of mind of the offenders is typically a critical element of how crimes are defined and how punishment is meted out."

The growth of hate crimes suggests that prejudice with its fists clenched is not all that susceptible to the persuasive power of the law. The legislation designed to deal with hate also becomes harder to justify when applied to threats—but not to acts—of violence. One of those laws became an issue in a major Ohio case that grew out of a 1989 incident at a public campground near Columbus. A black camper, Jerry White, complained to a park ranger about loud music coming from the neighboring campsite of David Wyant, a white man. After the park ranger left, Wyant shouted threats to shoot the "niggers." He was eventually charged with and convicted of aggravated menacing, a misdemeanor. But because his threat fell under Ohio's "ethnic intimidation" law, Wyant's crime was reclassified as a felony, which brought him an 18-month jail sentence.

Wyant's behavior was repellent, but it never degenerated into violence. If the law places extra penalties on his threats because they were racist, isn't it edging closer toward punishing offensive speech by itself? "The drafters of [the law] may have had in mind marauding Klan members or skinheads," says Susan Gellman, an Ohio public defender who filed a brief in Wyant's appeal opposing her state's hate-crime law. "But what they're getting is Archie Bunker." Then again, Archie Bunker didn't usually threaten to shoot anyone. —*Reported by Cathy Booth/Miami, Lynn Enmerman/Chicago and Julie Johnson/Washington*

A.C.L.U.—NOT ALL THAT CIVIL

THE AMERICAN CIVIL LIBERTIES UNION IS EVER READY FOR A LEGAL SQUABBLE, and sometimes the most intriguing ones occur among its own 300,000 members. Lately they have been split over free speech and hate speech, sexual harassment and the Rodney King beating, the same arguments that have divided other Americans. One essential conflict is between strict libertarians, for whom individual rights are as sacred as Moses' tablets, and new-breed egalitarians who favor minority and feminist causes and are more willing to see civil liberties give ground in the name of justice and equality.

After last year's acquittal in state court of the four policemen who beat Rodney King, A.C.L.U. president Nadine Strossen joined calls for a second prosecution under federal law. That represented a break with an A.C.L.U. position adopted in 1990 that repeat prosecution by different jurisdictions for the same act amounted to double jeopardy, which is unconstitutional. Last summer the national board suspended that position and considered supporting the second trial of the policemen. Then, at an argumentative meeting this month, the board voted 37-29 to reinstate the 1990 policy. All eight African-American board members at the meeting backed the losing side. "Rodney King could be my son," said Gwen Thomas, chair of the Colorado Civil Rights Commission.

First Amendment absolutists lost, however, when the organization adopted a position in January on the hate-crime case being argued this week before the Supreme Court. The A.C.L.U. is siding with the state of Wisconsin's view that it is constitutional for courts to impose heavier penalties when an action that is already a crime, like assault, is motivated by bigotry. In a rare step, the Ohio chapter of the A.C.L.U. has filed a Supreme Court brief that opposes the national organization and argues that such laws are an inadmissible limitation on free speech. And while the national organization in 1990 came out against speech codes that punish bigoted remarks on college campuses, the board voted after heated debate this month to revise its position that workplace speech could be regarded as sexual harassment only when it was directed at an individual and had "definable consequences" on such things as promotion. The new definition covers offensive language that is aimed at no one in particular—like a bulletin-board sign that says A WOMAN'S PLACE IS IN THE KITCHEN—and merely leaves hurt feelings.

Insiders disagree on whether the shifting views are fostered by the A.C.L.U.'s in-house affirmative-action plan that requires the board, formerly dominated by white males, to be at least 50% female and 20% minority. Whatever the reason, old soldiers like Harvard law professor Alan Dershowitz and columnist Nat Hentoff, both onetime A.C.L.U. board members, see a serious threat to single-minded support of individual liberty. Dershowitz asserts that "the A.C.L.U. is a very different organization today." To him, the key tenet of the A.C.L.U. faith is support for free-speech rights for "causes that you despise." Without that, "all you are is a political activist."

The consensus that appears to be emerging within the A.C.L.U. is typified by board member and gay activist Tom Stoddard, who says the absolutists are seeking "otherworldly vindication of one constitutional right without recognizing that all rights have value and can be reconciled." To him, both equality and liberty must be weighed and many rights enshrined. "Pure consistency is never possible in an organization that addresses so many rights simultaneously," says Stoddard. To the embattled Old Guard, however, purity and consistency were precisely what the A.C.L.U. was once all about. —*By Richard N. Ostling, Reported by Ketanji O. Brown/New York and Julie Johnson/Washington*



STROSSEN: An old faith questioned

United States Senate
Committee on the Judiciary

Questionnaire for Judicial Nominees
Attachments to Question 12(b)

Ketanji Brown Jackson
Nominee to be Associate Justice
of the Supreme Court of the United States



STRATEGIC PLAN 2017-2021

**Adopted
December 14, 2016**



MESSAGE FROM THE STRATEGIC PLANNING COMMITTEE CO-CHAIRS

November 2016

Every five years—for at least the last two decades—the Council for Court Excellence has engaged in a long-range planning exercise to determine the breadth of our next reform agenda. We have conducted survey research, compiled interview data, and convened a broad range of board directors and stakeholders to discuss the substantive projects we might undertake to improve the District of Columbia’s justice system. We have also, on occasion, addressed our financial challenges in an effort to agree affirmatively on belt-tightening policies and growing or shrinking our staff, among other responses to fiscal challenges. A financial retreat was certainly the priority in 2004 with a new incoming executive director, and then again in 2008, on the brink of a major recession.

With our existing 2011-2016 long-range plan set to end in December, the Council’s leadership last fall determined that the development of a more comprehensive, organizational strategic plan was not only warranted, but necessary in light of our current executive director’s planned departure in 2017. Indeed, the strategic plan that you are about to read has been the perfect opportunity to review, redefine, reassess, and in some cases reaffirm what CCE is about, with a focus on what we should do (the substance), who does it (the board, the staff, our stakeholders), and how to achieve greater quality, sustainability, and transparency.

Developing this strategic plan was a comprehensive and collaborative experience. To begin, CCE obtained funding and hired a superb strategic planner, Jen Lachman of Lachman Consulting. A strategic planning committee was convened, which we were asked to co-chair, that included a cross-section of the CCE board, diverse in terms of demographics, familiarity with the organization, and background. The 30-person committee, including all CCE staff, met monthly between March and October, along with dividing itself into working groups that focused on CCE’s programs, board composition and structure, fundraising and communications, and its upcoming leadership succession. CCE staff provided significant input throughout this process. Finally, the committee’s progress was reported regularly to the executive committee and to the board of directors at the June meeting to ensure a high level of transparency and accountability.

The strategic direction CCE will take, as outlined in this plan, is clarified through an aspirational vision statement and a redefined mission statement. We began by asking and answering a series of questions: How will the justice system in DC be different in five years as a result of CCE’s success? What will be the single best measure of our success? How does CCE need to look different internally to achieve our vision? How will we communicate our mission and impact? What will remain unchanged about CCE? By exploring these questions, we became more deeply grounded in our vision for a justice system in the District of Columbia that equitably serves its people, and we became more strongly aligned around the unique role CCE plays to identify and implement lasting improvements by collaborating with diverse stakeholders to conduct research, advance policy, educate the public, and increase civic engagement.

The committee spent significant time examining CCE’s geographic direction, in terms of remaining DC-focused vs. regional, vs. national. The consensus we reached is to remain a DC-focused organization, adding a regional layer if and when the issue or problem in question



warrants a broader geographic approach. It was also agreed that CCE will make every effort to impact justice systems at a national level by promoting its work among justice organizations throughout the country.

The plan sets forth five strategic priorities with specific goals to guide their future implementation. Under the first priority, the committee proposes that three of the four standing program committees be renamed to emphasize that CCE's work extends beyond the courts to the entire justice system, and that each committee create a five-year program plan. Given this wider focus on the District's entire justice system, rather than only its courts, the strategic planning committee recommends that the organization undergo a rebranding effort so that its name reflects this extended focus.

The second priority, to diversify and grow CCE's funding streams, focuses on ways to expand our fundraising efforts, including growing our fee-for-service work and increasing revenue from events and individual donors. These goals are closely linked to the third priority, to increase our visibility through branding, improving how we measure outcomes and impact of our work, and our communications efforts in general.

Priority four relates to the CCE board of directors, and focuses on specific ways to increase our board diversity and engagement in order to capitalize on our robust pool of talent that has made this organization so unique and productive.

The fifth priority area covers succession planning both in regard to the 2017 departure of CCE's executive director and the creation of a succession plan for future leadership transitions.

CCE's strategic plan concludes with a section on strategic adaptability, developed through the committee's discussions about the need for greater transparency in how we monitor progress and make decisions about project opportunities or organizational challenges. The five strategic criteria described in this section will act as a guiding framework to support us in making the right choices for CCE and the communities we serve.

This strategic plan will be presented to the CCE board of directors at its December 14, 2016, meeting for a formal vote. A series of implementation efforts, reflecting the plan's priorities and goals, will begin in early 2017 and will be refined—and reported on—throughout the life of the plan.

We acknowledge and thank the members of the strategic planning committee, listed below, who participated in this exceptional process. We are also grateful to Goodwin Procter LLP, Hollingsworth LLP, and Sidley Austin LLP for their generosity in hosting the committee's meetings. Finally, we acknowledge and thank our consultant Jen Lachman, whose skilled leadership propelled us from her very first question: What would it take to develop a shared picture of CCE's future vision and translate that vision into a blueprint for the next five years and beyond?

Sincerely,

Cary Feldman and Cynthia Wright
CCE Strategic Planning Committee Co-Chairs



STRATEGIC PLANNING COMMITTEE

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STRATEGIC PLAN, 2017-2021

CCE's VISION

The Council for Court Excellence envisions a justice system in the District of Columbia that equitably serves its people and continues to be a model for creating stronger and more prosperous communities.

CCE's MISSION

The Council for Court Excellence's mission is to enhance the justice system in the District of Columbia to serve the public equitably. CCE identifies and proposes solutions by collaborating with diverse stakeholders to conduct research, advance policy, educate the public, and increase civic engagement.

CCE will enhance the justice system in the District of Columbia by focusing on the following strategic priorities in 2017-2021:

PRIORITY 1	PRIORITY 2	PRIORITY 3	PRIORITY 4	PRIORITY 5
Strengthen the impact of CCE's initiatives through strategic focus on our four program areas: ➤ Civil Justice ➤ Criminal Justice ➤ Youth Justice ➤ Justice Education	Diversify and grow funding streams, so that CCE becomes more financially secure and sustainable.	Increase CCE's visibility and become more widely recognized as the go-to organization for justice policy issues in the District of Columbia.	Diversify board recruitment, engage current board directors, and cultivate new board leaders, so that CCE continues to capitalize on its robust pool of talented leadership.	Ensure an orderly, smooth leadership transition in 2017 and prepare CCE for any future leadership transitions.



Jury Service Revisited:

UPGRADES *for the*
21ST CENTURY

DC JURY SERVICE STATISTICS IN BRIEF

The US District Court for the District of Columbia and the Superior Court of the District of Columbia hold petit jury trials.

In 2014, the District Court held 46 jury trials, representing 2,984 prospective jurors in attendance at the Court for jury selection or orientation. In 2015 the average number of prospective jurors present for selection was 56.9, with 43.2% either not selected or challenged.

In 2014, the Superior Court Criminal Division held 367 jury trials and the Civil Division had 105 cases reach judgment from a jury trial. This represents 31,345 prospective jurors reporting for service, an average of 169 per day, with 24,404 sent to voir dire and 5,657 selected for panels. To reach those numbers, in 2014 the Superior Court sent out 150,454 summons, of which 22,027 were returned as undeliverable, 70,715 were never responded to, and 12,898 were responded to with a request for deferment.

A Note About the Highlight Boxes

Throughout the report you will see highlighted quotes and figures. This data comes from surveys, focus groups, roundtable discussions, and interviews. The Data Collection and Methodology section of the report explains how this information was gathered.

CONTENTS

Note from the Co-Chairs of the DC Jury Project.....	1
Mission Statement.....	2
Project Overview	3
Project Members and Acknowledgements	4
Summary List of Recommendations	5
Recommendations from Juror Care Working Group.....	8
Exhibit A: Sample Juror Forms	19
Exhibit B: Sample After Service Pamphlet.....	24
Exhibit C: Sample Letters of Thanks.....	28
Recommendations from Jury Pool and Summoning Working Group	32
Exhibit D: Kentucky Department for Libraries and Archives Model Employer Jury Duty Policy	41
Exhibit E: Selected State Laws Regarding Jury Service.....	42
Exhibit F: Other Model Jury Duty Policies.....	43
Recommendations from Trial Structure Working Group.....	46
Exhibit G: American Bar Association Formal Opinion 466	53
Exhibit H: Model Civil Jury Instructions Based on Superior Court Model Criminal Jury Instructions 1.102	60
Exhibit I: Sample California Jury Trial Information Sheet.....	62
Exhibit J: Sample General Order for Expedited Trial Procedures (California).....	64
Exhibit K: Criminal Jury Instructions for the District of Columbia, Instruction 1.106, Questions by Jurors	75
Issues to Watch.....	81
Data Collection and Methodology.....	83
Helpful Resources.....	122

NOTE FROM THE CO-CHAIRS OF THE DC JURY PROJECT

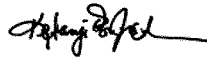
For the past 12 months, a Committee of the Council for Court Excellence (CCE or The Council) has undertaken to re-examine the jury system in the District of Columbia, as a follow up to CCE's initial study of jury service in 1998. We have been pleased to co-chair this recent effort, and we are delighted to share the results in this report: *Jury Service Revisited: Upgrades for the 21st Century*. Building on the seminal CCE study, our devoted Committee—comprised of judges, court officials, trial attorneys, bar leaders, policy experts, and former jurors—spent many hours researching various aspects of jury service in the District, debating potential proposals, and drafting the recommendations that appear in this report, which we hope will be useful both to the officials in our community who bear the responsibility of administering this critical institution and to the citizens who devote their time and attention to the important work of serving as jurors.

We would like to take this opportunity to applaud CCE for initiating this re-evaluation of the petit jury as an institution, and for supporting and facilitating this effort. We also express our gratitude to the judges and court administrators of the Superior Court of the District of Columbia and of the United States District Court for the District of Columbia for their participation and cooperation, without which we could not have produced such an informed report. These officials do an excellent job of endeavoring to insure that the time-honored institution of jury service functions well in the District of Columbia, and we sincerely hope that they will consider our recommendations in the spirit in which they are offered: to build upon and improve this vital organ of our democracy, which is key to the fair and just resolution of disputes between private citizens and also disputes between citizens and our government.

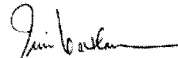
We want to extend special thanks to those who served on this Committee—your dedication, insight, and expertise were invaluable and much appreciated. This undertaking was no small task, and we applaud the participants for working in good faith to bridge differences that arose during the discussion of complex issues. Not all of the recommendations made are entirely unanimous, so the Working Groups deserve credit for tackling these issues forthrightly to produce recommendations that reflect the general consensus of the group. We are also grateful to those who advised our Committee in their capacity as former jurors, as well as those who answered our surveys and participated in our focus groups; we thank you for your reflections and your time. It is because of the collective efforts of all of the people who have been involved in this project in some way that we have been able to provide these recommendations, and it is our sincere hope that future participants in the jury system—whether they be prospective jurors, jurists, lawyers or litigants—will benefit from this group's work.

As you will see, the Committee's recommendations cover a wide spectrum of topics related to jury service. These suggestions are designed to account for changes in technology and circumstances that have occurred in the nearly twenty years since CCE's prior report; to make the system more efficient for jurors, judges and litigants; to foster understanding regarding the importance of jury service in our community; and ultimately, to increase satisfaction with the fairness and efficacy of the jury system on the part of all who come in contact with it.

We hope the recommendations will stimulate thought, and like the 1998 Report, will lead to constructive changes as appropriate, whether by legislation, rules, policies, or practices. All on our Committee stand ready to discuss, to explain, and to help implement the recommendations in order to update and improve jury service in the District of Columbia in the years to come.



The Honorable Ketanji Brown Jackson
United States District Court for the District of Columbia



Irvin B. Nathan
Senior Counsel, Arnold & Porter
Former DC Attorney General

MISSION STATEMENT

In consideration of the importance of the right to a trial by jury in the United States, the Council for Court Excellence, in cooperation with the leadership of the Superior Court of the District of Columbia and the US District Court for the District of Columbia, seeks to evaluate and strengthen the institution of the jury in the District of Columbia. This mission was originally articulated by the Council's 1998 Jury Project Committee, and is adopted here as part of the effort to evaluate that project's impact while also looking to the future and building on its work.

To this end, a Committee comprised of judges, court staff, interested members of the public, former jurors, attorneys, civic and business leaders, academics, and others has been established under the auspices of the Council for Court Excellence. The Council is a non-profit, non-partisan, civic organization that works to improve the administration of justice in the local and federal courts and the justice system in general.

The overall goal of the Committee is to support citizens in their roles as jurors and to improve the effective administration of justice through juries. Specifically, the DC Jury Project Committee will:

1. Study and evaluate the utilization of juries and the conduct of jury trials in both the United States District Court for the District of Columbia and the Superior Court of the District of Columbia. This evaluation will include examinations of jury selection, the trial process, and the jury service experience in general.
2. Publish and disseminate findings and recommendations of specific ways to enhance jury trials.
3. Encourage and support testing of proposed improvements through pilot projects in courtrooms of the DC Superior Court and the US District Court for DC.
4. Support implementation of recommendations contained in the DC Jury Project Report.
5. Suggest educational programs for the bench, the bar, jurors and the public concerning any prospective jury reforms.
6. Establish methods to periodically examine the utilization of any newly adopted rules and procedures to determine their effects, and suggest modifications when necessary.

PROJECT OVERVIEW

Creation of the Committee

The Council for Court Excellence assembled a 16-member Planning Committee on December 20, 2013 and charged it with laying the groundwork for a year-long study of the jury system in the District of Columbia. This group modeled its work after the successful efforts of the 1998 Jury Project Planning Committee and identified a number of priority issues to examine, structuring this effort as both a look forward and a look backward.

This core planning group was expanded to a 40-member DC Jury Project Committee by July 2014. Judge Ketanji Brown Jackson of the US District Court for DC and former DC Attorney General Irvin Nathan served as co-chairs of the Committee. Project members were drawn from the legal, civic, academic, and business communities in the District of Columbia.

Committee Structure and Process

DC Jury Project members were divided into three Working Groups – Juror Care, Jury Pool and Summoning, and Trial Structure. Over the course of a year, these respective Working Groups examined the summoning process, including the scope and quality of juror source lists, summons response rates, juror utilization, and sanctions for scofflaw jurors; addressed issues related to the nature of the trial process and how that process affects both judicial efficiency and juror understanding; and studied issues related to the quality of the juror experience, such as the physical environment of the courthouse, orientation materials, juror privacy, and juror compensation. The Working Groups were made up of former jurors, judges, attorneys, court administrators, and academics. The Working Groups met monthly to develop draft recommendations for consideration by the full Project Committee.

PROJECT MEMBERS AND ACKNOWLEDGEMENTS

Co-Chairs

Hon. Ketanji Brown Jackson, US District Court for the District of Columbia

Irvin B. Nathan, Senior Counsel, Arnold & Porter, former DC Attorney General

Working Group Chairs

Dana E. Koffman, Juror Care, Arnold & Porter

Rodney F. Page, Jury Pool and Summoning, Bryan Cave

Peter R. Kolker, Trial Structure, Zuckerman Spaeder

Members

Juror Care:

Linda L. Bostick, Former Juror
Marjorie S. Fargo, Jury Services, Inc.
Eric S. Glover, DC Bar/Office of the Attorney General
Lynn C. Mattucci, National Center for State Courts
Jonathan H. Pittman, Office of the Attorney General
Jonathan C. Shoemaker, Lee & McShane
Michael D. Sullivan, Levine Sullivan
Judge Ricardo M. Urbina, US District Court for DC
Natalie S. Walker, Washington Bar Association

Jury Pool and Summoning:

Betty M. Ballester, Superior Court Trial Lawyers Association
Prof. Andrew G. Ferguson, UDC
David A. Clarke School of Law
Randy S. Huggins, Former Juror/Accenture
Jay H. Hulme, Arent Fox
Andrea M. King, LexisNexis
Regina Larry, US District Court for DC Jury Officer

Nancy F. Lesser, PAX ADR
Shannon McClellan, US District Court for DC
Elizabeth A. Scully, Baker Hostetler
Judge Melvin R. Wright, DC Superior Court
Christopher A. Zampogna, Bar Association of DC

Trial Structure:

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Shaunte D. Gordon-Harvey, LexisNexis
A.J. Kramer, Federal Public Defender for DC
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Daniel H. Margolis, Law Offices of Daniel Margolis
Dwight D. Murray
Earl J. Silbert, DLA Piper
Katherine B. Yoder, DC Bar/Bonner Kiernan

Within the Council for Court Excellence, this project was staffed by June Kress, Executive Director; Zach Zarnow, Jury Analyst/DC Jury Project Manager; Emily Tatro, Policy Analyst; Amanda Townsend, Development Director and former interns Abdiaziz Ahmed, Daisy Ayon, Nathaniel Goodman-Johnson, Grace Kim, Daria Kapitanova, Rebecca Kozlowski, Badria Mryyan, Alyssa Orozco, Gregory Segal, Sheron Torho, Benjamin Wright, and Ilana Yanku.

The Project Committee wishes to thank the leadership and staff of the US District and DC Superior Courts for their assistance with this project.

The Committee also wishes to thank Judge Gregory E. Mize and Paula Hannaford-Agor of the National Center for State Courts for their input and assistance, as well as the American Board of Trial Advocates and the American Bar Association for inviting CCE staff to attend their respective conferences, which were invaluable in the collection of best practices.

The Council for Court Excellence would like to thank all of the jurors, judges, attorneys, and employers who gave their time to participate in focus groups and roundtable discussions, and to take our surveys.

Finally, thanks to the student volunteers from Howard University School of Law, George Washington University Law School, and University of the District of Columbia David A. Clarke School of Law for their help in voir dire and trial observation.

The Council for Court Excellence is especially grateful to our anonymous donors, as well as The Morris & Gwendolyn Cafritz Foundation, The City Fund, The GEICO Philanthropic Foundation, Pepco, the State Justice Institute, and the Anne and Ronald Abramson Family Foundation.

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SUMMARY LIST OF RECOMMENDATIONS

JUROR CARE:

1. **Using Positive Means to Encourage Participation**
The DC Jury Project recommends that the courts increase the use of positive means of encouraging participation in the jury system.
2. **Augmenting the Summons**
The DC Jury Project recommends that the summons form be augmented to include information about term of service, payment, amenities, and the like.
3. **Providing Substantial Information During Juror Orientation**
The DC Jury Project recommends that substantial information concerning jury service and the judicial system be provided before and during the juror orientation process.
4. **Implementing a Call-In/Online Check-In System**
The DC Jury Project recommends the utilization of a call-in and/or online check-in system for petit jurors in DC Superior Court to decrease juror "wait time" and increase juror satisfaction and willingness to serve.
5. **Using Technology to Interact with Jurors**
The DC Jury Project recommends that DC Courts make further use of technology to communicate and interact with jurors.
6. **Improving Juror Compensation**
The DC Jury Project recommends that the DC Council and DC Courts implement changes to juror compensation funds for the betterment of jurors, the Courts, and the community.
7. **Reducing Juror Stress**
The DC Jury Project recommends that the Courts consider enhancing procedures relating to the stress associated with jury service.
8. **Adjusting Trial Schedules**
The DC Jury Project recommends that judges consider adjusting trial schedules where feasible to minimize juror inconvenience.
9. **Thanking Jurors**
The DC Jury Project recommends that the Courts implement formal and official means of thanking potential and empaneled jurors for their service, including service as alternates.

JURY POOL AND SUMMONING:

10. **Ensuring Agency Source List Certification**
The DC Jury Project recommends amending the DC Code so that agencies that provide the Court with source lists have to certify that the lists have been accurately updated.
11. **Adding New Source Lists**
The DC Jury Project recommends drawing from additional source lists to increase the accuracy and representative nature of the master jury lists at DC Courts.

12. Utilizing Big Data Technology

The DC Jury Project recommends that the DC Courts examine the possibility of improving jury summoning rates by using big data resources to identify more accurate addresses and contact information for potential jurors.

13. Permitting Citizens to Provide the Court with Updated Information

The DC Jury Project recommends that citizens be permitted to provide information for inclusion in the master juror source list in DC in order to ensure that the source list includes citizens who are qualified but who are not otherwise included.

14. Reducing Felon Restrictions

The DC Jury Project recommends that the Superior Court revise its jury plan so as to reduce the ten-year restriction on people with felony convictions being called to serve on a petit jury.

15. Improving Employer Jury Service Policies with Civic Leave

The DC Jury Project recommends that employers adopt policies that encourage their employees to serve on juries and that make explicit the Constitutional and civic nature of jury service.

16. Excusing Jurors for Previous Service

The DC Jury Project recommends that the Superior Court and the District Court modify their jury plans to state explicitly that they will excuse prospective jurors who have served on a petit or grand jury within the past two years.

TRIAL STRUCTURE:

17. Clarifying the Rules for Researching Jurors

The DC Jury Project recommends that lawyers and their agents be permitted to research potential jurors and to monitor selected jurors by looking at the publicly available portion of social media sites subscribed to by those jurors. However, direct contact between an attorney or agent and a potential or selected juror should continue to be prohibited.

18. Sharing the Results of Criminal Background Checks of Jurors

The DC Jury Project recommends that judges consider ordering the government to share with defense attorneys the results of criminal record checks of potential jurors in criminal cases unless prohibited by law from doing so.

19. Improving Voir Dire and Peremptory Challenges

The DC Jury Project makes four recommendations regarding the jury selection process.

- First, the Committee recommends that prospective jurors be provided with questionnaires that request additional biographical information when they arrive for jury service and that these questionnaires be made available to counsel and the litigants when a panel arrives in the courtroom.
- Second, the Committee recommends that judges use the index-card method, or some similar technique, for voir dire screening that permits counsel both to offer additional questions and to make reasonable follow-up inquiries at the bench.
- Third, the Committee recommends that a jury panel be called in the Superior Court only after all preliminary trial matters have been resolved and that the number of jurors to be utilized for a venire should be limited to those prescribed by the Court's protocol, unless special circumstances warrant a larger pool.
- Fourth, the Committee recommends that the number of strikes permitted to litigants not be reduced below that now provided by statute and by rule in Federal and Superior Court.

20. Instructing the Jury on Social Media Rules

The DC Jury Project recommends that, before the trial begins, the Court instruct the jury regarding restrictions on the use of social media while serving as jurors.

21. Offering Expedited Jury Trials

The DC Jury Project recommends that the Superior Court provide an expedited jury trial option for civil trials. Shortening trials saves litigants and the Court time and money and reduces the burden of service on jurors.

22. Providing Affirmative Instructions on Note-Taking to Jurors

The DC Jury Project recommends that the Courts take special care to provide affirmative instructions to jurors so that jurors are aware that they are permitted to take notes during the trial.

23. Explaining the Procedures for Jurors to Ask Questions

The DC Jury Project recommends that judges in the DC Courts, in the exercise of their discretion in appropriate civil cases, permit jurors to submit written questions for witnesses so long as the Court instructs the jury that: (1) The Court will determine whether it is proper to pose the question to the witness; (2) The juror should not discuss any unasked question with the jury and should not draw any inference from the judge's decision not to pose the question to the witness; and (3) The questions as posed by the trial judge should be designed to assist the jury in reaching an impartial determination of the facts and not to serve as advocacy for either side in the trial.

Because no model jury instruction for civil cases similar to Criminal Jury Instruction 1.106 concerning questions from jurors in criminal cases currently exists, the DC Jury Project recommends the creation and adoption of a similar instruction in the model Civil Jury Instructions.

The DC Jury Project recommends that judges in DC Courts, in the exercise of their discretion in appropriate criminal cases, permit jurors to submit written questions for witnesses so long as the Court instructs the jury in accordance with DC Criminal Jury Instruction 1.106 that: (1) The Court will determine whether it is proper to pose the question to the witness; (2) The juror should not discuss any unasked question with the jury and should not draw any inference from the judge's decision not to pose the question to the witness; and (3) The questions as posed by the trial judge should be designed to assist the jury in reaching an impartial determination of the facts and not to serve as advocacy for either side in the trial.

24. Encouraging Post-Trial Communications Between Attorneys and Jurors

The DC Jury Project recommends that post-trial communications among jurors willing to speak with counsel and the Court should be encouraged in order to improve the administration of the jury system.

NEXT STEPS:

25. Authorizing Implementation of Recommendations

The DC Jury Project recommends that CCE advocate for the implementation of the recommendations in this report by conducting an education campaign that publicizes the report's findings, encourages citizens to serve on juries, and improves the perception and reality of jury service.

JUROR CARE WORKING GROUP

The Juror Care Working Group focused on promulgating recommendations aimed at building upon and improving the overall juror experience in the DC local and federal court system. The members of the Working Group included a variety of legal practitioners and consultants. Several of the members of the Working Group also have previously served as jurors in both the local and federal court. The Working Group was therefore able to draw from a variety of different experiences in reviewing and promulgating its recommendations. The Working Group examined and supplemented these issues with additional topics that became evident as our work progressed. Members of the Working Group also examined relevant practices and processes in neighboring jurisdictions with similar dockets, such as Maryland.

The Working Group met monthly from September 2014 to June 2015 starting with an agenda of issues gleaned from CCE's 1998 report. Based on the Working Group members' individual experiences and the information gathered by CCE staff members, Working Group members, and volunteer law students, the Working Group agreed upon and drafted nine separate recommendations. The Working Group believes that jury service is a vital aspect of our justice system, and our recommendations hope to not only encourage participation in the jury system, but also to ensure that all individuals have a positive experience before, during and after jury service. The recommendations thus can largely be grouped into two primary areas: Methods to encourage and increase jury participation prior to jury service through the promulgation of information, and enhancing the processes that are currently in place to ensure that jurors have a positive experience throughout their jury service.

For the first area, the Working Group examined studies that reveal a low turnout rate for citizens summoned for jury service, approximately 19% of whom ignore jury duty and approximately 43% of whom never receive the summons. The Working Group discussed factors that may drive this low turnout rate, and how to encourage participation by both the dissemination of information on the jury service process and the use of positive means. For example, the Working Group discussed ways the

courts can promulgate information to prospective jurors as part of the summoning process in an effort to alleviate any confusion or apprehension regarding serving on a jury.

For the second area, the Working Group focused on recommendations related to jury service itself. The Jury Project's recent survey found that while over 75% of jurors called to serve left with a favorable attitude toward jury service, less than half of those surveyed were eager to serve in the future. The Working Group discussed and examined methods to improve on a juror's experience so that a greater percentage of jurors will leave eager to serve in the future and will relay their positive experience to other potential jurors in the community. For example, the Working Group specifically discussed methods the courts can use to streamline the orientation and check-in process, as well as practices to ease scheduling, stress and compensation issues that many jurors encounter during their service.

The DC Jury Project understands and appreciates that the DC Courts are committed to ensuring that all jurors have a positive experience during jury service. We hope that our recommendations will assist in this effort.



Dana E. Koffman
Arnold & Porter
Juror Care Working Group Chair

01 THE DC JURY PROJECT RECOMMENDS THAT THE COURTS INCREASE THE USE OF POSITIVE MEANS OF ENCOURAGING PARTICIPATION IN THE JURY SYSTEM.

The DC Jury Project recommends that the Superior Court and the District Court take a positive approach to encouraging citizens to participate in jury service. Several actions may be taken to encourage participation in the jury system:

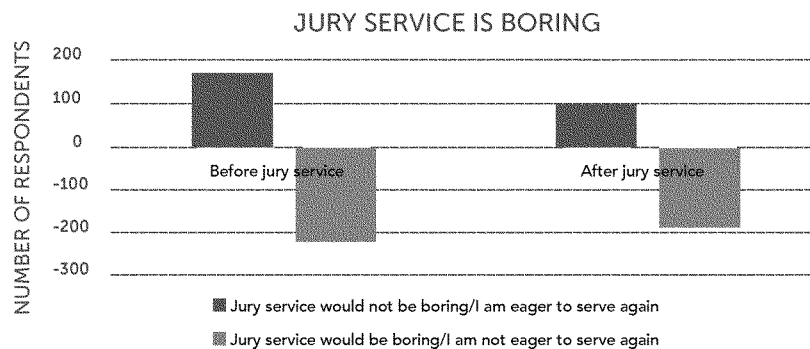
- Inform the public of the importance of jurors in the judicial system;
- Provide information to prospective jurors regarding what to expect, along with the summons;
- Advise jurors of the services available at the court (such as wireless internet and childcare);
- Educate jurors about the process when called to serve; and
- Express appreciation to jurors at the conclusion of their service.

In 2014, the Superior Court experienced a low turnout

rate for citizens summoned for jury service, approximately 15% of which were undeliverable and 47% to which a response was never received.¹ The DC Jury Project's recent survey reveals that while over 75% of jurors called to serve leave with a favorable attitude toward jury service, less than half of those surveyed were eager to serve in the future. The DC Jury Project believes that if positive reinforcement is provided from the time a juror is summoned through the conclusion of a juror's service, a greater percentage of jurors will be eager to serve in the future and will convey their positive experience to other potential jurors in the community. For example, the DC Jury Project commends the Superior Court for its policy of monitoring Twitter and thanking prospective jurors and former jurors who tweet about their positive experience. The DC Jury Project recommends that this practice be expanded and adopted by the US District Court.

The DC Jury Project recommends that the courts provide specific, helpful information to summoned prospective jurors, recognizing that summoned citizens may have limited experience with the judiciary and with the services available to a juror. While there is ample information available online for prospective jurors, not all citizens who are called to serve have access to the

¹ Past studies show similarly low turnout rates. See Council for Court Excellence, *Improving Juror Response Rates in the District of Columbia* (2006).



internet; therefore, the DC Jury Project recommends that the courts consider providing information regarding jury service, such as the answers to Frequently Asked Questions, along with the summons (See Recommendation #3). Additionally, courts should consider using text messages, phone calls, letters, and email reminders that could include some of this information as well as an additional thank you.

The DC Jury Project also recommends that the courts show their appreciation for citizens who have heeded the call to serve as jurors at the conclusion of their service, whether or not they have been empaneled on a jury, through a personal interaction with a judge (See Recommendation #9). The DC Jury Project's recent survey reflects a higher level of frustration with jury service in summoned citizens who are not empaneled than in those who are. The DC Jury Project recommends that before releasing prospective jurors who are not empaneled, a judge personally express appreciation for the time taken by the juror to appear for service, both in person and potentially through a thank you letter.

The DC Jury Project recommends that in contrast to positive means of promoting jury service, which should be widely implemented, the use of severe sanctions, including monetary fines, should be carefully considered prior to implementation. In light of the inaccuracy of the current source lists, it is possible that a citizen who never received a summons could be targeted for sanction. Furthermore, it is clear from surveys with jurors that the imposition of sanctions may lead to greater participation, but it could also result in far greater resentment toward what should be a positive experience.²

² Council for Court Excellence Jury Project, Show Cause Survey (2015).

02 THE DC JURY PROJECT RECOMMENDS THAT THE SUMMONS FORM BE AUGMENTED TO INCLUDE INFORMATION ABOUT TERM OF SERVICE, PAYMENT, AMENITIES, AND THE LIKE.

Providing important and specific information to citizens who have been called for jury service regarding their expected term of service prior to their arrival at the courthouse would significantly reduce juror frustration, confusion, or apprehension and limit the number of inquiries to the jury office. Giving citizens who are summoned more and earlier information about jury service would relieve anxiety and improve the overall court experience.

Given that approximately 30% of the residents of the District of Columbia do not have broadband internet access³, the DC Jury Project recommends that citizens receive substantial written information concerning jury service at the time that they are summoned. The

³ Connect DC Digital Inclusion Initiative, Connect DC Fact Sheet, available at: <http://connect.dc.gov/sites/default/files/dc/sites/connect/publication/attachments/Fact%20Sheet.pdf>



This was my first experience with DC Superior Court. It would have been nice to have known about amenities in advance. I didn't bring my laptop because I didn't know there was wifi.

—An Anonymous Juror

summons should be clear and easy to read. It should include specific information about getting to and through the courthouse (including Metro and parking information, the need to arrive at least ten minutes early to go through security, and the location of the jury office and jurors' lounge). Additionally, information about the summoning process and deferral and excusal procedures and policies should be included. At the time the summons issues, recipients should be informed about the term of service required, especially if circumstances may result in exceptions to the standard term. Citizens should also be notified of the appropriate attire, lunch information, payment information (such as juror debit cards and proof of service for their employers), amenities (such as WiFi access, childcare, the health unit for nursing mothers, vending machines, and lockers), things to bring (such as books, magazines, newspapers, laptops, and tablets) and any special services for persons with disabilities and persons needing assistance with communicating in English. Additionally, the juror summons should direct citizens to the court's website and the jury office for other helpful information, such as the juror fee schedule, courthouse evacuation procedures, inclement weather procedures, and a list of places to eat in the surrounding area.

The Superior Court and the District Court should include this additional information along with the summons, so that citizens receive it before their assigned reporting date. The Superior Court has already developed a very thorough Superior Court Juror Frequently Asked Questions (FAQs) handout, which includes much of the additional information referenced above.⁴ The DC Jury Project recommends that the courts consider redesigning the summons to incorporate the information provided in the FAQs handout and other necessary information. If redesigning the summons is not possible, the DC Jury Project recommends that the courts consider sending citizens reminders of their assigned reporting dates by email and/or text message and include the information provided in the FAQs handout and other necessary information along with the reminder email and/or text message.

⁴ The FAQs are available on the Court's website, here: <http://www.dccourts.gov/internet/faqlocator.jsf>

The courts should also consider how best to communicate this information with persons who have the ability to speak English but who are not fully able to understand the language in written form. The DC Jury Project recognizes that the District of Columbia is a diverse area, and that it is not feasible to mail jury summonses in all languages. However, interpretation assistance should be available by telephone to all citizens summoned for jury service. Due to the large percentage of Spanish-speaking residents, each mailed summons should state prominently on its cover that persons who speak Spanish may call the jury office to receive a written summons in Spanish or determine the appropriate course of action. A Spanish-speaking person should be available to assist these citizens when they call. In addition, a juror FAQ should be made available in the jury office and online in various popular languages (such as Spanish, French, Chinese, Korean, Amharic, Arabic, and Russian).

The following resources from DC and other jurisdictions should be consulted when determining how to best augment the summons:

DC Superior Court FAQ:
<http://www.dccourts.gov/internet/faqlocator.jsf>

DC District Court FAQ Handout:
<http://www.dcd.uscourts.gov/dcd/sites/dcd/files/jury-FAQ.pdf>

San Diego County Summons and Information Sheet⁵

Virginia Answer Book for Jurors:
<http://www.courts.state.va.us/courts/circuit/jury.pdf>

⁵ On file with CCE, available upon request.

03 THE DC JURY PROJECT RECOMMENDS THAT SUBSTANTIAL INFORMATION CONCERNING JURY SERVICE AND THE JUDICIAL SYSTEM BE PROVIDED BEFORE AND DURING THE JUROR ORIENTATION PROCESS.

Most citizens are not familiar with the court system. Therefore, the judiciary has an obligation to make its processes understandable and as user-friendly as possible. The orientation video currently in use in the DC Superior Court is a quality production that conveys important information on the importance and nature of jury duty. Similarly, the juror orientation slides currently available on the US District Court for DC's website provide key information on the overview and history of jury duty. These resources are crucial to ensuring that citizens receive information at the beginning of the jury service process, and the DC Jury Project recommends that the courts increase the visibility of this information and provide additional resources to supplement this information in order to ensure that citizens are provided with substantial background information about the courts and jury service from the beginning of the jury service process. Ensuring that citizens receive such information during, and even before, juror orientation will alleviate anxieties about jury service and improve potential jurors' overall court experience from the outset.

The DC Jury Project recognizes that the DC Superior Court and US District Court make their orientation materials (e.g., the Superior Court's orientation video) available to jurors online before they appear for jury service. The Committee recommends that notice of the availability of orientation materials also be included in the summons. In addition, the DC Jury Project recommends that the courts make their orientation materials available to a broader audience in and around the District in an effort to raise general awareness about the jury duty process, such as by providing public libraries

with copies of the materials or by placing informational posters in public areas like the Department of Motor Vehicles, libraries, and local and federal government buildings. The DC Jury Project also recommends that the courts work with DC area schools to incorporate juror orientation materials as part of Civics or Government courses and to encourage schools to utilize the programs available to raise awareness of jury service, such as the DC Superior Court's Court Visitor Program and CCE's School Jury Education Program.

The DC Jury Project also recommends that when citizens arrive for jury service, the courts provide them with orientation materials that contain information on specific logistics and expectations involved during the jury service process. Such information could consist of a brochure, handouts, or posters that discuss the basics of jury service and the court system and convey relevant information on accommodations and expectations for jurors during trial. The courts should also consider making available during orientation the same information that the DC Jury Project recommends be included with the summons to accommodate citizens who do not bring such information with them when they report for jury service (See Recommendation #2). While the District Court makes its juror orientation slides available online, it should also ensure that the informational slides are provided to citizens when they arrive for jury service. Providing citizens with specifics on the logistics of and expectations for jury service would be an effective supplement to the orientation materials presently utilized by the courts.

In addition, the DC Jury Project recommends that the courts increase staff presence during orientation to provide prospective jurors with the information described above. An increase in staff presence would humanize the juror service experience and also provide a forum for questions to be asked and answered. The increased presence of helpful court staff at the beginning of jury service would also serve to alleviate anxiety about the process.

04 THE DC JURY PROJECT RECOMMENDS THE UTILIZATION OF A CALL-IN AND/OR ONLINE CHECK-IN SYSTEM FOR PETIT JURORS IN DC SUPERIOR COURT TO DECREASE JUROR “WAIT TIME” AND INCREASE JUROR SATISFACTION AND WILLINGNESS TO SERVE.

A frequent complaint that citizens who are called for jury service make is the amount of idle “wait-time” spent during their time in the courthouse. Specifically, potential jurors often get discouraged over the amount of time they spend waiting to be assigned to a courtroom for voir dire and, in many instances, with the fact that they end an entire day of jury service without ever being sent to a courtroom at all. To alleviate part of the frustration with the amount of wait-time jurors experience, the DC Jury Project recommends the implementation of a telephone and/or online check-in system for petit jury service in Superior Court. These are time-tested methods for decreasing juror wait-time, which may increase overall satisfaction and willingness to serve on petit juries.

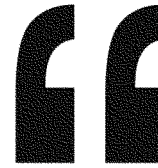
The DC Jury Project applauds the Superior Court for achieving a jury utilization rate of 78% for CY 2014, as reported in the District of Columbia Courts Statistical Summary 2014.⁶ However, this report also indicated for CY 2014 that while, on average, 169 jurors reported for service, only 131 were sent to voir dire each day. Consequently, on average, approximately 38 jurors, or 22.5% of jurors who reported each day, spent the day waiting and were never sent to a courtroom for voir dire.

A proven, successful method for the reduction of juror wait-time is the implementation of a telephone call-in system, an online reporting system, or a combination of both call-in and online systems for juror summoning. Pre-

viously known as a “standby” juror system, call-in/online check-in systems require summoned jurors to call an automated telephone system or to check in online through the court’s website after 5:00 pm the night before the juror’s assigned service date to determine whether he or she is required to appear. Upon entering the juror identification number that appears on the summons, an automated telephone message or online notice indicates which citizens do not need to report for duty.⁷

In its 1998 report, *Juries for the Year 2000 and Beyond*, the Council for Court Excellence encouraged the courts to investigate the implementation of such a standby juror system as one method of decreasing juror wait-time during the pre-trial phase of jury selection and improving overall juror satisfaction by eliminating unnecessary trips to the courthouse.⁸

The call-in/online check-in system for juror reporting is prevalent in most state court systems. A 2006 National Center for State Courts (NCSC) study revealed that nearly two thirds of state courts nation-wide employed a call-in system; and in jurisdictions with populations of 100,000 to 500,000 (similar to the District of Columbia), 82.4% of these jurisdictions utilized a telephone call-in system (while 22.3% also utilized online reporting technologies through the courts’ jury websites).⁹ Currently,



It would have been more convenient if DC had a call ahead system, like they do in other states.”

—An Anonymous Juror

⁷ Jurors summoned to report on a Monday would be instructed to call or check in online after 5:00 pm on the Friday prior to their Monday report date.

⁸ Council for Court Excellence (1998) District of Columbia Jury Project, *Juries for the Year 2000 and beyond: Proposals to Improve the Jury Systems in Washington*, DC RECOMMENDATION 13, p.16.

⁹ Hon. Gregory E. Mize (ret.), Paula Hannaford-Agor, J.D. & Nicole Waters, Ph.D. The State-of-the-States Survey of Jury Improvement Efforts: Compendium Report, Table 14 (2007). <http://www.ncsc-jurystudies.org/-/media/Microsites/Files/CJS/SOS/SOSCompendium-Final.ashx>

⁶ Data from the District of Columbia Courts Statistical Summary 2014: Case Activity for CY 2014. <http://www.dccourts.gov/internet/documents/2014-Statistical-Summary-FINAL-02-12-15.pdf>, p. 21.

most US District Courts, including the US District Court for the District of Columbia, utilize a call-in/online jury notification service.¹⁰ Similar services are also present in nearby urban state jurisdictions, such as Fairfax County, VA, and Montgomery County, MD, as well as the City of Baltimore, MD which handles a case-load similar to DC Superior Court.¹¹

The DC Superior Court website's eJuror Services currently is a technology that might be adjusted to include an online check-in component. Currently, eJuror Services permits summoned jurors to complete their juror questionnaire form online and to defer jury service for up to 90 days from the date of the original (as well as additional services, such as looking up a juror's last or next date for jury service).¹² The Jury Administration Office indicates that the majority of citizens summoned for jury service in the Superior Court of the District of Columbia currently utilize eJuror Services to complete their juror qualification questionnaires.¹³ The DC Jury Project recommends that the DC Superior Court Jury Administration Office investigate ways to expand eJuror Services to include an online notification system for petit jurors such that on the night before their service, summoned jurors can check in to determine whether they will need to report. The DC Jury Project also recommends that the Jury Administration Office investigate the implementation of an automated telephone call-in system for those citizens who do not have regular internet access.

The DC Jury Project recognizes that the Jury Administration Office staff in Superior Court currently evaluates the need for jurors each day through their daily morning check-in emails and coordinates with the presiding and

deputy presiding judges for each of the Criminal and Civil Divisions, who notify the Jury Administration Office as to the names of the judges and courtrooms for their respective divisions that will be requesting jurors for trial and the number of jurors needed per courtroom. This coordination between the presiding judges and deputy presiding judges of each division and the Jury Administration Office presently occurs in the morning of each trial day; the DC Jury Project recommends that this coordination occur in the afternoon prior to the court day for which jurors would be needed for voir dire and jury selection (currently Monday–Thursday) to facilitate an appropriate automated telephone and internet announcements that would be available to summoned petit jurors through the Jury Administration Office or online on eJuror Services after 5:00 pm. Such a procedure would allow summoned jurors to confirm whether to appear for jury service the following day (on Friday after 5:00 pm for jurors scheduled to appear on a Monday).

The American Bar Association's American Jury Project's Principles for Juries and Jury Trials, Principle 2 D, Sections (1) and (2) respectively, state that "courts should coordinate jury management and calendar management to make effective use of jurors. Courts should determine the minimally sufficient number of jurors needed to accommodate trial activity. This information and appropriate management techniques should be used to adjust both the number of persons summoned for jury duty and the number assigned to jury panels."¹⁴ The one-day/one-trial (OD/OT) jury service term, as currently utilized by the DC Superior Court, aims to make effective use of juror time, since it only requires one day of a juror's life in accordance with the principles set forth by the ABA American Jury Project and the goals and best practices pursued by most urban court systems. Utilization of a call-in/online check in system by jurors would further maximize court efficiency, decrease juror wait-time and would address juror frustrations and concerns such as those reported by jurors in this study.¹⁵

¹⁰ As confirmed by email correspondence 04/14/2015 with Regina Larry, Jury Administrator, USDC for the District of Columbia.

¹¹ Through telephone and email correspondence (04/03/15) with Melissa Monroe, acting manager of the Jury Division of the Circuit Court of the Circuit Court for Baltimore City learn this court has 33 sitting judges, summons 1200 jurors per day and sends up to 300 jurors to courtrooms per day for both criminal and civil jury trials.

¹² <http://www.dccourts.gov/internet/jurors/usingejuror.jsf>

¹³ In the April 24, 2015 meeting between members of the Jury Administration staff and representatives of the DC Jury Project, the Jury Administration office of Superior Court has estimated that close to 70% of citizens summoned for jury service in Superior Court already utilize Superior Court of DC eJuror Services to complete the Juror Qualification Form and defer jury service.

¹⁴ <http://www.americanbar.org/content/dam/aba/migrated/jury/projectstandards/principles.authcheckdam.pdf>

¹⁵ Regarding the responses of surveyed jurors who indicate that jury service interferes with work (53.5%) and is inconvenient (42.3%). See Council for Court Excellence Jury Project. Survey of recent jurors (2015).

05 THE DC JURY PROJECT RECOMMENDS THAT DC COURTS MAKE FURTHER USE OF TECHNOLOGY TO COMMUNICATE AND INTERACT WITH JURORS.

The DC Jury Project recommends that DC Courts use and/or expand the use of email, text messages, and social media to communicate with jurors and prospective jurors in at least four ways: (1) reminders about service; (2) scheduling changes; (3) expressions of appreciation for service; and (4) the creation of an online and/or automated telephone call-in system at the Superior Court (See Recommendation #4). The Jury Project also recommends that the Courts consider the expanded use of technology to include automated juror check-in kiosks at the Courts. These recommendations are based on research regarding innovations and best practices in other jurisdictions, as well as the results of the Jury Project's surveys of jurors and those present at a show cause hearing and juror focus groups.¹⁶

Several jurisdictions are already using these technology tools. New Jersey, for example, implemented a Jury Online System (JOS) in 2010, which allows prospective jurors to opt-in to receive email or text message reminders.¹⁷ The first reminder is sent four days prior to the juror's service date, and another is sent the day before. The day-before reminder also serves as a notification of reporting status, meaning that jurors who do not need to report do not have to check the website themselves,

but are instead alerted automatically.¹⁸ Jefferson County, Texas has plans to implement an I-Jury System that allows residents to fill out their questionnaires online and also allows prospective jurors to block out any dates in a three-month window when they will be unavailable for service.¹⁹ Racine County, Wisconsin, has also implemented an online and text message reminder system, which includes the ability to check on the status of rescheduled service.²⁰ San Joaquin County, California, allows jurors to sign up for text message alerts regarding their reporting status.²¹ The county also allows jurors to check in at a kiosk, bypassing lines and reducing the burden on the jury office.

The DC Superior Court should be commended for its use of Twitter to thank and encourage citizens who serve on juries. Twitter has also been useful in alerting prospective jurors of unexpected court closures and in monitoring for impermissible communications by jurors. The Jury Project recommends that the use of Twitter be expanded in both Courts. The DC Superior Court should also be commended for implementing an online chat feature where prospective jurors can ask questions and for the creation of a special email address where prospective jurors can send their questions. The DC Jury Project recommends that the District Court employ similar methods to allow prospective jurors to communicate with the Court.

CCE's survey of show cause hearings

4 out of 20 said they missed their original service date because they forgot

7 out of 20 indicated that they would have liked some kind of reminder about their service

¹⁶ Council for Court Excellence Jury Project. Survey of recent jurors (2015).

¹⁷ Rabner, Stuart. "Using Technology to Improve Jury Service." *Trends in State Courts* (2014): 39-42. http://www.ncsc.org/~media/Microsites/Files/Future%20Trends%202014/Using%20Technology%20to%20Improve%20Jury%20Service_Rabner.ashx. If a similar system were introduced in D.C., prospective jurors would be provided detailed information in their mailed summons about the various functions of the JOS. The summons would also include the instructions for providing the Court with their electronic contact information, should they choose to opt-in. See recommendation on augmenting the summons http://www.njd.uscourts.gov/court-info/faq/ejuror_summons

¹⁸ *Id.* at 41.

¹⁹ Henderson, Chelsea. "County Considers Adopting I-Jury." *Port Arthur News* (2015). <http://m.panews.com/2015/06/01/county-considers-adopting-i-jury/>.

²⁰ Bauter, Alison. "Jury Duty Reminders Now Available Online, Via Text Message." *Journal Times* (2013). http://journaltimes.com/news/local/jury-duty-reminders-now-available-online-via-text-message/article_5f850d30-1a0c-11e3-82d7-0019bb2963f4.html.

²¹ Mumma, Linda. "San Joaquin County Using Text Messages to Notify Jurors." *KCRA* (2015). <http://www.kcra.com/news/san-joaquin-county-using-text-messages-to-notify-jurors/33053480>.

06 THE DC JURY PROJECT RECOMMENDS THAT THE DC COUNCIL AND DC COURTS IMPLEMENT CHANGES TO JUROR COMPENSATION FUNDS FOR THE BETTERMENT OF JURORS, THE COURTS, AND THE COMMUNITY.

The DC Jury Project recommends that the DC Superior Court and US District Court for DC allow jurors to elect to waive the compensation that is ordinarily paid to jurors and have it designated for juror-related programs at the courts. This could be a source of revenue for the courts' jury infrastructure improvements, and it is also one means of empowering jurors.²²

In Maryland, Arizona, and Texas, jurors are allowed to donate their compensation to the court for jury services and amenities as well as to local charities.²³ In Prince George's County, Maryland, jurors have the option of donating their stipend to the Department of Social Services to help children in need.²⁴ The Texas Attorney General recently approved an expansion of eligible organizations to include organizations that may not directly benefit jurors.²⁵ The DC Jury Project recommends that waived juror compensation be directed toward increas-

ing the current transportation subsidy for all jurors and/or for court improvements that relate to jury service. Such funds could also be dedicated to a "lengthy trial" fund to support jurors who undertake substantial service commitments.

The DC Jury Project also recommends that the DC Courts consider establishing a lengthy trial fund, to be used to provide additional compensation to jurors in the rare circumstance when they are required to serve on a long trial. This fund would be available only for those jurors who are assigned to lengthy trials and who are not being paid their regular wages by their employer. This would lessen the financial burden on jurors and decrease the number of prospective jurors claiming financial hardship to judges and the jury office. The Arizona lengthy trial fund reimburses jurors who lose earnings while serving as a juror, up to \$300 per day, with proof of employment and income.²⁶ Unemployed jurors, or those who earn less than \$40 a day, are eligible for \$40 per day.²⁷ Revenue for the fund is generated from a \$15 filing fee applied to civil complaints, answers to civil complaints, and motions to intervene filed in Arizona's Superior Court.²⁸ Jurors become eligible to apply for the fund after serving for five days. A similar program in Oklahoma sets a 10-day service requirement.²⁹

Finally, the DC Jury Project recommends that the Superior Court and the DC Council increase the current transportation subsidy in order to cover the minimum cost for round-trip travel to the courthouses during peak travel times. Jurors and prospective jurors typically must travel to the courthouse during peak hours on public

22 While it is a self-selecting group, several participants in Jury Project juror focus groups noted that they thought of jury service as a civic duty. Therefore, some argued that pay was unnecessary. Similarly-minded jurors might appreciate the ability to return their pay to the court or donate it to charity. Several jurors also specifically mentioned wanting to donate their pay, as they were aware of the practice being allowed in other jurisdictions.

23 Arizona Jury Service Brochure: <http://www.superiorcourt.maricopa.gov/JuryServices/docs/JuryDutyGuide2.pdf>; also see American Legislative Exchange Council, Model Jury Patriotism Act: <http://www.alec.org/model-legislation/jury-patriotism-act/>.

24 Juror Donation Fund Prince George's County: <http://www.princegeorgescountymd.gov/sites/circuitcourt/JuryDuty/GenerousJuror/Pages/default.aspx>

25 Some of the organizations added to the list include: Central Texas Sickle Cell Anemia Association, Brazos Education Foundation, Fuzzy Friends Rescue, Meals on Wheels, YMCA of Central Texas, Big Brothers Big Sisters, State Crime Victim's Fund, and the Humane Society of Central Texas.

26 2008 Arizona Lengthy Trial Fund Report: <http://www.azcourts.gov/Portals/15/Jury/2008LTFReport.pdf> (compensation is limited to the difference between the regular juror stipend and the amount the juror makes from employment wages, with a cap set at \$300). Also see Arizona Claim Form in Exhibit B.

27 *Id.*

28 *Id.* The fund is not supplemented with appropriations from the legislature.

29 Oklahoma Jury Patriotism Act: <http://www.ncsc.org/topics/jury/jury-selection-trial-and-deliberations/state-links.aspx?cat=Juror%20Pay#Oklahoma>

transportation.³⁰ According to WMATA, peak hours include 5:00 am-9:30 am, and 3:00 pm-7:00 pm.³¹ The current transportation subsidy provided by the Superior Court to jurors and prospective jurors is \$4.00. The District Court provides jurors and prospective jurors with a \$7.00 transportation subsidy.³² A round-trip Metro train ride during peak hours (even one going only one stop) is \$4.30.³³ A round-trip ride on a Metro bus during peak hours is \$3.50. The Express Bus costs \$8.00 during peak hours.³⁴ A considerable number of those citizens who are summoned or who serve as jurors must take train rides longer than one stop or must transfer between public transportation methods. The Jury Project recommends that the transportation subsidy be increased to offset these costs, and that subsequent increases be made automatically, in accordance with increases to the cost of Metro mass transit.

“

The compensation should be commensurate with the rising Metro fare. What we got only paid for a one way Metro trip.

—An Anonymous Juror

³⁰ Prospective jurors summoned to Superior Court are requested to arrive for either the 8:30 am or 10:30 am orientation and check-in sessions. Most trials at both courts begin between 9:00 am and 10:00 am. Prospective jurors at the Superior Court who are being dismissed pursuant to the one day/one trial system are typically dismissed after 2:30 pm, meaning they will also likely be traveling during peak times. Those on a voir dire panel or serving on a jury will likely be traveling later, but still during peak travel times.

³¹ WMATA metro information: <http://www.wmata.com/rail/2-forcedesktop=1>

³² DC District Court Juror F.A.Q.: <http://www.dcd.uscourts.gov/dcd/sites/dcd/files/jury-FAQ.pdf>

³³ DC Courts Juror Subsidy information: <http://www.dccourts.gov/internet/jurors/gettingpaid/main.jsf>. Metro Calculator for trains and buses: http://www.wmata.com/rider_tools/calculator/calculator.cfm

³⁴ *Id.*

Juror Badge # _____

**ARIZONA LENGTHY TRIAL FUND
JUROR CLAIM FORM**

The following information is needed to process your claim. The information you provide will be used for administrative purposes only and will not be open to public inspection.

Complete either Section A, B or C of this form, depending on your employment status. Everyone must complete Section D. Everyone must sign this form under oath or affirmation. If you complete Section B, Part 1, you must submit the form to your employer for completion of Section B, Part 2. If you complete Section C, you must sign in the presence of a Notary Public or Clerk of Court. If you complete either Section B or C, you must attach documentation to support your claim such as copies of recent pay stubs or your IRS Form 1040 income tax return for the prior year.

Submit your completed claim form and supporting documentation to the Jury Commissioner for processing.

Section A – JURORS WHO ARE UNEMPLOYED OR RETIRED SHOULD COMPLETE THIS SECTION AND THEN GO TO SECTION D.

1. I, [print full name] _____, do hereby claim payment from the Arizona Lengthy Trial Fund for my recent jury service on a trial that lasted more than five days.
2. Check the one box that applies to you:
 - a. ☐ I am currently unemployed and therefore request the minimum payment allowed by statute.
 - b. ☐ I am retired and therefore request the minimum payment allowed by statute.

Go to Section D.

Section B, Part 1 – JURORS WHO ARE PAID A REGULAR HOURLY WAGE OR A REGULAR SALARY SHOULD COMPLETE THIS SECTION. SUPPORTING DOCUMENTATION MUST BE ATTACHED.

1. I, [print full name] _____, do hereby claim payment from the Arizona Lengthy Trial Fund for my recent jury service on a trial that lasted more than five days. My employer does not pay me for all of the time I missed work due to my jury service.
2. (Check the one box that applies to you):
 - ☐ I have attached a copy of my employer's jury service policy.
 - ☐ My employer does not have a written jury service policy.

To determine the amount of your claim, complete the information below. Attach additional pages if you need to explain overtime pay or if your work schedule varies.

3. The following describes how I am paid (choose a or b):
 - a. I am paid by the hour and normally work _____ hours per day. I earn \$ _____ per hour.
 I normally work the following days of the week (circle all that apply):
 Sunday Monday Tuesday Wednesday Thursday Friday Saturday
 -I am paid by the hour and normally work _____ hours of overtime per day for which I am paid \$ _____ per hour.
 I normally work overtime the following days of the week (circle all that apply):
 Sunday Monday Tuesday Wednesday Thursday Friday Saturday
 - b. I am paid a salary and normally earn \$ _____ per pay period in gross wages.

(Continued on next page)

Rev. June 1, 2012

Page 1 of 3

A COMPLETED CLAIM FORM AND ALL SUPPORTING DOCUMENTATION MUST BE SUBMITTED TO THE JURY COMMISSIONER NO LATER THAN 30 DAYS AFTER YOUR JURY SERVICE IS COMPLETED. CLAIM FORMS AND DOCUMENTATION SUBMITTED AFTER 30 DAYS WILL NOT BE PROCESSED OR APPROVED.

SECTION B, PART 1 (CONTINUED)

4. My normal workday begins at _____ (AM/PM) and ends at _____ (AM/PM).

5. My pay period is (circle the one that applies to you):

Daily Weekly Biweekly Semimonthly Monthly

6. I was NOT paid by my employer for the following dates of my jury service (Please indicate whether or not you lost an entire shift due to jury service, the amount of pay you lost on each date, and whether or not you were able to make up your missed shift at another time.): _____

7. I will continue to lose \$ _____ per day for the following dates of my jury service: _____
(Note: If this amount changes, you must submit a revised juror claim form.)

8. I have attached copies of my last two pay stubs or (identify other records attached as supporting documentation) _____

Have your employer complete Section B, Part 2, then go to Section D.

SECTION B, PART 2 – TO BE COMPLETED BY YOUR EMPLOYER.

1. Company name: _____

2. Company address: _____

3. Contact person to verify the employment information in Section B, Part 1: [print name, title, phone number, address] _____

I have read the information provided in Section B, Part 1 and swear or affirm under penalties of perjury that it is true and correct.

Signature of employer or authorized agent _____

Date _____

SECTION C – JURORS WHO ARE CONTRACT OR TEMPORARY EMPLOYEES, SELF-EMPLOYED, OR WHO ARE PAID COMMISSIONS ONLY SHOULD COMPLETE THIS SECTION. SUPPORTING DOCUMENTATION MUST BE ATTACHED.

1. I, [print full name] _____, do hereby claim payment from the Arizona Lengthy Trial Fund for my recent jury service on a trial that lasted more than five days. Due to my service as a juror, I lost the following earnings that I would otherwise have made: \$ _____ per day.

2. My claim is based on the following explanation: _____

3. I have attached a copy of my last year's 1040 income tax return (do not include income tax schedules), SE Form or (identify the records you have attached) _____

to support my claim (additional documentation may be required).

Go to Section D.

Section D – MUST BE COMPLETED IN FULL BY JUROR BEFORE PAYMENT CAN BE ISSUED.

1. My Social Security Number is: _____. (This information is being collected pursuant to 26 U.S.C. §6109 to provide you and the Internal Revenue Service with a FORM 1099 statement if applicable. It will not be used for any other purpose.)

2. Send my payment to the following address:

3. Daytime Phone Number _____

I swear or affirm under penalty of perjury under the laws of the State of Arizona that the information I have provided herein is true and accurate to the best of my knowledge and belief.

Pursuant to A.R.S. § 21-222(D)(3), if you reported income from self-employment or you reported compensation other than wages, you must sign this form in the presence of a notary.

Signature of claimant _____

Date _____

State of Arizona)
County of _____) ss.

Subscribed and sworn (or affirmed) before me on this _____ day of _____, 20_____.

My commission expires: _____

Notary Public or Clerk of Court _____

FOR COURT USE ONLY:

Case No. _____ Number of ALTF-eligible trial days: _____

☐ Claim approved in the amount of \$40/day from day 4 through the last day of this juror's service in the case listed above.

☐ Claim approved in the amount of \$ _____

☐ Claim disapproved.

07 THE DC JURY PROJECT RECOMMENDS THAT THE COURTS CONSIDER ENHANCING PROCEDURES RELATING TO THE STRESS ASSOCIATED WITH JURY SERVICE.

The DC Jury Project recommends that the District Court and the Superior Court consider implementing structural and procedural changes that are designed to prevent and alleviate stress related to jury service. Jurors may experience moderate stress during a trial, and approximately 10% of jurors may experience significant amounts of stress.³⁵ This service-related stress could be caused by a number of factors, including missing work, possible loss in pay, disruption of normal routine, information overload, and the elements of a case that are particularly gruesome or sensitive.³⁶ Moreover, nationwide studies by the National Center for State Courts have shown that jurors often feel underappreciated for their service, as well as upset, because internet access in jury lounges is lacking, restrooms are generally not well maintained, and they feel generally unappreciated.³⁷ The DC Jury Project recommends that the courts seek to address juror stress in various ways, including by enhancing juror lounges and deliberation rooms, creating a more welcoming environment for jurors arriving at the courthouse, and providing coping mechanisms for use after service has been completed.

When the courts next consider renovating, painting, or otherwise updating physical facilities, the DC Jury Project recommends that the courts consider these renovations as opportunities to improve the experience

of jurors. In addition, the DC Jury Project suggests providing refreshments or breakfast items for jurors who are sitting through orientation and waiting for instructions. We applaud the US District Court for providing jurors with refreshments during trials as appreciation for their service. We recommend that the DC Bar create a fund to help provide these services to the courts, especially in lengthy civil trials, to aid jurors in remaining attentive and to help them feel appreciated.

The DC Jury Project also encourages judges and clerks to recommend that jurors leave the building during breaks and lunch to clear their minds and relieve stress.

Finally, the DC Jury Project recommends offering jurors in certain cases information about coping mechanisms once their service is complete. Multiple states, including Arizona and Wisconsin, provide coping tips to jurors in every case through a pamphlet that also addresses common symptoms of stress.³⁸ Arizona also gives jurors access to six free counseling sessions to help cope with the effects of particularly difficult trials. This is known as "critical incident debriefing," and is provided through the Employee Assistance Program for all jurors who serve.³⁹ In Washington State, several courts have licensed mental health counselors who serve as "jury debriefers" to help jurors deal with stress and trauma and transition back to normal life after an intense trial.⁴⁰ We recommend the courts plan ahead for mitigating juror stress if they know a case will be particularly sensitive or disturbing.

The DC Jury Project has created a sample pamphlet, which the courts may wish to use or modify. It can be found in Exhibit B.

35 Paula Hannaford-Agor. *Jury News, The Court Manager*, 26(2), 50-52 (2011). See also, e.g., <http://www.9news.com/story/news/health/2015/04/13/emotional-toll-of-being-a-juror/25728697/>.

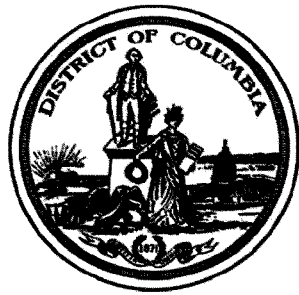
36 J. Chris Nordgren. Unified Justice System. *Practical Tips on Coping with the Stress of Jury Duty*. (1999). <http://ujsjurors.sd.gov/stress.html>.

37 National Center for State Courts. *Through the Eyes of the Juror: A Manual for Addressing Juror Stress* (1998). <http://www.ncsc-jury-studies.org/What-We-Do~/media/Microsites/Files/CJS/What%20We%20Do/THROUGH%20THE%20EYES%20OF%20THE%20JUROR.ashx>

38 Section of pamphlet used at the Superior Court of Arizona, Maricopa County. "Tips for Coping After Jury Duty". Paula Hannaford-Agor. *Jury News, The Court Manager*, 26(2), 50-52 (2011). <http://www.ncsc-jurystudies.org/~media/Microsites/Files/CJS/Jury%20News/A%20New%20Option%20for%20Addressing%20Juror%20Stress.ashx> and Wisconsin general brochure for stress: <http://www.doj.state.wi.us/sites/default/files/ocvs/specialized/jury-stress-brochure.pdf>

39 Paula Hannaford-Agor. *Jury News, The Court Manager*, 26(2), 50-52 (2011).

40 Libby Denkmann, *Guilty or innocent, debriefers help jurors recover from trauma after verdict*, Mynorthwest.com, KIRO Radio, April 10, 2015: <http://mynorthwest.com/11/2744794/Guilty-or-innocent-debriefers-help-jurors-recover-from-trauma-after-verdict>.

EXHIBIT B**SAMPLE AFTER SERVICE PAMPHLET**

"I consider trial by jury as the only anchor ever yet imagined by man, by which a government can be held to the principles of its constitution" – Thomas Jefferson

[COURT NAME]
[CHIEF JUDGE]
COURTHOUSE:
[NAME]
[ADDRESS]

PH: [PHONE]

[WEBSITE]

Now What?
How to Cope After
Jury Service



After Service Information

Thank You

Thank you for fulfilling your civic responsibility by serving on a jury. Jury service is an essential part of our justice system and can be very rewarding.²⁷ You were asked to listen to evidence and examine facts. Although coming to a conclusion may have been difficult, we appreciate your participation and understanding.²⁸

Serving on a jury is not an everyday task, so some stress may occur. Some jurors experience moderate levels of stress as one point or another.²⁹ There is no guarantee that you will experience stress after service, but if you do, know that you are not alone.

Signs You Might Be Stressed³⁰

Physical reaction: muscle tension, changes in sleep patterns or lack of energy.

Mental reaction: difficulty concentrating or remembering things or having a hard time making decisions.

Emotional reaction: moodiness, guilt, fear or dwelling on the details of the case.

Behavioral reaction: isolation, an increased desire to be alone, changes in eating habits or increased drug/alcohol use.

Coping Tips

Although stress is a normal reaction to jury service, and the symptoms usually subside in due time, there are some ways to cope.

- Understand that unless desired, you do not have to speak about the trial to anyone.³¹
- Stick to your normal routine as best as possible.³²
- Avoid caffeine, alcohol, and nicotine as they increase anxiety and can increase problems.³³
- Try relaxation techniques such as meditation, yoga, and relaxed breathing.³⁴
- Exercise and take care of your body as healthy habits can decrease stress.³⁵
- Speaking to family members, friends, or fellow jurors may be helpful to alleviate stress and remind yourself that you were part of a group and are not alone. Avoid negative thoughts about the verdict in these discussions.³⁶

Need More Assistance?

You are not alone when it comes to experiencing stress after jury service. This is a normal reaction to a stressful event. If signs of distress persist for two weeks after the jury service has ended consider contacting your physician to speak about alternate coping options.³⁷

²⁷ After Your Jury Service. Wisconsin Juror Brochure: <http://www.doj.state.wi.us/sites/default/files/ocvs/specialized/jury-stress-brochure.pdf>

²⁸ Tips For Coping After Jury Duty, Arizona Brochure: <http://www.ncsc-jurystudies.org/~media/Microsites/Files/CJS/Jury%20News/A%20New%20Option%20for%20Addressing%20Juror%20Stress.aspx>

²⁹ *Id.*

³⁰ After Your Jury Service. Wisconsin Juror Brochure: <http://www.doj.state.wi.us/sites/default/files/ocvs/specialized/jury-stress-brochure.pdf>

³¹ *Id.*

³² After Your Jury Service. Wisconsin Juror Brochure: <http://www.doj.state.wi.us/sites/default/files/ocvs/specialized/jury-stress-brochure.pdf>

³³ Tips For Coping After Jury Duty, Arizona Brochure: <http://www.ncsc-jurystudies.org/~media/Microsites/Files/CJS/Jury%20News/A%20New%20Option%20for%20Addressing%20Juror%20Stress.aspx> and After Your Jury Service. Wisconsin Juror Brochure: <http://www.doj.state.wi.us/sites/default/files/ocvs/specialized/jury-stress-brochure.pdf>

³⁴ *Id.*

³⁵ Tips For Coping After Jury Duty, Arizona Brochure: <http://www.ncsc-jurystudies.org/~media/Microsites/Files/CJS/Jury%20News/A%20New%20Option%20for%20Addressing%20Juror%20Stress.aspx>

³⁷ *Id.*

**08 THE DC JURY PROJECT
RECOMMENDS THAT JUDGES
CONSIDER ADJUSTING
TRIAL SCHEDULES WHERE
FEASIBLE TO MINIMIZE JUROR
INCONVENIENCE.**

Many judges do not hold trials on Fridays, instead holding initial scheduling conferences and attending to other matters. The DC Jury Project recognizes that non-trial days are critical to the management of the courts' docket. However, the DC Jury Project recommends that when the Court's schedule permits, judges consider holding trials on Fridays when doing so would result in the trial ending on that Friday, thus eliminating the need for the jury to return the next week for a single day. The DC Jury Project recognizes that many judges already consider rescheduling their other matters and hold trial on Fridays when doing so will mean that the trial will not need to continue into the next week and applauds them for doing so.

09 THE DC JURY PROJECT RECOMMENDS THAT THE COURTS IMPLEMENT FORMAL AND OFFICIAL MEANS OF THANKING POTENTIAL AND EMPANELED JURORS FOR THEIR SERVICE, INCLUDING SERVICE AS ALTERNATES.

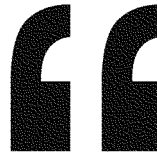
The DC Jury Project recommends that the District Court and the Superior Court thank jurors formally and officially by communicating with them directly after service. Jurors play an important role in our judicial system; those who answer a summons to serve should be made to feel appreciated, including those who never go through the voir dire process and those who serve as alternate jurors.

The Committee's research indicates that courthouse staff and judges do not universally thank jurors for their service. The DC Jury Project recommends that thanking jurors in person be made a standard practice in the DC courts.⁴¹ Staff should thank prospective jurors during orientation and at the conclusion of the day, when they are dismissed, on behalf of the court. Similarly, judges should take care to thank jurors at the start and end of each day of voir dire or trial, and should also thank jurors upon the conclusion of a trial.

The courts should also issue standard-form thank you notes, signed by a judge, to every citizen who responds to a summons and reports to the courthouse for duty. (See Exhibit C for sample thank you letters for use as models.) As a way to distribute these letters, we recommend that these letters be made readily available to the jury office for distribution to jurors when they return their

badges upon dismissal.⁴² The DC Jury Project further recommends creating a rotation for non-seated judges to thank jurors who were not empanelled for trial. The judges on this rotation should thank the jurors in the jury lounge when they are dismissed from their service for the day.

Finally, the DC Jury Project recommends notifying jurors who were selected as alternates and dismissed from the trial prior to deliberation about case outcomes. In several focus group sessions, former alternate jurors expressed their frustration with not being made aware of the case outcome after devoting so much of their time and effort to the process. Similarly, alternates who were notified reported being much more satisfied with their service.



We had to take off our job, I had to get someone to take care of my daughter. I felt like a number, not appreciated. If you don't get picked you don't get paid. If someone had just come out and told us what was going on, I would have felt better about it. Someone could have just come into the room and thanked us.

—An Anonymous Juror

⁴¹ As the court moves toward communicating with jurors via email, the DC Jury Project recommends considering this medium as a way to thank jurors as well.

⁴² Distribution in this manner might mitigate some of the administrative concerns that several judges have expressed regarding the amount of time and effort that would be required to address and mail personal letters to jurors.

EXHIBIT C**SAMPLE LETTERS OF THANKS**

[FOR LONG TRIALS]

[date]

Dear [Mr.] [Ms.] _____:

I would like to express my formal appreciation to you, individually, for your service to our Court in the recent [civil] [criminal] case of [caption]. You have made a significant contribution to the fair and impartial administration of justice in our community by your performance of duty on this jury. While jury duty always imposes a sacrifice for each person whose routine schedule is disrupted, the trial in this case took longer than many trials do. I especially appreciated your patience, understanding, good humor, spirit of cooperation, and commitment to the process.

Without good citizens like you, we judges could not fairly administer justice. Thank you so very much for your service on this jury. It was a pleasure to meet you and your colleagues.

Sincerely,

Paul L. Friedman

[DATE]

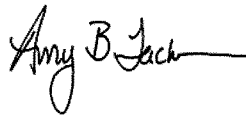
JUROR NAME
ADDRESS

Dear Mr./Ms. _____:

I am writing to thank you for your service as a juror in *United States v. XX* this week. Although the trial ultimately did not move forward, your willingness to participate as a juror helped ensure the defendant's right to a jury trial, which is a fundamental part of our system of justice. The system would not work at all if members of the community were unwilling to participate, and I appreciate the attention and patience you showed in these proceedings.

You have made a valuable contribution to the Court and to the community. Thank you again for your service.

Sincerely,

A handwritten signature in black ink that reads "Amy B. Jackson". The signature is written in a cursive style with a long horizontal line extending from the end of the name.

Amy Berman Jackson
U.S. District Court Judge

[Letterhead on Stationary]

[Date]

[Juror Name]

Dear Mr./Ms. [Juror Name]:

On behalf of the United States District Court for the District of Columbia, I want to personally thank you for the time and service you have provided to the Court as a juror. Your participation was essential to the resolution of the case in which you were a juror.

When the Constitution of the United States was adopted, and at various times thereafter, the founding fathers of our country and the Congress of the United States decided that certain legal disputes should be decided by jurors. Like any system of justice that mankind has ever devised, our system is not infallible. Nevertheless, I firmly believe that America has developed a system of justice that rivals any system that operates in the world today. In fact, having had the opportunity to examine and observe first hand many other systems of justice in other countries, I can confidently conclude that the United States stands far above virtually all other systems in providing quality justice to all individuals who enter the doors of our Nation's courthouses.

Your service as a juror contributed tremendously to the country's ongoing effort to ensure that all who access the courts of our Nation are treated fairly and receive equal protection under our laws. I commend you for your contribution to those goals and I hope that you will be willing and able to serve as a juror again when called upon by one of the courts of our Nation to do so.

Sincerely,

Reggie B. Walton
United States District Judge

[FOR SHORT TRIALS]

[date]

Dear [Mr.] [Ms.] _____:

I would like to express my formal appreciation to you, individually, for your service to our Court in the recent [civil] [criminal] case of [caption]. Jury duty always imposes a sacrifice for each person whose routine schedule is disrupted. So I very much appreciated your patience, understanding, attention, spirit of cooperation, and commitment to the process.

Without good citizens like you, we judges could not fairly administer justice. Thank you so very much for your service on this jury. It was a pleasure to meet you and your colleagues.

Sincerely,

Paul L. Friedman

JURY POOL AND SUMMONING WORKING GROUP

The current response rate to a jury summons in the courts of the District of Columbia is about 22%. The principal focus for consideration by the Jury Pool and Summoning Working Group was the question of how we can increase that response rate. If more citizens responded to their summons, individuals would be summoned less frequently, and the burden on those who respond would be lessened, as would the burden on the courts. The Working Group considered a variety of important and interesting proposals, including additions to the juror source lists, cooperation between the local and federal courts to avoid double booking of jurors, and juror summons and failure to appear. As explained below, two broad themes permeated our discussions.

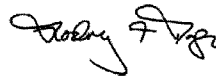
As a first theme, we reflected on the need for a legal, business and community culture of support for the jury system. We believe that the overall response of citizens to jury service reflects that culture. Broad dissemination of information about jury service helps create a supportive culture. We discussed the ways in which we might improve the support of the business community and employers for attendance at the Court when potential jurors are summoned. We also considered whether and how to approach the Council of the District of Columbia about compliance with the requirement of the *Jury Trial Improvements Act of 2006* that agencies providing lists of names to the court for jury service update those lists annually. We believe also that allowing people to volunteer to serve may mitigate the problem of low summons response rates.

Second, the advance of technology opens new avenues for improving participation. We support expanding the use of technology in the court system to take advantage of relevant innovations developed in the private sector. Technological advances may enable great improvement in the collection, automation, and accuracy of juror source list creation and summoning. Increased utilization of technology tools may allow jurors to call in, get text message reminders, consult websites, and receive emails regarding their jury summons, resulting in a greater response rate from those who actually receive their summons. Political campaigns and the private sector are

successfully using data to pinpoint demographic targets and interests, which could help improve the accuracy of source lists.

Our work also considered the earlier studies and recommendations on this topic. In 2006, the Council for Court Excellence published a report, *Improving Juror Response Rates in the District of Columbia*. Much like our own work, this report was in part a look backwards at the recommendations made by the 1998 Jury Project. In brief, the report recommended four methods to improve response rates: 1. Improve automation support; 2. Improve the master jury list; 3. Expand the follow-up program for non-responders; 4. Revisit the 10-year hold-out for convicted felons. CCE staff and interns have been tracking the implementation of the 1998 Jury Project's recommendations. In part, the task of the Working Group was to assess the level of implementation of the previous recommendations, determine whether there is still room for improvement in a recommendation's area, and advise whether the recommendation should be re-introduced or modified.

We know the courts are committed to improving the "yield" for jury summoning, and we hope our recommendations will aid that effort.



Rodney F. Page
Bryan Cave
Jury Pool and Summoning Working Group Chair

**10 THE DC JURY PROJECT
RECOMMENDS AMENDING THE
DC CODE SO THAT AGENCIES
THAT PROVIDE THE COURT
WITH SOURCE LISTS HAVE TO
CERTIFY THAT THE LISTS HAVE
BEEN ACCURATELY UPDATED.**

The DC Jury Project does not believe that penalties for non-compliance need to be included in the legislation, as the DC Council's oversight power and the Superior Court's jurisdiction are sufficient.

The DC Jury Project commends CCE for its efforts to draft and pass the *Jury Trial Improvements Act of 2006*.⁴³ Among other things, the act amended Section 3, Title 16 of the DC Code to include § 16-5104 (District of Columbia government agency source lists), providing that:

Any agency or instrumentality of the District of Columbia government required to provide names and addresses of individuals to the Court pursuant to § 111905 for purposes of summoning individuals for jury service shall take all reasonable steps to ensure that the names and addresses are accurate, including:

- (1) Entering into a memorandum of understanding with the Court for the prompt sharing of complete and accurate information; and
- (2) The purging of inaccurate name and address information by the provider agency or instrumentality not less than once every calendar year.

The DC Jury Project recommends that this section be amended to add the following third provision:

- (1) Certifying via signed declaration by the agency head and the inclusion of a "change log," documenting differences in the new list as compared to the old list, that the agency completed all due diligence to ensure that the list was accurately updated.

⁴³ Jury Trial Improvements Act of 2006, DC Law 16-272 (Mar. 14, 2007). <http://dclilms1.dccouncil.us/images/00001/20070108174433.pdf>.

11 THE DC JURY PROJECT RECOMMENDS DRAWING FROM ADDITIONAL SOURCE LISTS TO INCREASE THE ACCURACY AND REPRESENTATIVE NATURE OF THE MASTER JURY LISTS AT DC COURTS.

The DC Jury Project applauds the DC Superior Court for its efforts to implement CCE's previous recommendation to increase the number of source lists used.⁴⁴ According to the most recent Superior Court Jury Plan, the Court currently uses lists from the following sources:

(1) the list of voters registered in the District of Columbia; (2) the list of drivers, eighteen (18) years or older, licensed in the District of Columbia; (3) the list of residents of the District of Columbia, eighteen (18) years or older, who have received a non-driver's identification card from the District of Columbia; (4) the most recent list of individuals to whom District of Columbia personal tax income forms have been sent by the DC Department of Finance and Revenue, as well as the most recent list of individuals who have filed personal income tax forms in the District of Columbia; (5) the most recent list of individuals who have qualified to receive any type of public assistance benefits in the District of Columbia; (6) the most recent list of persons who have become naturalized citizens in the District of Columbia since the previous master jury list was created; (7) such other source lists as may become available.⁴⁵

The DC Jury Project first recommends that the list of newly naturalized citizens be supplied to the Court by the United States Citizenship and Immigration Services, as set forth in the Court's jury plan. The DC Jury Project believes that CCE and its partners could help facilitate this exchange.

The DC Jury Project further recommends that, in addition to the six sources listed above, the Superior Court seek other source lists pursuant to the seventh provision of the Jury Plan. In particular, we recommend obtaining a list of 18-year-olds from DC Public Schools to ensure adequate representation of DC youth in the jury pool.

The US District Court for the District of Columbia uses fewer source lists than the Superior Court to create its master jury wheel. The District Court currently uses lists from the following sources:

The judges of the Court find, pursuant to 28 U.S.C. § 1863(b)(2), that while the Registered Voters Master File of the DC Board of Elections represents a fair cross-section of the community in this District, an even greater number of citizens will be eligible for jury service if supplemental sources are also employed. In order to broaden the base from which potential jurors shall be chosen, the Court approves a source list compiled by merging the Registered Voters Master File of the DC Board of Elections or its supporting computer tape file, the computer tape file maintained by the DC Department of Motor Vehicles of individuals 18 years and older who hold a driver's license, learner's permit, or valid identification card issued by the DC Department of Motor Vehicles, and the list of all individuals of the District of Columbia whose income tax forms are



I generally get called every two years. I have some friends who have never been called.

—An Anonymous Juror

⁴⁴ See *Council for Court Excellence, Juries for the Year 2000 and Beyond* (1998) at Recommendation 6.

⁴⁵ Jury Plan for the Superior Court of the District of Columbia, Effective November 9, 2013. http://www.dccourts.gov/internet/documents/Jury-Plan-effective_11-9-2013.pdf.

filed with the DC Department of Finance and Revenue. This merged list will hereafter be referred to as the "Source List."⁴⁶

The DC Jury Project recommends that the US District Court expand the number of source lists used to include newly naturalized citizens, DC Public Schools, and others that would help to ensure that its master jury wheel is as representative of the population of DC as possible.

⁴⁶ Jury Selection Plan for the United States District Court for the District of Columbia for the Random Selection of Grand and Petit Jurors (As Amended Through October 2012) at Section B. <http://www.dcd.uscourts.gov/dcd/sites/dcd/files/ISPFinal120612.pdf>.

12 THE DC JURY PROJECT RECOMMENDS THAT THE DC COURTS EXAMINE THE POSSIBILITY OF IMPROVING JURY SUMMONING RATES BY USING BIG DATA RESOURCES TO IDENTIFY MORE ACCURATE ADDRESSES AND CONTACT INFORMATION FOR POTENTIAL JURORS.

In 2014, the Superior Court of the District of Columbia sent out over 150,000 summonses to potential jurors.⁴⁷ Of that number, approximately 22,000 summonses were returned to the Court as “undeliverable.”⁴⁸ An additional 70,000 summonses were registered as “failure to respond.”⁴⁹ New data collection services exist that can help to update contact information for potential jurors who live in the District of Columbia.

These information services companies – colloquially known as “big data” or public records companies – collect mailing addresses, email addresses, telephone numbers, and other public as well as private information about individuals in all 50 states across the United States. Big data companies can provide cost-effective services to update the source lists that the DC Courts use to identify qualified individuals who may be summoned to serve as potential jurors. The companies can also check the accuracy of current contact information the courts possess. This updated contact information could be utilized to supplement existing court strategies for improving the accuracy of receipt of the summons by residents, including permitting the implementation of an email notification system whereby courts could send the initial summons to a juror in digital format,

and send follow-up reminders to the juror with the date and time of their service (See Recommendations #4 and #5). Thus, the use of big data resources offers an opportunity to minimize the number of undeliverable and unknown responses, and to develop more effective ways to communicate with potential jurors, which would ultimately save the courts time, money, and effort.

By way of example, one potential service provider (LexisNexis) has a “Batch Service” that can update the court’s existing list of names and addresses for jurors with current mailing addresses, email addresses, and telephone numbers for the individuals whose summonses have been returned or who have no contact information. This updated information would provide the court with data about jurors who no longer live at the mailing address, and as a result, the court would avoid sending future summonses to the old addresses. The service could also verify that jurors who have not responded to a summons do, in fact, live at the address to which the summons was mailed. Both pieces of information could help the court improve its jury yield rate.⁵⁰

The DC Jury Project Committee recommends that the courts undertake an examination of the feasibility of utilizing big data services, recognizing that any issues regarding cost and security should be addressed prior to the implementation of any such services. The Committee suspects that personal privacy concerns are likely to be minimal, given that only public records are being used, and the only proposed use is to update addresses that the court already has permission to have and utilize.

⁴⁷ Interview with Superior Court Jury Officer Suzanne Bailey-Jones, Judge Melvin Wright, and Mr. Herbert Rouson, Special Operations Division, at DC Superior Court on April 23, 2015.

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ The DC Superior Court is currently undertaking a trial of LexisNexis Accurant Batch to evaluate the benefit of utilizing such a big data or public records service.

13 THE DC JURY PROJECT RECOMMENDS THAT CITIZENS BE PERMITTED TO PROVIDE INFORMATION FOR INCLUSION IN THE MASTER JUROR SOURCE LIST IN DC IN ORDER TO ENSURE THAT THE SOURCE LIST INCLUDES CITIZENS WHO ARE QUALIFIED BUT WHO ARE NOT OTHERWISE INCLUDED.

Citizens should be permitted to provide information for inclusion in the master juror source list. Such information could include updated addresses and contact information, as well as an indication of when the individual would best be able to serve. To create this opportunity, the Courts could utilize an online form; have paper forms available in public places, such as libraries and the DMV; or create an automated telephone hotline.

Permitting this practice could expand the jury pool, as well as increase its representativeness, while preserving the random selection of jurors (See Recommendation #11). Additionally, it furthers the important goal of court accessibility, and it helps to ensure that the juror source list includes citizens who are qualified to serve as jurors in DC Superior Court and the US District Court for DC, but who are not otherwise listed on one of the juror source lists.⁵¹

Citizens should not be permitted to volunteer to serve at a particular time, but they should be allowed to indicate to the courts the most optimal time for jury service, which would be added to the jury pool information, and could still allow the courts to make targeted random

selections from the master list.⁵² This practice would increase the summons response rate overall, and it would not skew the jury pool because the source lists would continue to be generally sorted and randomized.

This practice is currently permitted in four states: New York, Pennsylvania, Alaska and Maine.⁵³ As these jurisdictions have found, this practice helps capture and engage those citizens who are willing to take a proactive approach with regard to jury service.

⁵² A targeted random selection means drawing from the master jury wheel a group of prospective jurors, some of whom have indicated a certain time period is easier for them and some who have not done so, and then sending this mixed group a summons for service during a period that falls during the preferential period. This mixed group would be available for all of the jury trials taking place during that period and would also be subject to voir dire. The practical effect is the same as allowing prospective jurors to postpone their service to a later date.

⁵³ In New York, the Jury Information Line (a toll-free telephone number) prompts citizens to volunteer to be on the jury list. If qualified, these citizens are placed on the jury list from which jurors are randomly selected. See <http://www.nyjuror.gov/juryQandA.shtml#Q2>. In Pennsylvania, procedures for a citizen having their name included on the master juror list are addressed by the jury commission for each county. In Alaska, citizens may contact the administrative director of the Alaska Court system to provide the information the administrative director may require so they are included on the juror source list. Alaska Statute 09.20.050(d). In Maine, citizens can contact the clerk of court in their county of residence to be listed on the juror source list.

⁵¹ This recommendation was also made by CCE in 1998, but was not implemented. See *Council for Court Excellence, Juries for the Year 2000 and Beyond* (1998) at Recommendation 7.

14 THE DC JURY PROJECT RECOMMENDS THAT THE SUPERIOR COURT REVISE ITS JURY PLAN SO AS TO REDUCE THE TEN-YEAR RESTRICTION ON PEOPLE WITH FELONY CONVICTIONS BEING CALLED TO SERVE ON A PETIT JURY.

The DC Superior Court currently requires felons who have completed their incarceration, probation, parole, or supervised release to wait ten years before they are permitted to serve on a jury.⁵⁴ This requirement greatly surpasses the limitation that the District of Columbia Code sets in Section 11-1906(B), which states that people with felony convictions who have completed their sentencing requirements must wait only one (1) year before they may serve on a jury.⁵⁵ We recommend that the DC Superior Court revisit its rule and implement changes so that the court's requirement conforms with the one year limitation in the legislation. This would help to increase the size and inclusiveness of the petit jury pool.

There are several reasons why people with felony convictions should be allowed to serve on a jury soon after they have completed their sentences and have reintegrated back into society. First, like voting, serving on a jury is an important Constitutional and civic act. In DC, a felon's right to vote is automatically reinstated,⁵⁶ due in no small part to the growing recognition that a key element of rehabilitation is permitting felons to participate in the civic life of their community.⁵⁷ Second, the increased juror pool would help ensure that the overall

jury venire is representative of DC's population. And third, allowing felons to serve on juries within a shorter period of time after they have completed their sentences would have the practical effect of easing burdens on the court by increasing the pool of prospective jurors and simplifying the management of source lists, which now undergo an extensive purging process necessitated by the ten-year restriction.

Finally, the arguments against allowing felons to serve on juries are unpersuasive. For example, there is often no meaningful distinction between felons (who are excluded for ten years) and those who are convicted of misdemeanors (who are not excluded at all), given that misdemeanor convictions often involve similar criminal conduct and result from plea bargaining rather than any real difference in the culpability of the offender.⁵⁸ Similarly, once the punishment handed down is served, requiring ex-felons to continue to be excluded from the jury pool for lengthy amounts of time does not advance the purposes of punishment in any way.⁵⁹ Opponents of felon inclusion cite issues of inherent bias, presumption of character, and impact on reintegration and criminal desistance as reasons for exclusion.⁶⁰ However, research indicates that having a felony conviction is no more predictive of a pro-defense bias in a criminal case than several other factors.⁶¹ There is also no support for the contention that being a felon degrades one's character to the point at which he or she could not be added to the jury pool and go through the same voir dire pro-

⁵⁸ *Id.*

⁵⁹ See American Bar Association, *Principles for Juries and Jury Trials* (2005) at Principle Two: <http://www.americanbar.org/content/dam/aba/migrated/juryprojectstandards/principles.authcheckdam.pdf>.

⁶⁰ See James Binnall, *Convicts in Court: Felonious Lawyers Make a Case for Including Convicted Felons in the Jury Pool*, 73 *Alb. L. Rev.* 1379 (2010); James Binnall, *A Field Study of the Presumptively Biased: Is there Empirical Support for Excluding Convicted Felons from Jury Service?*, 36 *U. Denv. L. & Pol'y* 1 (2014); James Binnall, *A jury of none: an essay on the last acceptable form of civic banishment*, 34 *Dialectical Anthropology* 533 (2010); James Binnall, *Sixteen Million Angry Men: Reviving a Dead Doctrine to Challenge the Constitutionality of Excluding Felons from Jury Service*, 17 *Va. J. Soc. Pol'y & L.* 1 (2009); James Binnall, *A Felon Deliberates: Policy Implications of the Michigan Supreme Court's Holding in People v. Miller*, 87 *U. Det. Mercy L. Rev.* 59 (2009).

⁶¹ See *id.*; see also *The Exclusion of Felons From Jury Service*, 53 *Am.U.L. Rev.* 65 (2003).

⁵⁴ DC Superior Court Jury Plan Effective November 9, 2013. Section 6(g). http://www.dccourts.gov/internet/documents/Jury-Plan-effective_11-9-2013.pdf.

⁵⁵ DC Code §11-1906(B). <http://law.justia.com/codes/district-of-columbia/2013/division-ii/title-11/chapter-19/section-11-1906/>.

⁵⁶ National Conference of State Legislatures, *Felon Voting Rights*. <http://www.ncsl.org/research/elections-and-campaigns/felon-voting-rights.aspx>; also see http://www.nonprofitvote.org/voting-as-an-ex-offender/#District_of_Columbia.

⁵⁷ See *The Exclusion of Felons From Jury Service*, 53 *Am.U.L. Rev.* 65 (2003).

cess as any other prospective juror.⁶² Lastly, studies in Maine, where there are no restrictions on felons serving on juries, indicate that felons were excited about their opportunity to fulfill their civic duty and viewed service as a unique element of their reentry into society.⁶³

⁶² See *Id.*

⁶³ See James Binnall, *A Field Study of the Presumptively Biased: Is there Empirical Support for Excluding Convicted Felons from Jury Service?*, 36 U. Denv. L. & Pol'y 1 (2014).

15 THE DC JURY PROJECT RECOMMENDS THAT EMPLOYERS ADOPT POLICIES THAT ENCOURAGE THEIR EMPLOYEES TO SERVE ON JURIES AND THAT MAKE EXPLICIT THE CONSTITUTIONAL AND CIVIC NATURE OF JURY SERVICE.

A survey of 72 DC-area employers indicates that practices regarding leave for jury service vary from employer to employer, including how time spent serving is classified and whether and for how long employees are paid their regular wage while serving.⁶⁴ Because serving on a jury is an important civic act with direct Constitutional ties, the DC Jury Project recommends that employers adopt specific jury duty leave policies, and that such policies be as permissive and encouraging of jury service as possible.

To this end, the DC Jury Project has drafted the following model "Civic Leave" policy that it recommends be adopted by area employers:

Serving on a jury and voting are two of the most important civic acts a citizen in a democracy can take. In recognition of that fact, and to encourage participation in the democratic process by our employees, [ORGANIZATION] provides employees summoned to jury service, or wishing to vote in an election, paid time off, classified as Civic Leave, to do so.

Voting in an election: Supervisors are encouraged to schedule later starts, earlier dismissals, and longer lunches on election days. No employee will be prevented from voting. Neither the time spent traveling to and from a polling place nor the time spent voting will be deducted from an employee's hourly wage or treated differently in any way from normally scheduled working time. Employees are

encouraged to work with their supervisors to schedule time to vote.

Jury service: An employee's position will be held with similar hours, benefits, and salary until the completion of service. Similarly, an employee summoned for jury service will be paid for the duration of their service at their normal rate of pay. Compensation from the court can be kept or returned. Employees must notify their supervisor that they have been summoned for jury duty and must provide proof of summons.

See Exhibits D through F for model jury service policies from other jurisdictions.

The DC Jury Project also recommends that the DC government and courts encourage the adoption of jury service policies, and that good corporate citizens—businesses that adopt policies that are permissive when it comes to leave for jury service—should be recognized for their efforts and civic contributions in this area.

53.5% of those surveyed at the Superior Court said that jury service interfered with their work.

Employer Policies

(Does your employer have a jury service policy?)
Percent of Respondents Answering "Yes"

	Employment Status		
	Part Time (n=24)	Fulltime (n=371)	Self-Employed (n=37)
Employer has jury service policy	25.0%	79.6%	16.2%
Employer pays for jury service	29.2%	86.8%	16.2%
Satisfied with compensation	37.5%	68.5%	51.4%

⁶⁴ See employer service policy results in the Methodology and Data Collection section.

EXHIBIT D
**KENTUCKY DEPARTMENT
FOR LIBRARIES AND ARCHIVES
MODEL EMPLOYER
JURY DUTY POLICY**
Sample Policy #1

Employees subpoenaed for jury duty by the court will receive straight time earnings for the day or days served. The Library Director must be appropriately notified. Employees will be expected to work any hours before and after their jury duty service. Court duty leave does not apply if the employee is a party to any non-library related civil or criminal litigation.

Sample Policy #2

An employee will be granted necessary time off, with pay, to perform jury duty as required by law. The employee shall notify the Library Director immediately, in writing, of the requirement for this leave along with a copy of the notice of report for jury duty.

An employee who reports for jury duty and is excused from serving before noon must report to work for the afternoon, according to the work schedule of his or her department. However, the combination of jury duty and Library work shall not amount to more than a normal workday.

Part-time employees and employees in the introductory period summoned for jury duty will be granted time off with pay for the first three days of jury duty and unpaid time off for additional days in accordance with state and federal laws

Sample Policy #3**Jury Duty**

Jury Duty is recognized as a civic responsibility and staff members are encouraged to fulfill this obligation. Employees will be granted time off (regular work schedule) with pay to serve on a jury or as a witness when subpoenaed. The Library Director may request a copy

of such official notice before leave is granted. If jury or court appearance does not require a full workday, the employee is expected to return to work. Staff members will be permitted to retain the jury compensation. Court appearances by employees of a personal business nature will be counted as vacation time or personal days.

Sample Policy #4**Jury Duty**

_____ encourages you to fulfill your civic responsibilities by serving jury duty if you get a summons. Employees in an eligible classification will be granted paid leave for jury duty for that period they are required to serve on a jury.

If you are eligible for jury duty, you will be paid at your base rate of pay for the number of hours you would normally have worked that day. Employees in the following classifications are eligible for paid jury duty leave:

- Regular full-time employees
- Regular part-time employees

If you get a jury duty summons, show it to your supervisor as soon as possible. This will help us plan for your possible absence from work. We expect you to come to work whenever the court schedule permits.

Either you or _____ may ask the court to excuse you from jury duty if necessary. We may ask that you be relieved from going on jury duty if we think that your absence would cause serious operational problems for _____.

Subject to the terms, conditions, and limitations of the applicable plans, _____ will continue to provide health insurance benefits for the full period of jury duty leave.

Your vacation, sick leave, and holiday benefits will continue to accrue during jury duty leave.

EXHIBIT E

SELECTED STATE LAWS REGARDING JURY SERVICE

Model State Policy for Employers:

American Legislative Exchange Council, "Jury Patriotism Act"

Under the "Rights of Petit Jurors" section there are points for job preservation, benefits protection, length of service, frequency of service, and small business protection.

Under the "Lengthy Trial Fund" there are multiple points regarding pay of jurors from government or employer, and how to determine what is best for the circumstances.

<http://www.alec.org/model-legislation/jury-patriotism-act/>
This policy has been implemented by over 14 states.

Maryland:

Employers cannot force employees to use annual or sick leave for service. They cannot fire an employee because of jury service. Employer also cannot require an employee to work on the days they are scheduled for service.
<http://www.courts.state.md.us/jury-service/pdfs/employers-and-jury-service.pdf>

Section 8-501, Employment loss. Section 8-502, Leave. If these sections are violated there is a potential fine of no more than \$1,000.

<http://www.mdcourts.gov/jury-service/pdfs/employers-and-jury-service-laws.pdf>

Virginia:

Your employer cannot fire, demote, or otherwise penalize you for missing work while performing jury service. If you have been summoned and appear for jury duty for four or more hours in one day, including travel time, your employer may not require you to start any work shift that begins at or after 5:00 p.m. on the day you appeared for jury duty, or to start any work shift that begins before 3:00 a.m. on the day following the day you appeared for jury duty. Many employers will continue to pay your salary while you are in jury service. Contact your employer to find out what the policy is at your job.

<http://www.courts.state.va.us/courts/circuit/jury.pdf>

If any employer violates these provisions they are guilty of a Class 3 Misdemeanor.

<https://leg1.state.va.us/cgi-bin/legp504.exe?000+cod+18.2-465.1>

Employer is not required to pay employee during jury duty.

<http://www.employmentlawhandbook.com/leave-laws/state-leave-laws/virginia/#4>

District of Columbia:

§ 11-1913. Protection of Employment of Jurors.

If any employer violates these terms they are guilty of criminal contempt. Subject to \$300 fine and/or 30 days imprisonment for first offense, and \$5,000 and/or 180 days imprisonment for subsequent offenses.

<http://dccode.org/simple/sections/11-1913.html>

Pennsylvania:

Employer cannot fire or penalize employee because of jury service.

<http://www.blr.com/Compensation/Benefits/Leave/Jury-Duty-Court-Appearance-in-Pennsylvania>

If an employer penalizes employee due to jury service, the employee may bring civil action against employer to recover wages and benefits. Employee may also sue for reinstatement under certain circumstances.

This does not apply to retail or service industry employers who have fewer than 15 employees or manufacturing industry with less than 40 employees.

<http://law.justia.com/codes/pennsylvania/2010/title-42/4563>

EXHIBIT F**OTHER MODEL
JURY DUTY POLICIES****MODEL POLICY⁶⁵**

_____ recognizes jury duty as an important civic responsibility and highly encourages employees to partake when they are called to serve the community. Participating in jury duty will not be held against the employee in any way. They will maintain all benefits and wages agreed upon before being called for jury duty. When an employee is called for jury duty, they must inform their employer immediately after receiving the summons from the court.⁶⁶

What to give Employer:

- Copy of jury duty summons
- Date required to report
- Days of work being missed (if known)

PAY WHILE SERVING

According to federal law, _____ is not required to provide payment to employees while they are on jury duty.⁶⁷ However, _____ pays most employees while they are serving jury duty. If an employee continues to be paid while on jury duty, any money received from the court can be kept or returned to the court.

Who Qualifies:⁶⁸

- Full-time Employees
(30 hours a week or more)
- Part-time Employees
(If lost hours cannot be rescheduled)
- Seasonal Employees
(Length of employment exceeding 3 months)

JURY DUTY LEAVE

_____ employees are given jury duty leave when they are summoned. This leave is considered paid time off, but is its own form of leave. Employees will not use sick leave, personal days, or vacation days to serve on a jury. Employees are expected to report to court for jury duty on the days requested. If the employee does not have jury duty (for any reason) on a day they are scheduled to work, the employee must report to work. If jury duty ends before 12:00 pm and the employee had been scheduled to work, they are expected to report to work.⁶⁹ Employees must inform their employer when their jury service has been completed, and report to work on their next scheduled day.

_____ maintains the right to send a letter to the court asking for said employee to be excused from jury duty if the business is in danger of experiencing major setbacks without that employee.⁷⁰ Please note that there is no guarantee that the court will grant this request. The employee is not to use potential loss of pay as an excuse to get out of jury duty.

⁶⁵ AboutMoney. Use This Jury Duty Policy To Craft Your Own Policy (2015). <http://humanresources.about.com/od/policysamplesik/g/jury-duty.htm>.

⁶⁶ Kentucky Model Employer Policy #2. See Exhibit B.

⁶⁷ United States Department of Labor. Leave Benefits. <http://www.dol.gov/dol/topic/benefits-leave/juryduty.htm>.

⁶⁸ CBIA Human Resources. If Your Employee Is Called to Jury Duty (2015). <http://www5.cbia.com/hr/if-your-employee-is-called-to-jury-duty-2/>.

⁶⁹ Kentucky Model Employer Policy #2. See Exhibit B.

⁷⁰ *Id.*

**16 THE DC JURY PROJECT
RECOMMENDS THAT THE
SUPERIOR COURT AND THE
DISTRICT COURT MODIFY
THEIR JURY PLANS TO STATE
EXPLICITLY THAT THEY WILL
EXCUSE PROSPECTIVE JURORS
WHO HAVE SERVED ON A PETIT
OR GRAND JURY WITHIN THE
PAST TWO YEARS.**

The Superior Court of the District of Columbia and the US District Court of the District of Columbia both currently excuse prospective jurors from service if they have served as jurors in that court within the last two years.⁷¹ The DC Jury Project commends both courts for achieving this and recognizes the progress that has been made since *Juries for the Year 2000* recommended service no more frequently than every two years as an aspirational goal.⁷² The DC Jury Project recommends that the DC Courts modify their jury plans consistent with this recommendation and make this change known to the public. The questionnaire that arrives with the jury summons should list service within the last two years at either court as a permissible excuse from jury service. The two courts should work together to share records and verify previous service.

⁷¹ Superior Court Jury Plan Section 15, DC Code § 11-1911 ("In any twenty-four (24) month period an individual shall not be required to serve more than once as a grand juror or petit juror except as may be necessary by reason of the insufficiency of the Master Jury List or as ordered by the Court."). http://www.dccourts.gov/internet/documents/Jury-Plan-effective_11-9-2013.pdf; District Court for the District of Columbia Jury Selection Plan H(2), 28 U.S.C. § 1866(e) ("The following class of persons shall be excused from jury service... Persons who have served as grand or petit jurors in the US District Court for the District of Columbia within two years as specified in 28 U.S.C. § 1866(e)"). <http://www.dcd.uscourts.gov/dcd/sites/dcd/files/JSPFinal120612.pdf>.

⁷² *Council for Court Excellence, Juries for the Year 2000 and Beyond* (1998) at Recommendation 9 (recommending service not more frequently than every two years, stated in part: "while this recommendation may be impractical at this time... [the courts should] set a goal to this effect").

TRIAL STRUCTURE WORKING GROUP

The Trial Structure Working Group was comprised of a range of practitioners in the DC Superior Court and US District Court for the District of Columbia, including prosecutors, representatives of the Office of the Federal Public Defender and the Public Defender Service for DC as well as civil attorneys. Because of the diversity of practices, the group was able to identify a broad range of issues affecting prospective jurors, sitting juries and the litigants who depend upon them for decisions in their cases. The majority of jury trials occur in the Superior Court, so our work spotlighted the practices in that court as it provided a rich resource of practical experience. However, we also examined how federal court procedures differ from those in the Superior Court, reflecting that though federal trials are less frequent, they are often more lengthy and complex than the Superior Court cases and thus present different problems for jurors, lawyers and administrators.

The Trial Structure Working Group began examining the issues present in CCE's 1998 report and supplemented these issues with additional topics that became evident as our work progressed. Changes in technology and communications since the last CCE report caused us to examine issues that did not arise in the earlier study. The personal observations of practitioners well familiar with the operations of our courts including criminal law and civil practitioners were supplemented with information gathered by CCE staff members and by volunteer law students. In addition, several Committee members participated in round-table meetings with US District Court and Superior Court judges to discuss unwritten but important practices developed in the crucible of an active docket. The results of this information gathering enabled us to start down the arduous road of drafting recommendations. Along the way, we also surveyed practices in other jurisdictions that were described in the literature of court administrative journals. This process illuminated the multi-faceted issues we faced and enabled us to refine our thoughts into the recommendations that appear in this report.

Examining familiar issues is not enough in a rapidly changing world, so the Working Group considered how the development of social media, the internet and rapidly evolving communications have affected the conduct of jurors and of the court and how technology could be employed to promote the efficiency of the jury selection process. The intersection of many views in our Committee meetings made for spirited discussions enabling us to see important issues from many perspectives and thus to refine our recommendations to take account of the varying interests expressed by practitioners. For example, we examined and debated the practice followed by some -- but not all -- judges to invite jurors to submit questions to the court during the trial to supplement examinations by counsel; we looked at the post-trial communications between counsel and the jurors; we examined the proper limits of using social media in selecting jurors and in observing their conduct while serving on a jury. We also scrutinized the detailed and important mechanics of how jurors are screened for service by the *voir dire* process in an attempt to balance fairness to the litigants with the efficiency that jurors expect of our system.

Most of our recommendations were presented to the Plenary Committee as the unanimous view of the Trial Structure Working Group except with respect to the submission of questions by jurors in criminal cases. There, the strongly held views of some criminal defense attorneys focusing chiefly on the prosecution's burden of proving its case collided with the views of other Committee members who emphasized engaging jurors in a search for truth more as participants than spectators. The outcome of this disagreement was the submission of a dissenting view.

We hope and trust that these recommendations will improve the functioning of our jury system since it is an essential pillar to our system of justice.



Peter Kolker
Zuckerman Spaeder
Trial Structure Working Group Chair

**17 THE DC JURY PROJECT
RECOMMENDS THAT LAWYERS
AND THEIR AGENTS BE
PERMITTED TO RESEARCH
POTENTIAL JURORS AND TO
MONITOR SELECTED JURORS
BY LOOKING AT THE PUBLICLY
AVAILABLE PORTION OF SOCIAL
MEDIA SITES SUBSCRIBED TO
BY THOSE JURORS. HOWEVER,
DIRECT CONTACT BETWEEN AN
ATTORNEY OR AGENT AND A
POTENTIAL OR SELECTED JUROR
SHOULD CONTINUE TO BE
PROHIBITED.**

Collecting information about prospective jurors is a time-honored method of evaluating the potential fact-finders in a case about to begin trial. A traditional method of resorting to public records is not problematic. In the digital age, however, there are many more methods of learning about jurors. Many websites, such as Facebook and Twitter, enable users to make some information publicly available, while other information can be restricted to certain individuals designated by the user. Although attorneys and their agents can view information that is designated as publicly available, they should not make specific requests of a juror through social media that would allow them to view information that is not available to the general public. Doing so would constitute a prohibited communication between the attorney (or the attorney's agent) and a potential juror.

However, when viewing publicly available information on social media websites, some websites provide no feedback to the prospective juror regarding who has reviewed that information, whereas others may provide both notice that someone has viewed the publicly available profile as well as the identity of the viewing party.

The DC Jury Project adopts the opinion of the American Bar Association's Standing Committee on Ethics and Professional Responsibility, which expressed in a Formal Opinion⁷³ that a notification of this type does not constitute a communication between a lawyer and a juror or potential juror. In this formal opinion, the Committee refers to Model Rule 3.5(b),⁷⁴ which provides, in part, that:

A lawyer shall not:

- (a) seek to influence a judge, juror, prospective juror or other official by means prohibited by law;
- (b) communicate ex parte with such a person during the proceeding unless authorized to do so by law or court order;
- (c) communicate with a juror or prospective juror after discharge of the jury if:
 - (1) the communication is prohibited by law or court order;
 - (2) the juror has made known to the lawyer a desire not to communicate; or
 - (3) the communication involves misrepresentation, coercion, duress or harassment . . .

The ABA has determined that merely viewing an individual's public profile (which the ABA defines as "passively viewing" an individual's social media presence), even if that individual is informed of the identity of the viewer, does not constitute such a communication.⁷⁵ However, any effort to reach out to a potential juror through social media, even if limited to a request to be added to the potential juror's social network, would be considered a

⁷³ American Bar Association *Formal Opinion 466: Lawyers Reviewing Jurors' Internet Presence*: ckdarn. http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/formal_opinion_466_final_04_23_14.authcheckpdf

⁷⁴ Rule 3.5 of the District of Columbia Rules of Professional Conduct is to the same effect.

⁷⁵ As discussed in depth in ABA Formal Opinion 466, the Association of the Bar of the City of New York Committee on Professional Ethics and the New York County Lawyers' Association Committee on Professional Ethics have found that a passive notification of this type may violate the rules of ethics. As of the drafting of this recommendation, the District of Columbia Bar has not issued any opinions addressing the topic.

prohibited communication.

The Association of the Bar of the City of New York Committee on Professional Ethics (ABCNY), in Formal Opinion 2012-2 has taken a position contrary to the ABA. The ABCNY concluded that a “passive notification” to a juror with a social media account that an attorney had viewed his/her publicly-available social media profile constituted a prohibited communication with the juror. The ABCNY found that this was a communication because it entailed “the process of bringing an idea, information or knowledge to another’s perception— including the fact that they have been researched.” The ABCNY did include a caveat, and found that the communication would be prohibited only “if the attorney was aware that her actions” would cause such a notification to be sent to the juror. The New York County Lawyers’ Association Committee on Professional Ethics (NYCLA) in Formal Opinion 743 subsequently agreed with ABCNY’s opinion and stated, “If a juror becomes aware of an attorney’s efforts to see the juror’s profiles on websites, the contact may well consist of an impermissible communication, as it might tend to influence the juror’s conduct with respect to the trial.” These opinions are discussed in-depth in the ABA’s opinion, included as Exhibit G. The Committee has chosen to adopt the rule set forth by the ABA, rather than that set forth by the ABCNY and NYCLA.

The researching of jurors may also provide an opportunity to courts to ensure jurors are maintaining impartiality. Researching jurors can provide a path for courts to obtain critical information not divulged during voir dire.⁷⁶ See *Johnson v. McCullough*, 306 S.W.3d 551 (Mo. Banc 2010) (granting motion for a new trial when an empanelled juror did not respond in the affirmative when asked during voir dire if he had been a party to previous lawsuits and a background check conducted by attorneys after the completion of trial found that the juror had been a party in multiple lawsuits⁷⁷); *Khoury v. ConAgra Foods, Inc.*, 368 S.W.3d 189 (Mo. Ct. App.

2012) (holding the plaintiff suffered no prejudice when a juror was removed prior to opening statements after the defense researched the juror’s social media profile and found comments that would have been potentially detrimental to their case)^{78,79}; see also *Carino v. Muenzen*, 13 A.3d 363 (N.J. Super. Ct. App. Div. 2011) (holding that the trial court abused its discretion in preventing an attorney from researching jurors online because he had not informed the court or opposing counsel of his intent to do so in advance)⁸⁰; Missouri Supreme Court Rule 69.025 (requiring the court to allow litigants an opportunity to conduct an investigation, through case.net, of potential jurors’ litigation history).

See Exhibit G for the full text of ABA Formal Opinion 466.

76 Hoffmeister, T. Investigating Jurors in the Digital Age: One Click at a Time: https://law.ku.edu/sites/law.drupal.ku.edu/files/docs/law_review/v60/03_Hoffmeister_Final.pdf
77 *Johnson v. McCullough* 306 S.W.3d 551 (Mo. Banc 2010): <https://cases.justia.com/missouri/supreme-court/sc90401-37456.pdf>

78 *Khoury v. ConAgra Foods, Inc.*, 368 S.W.3d 189 (2012): https://scholar.google.com/scholar_case?case=185478726455672785&q=K-houry+v.+ConAgra+Foods&hl=en&as_sdt=20006&as_vis=1
79 Browning, J. (2013). As Voir Dire Becomes Voir Google, Where Are the Ethical Lines Drawn: <http://www.thejuryexpert.com/2013/05/as-voir-dire-becomes-voir-google/>
80 *Carina v. Muenzen*, 13 A.3d 363 (N.J. Super. Ct. App. Div. 2011) (table opinion): <http://www.leagle.com/decision/in%20njco%2020100830280.xml>

**18 THE DC JURY PROJECT
RECOMMENDS THAT JUDGES
CONSIDER ORDERING THE
GOVERNMENT TO SHARE WITH
DEFENSE ATTORNEYS THE
RESULTS OF CRIMINAL RECORD
CHECKS OF POTENTIAL JURORS
IN CRIMINAL CASES UNLESS
PROHIBITED BY LAW FROM
DOING SO.**

The DC Jury Project notes that a unique consideration related to researching jurors is the Government's access to the criminal records of jurors. Prosecutors are able to access the criminal records of jurors in ways that defense counsel are not because prosecutors often have access to non-public databases and resources that criminal defense attorneys do not. This may include the ability to simultaneously search multiple jurisdictions using databases that, while consisting of public records, are not available to criminal defense attorneys or the public. To conduct a similar search, defense attorneys would have to perform multiple searches on multiple databases, or dispatch agents to multiple jurisdictions. Accordingly, to ensure fairness, judges should consider ordering the prosecutor to share with the defense the results of any criminal records checks on potential jurors.⁸¹

⁸¹ See, e.g., *State v. Bessenecker*, 404 N.W.2d 134, 138-39 (Iowa 1987) ("We agree with the reasoning of those courts that generally have allowed defendants equal access to jurors' rap sheets obtained by the county attorney. We believe that considerations of fairness and judicial control over the jury selection process requires this result.")

19 THE DC JURY PROJECT MAKES FOUR RECOMMENDATIONS REGARDING THE JURY SELECTION PROCESS:

First, the committee recommends that prospective jurors be provided with questionnaires that request additional biographical information when they arrive for jury service and that these questionnaires be made available to counsel and the litigants when a panel arrives in the courtroom.

Second, the committee recommends that judges use the index-card method, or some similar technique, for voir dire screening that permits counsel both to offer additional questions and to make reasonable follow-up inquiries at the bench.

Third, the committee recommends that a jury panel be called in the superior court only after all preliminary trial matters have been resolved and that the number of jurors to be utilized for a venire should be limited to those prescribed by the court's protocol, unless special circumstances warrant a larger pool.

Fourth, the committee recommends that the number of strikes permitted to litigants not be reduced below that now provided by statute and by rule in federal and superior court.

CCE's 1998 study of jury functioning in the District of Columbia evaluated the manner by which petit juries were selected and seated in DC Superior Court and in US District Court. A number of suggested recommendations were made in that study, and many of them have been implemented in DC Superior Court where the majority of DC jury trials take place. The 2015 DC Jury Project addressed the voir dire process in a variety of ways; to wit—by reviewing the recommendations in the prior report⁸²; by conducting in-court observations of the process by which jurors are screened, challenged,

and selected; by meeting with US District Court and DC Superior Court judges; and by interviewing attorneys who practice frequently in both federal and local court. In addition, the Committee reviewed relevant literature that a number of groups that have studied the operation of various jury systems have produced. Based on these data points, the Committee note the following:

(1) Juror Information and the Use Of Questionnaires

Jurors appearing in routine cases in Superior Court and in US District Court do not typically receive a case-specific juror questionnaire in advance of their service, although the opposite is often true for high-profile cases or for prolonged trials in federal court. Information relating to the backgrounds and attitudes of potential jurors can provide important data for an attorney deciding whether to exercise a peremptory challenge. However, a questionnaire particularized to the individual case is not feasible for routine cases, which comprise the bulk of the DC Superior Court jury trial caseload.⁸³ Providing jurors with a questionnaire on background issues when they arrive for jury service could provide valuable additional information to counsel. These questionnaires could then be correlated with each juror's designated juror number, and the information could be provided in written form to counsel and the litigants, along with the jury panel list, at the start of jury selection.

(2) Requesting the Venire

The size of the panel to be sent to a courtroom from the juror lounge in DC Superior Court, and the timing of doing so, are important factors in minimizing the inconvenience to prospective jurors and avoiding prolonged and unnecessary waiting periods. The DC Superior Court administration has established procedures designed to take account of the prospective jurors' time by designating protocols to implement these procedures. Specifically, a judge trying a misdemeanor calendar with jury cases

⁸² Recommendations 17 - 32 made in the 1998 report were the focus of this aspect of the 2015 study.

⁸³ Recommendation 19 of the 1998 DC Jury Project suggested completion of a written questionnaire by all jurors, presumably on the day of their service, but it is not clear that the mechanics of that task could be efficiently implemented or could provide a better alternative to the furnishing of additional information at the time of summons response.

and a judge with a felony II calendar are limited in the size of the venire normally sent to the courtroom to 54 panel members.⁸⁴ The size of the panel is determined by the number of peremptory strikes allowed (three per side for misdemeanors; ten per side for felony cases, with possible additional strikes for alternate jurors and/or for multi-defendant cases). For civil cases, most of which involve juries of six, plus one alternate, the jury panel typically consists of twenty-four persons (consistent with the rule allowing three peremptory challenges per side). These normative levels of jury panel size can be exceeded only with the permission of the administrative judge for the criminal or civil division if the trial judge requests a larger panel because of a high-publicity case or a case involving sensitive matters that are likely to elicit emotional reactions from panel members.

Moreover, a request for a panel should only be made to the jury officer when the trial judge is ready to actually begin the voir dire process. That is, preliminary matters that must be conducted out of the presence of the jury must have concluded before the prospective jurors are sent to the courtroom in order to avoid having jurors stand in the corridors outside of the courtroom to avoid hearing preliminary matters which are not appropriate for juror consideration. The Committee is aware of instances in which a trial judge has sought to "reserve" a panel by calling for one before the completion of preliminary matters, resulting in unnecessary waiting by panel members. The Committee recommends that this practice not continue.

In addition, it is important that members of the jury panel understand that they have contributed to the functioning of the jury system even if they are not selected for service as the development of an acceptable panel depends upon eliminating jurors whom the litigants or the court elect to challenge with peremptory or "for cause" challenges.

(3) Peremptory Strikes

The ability to exercise peremptory strikes has long been considered "one of the most important rights" for a criminal defendant,⁸⁵ and has been a feature of the jury selection process that has been recognized as essential to ensure fairness.⁸⁶ Section 11-1908(b)(2) of the DC Code provides for the peremptory challenge, and Superior Court Criminal Rule 24 (b) specifies ten peremptory challenges per side for felonies and three per side for misdemeanors. Additional peremptory challenges are allowed for alternates, the number of challenges varying with the number of alternates. Rule 24 of the Federal Rules of Criminal Procedure provides for the same number. Three peremptory challenges per side are permitted in both Superior Court and federal court civil cases.⁸⁷

Peremptory strikes are used after obtaining information from prospective jurors about sensitive issues. An efficient method of obtaining this information from individual jurors has evolved at Superior Court and some, but not all, judges use it. The process involves seating each prospective juror by reference to his or her place on the jury panel list provided by the jury office and identifying the prospective juror only by his or her number for public purposes on an index card provided by the court to panel members. (Litigants are made aware of the names, addresses, and other basic information for the jurors, and this information could be augmented by the responses to questionnaires, as proposed above.) The judge conducts the basic voir dire by asking questions already reviewed with the lawyers. A juror with a positive response indicates the question number on his or her index card. The judge then interviews each such juror at the bench about those responses after all of the voir dire questions have been posed to the jurors. The conversation is on the record but is not heard by others in the courtroom, as the bench conference is shielded by the court's "husher" (a "white-noise" machine controlled by

⁸⁴ Felony I trials involve the most serious crimes, often resulting in lengthy trials. Because of this and because the serious offenses are sometimes difficult for prospective jurors to hear, Felony I judges are given greater leeway to request a larger venire panel, typically 70 persons.

⁸⁵ *Pointer v. United States*, 151 US 396 (1894).

⁸⁶ *Wells, et al. v. United States*, 516 A.2d 1108 (DC 1986).

⁸⁷ SCR-Civil, Rule 47-I; F. R. Civ. P., Rule 47(b); 28 U.S.C. § 1870.

the judge).⁸⁸ Some judges believe that it is beneficial to speak with each prospective juror -- including those who have not given a positive response to any of the voir dire questions -- as some prospective jurors seem reluctant to respond positively even when the questions do raise concerns for them. When probed individually, sometimes these concerns come to the surface,⁸⁹ and the Committee therefore recommends that each prospective juror be interviewed at the bench.

In addition, many believe that attorney-conducted voir dire is beneficial to the litigants and can be managed without substantial additional time. Therefore, the Committee encourages this practice as well, and even when attorney-led voir dire is not permitted, counsel should be permitted to make follow-up inquiries of prospective jurors who respond positively to the court's voir dire and who are called to the bench for examination. Although this is frequently allowed, the practice among Superior Court judges is not consistent.

(4) Number of Peremptory Challenges

The number of peremptory challenges is fixed by statute or court rule, as stated above.⁹⁰ The 1998 Jury Project considered reducing the number of peremptory challenges as a method of reducing the size of the panels sent to the courtroom and ultimately the number of jurors summoned. However, there was division among the 1998 Committee on this subject, and no change in the statutory number or the number fixed by rule was recommended, nor has any such change occurred.

Many frequent litigators are of the view that peremptory challenges serve the vital function of selecting a jury that the litigants consider to be fair.⁹¹ Because court approval of "for-cause" challenges tends to be sparse, the use of peremptory challenges provides the best safety valve for

litigants who question the fairness of particular prospective jurors on their panel.⁹² Therefore, the Committee does not favor reducing or eliminating peremptory challenges even though reducing peremptory challenges would reduce the number of jurors to be summoned. Any change is considered unnecessary in light of the other procedural improvements that have streamlined the process of selecting jurors and have reduced the number of prospective jurors called to a courtroom in the venire panel.

⁸⁸ Use of the husher has been validated by the DC Court of Appeals. *Copeland v. United States*, 111 A.3d 627 (DC # 13-CO-746, decided 3/12/15). Criminal defendants are able to hear the colloquy and thereby participate in this phase of the trial by remaining at counsel table with ear phones.

⁸⁹ See, *Be Cautious of the Quiet Ones*, Hon. Gregory Milze (Ret.), 10 Voir Dire 1 (2013).

⁹⁰ See SCR-Civil, Rule 47-1; F. R. Civ. P., Rule 47(b); 28 U.S.C. § 1870 and accompanying text, *supra*.

⁹¹ *Wells, et al. v. United States*, 515 A.2d 1108 (DC 1986).

⁹² The Committee is mindful of the need to ensure that peremptory challenges are not exercised in a manner that offends the principle of fairness established in *Batson v. Kentucky*, 476 US 79 (1986) prohibiting challenges that have the intent or effect of discriminating against jurors for racial or other improper reasons.

**20 THE DC JURY PROJECT
RECOMMENDS THAT BEFORE
THE TRIAL BEGINS, THE COURT
INSTRUCT THE JURY REGARDING
RESTRICTIONS ON THE USE OF
SOCIAL MEDIA WHILE SERVING
AS JURORS.**

The DC Superior Court has model jury instructions for criminal cases that admonish jurors:

In this age of electronic communication, I want to stress that you must not use electronic devices or computers to talk about this case, including tweeting, texting, blogging, e-mailing, posting information on a website or chat room, or any other means at all. Do not send or accept messages, including email and text messages, about your jury service. You must not disclose your thoughts about your jury service or ask for advice on how to decide any case.⁹³

The thrust of these instructions is a warning to jurors that they are prohibited from using social media during trial to conduct research about the case, disclose thoughts about the case, or seek advice on how to decide the case. The DC Jury Project recommends that the Court instruct potential jurors regarding the use of social media early in the proceedings, and in most cases even before trial begins.

Moreover, although the standard criminal jury instruction technically applies only to criminal cases, the DC Jury Panel believes that the standard criminal jury instruction is appropriate and should be used in civil cases as well.

The relevant text of the criminal jury instruction, as modified to add a new last paragraph, is attached in Exhibit H.

⁹³ DC Superior Court Model Criminal Jury Instructions 1.102

EXHIBIT G

AMERICAN BAR ASSOCIATION
FORMAL OPINION 466

Formal Opinion 466 April 24, 2014

Lawyer Reviewing Jurors' Internet
Presence

Unless limited by law or court order, a lawyer may review a juror's or potential juror's Internet presence, which may include postings by the juror or potential juror in advance of and during a trial, but a lawyer may not communicate directly or through another with a juror or potential juror.

A lawyer may not, either personally or through another, send an access request to a juror's electronic social media. An access request is a communication to a juror asking the juror for information that the juror has not made public and that would be the type of ex parte communication prohibited by Model Rule 3.5(b).

The fact that a juror or a potential juror may become aware that a lawyer is reviewing his Internet presence when a network setting notifies the juror of such does not constitute a communication from the lawyer in violation of Rule 3.5(b).

In the course of reviewing a juror's or potential juror's Internet presence, if a lawyer discovers evidence of juror or potential juror misconduct that is criminal or fraudulent, the lawyer must take reasonable remedial measures including, if necessary, disclosure to the tribunal.

Juror Internet Presence

The Committee has been asked whether a lawyer who represents a client in a matter that will be tried by a jury may review the jurors' or potential jurors' Internet presence leading up to and during trial, and, if so, what ethical obligations the lawyer might have regarding information discovered during the review. Jurors may and often will have an Internet presence through elec-

tronic social media or websites. General public access to such will vary. For example, many blogs, websites, and other electronic media are readily accessible by anyone who chooses to access them through the Internet. We will refer to these publicly accessible Internet media as "websites."

For the purposes of this opinion, Internet-based social media sites that readily allow account-owner restrictions on access will be referred to as "electronic social media" or "ESM." Examples of commonly used ESM at the time of this opinion include Facebook, MySpace, LinkedIn, and Twitter. Reference to a request to obtain access to¹ Formal Opinion 466 to another's ESM will be denoted as an "access request," and a person who creates and maintains ESM will be denoted as a "subscriber."

Depending on the privacy settings chosen by the ESM subscriber, some information posted on ESM sites might be available to the general public, making it similar to a website, while other information is available only to a fellow subscriber of a shared ESM service, or in some cases only to those whom the subscriber has granted access. Privacy settings allow the ESM subscriber to establish different degrees of protection for different categories of information, each of which can require specific permission to access. In general, a person who wishes to obtain access to these protected pages must send a request to the ESM subscriber asking for permission to do so. Access depends on the willingness of the subscriber to grant permission.²

This opinion addresses three levels of lawyer review of juror Internet presence:

1. passive lawyer review of a juror's website or ESM that is available without making an access request where the juror is unaware that a website or ESM has been reviewed;

¹ Unless there is reason to make a distinction, we will refer throughout this opinion to jurors as including both potential and prospective jurors and jurors who have been empaneled as members of a jury.

² The capabilities of ESM change frequently. The Committee notes that this opinion does not address particular ESM capabilities that exist now or will exist in the future. For purposes of this opinion, key elements like the ability of a subscriber to control access to ESM or to identify third parties who review a subscriber's ESM are considered generically.

2. active lawyer review where the lawyer requests access to the juror's ESM; and
3. passive lawyer review where the juror becomes aware through a website or ESM feature of the identity of the viewer.

Trial Management and Jury Instructions

There is a strong public interest in identifying jurors who might be tainted by improper bias or prejudice. There is a related and equally strong public policy in preventing jurors from being approached *ex parte* by the parties to the case or their agents. Lawyers need to know where the line should be drawn between properly investigating jurors and improperly communicating with them.³ In today's Internet saturated world, the line is increasingly blurred.

For this reason, we strongly encourage judges and lawyers to discuss the court's expectations concerning lawyers reviewing juror presence on the Internet. A court order, whether in the form of a local rule, a standing order, or a case management order in a particular matter, will, in addition to the applicable Rules of Professional Conduct, govern the conduct of counsel.

Equally important, judges should consider advising jurors during the orientation process that their backgrounds will be of interest to the litigants and that the lawyers in the case may investigate their backgrounds,

³ While this Committee does not take a position on whether the standard of care for competent lawyer performance requires using Internet research to locate information about jurors that is relevant to the jury selection process, we are also mindful of the recent addition of Comment [8] to Model Rule 1.1. This comment explains that a lawyer "should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology." See also *Johnson v. McCullough*, 306 S.W.3d 551 (Mo. 2010) (lawyer must use "reasonable efforts" to find potential juror's litigation history in Case.net, Missouri's automated case management system); N. H. Bar Ass'n, Op. 2012-13/05 (lawyers "have a general duty to be aware of social media as a source of potentially useful information in litigation, to be competent to obtain that information directly or through an agent, and to know how to make effective use of that information in litigation"); Ass'n of the Bar of the City of N. Y. Comm. on Prof'l Ethics, Formal Op. 2012-2 ("Indeed, the standards of competence and diligence may require doing everything reasonably possible to learn about jurors who will sit in judgment on a case.").

including review of their ESM and websites. If a judge believes it to be necessary, under the circumstances of a particular matter, to limit lawyers' review of juror websites and ESM, including on ESM networks where it is possible or likely that the jurors will be notified that their ESM is being viewed, the judge should formally instruct the lawyers in the case concerning the court's expectations.

Reviewing Juror Internet Presence

If there is no court order governing lawyers reviewing juror Internet presence, we look to the ABA Model Rules of Professional Conduct for relevant strictures and prohibitions. Model Rule 3.5 addresses communications with jurors before, during, and after trial, stating:

A lawyer shall not:

- (a) seek to influence a judge, juror, prospective juror or other official by means prohibited by law;
- (b) communicate *ex parte* with such a person during the proceeding unless authorized to do so by law or court order;
- (c) communicate with a juror or prospective juror after discharge of the jury if:
 - (1) the communication is prohibited by law or court order;
 - (2) the juror has made known to the lawyer a desire not to communicate; or
 - (3) the communication involves misrepresentation, coercion, duress or harassment.

Under Model Rule 3.5(b), a lawyer may not communicate with a potential juror leading up to trial or any juror during trial unless authorized by law or court order. See, e.g., *In re Holman*, 286 S.E.2d 148 (S.C. 1982) (communicating with member of jury selected for trial of lawyer's client was "serious crime" warranting disbarment).⁴

⁴ Judges also may choose to work with local jury commissioners to ensure that jurors are advised during jury orientation that they may properly be investigated by lawyers in the case to which they are assigned. This investigation may include review of the potential juror's Internet presence.

A lawyer may not do through the acts of another what the lawyer is prohibited from doing directly. Model Rule 8.4(a). See also *In re Myers*, 584 S.E.2d 357 (S.C. 2003) (improper for prosecutor to have a lay member of his “jury selection team” phone venire member’s home); cf. S.C. Ethics Op. 93-27 (1993) (lawyer “cannot avoid the proscription of the rule by using agents to communicate improperly” with prospective jurors).

Passive review of a juror’s website or ESM, that is available without making an access request, and of which the juror is unaware, does not violate Rule 3.5(b). In the world outside of the Internet, a lawyer or another, acting on the lawyer’s behalf, would not be engaging in an improper ex parte contact with a prospective juror by driving down the street where the prospective juror lives to observe the environs in order to glean publicly available information that could inform the lawyer’s jury-selection decisions. The mere act of observing that which is open to the public would not constitute a communicative act that violates Rule 3.5(b).⁵

It is the view of the Committee that a lawyer may not personally, or through another, send an access request to a juror. An access request is an active review of the juror’s electronic social media by the lawyer and is a communication to a juror asking the juror for information that the juror has not made public. This would be the type of ex parte communication prohibited by Model Rule

3.5(b).⁶ This would be akin to driving down the juror’s street, stopping the car, getting out, and asking the juror for permission to look inside the juror’s house because the lawyer cannot see enough when just driving past.

Some ESM networks have a feature that allows the juror to identify fellow members of the same ESM network who have passively viewed the juror’s ESM. The details of how this is accomplished will vary from network to network, but the key feature that is relevant to this opinion is that the juror-subscriber is able to determine not only that his ESM is being viewed, but also the identity of the viewer. This capability may be beyond the control of the reviewer because the notice to the subscriber is generated by the ESM network and is based on the identity profile of the subscriber who is a fellow member of the same ESM network.

Two recent ethics opinions have addressed this issue. The Association of the Bar of the City of New York Committee on Professional Ethics, in Formal Opinion 2012-2⁷, concluded that a network-generated notice to the juror that the lawyer has reviewed the juror’s social media was a communication from the lawyer to a juror, albeit an indirect one generated by the ESM network. Citing the definition of “communication” from Black’s Law Dictionary (9th ed.) and other authority, the opinion concluded that the message identifying the ESM viewer was a communication because it entailed “the process of bringing an idea, information or knowledge to another’s perception— including the fact that they have

5 Or. State Bar Ass’n, Formal Op. 2013-189 (“Lawyer may access publicly available information [about juror, witness, and opposing party] on social networking website”); N.Y. Cnty. Lawyers Ass’n, Formal Op. 743 (2011) (lawyer may search juror’s “publicly available” webpages and ESM); Ass’n of the Bar of the City of N.Y. Comm. on Prof’l Ethics, supra note 3 (lawyer may use social media websites to research jurors); Ky. Bar Ass’n, Op. E-434 (2012) (“If the site is ‘public,’ and accessible to all, then there does not appear to be any ethics issue.”). See also N.Y. State Bar Ass’n, Advisory Op. 843 (2010) (“A lawyer representing a client in pending litigation may access the public pages of another party’s social networking website (such as Facebook or MySpace) for the purpose of obtaining possible impeachment material for use in the litigation”); Or. State Bar Ass’n, Formal Op. 2005-164 (“Accessing an adversary’s public Web [sic] site is no different from reading a magazine or purchasing a book written by that adversary”); N.H. Bar Ass’n, supra note 3 (viewing a Facebook user’s page or following on Twitter is not communication if pages are open to all members of that social media site); San Diego Cnty. Bar Legal Ethics Op. 2011-2 (opposing party’s public Facebook page may be viewed by lawyer).

6 See Or. State Bar Ass’n, supra note 5, fn. 2, (a “lawyer may not send a request to a juror to access non-public personal information on a social networking website, nor may a lawyer ask an agent to do so”); N.Y. Cnty. Lawyers Ass’n, supra note 5 (“Significant ethical concerns would be raised by sending a ‘friend request,’ attempting to connect via LinkedIn.com, signing up for an RSS feed for a juror’s blog, or ‘following’ a juror’s Twitter account”); Ass’n of the Bar of the City of N.Y. Comm. on Prof’l Ethics, supra note 3 (lawyer may not chat, message or send a “friend request” to a juror); Conn. Bar Ass’n, Informal Op. 2011-4 (friend request is a communication); Mo. Bar Ass’n, Informal Op. 2009-0003 (friend request is a communication pursuant to Rule 4.2). But see N.H. Bar Ass’n, supra note 3 (lawyer may request access to witness’s private ESM, but request must “correctly identify the lawyer . . . [and] . . . inform the witness of the lawyer’s involvement” in the matter); Phila. Bar Ass’n, Advisory Op. 2009-02 (lawyer may not use deception to secure access to witness’s private ESM, but may ask the witness “forthrightly” for access).

7 Ass’n of the Bar of the City of N.Y. Comm. on Prof’l Ethics, supra, note 3.

been researched.” While the ABCNY Committee found that the communication would “constitute a prohibited communication if the attorney was aware that her actions” would send such a notice, the Committee took “no position on whether an inadvertent communication would be a violation of the Rules.” The New York County Lawyers’ Association Committee on Professional Ethics in Formal Opinion 743 agreed with ABCNY’s opinion and went further explaining, “If a juror becomes aware of an attorney’s efforts to see the juror’s profiles on websites, the contact may well consist of an impermissible communication, as it might tend to influence the juror’s conduct with respect to the trial.”⁸

This Committee concludes that a lawyer who uses a shared ESM platform to passively view juror ESM under these circumstances does not communicate with the juror. The lawyer is not communicating with the juror; the ESM service is communicating with the juror based on a technical feature of the ESM. This is akin to a neighbor’s recognizing a lawyer’s car driving down the juror’s street and telling the juror that the lawyer had been seen driving down the street.

Discussion by the trial judge of the likely practice of trial lawyers reviewing juror ESM during the jury orientation process will dispel any juror misperception that a lawyer is acting improperly merely by viewing what the juror has revealed to all others on the same network.

While this Committee concludes that ESM-generated notice to a juror that a lawyer has reviewed the juror’s information is not communication from the lawyer to the juror, the Committee does make two additional recommendations to lawyers who decide to review juror social media. First, the Committee suggests that lawyers be aware of these automatic, subscriber-notification features. By accepting the terms of use, the subscriber notification feature is not secret. As indicated by Rule 1.1, Comment 8, it is important for a lawyer to be current with technology. While many people simply click their agreement to the terms and conditions for use of an ESM network, a lawyer who uses an ESM network in his practice should review the terms and conditions,

⁸ N.Y. Cnty. Lawyers’ Ass’n, *supra* note 5.

including privacy Formal Opinion 466 6 features – which change frequently – prior to using such a network. And, as noted above, jurisdictions differ on issues that arise when a lawyer uses social media in his practice.

Second, Rule 4.4(a) prohibits lawyers from actions “that have no substantial purpose other than to embarrass, delay, or burden a third person . . .” Lawyers who review juror social media should ensure that their review is purposeful and not crafted to embarrass, delay, or burden the juror or the proceeding.

Discovery of Juror Misconduct

Increasingly, courts are instructing jurors in very explicit terms about the prohibition against using ESM to communicate about their jury service or the pending case and the prohibition against conducting personal research about the matter, including research on the Internet.

These warnings come because jurors have discussed trial issues on ESM, solicited access to witnesses and litigants on ESM, not revealed relevant ESM connections during jury selection, and conducted personal research on the trial issues using the Internet.⁹

In 2009, the Court Administration and Case Management Committee of the Judicial Conference of the United States recommended a model jury instruction that is very specific about juror use of social media, mentioning many of the popular social media by name.¹⁰ The recommended instruction states in part:

I know that many of you use cell phones, Blackberries, the internet and other tools of technology. You also must not talk to anyone at any time about this case or use these tools to communicate electronically with anyone about the case . . . You may

⁹ For a review of recent cases in which a juror used ESM to discuss trial proceedings and/or used the Internet to conduct private research, read Hon. Amy J. St. Eve et al., *More from the #Jury Box: The Latest on Juries and Social Media*, 12 *Duke Law & Technology Review* no. 1, 69-78 (2014), available at <http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=1247&context=dltr>.

¹⁰ Judicial Conference Committee on Court Administration and Case Management, *Proposed Model Jury Instructions: The Use of Electronic Technology to Conduct Research on or Communicate about a Case*, USCOURTS.GOV (June 2012), <http://www.uscourts.gov/uscourts/News/2012/juryinstructions.pdf>.

not communicate with anyone about the case on your cell phone, through email, Blackberry, iPhone, text messaging, or on Twitter, through any blog or website, including Facebook, Google+, My Space, LinkedIn, or YouTube. . . . I expect you will inform me as soon as you become aware of another juror's violation of these instructions.

These same jury instructions were provided by both a federal District Court and state criminal court judge during a three-year study on juries and social media. Their research found that "jury instructions are the most effective tool to mitigate the risk of juror misconduct through social media."¹¹ As a result, the authors recommend jury instruction on social media "early and often" and daily in lengthy trials.¹²

Analyzing the approximately 8% of the jurors who admitted to being "tempted" to communicate about the case using social media, the judges found that the jurors chose not to talk or write about the case because of the specific jury instruction not to do so.

While juror misconduct via social media itself is not the subject of this Opinion, lawyers reviewing juror websites and ESM may become aware of misconduct. Model Rule 3.3 and its legislative history make it clear that a lawyer has an obligation to take remedial measures including, if necessary, informing the tribunal when the lawyer discovers that a juror has engaged in criminal or fraudulent conduct related to the proceeding. But the history is muddled concerning whether a lawyer has an affirmative obligation to act upon learning that a juror has engaged in improper conduct that falls short of being criminal or fraudulent.

Rule 3.3 was amended in 2002, pursuant to the ABA Ethics 2000 Commission's proposal, to expand on a lawyer's previous obligation to protect a tribunal from criminal or fraudulent conduct by the lawyer's client to also include such conduct by any person.¹³

¹¹ Id. at 66.

¹² Id. at 87.

¹³ Ethics 2000 Commission, Model Rule 3.3: Candor Toward the Tribunal, AMERICAN BAR ASSOCIATION, http://www.americanbar.org/groups/professional_responsibility/policy/ethics_2000_commission/e2k_rule33.html (last visited Apr. 18, 2014).

Model Rule 3.3(b) reads:

(b) A lawyer who represents a client in an adjudicative proceeding and who knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures including, if necessary, disclosure to the tribunal.

Comment [12] to Rule 3.3 provides:

Lawyers have a special obligation to protect a tribunal against criminal or fraudulent conduct that undermines the integrity of the adjudicative process, such as bribing, intimidating or otherwise unlawfully communicating with a witness, juror, court official or other participant in the proceeding, unlawfully destroying or concealing documents or other evidence or failing to disclose information to the tribunal when required by law to do so. Thus, paragraph (b) requires a lawyer to take reasonable remedial measures, including disclosure if necessary, whenever the lawyer knows that a person, including the lawyer's client, intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding.

Part of Ethics 2000's stated intent when it amended Model Rule 3.3 was to incorporate provisions from Canon 7 of the ABA Model Code of Professional Responsibility (Model Code) that had placed an affirmative duty upon a lawyer to notify the court upon learning of juror misconduct:

This new provision incorporates the substance of current paragraph (a)(2), as well as ABA Model Code of Professional Responsibility DR 7-102(B) (2) ("A lawyer who receives information clearly establishing that a person other than the client has perpetrated a fraud upon a tribunal shall promptly reveal the fraud to the tribunal") and DR 7-108(G) ("A lawyer shall reveal promptly to the court improper conduct by a venireperson or juror, or by another toward a venireperson or juror or a member of the venireperson's or juror's family, of which the lawyer has knowledge"). Report-

er's Explanation of Changes, Model Rule 3.3.¹⁴

However, the intent of the Ethics 2000 Commission expressed above to incorporate the substance of DR 7-108(G) in its new subsection (b) of Model Rule 3.3 was never carried out. Under the Model Code's DR 7-108(G), a lawyer knowing of "improper conduct" by a juror or venireperson was required to report the matter to the tribunal. Under Rule 3.3(b), the lawyer's obligation to act arises only when the juror or venire person engages in conduct that is fraudulent or criminal.¹⁵ While improper conduct was not defined in the Model Code, it clearly imposes a broader duty to take remedial action than exists under the Model Rules. The Committee is constrained to provide guidance based upon the language of Rule 3.3(b) rather than any expressions of intent in the legislative history of that rule.

By passively viewing juror Internet presence, a lawyer may become aware of a juror's conduct that is criminal or fraudulent, in which case, Model Rule 3.3(b) requires the lawyer to take remedial measures including, if necessary, reporting the matter to the court. But the lawyer may also become aware of juror conduct that violates court instructions to the jury but does not rise to the level of criminal or fraudulent conduct, and Rule 3.3(b) does not prescribe what the lawyer must do in that situation. While considerations of questions of law are outside the scope of the Committee's authority, applicable law might treat such juror activity as conduct that triggers a lawyer's duty to take remedial action including, if necessary, reporting the juror's conduct to the court under current Model Rule 3.3(b).¹⁶

14 Ethics 2000 Commission, Model Rule 3.3 Reporter's Explanation of Changes, AMERICAN BAR ASSOCIATION, http://www.americanbar.org/groups/professional_responsibility/policy/ethics_2000_commission/e2k_rule33rem.html (last visited Apr. 18, 2014).

15 Compare MODEL RULES OF PROF'L CONDUCT R. 3.3(b) (2002) to N.Y. RULES OF PROF'L CONDUCT, R. 3.5(d) (2013) ("a lawyer shall reveal promptly to the court improper conduct by a member of the venire or a juror...").

16 See, e.g., *US v. Juror Number One*, 866 F.Supp.2d 442 (E.D. Pa. 2011) (failure to follow jury instructions and emailing other jurors about case results in criminal contempt). The use of criminal contempt remedies for disregarding jury instructions is not confined to improper juror use of ESM. *US v. Rowe*, 906 F.2d 654 (11th Cir. 1990) (juror held in contempt, fined, and dismissed from jury for violating court order to refrain from discussing the case with other jurors until after jury instructions delivered).

While any Internet postings about the case by a juror during trial may violate court instructions, the obligation of a lawyer to take action will depend on the lawyer's assessment of those postings in light of court instructions and the elements of the crime of contempt or other applicable criminal statutes. For example, innocuous postings about jury service, such as the quality of the food served at lunch, may be contrary to judicial instructions, but fall short of conduct that would warrant the extreme response of finding a juror in criminal contempt. A lawyer's affirmative duty to act is triggered only when the juror's known conduct is criminal or fraudulent, including conduct that is criminally contemptuous of court instructions. The materiality of juror Internet communications to the integrity of the trial will likely be a consideration in determining whether the juror has acted criminally or fraudulently. The remedial duty flowing from known criminal or fraudulent juror conduct is triggered by knowledge of the conduct and is not preempted by a lawyer's belief that the court will not choose to address the conduct as a crime or fraud.

Conclusion

In sum, a lawyer may passively review a juror's public presence on the Internet, but may not communicate with a juror. Requesting access to a private area on a juror's ESM is communication within this framework.

The fact that a juror or a potential juror may become aware that the lawyer is reviewing his Internet presence when an ESM network setting notifies the juror of such review does not constitute a communication from the lawyer in violation of Rule 3.5(b).

If a lawyer discovers criminal or fraudulent conduct by a juror related to the proceeding, the lawyer must take reasonable remedial measures including, if necessary, disclosure to the tribunal.

EXHIBIT H

**MODEL CIVIL JURY
INSTRUCTIONS BASED ON
SUPERIOR COURT
MODEL CRIMINAL JURY
INSTRUCTIONS 1.102**

Between now and when you are discharged from jury duty, you must not provide to or receive from anyone, including friends, co-workers, and family members, any information about your jury service. You may tell those who need to know where you are, that you have been picked for a jury, and how long the case may take. However, you must not give anyone any information about the case itself or the people involved in the case. You must also warn people not to try to say anything to you or write to you about your jury service or the case. This includes face-to-face, phone, or computer communications.

In this age of electronic communication, I want to stress that you must not use electronic devices or computers to talk about this case, including tweeting, texting, blogging, e-mailing, posting information on a website or chat room, or any other means at all. Do not send or accept messages, including email and text messages, about your jury service. You must not disclose your thoughts about your jury service or ask for advice on how to decide any case.

You must decide the facts based on the evidence presented in court and according to the legal principles about which I will instruct you. You are not permitted, during the course of the trial, to conduct any independent investigation or research about the case. That means, for example, you cannot use the Internet to do research about the facts or the law or the people involved in the case. Research includes something even as simple or seemingly harmless as using the Internet to look up a legal term or view a satellite photo of the scene of the alleged crime.

I want to explain the reasons why you should not con-

duct your own investigation. All parties have a right to have the case decided only on evidence and legal rules that they know about and that they have a chance to respond to. Relying on information you get outside this courtroom is unfair because the parties would not have a chance to refute, correct, or explain it. Unfortunately, information that we get over the Internet or from other sources may be incomplete or misleading or just plain wrong. It is up to you to decide whether to credit any evidence presented in court and only the evidence presented in court may be considered. If evidence or legal information has not been presented in court, you cannot rely on it.

Social Media Admonitions			
	USDC	DCSC	
Social media admonition given	100%	58%	*
Beginning of trial	100%	61%	
During trial	100%	28%	***
End of trial	100%	50%	
Compliance confirmation	0%	12%	

* p<.1

** p<.05

*** p<.01

Moreover, if any of you do your own research about the facts or the law, this may result in different jurors basing their decisions on different information. Each juror must make his or her decision based on the same evidence and under the same rules.

In some cases, there may be reports in the newspaper or on the radio, Internet, or television concerning the case while the trial is ongoing. If there should be such

media coverage in this case, you may be tempted to read, listen to, or watch it. You must not read, listen to, or watch such reports because you must decide this case solely on the evidence presented in this courtroom. If any publicity about this trial inadvertently comes to your attention during trial, do not discuss it with other jurors or anyone else. Just let me or my clerk know as soon after it happens as you can, and I will then briefly discuss it with you.

Finally, if you become aware that another juror may be violating my instructions, please let me or my clerk know as soon as you become aware so we can discuss it.

21 THE DC JURY PROJECT RECOMMENDS THAT THE SUPERIOR COURT PROVIDE AN EXPEDITED JURY TRIAL OPTION FOR CIVIL TRIALS. SHORTENING TRIALS SAVES LITIGANTS AND THE COURT TIME AND MONEY AND REDUCES THE BURDEN OF SERVICE ON JURORS.

The DC Jury Project recommends creating an optional expedited civil jury trial program in DC Superior Court. This could reduce the amount of time that is spent on cases prior to and during trials, thereby reducing the burden of jury service. It is suggested that DC Superior Court also make an informational document available to parties contemplating the expedited trial process.⁹⁴ An example of such a document can be found in Exhibit I to this recommendation.

We commend DC Superior Court for implementing the Track System that was previously suggested by the Council for Court Excellence in 2002.⁹⁵ The DC Jury Project recommends expanding the current Track System⁹⁶ to add an expedited option for all civil jury trials. We further recommend revisiting the “Time to Disposition” performance standards that the Court implemented in 2007 in order to adhere more closely to an expedited trial program.⁹⁷ It is recommended that the expedited trial program include provisions that limit discovery, peremptory challenges, and trial time for parties that opt for the expedited trial track. In exchange for these mutually

agreed-upon concessions, the case would advance on the trial calendar on a more expedited basis than even the Track I cases.

Multiple states, including California, Texas, Delaware, and Utah have implemented a type of expedited civil jury trial program.⁹⁸ Texas recently established an expedited trial program with multiple limitations on discovery. To be compatible with an expedited trial program, we recommend that discovery for each party be limited to a total of fifteen (15) interrogatories, requests for production, and requests for admissions.⁹⁹ We also recommend the courts consider allotting one (1) hour for voir dire, and three (3) to fifteen (15) hours for each party to present evidence; including the examination of witnesses.¹⁰⁰

While the bulk of civil trials in Superior Court relate to auto accident cases, other disputes may also be amenable to the fast track approach that could be incorporated into the DC Superior Court’s current tracking system.



One of the lawyers did an hour long closing statement. The lawyer-based time wasting was frustrating.

—An Anonymous Juror

94 See Exhibit A. California Expedited Jury Trial Information Sheet: <http://www.courts.ca.gov/documents/ejt010info.pdf>.

95 See CCE, Superior Court Success Story: Civil Case Reform in the District of Columbia, Appendix E: DC Superior Court Civil Actions Case Processing Diagram (2002). http://www.courtexcellence.org/uploads/files/Superior_Court_Success_Story_2002.pdf

96 Civil Rule 16 and Form CA 113 outline the tracking system now in force.

97 Superior Court of the District of Columbia Administrative Order 07-18 (Performance Measures-Time to Disposition and Excludable Time). <http://www.dccourts.gov/internet/documents/07-18.pdf>

98 NCSC report: Short, Summary & Expedited the Evolution of Civil Jury Trials. Document available upon request.

99 Howell, A. A Close Look at Texas’ New Expedited Trial Rules: <http://www.zelle.com/news-publications-237.html>

100 Utah Courts Expedited Jury Trial Requirements and Waivers: http://www.utcourts.gov/howto/civil/expedited_jury_trial/ and California Courts General Order Number 64 Attachment A. file:///C:/Users/Intern.CCE-DT7-06/Downloads/GO64.pdf. See Exhibit B.

EXHIBIT I

SAMPLE CALIFORNIA JURY TRIAL INFORMATION SHEET

THE COMMITTEE PROVIDES THIS EXHIBIT FOR INFORMATIONAL PURPOSES
BUT DOES NOT ENDORSE ALL OF THE PROVISIONS HEREIN

EJT-010-INFO Expedited Jury Trial Information Sheet

This information sheet is for anyone involved in a civil lawsuit who is considering taking part in an **expedited jury trial**—a trial that is shorter and has a smaller jury than a traditional jury trial. Taking part in this type of trial means you give up your usual rights to appeal. **Please read this information sheet before you agree to have your case tried under the expedited jury trial procedures.**

This information sheet does not cover everything you may need to know about expedited jury trials. It only gives you an overview of the process and how it may affect your rights. **You should discuss all the points covered here and any questions you have about expedited jury trials with your attorney. If you do not have an attorney, you should consult with one before agreeing to an expedited jury trial.**

1 What is an expedited jury trial?

An expedited jury trial is a short trial, generally lasting only one day. It is intended to be quicker and less expensive than a traditional jury trial.

As in a traditional jury trial, a jury will hear your case and will reach a decision about whether one side has to pay money to the other side. An expedited jury trial differs from a regular jury trial in several important ways:

- **The trial will be shorter.** Each side has 3 hours to put on all its witnesses, show the jury its evidence, and argue its case.
- **The jury will be smaller.** There will be 8 jurors instead of 12.
- **Choosing the jury will be faster.** The parties will exercise fewer challenges.
- **All parties must waive their rights to appeal.** In order to help keep down the costs of litigation, there are no appeals following an expedited jury trial except in very limited circumstances. These are explained more fully in **5**.

2 Will the case be in front of a judge?

The trial will take place at a courthouse and a judge, or, if you agree, a temporary judge (a court commissioner or an experienced attorney whom the court appoints to act as a judge) will handle the trial.

3 Does the jury have to reach a unanimous decision?

No. Just as in a traditional civil jury trial, only three-quarters of the jury must agree in order to reach a decision in an expedited jury trial. With 8 people on the jury, that means that at least 6 of the jurors must agree on the verdict in an expedited jury trial.

4 Is the decision of the jury binding on the parties?

Generally, yes, but not always. A verdict from a jury in an expedited jury trial is like a verdict in a traditional jury trial. The court will enter a judgment based on the verdict, the jury's decision that one or more defendants will pay money to the plaintiff or that the plaintiff gets no money at all.

But parties who agree to take part in expedited jury trials are allowed to make an agreement before the trial that guarantees that the defendant will pay a certain amount to the plaintiff even if the jury decides on a lower payment or no payment. That agreement may also put a cap on the highest amount that a defendant has to pay, even if the jury decides on a higher amount. These agreements are known as "high/low agreements." You should discuss with your attorney whether you should enter into such an agreement in your case and how it will affect you.

5 Why do I give up most of my rights to appeal?

To keep costs down and provide a faster end to the case, all parties who agree to take part in an expedited jury trial must agree to waive the right to appeal the jury verdict or decisions by the judicial officer concerning the trial unless one of the following happens:

- Misconduct of the judicial officer that materially affected substantial rights of a party;
- Misconduct of the jury; or
- Corruption or fraud or some other bad act that prevented a fair trial.

In addition, parties may not ask the judge to set the jury verdict aside, except on those same grounds. Neither you nor the other side will be able to ask for a new trial on the grounds that the jury verdict was too high or too low, that legal mistakes were made before or during the trial, or that new evidence was found later.

EJT-010-INFO Expedited Jury Trial Information Sheet
6 How else is an expedited jury trial different?

The goal of the expedited jury trial process is to have shorter and less expensive trials. The expedited jury trial rules set up some special procedures to help this happen. For example, the rules require that several weeks before the trial takes place, the parties show each other all exhibits and tell each other what witnesses will be at the trial. In addition, the judge will meet with the attorneys before the trial to work out some things in advance.

The other big difference is that the parties can make agreements about how the case will be tried so that it can be tried quickly and effectively. These agreements may include what rules will apply to the case, how many witnesses can testify for each side, what kind of evidence may be used, and what facts the parties already agree to and so do not need to take to the jury. The parties can agree to modify many of the rules that apply to trials generally or even to expedited jury trials (except for the four rules described in 1).

7 Who can have an expedited jury trial?

The process can be used in any civil case that the parties agree may be tried in a single day. To have an expedited jury trial, both sides must want one. Each side must agree that it will use only three hours to put on its case and agree to all the other rules in 1 above. The agreements between the parties must be put into writing in a document called a Proposed Consent Order Granting an Expedited Jury Trial, which will be submitted to the court for approval. The court must issue the consent order as proposed by the parties unless the court finds good cause why the action should not proceed through the expedited jury trial process.

8 Can I change my mind after agreeing to an expedited jury trial?

No, unless the other side or the court agrees. Once you and the other side have agreed to take part in an expedited jury trial, that agreement is binding on both sides. After you enter into the agreement, it can be changed only if both sides want to change it or stop the process or if a court decides there are good reasons the expedited jury trial should not be used in the case. This is why it is important to talk to your attorney before agreeing to an expedited jury trial.

You can find the law and rules governing expedited jury trials in Code of Civil Procedure sections 630.01–630.12 and in rules 3.1545–3.1552 of the California Rules of Court. You can find these at any county law library or online. The statutes are online at www.leginfo.ca.gov/calaw.html. The rules are at www.courts.ca.gov/rules.

EXHIBIT J**SAMPLE GENERAL ORDER FOR
EXPEDITED TRIAL PROCEDURES
(CALIFORNIA)**

**THIS SAMPLE IS NOT ENDORSED BY
THE COMMITTEE BUT IS PROVIDED
TO ILLUSTRATE THE CONCEPT**

**GENERAL ORDER NO. 64 —
ATTACHMENT A****PROCEDURE FOR EXPEDITED TRIALS****1. Expedited Trial Procedure**

The court encourages parties to agree to an expedited trial. The Expedited Trial Procedure is meant to offer an abbreviated, efficient and cost-effective litigation and trial alternative. Subject to the approval of the assigned judge, the following procedures shall govern. "Expedited Trial" means a consensual, binding trial before a jury or before a judge with limited discovery and limited rights to appeal.

2. Effective Date

The parties shall file a written agreement, using the court form titled "Agreement for Expedited Trial and Request for Approval." Neither the agreement nor its existence shall be disclosed to the jury. The time schedule for expedited procedures and trial shall begin on the date the agreement is approved by the court.

3. Termination of Agreement

The agreement may be terminated by the court upon a showing that one or more parties have not participated in good faith with the provisions of this General Order or that previously undisclosed facts have been discovered that make it inappropriate to proceed pursuant to the agreement.

4. Applicable Rules

The provisions of the Expedited Trial Agreement, as approved by the court, shall supersede and govern over any inconsistencies or conflicts that arise between it and the Federal Rules of Civil Procedure or the Local Rules of this Court. Otherwise, all Federal Rules of Civil Procedure, Rules of Evidence, and Local Rules of this Court shall apply.

5. Initial Disclosures

If initial disclosures have not been exchanged, or if they are not yet due, the disclosures required by Rule 26(a) (1) (A) shall be exchanged within seven (7) days after the agreement is approved by the court.

6. Expedited Trial Conference

Immediately upon the filing of the agreement, plaintiff shall contact the courtroom deputy for the assigned judge and request an initial expedited trial conference. The conference shall occur no later than thirty (30) days after the filing of the agreement. Upon request of any party, the court shall permit counsel to appear by telephone. A Joint Expedited Trial Statement shall be filed seven (7) days before the conference addressing all of the topics set forth in the O No. 64 Attachment A page 2 Standing Order for All Judges of the Northern District of California Joint Expedited Case Management Statement, found on the Court's website: www.cand.uscourts.gov.

A case management order shall be issued following the conference. Unless otherwise ordered by the court, the order shall require the parties to exchange the documents described in Rule 26(a) (3) of the Federal Rules of Civil Procedure no later than fifteen (15) days before the pretrial conference and shall require the parties to complete all discovery no later than ninety (90) days after the expedited trial conference. All Rule 12 and pleading issues shall be resolved by the court at the expedited trial conference, except as provided in section 10 of this General Order. The court may determine the extent, if any, that previous case management orders on matters subject to the expedited rules shall supersede or be combined with any previous orders.

7. Pretrial Conference

The pretrial conference shall be held no later than one hundred fifty (150) days after the agreement is approved by the court.

8. Discovery

Unless otherwise ordered by the court or by agreement of the parties, discovery shall be limited to ten (10) interrogatories per side, ten (10) document requests, ten (10) requests for admission, and fifteen (15) hours of depositions, per side. The parties may agree or the court may order, that the time for response to written discovery be shortened. Deposition time limits are inclusive of fact witnesses and expert witnesses.

9. Expert Witnesses

No party shall call more than one expert witness to testify, unless permitted by the court or by agreement of the parties.

10. Pretrial Motions

No pretrial motion shall be filed without leave of court, which shall be sought by a letter not to exceed one page. If leave is granted, the motion shall be in letter form, filed with the clerk, unless otherwise ordered. The response to the motion shall be by letter filed with the clerk not later than seven calendar days after receipt of the motion. Unless otherwise permitted, no letter shall exceed three pages. A letter reply, not to exceed one page may be filed within three days after receipt of opposition. The court may decide the motion without a hearing. If the court finds that a hearing is necessary, it may establish a briefing schedule and order further briefing. Pendency of a dispositive motion shall not stay any other proceedings. O No. 64 Attachment A page 3

11. Trial Date

Unless otherwise ordered, trial shall be held no later than six months after the agreement is approved by the court.

12. Trial

Jury trial will be before six jurors and may proceed before a five-person jury if a juror is unable to serve through conclusion of trial and deliberations. The court shall conduct all voir dire and shall determine time limits for opening statements and closing argument. Each side shall have three hours to present evidence, not including time for opening statement and time for closing argument. There shall be no findings of fact or conclusions of law in non-jury trials. In multi-party trials, plaintiffs shall divide the three hours among themselves, and defendants shall divide the three hours among themselves. If the parties cannot agree to a division of trial time, the judge shall order a division.

13. Post-trial Motions

(a) Post-trial motions shall be limited to determination of costs and attorney's fees, correcting a judgment for clerical error, conforming the verdict to the agreement, enforcement of judgment and motions for a new trial.

(b) Within ten (10) court days after notice of entry of a jury verdict, a party may file with the clerk and serve on each adverse party a notice of intention to move for a new trial on any of the grounds specified in section 13(c) of these procedures. The notice shall be deemed to be a motion for a new trial.

(c) Grounds for motions for a new trial shall be limited to: (1) judicial misconduct that materially affected the substantial rights of a party; (2) misconduct of the jury; (3) corruption, fraud, or other undue means employed in the proceedings of the court or jury. [this provision is not recommended by the Committee]

14. Judgment

Judgment shall be entered within 30 days after a bench trial, except as ordered by the court for good cause.

15. Appeal [this provision is not recommended by the Committee]

Before filing an appeal, a party shall make a motion for a new trial pursuant to paragraph 13 of these procedures. If the motion for a new trial is denied, the party may appeal the judgment and seek a new trial only on grounds specified in subsection 13(c). All other grounds for appeal shall be waived and are not permitted, unless the parties agree otherwise.

22 THE DC JURY PROJECT RECOMMENDS THAT THE COURTS TAKE SPECIAL CARE TO PROVIDE AFFIRMATIVE INSTRUCTIONS TO JURORS SO THAT JURORS ARE AWARE THAT THEY ARE PERMITTED TO TAKE NOTES DURING THE TRIAL.

It is standard practice in the DC Courts for jurors to be permitted to take notes.¹⁰¹ As part of its effort to assess the implementation of recommendations that CCE made in its *Juries for the Year 2000* report, the DC Jury Project undertook to evaluate this practice (and others) by conducting an extensive survey of judges, attorneys, and jurors, and also by holding both roundtable discussions with DC judges and focus groups with former jurors.¹⁰² The resulting data indicate that all of the surveyed judges permit jurors to take notes, but not all of the jurors or attorneys who were surveyed report the same.

The following questions and corresponding results were obtained via surveys:

Judges were asked:

Please indicate whether the following jury practices were used in your last trial:

- ☐ Jurors were provided with note-taking materials by the court
- ☐ Jurors were provided with exhibit notebooks containing descriptions of trial exhibits

- ☐ Jurors were permitted to ask questions of witnesses
- ☐ Jurors were given a written copy of the jury instructions

The DC Jury Project found that 100% of the judges who answered this question reported that jurors were provided with note-taking materials by the court.

Attorneys were asked:

Please indicate whether the following jury practices were used in your last trial:

- ☐ Jurors were provided with note-taking materials by the court
- ☐ Jurors were provided with exhibit notebooks containing descriptions of trial exhibits
- ☐ Jurors were permitted to ask questions of witnesses
- ☐ Jurors were given a written copy of the jury instructions

The DC Jury Project found that 67% of the attorneys who answered this question reported that jurors were provided with note-taking materials by the court.

Jurors in Superior Court were asked:

The following are practices used by some judges. Did your judge allow the jurors to:

Take notes during the trial
☐ Yes ☐ No ☐ Don't know

Submit questions to witnesses during trial
☐ Yes ☐ No ☐ Don't know

Submit questions during deliberation
☐ Yes ☐ No ☐ Don't know

The DC Jury Project found that 48% of jurors in civil trials in Superior Court who answered this question reported being allowed to take notes, while 53% of the responding jurors in criminal trials in the Superior Court reported being allowed to take notes.

¹⁰¹ Indeed, DC Superior Court Criminal Jury Instruction 1.105 explicitly permits note-taking by jurors.

¹⁰² The DC Jury Project surveyed over 600 jurors at both courts, over 180 attorneys, and over 30 judges at both courts. Additionally, 10 jurors participated in three focus groups and 14 judges participated in three roundtable discussions. In both the surveys and discussions all parties were asked about note-taking by jurors. See Data Collection and Methodology section. *Juries for the Year 2000* made recommendation number 20, recommending "that jurors be permitted to take notes during trials and that they be advised that they may do so."

These survey results were similar to the experiences expressed in the roundtables and focus groups. That is, each of the judges at roundtable discussions reported allowing their jurors to take notes, while several of the jurors who participated in the focus groups reported not being provided with note-taking materials or not being told that they could take notes. Thus, while it is true that jurors may have been permitted to take notes, it also appears to be true that at least some jurors may not understand that they are being provided with note-taking materials and that they have permission to use them during trial.

These results have led the DC Jury Project Committee to recommend that judges and the courts take special care to correct any misperception that jurors might have about note-taking, and thereby ensure that jurors are aware of their ability to take notes during trial.

23 THE DC JURY PROJECT RECOMMENDS THAT JUDGES IN THE DC COURTS, IN THE EXERCISE OF THEIR DISCRETION IN APPROPRIATE CIVIL CASES, PERMIT JURORS TO SUBMIT WRITTEN QUESTIONS FOR WITNESSES SO LONG AS THE COURT INSTRUCTS THE JURY THAT: (1) THE COURT WILL DETERMINE WHETHER IT IS PROPER TO POSE THE QUESTION TO THE WITNESS; (2) THE JUROR SHOULD NOT DISCUSS ANY UNASKED QUESTION WITH THE JURY AND SHOULD NOT DRAW ANY INFERENCE FROM THE JUDGE'S DECISION NOT TO POSE THE QUESTION TO THE WITNESS; AND (3) THE QUESTIONS AS POSED BY THE TRIAL JUDGE SHOULD BE DESIGNED TO ASSIST THE JURY IN REACHING AN IMPARTIAL DETERMINATION OF THE FACTS AND NOT TO SERVE AS ADVOCACY FOR EITHER SIDE IN THE TRIAL.

BECAUSE NO MODEL JURY INSTRUCTION FOR CIVIL CASES SIMILAR TO CRIMINAL JURY INSTRUCTION 1.106 CONCERNING QUESTIONS FROM JURORS IN CRIMINAL CASES CURRENTLY EXISTS, THE DC JURY PROJECT RECOMMENDS THE CREATION AND ADOPTION OF A SIMILAR INSTRUCTION IN THE MODEL CIVIL JURY INSTRUCTIONS.

Within the last 20 years, trial and appellate courts in the District of Columbia have recognized that allowing jurors to submit proposed written questions to the trial judge to be asked of witnesses while they are on the stand testifying may have substantial benefits to the administration of justice and to the jurors' thorough consideration of the case. Jurors may be confused by technical jargon or by what they consider gaps in the evidence. Allowing the judge to ask proper and permissible juror-submitted questions may benefit not only the jurors in reaching a well-considered decision but also benefit trial counsel who thereby become aware of certain juror concerns. Allowing questions may heighten the jurors' attention to the case by making them feel a part of the process rather than merely spectators. It may also leave the jurors feeling more satisfied with their experience, which if communicated to others, may encourage others to be more willing to serve.

The submission of written questions by jurors in civil cases is currently permitted by certain judges in DC Superior Court and may also be followed in federal courts. Those judges who allow the practice instruct jurors at the beginning of the case that, after a witness has completed his or her testimony, the juror may submit a written question to the judge who, after consultation with counsel, will decide whether to ask the question. The judge

instructs jurors not to consider the question if it was not asked or to speculate on the reason the judge chose not to ask it or on what the answer might have been. Jurors are instructed that they are not to become advocates for either side by submitting questions.

While there are concerns in criminal cases (discussed in the following recommendation) as to whether the submission of questions by jurors sometimes reduces the prosecutor's burden of proof, those concerns are not in play in civil cases.¹⁰³ Accordingly, the Committee encourages trial judges in both Superior Court and US District Court to exercise their discretion to allow jurors to submit written questions in appropriate civil cases.

The Committee is mindful of the absence of a civil jury instruction concerning questions submitted by jurors and is aware that efforts are underway to develop a civil version of the Model Criminal Jury Instruction 1.106 and the Committee endorses completion of that project. Until that instruction has been finalized, the Committee recommends that the Model Criminal Jury Instruction be adapted on a case-by-case basis for use in civil trials.

¹⁰³ E.g., American Bar Association, *Principles for Jury Trials*, August 2005, Principle 13 (C)) and related commentary, noting that there are concerns to jurors asking questions in criminal cases which do not arise in civil cases.

23 (CONTINUED) THE DC JURY PROJECT RECOMMENDS THAT JUDGES IN DC COURTS, IN THE EXERCISE OF THEIR DISCRETION IN APPROPRIATE CRIMINAL CASES, PERMIT JURORS TO SUBMIT WRITTEN QUESTIONS FOR WITNESSES SO LONG AS THE COURT INSTRUCTS THE JURY IN ACCORDANCE WITH DC CRIMINAL JURY INSTRUCTION 1.106, THAT: (1) THE COURT WILL DETERMINE WHETHER IT IS PROPER TO POSE THE QUESTION TO THE WITNESS; (2) THE JUROR SHOULD NOT DISCUSS ANY UNASKED QUESTION WITH THE JURY AND SHOULD NOT DRAW ANY INFERENCE FROM THE JUDGE'S DECISION NOT TO POSE THE QUESTION TO THE WITNESS; AND (3) THE QUESTIONS AS POSED BY THE TRIAL JUDGE SHOULD BE DESIGNED TO ASSIST THE JURY IN REACHING AN IMPARTIAL DETERMINATION OF THE FACTS AND NOT TO SERVE AS ADVOCACY FOR EITHER SIDE IN THE TRIAL.

Majority View:

The practice of allowing jurors in criminal cases to submit written questions for the trial judge's consideration has been approved by the appellate courts in both our local and federal courts. In *Yeager v. Greene*, 502 A. 2d 980 (DC 1985), the District of Columbia Court of Appeals authorized the submission of questions by jurors to the court in a criminal case. Later cases repeatedly reaffirmed the practice, which is followed by a number of, but not all, Superior Court judges.¹⁰⁴

In *United States v. Rawlings*, 522 F.3d 403 (DC Cir. 2008), the US Court of Appeals for the DC Circuit held that a trial judge in a criminal case, with proper instructions and cautions, may allow juror questions to be asked by the Court. However, the Court of Appeals observed that there were dangers in the practice and suggested it be used sparingly and only in appropriate cases. In *Rawlings*, the Court of Appeals observed, as several other Circuits have, that the practice of allowing jurors to submit written questions for the court's consideration may provide substantial benefits, noting "it can help focus the jurors, clear up confusion, alert counsel to evidentiary lacunae and generally ensure that jurors have the information needed to reach a reasoned verdict."¹⁰⁵ But it also observed that the practice carries significant risks, such as potentially removing jurors from their appropriate role as neutral fact finders; causing jurors to evaluate prematurely the evidence and adopting a position before hearing all of the facts; delaying the trial; and potentially undermining counsel's litigation strategies. The *Rawlings* Court also noted that if a question is not asked a juror may feel that his or her pursuit of truth has been thwarted or, if asked, the question may assume too much importance by the other jurors. Some members of the DC Jury Project noted a concern that allowing jurors to submit questions may skew the burden of proof required of the government in criminal or in forfeiture cases by aiding the government in the identification of potential weaknesses in the prosecution's case. While empirical evidence of such an effect has not come to our attention,

¹⁰⁴ See *Timms v. United States*, 25 A.3d 29 (DC 2011); *Hinton v. United States*, 979 A.2d 663 (DC 2009); *Plummer v. United States*, 870 539 (DC 2005).

¹⁰⁵ *Id.* at 407.

the concern is worth noting and our conversation with judges reflects that this concern is shared by some of those who decline to use the practice. Taking account of the potential perils of allowing questions, the Court of Appeals concluded that, "To minimize these risks, a District judge who decides to permit questioning by jurors in a given case should implement specific precautionary procedures."¹⁰⁶

A large majority of states and all of the federal circuits that have entertained the question (all but the 10th Circuit, where the matter has not arisen) have agreed that permitting jurors to ask questions in this fashion in criminal cases is within the sound discretion of the trial court. A recent article in the *American Journal of Trial Advocacy*, after surveying all of the states and federal courts, concluded that "juror questioning ... as a recognized trial procedure is complete" and is "an innovation whose time has fully arrived."¹⁰⁷ The article concluded that "every one of the empirical studies have verified the benefits juror questioning" and "strong statistical evidence exists when judges and attorneys use juror questioning their perceptions of this procedure change for the better."¹⁰⁸ Interviews of judges in our Superior Court and the federal District Court who have used this procedure for the past decade have confirmed that most of them agree with that perception. A study by the American Bar Association and the National Center for State Courts has found that in 28% of all state court trials and in 18% of federal court trials, jurors were permitted to ask questions.

We believe that the proper precautions are set forth in Model Jury Instruction 1.106 of the Criminal Jury Instructions for the District of Columbia which is used frequently by Superior Court judges in criminal cases. (See Exhibit K.) It emphasizes that the juror must be an impartial judge of the facts, not an advocate for either side. It makes clear that jurors may not ask questions orally. It states that questions will only be permitted when both sides' lawyers have concluded their examina-

tion, but before the witness leaves the stand. And most importantly, it makes clear that the judge will make the determination of whether to ask the witness the question after receiving input from counsel and will only do so if the judge deems it proper. It instructs the jury not to guess about what the answer would have been to an unasked question and not to discuss the unasked question with the other members of the jury.

In order to improve the administration of justice and enhance juror satisfaction and confidence in its verdicts, we urge trial courts to exercise their discretion in appropriate cases to allow jury questions in criminal trials in Superior Court and in Federal Court applying the cautionary suggestions embodied in the model jury instruction.

Jurors Asking Questions in Criminal Cases: Minority View:

The DC Jury Project Committee's recommendation that judges permit jurors to ask questions of witnesses in criminal cases was not unanimously agreed on by the entire Committee. In particular, both the Federal Public Defender and the Public Defender Service for DC, along with a substantial number of other members of the Committee, oppose the Committee's ultimate recommendation. Although case law permits the practice,¹⁰⁹ both public defender agencies assert that this practice is not without flaws.

The fact that both the local and federal courts of appeal in DC have held that juror questioning is allowed does not mean that the procedure is uncontroversial. The DC Circuit, in its opinion on the subject, *United States v. Rawlings*, 522 F.3d 403 (DC Cir. 2008), devoted substantial discussion to the reality that the "practice carries significant risk."¹¹⁰ The court noted, with regard to the specific facts in the case, that "this case illustrates just how perilous it can be for the court to routinely solicit and ask juror questions."¹¹¹ The court observed that the case "highlights the risk of allowing jury questions during trial and demonstrates why other circuits have advised that they be used only sparingly. To limit such risk in the

¹⁰⁶ *Rawlings* at 408.

¹⁰⁷ Frank, An Interdisciplinary Examination of Juror's Questioning of Witnesses at Trial, 38 *American Journal of Trial Advocacy*, 1, 7, 26 (2014).

¹⁰⁸ *Id.* at 48-49.

¹⁰⁹ See, e.g., *Timms v. United States*, 25 A.3d 29 (DC 2011).

¹¹⁰ *Id.* at 408.

¹¹¹ *Id.* at 409.

future, we, as have our sister circuits, advise trial judges to consider on a case-by-case basis whether and to what extent jury questions are appropriate, balancing the potential benefit of such questions against the dangers they pose.”¹¹² The court concluded that “[p]ermitting juror questions as a matter of course is ill-advised.”¹¹³ The DC Circuit’s view is hardly a blanket endorsement of the practice, and trial courts should not therefore presume that juror questions benefit the trial process.

The DC Circuit is far from isolated in its concerns. As part of its research, members of this Committee sampled 16 states that permitted juror questions by court decision.¹¹⁴ They also found three federal circuit courts of appeal that allowed questions by decision.¹¹⁵ As part of their analysis, they found four states that prohibited juror questions by decision¹¹⁶ and one federal circuit (the Second Circuit) that similarly prohibited juror questions by court decision. Concerning the permissive states and federal circuits, which number 19 in total, though, the majority of them (ten) acknowledge there are dangers inherent in the practice. Aside from our own federal circuit court in *United States v. Rawlings*, *supra*, the Fourth Circuit observed that “juror questioning is a course fraught with peril for the trial court. No bright-line rule is adopted here, but the dangers in the practice are very considerable.”¹¹⁷ The concerns are perhaps best summarized by the Alabama Supreme Court in *Ex Parte Malone*, 12 So.3d 60 (Ala. 2008). There, the court held that soliciting juror questions is not error *per se*, but “the practice should be disfavored and that a trial court should not promote or encourage the practice because it risks ‘altering the role of the jury from a neutral fact-finder to inquisitor and advocate.’”¹¹⁸

Judges should not rely on the Frank article cited in the

Committee’s recommendation.¹¹⁹ Although its conclusions are broad and sweeping, a closer reading of the article reveals its numerous shortcomings. The article itself acknowledges that some think “[p]ermitting jurors to question witnesses violates a defendant’s Sixth Amendment right to an impartial jury by transforming the jury into an active, partial decision-making body Although there may be problems with the jury system, juror questioning is not the solution. Trial courts should not continue to violate a criminal defendant’s right to a fair trial. In the future, jurors should remain silent.”¹²⁰ Indeed, the Frank article recognizes that the “transition from neutral to advocate was a significant concern” in allowing juror questioning, and acknowledges that no study has adequately addressed this issue.¹²¹ Despite the passage of two decades, the Eighth Circuit’s recognition of the pitfalls inherent in juror questions remain: “[T]he fundamental problem with jury questions lies in the gross distortion of the adversary system and the misconception of the role of the jury as a neutral factfinder in the adversary process. Those who doubt the value of the adversary system or who question its continuance will not object to distortion of the jury’s role. However, as long as we adhere to an adversary system of justice, the neutrality and objectivity of the juror must be sacrosanct.”¹²² Indeed, in a very recent article by United States District Judge Mark Bennett, “Reinvigorating and Enhancing Jury Trials Through an Overdue Juror Bill of Rights: WWJW—What Would Jurors Want?—A Federal Trial Judge’s View,”¹²³ he describes jury questioning in civil cases as a “superb innovation” that he now requires in all civil jury trials. He goes on to state, however, that despite being an ardent supporter of questioning in civil cases, he does not allow juror questioning in criminal cases “based on the problems that could arise with the presumption of innocence and shifting the burden of proof.” The Committee simply notes these important issues as a “concern.”

112 *Id.*

113 *Id.*

114 Alabama, Arkansas, Arizona, Colorado, the District of Columbia, Georgia, Hawaii, Maryland, Massachusetts, Missouri, New Jersey, New York, Nevada, Tennessee, Vermont, and Virginia.

115 Those circuits are: D.C., 6th, and 4th Circuit Courts of Appeal.

116 Minnesota, Mississippi, Nebraska, and Texas.

117 *DeBenedetto v. Goodyear Tire & Rubber Co.*, 754 F.2d 512, 517 (4th Cir. 1985).

118 *Id.* at 65-66 (citing *United States v. Ajmal*, 67 F.3d 12, 15 (2nd Cir. 1995)).

119 *An Interdisciplinary Examination of Juror’s Questioning of Witnesses at Trial*, 38 American Journal of Trial Advocacy 1 (2014).

120 Frank at 11, n.38 (internal citations omitted).

121 Frank at 14.

122 *United States v. Johnson*, 892 F.2d 707, 711 (8th Cir. 1989) (emphasis in original) (internal citation omitted).

123 38 Ariz. St. L.J. ____ (2016) (forthcoming), available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2652216.

A substantial minority of members of this Committee believe that there is sufficient controversy in allowing juror questions, and these members do not endorse the recommendation of the entire Committee. In particular, the public defender agencies have observed first-hand, over many years, the practice at work. Their opposition to this recommendation is based not only on the studies, articles, and cases that the Committee has considered, but also on their experiences as indigent criminal defense attorneys. The issue for them is one of fundamental fairness for their clients, in ensuring that they receive a fair trial, which is in turn grounded in the Sixth Amendment concerns articulated in the cases above. For these reasons, the minority view is that the DC benches should not adopt a practice that benches in other jurisdictions have approached, at best, with caution.

EXHIBIT K**CRIMINAL JURY INSTRUCTIONS FOR THE DISTRICT OF COLUMBIA,
INSTRUCTION 1.106, QUESTIONS BY JURORS****1-19****Instruction 1.106****Instruction 1.106 QUESTIONS BY JURORS**

Generally, only the lawyers and I ask witnesses questions. Occasionally, however, a juror thinks that an important question has not been asked. As a juror, you must be an impartial judge of the facts, not an advocate for either side in this proceeding. While I am not encouraging any of you to pose questions to the witnesses, if during the course of the trial you feel an important question has not been asked, you may write out that question on a piece of paper. You may not ask a question orally at any time during a trial. In addition, you may not discuss the questions with any fellow jurors or anyone else. You should submit your question to the court after the lawyers are finished with their questioning of the witness, but before the witness leaves the witness stand. Once a witness has left the witness stand and been excused, that witness will not be recalled to respond to a juror's question.

After consulting with the lawyers, I will determine whether the question relates to a fact or facts about which the witness can properly testify. If it is proper, I will ask the question. If I do not ask the question, that means I have decided that the question is not a legally proper one. The juror posing it should not guess or speculate about what the answer might have been, and must not consider the question or discuss it with other jurors during deliberations. If I decide the question relates only to a legal issue, I may decide to wait until final instructions and answer the question then.

Comment:

In the Fifth Edition, the Committee retained the admonition to jurors that they must remain impartial but deleted the rest of the final paragraph of the instruction which had informed the jurors that their questions were only to help understand the testimony, clarify evidence, or seek information; but not to discredit or argue with a witness. The Committee decided that portion of the paragraph was misleading in that it set up a false dichotomy between "getting information" and assessing the credibility of the witness who is providing the information. See *Davis v. Alaska*, 415 U.S. 308, 316 (1974) ("truth" of a witness's testimony is ascertained not only by "delving into the witness' story" but also by assessing whether the witness should be discredited, for reasons of bias or otherwise).

In *Yeager v. Greene*, 502 A.2d 980 (D.C. 1985), the District of Columbia Court of Appeals upheld a trial court's exercise of discretion to permit jurors to pose written questions to witnesses. Thus, a trial court in the District of Columbia Superior Court has discretion to permit jurors to pose written questions to witnesses during trial. Other federal and state courts have also approved this practice. See Opinion of Superior Court Judge Henry Greene in *Yeager*, 502 A.2d 980 at n.18; see generally *Plummer v. U.S.*, 870 A.2d 539, 543 (D.C. 2005)

("procedures used by the trial judge . . . including her explanation of the process to the jurors, were essentially the same as those used by the judge in *Yeager*, and at least implicitly approved by this court"; noting that it might have been better if the court had decided not to ask certain questions but finding no reversible error). The U.S. Court of Appeals for the D.C. Circuit addressed this issue in *U.S. v. Rawlings*, 300 U.S. App. D.C. 380, 522 F.3d 403 (D.C. Cir. 2008), and advised trial judges to permit this practice only sparingly and to consider on a

(Rel. 12-W-2014 Pub.1278)

Instruction 1.106

1-20

case-by-case basis whether and to what extent jury questions are appropriate, balancing the potential benefit of such questions against the dangers.

The Committee recommends that if a juror's question is posed by the court, the attorneys be permitted to ask follow-up questions.

24 THE DC JURY PROJECT RECOMMENDS THAT POST-TRIAL COMMUNICATIONS AMONG JURORS WILLING TO SPEAK WITH COUNSEL AND THE COURT SHOULD BE ENCOURAGED IN ORDER TO IMPROVE THE ADMINISTRATION OF THE JURY SYSTEM.

Case law and rules of court permit post-trial communications with jurors by counsel and by the court, but the practices differ between the US District Court and the Superior Court. In its 1998 report, *Juries for the Year 2000 and Beyond*, the Council for Court Excellence encouraged the courts to “regularly seek the feedback of jurors” and to tabulate the results for review by judges, jury administrators and court policy makers.”¹²⁴ The 1998 Report also encouraged “trial judges to join jurors at the close of a trial in order personally and informally to thank them for their service, to answer questions about the court and jury system, and to provide assistance for any juror who may have experienced extreme stress caused by the trial.”¹²⁵ In federal court, post-trial communications between jurors and counsel are permitted only when leave of court has been sought and granted.

¹²⁶ By contrast, the Superior Court does not provide a similar rule, and accordingly a different practice has

evolved, where some judges note that counsel may speak with jurors after they have been excused if the jurors wish to have such communication whereas others do not discuss the issue. The overwhelming majority of the Committee believes such post-trial communications with jurors can occur without judicial supervision and that such communications should be encouraged, provided that jurors are advised they are free to decline requested interviews. However, a minority of the Committee believes that post-trial communications should have judicial oversight in both courts.

As was true of the 1998 Committee, the current Committee continues to believe that post-trial communications between jurors and the court and counsel can be instructive not only with regard to the particular case but also in a systemic way as jurors can point out problems they encountered that could be ameliorated by further adjustments. Encouragement of post-trial communications involving the court with jurors is also supported by the American Bar Association, but under certain conditions.¹²⁷ The ABA recommended that any discussions between court and jurors following the conclusion of trial and the completion of the jurors’ service be conducted “only on the record and in open court with counsel having the opportunity to be present.”¹²⁸ Although this recommendation pertains to criminal cases, the Committee does not foresee the necessity of having post-trial discussions with the jury on the record in civil or criminal cases, nor does the Committee consider that conversations must take place in the courtroom. Moreover, post-trial communications between jurors and counsel is not covered by the ABA Standards, and the Committee is of the view that these communications may generally take place without judicial supervision unless required by court rule, as in federal court.

But there can be problems with post-verdict communications with jurors in criminal cases, where sentencing takes place months after the verdict is rendered. In *Harris v. United States*, 738 A.2d 269 (DC 1999), the District of Columbia Court of Appeals described a well-intentioned

¹²⁴ *Council for Court Excellence, Juries for the Year 2000 and Beyond* (1998), Recommendation 16.

¹²⁵ *Council for Court Excellence, Juries for the Year 2000 and Beyond* (1998) Recommendation 32.

¹²⁶ Local Criminal Rule 24.2(b) of the US District Court provides: (b) *After trial.* After a verdict is rendered or a mistrial is declared but before the jury is discharged, an attorney or party may request leave of Court to speak with members or the jury after their discharge. Upon receiving such a request, the Court shall inform the jury that no juror is required to speak to anyone but that a juror may do so if the juror wishes. If no request to speak with jurors is made before discharge of the jury, no party or attorney shall speak with a juror concerning the case except when permitted by the Court for good cause shown in writing. The Court may grant permission to speak with a juror upon such conditions as it deems appropriate, including but not limited to a requirement that the juror be examined only in the presence of the Court. Local Civil Rule 47.2(b) is identical.

¹²⁷ ABA Standards for Criminal Justice Discovery and Trial by Jury, 119 (3d ed. 1996); see also, American Bar Association, *Principles for Juries and Jury Trials*, Principle 18 and associated commentary.

¹²⁸ *Id.* at 227 – Standard 15-4.3

meeting of the trial judge with the jurors following the verdict, the purpose of which was to answer questions the jurors might have had and to determine if any improvements in the system might benefit the jurors. Counsel for the government and the defendant were not invited to participate in the conversation, and through the unpredictable evolution of the discussion, information came to the attention of the trial judge concerning the deliberations. At sentencing, the same trial judge described his conversation with the jurors and sought to assure defense counsel that the communications did not affect his sentencing decision.¹²⁹ Nevertheless, the Court of Appeals concluded that the trial judge, though inadvertently, had violated Canon 3(A)(4) of the ABA Model Code of Judicial Conduct¹³⁰ by having *ex parte* communications with the jurors.

To avoid the problem highlighted by the *Harris* court, the Committee, while encouraging post-trial communications between the court and jurors if they wish to participate in them, recommends that counsel be present during such communications. However, we do not believe it is necessary for such conversations — or others with counsel and jurors but not the court — to be on the record nor is it necessary for the trial judge to participate in these discussions, though they may certainly do so.

The Rules of Professional Conduct in force in DC do not preclude post-trial communications with jurors if there is no law, court order or rule barring such communications.¹³¹ Thus, in the Superior Court, where no rule bars post-trial communications between counsel and the jurors, those communications may proceed with those jurors who chose to speak with counsel. This is

true in both civil and criminal cases. As noted above, different Superior Court judges have different practices respecting such communications, with some allowing the communications to occur off the record in the jury room in the presence of both counsel, and others allowing the communications to occur in the courthouse corridors in the presence of one or both counsel. Still others do not express a view about such conversations.

On the other hand, the federal court local criminal rule 24.2 (b) and civil rule 47.2(b), cited above, clearly require a communication with discharged jurors to be preceded by an approved request to the court for leave to undertake such a conversation. The Committee urges federal judges to exercise their discretion by permitting such conversations when requested, and provided that jurors are informed of their right to decline requests for interviews and are cautioned to refrain from discussing the deliberation process.

In any event, courts have validated restrictions on the post-trial communications with jurors, particularly in criminal cases, but with some restrictions. In *United States v. Harrelson*¹³² the Court of Appeals for the Fifth Circuit validated a rule imposing the following conditions on post-trial communications with jurors conducted by the press. These restrictions are sometimes applied by courts to conversations between counsel and jurors. The cautions that the *Harrelson* court recommended follow:

1. No juror has any obligations to speak to any person about this case, and may refuse all interviews or comment.
2. No person may make repeated requests for interviews or questioning after a juror has expressed his or her desire not to be interviewed.
3. No interviewer may inquire into the specific vote of any juror other than the juror being interviewed.
4. No interview may take place until each juror in this case has received a copy of this order, mailed simultaneously with the entry of this order.¹³³

¹²⁹ 738 A.2d 269, 276-278

¹³⁰ This Canon provides: "A judge should accord to every person who is legally interested in a proceeding or his [or her] lawyer, full right to be heard according to law, and, except as authorized by law, neither initiate nor consider *ex parte* or other communications concerning a pending or impending proceeding." See also, *Foster v. United States*, 615 A.2d 213, 216 (DC 1992)

¹³¹ Rule 3.5 of the Rules of Professional Conduct provides, in pertinent part that "A lawyer shall not... (c) Communicate, either *ex parte* or which opposing counsel, with a juror or prospective juror after discharge of the jury if: (1) The communication is prohibited by law or court order; (2) The juror or prospective juror has made known to the lawyer a desire not to communicate or (3) The communication involves misrepresentation, coercion, duress or harassment..."

¹³² 713 F.2d 1114 (5th Cir. 1983)

¹³³ *United States v. Harrelson*, 713 F.2d 1114, 1116 (5th Cir. 1983)

The Committee does not believe that a *Harrelson*-type order is necessary for post-trial counsel/juror communications in the routine case and that such an order be issued only in cases that attract publicity or where the press has expressed a serious interest.

Moreover, there are sound reasons to caution counsel to avoid seeking to gain information from jurors aimed at impeaching the verdict by casting doubt on the jury's deliberations, as those are considered sacrosanct.¹³⁴

Taking these cautions into consideration, the Committee is of the view that in civil and criminal cases in the Superior Court, post-trial communications between counsel and jurors who wish to discuss the trial, but without inquiring specifically into the deliberations should be encouraged. In addition, communications between willing jurors and the Court, in the presence of counsel, aimed at determining jurors' perception of their experience and how those experiences could be improved is healthy and should be approved.

¹³⁴ See, *Tanner v. United States*, 483 US 107, 117 S.Ct. 2739 (1987); *Warger v. Shauers*, 574 US ___, 135 S.Ct. 521 (2014). Also, note that Rule 606(b)(1) of the Federal Rules of Evidence precludes a juror from testifying "about any statement made or incident that occurred during the jury's deliberations, the effect of anything on that juror's or another juror's vote or any juror's mental processes concerning the verdict or indictment." Additionally, the Court may not consider an affidavit treating such matters.

**25 THE DC JURY PROJECT
RECOMMENDS THAT
CCE ADVOCATE FOR THE
IMPLEMENTATION OF THE
RECOMMENDATIONS IN THIS
REPORT BY CONDUCTING AN
EDUCATION CAMPAIGN THAT
PUBLICIZES THE REPORT'S
FINDINGS, ENCOURAGES
CITIZENS TO SERVE ON
JURIES, AND IMPROVES THE
PERCEPTION AND REALITY OF
JURY SERVICE.**

The DC Jury Project recommends that upon publication of this report, CCE conduct an education and implementation campaign. The publicity and outreach efforts should focus on at least two areas: juror appreciation and promoting service.

Juror Appreciation

CCE should spearhead a variety of initiatives designed to demonstrate appreciation for jurors and jury service. These efforts could include videos of former jurors, civic and community leaders, and members of the judiciary talking about jury service. Videos would be made available online, on television, at libraries, schools, and other venues. Posters of a similar nature describing the importance of jury service and its connection to our Constitution could also be distributed. Additionally, forums and panel discussions with former jurors should be held. Finally, the publicity and outreach plan should strive to think creatively, and to consider not only raising the profile of jury service in the community but also generating tokens of appreciation for jurors, such as free or discounted meals with proof of service from corporate sponsors.

Promoting Service

CCE should also develop education initiatives designed to raise awareness of the important constitutional and civic nature of jury service. To that end, courts could host open houses and moderated panels regarding jury service, and there could be special programming at schools. Additionally, posters and other materials can be created, such as an "introduction to civic life" fact sheet for graduating high school students.

Social Media

Outreach efforts should make use of social media to promote jury service and raise awareness. Campaigns could feature #JurorVoices, #Iserved, service by celebrities and recognizable public servants, and first-person articles about service.

Strategic Partners

In implementation and education efforts, the assistance of CCE's partners will be essential. CCE should work with the courts, the DC Council, non-profits focused on civics, WMATA, local law schools and universities, pro-jury organizations like Save Our Juries (ABOTA), local schools, the American Bar Association, and others.

Implementation

The DC Jury Project recommends that CCE work with the project Committee and its partners to determine an outreach and community education plan that includes the order and methodology for raising awareness and interest and for implementing any of the Committee's recommendations.

Report Roll-Out Events

The publication of this report should coincide with a roll-out campaign designed to raise awareness of the report's recommendations, encourage discussion of jury service, and generate media coverage of the Committee's work. CCE should organize a media strategy, panel discussions, and events for the roll-out campaign.

ISSUES TO WATCH

This section includes ideas that relate directly to the modern realities of jury service, but about which the Committee is not yet able to make recommendations. These ideas relate to the core concerns of the Committee – expanding the jury pool, making juries more inclusive, and/or making the experience of service more enjoyable – but more information is needed, or the situation is changing and uncertain, or there is some other reason why making a recommendation at this time would be imprudent.

Service by Non-Citizens

Over the last several decades, the immigrant population in the United States has been steadily growing, resulting in an increase in the number of legal non-citizens living in DC and elsewhere. The inclusion of legal permanent residents in the jury pool could make the pool more representative. It is also potentially in line with the District's tradition of inclusiveness in democratic acts, particularly given recent movements relating to voting rights for legal permanent residents and the District's history of allowing people with felony criminal records to vote.¹³⁵ In 2013, the California legislature passed a bill that would have allowed legal permanent residents to serve on juries.¹³⁶ While the bill was ultimately vetoed by Governor Brown, his veto did not address the substantive arguments put forth by the bill's proponents.¹³⁷ However, unlike in California, the number of legal permanent residents living in DC is relatively small. In 2012, the Department of Homeland Security calculated that 2,811 legal

permanent residents declared the District of Columbia as their place of residence.¹³⁸

The Committee believes that, given the relatively small number of legal permanent residents in the District, and the Constitutional concerns raised by many Committee members, it would be imprudent to recommend any action on this issue without more study. As the demographics of the District change, the Committee believes that this issue will be worth watching.

Juror Security Line

The Committee has become aware of other jurisdictions that grant jurors access to a special security line or otherwise lets jurors bypass security checks at the courthouse entrance. The Committee agrees that jurors should be afforded such small conveniences, both as a means to make serving more pleasant and to minimize trial delays.

The Committee cannot presently recommend this practice because of the current physical layout of the Superior Court security lines and the inherent difficulties and costs associated with an attempt to re-organize them. The Committee, therefore, does not make any recommendation on this topic presently, but does recommend that this issue not be forgotten as the Courts renovate their facilities or otherwise reassess their security procedures.

Implicit Bias

Implicit bias refers to the positive or negative unconscious racial stereotypes that impact the human decision-making process.¹³⁹ Implicit bias is present to some degree in all people, regardless of their individual demographics.¹⁴⁰ These stereotypes are ingrained in people through their everyday lives via media sources,

¹³⁵ There is a movement in DC and other jurisdictions to grant legal permanent residents the right to vote. http://www.washingtonpost.com/local/should-legal-immigrants-have-voting-rights/contentious-issue-comes-to-dc-other-cities/2015/02/09/85072440-ab0f-11e4-ad71-7b9eba0f87d6_story.html. Per the DC Code, voting rights are restored upon completion of sentencing requirements. DC Code § 11-1906(B). <http://law.justia.com/codes/district-of-columbia/2013/division-ii/title-11/chapter-19/section-11-1906/>.

¹³⁶ CA AB-1401 Jury duty: eligibility. http://leginfo.ca.gov/faces/billNavClient.xhtml?bill_id=201320140AB1401.

¹³⁷ The veto message, in nearly its entirety, reads: "Jury service, like voting, is quintessentially a prerogative and responsibility of citizenship. This bill would permit lawful permanent residents who are not citizens to serve on a jury. I don't think that's right." Governor Brown's veto message. http://gov.ca.gov/docs/AB_1401_2013_Veto_Message.pdf.

¹³⁸ US Department of Homeland Security. 2012 Yearbook of Immigration Statistics. https://www.dhs.gov/sites/default/files/publications/ois_yb_2012.pdf.

¹³⁹ Anthony G. Greenwald and Linda Hamilton Krieger. *Implicit Bias: Scientific Foundations*. California Law Review. <http://perma.cc/SN25-QZXF>.

¹⁴⁰ *Id.*

cultural beliefs, and family norms, among other influences.¹⁴¹ These biases are so automatic that they are activated unconsciously.¹⁴² The Committee recognizes that implicit biases may play a role in jury trials. For example, several studies have shown that criminal defendants with afro-centric facial features generally receive more severe punishments as compared to other criminal defendants.¹⁴³ Another study showed that ambiguous actions by African Americans were interpreted more negatively than the same actions by other races, which has implications for juror decision-making.¹⁴⁴

The Committee believes that to formulate a recommendation on this topic would require more information and time than is presently available. In particular, any recommendation would require a thorough review of the scientific literature on both the phenomenon and potential fixes, neither of which is fully developed at this time.

Group Decision-Making Techniques

Making a decision as a group can be difficult. This is especially true for juries, where the issues being discussed are complicated, the repercussions of the group's decision are serious, and the people conducting the discussion are strangers who are often untrained in decision-making techniques. As such, some social scientists and legal scholars have begun advocating for courts to take a more active role in training jurors about group decision-making techniques.¹⁴⁵ These advocates

argue that it is important for jurors to speak about group decision-making strategies in an effort to understand the goals and tendencies of all group members and to establish norms and rules for their discussion. Otherwise, minority views may be unadvanced or even forgotten if not directly addressed.¹⁴⁶ This is especially common in situations where the group never discusses decision-making strategies for the group until a norm has been violated.¹⁴⁷ Scholars have also conducted preliminary research that indicates that courts should encourage jurors to use an evidence-driven approach instead of a verdict-driven approach in deliberations. Evidence-driven deliberations exist when jurors focus on the story of the trial and the best account of facts. Verdict-driven deliberations entail jurors stating their individual verdicts prior to beginning discussion.¹⁴⁸ These studies suggest that an evidence-driven, rather than verdict driven, approach would be more beneficial to trial outcomes because jurors focus on all of the evidence to compile a story.¹⁴⁹ These same studies discovered that most juries conducted verdict-driven deliberations.¹⁵⁰

At this time, the Committee believes that more study on this topic is needed. There is considerable research into group decision-making techniques in other contexts, but examinations of juries specifically are still preliminary and small in number. The Committee believes that there may be merit to the idea that jurors could benefit from being provided guidance in how to make their decisions, either through the judge, a handout describing decision-making techniques, or some sort of flow chart. However, the Committee believes that research into the best method for providing this guidance is still preliminary, and it would be premature to advocate for a particular method at this time.

141 Northwestern University Law Review. *Hidden Racial Bias: Why We Need to Talk with Jurors About Ferguson*. <http://colloquy.law.northwestern.edu/main/2015/02/hidden-racial-bias.html>.

142 Isabel Wilkerson. *No, You're Not Imagining It*. <https://www.questia.com/read/1P3-3060466141/no-you-re-not-imagining-it> (quoting leading implicit bias researcher David R. Williams that "this bias is so automatic that it kicks in before a person is ever aware it exists").

143 Jerry Kang. *Implicit Bias A Primer for Courts*. http://www.americanbar.org/content/dam/aba/migrated/sections/criminaljustice/PublicDocuments/unit_3_kang.authcheckdam.pdf.

144 *Id.* at 4.

145 Indiana Law Review. *All Together Now: Using Principles of Group Dynamics to Train Better Jurors*. <http://scholars.law.unlv.edu/cgi/viewcontent.cgi?article=1919&context=facpub>; Jerry J. Fang. *12 Confused Men: Using Flowchart Verdict Sheets to Mitigate Inconsistent Civil Verdicts*. Full PDF available upon request; Joan Kessler. *The Social Psychology of Jury Deliberations*. http://joanbkessler.com/images/SOCIAL_PSYCHOLOGY_OF_JURY.PDF.

146 Indiana Law Review. *All Together Now: Using Principles of Group Dynamics to Train Better Jurors*. <http://scholars.law.unlv.edu/cgi/viewcontent.cgi?article=1919&context=facpub>

147 *Id.* at 452.

148 National Center for State Courts. *Are Hung Juries a Problem?* <http://www.ncsc-jurystudies.org/What-We-Do~/media/Microsites/Files/CJS/What%20We%20Do/Are%20Hung%20Juries%20A%20Problem.ashx>.

149 *Id.* at 13.

150 *Id.*

DATA COLLECTION AND METHODOLOGY

Research Design

This report represents the broadest and deepest data collection effort about jury service in DC in decades. The data include surveys of those summoned for jury service, those ordered to show cause for failure to appear, judges, attorneys, and employers. The data also includes roundtable discussions with District and Superior Court judges, focus group discussions with jurors, and observations of voir dire and trial proceedings at the District and Superior Court. Finally, best practices and current procedures were researched through discussions with jury office administrators, attendance at jury conferences, an extensive literature review, and other research activities. The data were collected over a one year period, from July 2014 to July 2015, and build on CCE's and the DC Jury Project Committee's existing knowledge, derived from years of jury reform work and from Committee members' experiences as trial attorneys, judges, consultants, former jurors, and members of the original Jury Project Committee in 1998.

Survey Methodology

The DC Jury Project Committee created nine surveys that were mostly quantitative in nature, but did allow for some open ended answers.

At the District Court, prospective jurors present for voir dire and selected jurors were surveyed in separate surveys, per the Court's request. The Court distributed the surveys at the courthouse once the prospective juror or juror had completely finished their service and were no longer subject to being on call. The Court also placed a link to those surveys on their website. Judges at the District Court were surveyed twice via emailed link, with the second survey as a follow-up containing additional issues raised during DC Jury Project Committee meetings. The District Court provided helpful feedback on the questions used to survey judges, prospective jurors, and jurors. The Court also granted requests to send reminder emails about the survey to judges.

At the Superior Court, those summoned for jury service were surveyed in person by CCE staff and interns. The Court granted a one month period during which CCE conducted the survey.

Judges at the Superior Court were surveyed only once via emailed link. Requests to send a reminder e-mail were declined, and the Court requested that several questions be omitted from the surveys.

In addition, the Superior Court granted a request to survey those appearing at an Order to Show Cause Hearing. CCE staff and interns conducted the survey among hearing attendees once they were released by replicating the procedure described above to survey jurors.

Attorneys were surveyed via emailed link. DC Jury Project Committee members, the CCE Board of Directors, and various bar associations and email list servers were utilized to attain a wide distribution.

Employers were surveyed via emailed link. DC Jury Project Committee members and the CCE Board of Directors were both asked to distribute this survey to their networks. Various human resources associations were also asked, but declined. Several attempts to receive assistance from the DC Chamber of Commerce were similarly unsuccessful.

Focus Groups and Roundtables Methodology

The DC Jury Project Committee convened three juror focus groups over lunch on three separate days, hosted by several Committee members' law firms. The Committee developed several pages of questions on topics of interest to all three Working Groups. A Committee member served as a moderator at each session, with CCE staff on hand to take notes. One session was video recorded, with the consent of the participants. Participants agreed that the Committee could quote them in the report anonymously, but any quotes given with attribution required permission.

Roundtable discussions with judges at the District and Superior Court were arranged with the assistance of the Chief Judges of both Courts and their staffs. As with the

juror focus groups, the Committee developed several pages of questions on topics of interest to all three Working Groups. Two Committee members served as moderators for each session, with CCE staff on hand to take notes. The roundtables were held over lunchtime at both courts, twice at the District Court and once at the Superior Court.

Court Observation Methodology

The Committee created two court observation forms, one for observing voir dire and one for observing a trial. The forms were designed to capture quantitative and qualitative information. Committee members and court administrators provided CCE staff with information on upcoming trials, and a team of student volunteers from George Washington University Law School, the University of the District of Columbia David A. Clarke School of Law, and Howard University Law School, as well as CCE interns and the occasional DC Jury Project Committee member, conducted observations. Observers were instructed to not observe the same proceeding. Observations at the Superior Court were usually arranged by sending a volunteer to the courthouse in the morning to check the trial schedule, as only the criminal calendar is available online, and trials are often rescheduled. The District Court trial schedule is published on-line, but it too is subject to change at the last minute, so volunteers were instructed to check the calendar frequently online and at the courthouse.

Methodological Considerations

The Committee believes that, taken in conjunction with research and personal experiences, it can make generalizable assumptions about jury service in the District of Columbia from this data, but recognizes that more data would have been useful. In particular, it would have been helpful to have had more time to survey jurors at the Superior Court, where the most jury trials occur. The Committee similarly wishes that it had been able to observe more show cause hearings. The Committee did its best to conduct a broad survey of employers, but recognizes that the responses over-represent the legal industry. Finally, regarding focus groups, roundtable discussions, and court observations, the Committee again believes that these were useful and informative undertakings, but with more time could have perhaps been conducted in greater number and with more participants.

SUMMARY OF DATA COLLECTION

Superior Court Respondents

Jurors and Prospective Jurors: 573
Judges: 17
Order to Show Cause Hearing Attendees: 18

District Court Respondents

Selected Jurors and Prospective Jurors Not Selected during Voir Dire: 66
Judges: 17
Follow Up Survey of Judges Regarding Jurors Asking Questions and Post-Trial Communication: 9
Judge Roundtables: 2

Additional Respondents

Trial Attorneys: 183
DC Area Employers: 72
Juror Focus Groups: 3

Court Observations

Trials: 24
Voir Dire Proceedings: 26

REPRESENTATIVE SURVEY INSTRUMENT

DC Superior Court Jury Service Survey (Combined)

Thank you for taking the time to complete this brief anonymous survey about your experience with jury service in the DC Superior Court. Your response will be collected and analyzed by the Council for Court Excellence (CCE), a 32-year-old DC non-profit that promotes justice system reform.

The CCE is not a government agency and will not share your personal information with anyone.

Name (optional): _____

1. Do you recall your date(s) of service?

☐ Yes (please indicate the dates: _____) ☐ No

2. Using the scale below, please indicate your agreement or disagreement for each statement.

	Completely Agree	Agree	Neither agree/ disagree	Disagree	Completely disagree
I expected jury service to be inconvenient to me	☐	☐	☐	☐	☐
I thought that jury service would be a financial burden	☐	☐	☐	☐	☐
I thought that jury service would interfere with my work	☐	☐	☐	☐	☐
I thought jury service would be boring	☐	☐	☐	☐	☐

3. Does your employer have an established policy for jury service?

☐ Yes ☐ No ☐ Don't know

4. Does your employer continue to pay you while you are on jury duty?

☐ Yes ☐ No ☐ Don't know

5. Were you satisfied with the compensation you received for jury service?

☐ Yes ☐ No

6. How many days did you report to the courthouse? _____

7. How many times were you sent to a courtroom for jury selection? _____

8. When sent to a courtroom, did the judge explain the jury selection process clearly?

(If sent multiple times for jury selection, please indicate your response for each jury selection you attended).

Jury Selection 1 ☐ Yes ☐ No ☐ Don't know/don't recall

Jury Selection 2 ☐ Yes ☐ No ☐ Don't know/don't recall

Jury Selection 3 ☐ Yes ☐ No ☐ Don't know/don't recall

9. Were you in jury selection for a civil or criminal case?

(If sent multiple times, please indicate the number of times for each category).

☐ Criminal _____ ☐ Civil _____ ☐ Don't know

10. Using the scale below, indicate your level of satisfaction or dissatisfaction:

	Completely Satisfied	Satisfied	Neither Satisfied/ dissatisfied	Dissatisfied	Completely Dissatisfied
Staff assistance	☐	☐	☐	☐	☐
Adequate space in juror registration area	☐	☐	☐	☐	☐
Physical comfort of Jurors Lounge	☐	☐	☐	☐	☐
Treatment by court personnel	☐	☐	☐	☐	☐
Online eJuror services system	☐	☐	☐	☐	☐
Juror orientation video	☐	☐	☐	☐	☐
Information on delays and scheduling	☐	☐	☐	☐	☐
Information on transportation, parking, and directions	☐	☐	☐	☐	☐



If you **have not served** on a jury trial, please **SKIP to question #17**.
If you **have served** on a jury trial, please **continue** to answer all questions.

11. The following practices are used by some judges. Did the judge allow jurors to:

- Take notes during the trial ☐ Yes ☐ No ☐ Don't know
 Submit questions to witnesses during trial ☐ Yes ☐ No ☐ Don't know
 Submit questions during deliberation ☐ Yes ☐ No ☐ Don't know

12. During the trial, did the judge tell you what the schedule would be, and to follow that schedule?

- ☐ Yes ☐ No ☐ Don't know

13. If your jury was having trouble reaching a verdict, did the judge:

- ☐ Speak to you ☐ Permit the lawyers to restate their closing arguments ☐ Don't know

14. Did the judge speak to you after the jury finished its deliberations?

- ☐ Yes ☐ No ☐ Don't know

15. Did you have any difficulty:

- Understanding the evidence of the case? ☐ Yes ☐ No ☐ Don't know
 Understanding instructions by the judge? ☐ Yes ☐ No ☐ Don't know

16. Did the judge tell you what to do if a member of the media contacted you?

- ☐ Yes ☐ No ☐ Don't know

17. Do you use social media (e.g., Facebook, Twitter, Instagram, LinkedIn, etc.)?

- ☐ Yes ☐ No

18. If yes, please indicate which social media platforms that you use.

- ☐ Facebook ☐ Twitter ☐ Instagram ☐ LinkedIn ☐ Other (please specify) _____

19. Using the scale below, indicate your level of agreement or disagreement for each statement.

	Completely Agree	Agree	Neither agree/ disagree	Disagree	Completely disagree
In general, my attitude toward jury service is favorable	☐	☐	☐	☐	☐
The jury system is an efficient process	☐	☐	☐	☐	☐
If summoned in the future, I would be eager to serve	☐	☐	☐	☐	☐
Jury service was inconvenient to me	☐	☐	☐	☐	☐
Jury service was a financial burden for me	☐	☐	☐	☐	☐
Jury service interfered with my work	☐	☐	☐	☐	☐

20. Would you be willing to participate in a focus group led by the Council for Court Excellence (CCE) to discuss your jury experience?

☐ Yes ☐ No

If yes, please provide:

Name _____

Email _____ Phone _____

Demographics (optional)—please check the answer that fits you best.

21. Gender ☐ Male ☐ Female

22. Age

☐ 18-22 ☐ 23-32 ☐ 33-42 ☐ 43-52 ☐ 53-62 ☐ 63-72 ☐ Over 72

23. Marital Status

☐ Single ☐ Married ☐ Divorced ☐ Widowed

24. Ethnicity

☐ Hispanic or Latino ☐ Not Hispanic or Latino

25. Race

☐ American Indian or Alaska Native ☐ Asian ☐ Black or African American

☐ White ☐ Native Hawaiian or Pacific Islander

☐ Other (please specify) _____

26. How many years of school have you completed?

☐ Less than a high school degree ☐ High School degree or GED

☐ One to three years of college ☐ Associate's degree

☐ Bachelor's degree or higher

27. What was your approximate household income in 2013?

☐ Under \$16,500 (min. wage of \$8.25/hour or less) ☐ \$50,001 - \$70,000
☐ \$16,501- \$30,000 (min. wage to \$15/hour) ☐ \$70,001 - \$120,000
☐ \$30,001- \$50,000 (hourly wage from \$15 to \$25) ☐ Over \$120,000

28. Job Status

- | | | |
|---|---|--|
| ☐ Employed full-time | ☐ Employed part-time | ☐ Self-employed |
| ☐ Student | ☐ Unemployed | ☐ Retired |

For questions, please contact Zachary Zarnow

Phone: 202-785-5917

Email: zarnow@courtexcellence.org

Council for Court Excellence (CCE)

1111 14th Street, NW, Suite 500

Washington, DC 20005

Website: www.courtexcellence.org

SUPERIOR COURT SURVEY RESPONDENTS

DC Superior Court Jurors and Prospective Jurors

Demographics

DEMOGRAPHIC CHARACTERISTICS	TRIAL JURORS	JURY PANEL	JURY POOL
N =	97	408	572
GENDER			
Male	46.4%	35.5%	35.5%
Female	43.3%	51.5%	53.1%
Unknown	10.3%	12.9%	11.2%
AGE			
18-22	6.2%	2.7%	3.1%
23-32	29.9%	26.7%	27.6%
33-42	19.6%	21.1%	20.8%
43-52	15.5%	14.5%	14.5%
53-62	14.4%	16.4%	16.8%
63-72	9.3%	8.3%	7.7%
Over 72	0.0%	1.5%	1.0%
Unknown	6.2%	9.8%	8.4%
MARITAL STATUS			
Single	61.9%	47.1%	49.5%
Married	24.7%	36.5%	35.5%
Divorced	5.2%	4.9%	5.1%
Widowed	2.1%	1.7%	1.6%
Unknown	6.2%	9.8%	8.4%
Ethnicity			
Hispanic/Latino	4.1%	4.2%	4.5%
Not Hispanic/Latino	51.6%	53.9%	55.1%
Unknown	44.3%	41.9%	40.2%
RACE			
White	41.2%	55.4%	55.2%
Native American	0.0%	0.7%	0.9%
Asian	5.2%	2.9%	2.8%
Black	38.1%	23.3%	25.2%
HPI	1.0%	0.5%	0.5%
Other	2.1%	2.7%	2.1%

91

Unknown	12.4%	14.2%	12.9%
EDUCATION			
Less than HS	3.1%	1.5%	1.6%
HS or GED	12.4%	6.1%	7.0%
1 to 3 Years College	12.4%	7.6%	8.0%
AA/AS Degree	3.1%	2.5%	2.3%
BA/BS or Higher	61.9%	73.0%	73.1%
Unknown	7.2%	9.3%	8.0%
HOUSEHOLD INCOME			
Under \$16,500	8.2%	3.9%	4.2%
\$16,501 to \$30,000	7.2%	4.7%	4.9%
\$30,001 to \$50,000	17.5%	11.5%	11.7%
\$50,001 to \$70,000	13.4%	9.1%	10.5%
\$70,001 to \$120,000	21.6%	21.6%	22.6%
More than \$120,000	19.6%	33.3%	32.2%
Unknown	12.4%	15.9%	14.0%
EMPLOYMENT STATUS			
Unemployed	7.2%	5.6%	5.4%
Student	6.2%	4.2%	4.4%
Employed Part time	4.1%	3.7%	4.2%
Employed Fulltime	63.9%	65.7%	65.0%
Self-employed	4.1%	5.6%	6.5%
Retired	7.2%	6.1%	5.9%
Unknown	7.2%	9.1%	8.6%
SOCIAL MEDIA USE			
	62.8%	74.1%	73.4%

Expectations

	Completely Agree / Agree	Neutral	Disagree / Completely Disagree
I expected jury service to be inconvenient	62.4%	19.8%	17.7%
I thought jury service would be a financial burden	17.3%	19.8%	62.9%
I thought jury service would interfere with work	61.5%	11.5%	26.6%
I thought jury service would be boring	42.8%	25.0%	31.9%

Notes: Compared to persons not selected as trial jurors, persons selected were marginally less likely to agree that jury service would be inconvenient and significantly less likely to agree that it would interfere with work. Otherwise, there was no difference between persons selected and not selected.

Employer Policies (Does your employer have a jury service policy?)

Percent of Respondents Answering "Yes"

	Employment Status		
	Part Time (n=24)	Fulltime (n=371)	Self-Employed (n=37)
Employer has jury service policy	25.0%	79.6%	16.2%
Employer pays for jury service	29.2%	86.8%	16.2%
Satisfied with compensation	37.5%	68.5%	51.4%

Trial Practices

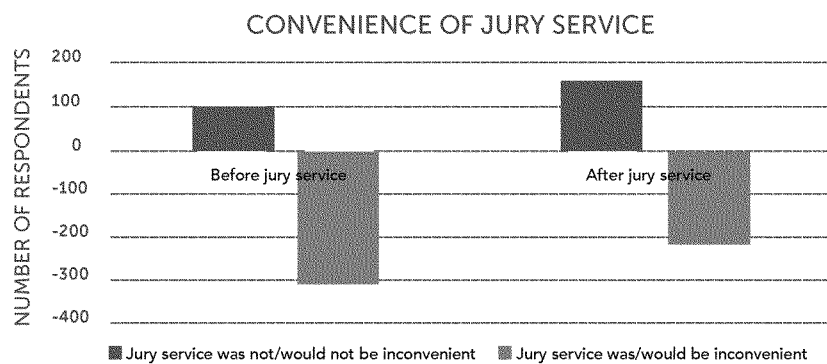
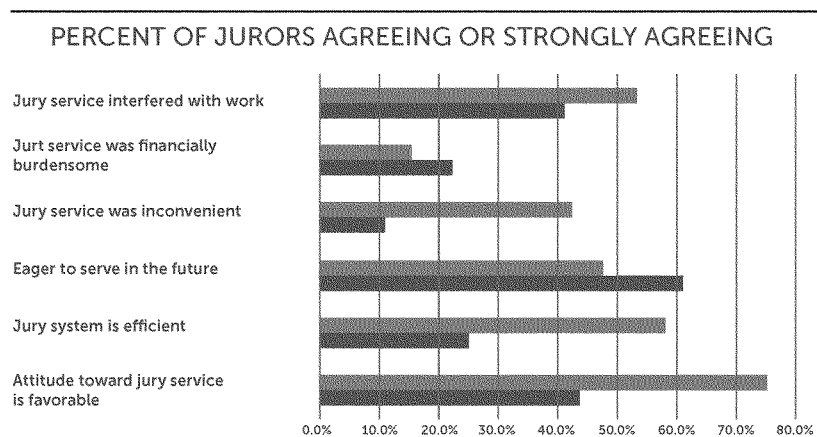
	Civil Trials (n=23)	Criminal Trials (n=66)
Judge permitted juror notetaking	47.8%	53.0%
Judge permitted juror questions to witnesses	4.3%	12.1%
Judge permitted juror questions during deliberations	39.1%	31.8%
Judge followed schedule	56.5%	69.7%
Judge spoke with jury after verdict	30.4%	36.4%
Difficulty with evidence	17.4%	6.1%
Difficulty with instructions	4.3%	9.1%
Guidance on media contact	8.7%	30.3%
Judge assisted with jury deadlock by ...		
Speaking to jury	60.9%	34.8%
Permitting lawyers to restate closing arguments	13.0%	6.1%

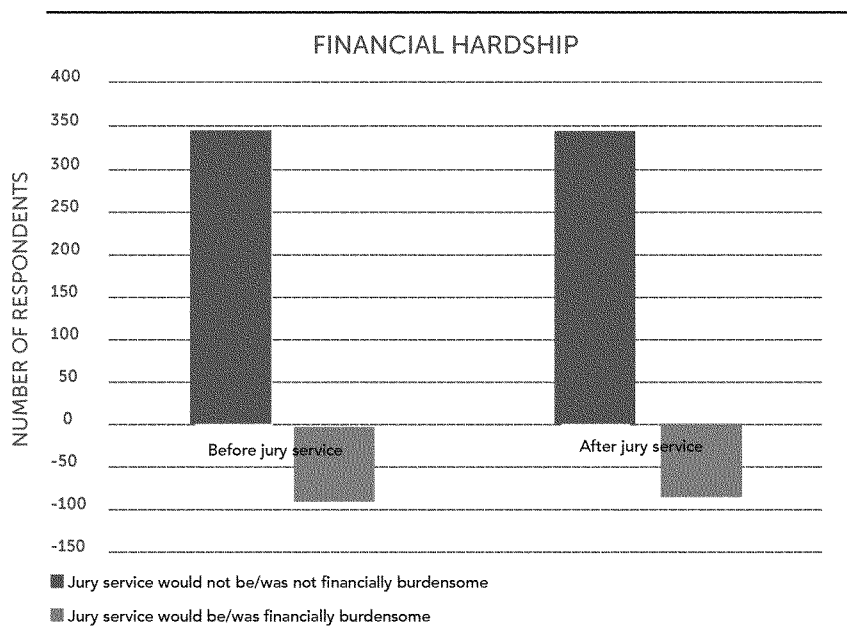
Experience Serving

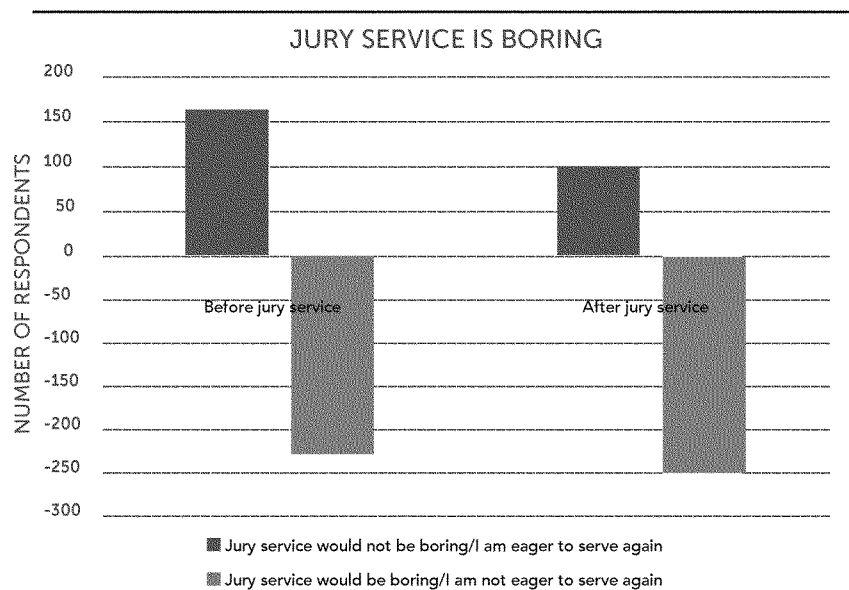
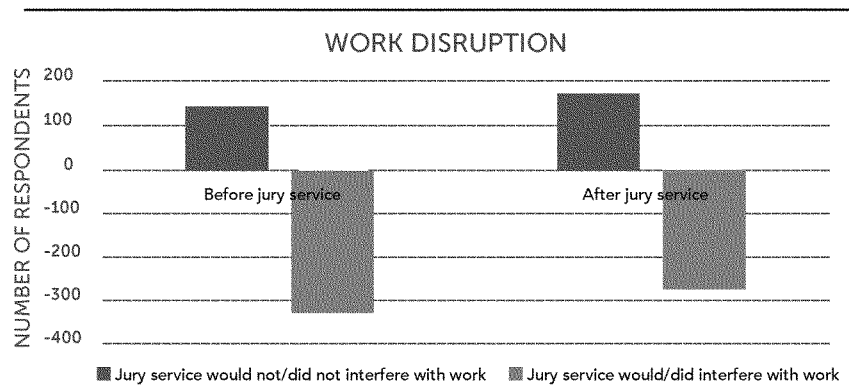
	Completely Agree / Agree	Neutral	Disagree / Completely Disagree
Attitude toward jury service is favorable	75.2%	16.1%	8.4%
Jury system is efficient	58.2%	24.0%	17.8%
Eager to serve in the future	47.6%	34.0%	18.3%
Jury service was inconvenient	42.3%	27.5%	30.2%
Jury service was financially burdensome	15.4%	21.0%	63.6%
Jury service interfered with work	53.5%	15.3%	31.2%

Note: Persons selected as trial jurors were significantly more likely to view the jury system as efficient, and significantly more likely to report that jury service was financially burdensome. There were no other statistically measurable differences between trial jurors and persons not selected as trial jurors.

Attitudinal Changes







Juror Ratings

	Completely satisfied / Satisfied	Neither Satisfied nor Dissatisfied	Dissatisfied / Completely Dissatisfied
Staff assistance	93.10%	4.10%	2.80%
Juror registration area	90.8%	5.5%	3.7%
Jurors' Lounge	81.6%	10.6%	7.8%
Treatment by court personnel	94.4%	3.7%	1.9%
Online eJuror system	71.4%	22.8%	5.8%
Orientation video	71.1%	21.2%	7.5%
Information on delays/scheduling	74.2%	21.9%	4.0%
Information on transportation/parking and directions	75.1%	20.7%	4.3%

Note: no difference in satisfaction rates based on whether respondent was sent to a courtroom for voir dire or whether the respondent was selected as a trial juror.

Superior Court Judges

Please indicate whether the following jury practices were used in your last trial:		
Answer Options	Response Percent	Response Count
Jurors were provided with note-taking materials by the court	93.8%	15
Jurors were provided with exhibit notebooks containing descriptions of trial exhibits	18.8%	3
Jurors were permitted to ask questions of witnesses	25.0%	4
Jurors were given a written copy of the jury instructions	93.8%	15
answered question		16
skipped question		1

Superior Court Order to Show Cause Hearing Participants

Your feelings toward attendance: Why did you miss jury service?

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	22 Other	7	38.9	38.9	38.9
	7 Too busy at work	2	11.1	11.1	50.0
	9 Personal illness	2	11.1	11.1	61.1
	2 Forgot	1	5.6	5.6	66.7
	4 Family illness	1	5.6	5.6	72.2
	10 Looking for work	1	5.6	5.6	77.8
	11 Lack of child care	1	5.6	5.6	83.3
	14 Lack of transportation	1	5.6	5.6	88.9
	17 Unaware of responsibilities	1	5.6	5.6	94.4
	21 More than one reason	1	5.6	5.6	100.0
	Total	18	100.0	100.0	

Your feelings toward attendance: Comments

		Frequency	Percent	Valid Per- cent	Cumulative Per- cent
Valid		10	55.6	55.6	55.6
	"I Forgot"	1	5.6	5.6	61.1
	"Rescheduled - Who arrived was not on list"	1	5.6	5.6	66.7
	"School"	1	5.6	5.6	72.2
	"Tried to defer. Told I couldn't until I was accepted"	1	5.6	5.6	77.8
	Change of Address	1	5.6	5.6	83.3
	Didn't Receive Notice	1	5.6	5.6	88.9
	Maternity Leave - Breastfeeding	1	5.6	5.6	94.4
	Misinterpreted Summons	1	5.6	5.6	100.0
	Total	18	100.0	100.0	

Order to Show Cause Hearing participants were more likely than surveyed Superior Court jurors to say that jury service interfered with work or was inconvenient, and they were less likely to say that they were eager to serve in the future. However, they were also more likely to say that jury service was efficient, that they had a favorable attitude toward jury service, and that they were less likely to say that jury service was financially burdensome. These findings are surprising, but given the small sample size of Order to Show Cause Hearing participants these data might just reflect the idiosyncratic views of the respondents.

US DISTRICT COURT FOR DC

Selected Jurors and Prospective Jurors Not Selected during Voir Dire

Demographics

DEMOGRAPHIC CHARACTERISTICS	TRIAL JURORS	EDUCATION	
N =	66	Less than HS	0.0%
GENDER		HS or GED	6.1%
Male	30.3%	1 to 3 Years College	6.1%
Female	39.1%	AA/AS Degree	4.5%
Unknown	30.3%	BA/BS or Higher	51.5%
AGE		Unknown	30.3%
18-22	0.0%	HOUSEHOLD INCOME	
23-32	12.1%	Under \$16,500	1.5%
33-42	16.7%	\$16,501 to \$30,000	3.0%
43-52	15.2%	\$30,001 to \$50,000	7.6%
53-62	12.1%	\$50,001 to \$70,000	12.1%
63-72	10.6%	\$70,001 to \$120,000	16.7%
Over 72	3.0%	More than \$120,000	21.2%
Unknown	30.3%	Unknown	37.9%
MARITAL STATUS		EMPLOYMENT STATUS	
Single	28.8%	Unemployed	1.5%
Married	28.8%	Student	0.0%
Divorced	6.1%	Employed Part time	1.5%
Widowed	1.5%	Employed Fulltime	53.0%
Unknown	34.8%	Self-employed	0.0%
ETHNICITY		Retired	10.6%
Hispanic/Latino	4.5%	Unknown	33.3%
Not Hispanic/Latino	40.9%	SOCIAL MEDIA USE	62.8%
Unknown	54.5%		
RACE			
White	27.3%		
Native American	0.0%		
Asian	6.1%		
Black	28.8%		
HPI	1.8%		
Other	3.0%		
Unknown	33.3%		

Expectations

	Completely Agree / Agree	Neutral	Disagree / Completely Disagree
I expected jury service to be inconvenient	51.6%	27.4%	20.9%
I thought jury service would be a financial burden	12.9%	19.4%	67.7%
I thought jury service would interfere with work	54.8%	19.4%	25.8%
I thought jury service would be boring	22.6%	32.3%	45.1%

Employer Policies

Percent of Respondents Answering "Yes"

	Employment Status	
	Part Time (n=1)	Fulltime (n=29)
Employer has jury service policy	0.0%	71.4%
Employer pays for jury service	0.0%	62.9%
Satisfied with compensation	100.0%	77.1%

Service Days

NUMBER OF DAYS REPORTING (N=66)	
One	9.1%
Two	0.0%
Three to five	39.4%
More than 5	45.4%
Unknown	6.1%

NUMBER OF COURTROOMS FOR JURY SELECTION (N=66)	
None	4.5%
One	80.3%
Two	4.5%
Three to five	3.0%
More than 5	1.5%
Unknown	6.1%

CASE TYPES (N=406)	
Civil	63.6%
Criminal	28.8%
Don't Know	7.6%

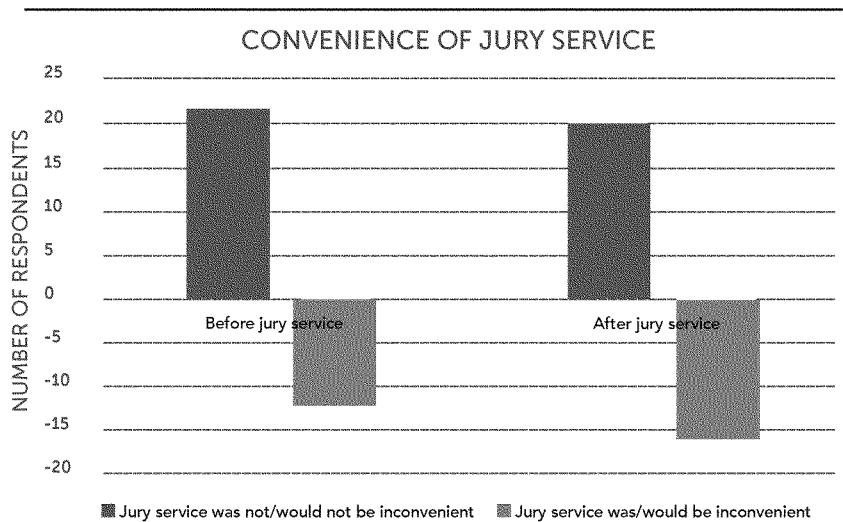
Trial Practices

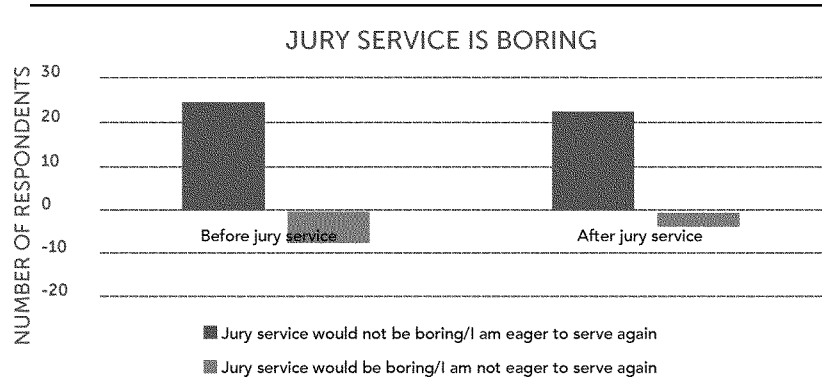
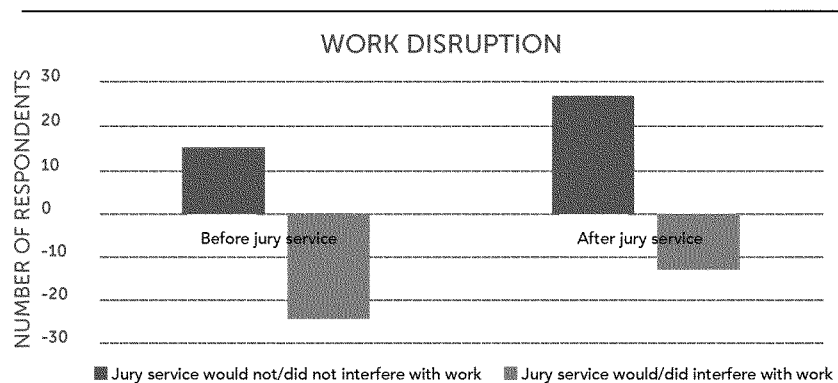
	Civil Trials (n=42)	Criminal Trials (n=19)
Judge permitted juror notetaking	69.0%	100.0%
Judge permitted juror questions to witnesses	11.1%	7.1%
Judge permitted juror questions during deliberations	64.3%	78.9%
Judge followed schedule	78.6%	94.7%
Judge spoke with jury after verdict	66.7%	89.5%
Difficulty with evidence	23.8%	10.5%
Difficulty with instructions	7.1%	15.8%
Guidance on media contact	33.3%	78.9%
Judge assisted with jury deadlock by ...		
Speaking to jury	11.9%	63.2%
Permitting lawyers to restate closing arguments	4.8%	0.0%

Experience

	Completely Agree / Agree	Neutral	Disagree / Completely Disagree
Attitude toward jury service is favorable	95.7%	4.3%	0.0%
Jury system is efficient	72.3%	19.1%	8.5%
Eager to serve in the future	52.9%	34.0%	12.8%
Jury service was inconvenient	46.8%	19.1%	34.0%
Jury service was financially burdensome	8.5%	12.8%	78.7%
Jury service interfered with work	58.7%	10.9%	30.4%

Attitudinal Changes





District Court Judges***Would you say the jury in your last jury trial was:***

Answer Options	Completely Agree	Agree	Neither agree/disagree	Disagree	Completely disagree	Response Count
Highly engaged and focused during the trial	13	4	0	0	0	17
Able to understand the facts in the case	14	3	0	0	0	17
Able to understand the law in the case	12	5	0	0	0	17
answered question						17
skipped question						0

Please indicate whether the following jury practices were used in your last trial:

Answer Options	Response Percent	Response Count
Jurors were provided with note-taking materials by the court	100.0%	17
Jurors were provided with exhibit notebooks containing descriptions of trial exhibits	17.6%	3
Jurors were permitted to ask questions of witnesses	17.6%	3
Jurors were given a written copy of the jury instructions	94.1%	16
answered question		17
skipped question		0

Have you experienced jurors who used technology, including social media (e.g., Facebook, Twitter, Instagram, etc.), in an unauthorized way to:

Answer Options	Yes	No	Don't Know	Response Count
Seek out information about the case or its elements?	8	8	1	17
Disclose information about the case or the juror's view on the case prior to the verdict?	1	12	2	15
answered question				17
skipped question				0

<i>Did you specifically discuss the unauthorized use of technology and social media with jurors in your last jury trial?</i>		
Answer Options	Response Percent	Response Count
Yes	100.0%	17
No	0.0%	0
Don't Know	0.0%	0
answered question		17
skipped question		0

<i>Please rate the importance of the following proposals to increase juror turnout and satisfaction:</i>						
Answer Options	Most Important	Important	Neither un/important	Unimportant	Least important	Response Count
Improving child care at the courthouse	3	4	2	1	1	11
Raising juror pay	4	2	5	0	0	11
Raising the transportation allowance	3	6	2	0	0	11
Improving facilities for jurors	2	2	4	3	0	11
Reducing the number of jurors who arrive for service	3	1	4	2	0	10
Improving the ability of jurors to schedule their jury duty	4	7	1	0	0	12
Increasing the amount of information provided to jurors when called for service	3	5	4	0	0	12
Creating a smartphone app to give information to jurors prior to their service	3	3	5	1	0	12
Launching a campaign promoting jury service	4	2	4	0	0	10
Launching a jury appreciation advertising campaign	4	4	2	1	0	11
Increasing enforcement against jurors who ignore summons	3	4	1	2	0	10
Encouraging employers to adopt more jury-friendly policies	5	8	0	0	0	13
answered question						13
skipped question						4

Follow-up Survey of District Court Judges Regarding Jurors Asking Questions and Post-Trial Communications

Please indicate whether you permit jurors to submit questions to the court to ask witnesses:

Answer Options	Response Percent	Response Count
Only in civil trials	11.1%	1
Only in criminal trials	0.0%	0
In both civil and criminal trials	11.1%	1
I do not permit jurors to submit questions	44.4%	4
Comments?	33.3%	3
answered question		9
skipped question		0

When you permit jurors to submit questions do you give the instruction in the "red book":

Answer Options	Response Percent	Response Count
In criminal cases only	0.0%	0
In civil cases only	25.0%	2
In both civil and criminal cases	0.0%	0
I do not permit jurors to submit questions	62.5%	5
Other (please specify)	12.5%	1
answered question		8
skipped question		1

Consistent with your answers to the previous questions, when you do permit jurors to submit questions, do you do so:

Answer Options	Response Percent	Response Count
Routinely	0.0%	0
Only when asked to do so by a party to the case	12.5%	1
Only when asked by the jurors if they are permitted to ask questions	0.0%	0
Only in complex cases	12.5%	1
Not applicable (I never allow jurors to ask questions)	62.5%	5
Other (please specify)	12.5%	1
answered question		8
skipped question		1

In your experience, has permitting jurors to submit questions aided one side in litigation more consistently than the other? (select all that apply)

Answer Options	Response Percent	Response Count
In criminal cases it more consistently aides the prosecution	0.0%	0
In criminal cases it more consistently aides the defendant	0.0%	0
In civil cases it more consistently aides the plaintiff	12.5%	1
In civil cases it more consistently aides the defendant	0.0%	0
Neither side is more consistently aided in criminal cases	12.5%	1
Neither side is more consistently aided in civil cases	25.0%	2
Not applicable (I do not allow jurors to ask questions)	62.5%	5
Other (please specify)	0.0%	0
answered question		8
skipped question		1

Do you typically grant requests by counsel to engage in post-trial communications with jurors?

Answer Options	Response Percent	Response Count
I typically grant such requests	44.4%	4
I typically do not grant such requests	11.1%	1
Other (please specify)	44.4%	4
answered question		9
skipped question		0

When you do grant requests for post-trial communications, do you:

Answer Options	Response Percent	Response Count
Observe but not participate in the discussion	0.0%	0
Observe and participate in the discussion	33.3%	3
Not observe, but require the presence of a clerk or court employee	55.6%	5
Not observe	11.1%	1
Other (please specify)	22.2%	2
answered question		9
skipped question		0

<i>Do you believe the District Court rule requiring Court approval for such communications should continue?</i>		
Answer Options	Response Percent	Response Count
Yes	100.0%	9
No	0.0%	0
Comments?		2
	answered question	9
	skipped question	0

Attorneys

Percent of respondents who indicated that ...

Jurors were given notetaking materials	67%
Jurors were given an notebook	18%
Jurors were permitted to ask questions of witnesses	12%
Jurors were given written jury instructions	45%

Jurors in civil trials were marginally more likely to be given notetaking materials, and significantly more likely to be given copies of jury instructions

Jurors who were given notetaking materials were marginally more likely to be perceived as engaged and focused during the trial

Jurors who were given written jury instructions were significantly more likely to be perceived as engaged and focused during the trial.

NOTE: No effect of decision-making aids on perceptions of juror comprehension of the facts or the law

Percent of respondents who reported that ...

	Yes	No	DK
I have experienced jurors using technology to research the case	9%	31%	60%
I have experienced jurors using technology to disclose information about the case	3%	34%	62%
Jurors were instructed about inappropriate use of technology in my last jury trial	61%	16%	22%

No difference based on respondent court type.

Compared to respondents in civil trials, respondents in criminal trials were significantly more likely to report that jurors were instructed about inappropriate use of technology in their last jury trial.

Criminal defense attorneys were the most likely to report that they had experienced jurors using technology inappropriately (42% research, 27% disclosing information); all other respondent types were 20% or lower .

	No	Yes
--	----	-----

Jury reflected demographic diversity of DC	44%	55%
--	-----	-----

Respondents who practice in USDC were significantly more likely than respondents who practice in DCSC to report that the jury venire reflected the demographic diversity of DC.

There was no difference in respondent reports based on trial type.

Average rating of importance of jury improvement efforts

Encourage juror-friendly employment policies	4.12
Improving juror scheduling ability	3.87
Enforce jury summons (FTA follow up)	3.60
Juror compensation	3.57
Transportation allowance	3.57
Launch a public education campaign	3.55
Increased information about jury service	3.43
Childcare	3.36
Develop a smartphone app for jury service	3.26
Launch a juror appreciation campaign	3.20
Juror facilities	3.16
Reducing number of jurors reporting	2.95

Respondents who practice in USDC rated the importance of reducing the number of jurors who report for service and increasing the amount of information about jury service marginally higher, and rated increasing the transportation allowance marginally lower, than respondents who practice in DCSC.

Civil attorneys were the least likely to rate childcare as an important effort; judges were the most likely to rate FTA enforcement as an important effort.

EMPLOYERS

<i>What type of employer are you?</i>		
Answer Options	Response Percent	Response Count
Food Service	2.8%	2
Non-profit	30.6%	22
Government	5.6%	4
Retail	1.4%	1
Health Care	1.4%	1
Legal	34.7%	25
Utility	0.0%	0
Construction	0.0%	0
Manufacturing	0.0%	0
Transportation	1.4%	1
Finance/Banking	1.4%	1
Insurance	2.8%	2
Real Estate	0.0%	0
Science/Technology	1.4%	1
Education	4.2%	3
Arts/Entertainment	0.0%	0
Agriculture	0.0%	0
Other (please specify)	12.5%	9
answered question		72
skipped question		0

How many employees do you have?		
Answer Options	Response Percent	Response Count
1-5	16.7%	12
5-10	8.3%	6
10-15	5.6%	4
15-20	2.8%	2
20-30	0.0%	0
30-40	2.8%	2
40-50	4.2%	3
50-60	1.4%	1
60-70	2.8%	2
70-80	1.4%	1
80-90	1.4%	1
90-100	2.8%	2
100-200	11.1%	8
200-400	9.7%	7
≥400	0.0%	0
≥500	0.0%	0
≥700	5.6%	4
≥1,000	23.6%	17
answered question		72
skipped question		0

Do you have an established policy regarding employees summoned for jury duty?		
Answer Options	Response Percent	Response Count
Yes	88.4%	61
No	8.7%	6
Don't Know	2.9%	2
answered question		69
skipped question		3

How do you inform employees about the jury duty policy?

Answer Options	Response Percent	Response Count
Employee handbook	63.8%	44
New-employee orientation	5.8%	4
Upon request by employee	10.1%	7
Other (please specify)	20.3%	14
answered question		69
skipped question		3

Which classifications of employees are compensated for days absent from work for jury duty?

Answer Options	Response Percent	Response Count
All	81.7%	49
Full-time salaried	10.0%	6
Full-time hourly	0.0%	0
Part-time hourly	0.0%	0
Part-time salaried	0.0%	0
Other (please specify)	8.3%	5
answered question		60
skipped question		12

What portion of employees' regular wages does the jury duty policy cover for days absent?

Answer Options	Response Percent	Response Count
None	4.6%	3
Half	1.5%	1
Full	80.0%	52
Other (please specify)	13.8%	9
answered question		65
skipped question		7

Are employees required to forfeit to the company any compensation received from the Court for jury service?

Answer Options	Response Percent	Response Count
Yes	34.4%	21
No	65.6%	40
If yes, please describe what percentage and any exceptions		12
answered question		61
skipped question		11

How many days will employees be paid while they are absent for jury duty?

Answer Options	Response Percent	Response Count
None	1.5%	1
1	4.6%	3
2	1.5%	1
3	1.5%	1
4	3.1%	2
5	6.2%	4
More than five (please specify)	81.5%	53
answered question		65
skipped question		7

Do you require employees to provide proof that they were summoned for jury duty?

Answer Options	Response Percent	Response Count
Yes	81.5%	53
No	10.8%	7
Don't know	7.7%	5
answered question		65
skipped question		7

<i>How do you categorize days employees are absent for jury duty?</i>		
Answer Options	Response Percent	Response Count
Unpaid vacation time	0.0%	0
Paid vacation time	3.1%	2
Administrative leave	44.6%	29
Holiday	0.0%	0
Sick leave	0.0%	0
Other (please specify)	52.3%	34
answered question		65
skipped question		7

Court Observations

Findings from Voir Dire Observations

Court observers watched 26 jury selections, four in the US District Court and 22 in the DC Superior Court. Twelve of the trials were criminal trials; 14 were civil trials. The average length of jury selection was just under 2 hours for civil trials (112 minutes), but nearly 3.5 hours for criminal trials (209 minutes). This was a statistically significant difference ($F=8.021$, $p=.012$). The longest jury selection recorded was nearly 5 hours (285 minutes) for two cases (one civil case in the District Court, one criminal case in the Superior Court).

The data included information 10 cases about the amount of time that passed from when the jury panel left the jury assembly room to when jury selection officially began in the courtroom. Fifty percent of the jury selections began 20 minutes or less after the jury panel left the jury assembly room in the courthouse. Only 2 cases began more than 30 minutes later (35 minutes, and 60 minutes, respectively).

The court observers took note of the apparent gender, race, and ethnicity of jurors on the jury panels. Although not generally the most accurate method for assessing demographic identification, observers did not have access to demographic information recorded in the courts' jury management systems. Table 1 shows the average demographic composition of the jury pools based on those observations. Jury panels in the US District Court had a much greater proportion of women compared to men (61% versus 39%) while the gender breakdown was approximately equal in the DC Superior Court. The difference in gender breakdown for the two courts was statistically significant. Jury panels in the DC Superior Court had marginally greater proportions of white jurors, but it is unknown whether this is an actual difference or resulted from errors on the part of the courtroom observers. No other statistically significant differences were observed for other races/ethnicities.

Table 1: Demographic Composition of Jury Panels

	USDC	DCSC	
Male	39%	51%	**
Female	61%	49%	**
White	52%	62%	*
Black	38%	31%	
Asian	4%	3%	
Other	0%	2%	
Hispanic	5%	3%	

* $p < .1$

** $p < .05$

The vast majority of judges (88%) in these trials adequately explained the jury selection process.¹ Table 2 describes the observers' assessments of courtroom management during jury selection. Judges in both courts were rated very highly (generally good or excellent) on all measures. Although observers rated the US District Court somewhat higher, only the assessments of the explanation of rules and procedures was marginally different between the two courts; differences for all other assessments were not statistically significant.

¹ Only three observers reported that the judge did not explain voir dire. All of these cases were criminal trials in the DC Superior Court.

Table 2: Observer Assessments of Voir Dire Management
(mean rating on a scale of 1-5, with 5 being highest)

	USDC	DCSC
Control of Courtroom	5.0	4.7
Time Management	4.5	4.2
Politeness	5.0	4.5
Explanation of Rules/Procedures	5.0	4.3 *

$p < .1$

In 23 of the 26 trials, the judge summarized the case for the jurors at the beginning of jury selection; this information was missing for the remaining three trials. Most judges provided paper and writing utensils for jurors to use during voir dire, and approximately two-thirds (69%) provided index cards for jurors to signal affirmative answers to questions. Very few judges used preprinted forms, juror questionnaires, or electronic aids during jury selection. Table 3 summarizes the materials provided to jurors for conducting voir dire.

**Table 3: Proportion of trials
in which materials were
provided to jurors for voir
dire**

Paper	81%
Writing utensils	89%
Index cards	69%
Forms	12%
Questionnaires	15%
Electronic aids	4%

In both courts, judge-conducted voir dire dominated the jury selection process (81% of trials). Most of the voir dire questions were delivered orally (85%). Two-thirds of the jurors (69%) responded in a bench conference and slightly more than one-quarter (27%) responded orally. In a small proportion of trials, judges asked prospective jurors to write their answers on index cards, which were then shared with the judge and attorneys during bench conferences.

When bench conferences were conducted, two-thirds of judges (69%) used noise machines to mask the conversation from the public, and more than half (55%) provided headphones to defendants to be able to listen to the bench conferences. At the conclusion of voir dire, 58% of judges thanked the jurors selected for trial, and 62% thanked the jurors who were not selected.

Findings from Trial Observations

Court observers watched 24 trials, five in the US District Court and 19 in the DC Superior Court. Sixteen of the trials were criminal trials; eight were civil trials. The average trial length was 3 days for both civil and criminal trials; the longest trial was 8 days (criminal trial in the DC Superior Court).

Table 4 shows the demographic composition of the impaneled juries. Like the jury pools from which they were selected, the juries in the US District Court have a much greater gender imbalance than those of the DC Superior Court. Interestingly, Hispanic representation in the District Court juries is considerably greater (13%) than that in the jury pools from which they were selected (5%). In the DC Superior Court, the racial demographics of the impaneled juries are considerably close to that of the local community than would be expected given the demographics of the jury pools. However, this is a small sample of trials and may not reflect the demographic composition of most juries in these courts.

Table 4: Demographic Composition of Juries

	USDC	DCSC	
Male	36%	54%	**
Female	64%	46%	**
White	36%	47%	
Black	31%	38%	
Asian	5%	2%	
Other	3%	1%	
Hispanic	13%	2%	***

* $p < .1$

** $p < .05$

*** $p < .01$

Table 5 shows the proportion of trials in which various jury trial innovations were employed. The US District Court appears to be more consistent across trials concerning these procedures than the DC Superior Court, but there was no statistically significant difference in the use of these procedures.

Table 5: Trial Procedures

	USDC	DCSC
Judge explained voir dire	100%	82%
Judge followed trial schedule	100%	88%
Jurors were given notetaking materials	100%	100%
Jurors were permitted to take notes	100%	100%
Juror questions to witnesses permitted	0%	26%
Juror questions during deliberations permitted	50%	50%
Judge gave interim summations	100%	89%
Attorneys gave interim summations	50%	65%
Written copies of jury instructions	75%	53%
Copies of witness photographs	0%	6%
Electronic exhibits displayed	100%	95%
Electronic exhibits available during deliberations	0%	0%

The US District Court was also consistent in the use of admonitions concerning juror use of social media, repeating the admonition periodically during the trial. The DC Superior Court, in contrast gave the admonition in less than two-thirds of the trials, usually at the beginning of the trial and, in half the trials, at the end of the trial. See Table 6.

Table 6: Social Media Admonitions

	USDC	DCSC	
Social media admonition given	100%	58%	*
beginning of trial	100%	61%	
during trial	100%	28%	***
end of trial	100%	50%	
compliance confirmation	0%	12%	

* $p < .1$

** $p < .05$

*** $p < .01$

Overall, observers gave judges in both courts relatively high ratings concerning trial management practices. See Table 7.

Table 7: Observer Assessments of Trial Management
(mean rating on a scale of 1-5, with 5 being highest)

	USDC	DCSC	
Control of Courtroom	5.0	4.7	
Time Management	5.0	4.5	*
Politeness	4.6	4.6	
Explanation of Rules/Procedures	4.2	4.2	

$p < .1$

HELPFUL RESOURCES

ORGANIZATIONS

National Center for State Courts (NCSC)

<http://www.ncsc.org/>

American Board of Trial Advocates (ABOTA)

<https://www.abota.org/>

American Bar Association

<http://www.americanbar.org/aba.html>

American Judicature Society

<https://www.ajs.org>

PUBLICATIONS

"Juries for the Year 2000 and Beyond"

Council for Court Excellence

District of Columbia Jury Project

<http://www.courtexcellence.org/uploads/publications/Juries2000.pdf>

"Short, Summary and Expedited: The Evolution of Civil Jury Trials"

National Center for State Courts

<http://www.ncsc.org/~media/Files/PDF/Information%20and%20Resources/Civil%20cover%20sheets/ShortSummaryExpedited-online%20rev.ashx>

"The State-of-the-States Survey of Jury Improvement Efforts: A Compendium Report"

National Center for State Courts

<http://www.ncsc-jurystudies.org/~media/Microsites/Files/CJS/SOS/SOSCompendiumFinal.ashx>

Voir Dire Magazine

American Board of Trial Advocates

<https://www.abota.org/index.cfm?pg=voirdire>

"Be Cautious of the Quiet Ones"

Gregory E. Mize

Voir Dire Magazine

<http://www.thefederation.org/documents/36%20-%20Mize4.pdf>

"The Exclusion of Felons from Jury Service"

Brian C. Kalt

American University Law Review

<http://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=1090&context=aulr>

123

"Principles for Juries and Jury Trials"

American Bar Association

<http://www.americanbar.org/content/dam/aba/migrated/juryprojectstandards/principles.authcheckdam.pdf>

"Dialogue on the American Jury: We the People in Action"

American Bar Association

http://www.americanbar.org/groups/judicial/american_jury/resources/dialogue_on_the_american_jury.html

"Why Jury Duty Matters: A Citizen's Guide to Constitutional Action"

Andrew Ferguson

"Juror Reactions to Jury Duty: Perceptions of the System and Potential Stressors"

Behavioral Sciences and the Law

<http://digitalcommons.unl.edu/cgi/viewcontent.cgi?article=1159&context=psychfacpub>

"Reluctant Jurors: What Summons Responses Reveal About Jury Duty Attitudes"

Susan Carol Losh; Adina W. Wasserman; Michael A. Wasserman

Judicature, Volume 83, Number 6 (2000)

"Why Citizens Don't Respond to Jury Summonses and What Courts Can Do About It"

Robert G. Boatright

Judicature, Volume 82, Number 156 (1999)

MISCELLANEOUS

Jur-E Bulletin

National Center for State Courts

<http://www.ncsc.org/jure>

Jury Service FAQ

United States District Court for the District of Columbia

<http://www.dcd.uscourts.gov/dcd/sites/dcd/files/jury-FAQ.pdf>

Jury Service FAQ

DC Superior Court

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United States Senate
Committee on the Judiciary

Questionnaire for Judicial Nominees
Attachments to Question 12(c)

Ketanji Brown Jackson
Nominee to be Associate Justice
of the Supreme Court of the United States

**Response to Question for the Record from Senator Dick Durbin, Chair, Senate Judiciary
Committee to Judge Ketanji Brown Jackson, Nominee to the
United States Court of Appeals for the D.C. Circuit**

1. The Judiciary Committee has received a number of letters of support from conservatives who have worked and clerked with you. As I mentioned during your hearing, Judge Thomas Griffith— an appointee of President George W. Bush who retired from the bench last year—wrote to the Committee: “Although [Judge Jackson] and I have sometimes differed on the best outcome of a case, I have always respected her careful approach and agreeable manner, two indispensable traits for success in a collegial body.”

The Committee also received a letter signed by 23 Supreme Court law clerks who clerked alongside you during the October 1999 Term. The 23 signatories included clerks to Chief Justice Rehnquist and Justices Scalia, Thomas, Kennedy, and O’Connor, among others.

Please describe the importance you place on working with colleagues who may have different views or who may approach an issue differently than you do.

RESPONSE: I have had the privilege of working alongside people who have a variety of viewpoints about the law and legal analysis throughout my professional career. As a Supreme Court law clerk, for example, I evaluated complex legal issues and regularly exchanged significant insights with the clerks of other Justices. Similarly, my work in both private practice and on the Sentencing Commission (a bi-partisan policymaking body by statute) routinely required me to consider, assess, and incorporate the views and concerns of brilliant lawyers and judges with different backgrounds and perspectives. Taking into account the views of others helped me to formulate my own perspective on the issues we were considering. And the skills that I developed while engaging in such interactions should serve me well on the circuit court, if I am confirmed. Because the D.C. Circuit often address complicated and potentially contentious legal issues, the ability to listen with an open mind to other points of view, and to be respectful even if a judge ultimately disagrees with another judge’s analysis or conclusions, is crucial to the effective operation of the court, and, ultimately, maintains public trust in the court as an institution.

**Responses to Questions for the Record from Senator Chuck Grassley, Ranking Member
to Judge Ketanji Brown Jackson, Nominee to the
United States Court of Appeals for the D.C. Circuit**

1. Are you aware of the dark money left wing group Demand Justice?
 - a. Are you aware that you are on their “shortlist” for the Supreme Court?
 - b. Are you aware that when the group initially released their list on October 15, 2019 you were not on the list?¹
 - c. Do you have any idea why you were added to the list after originally being left off of it?
 - d. Have you had any conversations with anyone associated with Demand Justice since October 15, 2019?

RESPONSE: I am aware that the group Demand Justice has compiled a Supreme Court “shortlist.” I am also aware that I was not on the first iteration of that list, and that I am now listed. I do not know why I was added to the list. Chris Kang, who I understand is affiliated with Demand Justice, is among the many people who offered me congratulations on this nomination. I met Mr. Kang when he served as chief judicial nominations counsel to President Obama in 2012, when I was nominated to be a U.S. District Judge. That is the only communication that is responsive to this question.

2. What is an *Irons* footnote?

RESPONSE: An *Irons* footnote is a mechanism by which a panel of the D.C. Circuit can overrule a circuit precedent that, “due to an intervening Supreme Court decision, or the combined weight of authority from other circuits, . . . is clearly an incorrect statement of current law.” D.C. Circuit Policy Statement on *En Banc* Endorsement of Panel Decisions (“*Irons* Footnote Policy”) at 1 (Jan. 17, 1996) (alteration omitted); see also *Irons v. Diamond*, 670 F.2d 265, 267–68 & n. 11 (D.C. Cir.1981). D.C. Circuit panels are permitted to use *Irons* footnotes when “the circumstances of the case or the importance of the legal questions presented do not warrant the heavy administrative burdens of full en banc hearing.” *Irons* Footnote Policy at 1; see also *Oakey v. U.S. Airways Pilots Disability Income Plan*, 723 F.3d 227, 232 (D.C. Cir. 2013).

3. What is *Skidmore* deference? Can you summarize the D.C. Circuit’s current *Skidmore* jurisprudence?

RESPONSE: *Skidmore* deference refers to the Supreme Court’s conclusion that a court may defer to an agency’s interpretation of a statute that the agency itself administers, when that agency interpretation is not set forth in a document that has the force of law (i.e., not a rule or adjudication). When *Skidmore* deference is applicable,

¹ Available at <https://demandjustice.org/demand-justice-releases-supreme-court-shortlist-of-diverse-progressive-lawyers/>.

the agency's "interpretation is 'entitled to respect' only to the extent it has the 'power to persuade.'" *Gonzales v. Oregon*, 546 U.S. 243, 256 (2006) (quoting *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)); see also *Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 159 (2012) (explaining that a court applying *Skidmore* deference accords the agency's interpretation "a measure of deference proportional to the 'thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade'" (quoting *United States v. Mead Corp.*, 533 U.S. 218, 228 (2001))). The D.C. Circuit's current *Skidmore* jurisprudence is consistent with the Supreme Court's articulation of the doctrine. See, e.g., *Indian River Cty. v. U.S. Dep't of Transp.*, 945 F.3d 515, 531 (D.C. Cir. 2019) ("When an agency's interpretation of a statute has been binding on agency staff for a number of years, and it is reasonable and consistent with the statutory framework, deference to the agency's position is due under *Skidmore*."); *Orton Motor, Inc. v. U.S. Dep't of Health & Hum. Servs.*, 884 F.3d 1205, 1211 (D.C. Cir. 2018) ("Ultimately, a court will uphold an agency determination under *Skidmore* if it is persuasive.").

4. What is *Chevron* deference? Can you summarize the D.C. Circuit's current *Chevron* jurisprudence?

RESPONSE: I have applied the *Chevron* deference doctrine in at least 11 of my written opinions. See, e.g., *Las Americas Immigrant Advoc. Ctr. v. Wolf*, 2020 WL 7039516, at *13 (D.D.C. Nov. 30, 2020); *Otay Mesa Prop., L.P. v. Dep't of the Interior*, 344 F. Supp. 3d 355, 368 (D.D.C. 2018); *Depomed, Inc. v. Dep't of Health & Hum. Servs.*, 66 F. Supp. 3d 217, 229 (D.D.C. 2014); *Am. Meat Inst. v. Dep't of Agric.*, 968 F. Supp. 2d 38, 52 (D.D.C. 2013). *Chevron* deference refers to the Supreme Court's requirement that "a court review[ing] an agency's construction of the statute which it administers" must defer to the agency's authoritative interpretation of that statute in certain circumstances. *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842 (1984). An agency's statutory interpretation "qualifies for *Chevron* deference when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority." *United States v. Mead Corp.*, 533 U.S. 218, 226–27 (2001). In order to determine whether or not to defer under *Chevron*, courts must employ a two-step process. The court decides, first, "whether Congress has directly spoken to the precise question at issue[.]" using "traditional tools of statutory construction[.]" *Chevron*, 467 U.S. at 842, 843 n.9. "If the intent of Congress is clear," the court "must give effect to the unambiguously expressed intent of Congress." *Id.* at 842–43. But "if the statute is silent or ambiguous with respect to the specific issue," the court must proceed to determine whether the agency's interpretation is "based on a permissible construction of the statute[.]" *id.* at 843, and, if so, the court must defer to the agency's interpretation. The D.C. Circuit's current *Chevron* jurisprudence is consistent with the Supreme Court's articulation of the doctrine. See, e.g., *Murray Energy Corp. v. EPA*, 936 F.3d 597, 608 (D.C. Cir. 2019) (recognizing that, "[o]n questions of statutory interpretation, the court must review [the agency's] actions in

accordance with the standard set forth in” *Chevron*); *see also id.* (reiterating that “*Chevron* deference involves a two-step analysis.”).

5. What is *Auer* deference? Can you summarize the D.C. Circuit’s current *Auer* jurisprudence?

RESPONSE: *Auer* deference is a doctrine that instructs courts to “defer[] to agencies’ reasonable readings of genuinely ambiguous regulations.” *Kisor v. Wilkie*, 139 S. Ct. 2400, 2408 (2019) (citing *Auer v. Robbins*, 519 U.S. 452 (1997); *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410 (1945)). Recently, in *Kisor v. Wilkie*, the Supreme Court clarified the circumstances under which *Auer* deference is warranted, holding that “a court should not afford *Auer* deference unless” the court determines that “the regulation is genuinely ambiguous” after “exhaust[ing] all the ‘traditional tools’ of construction.” *Id.* at 2415. And even “[i]f genuine ambiguity remains,” deference is only required when “the agency’s reading” is “reasonable”—*i.e.*, “it must come within the zone of ambiguity the court has identified after employing all its interpretive tools.” *Id.* at 2415–16. An agency’s interpretation of its regulations “must [also] be the agency’s ‘authoritative’ or ‘official position,’” as well as “in some way implicate its substantive expertise[,]” to qualify for *Auer* deference. *Id.* at 2416–17. The Supreme Court has further explained that *Auer* deference would not be warranted if the reviewing “court concludes that an interpretation does not reflect an agency’s authoritative, expertise-based, fair, or considered judgment[,]” *id.* at 2414 (internal quotation marks, alteration, and citation omitted), and is instead “a merely convenient litigating position or *post hoc* rationalization advanced to defend past agency action against attack[,]” *id.* at 2417 (internal quotation marks, alteration, and citation omitted). The D.C. Circuit’s current *Auer* jurisprudence is consistent with the Supreme Court’s articulation of the doctrine. For instance, the D.C. Circuit recently maintained that “[a]n agency may receive deference when it reasonably interprets its own ‘genuinely ambiguous’ regulations.” *Nat’l Lifeline Ass’n v. FCC*, 983 F.3d 498, 507 (D.C. Cir. 2020) (quoting *Kisor*, 139 S. Ct. at 2414); *see also id.* (emphasizing that “if there is only one reasonable construction of a regulation—then a court has no business deferring to any other reading, no matter how much the agency insists it would make more sense” (quoting *Kisor*, 139 S. Ct. at 2415)).

6. Is there an analytical difference between *Auer* deference and *Seminole Rock* deference?

RESPONSE: In *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410 (1945), the Supreme Court held that a federal court must defer to an agency’s interpretation of a regulation that the agency administers. It appears that the Court has historically treated the *Seminole Rock* deference standard and as interchangeable shorthand for the same idea that it expressed in its subsequent articulation of *Auer* deference: “This Court has often deferred to agencies’ reasonable readings of genuinely ambiguous regulations” and “[w]e call that practice *Auer* deference, or sometimes *Seminole Rock* deference, after two cases in which we employed it.” *Kisor v. Wilkie*, 139 S. Ct. 2400, 2408 (2019). The D.C. Circuit has relied on those two cases interchangeably as

well. See, e.g., *Tilden Mining Co., Inc. v. Sec'y of Lab.*, 832 F.3d 317, 322 (D.C. Cir. 2016) (noting that courts afford deference to an agency's interpretation of its own regulation "based on the Supreme Court's decisions in [*Auer*] and [*Seminole Rock*]"). Whatever analytical differences there may be between *Seminole Rock* and *Auer*, the current controlling authority concerning deference to an agency's interpretations of its own regulations is neither *Auer* nor *Seminole Rock*; the Supreme Court has declined to overrule *Auer* / *Seminole Rock*, but, in *Kisor*, it established a detailed multi-factor process for determining when this kind of deference is proper. See 139 S. Ct. at 2414–18.

- 7. When a new presidential administration begins, they may want to reverse, review, expand upon, or otherwise change agency actions from the previous administration.**
- a. What kind of process do agencies have to go through in order to revoke a rule promulgated by a previous administration?**

RESPONSE: Under section 1 of the Administrative Procedure Act ("APA"), an agency is generally required to use the same processes to repeal a rule as it used to promulgate the rule. See *Perez v. Mortgage Bankers Ass'n*, 575 U.S. 92, 101 (2015). Thus, if the agency issued the rule after engaging in notice and comment rulemaking pursuant to section 553 of the APA, it must ordinarily go through the notice and comment process in order to repeal the rule.² However, if the rule in question did not require notice-and-comment rulemaking in the first place (if, for instance, it was an interpretive rule), then the agency need not use the notice-and-comment process to repeal the rule. See *id.* at 102 (holding that courts may not impose any additional procedural requirements on agencies beyond those set forth in the APA); *Vermont Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc.*, 435 U.S. 519, 524 (1978) (same). The Supreme Court has further emphasized that, when an agency changes its policy position on a matter, the agency must provide a "reasoned explanation for its action[.]" "display awareness that it is changing position[.]" and "show that there are good reasons for the new policy." *F.C.C. v. Fox Tel. Stations, Inc.*, 556 U.S. 502, 515 (2009).

- b. What has the Supreme Court said about this issue?**

RESPONSE: Please see my response to Question 7a.

- c. What are the key D.C. Circuit cases on point here?**

RESPONSE: Key D.C. Circuit cases on this topic include *Friends of Animals v. Bernhardt*, 961 F.3d 1197 (D.C. Cir. 2020), *Natural Resources Defense Council v. Wheeler*, 955 F.3d 68 (D.C. Cir. 2020), *Mingo Logan Coal Co. v. Environmental*

² The APA's notice-and-comment process entails issuing a notice of proposed rulemaking, giving interested parties an opportunity to comment on the proposed rule, and issuing a final rule with "a concise general statement of [the rule's] basis and purpose." See 5 U.S.C. § 553.

Protection Agency, 829 F.3d 710 (D.C. Cir. 2016), and *Consumer Energy Council of America v. Federal Energy Regulatory Commission*, 673 F.2d 425 (D.C. Cir. 1982). The doctrine announced in *Paralyzed Veterans of America v. D.C. Arena L.P.*, 117 F.3d 579 (D.C. Cir. 1997), has also been a “key” case in this area, but the Supreme Court abrogated the *Paralyzed Veterans* rule in *Perez v. Mortgage Bankers Association*, 575 U.S. 92 (2015).

8. **You served as a law clerk for Justice Breyer with Tim Wu. Mr. Wu is now a member of President Biden’s National Economic Council.**
- How have you handled recusal when it comes to cases that have come before you that implicated Mr. Wu’s work on the National Economic Council?**
 - If confirmed, how will you handle recusal when it comes to cases that come before you that implicate Mr. Wu’s work on the National Economic Council?**

RESPONSE: I have not had a case in which the National Economic Council was a party. In general, if confirmed to the U.S. Court of Appeals, my process for determining whether particular matters required my recusal would involve reviewing the Judicial Code of Conduct and 28 U.S.C. § 455 concerning the legal standards that pertain to recusal. I will also consult with my colleagues, and, if necessary, discuss the matter with counsel to the Judicial Conference Committee on Codes of Conduct. This is the process that I have followed as a district court judge.

9. **You were listed as a counsel on a brief in support of defendant-appellants in *McGuire v. Reilly*, 260 F.3d 36 (1st Cir. 2001). Some of the amici curiae your brief was on behalf of include: Repro Associates, Abortion Access Project of Massachusetts, Mass. NARAL, and the Religious Coalition for Reproductive Choice, among others.**
- You appear to have worked on this brief while an associate at a law firm in Boston. Was this a pro bono case?**
 - How did you get involved with this case? Did you seek out this assignment?**
 - Based on your brief’s analysis of *Hill v. Colorado*, could a legislature enact content-neutral buffer zones that prohibited protests to occur outside of federal courthouses or police stations?**

RESPONSE: The referenced brief was drafted and filed when I was an associate at Goodwin Proctor LLP in Boston in 2001, during my first year of law practice after completing my Supreme Court clerkship. I was assigned to work on this amicus brief related to a matter that was pending in the First Circuit, among other projects. I do not recall how I came to work on this assignment, but I am listed on the brief along with the Goodwin Proctor partner and senior associate with whom I was working at that time. The analysis of *Hill* that is presented in that brief is a legal argument that was made on behalf of my amici-clients, and there have been developments in the law concerning buffer zones in the two decades that have transpired since the brief was filed.

As a sitting federal judge, I am bound by the Supreme Court's current First Amendment caselaw, and I would apply the binding case law of the Supreme Court and the D.C. Circuit if I am assigned to any First Amendment case in which such precedents are applicable. As a pending judicial nominee and a sitting federal judge, it would be inappropriate for me to opine on the constitutionality of buffer zones that government officials might establish in hypothetical circumstances.

- 10. Some of my colleagues on the other side of the aisle have criticized previous nominees for their membership or involvement with the Federalist Society. While I know you were never a member, you have spoken at an event hosted by the American Constitution Society, a self-described progressive legal organization.**
- a. In your opinion, what is the substantive difference between the Federalist Society and the American Constitution Society?**
 - b. Do you think a nominee's involvement with the American Constitution Society is less problematic than with a nominee's involvement with the Federalist Society?**

RESPONSE: I am not a member of the Federalist Society or the American Constitution Society, and thus I am not in a position to speak to the substantive differences between those two organizations or whether a nominee's involvement with either organization is "problematic." Canon 4 of the Code of Conduct for United States Judges authorizes judges to participate in extrajudicial activities, including being involved with organizations, subject to certain limitations, *see also* Advisory Opinion No. 93 ("Extrajudicial Activities Related to the Law"), and the Code's commentary emphasizes that "a judge should not become isolated from the society in which the judge lives[.]" Commentary to Canon 4. The Judicial Conference Committee on Codes of Conduct has also spoken to this issue: Advisory Opinion No. 82 provides that, prior to undertaking involvement with any organization, judges should carefully consider "the Code's fundamental commands to avoid impropriety or the appearance of impropriety, [to] not lend the prestige of office, and [to] not participate in activities that would detract from the dignity of the judge's office, interfere with the performance of official duties, reflect adversely on the judge's impartiality, or lead to frequent disqualification." Advisory Opinion No. 82 ("Joining Organizations").

- 11. The left-wing group Demand Justice has deployed a billboard truck to pressure Justice Breyer into retiring:**



Do you agree with Demand Justice's message?

RESPONSE: As a pending judicial nominee and a sitting federal judge, I am bound by the Supreme Court's precedents, regardless of that Court's composition. It would be inappropriate for me to comment on whether or when any sitting Supreme Court Justice should retire.

12. In response to a question from Senator Hawley about a statement of beliefs from a school on whose board you used to sit, you answered that you're a member of a lot of organizations and you don't know all the statements of every organization you're a member of. Then-Senator Franken asked then-Professor Amy Barrett at her hearing of her speaking at the Blackstone Fellowship in light of their positions on LGBT issues, "Is it your habit of accepting money from organizations without first learning what they do?"

- a. Is it your habit to join an organization without knowing what they believe in?**
- b. Can you list the organizations you joined before learning about what the organization believed in?**

RESPONSE: I served on the inaugural advisory board of Montrose Christian School—a now-defunct kindergarten through 12th grade private school—from the fall of 2010 to the fall of 2011, prior to my nomination and confirmation as a federal district judge. I was aware that Montrose Christian School was affiliated with Montrose Baptist Church. I was not aware that the school had a public website or that any statement of beliefs was posted on the school's website at the time of my service. My service on the advisory school board primarily involved planning for school fund-raising activities for the benefit of enrolled students. I did not receive any compensation for my service.

13. What kind of analysis does the D.C. Circuit use to determine if a final rule is a "logical outgrowth" of a proposed rule?

RESPONSE: A final rule qualifies as a logical outgrowth of a proposed rule, and thus satisfies the Administrative Procedure Act's notice requirement, "if interested parties should have anticipated that the change was possible, and thus reasonably should have filed their comments on the subject during the notice-and-comment period." *Idaho Conservation League v. Wheeler*, 930 F.3d 494, 508 (D.C. Cir. 2019) (quoting *CSX Transp., Inc. v. STB*, 584 F.3d 1076, 1079–80 (D.C. Cir. 2009)). "On the other hand, a final rule is *not* a logical outgrowth if 'interested parties would have had to divine [the agency's] unspoken thoughts, because the final rule was surprisingly distant from the proposed rule.'" *Id.* (quoting *CSX Transp.*, 584 F.3d at 1080 (emphasis supplied)). Thus, the D.C. Circuit has "found that a final rule represents a logical outgrowth where the [agency's Notice of Proposed Rulemaking] expressly asked for comments on a particular issue or otherwise made clear that the agency was contemplating a particular change." *CSX Transp.*, 584 F.3d at 1081. "By contrast, [the D.C. Circuit's] cases finding that a rule was not a logical outgrowth have often involved situations where the proposed rule gave no indication that the agency was considering a different approach, and the final rule revealed that the agency had completely changed its position." *Id.*

- 14. Senator Booker invoked John Adams representing British soldiers accused of murder during the Boston Massacre as a reason why you are the right person for the job. Please list all the cases where you represented a client whose views you disagreed with or whose alleged crimes you found offensive.**

RESPONSE: Under the ethics rules that apply to lawyers, an attorney has a duty to represent her clients zealously, which includes refraining from contradicting her client's legal arguments and/or undermining her client's interests by publicly declaring the lawyer's own personal disagreement with the legal position or alleged behavior of her client. Because these standards apply even after termination of the representation, it would be inappropriate for me to list the cases in which I previously represented a client whose views I disagreed with or whose alleged crimes I found offensive.

- 15. In response to my question about sentencing reform, you mentioned that one of your rationales for giving judges more information is because judges don't like to be "outliers."**
- a. What, if anything, should we as Congress do about judges who *are* outliers?**
 - b. Is that an area for the judicial branch to work on solutions for?**
 - c. Is it worse to be an outlier below the mean, above the mean, or are they both equally bad?**

RESPONSE: As a sitting federal district court judge, my current role in the justice system is to evaluate the facts of cases and controversies that parties with standing to adjudicate legal claims present, and I resolve each case on an individual basis by assessing the parties' legal arguments based on the law, as I understand it, including the binding precedents of the Supreme Court and the D.C. Circuit. I no longer serve

on the United States Sentencing Commission, and canons of judicial ethics prevent me from opining on particular policy positions regarding sentencing reforms or commenting on the particular legislation that Congress should enact. Congress has authorized a policymaking branch of the Judiciary—the United States Sentencing Commission—to make proposals concerning sentencing reforms; additionally, with Congress’ consent, the Commission promulgates sentencing guidelines for federal judges to use when imposing sentences in individual cases. After *Booker*, judges have a duty to calculate and consider the applicable sentencing guidelines in every federal criminal case, and to impose a sentence that is sufficient but not greater than necessary to comply with the purposes of punishment, as 18 U.S.C. § 3553(a) requires.

- 16. During Senator Feinstein’s questioning of you, she referenced a statistic from the left-wing group Alliance for Justice that put your reversal rate at less than 2%. I know that was not your statistic, but you didn’t object to the premise of the question and answered. Do you believe 2% is an accurate portrayal of your reversal rate? If not, what do you think your reversal rate is?**

RESPONSE: To the best of my knowledge, it is accurate to say that only 2% of the written opinions that I have issued have been reversed by the Court of the Appeals.

- 17. Westlaw has reversal reports for every sitting judge. Instead of using the total number of opinions (which appears to be the denominator used by AFJ in getting to 2%), Westlaw looks at the opinions that were *actually* appealed, which makes sense to me since an opinion that is not appealed cannot be reversed.³ Using those numbers, you have been reversed 8 times out of 75 appeals, for a rate of 10.7%. Do you believe this is a more accurate reflection of your reversal rate? If not, why not?**

RESPONSE: The reversal-rate analysis that Westlaw employs is misleading. 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. The performance of a judge who has written 562 opinions, only 75 of which have even been appealed, is not the same as that of a judge who has written 80 opinions, 75 of which have been appealed, even if those two judges have the same number of reversals. Westlaw would apparently characterize a hypothetical judge who has issued hundreds of uncontested written decisions as having a 50% reversal rate if only four of his decisions are appealed and if two of those four are reversed.

Westlaw’s reversal-rate analysis also lacks an assessment of the relative complexity of the cases at issue or the practices of the court of appeals that reviews a district

³ Westlaw notes that the number of cases appealed comes “from only those appeals where the lower court judge is identified in the decision.”

judge's work. Not all reversals are equivalent. *See, e.g., Gov't of Guam v. United States*, 341 F. Supp. 3d 74 (D.D.C. 2018) (adopting the view of the Sixth and Seventh Circuits, in the context of a circuit split, concerning a dispute regarding application of a provision of the Comprehensive Environmental Response, Compensation, and Liability Act), *rev'd*, 950 F.3d 104 (D.C. Cir. 2020) (reversing after a determination that the D.C. Circuit will side with the Ninth Circuit, rather than the Sixth and Seventh, with respect to the question at issue), *cert. granted*, 141 S. Ct. 976 (oral argument held Apr. 26, 2021). Thus, while Westlaw's analysis suggests that a judge's reversal rate (calculated solely based on the number of appeals and the number of reverses) is a reliable marker of judicial competence, without weighting the cases or standardizing the review practices of the various courts of appeals, it is difficult to draw meaningful conclusions.

18. In your response to Senator Tillis, you said that you did not have control over what third parties or reporters say about your rulings.

- a. Does any judge have control over what third parties or reporters say about her rulings?
- b. Was it wrong for Senator Tillis to question you over what third parties or reporters said about your rulings?
- c. Was it wrong of Democrats to question judicial nominees appointed by President Trump over what third parties or reporters said about their rulings?

RESPONSE: No judge has control over what third parties or reporters say about her rulings. It would be inappropriate for me to comment on the propriety of any question that any Senator asks of a nominee in connection with the Senate's exercise of its constitutional advise and consent power.

19. In your response to Senator Tillis, you said that you did not have control over what third parties or reporters say about your rulings. You also said in the *McGahn* opinion, "Stated simply, the primary takeaway from the past 250 years of recorded American history is that Presidents are not kings." Did the Department of Justice claim monarchical powers for the President in that case?

RESPONSE: In *McGahn*, the Department of Justice claimed that the President has the power to prevent certain former staff members from appearing for questioning in response to a valid legislative subpoena, even against will of the former staff member to whom the subpoena is directed—i.e., even when the former staff member would otherwise be required by law to respond to the subpoena, would willingly do so, and would be able to invoke executive privilege in the context of such questioning, where appropriate.

20. You go on to explain, "This means that they do not have subjects, bound by loyalty or blood, whose destiny they are entitled to control."

- a. Did the Department of Justice claim blood loyalty on the part of Don McGahn?

- b. Assuming “not a subject, bound by loyalty or blood” is the correct analytical category by which to understand the relationship between the President and his staff, does it also apply to the following relationships? If not, why not?
- i. Attorney General and political staff
 - ii. Attorney General and career staff
 - iii. Senators and Senate staff
 - iv. Judges and law clerks
 - v. Police chiefs and patrol officers

RESPONSE: As a sitting federal judge, it would not be appropriate for me to provide an opinion concerning hypothetical disputes over directives from the listed government officials to their staff members. With respect to the Department of Justice’s arguments concerning the power of the President to direct that certain former White House staff members ignore a valid legislative subpoena, please see my response to Question 19.

21. In *McGahn* you continued: “Rather, in this land of liberty, it is indisputable that current and former employees of the White House work for the People of the United States, and that they take an oath to protect and defend the Constitution of the United States.”
- a. Doesn’t this beg the question?
 - b. Wasn’t the position of the Department of Justice that Don McGahn couldn’t comply with the subpoena *because of* his oath to protect and defend the Constitution of the United States?

RESPONSE: Please see my response to Question 19.

22. If a future Congress were to subpoena one of your law clerks to better understand your thinking in the *McGahn* case and you instructed him or her not to comply with the subpoena, would it answer that “the primary takeaway from the past 250 years of recorded American history is that Judges are not kings; this means that they do not have subjects, bound by loyalty or blood, whose destiny they are entitled to control”?

RESPONSE: Please see my response to Question 20.

23. President Obama famously said of enacting policy without legislation, “I have a pen and a phone.” Was President Obama a king?

RESPONSE: I am not familiar with the quoted statement. The Supreme Court has addressed the extent of the President’s authority to issue executive orders or undertake executive actions, with and without congressional authorization. See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952); see also *Medellin v. Texas*, 552 U.S. 491 (2008); *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004); *Dames & Moore v. Regan*, 453 U.S. 654 (1981). Broadly speaking, “[t]he President’s authority to act, as with the exercise of any governmental power, ‘must stem either from an act

of Congress or from the Constitution itself[.]” *Medellin*, 552 U.S. at 524 (citation omitted), and the Supreme Court’s pronouncements regarding this issue are binding on me as a sitting federal judge. The Code of Conduct for federal judges prevents me from further opining about the oft-litigated and controversial subject of the power of the President to enact policy without legislation.

24. During your hearing there were multiple comments made about the importance of an independent judiciary. You defined judicial activism to Senator Cruz as a judge unable or unwilling to separate personal views from the law and ruling consistent with those views instead of the law. I agree.

- a. **Is the final disposition of a case the only metric to mark judicial activism? More specifically—if a judge reaches the result mandated by the law and by precedent but editorializes why she disagrees with the result or engages in superfluous dicta, is that also judicial activism?**
- b. **“I have my doubts about the wisdom of courts opining on hot-button political issues or the motives of citizens who hold one position or another in those debates.” Do you agree with this statement? If not, why not?**

RESPONSE: I am not familiar with the quoted statement. During the hearing, I emphasized that courts have a duty of independence from political pressure, meaning that judges must resolve cases and controversies in a manner that is consistent with what the law requires, despite the judge’s own personal views of the matter, and this is so even with respect to cases and controversies that pertain to controversial political issues. While the 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 who is unwilling or unable to rule as the law requires and instead resolves cases consistent with his or her personal views. It is my testimony that judicial activism is properly defined as characterizing a judge who is unwilling or unable to rule as the law requires.

25. Senator Cruz asked you if you believed in the idea of a “living constitution” and you declined to answer one way or the other, citing your lack of experience interpreting constitutional text. During your 2013 nomination to the District Court, the late Senator Tom Coburn asked you the following written question for the record: “Some people refer to the Constitution as a ‘living’ document that is constantly evolving as society interprets it. Do you agree with this perspective of constitutional interpretation?” You responded: “No.”

- a. **Why did your answer change from 2013 to now?**
- b. **If you were absolute in your answer about disagreeing with the idea of a “living” constitution in 2013 but were not during your hearing last week, should we take your answer to mean that you at least agree with the “living” constitution more than you did in 2013?**
- c. **If so, what has happened during your tenure as a District Judge to make you believe more in a “living” constitution than you did in 2013?**

- d. As I mentioned, you cited your lack of experience interpreting constitutional text in declining to answer Senator Cruz’s question. Yet you answered freely in 2013. Did you have more experience interpreting constitutional text in 2013 than you do now?**

RESPONSE: As a sitting federal judge, I am bound by the methods of constitutional interpretation that the Supreme Court has adopted, and I have a duty not to opine on the Supreme Court’s chosen methodology or suggest that I would undertake to interpret the text of the Constitution in any manner other than as the Supreme Court has directed. I also have a duty to avoid commenting on, or providing personal views of, disputed legal matters such as the most appropriate method of interpreting the Constitution. I was not a sitting federal judge when I answered Senator Coburn’s question in 2013.

- 26. Under the Supreme Court’s First Amendment jurisprudence, can someone shout “fire” in a crowded theater?**

RESPONSE: In *Schenck v. United States*, Justice Oliver Wendell Holmes, Jr., writing for the Court, stated in dicta that “[t]he most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic.” 249 U.S. 47, 52 (1919). The facts of *Schenck* itself did not involve yelling fire in a crowded theater; instead, the Court was reviewing convictions for conspiracy to violate the Espionage Act of 1917, where the defendants had merely mailed leaflets that asserted that the draft was unlawful to men eligible for military service. *See id.* at 48–49. The Court affirmed the convictions on the ground that such speech presented a “clear and present danger” by obstructing the war effort. *Id.* at 52.

Schenck’s “clear and present danger” test no longer governs the scope of permissible speech proscriptions, and the Supreme Court has generally recognized that “the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force[.]” *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969). However, under *Brandenburg*, the State may proscribe speech or advocacy, including potentially yelling fire in a crowded theater, if the speech “is directed to inciting or producing *imminent* lawless action and is *likely* to incite or produce such action.” *Id.* (emphases added).

- 27. Justice Scalia’s opinion in *D.C. v. Heller* does allow for some regulation of firearms, such as possession of firearms by felons. Which firearm regulations has the D.C. Circuit upheld as constitutional?**

RESPONSE: Since the Supreme Court’s decision in *Heller*, the D.C. Circuit has upheld challenged firearm regulations on five separate occasions. In *Heller v. District of Columbia*, 670 F.3d 1244 (D.C. Cir. 2011), the D.C. Circuit upheld the District’s basic registration requirement as applied to handguns and the District’s prohibitions on assault weapons and large-capacity magazines. In *Schrader v. Holder*, 704 F.3d 980 (D.C. Cir. 2013), the D.C. Circuit upheld the federal law

prohibiting felons from possessing firearms as applied to common-law misdemeanants. In *Heller v. District of Columbia*, 801 F.3d 264 (D.C. Cir. 2015), the D.C. Circuit upheld the District's basic registration requirement as applied to long guns, the District's requirement that a registrant be fingerprinted and photographed and make a personal appearance to register a firearm, the District's requirement that an individual pay certain fees associated with the registration of a firearm, and the District's requirement that registrants complete a firearms safety and training course. In *Medina v. Whitaker*, 913 F.3d 152 (D.C. Cir. 2019), the D.C. Circuit upheld the federal statute prohibiting felons from possessing firearms, as applied to a person convicted of a felony count of making a false statement to a lending institution. And, most recently, in *United States v. Class*, 930 F.3d 460 (D.C. Cir. 2019), the D.C. Circuit upheld a federal law prohibiting the possession of firearms on the grounds of the United States Capitol, as applied to a defendant who possessed guns in a parking lot near the Capitol.

28. Is it proper for a circuit court judge to question Supreme Court precedent in a concurring opinion? What about in a dissent?

RESPONSE: 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.

29. When interpreting text you find to be ambiguous, which tools would you use to resolve that ambiguity?

RESPONSE: As a sitting district court judge, I have routinely undertaken to interpret statutes, and I have issued nearly 50 written opinions that involve statutory interpretation. My review of my past practice indicates that I seek to resolve alleged ambiguities in a statutory provision by examining the structure of the statute as a whole and other indicia of meaning based upon the statutory text. See, e.g., *All. of Artists & Recording Cos., Inc. v. Gen. Motors Co.*, 162 F. Supp. 3d 8 (D.D.C. 2016), *aff'd*, 947 F.3d 849 (D.C. Cir. 2020). If that does not resolve the ambiguity, I look to Supreme Court precedent for guidance as to the tools of interpretation to apply next in light of the particular circumstances of the case (e.g., the rule of lenity in the criminal context, *Chevron* deference, etc.). I have also consulted the legislative history of a statute, as the Supreme Court permits, but I have never resolved an ambiguity based solely on the legislative history of the statute.

30. When interpreting text you find to be ambiguous, how would you handle two competing, contradictory canons of statutory interpretation?

RESPONSE: As a district court judge, I have routinely undertaken to interpret statutes, and I have issued nearly 50 written opinions that involve statutory interpretation. In my experience, canons of statutory interpretation sometimes lead to

conflicting results, and are not always and inevitably helpful. I attempt to resolve alleged ambiguities in a statutory provision by carefully examining the text of the provision and the statute as whole, including any statutory statements of finding and purpose. If necessary, I consult the legislative history of the statute, as the Supreme Court permits, in order to ascertain the will of Congress.

31. How do you decide when text is ambiguous?

RESPONSE: Some of the nearly 50 written opinions that I have issued that involve statutory interpretation address disputed questions of first impression about the meaning of the text. *See, e.g., Otay Mesa Prop., L.P. v. U.S. Dep't of Interior*, 344 F. Supp. 3d 355, 367–70 (D.D.C. 2018). In each of those cases, when deciding whether the statute's text is ambiguous, I used traditional tools of statutory construction, including textual analysis, structural analysis, and canons of construction, to determine whether the statute at issue “can be read more than one way” and is therefore ambiguous, *AFL-CIO v. FEC*, 333 F.3d 168, 173 (D.C. Cir. 2003) (citation omitted); *see also, e.g., Otsuka Pharm. Co. v. Burwell*, 302 F. Supp. 3d 375, 391–99 (D.D.C. 2016), *aff'd*, 869 F.3d 987 (D.C. Cir. 2017).

32. Do you find, in general, Congressional statutes or agency regulations to consist of more ambiguous text?

RESPONSE: As a district court judge who has reviewed both congressional statutes and agency regulations, it is my role to interpret statutes and regulations, as necessary, to resolve the cases before me. I have not formed an opinion as to whether statutes or regulations tend to be more ambiguous as a generally matter, and I doubt that it is possible to determine in the abstract which form of law has “more ambiguous text.” I evaluate each case that comes before me on its own merits.

33. In Federalist No. 62, James Madison wrote: “It will be of little avail to the people, that the laws are made by men of their own choice, if the laws be so voluminous that they cannot be read, or so incoherent that they cannot be understood; if they be repealed or revised before they are promulgated, or undergo such incessant changes that no man, who knows what the law is to-day, can guess what it will be to-morrow. Law is defined to be a rule of action; but how can that be a rule, which is little known, and less fixed?” Do you agree with this statement?

RESPONSE: In our constitutional system, the Legislative Branch promulgates statutes, consistent with its limited authority under Article I of the Constitution and the protections of individual rights embodied in the Constitution's Amendments. I understand this quotation from Federalist No. 62, which is entitled, “The Senate,” to be addressing the extent to which the Senate should exercise its powers in a prudent manner that leads to clear statements of policy concerning the matters that the Senate seeks to address. In any case that raises the question of the clarity of legislative enactments, it would be my duty to apply Supreme Court precedent and the binding law of the D.C. Circuit to resolve the dispute before me.

- 34. Do you agree with the Supreme Court that the free exercise clause lies at the heart of a pluralistic society (*Bostock v. Clayton County*)? If so, does that mean that the Free Exercise Clause requires that religious organizations be free to act consistently with their beliefs in the public square?**

RESPONSE: During my confirmation hearing, I testified in response to a question from Senator Hawley that the Free Exercise Clause is a fundamental and foundational constitutional right. The Supreme Court has made clear that the First Amendment's Free Exercise Clause and Establishment Clause, the Religious Freedom Restoration Act, and other federal statutes guarantee that religious individuals and organizations will have substantial autonomy to act consistently with their religious beliefs.

- 35. Do you agree with the Supreme Court that the principle of church autonomy goes beyond a religious organization's right to hire and fire ministers? What, in your view, are the limits on church autonomy consistent with what the Supreme Court has said?**

RESPONSE: Federal courts, including the Supreme Court, are actively evaluating the scope of the fundamental First Amendment right of religious liberty in a variety of circumstances. I am bound by the Supreme Court's precedents and pronouncements regarding church autonomy, including its reaffirmance in *Our Lady of Guadalupe School v. Morrissey-Berru*, 140 S. Ct. 2049 (2020), that the Free Exercise Clause protects the right of religious institutions "to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine." *Id.* at 2055 (citation omitted). As a pending judicial nominee and a sitting federal judge, it would be inappropriate under Canon 3 of the Code of Conduct for me to provide personal views regarding the limits of church autonomy beyond what the Supreme Court has said.

- 36. Do you agree that the Religious Freedom Restoration Act requires assessing compelling government interests "to the person" substantially burdened by a government action?**

- a. **If not, why not?**
- b. **If so, can *general* interests restrict religious liberty, or must the interests be defined more precisely?**

RESPONSE: In *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418 (2006), the Supreme Court held that the Religious Freedom Restoration Act "requires the Government to demonstrate that the compelling interest test is satisfied through application of the challenged law 'to the person'—the particular claimant whose sincere exercise of religion is being substantially burdened." *Id.* at 430–31 (citation omitted). Thus, federal courts must "look[] beyond broadly formulated interests justifying the general applicability of government mandates and scrutinize[] the asserted harm of granting specific exemptions to particular religious claimants." *Id.* at 431. My personal views of this standard, if any, are irrelevant; notwithstanding

any personal views of this issue, I am required to apply the Supreme Court's interpretation of what RFRA requires. If confirmed, I will do so.

37. Do you agree with the following statements?

- a. **We live in a pluralistic society with people of widely diverse faith traditions. Religious freedom for all is part of our country's bedrock, from the enactment of our Constitution to the establishment of our more recent statutes that protect against religious discrimination.**

RESPONSE: Please see my response to Question 34.

- b. **Title VII requires that employers not discriminate against applicants or employees because of their religious beliefs, observances, or practices and that employers accommodate religious beliefs, observances, and practices, absent undue hardship.**

RESPONSE: Title VII of the Civil Rights Act of 1964 prohibits employers from undertaking certain employment practices "because of [an] individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2. Under that statute, prohibited practices include the failure or refusal to hire an individual, or the discharge of an individual, on the basis of these protected characteristics, as well as "discriminat[ion] against any [such] individual with respect to his compensation, [or the] terms, conditions, or privileges of employment." *See id.* § 2000e-2(a). The definitions provision of Title VII defines "religion" as "includ[ing] all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business." *Id.* § 2000e(j).

- c. **Federal civil-rights regulators should seek to learn more about the extent to which employees request time off for prayer or Sabbath observance, seek exemption from grooming or dress codes, or seek to avoid participation in hot-button practices like abortion or LGBTQ celebration.**

RESPONSE: As a sitting district judge, my role in the judicial system is to consider any legal claims brought by employees concerning the manner in which their employers have treated their requests for religious accommodation. My role as a circuit judge, if confirmed, would be the same. It would be inappropriate for me to comment on threshold policy questions concerning what federal civil-rights regulators can or should do to educate themselves regarding such requests.

- d. **It is important to improve religious discrimination awareness for employees and employers while encouraging meaningful dialogue between employees, employers, and the government.**

RESPONSE: As a sitting district judge, my role is to consider any legal claims brought by employees concerning alleged religious discrimination, and my role as a circuit judge, if confirmed, would be the same. It would be inappropriate for me to comment about threshold policy matters, including the importance *vel non* of general awareness and meaningful dialogue about religious discrimination.

e. The federal government should prevent and remedy unlawful religious discrimination.

Please see my answers to Question 37(c) and (d).

38. You can answer the following questions yes or no:

- a. **Was *Brown v. Board of Education* correctly decided?**
- b. **Was *Loving v. Virginia* correctly decided?**
- c. **Was *Griswold v. Connecticut* correctly decided?**
- d. **Was *Roe v. Wade* correctly decided?**
- e. **Was *Planned Parenthood v. Casey* correctly decided?**
- f. **Was *Gonzales v. Carhart* correctly decided?**
- g. **Was *District of Columbia v. Heller* correctly decided?**
- h. **Was *McDonald v. City of Chicago* correctly decided?**
- i. **Was *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC* correctly decided?**
- j. **Was *Sturgeon v. Frost* correctly decided?**
- k. **Was *Juliana v. United States* (9th Cir.) correctly decided?**
- l. **Was *Rust v. Sullivan* correctly decided?**

RESPONSE: As a sitting federal judge, all of the Supreme Court's pronouncements are binding on me, and consistent with the positions taken by other pending judicial nominees, it would be inappropriate for me to comment on the merits or demerits of any of the Supreme Court's binding precedents. Of the listed cases, the *Brown v. Board* and *Loving v. Virginia* opinions are two exceptions to this general rule. *Brown* overruled the manifest injustice of *Plessy v. Ferguson*, and its underlying premise—that "separate but equal is inherently unequal"—is beyond dispute. *Loving*, which reaffirms the Court's rejection of the "notion that the mere 'equal application' of a statute containing racial classifications" comports with the Fourteenth Amendment, is a direct outgrowth of *Brown*. Therefore, I can confirm that that these two matters were rightly decided without calling into question my duties under the Code of Conduct.

39. Do Blaine Amendments violate the Constitution?

RESPONSE: The original Blaine Amendment—a proposal that Congress considered but did not pass in the 1870's—"would have amended the Constitution to bar any aid to sectarian institutions." *Mitchell v. Helms*, 530 U.S. 793, 828 (2000). Some states have enacted state-law provisions or have adopted practices that bar government entities from appropriating funds to religious sects or institutions (which I understand

are referred to as Blaine Amendments), on the grounds that doing so is necessary to prevent Establishment Clause violations. The Supreme Court recently addressed one such state-law provision in *Espinoza v. Montana Department of Revenue*, 140 S. Ct. 2246, 2262 (2020) (assessing the Montana Supreme Court's application of a no-aid provision in Montana's Constitution to invalidate a state scholarship program). In *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012 (2017), the Supreme Court reviewed a similar state agency's practice of summarily denying a religious institution's application for competitively awarded grant funding on the grounds that the money could not be given to a religious institution. In both cases, the Supreme Court struck down the state restrictions as a violation of the First Amendment's neutrality requirement. *See also Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 524 (1993). As a sitting federal judge, I am bound by the Supreme Court's precedents regarding whether a state prohibition concerning the provision of funds to religious sects or institutions violates the Constitution.

40. Please describe the selection process that led to your nomination from beginning to end (including the circumstances that led to your nomination and the interviews in which you participated).

RESPONSE: On January 26, 2021, White House Counsel Dana Remus contacted me concerning my potential nomination to the D.C. Circuit to fill the anticipated vacancy that would arise from then-Judge Merrick Garland's confirmation as Attorney General of the United States. Since that date, I have been in contact with officials from the White House Counsel's Office and the Office of Legal Policy at the Department of Justice regarding my potential nomination and the nominations process. On February 24, 2021, I met with President Biden and Dana Remus at the White House concerning the nomination, and on March 30, 2021, the President announced his intent to nominate me.

41. Have you had any conversations with individuals associated with the group Demand Justice, including but not limited to Brian Fallon or Chris Kang in connection with this or any other potential judicial nomination? If so, please explain the nature of those conversations.

RESPONSE: Chris Kang, who I understand is affiliated with Demand Justice, is among the many people who offered me congratulations on this nomination. Mr. Kang served as chief judicial nominations counsel to President Obama in 2012, when I was nominated to be a U.S. District Judge. That is the only communication that is responsive to this question.

42. Have you had any conversations with individuals associated with the American Constitution Society, including but not limited to Russ Feingold, in connection with this or any other potential judicial nomination? If so, please explain the nature of those conversations.

RESPONSE: No.

- 43. Have you had any conversations with individuals associated with the Lawyers Committee for Civil and Human Rights, including but not limited to Vanita Gupta, in connection with this or any other potential judicial nomination? If so, please explain the nature of those conversations.**

RESPONSE: I had one conversation with Kristen Clarke in mid-April 2021, in which we discussed her experience in appearing before the Committee. That is the only communication that is responsive to this question.

- 44. You mention in your SJQ that you met with President Biden before being nominated. Did he ask you any questions about judicial precedent or public policy in that meeting? If so please describe those questions and your responses.**

RESPONSE: President Biden did not ask me any questions about judicial precedent or public policy.

- 45. Please explain with particularity the process by which you answered these questions.**

RESPONSE: The answers that I have provided to all of the written questions of the members of the Committee are mine alone. To generate each response, I read the question carefully, researched the law and my own practices as a district judge, as necessary, and drafted answers to the questions. I then shared my draft answers with employees of the Department of Justice's Office of Legal Policy and received their feedback. I then finalized the responses based on my independent judgment.

- 46. Do these answers reflect your true and personal views?**

RESPONSE: I have responded truthfully to each question, and have provided answers that are true and consistent with my oath of office and my duties and obligations as a sitting federal judge.

**Responses to Questions for the Record from Senator Tom Cotton
to Judge Ketanji Brown Jackson, Nominee to the
United States Court of Appeals for the D.C. Circuit**

1. Since becoming a legal adult, have you ever been arrested for or accused of committing a hate crime against any person?

RESPONSE: No.

2. Since becoming a legal adult, have you ever been arrested for or accused of committing a violent crime against any person?

RESPONSE: No.

3. During your confirmation hearing, you engaged in a policy discussion with Ranking Member Grassley regarding sentencing policy, which you clarified was a discussion in which you engaged not as a sitting judge, but “as a former member of the Sentencing Commission.” In that discussion, you also expressed your support for particular sentencing laws passed by Congress. As a former member of the Sentencing Commission, do you believe that federal criminal sentences for drug trafficking should be more lenient?

RESPONSE: During my confirmation hearing, Ranking Member Grassley stated that he himself was “someone who has worked hard on the First Step Act and other issues of criminal justice reform,” and that he “appreciate[d]” my prior work “on sentencing reform[.]” He then asked me one question about a particular policy position that I had publicly asserted as a member of the Sentencing Commission—a position that Judge William Pryor, a former Acting Chair of the Sentencing Commission, also shared. In this regard, Ranking Member Grassley noted that, as members of the Sentencing Commission, Judge Pryor and I had publicly “agree[d] sentencing needs to be reformed” but we had also publicly debated the nature of any such reforms. Ranking Member Grassley’s one question to me during the confirmation hearing was to ask me to explain the difference between Judge Pryor’s and my publicly stated policy positions on sentencing reform, and, specifically, “why [I] trust judges with more discretion when it comes to sentencing than Pryor does?”

In response to Ranking Member Grassley’s question, I first thanked Ranking Member Grassley, Chairman Durbin, Senator Lee and other members of the Judiciary Committee, “as a former member of the Sentencing Commission,” for their work on statutory changes to the federal sentencing system. I then proceeded to explain the different approaches that Judge Pryor and I had taken “in our public statements and in the [Commission] meetings about the need for reform[.]” and I explained our respective, publicly stated views about “how do we change the system after the Supreme Court’s decision making the Guidelines advisory and not binding anymore on judges?” Ranking Member Grassley did not respond to my description of the past

positions that Judge Pryor and I had taken in the context of proposed sentencing reforms during my service as a policymaker on the Sentencing Commission, nor did I engage in any policy discussion with Ranking Member Grassley or express a current position on any federal sentencing laws.

As a pending judicial nominee and a sitting federal judge, I am not a policymaker, and the Code of Conduct for United States Judges prevents me from expressing a view about the propriety of the penalties that Congress has prescribed for any crimes. It would be inappropriate for me to provide policy views concerning whether federal criminal sentences should be more lenient, even based on my expertise as a “former member of the Sentencing Commission[.]” because doing so would jeopardize the confidence of the parties and the public in my ability to set aside any such views and faithfully apply the penalties that currently exist in federal criminal statutes.

4. **During your confirmation hearing, you engaged in a policy discussion with Ranking Member Grassley regarding sentencing policy, which you clarified was a discussion in which you engaged not as a sitting judge, but “as a former member of the Sentencing Commission.” In that discussion, you also expressed your support for particular sentencing laws passed by Congress. As a former member of the Sentencing Commission, do you believe that federal criminal sentences for fentanyl trafficking should be more lenient?**

RESPONSE: Please see my response to Question 3, which clarifies the scope and circumstances of my statements in response to Ranking Member Grassley’s question during my confirmation hearing. When I responded to Ranking Member Grassley’s request that I explain a particular policy position that I had taken publicly during my service as a member of the Sentencing Commission, I did not undertake to express any current policy views of federal sentencing statutes “as a former member of the Sentencing Commission” or otherwise. As a pending judicial nominee and a sitting federal judge, it would be inappropriate for me to answer this policy question about statutory penalties for fentanyl trafficking.

5. **During your confirmation hearing, you engaged in a policy discussion with Ranking Member Grassley regarding sentencing policy, which you clarified was a discussion in which you engaged not as a sitting judge, but “as a former member of the Sentencing Commission.” In that discussion, you also expressed your support for particular sentencing laws passed by Congress. As a former member of the Sentencing Commission, do you believe that federal criminal sentences for heroin trafficking should be more lenient?**

RESPONSE: Please see my response to Question 3, which clarifies the scope and circumstances of my statements in response to Ranking Member Grassley’s question during my confirmation hearing. When I responded to Ranking Member Grassley’s request that I explain a particular policy position that I had taken publicly during my service as a member of the Sentencing Commission, I did not undertake to express any current policy views of federal sentencing statutes “as a former member of the

Sentencing Commission” or otherwise. As a pending judicial nominee and a sitting federal judge, it would be inappropriate for me to answer this policy question about statutory penalties for heroin trafficking.

6. **During your confirmation hearing, you engaged in a policy discussion with Ranking Member Grassley regarding sentencing policy, which you clarified was a discussion in which you engaged not as a sitting judge, but “as a former member of the Sentencing Commission.” In that discussion, you also expressed your support for particular sentencing laws passed by Congress. As a former member of the Sentencing Commission, do you believe that federal criminal sentences for methamphetamine trafficking should be more lenient?**

RESPONSE: Please see my response to Question 3, which clarifies the scope and circumstances of my statements in response to Ranking Member Grassley’s question during my confirmation hearing. When I responded to Ranking Member Grassley’s request that I explain a particular policy position that I had taken publicly during my service as a member of the Sentencing Commission, I did not undertake to express any current policy views of federal sentencing statutes “as a former member of the Sentencing Commission” or otherwise. As a pending judicial nominee and a sitting federal judge, it would be inappropriate for me to answer this policy question about statutory penalties for methamphetamine trafficking.

7. **During your confirmation hearing, you engaged in a policy discussion with Ranking Member Grassley regarding sentencing policy, which you clarified was a discussion in which you engaged not as a sitting judge, but “as a former member of the Sentencing Commission.” In that discussion, you also expressed your support for particular sentencing laws passed by Congress. As a former member of the Sentencing Commission, do you believe that federal criminal sentences for armed criminals should be more lenient?**

RESPONSE: Please see my response to Question 3, which clarifies the scope and circumstances of my statements in response to Ranking Member Grassley’s question during my confirmation hearing. When I responded to Ranking Member Grassley’s request that I explain a particular policy position that I had taken publicly during my service as a member of the Sentencing Commission, I did not undertake to express any current policy views of federal sentencing statutes “as a former member of the Sentencing Commission” or otherwise. As a pending judicial nominee and a sitting federal judge, it would be inappropriate for me to answer this policy question about statutory penalties for armed criminals.

8. **During your confirmation hearing, you engaged in a policy discussion with Ranking Member Grassley regarding sentencing policy, which you clarified was a discussion in which you engaged not as a sitting judge, but “as a former member of the Sentencing Commission.” In that discussion, you also expressed your support for particular laws passed by Congress. As a former member of the Sentencing**

Commission, do you believe that federal criminal sentences for violent crime should be more lenient?

RESPONSE: Please see my response to Question 3, which clarifies the scope and circumstances of my statements in response to Ranking Member Grassley's question during my confirmation hearing. When I responded to Ranking Member Grassley's request that I explain a particular policy position that I had taken publicly during my service as a member of the Sentencing Commission, I did not undertake to express any current policy views of federal sentencing statutes "as a former member of the Sentencing Commission" or otherwise. As a pending judicial nominee and a sitting federal judge, it would be inappropriate for me to answer this policy question about statutory penalties for violent crimes.

- 9. During your confirmation hearing, you engaged in a policy discussion with Ranking Member Grassley regarding sentencing policy, which you clarified was a discussion in which you engaged not as a sitting judge, but "as a former member of the Sentencing Commission." In that discussion, you also expressed your support for particular laws passed by Congress. As a former member of the Sentencing Commission, do you believe that illegally reentering the United States after being deported should be a crime?**

RESPONSE: Please see my response to Question 3, which clarifies the scope and circumstances of my statements in response to Ranking Member Grassley's question during my confirmation hearing. When I responded to Ranking Member Grassley's request that I explain a particular policy position that I had taken publicly during my service as a member of the Sentencing Commission, I did not undertake to express any current policy views of federal sentencing statutes "as a former member of the Sentencing Commission" or otherwise. As a pending judicial nominee and a sitting federal judge, it would be inappropriate for me to answer this policy question about whether Congress should have criminalized illegally reentering the United States after being deported.

- 10. During your confirmation hearing, you engaged in a policy discussion with Ranking Member Grassley regarding sentencing policy, which you clarified was a discussion in which you engaged not as a sitting judge, but "as a former member of the Sentencing Commission." You also told Senator Lee that you are "aware of" studies regarding racial bias, again mentioning your time as a member of the Sentencing Commission. You said further that the different thresholds to trigger mandatory minimum sentences in crack cocaine cases as compared with powder cocaine cases are one factor that you believe contributes to alleged racial disparities in criminal sentencing. What other factors do you believe contribute to alleged racial disparities in federal criminal sentencing?**

RESPONSE: Please see my response to Question 3, which clarifies the scope and circumstances of my statements in response to Ranking Member Grassley's question during my confirmation hearing. When I responded to Ranking Member Grassley's

request that I explain a particular policy position that I had taken publicly during my service as a member of the Sentencing Commission, I did not undertake to express any current policy views of federal sentencing statutes “as a former member of the Sentencing Commission” or otherwise.

In response to Senator Lee—who asked me whether I would agree or disagree “with someone who said that most racial disparities in criminal convictions and sentencings result from an unconscious racial bias of judges, juries, and other judicial decisionmakers”—I began by explaining that “as a judge now, it is very important for me not to make personal commitments about things like the question that you asked.” I then acknowledged being “aware of social science research” regarding implicit bias, citing in particular the work of Harvard Professor Mahzarin Banaji, and I also stated that I am aware of research that the Sentencing Commission has conducted concerning the impact of certain policy choices in the federal sentencing system on different demographic groups. The Commission’s body of research regarding the federal sentencing system in the wake of the Anti-Drug Abuse Act of 1986, which is the legislation that established mandatory minimums and created the 100-to-1 crack cocaine/powder cocaine disparity, is among the research with which I am familiar. The Commission’s October 2017 report concerning the impact of mandatory minimum penalties for drug offenses in the federal criminal justice system is another such research study.

When I responded to Senator Lee, I did not express any personal views regarding my own beliefs about what factors contribute to alleged racial disparities in criminal convictions and sentencings, and as a pending judicial nominee and a sitting federal judge, it would be inappropriate for me to express a belief about whether there are racial disparities in federal criminal sentencing, or whether unconscious bias of judicial officers causes any such disparities. It would likewise be inappropriate for me to identify other potentially contributing factors, in response to this policy question.

11. During your confirmation hearing, you commented on the Supreme Court’s jurisprudence regarding the First Amendment. Specifically, you said that “the Supreme Court has rightly viewed the First Amendment right to religious liberty as foundational, fundamental.” I’d like to ask you about another of the Supreme Court’s views on foundational, fundamental rights: You said during your hearing that you are bound by the Supreme Court’s opinions on the Second Amendment, including *District of Columbia v. Heller*, and *McDonald v. Chicago*. Do you believe that the Supreme Court “rightly viewed” Second Amendment rights in those cases?

RESPONSE: During my confirmation hearing, I expressed the indisputable fact that the First Amendment of the Constitution, which states that “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof[.]” expressly protects a fundamental and foundational right to religious liberty. I also explained that “the Supreme Court is working through the doctrine” and that “there has been a series of cases in the last few years as the [Supreme] Court determines what it means to treat religious organizations differently.” Similarly, the Second Amendment

states that “[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[.]” and in *District of Columbia v. Heller*, the Supreme Court held that this constitutional provision establishes “an individual right to keep and bear arms[.]” *see* 554 U.S. 570, 595 (2008); *see also McDonald v. City of Chicago*, 561 U.S. 742, 74–50 (2010). As a current federal judge, I am bound to follow both *Heller* and *McDonald*, as I would be if confirmed to the D.C. Circuit. I have not expressed any personal views of the scope and contours of the fundamental rights protected by the First and Second Amendments, 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.

- 12. During your confirmation hearing, you commented on the Supreme Court’s jurisprudence regarding the First Amendment. Specifically, you said that “the Supreme Court has rightly viewed the First Amendment right to religious liberty as foundational, fundamental.” I’d like to ask you about another of the Supreme Court’s holdings regarding the First Amendment: In *Citizens United v. FEC*, the Supreme Court held that the First Amendment prohibits the government from restricting independent political expenditures by entities such as corporations, nonprofit entities, and others. Do you believe that the Supreme Court “rightly viewed” the First Amendment’s Free Speech Clause in *Citizens United*?**

RESPONSE: During my confirmation hearing, I expressed the indisputable fact that the First Amendment of the Constitution, which states that “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof[.]” expressly protects a fundamental and foundational right to religious liberty. The First Amendment also prohibits Congress from “abridging the freedom of speech” by legislation, and the Supreme Court has long held that it thereby expressly protects a fundamental and foundational right to free speech. In *Citizens United v. Federal Election Commission*, 558 U.S. 310 (2010), the Supreme Court determined that the First Amendment’s fundamental right to free speech prohibits the federal government from imposing limits on corporate entities’ independent expenditures for political communications. As a sitting federal judge, I am bound to follow *Citizens United*, as I would be if confirmed to the D.C. Circuit. I have not expressed any personal view about the Supreme Court’s application of First Amendment protections to campaign-finance restrictions, or any other law, and it would not be appropriate for me to do so under the Code of Conduct for Judges, given the fact that I am bound by Supreme Court precedents and campaign-finance issues are the subject of ongoing legislative review. Disputes concerning these matters are routinely litigated in federal courts.

- 13. During your confirmation hearing, you commented on the Supreme Court’s jurisprudence regarding the First Amendment. Specifically, you said that “the Supreme Court has rightly viewed the First Amendment right to religious liberty as foundational, fundamental.” I’d like to ask you about another of the Supreme Court’s holdings regarding the First Amendment: In *Citizens United v. FEC*, the Supreme Court held that the First Amendment prohibits the government from**

restricting independent political expenditures by entities such as corporations, nonprofit entities, and others. Do you believe that the Supreme Court “rightly viewed” the First Amendment’s Free Speech Clause in *Citizens United*?

RESPONSE: Please see my response to Question 12.

14. During your confirmation hearing, you commented on the Supreme Court’s jurisprudence regarding the First Amendment. Specifically, you said that “the Supreme Court has rightly viewed the First Amendment right to religious liberty as foundational, fundamental.” I’d like to ask you about another of the Supreme Court’s holdings regarding the First Amendment: In *Roman Catholic Diocese of Brooklyn v. Cuomo*, the Supreme Court in November 2020 enjoined New York from enforcing its 10- and 25- person occupancy limits on religious gatherings, which it described as “the Governor’s severe restrictions on the applicants’ religious services.” Do you believe that the Supreme Court “rightly viewed” the First Amendment’s Free Exercise Clause in *Roman Catholic Diocese of Brooklyn v. Cuomo*?

RESPONSE: During my confirmation hearing, I expressed the indisputable fact that the First Amendment of the Constitution, which states that “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof[.]” expressly protects a fundamental and foundational right to religious liberty. I also explained that “the Supreme Court is working through the doctrine” and that “there has been a series of cases in the last few years as the [Supreme] Court determines what it means to treat religious organizations differently.” As a sitting federal judge, I am bound to follow the Supreme Court’s decision in *Roman Catholic Diocese of Brooklyn v. Cuomo*, as well as the principles that the Court recently articulated, *per curiam*, in *Tandon v. Newsom*, and I would continue to be bound by Supreme Court precedents in this area if confirmed to the D.C. Circuit. I have not expressed any personal views of the scope and contours of the fundamental right to religious liberty, and it would not be appropriate for me to do so under Canon 3 of the Code of Conduct for Judges, as the Supreme Court and other courts are actively evaluating the Free Exercise Clause, as applied to various government regulations.

15. During your confirmation hearing, you commented on the Supreme Court’s jurisprudence regarding the First Amendment. Specifically, you said that “the Supreme Court has rightly viewed the First Amendment right to religious liberty as foundational, fundamental.” I’d like to ask you about another of the Supreme Court’s holdings regarding the First Amendment: In *Tandon v. Newsom*, the Supreme Court in April 2021 enjoined California from enforcing its limits on religious gatherings, including gatherings in private homes, noting that California “treats some comparable secular activities more favorably than at-home religious exercise.” This decision did not break new ground, and the Court even noted that this ruling was “the fifth time that the Court has summarily rejected the Ninth Circuit’s analysis of California’s COVID restrictions on religious exercise,” and that the Court’s decisions have made the law on the Free Exercise Clause “clear.” You

mentioned in your confirmation hearing that you are aware of the “series of rulings” from the Supreme Court on this issue in the past few years. Do you believe that the Supreme Court “rightly viewed” the First Amendment’s Free Exercise Clause in *Tandon v. Newsom*?

RESPONSE: Please see my response to Question 14.

16. During your confirmation hearing, when asked by Senator Hawley about the First Amendment right to religious liberty, you responded, “I do believe in religious liberty. That is a foundational tenet of our entire government, our constitutional scheme. The Supreme Court has made clear through its case law that governments can’t infringe on people’s religious rights.” Do you believe that the First Amendment right to free speech, which the Supreme Court has held in *Citizens United v. FEC* also applies to the speech of corporations and nonprofit entities, is a “foundational tenet of our entire government, our constitutional scheme?”

RESPONSE: Please see my response to Question 12.

17. During your confirmation hearing, when asked by Senator Hawley about the First Amendment right to religious liberty, you responded, “I do believe in religious liberty. That is a foundational tenet of our entire government, our constitutional scheme. The Supreme Court has made clear through its case law that governments can’t infringe on people’s religious rights.” Do you believe in the Second Amendment right of an individual to keep and bear arms?

RESPONSE: Please see my response to Question 11.

18. During your confirmation hearing, when asked by Senator Hawley about the First Amendment right to religious liberty, you responded, “I do believe in religious liberty. That is a foundational tenet of our entire government, our constitutional scheme. The Supreme Court has made clear through its case law that governments can’t infringe on people’s religious rights.” Do you believe that the Second Amendment right of an individual to keep and bear arms is a “foundational tenet of our entire government, our constitutional scheme?”

RESPONSE: Please see my response to Question 11.

19. Are civil rights guaranteed to all Americans, or only specific sub-sets of Americans?

RESPONSE: All Americans have the rights that are guaranteed by our Constitution. Federal civil rights statutes, such as the Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241, the Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327, and the Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, 107 Stat. 1488, contain provisions that specifically define the scope of the protections that are afforded by the particular congressional enactment, and in so doing, statutes such as these ultimately ensure liberty and justice for all. Such statutes also typically

contain extensive findings by Congress pertaining to the prior discriminatory treatment of the groups of persons that the statutes cover. *See, e.g.*, Civil Rights Act of 1991, Pub. L. No. 102-166, § 3(1), 105 Stat. 1071 (stating that the law was meant to provide, among other things, “appropriate remedies for intentional discrimination and unlawful harassment in the workplace”); Americans with Disabilities Act § 2(b)(1) (declaring that the law’s purpose is to “provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities”); Religious Freedom Restoration Act § 2(b)(2) (explaining that the law was intended to “provide a claim or defense to persons whose religious exercise is substantially burdened by government”). These civil rights statutes, and others, protect the constitutional rights of the categories of persons that are specifically identified in the statutes.

20. Do illegal aliens have a civil right to come to the United States?

RESPONSE: The circumstances under which noncitizens may be admitted into the United States are established in several federal statutes, including the Immigration and Nationality Act, 8 U.S.C. § 1101, *et seq.*, as amended by legislation including the Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102, and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, div. C, 110 Stat. 3009. Section 208 of the INA authorizes the Secretary of Homeland Security or the Attorney General to grant asylum to noncitizens who qualify as refugees within the meaning of the statute and satisfy certain eligibility criteria. *See* 8 U.S.C. § 1158. The Supreme Court has also held that “the Due Process Clause applies to all ‘persons’ within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent[.]” *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001); however, the Court has recently clarified that noncitizens “seeking initial entry[.]” such as those “who arrive at ports of entry” or those who are “detained shortly after unlawful entry[.]” are afforded “only those rights regarding admission that Congress has provided by statute[.]” *Dep’t of Homeland Sec. v. Thuraissigiam*, 140 S. Ct. 1959, 1982–83 (2020).

21. Please describe with particularity the process by which you answered these questions and the written questions of the other members of the Committee.

RESPONSE: The answers that I have provided to all of the written questions of the members of the Committee are mine alone. To generate each response, I read the question carefully, researched the law and my own practices as a district judge, as necessary, and drafted answers to the questions. I then shared my draft answers with employees of the Department of Justice’s Office of Legal Policy and received their feedback. I then finalized the responses based on my independent judgment.

22. Did any individual outside of the United States federal government write or draft your answers to these questions or the written questions of the other members of the Committee? If so, please list each such individual who wrote or drafted your answers. If government officials assisted with writing or drafting your answers,

please also identify the department or agency with which those officials are employed.

RESPONSE: The answers that I have provided to all of the written questions of the members of the Committee are mine alone. No individual outside of the United States federal government wrote or drafted any of the answers to any of the written questions that were sent to me by members of the Committee. My current and former chambers staff assisted me with research, as necessary, and employees of the Department of Justice's Office of Legal Policy provided feedback on the answers that I drafted.

**Responses to Questions for the Record from Senator Ted Cruz
to Judge Ketanji Brown Jackson, Nominee to the
United States Court of Appeals for the D.C. Circuit**

1. **Different judges apply different theories of interpretation to the Constitution. Some understand the Constitution to be living document, whereas Justice Scalia described himself as an originalist and said the Constitution was “dead, dead, dead.” During your hearing, you testified that you have not presided over any cases that have “required [you] to develop a view on Constitutional interpretation of text.”**

- a. **Is it your testimony that, as a sitting judge and a nominee for D.C. Circuit Court of Appeals that you do not have a theory of constitutional interpretation?**

RESPONSE: Yes, that is my testimony. As a sitting district judge, I view my role as applying D.C. Circuit and Supreme Court precedents to cases that come before me, and not developing my own theory of constitutional interpretation. If confirmed to the D.C. Circuit, I would likewise be bound by both Supreme Court and D.C. Circuit precedent.

- b. **If your answer to subpart (a) is anything other than “yes” please describe the theory of Constitutional interpretation of text to which you ascribe.**

RESPONSE: Please see my response to subpart (a).

2. **Describe how you would characterize your judicial philosophy, and identify which U.S. Supreme Court Justice’s philosophy from Warren, Burger, Rehnquist, or Robert’s Courts is most analogous with yours.**

RESPONSE: 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.

3. Do you believe the meaning of the Constitution changes over time absent changes through the Article V amendment process?

RESPONSE: As a sitting district judge, I am currently bound by the methods of constitutional interpretation that the Supreme Court has adopted, and I have a duty not to opine on the Supreme Court's methodology or suggest that I would undertake to interpret the text of the Constitution in any manner other than as the Supreme Court has directed. I also have 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.

4. Is it appropriate for the executive under the Constitution to refuse to enforce a law, absent constitutional concerns? Please explain.

RESPONSE: The Constitution requires that the President "take Care that the Laws be faithfully executed[.]" U.S. Const. art. II, § 3. As a sitting federal judge, who might be called upon to address a President's refusal to enforce a law in the context of a litigated case, it would be inappropriate for me to opine as to whether the President's refusal to enforce a law violates Article II, section 3 or any other constitutional provision.

5. What are the judicially enforceable limits on the President's ability to issue executive orders or executive actions?

RESPONSE: The Supreme Court has addressed the scope of the President's power to issue executive orders or undertake executive actions, with and without congressional authorization. *See Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952); *see also Medellin v. Texas*, 552 U.S. 491 (2008); *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004); *Dames & Moore v. Regan*, 453 U.S. 654 (1981). Broadly speaking, "[t]he President's authority to act, as with the exercise any of governmental power, 'must stem either from an act of Congress or from the Constitution itself.'" *Medellin*, 552 U.S. at 524 (citation omitted). The judicially enforceable limits on the President's ability to act thus include circumstances in which the President acts without express constitutional or statutory authority, or when the executive action impermissibly interferes with the functions that the Constitution assigns to another branch of government, or when the executive action otherwise violates a constitutional or statutory provision.

6. President Biden has created a commission to advise him on reforming the Supreme Court. Do you believe that Congress should increase, or decrease, the number of justices on the U.S. Supreme Court? Please explain.

RESPONSE: As a sitting federal judge, I am bound by the Supreme Court's precedents, regardless of that Court's size or composition. It would be

inappropriate for me to comment on the merits or demerits of proposals to increase or decrease the number of Justices on the Supreme Court.

7. Do you personally own any firearms? If so, please list them.

RESPONSE: No, I do not own any firearms.

8. Have you ever personally owned any firearms?

RESPONSE: No, I have never owned a firearm.

9. Have you ever used a firearm? If so, when and under what circumstances?

RESPONSE: I have not had occasion to use a firearm. I am familiar with the operation of firearms, however, through my service on a court that often handles trial cases that involve unlawful possession of dangerous weapons, and also through my relationship with my only sibling, who has served both as an infantryman and officer in the Maryland Army National Guard (during which he was twice deployed overseas) and as an undercover narcotics recovery officer in the Baltimore City police department. My earliest exposure to firearms occurred in connection with my childhood relationship with two of my uncles, who were employed as law enforcement officers in Miami-Dade County when I was a child, one of whom was subsequently appointed as the Chief of the City of Miami Police Department.

10. Is the ability to own a firearm a personal civil right?

RESPONSE: In *District of Columbia v. Heller*, the Supreme Court held that the Second Amendment confers “an individual right to keep and bear arms.” 554 U.S. 570, 595 (2008). In *McDonald v. City of Chicago*, the Court further held that the right that the Second Amendment guarantees is a fundamental right that applies to the states as well the federal government. *See* 561 U.S. 742, 750 (2010). These precedents of the Supreme Court are binding on me, and I would be required to apply them in any case that implicates a restriction or limitation on a person’s individual right to own a firearm.

11. Does the right to own a firearm receive less protection than the other individual rights specifically enumerated in the Constitution?

RESPONSE: The Supreme Court has held that the Second Amendment confers “an individual right to keep and bear arms.” *Heller*, 554 U.S. at 595. The Court has also clarified that the individual constitutional right to keep and bear arms is “not unlimited, just as the First Amendment’s right of free speech [is] not[.]” *Id.* To my knowledge, neither the Supreme Court nor the D.C. Circuit has concluded that the right to own a firearm receives less protection than the other individual rights that are specifically enumerated in the Constitution. If confirmed, I will abide by

Heller, McDonald, and any other Supreme Court and D.C. Circuit precedent that defines the scope of protections that the Second Amendment guarantees.

12. Does the right to own a firearm receive less protection than the right to vote under the Constitution?

RESPONSE: Please see my response to Question 11.

13. Is the Religious Freedom Restoration Act a civil rights law?

RESPONSE: Yes. “Congress enacted [the Religious Freedom Restoration Act (“RFRA”), 42 U.S.C. §§ 2000bb–2000bb4] in 1993 in order to provide very broad protection for religious liberty.” *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 693 (2014). RFRA’s statutory statement of findings and purpose states, *inter alia*, that, under our constitutional scheme, “governments should not substantially burden religious exercise without compelling justification[.]” 42 U.S.C. § 2000bb(a)(3), and RFRA was promulgated to ensure that the government “justif[ies] burdens on religious exercise imposed by laws neutral toward religion[.]” *id.* § 2000bb(a)(4). The statute is aimed at protecting individuals’ First Amendment right to the free exercise of religion in a manner that is similar to the Civil Rights Act’s protection of the Fourteenth Amendment right to equal protection and due process by prohibiting discrimination. Indeed, in interpreting a phrase “persons acting under color of law” as it appears in RFRA, the Supreme Court observed that RFRA “draws from one of the most well-known civil rights statutes: 42 U.S.C. § 1983, and explained that “[b]ecause RFRA uses the same terminology as § 1983 in the very same field of civil rights law, it is reasonable to believe that the terminology bears a consistent meaning.” *Tanzin v. Tanvir*, 141 S. Ct. 486, 490–91 (2020) (internal quotation marks and citation omitted). Congress has also identified RFRA as a civil rights law by including it among the statutes for which attorneys fees are available under the Civil Rights Attorney’s Fees Award Act. *See* 42 U.S.C. § 1988.

14. Are there identifiable limits to what government may impose—or may require—of private institutions, whether it be an religious organization like Little Sisters of the Poor or small businesses operated by observant owners?

RESPONSE: The Supreme Court has made clear that, under certain circumstances, various constitutional protections limit what the government can impose on, or require of, private persons and institutions. These constitutional limits include the First Amendment’s Free Exercise Clause. *See, e.g., Tandon v. Newsom*, 141 S. Ct. 1294, 1296–97 (2021) (per curiam); *Roman Cath. Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 66–68 (2020) (per curiam). The Supreme Court has also found that government can lack the constitutional authority to regulate the conduct of private parties under certain circumstances. *See, e.g., United States v. Morrison*, 529 U.S. 598, 613 (2000); *United States v. Lopez*, 514 U.S. 549, 561 (1995); *see also Nat’l Fed’n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 558 (2012).

- 15. Do Americans have the right to their religious beliefs outside the walls of their houses of worship and homes?**

RESPONSE: Under the binding precedents of the Supreme Court, the rights secured by the Free Exercise Clause and the Religious Freedom Restoration Act are not limited to religious practices in the home or in houses of worship.

- 16. You served on the advisory board of the Montrose Christian School. While you served, the school had a statement of beliefs, posted on its website, that included traditional Christian moral teachings like “all Christians are under obligation to seek to make the will of Christ supreme.”**

- a. Were you aware of this publicly posted statement of beliefs during your time on the advisory board?**

RESPONSE: I served on the inaugural advisory board of Montrose Christian School—a now-defunct kindergarten through 12th grade private school—for one year, from the fall of 2010 to the fall of 2011. I was aware that Montrose Christian School was affiliated with Montrose Baptist Church. I was not aware that the school had a public website or that any statement of beliefs was posted on the school’s website. My service on the board primarily involved planning for school fund-raising activities for the benefit of enrolled students. I did not receive any compensation for my service.

- b. If so, were you aware of the specific declarations that:**

- i. “Man is the special creation of God, made in His own image. He created them male and female as the crowning work of His creation. The gift of gender is thus part of the goodness of God’s creation.”**
 - 1. Yes or no?**
- ii. “In the spirit of Christ, Christians should oppose racism, every form of greed, selfishness, and vice, and all forms of sexual immorality, including adultery, homosexuality, and pornography. We should work to provide for the orphaned, the needy, the abused, the aged, the helpless, and the sick. We should speak on behalf of the unborn and contend for the sanctity of all human life from conception to natural death. Every Christian should seek to bring industry, government, and society as a whole under the sway of the principles of righteousness, truth, and brotherly love.”**
 - 1. Yes or no?**
- iii. “A wife is to submit herself graciously to the servant leadership of her husband even as the church willingly submits to the headship of Christ. She, being in the image of God as is her husband and thus equal to him, has the God-given responsibility to respect her husband and to serve as his helper in managing the household and nurturing the next generation.”**

1. Yes or no?

RESPONSE: Please see my answer to Q.16.a.

- c. I have not, and will not, inquire as to what you believe on these issues, and whether these statements reflect your personal views. Probing a nominee's faith, and making it a matter of public display and ridicule, is and has never been appropriate. Do you agree that an individual's beliefs on these matters do not affect his or her fitness to be a judge?**

RESPONSE: Article VI of the Constitution forbids any religious test for appointment to any public office, including an appointment to judicial service. That provision states, in relevant part, that "all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution; but no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States." Per the oath of office and the Code of Conduct, a judge is required to set aside all personal beliefs, including any religious beliefs, when she undertakes to rule in the cases to which she is assigned.

- 17. President Biden has promised to nominate judges "who look like America." What do you understand this to mean?**

RESPONSE: My understanding is that President Biden is seeking to appoint judges from a variety of professional and personal backgrounds.

- 18. Is it appropriate to consider skin color or sex when making a political appointment? Is it constitutional?**

RESPONSE: As a pending judicial nominee and sitting federal judge, the Constitution and the Code of Conduct for United States Judges prevent me from commenting on the constitutionality of any particular set of factors that the Executive Branch might or does consider when making political appointments.

- 19. Is there systemic racism in public policy across America?**

RESPONSE: I am aware that policymakers in the Executive Branch have expressed views about "systemic racism," including, for example, the view that "systemic racism refers to historic patterns or practices that have had a disparate impact of communities of color and other ethnic minorities, such as the fact that those communities have disproportionately lower rates of employment and wealth accumulation." Responses to Questions for the Record to Judge Merrick Garland, Nominee to be United States Attorney General, at 64 (Feb. 28, 2021). Policymakers routinely consider evidence concerning such matters, and they also make determinations regarding relevant policy changes. The role of a judicial

officer is distinct from that of a policymaker; as a judicial officer, it is my duty to adjudicate individual claims, including claims of race discrimination, that are filed by persons who are authorized to litigate such cases or controversies in federal court. When I have jurisdiction to do so, I resolve properly filed legal disputes concerning race discrimination and other unlawful conduct based on the arguments that the parties make, the established facts of the particular case, and the applicable law, and I do not draw upon, reference, or consider my personal views, if any, regarding systemic racism. Thus, it would be inappropriate for me to comment on the existence *vel non* of any such phenomenon.

20. Is the criminal justice system systemically racist?

RESPONSE: Please see my response to Question 19.

21. If you are to join the D.C. Circuit, and supervise along with your colleagues the court's human resources programs, will it be appropriate for the Court to provide its employees trainings which include the following:

- a. One race or sex is inherently superior to another race or sex;**
- b. An individual, by virtue of his or her race or sex, is inherently racist, sexist, or oppressive;**
- c. An individual should be discriminated against or receive adverse treatment solely or partly because of his or her race or sex; or**
- d. Meritocracy or related values such as work ethic are racist or sexist.**

RESPONSE: To my knowledge, the judges of the D.C. Circuit are not involved in evaluating or selecting training programs for court employees. If I join the D.C. Circuit, and if am asked to participate in evaluating any such program, I would assess the program's teachings and would oppose any instruction regarding race or sex that is unconstitutional or are otherwise contrary to law in light of the binding precedents of the Supreme Court and the D.C. Circuit.

22. Will you commit to opposing any proposed trainings for D.C. Circuit employees that teach that meritocracy, or related values such as work ethic and self-reliance, are racist or sexist?

RESPONSE: Please see my response to Question 21.

23. Is it appropriate for a witness to a crime to consider the race of the perpetrator when deciding whether to provide information to the police or federal authorities?

RESPONSE: As a sitting federal judge, it is not my role to determine whether a witness's consideration of the race of a perpetrator is "appropriate," as opposed to unlawful, and I assess the lawfulness of a defendant's behavior based solely on the

facts of the particular case and the applicable law, including binding precedents of the D.C. Circuit and the Supreme Court. In any event, this question provides insufficient information to form an opinion about the appropriateness of the hypothesized witness's decision-making process, and as a pending judicial nominee and a sitting federal judge, I am not able to provide any view regarding the lawfulness of a witness's consideration of race in this hypothetical situation.

24. Is it racist for a person to call police out of concern over the threatening or unlawful conduct of a person of color?

RESPONSE: As a sitting federal judge, it is not my role to determine whether conduct by individuals is "racist," as opposed to unlawful, but the question itself posits that race played no role in the caller's decision to contact the police. Moreover, as a pending judicial nominee and a sitting federal judge, I am not able to provide any view regarding the lawfulness of a person's decision to call the police in this hypothetical situation.

25. Does the President have the authority to abolish the death penalty?

- a. Does the implementation of a criminal punishment prescribed by law depend entirely on the President's discretion?**
- b. Could a President lawfully declare, as a policy, that he disfavors physical imprisonment and order all federal prosecutors to refuse to seek it?**

RESPONSE: Under our constitutional system, Congress determines the applicable penalties for conduct that it has declared unlawful, and, by statute, it has determined that the death penalty is an appropriate sentence for certain federal crimes under certain circumstances. The Supreme Court has upheld the death penalty as constitutional, and it is the President's duty to "take Care that the Laws be faithfully executed." U.S. Const. art II, § 3. Acting alone, the President does not have the authority to change the laws that Congress enacts, including the penalties that Congress has prescribed for criminal offenses. As a pending judicial nominee and sitting federal judge, I cannot opine as to any hypothetical scenario in which the President might refuse to implement any aspect of the criminal justice regime that the federal statutes embody.

26. At his hearing, Attorney General Garland said that an attack on a courthouse while in operation, and trying to prevent judges from actually trying cases, "plainly is domestic extremism." And when pressed, he mentioned also that an attack "simply on government property at night or any other kind of circumstances" is a clear and serious crime. But he seemed to make a distinction between the two, describing the latter (and only the latter) as an "attack on our democratic institutions." If you are confirmed, you will be sitting on a very important court. Do you agree with these statements?

RESPONSE: I am not familiar with these statements by Attorney General Garland, but the quoted statements appear to refer to alternative hypothetical circumstances involving an attack on a courthouse. Because litigation involving such issues might arise in the future, Canon 3 of the Code of Conduct prohibits me, as a sitting federal judge, from providing any personal view of whether the hypothesized conduct qualifies as “domestic extremism” or constitutes “an attack on our democratic institutions.”

27. Do you agree that free speech is an essential and irreplaceable American value?

RESPONSE: Yes. The First Amendment of the Constitution plainly protects the right of free speech, *see* U.S. Const. amend. I, and the Supreme Court has long held that freedom of speech is a “fundamental” right. *See, e.g., Schneider v. New Jersey*, 308 U.S. 147, 150 (1939).

a. What are the present threats to free speech in America?

RESPONSE: Policymakers routinely consider whether free speech in America is being threatened in various ways, and judicial officers also sometimes consider legal actions brought by individuals and entities who claim that their rights to free speech are being threatened. As a judicial officer, it is my duty to adjudicate individual claims of free-speech violations, and when I have jurisdiction to do so, I resolve properly filed legal disputes concerning violations of free speech based solely on the arguments that the parties make, the established facts of the particular case, and the applicable law. *See, e.g., Patterson v. United States*, 999 F. Supp. 2d 300 (D.D.C. 2013). I do not draw upon, reference, or consider my personal views, if any, regarding present threats to free speech in America. Thus, it would be inappropriate for me to comment on the existence *vel non* of any such threats.

b. What role do the courts have in addressing threats to free speech?

RESPONSE: Please see my response to Question 27(a).

c. Does the First Amendment protect speech that some may consider offensive?

RESPONSE: Yes. “If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.” *Texas v. Johnson*, 491 U.S. 397, 414 (1989); *see also Street v. New York*, 394 U.S. 576, 592 (1969) (“It is firmly settled that under our Constitution the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers.”).

i. If so, what are the limits to that protection?

RESPONSE: The Supreme Court has made clear that “speech that is ‘vulgar,’ ‘offensive,’ and ‘shocking’ is ‘not entitled to absolute constitutional protection under all circumstances.’” *Hustler Mag., Inc. v. Falwell*, 485 U.S. 46, 56 (1988) (quoting *FCC v. Pacifica Found.*, 438 U.S. 726, 747 (1978)). For instance, the government can “lawfully punish an individual for the use of insulting “‘fighting” words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace.”” *Id.* (quoting *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571–72 (1942)). Similarly, “obscene material is unprotected by the First Amendment[.]” such that the government may regulate materials that, “taken as a whole, appeal to the prurient interest in sex, which portray sexual conduct in a patently offensive way, and which, taken as a whole, do not have serious literary, artistic, political, or scientific value.” *Miller v. California*, 413 U.S. 15, 24 (1973).

d. What is “hate speech”?

RESPONSE: A plurality of the Supreme Court has described “[s]peech that demeans on the basis of race, ethnicity, gender, religion, age, disability, or any other similar ground” as “hateful[.]” *Matal v. Tam*, 137 S. Ct. 1744, 1764 (2017) (plurality opinion). However, the Supreme Court has not defined “hate speech” as a distinct doctrinal category, and the Court has consistently recognized First Amendment limits on the government’s ability to regulate such speech. *See, e.g., Snyder v. Phelps*, 562 U.S. 443, 457–58 (2011); *R.A.V. v. City of St. Paul*, 505 U.S. 377, 380–81 (1992) (holding that an ordinance that prohibits “plac[ing] on public or private property a symbol, object, appellation, characterization or graffiti, including, but not limited to, a burning cross or Nazi swastika, which one knows or has reasonable grounds to know arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender” is facially unconstitutional); *see also B.W.A. v. Farmington R-7 Sch. Dist.*, 554 F.3d 734, 739 (8th Cir. 2009) (observing that “[r]acially offensive speech cannot be restricted for that reason alone”).

i. Is “hate speech,” as you have just defined it, protected by the First Amendment?

RESPONSE: Please see my response to Question 27(d).

ii. If so, what are the limits to that protection?

RESPONSE: The Supreme Court has held that the government may punish “‘fighting’ words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace[.]” *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942), consistent with the First Amendment. The government can also permissibly regulate “true threats,” *i.e.*, “those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals.” *Virginia v. Black*, 538 U.S. 343, 359 (2003).

28. Do public educational institutions have the legal obligation to protect the speech rights of students and employees?

RESPONSE: Yes. The Supreme Court has held that “First Amendment rights, applied in light of the special characteristics of the school environment, are available to teachers and students” in public educational institutions, and that “[i]t can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.” *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969). Thus, “the First Amendment generally precludes public universities from denying student organizations access to school-sponsored forums because of the groups’ viewpoints.” *Christian Legal Soc’y Chapter of Univ. of Cal. v. Martinez*, 561 U.S. 661, 667–68 (2010). However, the Supreme Court has held that public schools can regulate student speech that would “materially and substantially disrupt the work and discipline of the school[.]” *Tinker*, 393 U.S. at 513, and that “the constitutional rights of students in public school are not automatically coextensive with the rights of adults in other settings[.]” *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 682 (1986). Whether the *Tinker* rule applies to student speech that occurs off campus is a matter that the Supreme Court is currently considering in the case of *Mahanoy Area School District v. B.L.*, No. 20-255 (U.S. argued Apr. 28, 2021).

29. Do private educational institutions have the legal obligation to protect the speech rights of students and employees?

RESPONSE: The Supreme Court has held that the First Amendment does not directly regulate the actions of private educational institutions, because, by its terms, the First Amendment “appl[ies] to governmental action” and “ordinarily does not itself throw into constitutional doubt the decisions of private citizens to permit, or to restrict, speech[.]” *Denver Area Educ. Telecomms. Consortium, Inc. v. FCC*, 518 U.S. 727, 737 (1996).

30. Are educational institutions that receive federal funding permitted to discriminate on the basis of speech?

RESPONSE: Whereas Title VI of the Civil Rights Act of 1964 prohibits entities (including educational institutions) that receive federal funding from discriminating on the basis of race, color, or national origin, 42 U.S.C. § 2000d, and Title IX of the Education Amendments of 1972 prohibits educational institutions that receive federal funding from discriminating on the basis of sex, 20 U.S.C. § 1681(a), to my knowledge, no federal statute currently prohibits educational institutions that receive federal funding from discriminating on the basis of speech.

31. In 2011, the U.S. Department of Education issued a dear Deal Colleague Letter to colleges and universities that broadened the definition of sexual harassment and required schools to adopt a lenient “more likely than not” burden of proof when

adjudicating claims, among other procedural defects. How does this compare with the standard of proof that governs in criminal prosecutions?

RESPONSE: It is well established that “the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.” *In re Winship*, 397 U.S. 358, 364 (1970). Because the “more likely than not” burden of proof is a lower standard than proof beyond a reasonable doubt, it would be easier to establish guilt concerning claims of sexual harassment in the context of DOE adjudications than in criminal prosecutions concerning similar conduct.

32. Given the information in the public domain, do you believe that Brett Kavanaugh sexually assaulted Christine Blasey Ford?

RESPONSE: As a pending judicial nominee and a sitting federal judge, it would be inappropriate for me to comment on this question.

**Responses to Questions for the Record from Senator Mike Lee
to Judge Ketanji Brown Jackson, Nominee to the
United States Court of Appeals for the D.C. Circuit**

1. How would you describe your judicial philosophy?

RESPONSE: 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. 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. If confirmed to the U.S. Court of Appeals for the D.C. Circuit, I would do the same.

2. What sources would you consult when deciding a case that turned on the interpretation of a federal statute?

RESPONSE: I have issued nearly 50 published opinions in which I have engaged in the process of interpreting a federal statute. When I undertook to determine the meaning of statutory text in each of those cases, I started with a comprehensive evaluation of the statute's text, using traditional tools of statutory construction, including a close textual analysis of the words and structure of the statute. *See, e.g., All. of Artists & Recording Cos., Inc. v. Gen. Motors Co.*, 162 F. Supp. 3d 8 (D.D.C. 2016), *aff'd*, 947 F.3d 849 (D.C. Cir. 2020). I have also occasionally employed canons of construction. Use of these tools ordinarily results in a conclusion regarding the meaning of the statutory provision. However, if I find that the statutory text is ambiguous insofar as it is susceptible to more than one meaning, I reconsider the parties' arguments and may consult the legislative history, as the Supreme Court permits, in an effort to ascertain the will of Congress. I have never resolved a statutory ambiguity based solely on the legislative history of the statute.

3. What sources would you consult when deciding a case that turned on the interpretation of a constitutional provision?

RESPONSE: I would interpret the Constitution in a manner that is consistent with the methods of interpretation that the Supreme Court employs when it undertakes to interpret constitutional provisions. The Supreme Court has recently interpreted various constitutional provisions by attempting to ascertain the original meaning of the words used as understood by the public at the time of the Founding. *See, e.g., United States v. Jones*, 132 S. Ct. 945, 949 (2012) (Fourth Amendment); *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 906 (2010) (First Amendment); *District of Columbia v. Heller*, 554 U.S. 570, 576–600 (2008) (Second Amendment); *Crawford v. Washington*, 541 U.S. 36, 42–57 (2004) (Confrontation Clause); *Alden v. Maine*, 527 U.S. 706, 715–724 (1999) (Eleventh Amendment). And while the

Supreme Court has primarily evaluated the original public meaning of the text of the constitutional provision at issue, *see Jones*, 132 S. Ct. at 949, 953; *Heller*, 554 U.S. at 576–77, its binding precedents also sometimes refer to the original intent of the Framers, *see Crawford*, 541 U.S. at 53–54, 59, 61. As a lower court judge, I am bound by both the precedents of the Supreme Court and its method of analysis, and if called upon to interpret a constitutional provision, I would adhere to the methods of analysis that the Supreme Court and the D.C. Circuit employ, without regard to any personal view of how the Constitution should be interpreted.

4. What role do the text and original meaning of a constitutional provision play when interpreting the Constitution?

RESPONSE: Please see my response to Question 3.

5. What are the constitutional requirements for standing?

RESPONSE: The “irreducible constitutional minimum” requirements for standing to invoke the power of a federal court to resolve, as necessary to demonstrate that the plaintiff’s legal claim presents a remediable case or controversy that gives rise to jurisdiction under Article III of the Constitution, are: (1) that the plaintiff has suffered an injury in fact that is “concrete and particularized” and “actual or imminent”; (2) that the asserted injury is fairly traceable to the defendant’s action, and (3) that it is “likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.” *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–61 (1992) (internal quotation marks and citations omitted).

6. Do you believe there is a difference between “prudential” jurisdiction and Article III jurisdiction in the federal courts? If so, which jurisdictional requirements are prudential, and which are mandatory?

RESPONSE: Article III, section 2 defines the scope of a federal court’s jurisdiction—i.e., “[t]he judicial Power” that the Constitution vests in the federal judiciary—and the Supreme Court has developed various doctrines that relate the exercise of a federal court’s jurisdiction. Some of these doctrines are mandated by the Constitution’s text; others are merely “prudential.”

Standing, mootness, and ripeness are all rooted in Article III’s “case” or “controversy” requirement. *See, e.g., Lujan v. Defs. of Wildlife*, 504 U.S. 555, 559–60 (1992); *Friends of the Earth, Inc. v. Laidlaw Env’t Servs. (TOC), Inc.*, 528 U.S. 167, 180 (2000); *Duke Power Co. v. Carolina Env’t Study Grp., Inc.*, 438 U.S. 59, 81 (1978). These determinations are mandatory considerations that must be assessed at the outset of a case, and if there is no standing, or if the matter is moot or unripe, the court lacks jurisdiction to proceed to review the merits and resolve the dispute.

Other limits on a federal court’s exercise of jurisdiction that are not grounded in the text of Article III, but the Supreme Court has determined that the exercise of a court’s

jurisdiction over certain cases and controversies is restricted on these grounds nevertheless. See, e.g., *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 12 (2004) (explaining that “prudential standing encompasses the general prohibition on a litigant’s raising another person’s legal rights, [and] the rule barring adjudication of generalized grievances more appropriately addressed in the representative branches” (internal quotation marks and citation omitted)); *Duke Power Co.*, 438 U.S. at 81–82 (discussing “prudential considerations embodied in the ripeness doctrine[.]” such as the extent to which the parties would be “adversely affected” by a “delayed resolution” of the case); *United States v. W.T. Grant Co.*, 345 U.S. 629, 632–33 (1953) (noting that various practical concerns impact mootness determinations, such as the likelihood that an action will recur). Notwithstanding these “prudential” considerations, the Supreme Court has recently reiterated that federal courts must hear cases that have been properly brought, and that “a federal court’s obligation to hear and decide cases within its jurisdiction is virtually unflagging.” *Lexmark Int’l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 126 (2014) (internal quotation marks and citation omitted).

Another potential category of prudential restrictions that pertain to a court’s jurisdiction relate to circumstances under which a court can hear claims that implicate the adjudicative authority of the States. The Supreme Court has sometimes required federal courts to abstain from exercising jurisdiction as a prudential matter, rather than one that is necessarily grounded in Article III. See, e.g., *R.R. Comm’n of Tex. v. Pullman Co.*, 312 U.S. 496, 501 (1941) (emphasizing that federal courts should abstain from exercising jurisdiction over a case involving state law when, for instance, resolution of a state law question by state courts can avoid the necessity of deciding a question of federal constitutional law); see also *Younger v. Harris*, 401 U.S. 37, 41 (1971) (holding that federal courts should not grant injunctive relief against state criminal prosecution pursuant to “the national policy forbidding federal courts to stay or enjoin pending state court proceedings except under special circumstances”).

7. How would you define the doctrine of administrative exhaustion?

RESPONSE: Administrative exhaustion is the principle that a plaintiff must pursue administrative remedies before seeking to challenge an agency or state action in federal court. See, e.g., *McKart v. United States*, 395 U.S. 185, 193 (1969).

8. Do you believe Congress has implied powers beyond those enumerated in the Constitution? If so, what are those implied powers?

RESPONSE: The scope of Congress’s constitutional authority is a matter that is subject to vigorous and ongoing debate. Article I, section 8 lists various specific powers of the Legislative branch, and it concludes with the statement that the Legislature also has the power “[t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by the Constitution in the Government of the United States, or in any Department or

Officer thereof.” U.S. Const. art I, § 8, cl. 18. Similarly, section 5 of the Fourteenth Amendment confers to Congress the “power to enforce, by appropriate legislation, the provisions of this article.” Some have argued that these and other constitutional grants of authority compel the conclusion that the Framers intended for Congress to have implied powers beyond those enumerated in the Constitution.

The Supreme Court has, at times, recognized that Congress has certain implied powers. *See, e.g., Perez v. Brownell*, 356 U.S. 44, 57 (1958) (explaining that, “[a]lthough there is in the Constitution no specific grant to Congress of power to enact legislation for the effective regulation of foreign affairs, there can be no doubt of the existence of this power in the law-making organ of the Nation”), *overruled in part on other grounds by Afroyim v. Rusk*, 387 U.S. 253 (1967); *McGrain v. Daugherty*, 273 U.S. 135, 173 (1927) (holding “that the two houses of Congress, in their separate relations, possess, not only such powers as are expressly granted to them by the Constitution, but such auxiliary powers as are necessary and appropriate to make the express powers effective”). However, the Supreme Court has also made clear that “[e]very law enacted by Congress must be based on one or more of its powers enumerated in the Constitution.” *United States v. Morrison*, 529 U.S. 598, 607 (2000); *see also United States v. Lopez*, 514 U.S. 549, 566 (1995) (“The federal government is acknowledged by all to be one of enumerated powers.” (internal quotation marks, citation, and alterations omitted)). Thus, while “[t]he principle [that Congress] can exercise only the powers granted to it . . . is now universally admitted[,]” the significant “question respecting the extent of the powers actually granted[] is perpetually arising, and will probably continue to arise, as long as our system shall exist.” *Lopez*, 514 U.S. at 566 (quoting *McCulloch v. Maryland*, 4 Wheat. 316, 405 (1819)) (internal quotation marks and alterations omitted)).

9. Where Congress enacts a law without reference to a specific Constitutional enumerated power, how would you evaluate the constitutionality of that law?

RESPONSE: If I were ever called upon to evaluate a congressional enactment that did not reference a specific power enumerated in the Constitution, I would utilize the same methods of evaluation that the Supreme Court has used to assess Congress’s ability to enact laws that have been challenged on those grounds.

In *United States v. Lopez*, 514 U.S. 549 (1995), for example, the Supreme Court assessed the authority of Congress to enact the Gun-Free School Zones Act by “start[ing] with first principles[,]” and in this regard, it focused on the text of the Constitution itself. *See id.* at 552 (noting that “[t]he Constitution creates a Federal Government of enumerated powers”). The Court then reviewed prior precedents that had addressed the extent of Congress’s power under the Commerce Clause, *see id.* at 553–59, and gleaned applicable principles from those binding authorities, including confirmation that Congress’s Commerce Clause power “is subject to outer limits[,]” *id.* at 557. The Court also determined, based on the circumstances presented in the prior binding precedents, that even its past decisions affirming Congress’s authority to enact legislation under the Commerce Clause “had involved economic activity in a

way that the possession of a gun in a school zone does not[.]” *id.* at 560, and it also noted that, “as part of [its] independent evaluation of constitutionality under the Commerce Clause” it would have “of course consider[ed] legislative findings, and indeed even congressional committee findings, regarding effect on interstate commerce[.]” if the statute or its legislative history had contained such findings, *id.* at 562.

I would ascertain if the Supreme Court or the D.C. Circuit has used additional, or different, tools to evaluate the constitutionality of enactments of Congress that do not reference a specific enumerated right. And I would research the applicable methods of interpretation, and apply such tools, if I had to evaluate the constitutionality of any such statute.

10. Does the Constitution protect rights that are not expressly enumerated in the Constitution? Which rights?

RESPONSE: The Supreme Court has determined that the Constitution protects certain rights that are not specifically enumerated in the Constitution. Cases such as *Griswold v. Connecticut*, 381 U.S. 479 (1965), and *Eisenstadt v. Baird*, 405 U.S. 438 (1972), recognize an unenumerated right to privacy that encompasses the right to marital privacy and to use contraception. *Obergefell v. Hodges*, 576 U.S. 644 (2015), and *Loving v. Virginia*, 388 U.S. 1 (1967), affirm a constitutional right to marry, and *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535 (1942), and *Pierce v. Society of Sisters*, 268 U.S. 510 (1925), recognize the right to have children and to direct their education. In *Saenz v. Roe*, 526 U.S. 489 (1999), the Supreme Court affirmed a right to travel, and *Roe v. Wade*, 410 U.S. 113 (1973), and *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992), articulate a limited right to terminate a pregnancy, particularly before viability, *Casey*, 505 U.S. at 870. The Supreme Court has also “assumed, and strongly suggested” that there is a “right to refuse unwanted lifesaving medical treatment.” *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997).

According to the Supreme Court, the due process clauses of the Fifth and Fourteenth Amendments are the primary sources for the recognition of unenumerated rights, and the Court has held that, as a general matter, due process protects “those fundamental rights and liberties which are, objectively, deeply rooted in this Nation’s history and tradition” and “implicit in the concept of ordered liberty[.]” *Glucksberg*, 521 U.S. at 720–21 (internal quotation marks and citations omitted). The Supreme Court has also, at times, suggested that the Ninth Amendment—which provides that the “enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people[.]” and the Privileges and Immunities Clause of Article IV, section 2, which states that “the Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States[.]” are sources for unenumerated rights. See, e.g., *Roe*, 410 U.S. at 152–53; *Saenz*, 526 U.S. at 501–02.

11. What rights are protected under substantive due process?

RESPONSE: Please see my response to Question 10.

- 12. If you believe substantive due process protects some personal rights such as a right to abortion, but not economic rights such as those at stake in *Lochner v. New York*, on what basis do you distinguish these types of rights for constitutional purposes?**

RESPONSE: As a pending judicial nominee and a sitting federal judge, any personal views that I might have regarding of the scope of substantive due process have no bearing on the constitutional analysis that I would impose in any case that implicates these issues. Under binding Supreme Court precedent, the substantive due process clause protects unenumerated rights that are “deeply rooted in this Nation’s history and tradition” and “implicit in the concept of ordered liberty,” *Washington v. Glucksberg*, 521 U.S. 702, 720–21 (1997) (internal quotation marks and citations omitted), and the government’s regulation of such unenumerated personal rights may be subject to heightened scrutiny. The Supreme Court has not afforded the same protection to the unenumerated economic rights that were initially recognized in *Lochner*. See *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937); *Williamson v. Lee Optical of Okla. Inc.*, 348 U.S. 483 (1955). The Court has held that the government can regulate in a manner that restricts economic freedom if the regulation at issue is rationally related to a legitimate government interest. See, e.g., *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 461 (1981); *City of New Orleans v. Dukes*, 427 U.S. 297, 303 (1976).

- 13. What are the limits on Congress’s power under the Commerce Clause?**

RESPONSE: According to the Supreme Court, Congress’s power under the Commerce Clause is broad, but it is not unlimited. The Court has held that Congress may only regulate three categories of activity pursuant to that constitutional provision: (1) “the use of the channels of interstate commerce,” (2) “the instrumentalities of interstate commerce, or persons or things in interstate commerce” and activities that threaten such instrumentalities, persons or things, and (3) activities that “substantially affect interstate commerce[.]” *United States v. Lopez*, 514 U.S. 549, 558–59 (1995); see also *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 536 (2012).

- 14. What qualifies a particular group as a “suspect class,” such that laws affecting that group must survive strict scrutiny?**

RESPONSE: When an act of government distinguishes between groups of people, the Supreme Court has described the “traditional indicia of suspectness” to include those classifications that pertain to “an immutable characteristic determined solely by the accident of birth,” and also those that pertain to classes of persons who are “saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process.” *Johnson v.*

Robison, 415 U.S. 361, 375 n.14 (1974) (internal quotation marks and citations omitted). To date, when there is a constitutional challenge, the Supreme Court has determined that race, religion, national origin, and alienage are suspect classes that are subject to heightened (“strict”) scrutiny. *See, e.g., City of New Orleans v. Duke*, 427 U.S. 297, 303 (1976); *Graham v. Richardson*, 403 U.S. 365, 371–32 (1971).

15. How would you describe the role that checks and balances and separation of powers play in the Constitution’s structure?

RESPONSE: Checks and balances play an essential role in our constitutional scheme, because liberty can only be achieved, and retained, through the stratification of government power. The Framers carefully and deliberately divided the powers of government among the three branches, and they also authorized each branch to relate to, and work in concert with, the others, so as to serve as a check on the others’ accumulation of power. In Federalist 51, James Madison explained that “the great security against a gradual concentration of the several powers in the same department, consists in giving to those who administer each department the necessary constitutional means and personal motives to resist encroachments of the others.” The Federalist No. 51 (James Madison); *see also Buckley v. Valeo*, 424 U.S. 1, 121 (1976) (“[T]he men who met in Philadelphia in the summer of 1787 . . . viewed the separation of powers as a vital check against tyranny.”). And the structure of our constitutional system prevents autocracy while also promoting “a workable government.” *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring); *see also id.* (“While the Constitution diffuses power to better secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government[,]” and thereby “enjoins upon its branches separateness but interdependence, autonomy but reciprocity.”). Thus, the system of separate powers, accompanied by checks and balances, is a foundational component of our governmental scheme that promotes core constitutional values, by design. *See Myers v. United States*, 272 U.S. 52, 292–93 (1926) (Brandeis, J., dissenting) (“Checks and balances were established in order that this should be ‘a government of laws and not of men.’ . . . The purpose [of the doctrine of the separation of powers] was not to promote efficiency but to preclude the exercise of arbitrary power . . . by means of the inevitable friction incident to the distribution of the governmental powers among three departments,” in order “to save the people from autocracy.”).

16. How would you go about deciding a case in which one branch assumed an authority not granted it by the text of the Constitution?

RESPONSE: I have yet to be assigned a case involving a claim that Congress was not constitutionally authorized to enact certain legislation. If I had such a case, I would analyze the constitutional text that pertains to the issue in dispute consistent with Supreme Court and D.C. Circuit precedents that evaluate other allegedly unauthorized exercises of congressional authority, including cases such as *Medellin v. Texas*, 552 U.S. 491 (2008), *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004), *United States v. Morrison*, 529 U.S. 598 (2000), and *United States v. Lopez*, 514 U.S. 549 (1995).

In a case of mine that involved a claim that the President had overstepped his constitutional authority by issuing executive orders that governed the collective bargaining rights of federal employees in a manner that conflicted with the will of Congress as set forth in the prescriptions of Federal Service Labor-Management Relations Act (“FSLRMS”), 5 U.S.C. § 7101–35, *see Am. Fed’n of Gov’t Emps., AFL-CIO v. Trump*, 318 F. Supp. 3d 370 (D.D.C. 2018), *rev’d and vacated on other grounds*, 929 F.3d 748 (D.C. Cir. 2019), I consulted and applied binding Supreme Court and D.C. Circuit case law regarding the authority of the President to regulate federal labor-management relations with or without specific congressional authorization, *see id.* at 412–18, and interpreted the statute’s text in light of precedents that define the statutory right of federal employees to bargain collectively, *see id.* at 418–40.

17. What role should empathy play in a judge’s consideration of a case?

RESPONSE: A judge has a duty to decide cases based solely on the law, without fear or favor, prejudice or passion. In all cases, courts should generally be mindful that the exercise of judicial authority has a profound impact of the lives and circumstances of litigants. But to the extent that empathy is defined as one’s ability to share what another person is feeling from the other person’s point of reference, empathy should not play a role in a judge’s consideration of a case.

18. What’s worse: Invalidating a law that is, in fact, constitutional, or upholding a law that is, in fact, unconstitutional?

RESPONSE: The statutes that Congress enacts are presumed to be constitutional, and there is no legal authority for a court to invalidate a congressional enactment that is, in fact, constitutional. Furthermore, the Supreme Court has long required lower federal courts to avoid considering constitutional questions that might lead to the invalidation of federal statutes, if possible, and there are often threshold considerations under Article III that limit a federal court’s power to address a constitutional challenge in any event. Thus, I would need significantly more information than this question provides about the laws at issue and the circumstances under which they are being challenged in order to be able to form any opinion about which exercise of judicial authority is “worse.” Even if such information was provided, however, as a pending judicial nominee and a sitting federal judge, it would be inappropriate for me to opine on the relative merits or demerits of hypothesized scenarios regarding judicial treatment of challenged government action.

19. From 1789 to 1857, the Supreme Court exercised its power of judicial review to strike down federal statutes as unconstitutional only twice. Since then, the invalidation of federal statutes by the Supreme Court has become significantly more common. What do you believe accounts for this change? What are the downsides to the aggressive exercise of judicial review? What are the downsides to judicial passivity?

RESPONSE: Please see my response to Question 18. As a district court judge, my role has been to consider the facts and arguments that are presented in each case that is assigned to me, and to apply the law (including and especially the binding precedents of the Supreme Court and the D.C. Circuit) to resolve the matter before me. It is well established that “[i]t is emphatically the province and duty of the judicial department to say what the law is[.]” and that this power includes ruling on the constitutionality of legislation that Congress passes and the President signs, *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803). But I have not formed any opinions about broader trends or changes in the Supreme Court’s practices concerning invalidation of federal statutes. Even if I had formed such an opinion, it would be inappropriate for me, as a pending judicial nominee and a sitting federal judge, to comment on the benefits and disadvantages of difference in the rate at which the Court exercises its power to review the constitutionality of legislative enactments.

20. How would you explain the difference between judicial review and judicial supremacy?

RESPONSE: Judicial review refers to the power of the judiciary to assess the legality of decisions made by the executive and legislative branch. *See Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803). Judicial supremacy refers to the idea that the Supreme Court is the final arbiter on the meaning of constitutional provisions. *See, e.g., City of Boerne v. Flores*, 521 U.S. 507, 536 (1997) (explaining that, while “[i]t is for Congress in the first instance to ‘determin[e] whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment,’ and its conclusions are entitled to much deference[.] . . . the courts retain the power, as they have since *Marbury v. Madison*, to determine if Congress has exceeded its authority under the Constitution.” (quoting *Katzenbach v. Morgan*, 384 U.S. 641, 651 (1966))); *see also* Barry Friedman & Erin F. Delaney, *Becoming Supreme: The Federal Foundation of Judicial Supremacy*, 111 Colum. L. Rev. 1137 (2011) (explaining the doctrine of judicial supremacy).

21. Abraham Lincoln explained his refusal to honor the Dred Scott decision by asserting that “If the policy of the Government upon vital questions affecting the whole people is to be irrevocably fixed by decisions of the Supreme Court . . . the people will have ceased to be their own rulers, having to that extent practically resigned their Government into the hands of that eminent tribunal.” How do you think elected officials should balance their independent obligation to follow the Constitution with the need to respect duly rendered judicial decisions?

RESPONSE: The Constitution’s tenets are binding on officials who are elected to serve in the government of the United States, and it is clear beyond cavil that such officials have an independent obligation to adhere to the Constitution’s commands. As a judicial officer, my role is to determine whether and to what extent the Constitution and laws of the United States have been violated by anyone, including such officials, in the context of cases or controversies that are properly filed in federal court and assigned to me. As a pending judicial nominee and a sitting federal judge,

it would be inappropriate for me to opine on the antecedent question of how such officials can avoid violating the Constitution as interpreted by the judiciary, or the means by which such officials can accomplish the subsequent duty of balancing their own understanding of what the Constitution requires with the determinations that are made in judicial decisions.

22. **In Federalist 78, Hamilton says that the courts are the least dangerous branch because they have neither force nor will, but only judgment. Explain why that's important to keep in mind when judging.**

The Federalist Papers speak to the Framers' intent concerning the powers that the Constitution confers upon the branches of the federal government. In No. 78, Hamilton asserts that "the judiciary is beyond comparison the weakest of the three departments of power[.]" and he also makes clear that the judicial power to review and invalidate legislative action for conformity with the Constitution's commands—which is in "the proper and peculiar province of the courts"—does *not* "imply a superiority of the judiciary to the legislative power." The Federalist No. 28 (Alexander Hamilton). To this end, the Supreme Court has established various doctrines to ensure that courts, which are not accountable to the people by design, cannot exercise unlimited power. These doctrines include the Supreme Court's interpretation of Article III to confine courts to the consideration of "cases" or "controversies," and it is important for courts to keep the judiciary's limited authority in mind when judging, consistent with the Framers' intent. *See, e.g., Lujan v. Defs. of Wildlife*, 504 U.S. 555, 577 (1992) (preventing the Judiciary from intruding into the executive sphere).

23. **How would you describe your approach to reading statutes – how much weight do you give to the plain meaning of the text? When we talk about the plain meaning of a statute, are we talking about the public understanding at the time of enactment, or does the meaning change as social norms and linguistic conventions evolve?**

RESPONSE: As a district court judge, I routinely undertake to interpret statutes, and have issued nearly 50 opinions that involve some form of statutory interpretation. Based on my past practice, I give the statute's text controlling weight. I have considered the meaning of the terms that the legislature used, the structure of the statute as a whole, and other traditional tools of statutory construction, including canons of statutory interpretation. *See, e.g., All. of Artists & Recording Cos., Inc. v. Gen. Motors Co.*, 162 F. Supp. 3d 8 (D.D.C. 2016), *aff'd*, 947 F.3d 849 (D.C. Cir. 2020). I also apply Supreme Court and D.C. Circuit precedents regarding the appropriate method of interpretation in light of the particular circumstances of the case (e.g., the rule of lenity in the criminal context, *Chevron* deference, etc.). If and only if a statute is ambiguous, I have also occasionally consulted the legislative history of a statute, as the Supreme Court permits, to assess the original intent of the legislative body that enacted the provision at issue. I have not considered the meaning of a statute to change as social norms and linguistic conventions evolve.

And I have not resolved a statutory ambiguity based solely on the legislative history of the statute.

24. **As a circuit court judge, you would be bound by both Supreme Court precedent, and prior circuit court precedent. What is the duty of a lower court judge when confronted with a case where the precedent in question does not seem to be rooted in constitutional text, history, or tradition and also does not appear to speak directly to the issue at hand? In applying a precedent that has questionable constitutional underpinnings, should a lower court judge extend the precedent to cover new cases, or limit its application where appropriate and reasonably possible?**

RESPONSE: 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.

25. **Would it ever be appropriate for a judge to review a decision of the President or an Officer of the United States that Congress has committed to the “sole and unreviewable discretion” of the executive?**

RESPONSE: I confronted this question in *Make the Road New York v. McAleenan*, 405 F. Supp. 3d 1 (D.D.C. 2019), and my analysis of the facts and arguments in that matter, in light of D.C. Circuit precedents, yielded a nuanced answer.

The text of section 1225(b)(1)(A)(iii)(I) of the Immigration and Nationality Act (“INA”) grants DHS “sole and unreviewable discretion” to designate categories of unauthorized noncitizens for expedited removal, which plainly indicates Congress’s intention to confer to DHS exclusive discretion to make that determination, insofar as the statute anoints the agency as the “sole” decider, and suggests that once DHS makes that determination, the agency’s decision regarding how long a noncitizen must be present in the United States to warrant more extensive removal procedures is final (i.e., “unreviewable”). But Congress has also elsewhere directed executive agencies as to *how* they must go about exercising the discretion that it confers. See Administrative Procedure Act, 5 U.S.C. §§ 551–59. And the D.C. Circuit has long recognized that judicial review of the procedures that an agency employs to make congressionally authorized determinations may be authorized, despite broadly worded delegations of authority. See, e.g., *Delta Air Lines, Inc. v. Export-Import Bank of the U.S.*, 718 F.3d 974, 977 (D.C. Cir. 2013) (per curiam) (explaining that a “‘statute can confer on an agency a high degree of discretion, and yet a court might still have an obligation to review the agency’s exercise of its discretion to avoid abuse,’ especially

on procedural grounds” (quoting 3 Richard J. Pierce, Jr., *Administrative Law Treatise* § 17.6 (4th ed. 2002)). Thus, the question of first impression that I addressed in *Make the Road* was whether the “sole and unreviewable discretion” language in section 1225(b)(1)(A)(iii)(I) of the INA conferred discretion that was not *only* exclusive, but was *also* preclusive of the standard procedural requirements that would otherwise apply to govern DHS’s decision making process.

As the opinion explains, in my view, the language of section 1225(b)(1)(A)(iii)(I) can be read together with the APA’s procedural requirements, per the *in para materia* canon and other traditional tools of statutory interpretation, to mean that Congress intended to provide DHS with the exclusive authority to make the expedited removal designation determination within the statutory limits, but that the agency must exercise its broad discretion consistent with its standard decision making obligations under the APA. Given this reading of the relevant statutes, section 1225(b)(1)(A)(iii)(I) serves to bar judicial review of the substantive merits of the agency’s expedited removal designation decision (except, perhaps, for constitutional challenges), but judicial review of the procedures that DHS employs when it exercises the broad discretion that Congress has provided remains available, under the APA. *See Make the Road NY*, 405 F. Supp.3d at 43 (observing that, while the INA confers broad discretion to DHS to make the designation decision, it does not address the procedures that the agency must use, nor does it plainly indicate that Congress intended to authorize DHS to opt to forego the procedural mandates that would ordinarily apply); *see also id.* (reasoning that Congress’s preservation of the federal court’s subject matter jurisdiction to hear challenges to the validity of the implementation of the expedited removal system in 8 U.S.C. § 1252(e)(3) further suggests that Congress intended to authorize judicial review of the agency’s abandonment of procedural standards with respect to the expedited removal process). On appeal, the D.C. Circuit panel disagreed with this analysis, *see Make the Rd. N.Y. v. Wolf*, 962 F.3d 612 (D.C. Cir. 2020); it held, in essence, that where Congress has delegated to an agency “sole and unreviewable discretion” to make a specified determination, that language is sufficient to establish that Congress has necessarily granted decision making authority that is *both* exclusive *and* preclusive of APA review of the procedures that the agency employs. *See id.* at 633–34. That Circuit determination is binding precedent, which means that, going forward, it is not appropriate in this jurisdiction for a judge to review an executive decision that Congress has committed to the “sole and unreviewable discretion” of the executive based on a claim that the agency’s exercise of that discretion violates the APA.

26. Do you believe it is ever appropriate to look past jurisdictional issues if they prevent the court from correcting a serious injustice?

RESPONSE: No. My uniform practice in the eight years that I have served as a district judge has been to determine whether or not I have subject matter jurisdiction as a threshold question, and to dismiss the case where I have no jurisdiction, without reaching the merits. *See, e.g., New England Anti-Vivisection Soc’y v. U.S. Fish & Wildlife Serv.*, 208 F. Supp. 3d 142, 148 (D.D.C. 2016) (explaining that, because the

plaintiff lacked standing, “the Court is constrained to refrain from passing on the merits of Plaintiffs’ arguments or granting them the relief they seek”); *Food & Water Watch, Inc. v. Vilsack*, 79 F. Supp. 3d 174, 206 (D.D.C. 2015) (finding that, because the plaintiffs lacked standing, “this Court has no authority to reach the merits of their case” and dismissing case as a result), *aff’d*, 808 F.3d 905 (D.C. Cir. 2015); *Z St., Inc. v. Koskinen*, 44 F. Supp. 3d 48, 53–54 (D.D.C. 2014) (“As a court of limited jurisdiction, we begin, and end, with an examination of our jurisdiction.” (quotation marks and citation omitted)), *aff’d sub nom. Z St. v. Koskinen*, 791 F.3d 24 (D.C. Cir. 2015).

27. **Once again, for the record, please explain your statement that “observed inconsistencies are largely attributable to factors other than group-based bias by judicial decisionmakers.”**

RESPONSE: The quoted statement is from a presentation that I made in May of 2019, as participant in Columbia Law School’s Courts & Legal Process colloquium, which is a long-standing series that brings judges and other legal experts to campus to critique draft academic articles about judicial process for the benefit of students in Professor Burt Huang’s seminar on the courts. The draft article that I was asked to review was entitled “Is Judicial Bias Inevitable?” and the authors opened with the contention that, while impartiality is a key tenet of any fair judicial system in theory, in practice, “judges cannot be impartial” because “[s]ocial science has uncovered the prevalence and inevitability of biases, heuristics, and stereotypes in human decision making, which operate automatically and, at times, unconsciously.” The article cited and described the findings of various social scientists who study implicit bias, including Harvard Professor Mahzarin R. Banaji, as support for the proposition that “the particular identities and roles of parties have proven a significant factor in shaping judicial outcomes, casting a shadow on judicial impartiality.” And due to what the authors called “the growing recognition of the prevalence and impact of implicit bias” in judicial decision making, the article’s primary contribution was its exploration of the authors’ proposed solution: “the use of online court proceedings” that “substitut[e] physical meetings with online interaction” and thereby “limit judicial exposure to, and hence the impact of, the group identities of the parties, thus mitigating disparities in judicial outcomes that stem from visible markers of group-based identity (for example, age, gender and race).”

In critiquing the article, I accepted the authors’ premise that inconsistencies in judicial outcomes with respect to different demographic groups have been observed, and that the implicit bias phenomenon that social science research documents may be a factor. But I argued—as the quoted statement indicates—that such inconsistencies might also be attributable to factors other than implicit bias. I further maintained that, regardless, any judicial system that is devoid of human interaction would be unlikely to produce fair and just results. See KBJ Reflections on Courts & Legal Process Article, at 1 (“My concern is that the article both *overestimates* the extent to which disparate outcomes are in fact attributable to bias (unconscious or otherwise), and

underestimates the importance of human interaction as an indispensable feature of a fair and just[] dispute resolution system.”) (emphasis in original).

28. **In your hearing testimony, you mentioned that the sentencing disparity between crack and powder cocaine has resulted in disparities in criminal convictions and sentencing. What additional factors—other than unconscious bias—have you seen come into play that could account for some of the disparities we see in criminal convictions and sentencing?**

RESPONSE: During my confirmation hearing, when I was asked whether I would agree or disagree “with someone who said that most racial disparities in criminal convictions and sentencings are result from an unconscious racial bias of judges, juries, and other judicial decisionmakers[.]” I began my response by explaining that “as a judge now, it is very important for me not to make personal commitments about things like the question that you asked.” I then stated that I am “aware of social science research” regarding implicit bias, citing in particular the work of Harvard Professor Mahzarin Banaji, and I also stated that I am aware of research that the Sentencing Commission has conducted concerning the impact of certain policy choices in the federal sentencing system on different demographic groups. The Commission’s body of research regarding the federal sentencing system in the wake of the Anti-Drug Abuse Act of 1986, which is the legislation that established mandatory minimums and created the 100-to-1 crack cocaine/powder cocaine disparity, is among the research with which I am familiar. The Commission’s October 2017 report concerning the impact of mandatory minimum penalties for drug offenses in the federal criminal justice system is another such research study. I did not express any personal views regarding my own beliefs about what factors contribute to alleged racial disparities in criminal convictions and sentencings, and as a pending judicial nominee and a sitting federal judge, it would be inappropriate for me to express a belief about whether there are racial disparities in federal criminal sentencing, or whether unconscious bias of judicial officers causes any such disparities. It would likewise be inappropriate for me to identify other potentially contributing factors in response to this policy question.

29. **Does it concern you that so called “dark money” groups, like Demand Justice and the Leadership Conference on Civil and Human Rights, support your nomination to the U.S. Court of Appeals for the D.C. Circuit?**

- a. **Have you ever spoken with anyone at Demand Justice or the Leadership Conference on Civil and Human Rights Regarding your nomination to the D.C. Circuit?**

RESPONSE: Among the many people who have offered me congratulations with respect to this nomination was Chris Kang, who I understand is affiliated with Demand Justice. I met Mr. Kang when he served as chief judicial nominations counsel to President Obama in 2012, when I was nominated to be a U.S. District Judge. That is the only communication that is responsive to this question.

30. **When sentencing an individual defendant in a criminal case, what role, if any, should the defendant's group identit(ies) (e.g., race, gender, nationality, sexual orientation or gender identity) play in the judges' sentencing analysis?**

RESPONSE: Pursuant to section 3553(a) of Title 18 of the United States Code, district judges must impose sentences that are "sufficient, but not greater than necessary" to promote the purposes of punishment, including providing just punishment, deterrence, incapacitation and rehabilitation. 18 U.S.C. § 3553(a). When the Court undertakes to "determin[e] the particular sentence to be imposed" under this statute, Congress has directed the judge to consider "the nature and circumstances and the history and characteristics of the defendant[.]" among other things. 18 U.S.C. § 3553(a)(1).

31. **Would it ever be appropriate to sentence a defendant who belongs to a historically disadvantaged group less severely than a similarly situated defendant who belongs to a historically advantaged group to correct systemic sentencing disparities?**

RESPONSE: No. The factors that a judge may appropriately consider when sentencing an individual defendant are prescribed by Congress in section 3553(a) of Title 18 of the United States Code, and the need to treat similarly situated defendants differently in order to correct systemic sentencing disparities is not a factor that Congress has instructed courts to consider when crafting a sentence. Section 3553(a) instructs courts to consider "the need to *avoid* unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct." *Id.* § 3553(a)(6) (emphasis added). And consistent with congressional commands in this regard, section 5H1.10 of the Sentencing Guidelines Manual states that race and certain other demographic factors (i.e., sex, national origin, creed, religion, and socio-economic status) "are not relevant in the determination of a sentence."

32. **It has been reported that you met with President Biden to discuss your potential nomination to the D.C. Circuit. Once again, for the record, will you confirm that President Biden did not discuss or ask for a commitment from you on any of the following issues:**

- a. **Abortion or *Roe v. Wade*?**
- b. **The Second Amendment, *District of Columbia vs. Heller* or *MacDonald v. Chicago*?**
- c. **Efforts to defund the police?**
- d. **Illegal immigration?**

1050

RESPONSE: President Biden did not discuss any of these issues with me or ask for any commitments related to these matters.

**Responses to Questions for the Record from Senator Ben Sasse
to Judge Ketanji Brown Jackson, Nominee to the
United States Court of Appeals for the D.C. Circuit**

For all nominees:

1. **Since becoming a legal adult, have you participated in any events at which you or other participants called into question the legitimacy of the United States Constitution?**

RESPONSE: No.

2. **Since becoming a legal adult, have you participated in any rallies or demonstrations where you or other participants have willfully damaged public or private property?**

RESPONSE: No.

3. **Was *Marbury v. Madison* correctly decided?**

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

Marbury v. Madison is one of three exceptions to the general principle that a judge should not critique or comment on the Supreme Court’s precedents. *Marbury* warrants this special status because the principle of judicial review that that decision established—i.e., its holding that, per the design of our Constitution, “[i]t is emphatically the province and duty of the judicial department to say what the law is[.]” *Marbury v. Madison*, 5 U.S. 137, 177 (1803)—is a foundational finding that is beyond dispute. See Federalist No. 78 (Alexander Hamilton) (“The interpretation of the laws is the proper and peculiar province of the courts.”). Therefore, just as other nominees for judicial office and other sitting federal judges have done, I can confirm that *Marbury* was rightly decided without calling into question my duties under the Code of Conduct.

4. **Was *Brown v. Board of Education* correctly decided?**

RESPONSE: As a sitting federal judge, all of the Supreme Court’s pronouncements are binding on me, and under the Code of Conduct for United States Judges, I have a duty to refrain from critiquing the law that governs my decisions, because doing so creates the impression that the judge would have difficulty applying binding law to

their own rulings. Consistent with the positions taken by other pending judicial nominees, it is my testimony that, as a general matter, it would be inappropriate for me to comment on the merits or demerits of the Supreme Court's binding precedents.

Brown v. the Board of Education is one of three exceptions to the general principle that a judge should not comment on the Supreme Court's precedents. *Brown* warrants this special status because that decision overruled the manifest injustice of *Plessy v. Ferguson*, which had given rise to legally enforceable segregation in various places in the United States by endorsing 'separate but equal' as consistent with the Constitution's Equal Protection Clause. The underlying premise of the *Brown* decision—i.e., that "separate but equal is inherently unequal"—is beyond dispute, and judges can express their agreement with that principle without calling into question their ability to apply the law faithfully to cases raising similar issues. Therefore, just as other nominees for judicial office and other sitting federal judges have done, I can confirm that *Brown* was rightly decided without calling into question my duties under the Code of Conduct.

5. Was *Loving v. Virginia* correctly decided?

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

Loving v. Virginia is one of three exceptions to the general principle that a judge should not comment on the Supreme Court's precedents. *Loving* reaffirmed the rejection of the "notion that the mere 'equal application' of a statute containing racial classifications" comports with the Fourteenth Amendment, *Loving v. Virginia*, 388 U.S. 1, 8 (1967), and as such, it is a direct outgrowth of *Brown*. Therefore, just as other nominees for judicial office and other sitting federal judges have done, I can confirm that *Loving* was rightly decided without calling into question my duties under the Code of Conduct.

6. Was *Roe v. Wade* correctly decided?

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

7. Was *United States v. Virginia* correctly decided?

RESPONSE: My response to Question 6 applies to this question.

8. Was *District of Columbia v. Heller* correctly decided?

RESPONSE: My response to Question 6 applies to this question.

9. Was *Boumediene v. Bush* correctly decided?

RESPONSE: My response to Question 6 applies to this question.

10. Was *Citizens United v. FEC* correctly decided?

RESPONSE: My response to Question 6 applies to this question.

11. Was *Obergefell v. Hodges* correctly decided?

RESPONSE: My response to Question 6 applies to this question.

12. In the absence of controlling Supreme Court precedent, what factors determine whether it is appropriate for an en banc court to reaffirm its own precedent that conflicts with the original public meaning of the Constitution?

RESPONSE: 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. The primary circumstance in which that action is warranted is when “an intervening development of the law, through either the growth of judicial doctrine or further action taken by Congress, necessitates a shift in the Court’s position.” *United States v. Burwell*, 690 F.3d 500, 504 (D.C. Cir. 2012) (quoting *Patterson v. McLean Credit Union*, 491 U.S. 164, 173 (1989)). In addition, “it is appropriate for the en banc court to set aside circuit precedent when, ‘on reexamination of an earlier decision, it decides that the panel’s holding on an important question of law was fundamentally flawed.’” *Allegheny Def. Project v. Fed. Energy Regul. Comm’n*, 964 F.3d 1, 18 (D.C. Cir. 2020) (quoting *Critical Mass Energy Project v. Nuclear Regulatory Comm’n*, 975 F.2d 871, 876 (D.C. Cir. 1992) (en banc)). It is also permissible for the en banc court to overturn its own prior precedent “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.’” *Burwell*, 690 F.3d at 504 (quoting *Patterson*, 491 U.S. at 173).

13. In the absence of controlling Supreme Court precedent, what factors determine whether it is appropriate for an en banc court to reaffirm its own precedent that conflicts with the original public meaning of the text of a statute?

RESPONSE: Please see my answer to Question 12. It does not appear that the D.C. Circuit's practices concerning overturning its own past precedents turns on whether the prior precedent conflicts with the original public meaning of *the Constitution* as opposed to the circumstance in which a prior precedent conflicts with the original public meaning of the text of *a statute*. In the latter context, however, the D.C. Circuit has found that "[a] court of appeals sitting en banc may also reexamine its own interpretation of a statute 'if it finds that other circuits have persuasively argued a contrary construction.'" *United States v. Burwell*, 690 F.3d 500, 504 (D.C. Cir. 2012) (quoting *Critical Mass Energy Proj. v. NRC*, 975 F.2d 871, 876 (D.C. Cir. 1992) (en banc)).

14. If defendants of a particular minority group receive on average longer sentences for a particular crime than do defendants of other racial or ethnic groups, should that disparity factor into the sentencing of an individual defendant?

RESPONSE: No. The factors that a judge may appropriately consider when sentencing an individual defendant are prescribed by Congress in section 3553(a) of Title 18 of the United States Code, and the need to treat similarly situated defendants differently in order to correct systemic sentencing disparities is not a factor that Congress has instructed courts to consider when crafting a sentence. Section 3553(a) instructs courts to consider "the need to *avoid* unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct." *Id.* § 3553(a)(6)(emphasis added). And consistent with congressional commands in this regard, section 5H1.10 of the Sentencing Guidelines Manual states that race and certain other demographic factors (i.e., sex, national origin, creed, religion, and socio-economic status) "are not relevant in the determination of a sentence."

Additional Questions For Judge Ketanji Brown Jackson:

1. Please list some examples from your time as a federal district court judge of when your rulings conflicted with your personal policy preferences.

RESPONSE: My role as a district court judge has been to consider the facts and arguments that are presented in each case and controversy that is presented, and to apply the law faithfully to resolve the issues before me. Because my personal policy preferences play no role in the performance of my duties, in every case that I have handled, I have set aside my personal policy preferences completely, and have considered only the parties' arguments, the relevant facts, and the law as I understand it, including and especially the binding precedents of the Supreme Court and the D.C. Circuit. As a pending judicial nominee and a sitting federal judge, it would be inappropriate for me to publicly identify those opinions of mine in which my personal

policy preferences conflicted with the ruling that I made in the case based on what the law required. This is because judges are duty bound not to act or speak in a manner that might call into question their impartiality or their ability to rule consistently with the law, rather than their stated policy preferences, and the discussion of a judge's own policy preferences gives rise to that concern.

2. Why did you choose to become an Assistant Federal Public Defender?

RESPONSE: I chose to become an Assistant Federal Public Defender because public service is a core value in my family, and after becoming a lawyer, I determined that being a public defender was the highest and best use of my time and talents. Both of my parents spent most of their careers in the public sector—my mother as a public school science teacher to start, and, later, the principal of a public magnet school in South Florida. My father started his working life as a public high school history teacher and ended it as chief legal counsel to the Miami-Dade County School Board. Two of my uncles were career law enforcement officers: one was a Miami-Dade County sex crimes detective, and the other rose through the ranks of the City of Miami Police Department to become the Chief of Police. And my younger brother (my only sibling) served as an undercover police officer in a drug sting unit in Baltimore after graduating from college, before he joined the Maryland Army National Guard, trained to be an infantry officer, and led two battalions during two tours of duty in Iraq and the Sinai Peninsula.

Given this family background, there was no question that I would gravitate toward public service at some point in my legal career. After clerking for three federal judges and working briefly in private practice, I served as a staff attorney at the Sentencing Commission in a legislative drafting and policymaking role. I soon discovered that I lacked a practical understanding of the actual workings of the federal criminal justice system, and I decided that serving “in the trenches,” so to speak, would be helpful. A position with the Federal Public Defender was a highly competitive and extraordinary opportunity to hone one's litigation skills and to gain knowledge about critical aspects of federal criminal justice processes. I also viewed working in the office of the Federal Public Defender as an opportunity to help people in need, and to promote core constitutional values, such as the Sixth Amendment principles that the government cannot deprive people who are subject to its authority of their liberty without meeting its burden of proving its criminal charges, and that every person who is accused of criminal conduct by the government, regardless of wealth and despite the nature of the accusations, is entitled to the assistance of counsel.

3. Were you ever concerned that your work as an Assistant Federal Public Defender would result in more violent criminals—including gun criminals—being put back on the streets?

RESPONSE: The primary concern of lawyers of who work as public defenders is the same as that of the Framers who crafted the Sixth Amendment of the Constitution:

that, in order to guarantee liberty and justice for all, the government has to provide due process to the individuals it accuses of criminal behavior, including the rights to a grand jury indictment, a fair trial by a jury of one's peers, and competent legal counsel to hold the government accountable for providing a fair process and otherwise assist in the preparation of a defense against the charges. The Constitution guarantees that every person who is compelled to enter into the criminal justice system by virtue of being accused of a crime will receive representation in the context of their interactions with government authorities, and attorneys in the federal public defender's office perform this crucial function. Having lawyers who can set aside their own personal beliefs about their client's alleged behavior or their client's propensity to commit crimes benefits *all* persons in the United States, because it incentivizes the government to investigate accusations thoroughly and to protect the rights of the accused during the criminal justice process, which, in the aggregate, reduces the threat of arbitrary or unfounded deprivations of individual liberty.

- 4. While working as an Assistant Federal Public Defender, why did you choose to work on behalf of Guantanamo detainee Khi Ali Gul? If you did not have a choice as to whether working on behalf of this client, did you ever consider resigning from your position?**

RESPONSE: Between 2005 and 2007, as an employee of the Office of the Federal Public Defender in Washington D.C., I worked with other assistant federal public defenders to represent some of the individuals designated as enemy combatants who were detained by the federal government without charge or trial at the U.S. Naval Base in Guantanamo Bay, Cuba, and whose legal claims for relief were being litigated in the federal courts in the District of Columbia. The Federal Public Defender's office in Washington, D.C., is a relatively small office, and to my knowledge, the U.S. District Court for the District of Columbia was the exclusive venue in which the legal claims of Guantanamo Bay detainees were being reviewed. Khi Ali Gul was one of the individuals whom the D.C. Federal Public Defenders' office represented, and in my role as an Assistant Federal Public Defender, I drafted various motions, and worked on other court filings on his behalf.

At the time of this representation, my brother was an enlisted U.S. Army infantryman who was deployed outside of Mosul, Iraq, and I was keenly and personally mindful of the tragic and deplorable circumstances that gave rise to the U.S. government's apprehension and detention of the persons who were secured at Guantanamo Bay. In the wake of the horrific terrorist attacks in September of 2001, I was also among the many lawyers who were keenly aware of the threat that the 9-11 attacks had posed to foundational constitutional principles, in addition to the clear danger to the people of the United States.

Under the ethics rules that apply to lawyers, an attorney has a duty to represent her clients zealously, which includes refraining from contradicting her client's legal arguments and/or undermining her client's interests by publicly declaring the lawyer's own personal disagreement with the legal position or alleged behavior of her

client. Because these standards apply even after termination of the representation, it would be inappropriate for me to comment on whether I disagreed with Khi Ali Gul, found his alleged crimes offensive, or considered resigning my position as an Assistant Federal Public Defender based on any such disagreement or offense.

5. Were you ever concerned that your work on behalf of Guantanamo detainee Khi Ali Gul would result in him returning to his terrorist activities?

RESPONSE: Please see my response to Additional Question 4.

6. While in private practice, why did you choose to represent clients filing amicus briefs in support of the petitioners in *Boumediene v. Bush* and *Al-Odah v. United States*?

RESPONSE: Between 2007 and 2010, I was employed as Of Counsel in the Supreme Court and Appellate Group of a private law firm. The firm represented both paying clients and clients who retained our services pro bono. During that time, the Supreme Court was considering several cases that involved Guantanamo Bay detainees, including a challenge to the detention review procedures that the government was providing to such detainees, which it addressed in the consolidated cases of *Boumediene v. Bush* and *Al-Odah v. United States*, and a case that raised the issue of whether Congress had authorized the President to detain as enemy combatants, without criminal charge or trial, lawful residents of the United States who were apprehended within the United States (*Al-Marri v. Spagone*).

I co-authored Supreme Court amicus briefs for clients in two of these cases. One of the briefs that I drafted was filed on behalf of twenty former federal judges, who argued, on the basis of the examination of Founding-era historical texts, that the Framers would not have intended for our constitutional scheme to permit reliance on evidence that had been extracted from torture during criminal trials. I filed another amicus brief on behalf of The Cato Institute, The Constitution Project, and the Rutherford Institute, arguing that Congress's authorization for the use of military force did not permit lawful residents of the United States to be detained indefinitely as enemy combatants. I believe that I was assigned to work on these amicus briefs because of the knowledge of the military tribunal processes that I had accumulated from my prior work as an Assistant Federal Public Defender.

7. Were you ever concerned that your work in support of the petitioners in *Boumediene v. Bush* and *Al-Odah v. United States* would result in more terrorists being released back into the fight against the United States?

RESPONSE: Please see my response to Additional Question 5. The work that I did in relation to these cases was on behalf of clients who were filing amicus briefs to inform the Supreme Court concerning the clients' views of particular legal issues that the Court may have sought to address in the context of its review. The brief I filed on behalf of my clients—retired federal judges—in the consolidated *Boumediene* and *Al-*

Odah cases argued that the judicial review that the Detainee Treatment Act provided was not an adequate substitute for the common law writ of habeas corpus, because it did not appear that the reviewing court was authorized to determine the extent to which the Combatant Status Review Tribunal had relied on statements extracted by torture when the court ruled on the legality of the detention.

- 8. While in private practice, why did you choose to represent clients filing amicus briefs in support of the petitioner in *Al-Marri v. Spagone*?**

RESPONSE: Please see my response to Additional Question 6.

- 9. Were you ever concerned that your work in support of the petitioner in *Al-Marri v. Spagone* would result in more terrorists being released back into the fight against the United States?**

RESPONSE: Please see my response to Additional Question 7.

**Responses to Questions for the Record from Senator Thom Tillis
to Judge Ketanji Brown Jackson, Nominee to the
United States Court of Appeals for the D.C. Circuit**

1. **Judge Jackson, do you believe that a judge's personal views are irrelevant when it comes to interpreting and applying the law?**

RESPONSE: Yes. Under the Code of Conduct for United States Judges and established standards of judicial ethics, a judge's own personal views regarding a matter must not have any bearing on her interpretation and application of the law.

2. **What is judicial activism? Do you consider judicial activism appropriate?**

RESPONSE: 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. During the hearing, I emphasized that courts have a duty of independence from political pressure, meaning that judges must resolve cases and controversies in a manner that is consistent with the law, despite the judge's own personal views of the matter, even when the cases pertain to controversial political issues. Judicial activism, so defined, is not appropriate.

3. **Judge Jackson, do you believe impartiality is an aspiration or an expectation for a judge?**

RESPONSE: Impartiality is much more than a mere "aspiration" or "expectation." Ruling without fear or favor is the essence of judicial independence, which is the constitutional mandate of judicial service. *See* The Federalist No. 78 (Alexander Hamilton). My record of rulings in cases challenging government action demonstrates my ability to rule independently and impartially, regardless of the presidential administration that promulgates the policy being challenged.

4. **Judge Jackson, should a judge second-guess policy decisions by Congress or state legislative bodies to reach a desired outcome?**

RESPONSE: No. The role of a judge is evaluate legal claims that are made about an act of the defendant (who may well be a policymaker), and to determine the merits of those claims based on arguments presented by the parties, in light of applicable law, including the binding precedents of the Supreme Court. At no point in the process of judicial decision making can a judge substitute her own policy preferences for those of Congress or state legislative bodies, either to reach a desired outcome or for any other purpose.

5. **Does faithfully interpreting the law sometimes result in an undesirable outcome? How, as a judge, do you reconcile that?**

RESPONSE: Faithfully interpreting the law can sometimes result in an outcome that conflicts with a judge's own personal view of the matter. It is the judge's duty to set aside her personal view of the matter, and/or the outcome that she would personally prefer, and faithfully apply the law. An outcome that comports with the law, as set forth in the binding precedents of the circuit and the Supreme Court, is required by the judge's oath and the Constitution. Thus, that outcome *is* the most desirable one, regardless of a judge's own personal beliefs.

6. Should a judge interject his or her own politics or policy preferences when interpreting and applying the law?

RESPONSE: No. Please see my response to Questions 1, 2, 4 and 5. A judge has a duty to set aside her own politics and/or policy preferences when she is interpreting and applying the law.

7. What is the longest decision you have issued as a District Court Judge?

RESPONSE: I have written dozens of lengthy written opinions (defined as written rulings that are 50 or more pages long), dating back to the early days of my appointment as a federal judge. (*See* my response to Question 10, *infra*.) Although I may have missed one or more of my lengthy opinions in searching my records and electronic databases to respond to this question, it appears that the longest decision that I have issued as a district court judge was *Make the Road New York v. McAleenan*, 405 F. Supp. 3d 1 (D.D.C. 2019), which is 126 pages long.

8. What is the shortest decision you have issued as a District Court Judge?

RESPONSE: I have handled hundreds of cases, and have made thousands of decisions in connection with those matters, in the eight years that I have been a district court judge. I cannot accurately identify my "shortest decision," because many decisions at the trial-court level take the form of short orders that are not published in electronic case reporting databases such as Westlaw or LEXIS. The shortest written decisions I have issued as a district court judge take the form of paperless Minute Orders that consist of a sentence or two on the docket of a case. *See, e.g., Tarque v. Biden*, No. 21-cv-338, Min. Order of Apr. 4, 2021 (granting motion for extension of time to answer complaint); *Citizens for Responsibility & Ethics in Wash. v. Dep't of Trans.*, No. 21-cv-610, Min. Order of Apr. 29, 2021 (requiring the parties to file a status report in a FOIA case); *Centro Presente, Inc. v. Wolf*, No. 19-cv-2480, Min. Order of Mar. 17, 2021 (granting motion for leave to appear pro hac vice). I have also routinely issued short paper orders regarding a variety of legal issues. *See, e.g., Hogue v. Costal Int'l, Inc.*, No. 18-cv-389, Order Dismissing Case for Lack of Prosecution, ECF No. 39 (D.D.C. May 4, 2021); *In re Subpoena Duces Tecum to Verizon Wireless*, No. 19-mc-103, Order Transferring Case, ECF No. 4 (D.D.C. July 18, 2019); *Nugent v. Nat'l Pub. Radio, Inc.*, No. 14-cv-0416, Order, ECF No. 8 (D.D.C. March 28, 2014) (granting the defendant's motion to withdraw its notice of removal and remanding the case to the Superior Court of the District of Columbia).

9. **What is the average length of all of the decisions you have issued as a District Court Judge?**

RESPONSE: Please see my responses to Questions 7 and 8. I am unable to determine accurately the length of my shortest decisions and/or the precise number of short orders that I have issued as a district court judge. As a result, it is impossible to determine “the average length of all of the decisions that [I] have issued[.]”

10. **During the Senate Judiciary Committee Hearing, you said that your opinion in the McGahn case was “just another opinion.”**

- **How many pages was the opinion you issued in this case?**

- **Is this the longest opinion you have issued?**

- **Were you overruled at any level in full or in part upon appeal?**

- **Can you explain why you think an opinion that is so lengthy is “just another opinion?”**

RESPONSE: Please see my response to Question 7. It is routine for judges seated in the District of Columbia to issue lengthy opinions, such as the one in *McGahn*, because federal judges in Washington, D.C. regularly handle some of the most complex and consequential legal disputes that can be resolved by an Article III judicial officer under our constitutional scheme, due to the unique nature of our docket, which is largely comprised of legal disputes concerning the scope and application of the federal government’s power. The length of a written opinion that resolves such a dispute depends on the complexity and number of legal arguments that the parties make concerning the significant legal claims brought in the case.

The opinion that I issued in *McGahn* was 118 pages long (excluding the table of contents). The following description documents my opinion-writing practices during the eight years that I have been on the bench and establishes that *McGahn* is the third longest opinion that I have issued as a district court judge.

In September of 2013, approximately six months after I received my judicial commission, I issued a 76-page opinion in *American Meat Institute v. U.S. Department of Agriculture*, 968 F. Supp. 2d 38 (D.D.C. 2013). The following year, in 2014, I issued four more opinions that were over 50 pages in length. *See Pencheng Si v. Laogai Rsch. Found.*, 71 F. Supp. 3d 73 (D.D.C. 2014) (51 pages); *Nat. Res. Def. Council v. Nat’l Marine Fisheries Serv.*, 71 F. Supp. 3d 35 (D.D.C. 2014) (61 pages); *A Love of Food I, LLC v. Maoz Vegetarian USA, Inc.*, 70 F. Supp. 3d 376 (D.D.C. 2014) (69 pages); *United States ex rel. Tran v. Computer Scis. Corp.*, 53 F. Supp. 3d 104 (D.D.C. 2014) (58 pages).

In 2015, I issued five lengthy opinions, including *Takeda Pharmaceuticals, U.S.A., Inc. v. Burwell*, 78 F. Supp. 3d 65 (D.D.C. 2015), which was 77 pages long; *XP Vehicles, Inc. v. Department of Energy*, 118 F. Supp. 3d 38 (D.D.C. 2015), was 67 pages long, and *Otay Mesa Property, L.P. v. U.S. Department of the Interior*, 144 F.

Supp. 3d 35 (D.D.C. 2015), was 62 pages long. Likewise, in 2016, I issued *Yah Kai World Wide Enterprises, Inc. v. Napper*, 195 F. Supp. 3d 287 (D.D.C. 2016), which was 65 pages long, and four other opinions that qualify as lengthy: *Otsuka Pharmaceuticals Co., Ltd. v. Burwell*, 302 F. Supp. 3d 375 (D.D.C. 2016) (57 pages); *Abington Memorial Hospital v. Burwell*, 216 F. Supp. 3d 110 (D.D.C. 2016) (59 pages); *Pacific Ranger, LLC v. Pritzker*, 211 F. Supp. 3d 196 (D.D.C. 2016) (51 pages); *New England Anti-Vivisection Society v. U.S. Fish & Wildlife Service*, 208 F. Supp. 3d 142 (D.D.C. 2016) (59 pages).

In 2017 I wrote an opinion that was more than 100 pages long. *Kubicki on behalf of Kubicki v. Medtronic, Inc.*, No. 12-cv-734, sealed slip. op., ECF No. 158 (D.D.C. Dec. 12, 2017), published at 293 F. Supp. 3d 129 (D.D.C. 2018), was 103 pages. I also issued *Ross v. Lockheed Martin Corp.*, 267 F. Supp. 3d 174 (D.D.C. 2017), that year (52 pages). Similarly, I issued three lengthy opinions in 2018, including one that was 119 pages. See *Am. Fed. of Gov't Emps., AFL-CIO v. Trump*, 318 F. Supp. 3d 370 (D.D.C. 2018); see also *In re Air Crash over S. Indian Ocean on Mar. 8, 2014*, 352 F. Supp. 3d 19 (D.D.C. 2018) (61 pages); *Yah Kai World Wide Enters., Inc. v. Napper*, 292 F. Supp. 3d 337 (D.D.C. 2018) (62 pages).¹

Thus, the 118-page opinion in *Committee on the Judiciary v. McGahn*, 415 F. Supp. 3d 148 (D.D.C. 2019), which I issued in November of 2019, was not unusual. Indeed, just two months prior, in late September of that same year, I had issued *Make the Road New York v. McAleenan*, 405 F. Supp. 3d 1 (D.D.C. 2019), which was 126 pages long. And I issued the 51-page opinion in *Center for Biological Diversity v. McAleenan*, 404 F. Supp. 3d 218 (D.D.C. 2019), at the beginning of September of 2019 a few weeks prior to *Make the Road New York*. In 2020, I issued three additional lengthy opinions: *Las Americas Immigrant Advocacy Center v. Wolf*, 19-cv-3640, --- F. Supp. 3d ---, 2020 WL 7039516 (D.D.C. Nov. 30, 2020) (60 pages); *Kiakombua v. Wolf*, --- F. Supp. 3d ---, No. 19-cv-1872, 2020 WL 6392824 (D.D.C. Oct. 31, 2020) (96 pages); *AFL-CIO v. NLRB*, 466 F. Supp. 3d 68 (D.D.C. 2020) (52 pages).

McGahn was a lengthy opinion because it required me to resolve cross-motions for summary judgment concerning “three legal contentions of extraordinary constitutional significance.” 451 F. Supp. 3d at 152 (internal quotation marks and citation omitted). In particular, I held that (1) the inter-branch subpoena dispute between the President and the House Judiciary Committee was a justiciable matter that the Judiciary Committee had Article III standing to pursue in federal court; (2) the Judiciary Committee had a cause of action to seek enforcement of its subpoena; and (3) the President does not have the power to prevent his aides from responding to legislative subpoenas on the basis of absolute testimonial immunity. On appellate review, over the course of two opinions, a divided panel of the D.C. Circuit reversed my rulings on the standing and cause of action issues, but the entire D.C. Circuit granted en banc

¹ *Yah Kai* was a trademark matter in which I presided over two bench trials: one in 2016 addressing liability and one in 2018 addressing damages. Taken together, my findings of fact and conclusions of law in this matter totaled 127 pages.

review twice, and has now vacated both panel reversals. To date, the en banc D.C. Circuit has affirmed my conclusion that the House Judiciary Committee has standing to adjudicate its subpoena enforcement claims in federal court notwithstanding the inter-branch nature of the dispute. The cause of action and merits questions remain pending.

11. As of November 1, 2019, were you a lawyer and former public defender?

RESPONSE: On November 1, 2019, I was a lawyer and a federal district judge. I was also a former Vice Chair of the United States Sentencing Commission; a former law firm Of Counsel and associate; and a former Assistant Federal Public Defender who had been employed in the appellate division of the Office of the Federal Public Defender in Washington D.C.

12. Are you a bold progressive champion? If yes, please explain.

RESPONSE: I have never called myself or anyone else a “bold progressive champion” nor do I have a clear understanding of the meaning of that phrase. As a pending judicial nominee and sitting federal judge, it would contravene the Code of Conduct to associate myself with any political viewpoint or leaning.

13. Have you been on the front lines advancing the law for progressive values? If yes, please explain.

RESPONSE: I have never purported to be “on the front lines advancing the law for progressive values” or stated anything of the sort. As a pending judicial nominee and sitting federal judge, it would contravene the Code of Conduct to associate myself with any political viewpoint or leaning.

14. You said that “you have served on “many boards” and that you “don’t necessarily agree with all of the . . . statements of any of all the things those boards might have in their materials.” Please list the name and length of service for each board on which you served that you do not entirely agree with all of their materials. For each one please identify each statement or material with which you do not agree.

RESPONSE: During my confirmation hearing, Senator Hawley referenced various statements that apparently once appeared on the website of Montrose Christian School, a private kindergarten through 12th grade school. Montrose Christian School is now defunct; I served as an advisory school board member with respect to that school for one year, spanning 2010 and 2011. In the context of his question, Senator Hawley stated that he had defended Justice Amy Coney Barrett’s right to serve on a religious school board, and that he would also “defend [my] right to religious liberty and to serve on this board whatever your opinions may be[.]” He also stated that he had gleaned “from [my] service” that I “believe in the principle of the constitutional right of religious liberty[.]” In response, and primarily to clarify that my board service did

not itself portend any personal belief about religious liberty or anything else, I explained that my views about religious liberty “come[] from my duty to observe Supreme Court precedent [and] to follow its tenets, not from any personal views that I might have.” Emphasizing that “any personal views that I might have about religion would never come into my service as a judge,” I also said that “I have served on many boards, and that I don’t necessarily agree with all of the statements of all of the things that those boards might have in their materials.” I did not state any personal view concerning the statements that Senator Hawley identified and that Montrose Christian School purportedly posted on its website. Nor did I express any agreement or disagreement with any statements of any other board on which I have served.

The various boards on which I have served—all without compensation—and my length of service are listed at questions 6 and 9 of my Senate Judiciary Questionnaire for Judicial Nominees. As a pending judicial nominee and sitting federal judge, it would be inappropriate for me to identify any statements or policy positions of those boards and indicate my personal agreement or disagreement with those statements.

15. Is there any board on which you served in the past that you would not serve on today were you not a federal judge?

RESPONSE: As a pending judicial nominee and sitting federal judge, I cannot give voice to any regrets concerning prior board service, because to do so would give rise to speculation about my personal views concerning such boards and their policy positions, which could undermine the public’s confidence in my ability to set aside such personal views and rule only with respect to the facts and law in any case concerning parties that hold similar policy positions.

16. Senator Hawley asked if you believe in the constitutional right of religious liberty based on your affiliation with a board you served on. You seemed to indicate in your answer that the reason you believe in the individual right to religious liberty is because of Supreme Court Precedent. Is that what you intended to say? Is it correct that the reason you believe in an individual’s right to religious liberty is because of Supreme Court Precedent?

RESPONSE: Please see my response to Question 14, which clarifies the intended scope of my answer to Senator Hawley concerning religious liberty. My duty as a federal judge is to uphold the Constitution, and the First Amendment states that the “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof[.]” The Supreme Court has repeatedly reaffirmed that the First Amendment to the Constitution expressly protects a fundamental individual right to religious liberty.

17. Some are demanding that Justice Breyer retire. Do you agree that should Justice Breyer retire this year, President Biden would have the right to nominate someone to fill that seat on the Supreme Court?

RESPONSE: Article II, section 2 of the Constitution vests the President with the “Power, by and with the Advice and Consent of the Senate, to . . . appoint . . . Judges of the supreme Court.” *See* U.S. Const., art. II, § 2. I am obligated to apply binding precedents of the Supreme Court, regardless of its size.

18. How would you respond if a group ran ads and publicly called for you to retire as a District Court Judge? Would this answer change as a Circuit Court Judge? As a Supreme Court Justice?

RESPONSE: Under Article III, section 1 of the Constitution, all judges “both of the supreme and inferior Courts, shall hold their Offices during good Behaviour[.]” To promote judicial independence and impartiality in the performance of a federal judge’s duties, the Code of Conduct for United States Judges prohibits judges from engaging in public debates of a political nature or publicly responding to public pressure of any kind. *See* Code of Conduct for United States Judges, Canon 5. Therefore, it would likely be inappropriate for me to respond in any way to advertisements that call for my retirement as a district judge. The Code of Conduct for Judges applies to circuit judges as well, so in the unlikely event that a response to a group’s public call for retirement would be appropriate for me as a district judge, such response would also be inappropriate for me as a circuit judge, if I am confirmed.

19. Do you agree with that Justice Breyer should retire? If not, why not?

RESPONSE: As a pending judicial nominee and a sitting federal judge, I am bound by the Supreme Court’s precedents, regardless of that Court’s composition. It would be inappropriate for me to comment on whether or when any sitting Supreme Court Justice should retire.

20. Judge Jackson, if you are confirmed, what will you do to protect Americans’ right to practice their faith during this incredibly difficult time?

RESPONSE: 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 First Amendment’s fundamental right to the free exercise of religion. If I were to be confirmed to the D.C. Circuit, that obligation would not change.

21. Judge Jackson, is there a line where a First Amendment activity or peaceful protesting becomes rioting and is no longer protected? What is that line? Do you agree that looting, burning property, and causing other destruction is not a protected First Amendment activity?

RESPONSE: The First Amendment expressly protects “the right of the people *peaceably* to assemble,” U.S. Const. amend. I (emphasis added), and the Supreme Court has recognized that “peaceful demonstrations in public places are protected” but that “where demonstrations turn violent, they lose their protected quality as expression under the First Amendment[.]” *Grayned v. City of Rockford*, 408 U.S. 104, 116

(1972); *see also, e.g., Gregory v. City of Chicago*, 394 U.S. 111, 112 (1969) (explaining that a “march, if peaceful and orderly, falls well within the sphere of conduct protected by the First Amendment”). The precedents of the Supreme Court and the D.C. Circuit concerning this and all other legal issues are binding on me, and, if confirmed, I would faithfully apply those precedents if I were ever assigned a case on appeal that involved these issues. As a pending judicial nominee and sitting federal judge, it would be inappropriate for me to opine as to hypothetical circumstances that test of the limits of these principles, as such matters are regularly litigated in the Supreme Court and the lower federal courts. *See* Code of Conduct for United States Judges, Canon 3(A)(6) (“A judge should not make public comment on the merits of a matter pending or impending in any court.”).

22. Judge Jackson, how would you evaluate a lawsuit challenging a Sheriff’s policy of not processing handgun purchase permits? Should local officials be able to use a crisis, such as COVID-19 to limit someone’s constitutional rights? In other words, does a pandemic limit someone’s constitutional rights?

RESPONSE: I would evaluate any case concerning handguns or COVID-19 restrictions consistent with the binding precedents of the Supreme Court. Two weeks ago, in the case of *New York State Rifle & Pistol Association, Inc. v. Corlett*, No. 20-843, the Supreme Court granted *certiorari* in case that involved the denial of applications to carry a gun outside the home for self-defense individuals that had been submitted pursuant to a New York statute. In a similarly recent series of *per curiam* opinions, including *Roman Cath. Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 68 (2020), and *Tandon v. Newsom*, 141 S. Ct. 1294 (2021), the Supreme Court has also addressed the application of Free Exercise principles to restrictions that various localities have issued out of COVID-related public health concerns. As a pending judicial nominee and a sitting federal judge, it would be inappropriate for me to opine on the constitutionality of such firearm and religious-liberty restrictions while these issues are being actively litigated in the Supreme Court and other lower federal courts. *See* Code of Conduct for United States Judges, Canon 3(A)(6) (“A judge should not make public comment on the merits of a matter pending or impending in any court.”).

23. Judge Jackson, what will you do if you are confirmed to ensure that Americans feel confident that their Second Amendment rights are protected?

RESPONSE: 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. If I were to be confirmed to the D.C. Circuit, that obligation would not change.

24. What process do you follow when considering qualified immunity cases, and under the law, when must the court grant qualified immunity to law enforcement personnel and departments?

RESPONSE: According to my records, I have considered whether qualified immunity shielded a law enforcement officer from liability for alleged constitutional violations nine times over the past eight years, and in each case, I carefully considered the particular facts and circumstances that the case presented and adhered to Supreme Court and D.C. Circuit precedents when reaching my decision. Under binding Supreme Court and D.C. Circuit case law, a court must grant summary judgment or dismiss a civil action against an officer “when [the] official’s conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.” *Kisela v. Hughes*, 138 S. Ct. 1148, 1152 (2018) (per curiam) (quoting *White v. Pauly*, 137 S. Ct. 548, 551 (2017) (per curiam)). Thus, the two relevant questions in determining whether qualified immunity applies are (1) “whether a constitutional right would have been violated on the facts alleged[.]” and (2) “whether the right was clearly established” at the time of the violation.” *Saucier v. Katz*, 533 U.S. 194, 200 (2001). In my rulings, upon consideration of these questions in light of the particular facts at issue, I have both granted defense motions for summary judgment on the grounds that the law enforcement officers are entitled to qualified immunity, and denied defense motions for qualified immunity based on a finding that the officer violated the plaintiff’s clearly established rights. *See, e.g., Kyle v. Bedlion*, 177 F. Supp. 3d 380 (D.D.C. 2016); *Patterson v. United States*, 999 F. Supp. 2d 300 (D.D.C. 2013); *Page v. Mancuso*, 999 F. Supp. 2d 269 (D.D.C. 2013).

25. Do you believe that qualified immunity jurisprudence provides sufficient protection for law enforcement officers who must make split-second decisions when protecting public safety?

RESPONSE: The existing standards that the Supreme Court has adopted for determining whether a law enforcement officer is entitled to qualified immunity are binding on me, and are explained in my response to Question 24. If confirmed, I will faithfully apply all binding precedents of the Circuit and the Supreme Court, including any precedent pertaining to qualified immunity, and my past practices demonstrate that any personal views that I might have regarding the sufficiency of qualified immunity doctrine have played no role in my determination of whether to grant or deny a motion for qualified immunity. As a pending judicial nominee and a sitting federal judge, it would be inappropriate for me to comment on whether the Supreme Court’s qualified immunity jurisprudence provides sufficient protection for law enforcement officers.

26. What do you believe should be the proper scope of qualified immunity protections for law enforcement?

RESPONSE: Please see my response to Question 25.

27. Do you agree with the current state of the *Chevron* deference doctrine? Or do you believe there should be either more or less deference given to agencies?

RESPONSE: *Chevron* deference refers to the Supreme Court's requirement that "a court review[ing] an agency's construction of the statute which it administers" must defer to the agency's authoritative interpretation of that statute in certain circumstances. *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842 (1984). Consistent with the current state of Supreme Court jurisprudence, I have applied the *Chevron* deference doctrine in at least 11 of my written opinions. See, e.g., *Las Americas Immigrant Advoc. Ctr. v. Wolf*, 2020 WL 7039516, at *13 (D.D.C. Nov. 30, 2020); *Otay Mesa Prop., L.P. v. Dep't of the Interior*, 344 F. Supp. 3d 355, 368 (D.D.C. 2018); *Depomed, Inc. v. Dep't of Health & Hum. Servs.*, 66 F. Supp. 3d 217, 229 (D.D.C. 2014); *Am. Meat Inst. v. Dep't of Agric.*, 968 F. Supp. 2d 38, 52 (D.D.C. 2013). As a pending judicial nominee and a sitting federal judge, it would be inappropriate for me to comment on my personal beliefs regarding the current state of the *Chevron* doctrine. If confirmed as a circuit judge, I would continue to apply faithfully all binding precedents of the Circuit and the Supreme Court, including any precedent pertaining to the level of deference that should be afforded to agencies.

28. How have your views on agency deference developed during your time as a district judge?

RESPONSE: Prior to my work as a district judge, my expertise was in federal criminal sentencing policy, rather than administrative law. During my work as a district judge over the past eight years, I have handled many cases involving challenges to agency action, including challenges to an agency's interpretation of a statute. I have faithfully applied all binding precedents of the D.C. Circuit and the Supreme Court, including any precedent pertaining to the level of deference that should be afforded to agencies, and would continue to do so if am confirmed as a circuit judge.

JUDGE FOR THE DISTRICT OF NEVADA

Mr. Gordon. Thank you, Chairman, and let me thank the Committee entirely for having us here today. Ranking Member Senator Grassley and Senator Blumenthal, thank you for coming and allowing us to meet with you today.

I would like to thank the President for making this nomination. I would like to thank Senator Reid for his recommendation and his very kind words today, and thank you to Senator Heller for his kind words and supporting this nomination.

I would like to recognize my wife and inspirator, Sue Gordon. She is at home in Las Vegas with our daughter, Allison, who is a seventh grader at Faith Lutheran Middle School. My oldest son, Dan Gordon, is a sophomore at the University of Colorado at Boulder, who is studying for finals right now, so we figured that was a little more important. My other son, Matt Gordon, is a freshman at the University of San Diego. He, too, is studying for finals and could not make it out here as well.

I would like thank my parents: my mother, Lillius Gordon, who is in Las Vegas watching this on the Webcast. My father, Hank Gordon, and his wife, my second mom, Marti Gordon, they are also watching this on the Webcast from Las Vegas.

My brother, Scott, who is here with me from Albuquerque, was able to attend. I have two other brothers, John and Jeff. They are also watching this from Las Vegas. And my sister, Sandy, who is an attorney practicing in San Diego, is watching this as well. I thank them for their support.

With me today is my cousin, Allison Gordon, and her two children--I am sorry, Allison Cox, and her two children, Trey and Lauren, and I thank them for coming down and supporting us.

And, finally, with me today also is the managing partner of my law firm, McDonald Carano Wilson. His name is John Frankovich. He flew out from Reno to be here, and I thank him for his efforts to come out and support us.

I would also like to thank all the lawyers and staff at my law firm, McDonald Carano, in Las Vegas and Reno, who without their support I would not be able to get this far.

Thank you very much for your time.

[The biographical information of Mr. Gordon follows:]

[GRAPHIC] [TIFF OMITTED]

Senator Whitehouse. Thank you very much, Mr. Gordon.

Commissioner Jackson, welcome, and you are recognized for any statement or acknowledgments you would care to make.

STATEMENT OF KETANJI BROWN JACKSON, NOMINEE TO BE DISTRICT
JUDGE FOR THE DISTRICT OF COLUMBIA

Ms. Jackson. Thank you, Mr. Chairman, and thank you, Members of the Committee, for your time this morning. I would also like to thank the Chair of the Senate Judiciary Committee and the Ranking Member for scheduling this hearing and the President of the United States for having confidence in me and for giving me this great honor.

My thanks also extends to Congresswoman Norton who honored me with those very kind words of introduction and who also selected me for recommendation to the President. And thanks as well to Representative Ryan. I am so grateful that he was able to take time out of his busy schedule to come here and provide his personal endorsement.

I do have a number of family members and friends who have come here today and many who are watching by Webcast, and I appreciate this opportunity to acknowledge them.

- CONFIRMATION HEARINGS ON FEDERAL APPOINTMENTS

First is my husband of 16 years, Dr. Patrick Jackson. Patrick is a terrific surgeon, and he is my best friend and my biggest fan, and without his love and support, I do not think I would have had the courage to pursue this dream.

Patrick is here with our two daughters, Talia and Leila, who are getting quite the civics lesson this morning; and my parents, Johnny and Ellery Brown. They have been with me from the beginning, and they have always been there when I need them, and they have flown here from Miami to be with me today.

Also here is my brother, First Lieutenant Ketajh Brown, and I am particularly happy that he was able to be with us, because not too long ago he was stationed in the Sinai Peninsula and in Mosul, Iraq; before that he was an infantry officer in the Maryland Army National Guard.

Also here are my in-laws, Pamela and Gardner Jackson, who have flown here from Boston, Massachusetts; and my wonderful and supportive brother-in-law and sister-in-law, William and Dana Jackson.

To the many friends and family members who are watching by Webcast and the other friends who are here and watching, I appreciate your words of encouragement.

And, finally, I would just like to give a special word of gratitude to the three federal judges for whom I clerked: Judge Patti Saris, Judge Bruce Selya, and Justice Stephen Breyer. They have been my inspiration through this journey, and I am grateful every day for their continued mentorship and support.

Thank you.

[The biographical information of Ms. Jackson follows:]

[GRAPHIC] [TIFF OMITTED]

Senator Whitehouse. Thank you, Commissioner Jackson.

Our final nominee, Judge Beverly O'Connell, welcome. Please proceed with whatever statement or acknowledgments you would care to make.

STATEMENT OF BEVERLY REED O'CONNELL, NOMINEE TO BE DISTRICT
JUDGE FOR THE CENTRAL DISTRICT OF CALIFORNIA

Judge O'Connell. Thank you, Mr. Chairman.

First, I, too, would like to thank the President for nominating me for this honor; Senator Boxer for her kind words; Senator Feinstein for her support of my application; to you, Chairman Whitehouse, Ranking Member Grassley, for scheduling this hearing. And I would like to introduce to you some of the family that I have with me today.

We are a family of public servants, and I would like to introduce my husband, who is a deputy district attorney in Los Angeles; my sister, Linda Reid, formerly of the Central Intelligence Agency; her wife, Sherry Burns, retired from the Central Intelligence Agency; our niece, Kaelin, the only one who is in the private sector in our family; her friend, Whitney Welsh, who has become an adopted member of our family; and Presiding Justice Tricia Bigelow from Division 8, Second District Court of Appeal in Los Angeles.

I would be remiss without thanking my court staff: my court reporter, Mary Lou Murphy; and my courtroom deputy clerk, Martha Cabrera, whose professionalism and commitment to justice makes my courtroom a place where everybody has a fair chance to be heard.

I would also like to recognize all my friends and family in California who could not be here, but are probably going to watch a delayed recording since it is very early on the west coast.

Thank you.

- CONFIRMATION HEARINGS ON FEDERAL APPOINTMENTS

[The biographical information of Judge O'Connell follows:]

[GRAPHIC] [TIFF OMITTED]

Senator Whitehouse. Thank you very much, Judge O'Connell.

As the Chairman of this particular hearing, I am going to be here through the bitter end of it, so I am going to yield my time right now to the Honorable Ranking Member, Senator Grassley, and then recognize Senator Blumenthal, then recognize Senator Lee, and reserve my questioning until the end. So without further ado, Ranking Member Grassley.

Senator Grassley. And that is quite a courtesy for us minority people here.

Senator Whitehouse. Not to have to listen to me.

[Laughter.]

Senator Grassley. Thank you very much, and I appreciate everything I have learned about you, although it has just been lately that I have learned it, but as other people have said, qualified to do this.

I am going to start with you, Ms. Dick, a couple questions. I understand that last year there was a significant class action settlement in favor of Louisiana health care providers in relationship to the Louisiana PPO Act. As a member of the Louisiana Workforce Commission, you heard cases involving disputed claims by health care providers, so I would like to have you explain your work there as it relates to the class action settlement. And, specifically, were any of your decisions overturned by that settlement?

Ms. Dick. Thank you, Ranking Member Grassley, for the question. Yes, I was hired by the Louisiana Workforce Commission, which is the agency that would be akin to a Department of Labor. We just happen to call it the "Workforce Commission." They have jurisdiction over both workers' compensation and unemployment compensation. And there were approximately 4,000 to 5,000 lawsuits filed in the Office of Workers' Compensation that challenged whether or not physicians who treated injured workers could be compensated with PPO discounts if they had signed a PPO provider agreement.

As you might imagine, that volume of litigation literally flooded those administrative courts, and so the Louisiana Workforce Commission determined that they needed some help. And so I was engaged, really, to preside specifically over those cases.

There ultimately was a class settlement. I did not participate in that class settlement in any way. I simply presided over the cases that were assigned to my docket, set them for trial, set them for hearings, moved them along. Ultimately, I concluded that the physicians, if they had entered into a contract, that they could be compensated under the terms of that contract, and that decision in a different case was affirmed by the Louisiana Supreme Court.

Senator Grassley. Okay. A second question for you. There are a number of different theories explaining how judges should interpret the Constitution. We often hear nominees recite the mantra that they will apply the law to the facts, and I do not argue with that, but I am looking for an answer with a little bit more thought behind it. What constitutional interpretation models will guide you when you are faced with constitutional questions?

Ms. Dick. Senator, it is my very firm belief that it will be my job as a district court judge, which is, you know, kind of the grassroots foot soldier, and I am very cognizant of the fact that that will be my role, a foot soldier, and I will follow the precedent which is enunciated by the United States Fifth Circuit Court of Appeal and foremost by the U.S. Supreme

- CONFIRMATION HEARINGS ON FEDERAL APPOINTMENTS

Court. Whether like it or not, that is of no moment. It is how does the U.S. Supreme Court interpret whatever congressional statute is at issue or the provisions of the Constitution, and that is what I would follow.

Senator Grassley. Mr. Gordon, I bet you are just going to love to be asked a question about something you wrote 30 years ago, but we do not do it because of--we kind of want to know what the situation is today. This dealt with the decriminalization of prostitution. At one point in the article, you discuss the 1908 Supreme Court case, Bitty. In that case, the Court upheld federal statute noting prostitution was hostile to ``the idea of the family.'' You criticized the Court for their view, stating that criminalization of prostitution ``is an ineffective way to preserve marriage and the family.''

I recognize that this paper was written 30 years ago and you were in college at the time, so the first question is: Have your views of this topic changed since you wrote that article so many years ago?

Mr. Gordon. Yes, Senator, they have changed somewhat. Like you pointed out, that was an article that was a condensed version of my honors senior thesis out of Claremont McKenna College that was more of a policy analysis of prostitution, comparing the Nevada model to the German model, and looking at various issues related to the policies behind criminalization of prostitution.

That policy analysis really is the area for Congress and the State legislatures to make decisions. It is not for judges to make policy decisions like that. That is the legislative body. I recognize that judges have a separate function. The Founders set up three branches of our government, and the judicial power is very limited. And it is up to the elected officials like Senators, Congress folks, and State legislators to pass those kinds of policy decisions.

Senator Grassley. Prostitution is largely, if it is a criminal activity, left to individual States. There is a federal interest. Congress has lawfully established anti-prostitution laws based on powers delegated in the Constitution: immigration, regulating interstate commerce, and establishing foreign trade. The statute at issue in Bitty is one example, so a broad question: When reviewing a federal statute, is it ever permissible for a court to refer to State laws in order to assist in its ruling? If so, when and under what circumstances?

Mr. Gordon. Senator, if the answer is obvious from the plain language of the statute, that ends the inquiry. If it is not, then I believe judges look to the precedent from the U.S. Supreme Court or the courts of appeals from that jurisdiction, and that should end the inquiry as well.

Senator Grassley. Okay. For all of you, I will have some written questions as well.

I want to go to Ms. Jackson. I thought after Ryan got done speaking about you we could just vote you out right away.

Ms. Jackson. That would be my hope, Senator.

[Laughter.]

Senator Grassley. Anyway, and that does not denigrate what your Congresswoman said about you, but I want to ask you about some terrorism cases. In looking at the arguments you have made in court representing terrorists and the notes you provided the Committee last week from a December 2007 presentation, I have questions about your views on the rights of detainees, and that in turn causes some concern about how you will handle terrorism cases that may come before you if you are confirmed.

Do you believe that terrorists pose a danger to America?

Ms. Jackson. Yes, Senator, I do.

Senator Grassley. Okay. Do you believe that the United

States is at war against terrorists?

Ms. Jackson. Yes, Senator, I do.

Senator Grassley. What is your understanding of the current state of law regarding those detainees as a result of the United States Global War on Terrorism? How will you approach these issues, if confirmed?

Ms. Jackson. Senator, I have not looked at the issue in terms of the current state of the law in many years. The time that I worked on the terrorism cases that you referred to, I was an assistant federal public defender. That was several years ago. And then I worked on a few amicus briefs when I was at Morrison & Foerster. In all of those situations, the views that were expressed were the views of my clients that I represented them in that capacity and the briefs did not necessarily represent my personal views with regard to the war on terror or anything else.

Senator Grassley. Okay. I will accept your answer for now. I might, on reflection, follow up, maybe, to ask you to look at it a little more definitively and give me a written answer.

Ms. Jackson. Yes, sir.

Senator Grassley. But do not do that until I submit it to you, because I want to think about that.

Since you are on the Sentencing Commission, I am going to ask you three questions.

Ms. Jackson. Okay.

Senator Grassley. But just one on sentencing, and then I have got two that I will submit in writing.

It is my understanding that sentences handed down by the D.C. district judges frequently are departures from the Sentencing Guidelines. Have you studied this since being appointed to the Commission? And do you have any observations to share with us on that topic?

Ms. Jackson. Well, the Commission is working on a report right now that gathers data and information not only about the D.C. District Court but also courts nationwide with respect to their sentencing practices. We are in the process of analyzing the information and issuing this report, which we hope will be out early next year.

I can say that, as the Chairman of the Commission testified to the House Judiciary Committee, the Commission is concerned about trends that we are seeing in the data with regard to increasing disparity in sentencing and that a number of courts have been in the position of having judges sentence outside the guidelines with respect to certain offenses, and we are analyzing that, and we hope to have a report shortly.

Senator Grassley. Ms. O'Connell, as a State judge in California, have you ever imposed a death sentence?

Judge O'Connell. No, I have not, Senator. In order to have a death case, I am under the California Rules of Court trained and eligible to handle such a case. The district attorney must seek the death penalty. The jury must return such a verdict before it would be appropriate for me to hand down a sentence like that, and no such case has yet come before me.

Senator Grassley. If confirmed, would you be able to impose the death penalty where it was appropriate as a federal judge?

Judge O'Connell. Yes, Senator, I would.

Senator Grassley. Okay. You co-authored a chapter on electronic evidence decisionmaking. In it, you wrote, "An effective advocate is one who develops empathetic ties to decisionmakers, be they judge or jury, and exploits them to their clients' advantage."

What role does empathy have in the role that a judge plays?

Judge O'Connell. Certainly, Senator, and to the extent empathy is defined as "respect for the litigants," in my courtroom, all litigants who appear in front of me are treated

- CONFIRMATION HEARINGS ON FEDERAL APPOINTMENTS

with respect. To the extent empathy means ``feeling sorry for someone'' or ``being guided by passion or prejudice,'' that has no place in judicial decisionmaking and has, over my seven years on the bench, played no role in my decisions from the bench.

Senator Grassley. I am going to read one question, but I think you just answered it, so you do not have to say any more. But I was going to follow up. Do you believe that the sentence a defendant receives for a particular crime should depend on the judge he or she happens to draw? Maybe I will ask you to speak to that.

Judge O'Connell. Okay. No.

Senator Grassley. Okay.

[Laughter.]

Senator Whitehouse. Short and sweet.

Senator Grassley. Thanks to all of you.

Judge O'Connell. Thank you.

Senator Whitehouse. Thank you very much, Senator Grassley.

Senator Blumenthal.

Senator Blumenthal. Thank you, Mr. Chairman.

Let me begin by asking a question of Ms. Dick and Mr. Gordon. I note from my review of your records that your respective practices have been primarily in the civil area, and I wonder whether you feel qualified to do the kind of criminal work that a federal district judge inevitably has to do. Ms. Dick, maybe you can begin by answering.

Ms. Dick. Yes, thank you, Senator Blumenthal. I do not feel qualified right now, but I will be qualified, and the way that I will come about that knowledge will be work ethic, work ethic, work ethic.

Senator Blumenthal. Thank you.

Mr. Gordon.

Mr. Gordon. Senator, I agree with Ms. Dick's comment. I recognize the need to roll up my sleeves and dig in and work, to study the applicable Rules of Criminal Procedure, case law, and Supreme Court precedent and will do so.

Senator Blumenthal. Thank you.

Commissioner Jackson, I want to ask you a couple of questions about the Sentencing Commission.

Ms. Jackson. Yes.

Senator Blumenthal. And, in particular, give you an opportunity to answer--it may not have been your decision, but the decision to apply retroactively some of the guidelines that the Sentencing Commission promulgated. Would you care to comment?

Ms. Jackson. Yes, Senator. It was in part my decision because the Commission unanimously determined that the standards that apply when the Commission decides retroactivity applied in the crack cocaine context. And I would say that the Sentencing Reform Act, which is the Commission's organic statute, as the Commission read it and as it states, requires that the Commission undertake retroactivity determinations whenever penalties are reduced, and the Commission reduced the crack cocaine penalties pursuant to Congress' direction when Congress enacted the Fair Sentencing Act. And so then we undertook the retroactivity analysis, and the bipartisan commission unanimously determined that the factors that apply, apply to the crack cocaine context, a decision that the Justice Department also agreed with, and so did nearly every party that appeared before us at the hearing.

Senator Blumenthal. And I think there is, for my own part, substantial persuasive basis for that decision, and I just wanted to give you an opportunity to address any concerns that may be raised.

Let me ask you, do you have a view as a prospective member

of the bench as to when departures from the Sentencing Guidelines are justified, what reasons there ought to be for departing from the guidelines?

Ms. Jackson. Well, Senator, the guidelines themselves have various departure criteria. The guidelines state that when there is a situation in which a factor is not taken into account by the guidelines or the degree to which the factor exists is unusual and takes the case out of the heartland of cases, that would be an appropriate circumstance to depart.

The Supreme Court in Booker also held that the guidelines themselves are no longer mandatory, that a court also needs to take into account, in addition to the guidelines, the factors that are listed under 3553(a), things like the nature and circumstances of the offense and the characteristics of the offender, and all of those factors are things that courts need to look at in determining whether or not to apply a guideline sentence.

So in my role as a district judge, if confirmed, I would follow the Supreme Court's precedents and give significant weight to the guidelines in that analysis.

Senator Blumenthal. Maybe I should have phrased it differently. Do you think there are some reasons that are more persuasive than others for departing from the guidelines, such as, for example, individual circumstances versus the policy of the sentencing statutes and so forth?

Ms. Jackson. Senator, I do not have a particular view on that. I think it would depend on the case, that the judge would need to look at the circumstances that exist in the case in deciding what factors to either stay within the guidelines as a result of or depart from the guidelines as a result of.

Senator Blumenthal. Judge O'Connell, do you have any views on the Sentencing Guidelines? I know you have not dealt with them directly as a State court judge, and I must confess I do not think California has sentencing guidelines, but----

Judge O'Connell. We do not, but you should know that with me is the author of the California sentencing, federal--excuse me, felony sentencing, so I have the expert in California law right behind me. But we do not have the guidelines in California. But as an Assistant United States Attorney, before the guidelines became advisory, they were mandatory. So I am certainly familiar with their application, and I believe that they provide a wonderful starting point to ensure uniformity of sentences.

Senator Blumenthal. I know that as an Assistant United States Attorney, you not only tried cases but also served in a supervisory role in, I think it was, the General Crimes Section. And I wonder whether you found yourself sometimes differing with what the guidelines provided.

Judge O'Connell. I have not been involved--that was quite some time ago, and I do not have any specific recollections. But the guidelines were mandatory, so we followed the guidelines.

Senator Blumenthal. Thank you.

Thank you, Mr. Chairman, and I thank each of you again for your willingness to serve in this very, very important capacity. Thank you.

Senator Whitehouse. Senator Lee.

Senator Lee. Thank you, Mr. Chairman. Thanks to all of you for coming and for your family members and friends who have joined us.

I wanted to start with Judge O'Connell. You have written that "an effective advocate is one who develops empathetic ties to decisionmakers, be they judge or jury, and exploits them to their clients' advantage." Let us talk about that statement for a minute. I do not doubt you have got to persuade

as an advocate, but how should judges respond when they feel an empathetic pull on the part of one of the parties or one of the advocates?

Judge O'Connell. Empathy as far as feeling sorry or closeness for a party should not govern judicial decisionmaking. The sentence of a criminal defendant should not differ based upon the judge. I can respect that as effective advocacy. The fact that I recognize that is important because then I can disregard it.

Senator Lee. Good. So you think having written that and identified the fact, you would be able to identify it more quickly and say that is an empathetic factor, let us move on to the law?

Judge O'Connell. Absolutely, Senator. For example, apparently I have become much funnier after having been a judge than I ever was as an advocate, so I understand the pulls that, as a judge, advocates attempt to persuade me.

Senator Lee. And do they laugh more at your jokes while you are wearing the robe and in the courtroom?

[Laughter.]

Judge O'Connell. Probably.

Senator Lee. There was something else that you wrote that caught my attention because I come from a State with a lot of snow. You said that each judge's approach to electronic discovery and to the admission of certain types of evidence can differ as much as a snowflake might differ. Tell us what you mean by that.

Judge O'Connell. The admission of electronic evidence is an evolving area in California, and it depends on the purpose for admitting the evidence, whether it is for the truth of the matter asserted or whether it is for a different purpose, demonstrative evidence. The purpose of that comment was to say that the type of evidence and the uniqueness of the type of evidence must be analyzed.

Electronic evidence is also very dangerous because it is subject to manipulation, and judges need to be aware of how the technology works in order to adequately assess foundation and admissibility.

Senator Lee. In California, have you been able to--has a body of case law evolved to the point where parties know what to expect going into it?

Judge O'Connell. It has not yet evolved. In fact, in several areas, there are cases currently pending before the California Supreme Court which will give us guidance at the trial court level as to the admissibility of, for example, red light camera photographs, Facebook/MySpace pages, those types of things.

Senator Lee. Right. And as a federal judge, I guess you will have a different set of standards to abide by, but you will know what to ask.

Judge O'Connell. I will know the questions to ask, yes, Senator.

Senator Lee. Thank you.

And, Commissioner Jackson, I wanted to turn to you. First of all, I developed great empathy for you when I read that you were an attorney at the Sentencing Commission at the time Booker came down.

Ms. Jackson. Yes, I was.

Senator Whitehouse. How did that empathy work out for you?

[Laughter.]

Senator Lee. See, I am allowed to have empathy because I am a politician.

I was an Assistant U.S. Attorney at the time that came down. I was on a flight on my way to a wedding, and I read the clip about it, and all of a sudden I thought my world was about

to change, and it did.

Ms. Jackson. And it did.

Senator Lee. Tell us how you went about digesting that and writing up guidance materials for the Commission.

Ms. Jackson. Well, as you know, the Commission had a little bit of foreshadowing that something might happen in Booker because the previous year the Supreme Court handed down the Blakely decision.

Senator Lee. Right. I am sorry, yes, Blakely.

Ms. Jackson. Blakely.

Senator Lee. Yes, Blakely was the one that I read on the way to the wedding.

Ms. Jackson. Yes. So I was at the Commission as a staff member between Blakely and Booker, and it was a very interesting time.

Senator Lee. And we were not yet sure whether and to what extent it was going to apply to the federal----

Ms. Jackson. That is correct. And I was in the Drafting Division of the Sentencing Commission, and a lot of thought went into what might happen and what sorts of things the Commission could do in order to respond to a Supreme Court decision. So it was quite an interesting time for me.

Senator Lee. I suppose that there is not a direct analog to being a district judge and that that was our Nation's highest court, but it certainly is indicative of the ripple effect that a single court decision can have on the entire profession when it issues a ruling like that. But that is the case. There is not much we can do about that.

I also wanted to ask you, do you intend to follow Justice Breyer's very awesome style of questioning an oral argument in your court?

[Laughter.]

Ms. Jackson. I do not think anybody could match Justice Breyer in his questioning, and I do not know that I would even attempt to try.

Senator Lee. Thank you. I see my time has expired.

Thank you, Chairman.

Senator Whitehouse. Thank you very much, Senator Lee.

First of all, let me thank each of you for the decision that you have made to take this step into this particular kind of public service. I am sure that for many of you there would be more remunerative paths you could take, and there are also times when the role that you will be assuming, if confirmed, is a very lonely one. And my question for each of you is: In the event that the law requires--your reading of the facts and the law in the case before you requires that you make a decision that will be unpopular in your community, are you willing to take that step to cross public opinion and do what you believe is right? As you know, federal judges have a long and proud history of doing exactly that, particularly in the South through the civil rights era, but it is a very difficult position to be in to take a position that those around you disagree with. Ms. Dick.

Ms. Dick. Without question, Senator Whitehouse, I would be willing to cross public opinion in order to follow the rule of law.

Senator Whitehouse. Mr. Gordon.

Mr. Gordon. I agree, Senator. Without the courage to make such decisions, the very foundations of our government fall apart, and judges have to have the courage to make unpopular decisions at times.

Senator Whitehouse. Well said.

Commissioner Jackson.

Ms. Jackson. Yes, Senator, I certainly would. I would see that as my duty and obligation as a federal judge.

Senator Whitehouse. Judge O'Connell.

Judge O'Connell. Thank you, Senator. I believe it has been my practice and will continue to be my practice to follow the law, regardless of public opinion.

Senator Whitehouse. Good. Well, my final questions are going to be for Commissioner Jackson. We are going to have a Rhode Island moment now, Commissioner Jackson.

Ms. Jackson. Oh, goodness.

[Laughter.]

Senator Whitehouse. And let me remind you you are under oath as you answer these important questions.

Bruce Selya is a Rhode Islander. He is a person I am very proud of and admiring of. I am also impressed with his vocabulary. And I have always wondered, now that I have got a clerk of his before me, where do those words come from? Does he give you a thesaurus to find good ones? Does he simply have an amazing vocabulary in his mind? Can we confirm this important issue right now in this hearing?

Ms. Jackson. Yes, sir, and the latter is the case. It is quite amazing to work for him because one of the things you learn early on is that you as a clerk are not supposed to be the one to provide the words. That is his job, and so you write the opinion or draft the opinion, and it comes back with these wonderful words in them that come from his head. So he is truly amazing, as you said.

Senator Whitehouse. Well, Judge Selya is a very distinguished Rhode Island jurist. He was legal counsel to Senator John Chafee before he was Senator, when he was Governor of Rhode Island. Senator Chafee served with great distinction here in this body. Judge Selya went on to the First Circuit, and I think he recently passed a milestone of having written now more majority and court opinions than any judge in the history of the First Circuit, if I am not mistaken.

Ms. Jackson. I was not aware of that, but I would not be surprised.

Senator Whitehouse. Yes, very, very impressive.

Well, equally, each of you is very, very impressive, and we look forward to pushing for a prompt confirmation, and if this should wash into the following year, we hope very much that our colleagues will allow this hearing to stand so we do not have to replicate it and that we can quickly move you back into the queue and toward nomination. And with any luck, we will be able to slow down the logjam that occurs on the executive calendar on the Senate floor. Or, I guess, speed things up through the logjam would be the better way to say that.

So, once again, congratulations on the great honor of having been nominated by the President. Congratulations on the personal decision you made to go forward, and best wishes in the confirmation process and in your careers ahead.

The hearing record will remain open for another week for any further questions that the minority or the majority may have and for any materials that anybody may wish to add to the record. But subject to that, the hearing is adjourned.

[Whereupon, at 11:11 a.m., the Committee was adjourned.]

Response of Ketanji B. Jackson
Nominee to be United States District Judge for the District of Columbia
to the Written Questions of Senator Amy Klobuchar

- 1. If you had to describe it, how would you characterize your judicial philosophy?
How do you see the role of the judge in our constitutional system?**

Response: My judicial philosophy is to approach all cases with professional integrity, meaning strict adherence to the rule of law, keeping an open mind, and deciding each issue in a transparent, straightforward manner, without bias or any preconceived notion of how the matter is going to turn out.

- 2. What assurances can you give that litigants coming into your courtroom will be treated fairly regardless of their political beliefs or whether they are rich or poor, defendant or plaintiff?**

Response: If I am confirmed as a district court judge, the litigants in my courtroom could rest assured that I will treat everyone with patience, dignity, and respect no matter what his status or station in life. I will encourage all litigants to present their arguments and evidence and establish an environment in which everyone is afforded a full and fair opportunity to be heard. Having worked with a variety of people throughout my career, I am comfortable communicating with, and relating to, people of various beliefs and backgrounds. Moreover, I am entirely capable of approaching each matter with an open mind and giving thorough consideration to every argument, no matter who presents it. I would be fully committed to doing so if confirmed as a district court judge.

- 3. In your opinion, how strongly should judges bind themselves to the doctrine of stare decisis? How does the commitment to stare decisis vary depending on the court?**

Response: Stare 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.

Response of Ketanji B. Jackson
Nominee to be United States District Judge for the District of Columbia
to the Written Questions of Senator Chuck Grassley

- 1. Please identify the provision in the Fair Sentencing Act of 2010 that granted authority for the United States Sentencing Commission to give retroactive effect to parts of the Commission's permanent amendment to the federal sentencing guidelines that implements the Act.**

Response: The Commission's authority—and duty—to consider giving retroactive effect to the Commission's permanent amendment to the federal sentencing guidelines arose not from the Fair Sentencing Act itself but from another statute passed by Congress, Title 28 section 994(u). Sections 2 and 3 of the Fair Sentencing Act reduce the statutory penalties for certain crack cocaine offenses, and section 8 requires the Commission to make conforming reductions in the sentencing guidelines. As a result, the Commission was required to consider giving retroactive effect to those guideline amendments under section 994(u), which the Commission has long interpreted to require it to consider retroactivity whenever it reduces the term of imprisonment recommended in a guideline.

- 2. The intent of the Fair Sentencing Act of 2010 was that new sentencing guidelines were to be applied only prospectively. As a Commissioner and Vice-Chair of the Sentencing Commission, what led you to believe that Congress intended a retroactive application?**

Response: The Fair Sentencing Act of 2010 is silent on the matter of retroactivity. By contrast, Title 28 section 994(u) expressly states that “[i]f the Commission reduces the term of imprisonment recommended in the guidelines applicable to a particular offense or category of offenses, it shall specify in what circumstances and by what amount the sentences of prisoners serving terms of imprisonment for the offense may be reduced.” The bi-partisan members of the Commission unanimously determined that, because no provision in the Fair Sentencing Act abrogates the Commission's duties under § 994(u), Congress intended for the Commission to consider the circumstances, if any, and the extent of any retroactive application of the FSA guideline amendments.

- 3. In arriving at your decision to support retroactive application, what weight did you give to concerns regarding administrative and financial burdens that would result from retroactive application?**

Response: Whether or not retroactive application of a guideline amendment will result in administrative and/or financial burdens is one of the three primary factors that the

Commission considers when it undertakes the required retroactivity analysis. At the Commission's hearing on the retroactivity of the FSA amendments, judges, prosecutors and defense counsel testified regarding their experience with administering crack offender retroactivity applications in 2007, and every witness who spoke to this issue testified that the process was not administratively or financially burdensome. I gave great weight to this testimony in arriving at my decision to support retroactivity.

- 4. The Sentencing Commission determined that approximately 12,000 prison inmates would be released because of retroactive application. As a Commissioner, what weight did you give to this factor in arriving at your vote to support retroactive application of the amendment?**

Response: The Commission conducted a detailed data analysis regarding the retroactive effect of the FSA guideline amendments and estimated that approximately 12,000 inmates would be eligible to apply for a sentence reduction if the FSA guideline amendments were made retroactive. The submission of such an application does not in itself result in the release of the applying inmate; rather, it permits the sentencing judge to review the individual inmate's sentence and it requires the judge to consider various factors such as the risks to public safety when deciding whether a reduction in the term of imprisonment is appropriate in a particular case. As a Commissioner, I gave great weight to the Commission's data analysis and the fact that a judge would have to make a specific determination regarding the appropriateness of a sentence reduction in each case in arriving at my vote to support retroactivity.

- 5. Please explain how the release of 12,000 prisoners, with high recidivism rates, helps to preserve public safety.**

Response: The release of an inmate who has a high risk of recidivism does not help to preserve public safety; consequently, no prisoners were automatically released as a result of the Commission's retroactivity determination. Instead, retroactive application of the FSA guideline amendments permitted certain inmates who had been convicted of crack cocaine offenses to seek a reduced sentence by submitting an application for a penalty reduction to the sentencing court. Under the procedures set forth in Title 18 section 3582(c)(2) and U.S.S.G. § 1B1.10, the sentencing courts that received such applications were required to make individual determinations regarding the appropriateness of a sentence reduction after considering many specific factors, including the potential impact on public safety as a result of reducing an inmate's term of imprisonment.

- 6. Given that the Sentencing Commission previously reduced crack cocaine sentences – in 2007 without Congressional approval – why do you believe it is fair to give these defendants a sentencing windfall by granting another opportunity for further sentence reductions?**

Response: In 2007, the Commission unanimously determined that crack cocaine penalties under the guidelines should be reduced by two levels and that this sentence reduction should apply retroactively. The Fair Sentencing Act subsequently reduced the statutory mandatory minimum penalties and corresponding guidelines for crack cocaine offenses by an even greater amount. The defendants whose sentences were previously reduced by only two levels pursuant to the Commission's action do not receive a windfall as a result of retroactivity; rather, they are provided the same opportunity as other eligible inmates to apply to the sentencing court for an individualized determination regarding the appropriateness of the application of the lower guideline penalties prescribed in the Fair Sentencing Act.

- 7. Please provide to the Committee any prepared statements, or transcripts of statements you made at any hearings, public meetings, or Commission business meetings regarding crack cocaine sentencing.**

Response: There were four occasions in which I participated in public Commission hearings or meetings that considered crack cocaine sentences, all of which were included in the questionnaire that I submitted to the Committee in connection with my nomination:

On October 15, 2010, the Commission held a public meeting concerning the Commission's adoption of a temporary emergency amendment implementing the Fair Sentencing Act. There is no transcript or video of that meeting. The minutes indicate only that I "noted that the proposed amendment is a temporary emergency amendment that seeks to adhere closely to congressional intent and that the Commission will have the opportunity to consider the §2D1.1 guideline in the course of this amendment cycle."

On June 30, 2011, I made a statement at the public Commission meeting in which the Commission unanimously voted to apply the final Fair Sentencing Act guideline amendments retroactively. My Committee questionnaire included a link to the video from this meeting, as well as the meeting minutes. In addition, here is a link to the transcript, which is posted on the Commission's website:

http://www.ussc.gov/Legislative_and_Public_Affairs/Public_Hearings_and_Meetings/20110630/Meeting_Transcript.pdf.

On March 17, 2011, and June 1, 2011, I questioned witnesses during the Commission's public hearings related to the enactment of the Fair Sentencing Act amendments and retroactivity. As noted in my Committee questionnaire, the hearing transcripts are available on the Commission's website at the following links:

http://www.ussc.gov/Legislative_and_Public_Affairs/Public_Hearings_and_Meetings/20110317/Hearing_Transcript.pdf, and
http://www.ussc.gov/Legislative_and_Public_Affairs/Public_Hearings_and_Meetings/20110601/Hearing_Transcript.pdf.

- 8. Do you agree that the sentencing guidelines, if applied properly and followed faithfully, can go a long way to assure predictability and uniformity in sentencing?**

Response: Yes.

- 9. If you are confirmed, how would you apply the sentencing guidelines?**

Response: Although the sentencing guidelines are now advisory, sentencing judges must consider the guidelines and policy statements pursuant to 18 U.S.C. § 3553(a)(4) and (a)(5), and the Supreme Court has repeatedly emphasized that sentencing judges must properly calculate and consider the guidelines as the first step of the federal sentencing process. *See, e.g., Rita v. United States*, 127 S. Ct. 2456, 2465 (2007). The guidelines are “the product of careful study based on extensive empirical evidence derived from the review of thousands of individual sentencing decisions,” *Gall v. United States*, 128 S. Ct. 586, 594 (2007), and they are both “the starting point and the initial benchmark” of federal sentencing. As a Commissioner on the Sentencing Commission, I am well aware of the careful process by which the sentencing guidelines have been developed and the importance of the guidelines in promoting nationwide consistency and uniformity in sentencing. If confirmed as a judge, I will give great weight to the sentencing guideline range in every criminal case.

- 10. At your hearing, I asked you about your understanding of the current state of law regarding those detained as a result of the United States Global War on Terrorism. Now that you have had time to review that issue, please provide a response.**

Response: The law regarding individuals who have been detained by the United States pursuant to the global war on terrorism is a complicated and fact-specific body of law that has been developing by federal statute and in the cases of the Supreme Court and the D.C. Circuit over the past decade. I have not handled detainee cases in many years and have no expertise in this area of the law, but I understand that the Supreme Court has

interpreted federal statutes to provide the Executive Branch with the authority to detain unlawful enemy combatants indefinitely. In *Hamdi v. Rumsfeld*, 542 U.S. 507, 518 (2004), the Court concluded that the detention of unlawful enemy combatants, “for the duration of the particular conflict in which they were captured, is so fundamental and accepted an incident to war as to be an exercise of the ‘necessary and appropriate force’ Congress has authorized the President to use.” Moreover, the *Hamdi* Court signaled that detained enemy combatants may be tried by “appropriately authorized and properly constituted military tribunals,” 542 U.S. at 538, and Congress subsequently enacted the Military Commissions Act of 2006, P.L. 109-366, 120 Stat. 2600 (2006), to “establish[] procedures governing the use of military commissions to try alien unlawful enemy combatants engaged in hostilities against the United States.” If confirmed and presented with a case involving these issues, I would carefully research the applicable statutes and precedents and faithfully apply the law, as I would in any other case.

a. How will you approach terrorism/detainee issues, if confirmed?

Response: It is my understanding that the judges of the U.S. District Court of the District of Columbia have decided that new terrorism/detainee cases involving detainees held at the U.S. facility in Guantanamo Bay will only be assigned to judges who have previously handled these matters. To the extent that I am confirmed and assigned a terrorism/detainee case in another context, I will research the law carefully and apply it faithfully, giving full consideration and effect to the applicable federal statutes and the terrorism/detainee-related precedents of the Supreme Court and the D.C. Circuit.

b. Will you recuse, if assigned terrorism/detainee cases?

Response: I will review the recusal standards established in the judicial code of conduct in all cases, and would recuse myself in any case that warrants such action under those standards, including any terrorism case.

11. You have participated in events involving the American Constitution Society for Law and Policy. There is nothing wrong with participation or membership in such groups. Peter Edelman, as chair of the board of directors for American Constitution Society for Law and Policy, indicated that a goal of the organization is “countering right-wing distortions of our Constitution.” Do you agree with this sentiment? If confirmed, would you follow what Mr. Edelman has described as a “progressive perspective of the constitution”?

Response: I was asked to be a panelist at a single event sponsored by the American Constitution Society. I have never been a member of the organization, nor was I previously aware of any statements that the organization’s leaders have made regarding

the organization's goals or constitutional views. Given my limited involvement with this organization, I cannot opine on any characterization of its goals. If confirmed, I would follow the text of the Constitution as interpreted by the Supreme Court and the D.C. Circuit.

12. What is your view of the role of the courts on improving the lives of everyday citizens?

Response: Courts have a role in making sure that everyday citizens have access to justice. To this end, judges should convey respect in all of their interactions with the litigants and should ensure that the courtroom is a welcoming environment—one in which everyday citizens are encouraged to make their arguments to the best of their ability, and the presented claims are fully heard and fairly considered. Courts should decide pending matters expeditiously for the benefit of the parties, also should encourage the local bar to provide representation for any litigant who wants counsel, regardless of their ability to pay.

13. Do you believe, as Delegate Norton testified, that the citizens of her district are “denied many of the ordinary rights enjoyed by other Americans.” If so, what would be your role as a District Judge for the District of Columbia, to identify and guarantee those rights?

Response: If confirmed, my role as a judge would be to decide cases and controversies that come before me, based only on the law as set forth in federal statutes and handed down by the Supreme Court and the D.C. Circuit.

14. What is the most important attribute of a judge, and do you possess it?

Response: The most important attribute of a judge is 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 is supposed to turn out. I believe that I possess this attribute.

15. Please explain your view of the appropriate temperament of a judge. What elements of judicial temperament do you consider the most important, and do you meet that standard?

Response: A judge should treat everyone who appears before her with dignity and respect. She should have a calm, even-tempered, and thoughtful demeanor, and rule efficiently and decisively. Most importantly, a judge must be an effective communicator, both orally and in writing, so that the parties understand what has been decided and what to expect going forward. I believe that I meet this standard.

16. In general, Supreme Court precedents are binding on all lower federal courts and Circuit Court precedents are binding on the district courts within the particular circuit. Please describe your commitment to following the precedents of higher

courts faithfully and giving them full force and effect, even if you personally disagree with such precedents?

Response: If confirmed, I would be committed to following the precedents of the Supreme Court and the D.C. Circuit, even if I personally disagreed with them.

- 17. At times, judges are faced with cases of first impression. If there were no controlling precedent that was dispositive on an issue with which you were presented, to what sources would you turn for persuasive authority? What principles will guide you, or what methods will you employ, in deciding cases of first impression?**

Response: In cases of first impression involving the interpretation of a statute, I would look at the plain language of the statute, the structure of the statutory provision, and any precedents regarding analogous legal provisions or similar issues. I would employ standard canons of statutory interpretation and interpret the statute consistent with existing precedents addressing related questions. Under all circumstances, I would studiously review the opinions of the Supreme Court, the D.C. Circuit, and other federal courts of appeals that address similar situations.

- 18. What would you do if you believed the Supreme Court or the Court of Appeals had seriously erred in rendering a decision? Would you apply that decision or would you use your best judgment of the merits to decide the case?**

Response: I would apply any and all decisions of the Supreme Court or the D.C. Circuit, even those that I personally believed were rendered erroneously.

- 19. Under what circumstances do you believe it appropriate for a federal court to declare a statute enacted by Congress unconstitutional?**

Response: A federal court must respect Congress and its enactments, and should only declare a federal statute unconstitutional in the narrowest of circumstances. Such circumstances include when a statute has been enacted without authority, based on clear and controlling precedents established by the Supreme Court or a Court of Appeals.

- 20. In your view, is it ever proper for judges to rely on foreign law, or the views of the “world community”, in determining the meaning of the Constitution?**

Response: No, it is not proper for judges to rely on foreign law or the views of the “world community” in determining the meaning of the Constitution.

- 21. As you know, the federal courts are facing enormous pressures as their caseload mounts. If confirmed, how do you intend to manage your caseload?**

Response: Managing mounting caseloads is a primary responsibility of a judge and is essential to stemming excessive litigation costs. Judges must actively engage in the supervision of cases and settlements, hold regular status hearings, streamline discovery,

rule on dispositive motions efficiently, and utilize the time and talents of magistrate judges. If confirmed, I would consider it my obligation to manage my cases, and I would employ all of these tools, and others, to achieve that goal.

22. Do you believe that judges have a role in controlling the pace and conduct of litigation and, if confirmed, what specific steps would you take to control your docket?

Response: Yes, I believe that district court judges have an obligation to monitor and control the pace and conduct of the matters that are assigned to them. A federal judge can control his or her docket by paying careful attention to progression of cases, holding regular status hearings, issuing case management orders, ruling definitively and efficiently on dispositive motions, and working in concert with magistrate judges. If confirmed, I would take all of these steps, and others, to control my docket.

23. You have spent your entire legal career as an advocate for your clients, or in public policy positions. As a judge, you will have a very different role. Please describe how you will reach a decision in cases that come before you and to what sources of information you will look for guidance. What do you expect to be most difficult part of this transition for you?

Response: If confirmed as a judge, I will decide cases and controversies by applying the law to the fairly determined facts in a straightforward, neutral manner. For guidance, I will look to all relevant legal authorities, including the Constitution and the plain language of federal statutes, as well as the binding precedents of the Supreme Court and the D.C. Circuit. The most difficult part of the transition from criminal justice policy is likely to be handling the variety of subject matters and issues that are presented to a district court judge.

24. Please describe with particularity the process by which these questions were answered.

Response: I reviewed the questions posed and drafted the answers on my own and without assistance. I then submitted my draft answers to an official at the Department of Justice, who discussed them with me. Shortly thereafter, I finalized the answers and forwarded them to the Department for submission to the Committee.

25. Do these answers reflect your true and personal views?

Response: Yes.

Response of Ketanji B. Jackson
Nominee to be United States District Judge for the District of Columbia
to the Written Questions of Senator Tom Coburn, M.D.

1. **Some people refer to the Constitution as a “living” document that is constantly evolving as society interprets it. Do you agree with this perspective of constitutional interpretation?**

Response: No.

- a. **If not, please explain.**

Response: The Constitution embodies fundamental principles of limited government authority that originated with the Founders and do not “evolve.”

2. **Do you believe judicial doctrine rightly incorporates the evolving understandings of the Constitution forged through social movements, legislation, and historical practice?**

Response: No.

- a. **If not, please explain.**

Response: Courts must apply established constitutional principles to new circumstances, but the meaning of the Constitution itself does not evolve nor does it incorporate new understandings resulting from social movements, legislation, or historical practices.

3. **What principles of constitutional interpretation would you look to in analyzing whether a particular statute infringes upon some individual right?**

Response: In analyzing whether a statute infringes upon an individual right, I would look to the plain language of the statute and apply the binding precedents of the Supreme Court and the D.C. Circuit that analyze the statute or an analogous provision. My role as a district court judge would be to apply the law as handed down by the Supreme Court and the D.C. Circuit to the facts before me.

4. **In *Roper v. Simmons*, 543 U.S. 551 (2005), Justice Kennedy relied in part on the “evolving standards of decency” to hold that capital punishment for any murderer under age 18 was unconstitutional. I understand that the Supreme Court has ruled on this matter and you are obliged to follow it, but do you agree with Justice Kennedy’s analysis?**

Response: The Supreme Court’s decision in *Roper* is binding precedent and I would faithfully apply it, if confirmed as a district court judge. I do not believe that it would be appropriate for me to express my personal view of the Supreme Court’s decision. My

personal views on this or any other subject matter would not affect my handling of any case that I might be assigned as a district court judge.

- a. When determining what the “evolving standards of decency” are, justices have looked to different standards. Some justices have justified their decision by looking to the laws of various American states, in addition to foreign law, and in other cases have looked solely to the laws and traditions of foreign countries. Do you believe either standard has merit when interpreting the text of the Constitution?**

Response: The laws and traditions of foreign countries are not relevant to the interpretation of the text of the U.S. Constitution. The Supreme Court has indicated that the laws of the American States can be relevant under certain circumstances, and if confirmed, I would faithfully apply any precedent on this issue.

- i. If so, do you believe one standard more meritorious than the other? Please explain why or why not.**

Response: Please see previous answer.

- 5. In your view, is it ever proper for judges to rely on foreign or international laws or decisions in determining the meaning of the Constitution?**

Response: No.

- a. If so, under what circumstances would you consider foreign law when interpreting the Constitution?**

Response: Please see answer to question 4(a).

- b. Do you believe foreign nations have ideas and solutions to legal problems that could contribute to the proper interpretation of our laws?**

Response: Any ideas and solutions to legal problems that foreign nationals may have would be matters for Congress to consider in making policy decisions regarding legal issues, not bases for a court’s interpretation of the existing laws of the United States.

Written Questions of Senator Ted Cruz

Ketanji Jackson

Nominee, United States District Judge for the District of Columbia

U.S. Senate Committee on the Judiciary

January 25, 2013

Judicial Philosophy

Describe how you would characterize your judicial philosophy, and identify which US Supreme Court Justice's judicial philosophy from the Warren, Burger, or Rehnquist Courts is most analogous with yours.

Response: If confirmed as a district court judge, my judicial philosophy would be to approach each case with professional integrity, meaning strict adherence to the rule of law and application of the law to the facts in a straightforward and transparent manner, without any bias or preconceived notion of how the matter is going to be resolved. The role of a Supreme Court Justice is different than that of a district court judge in that it often extends to the development of broader legal principles to guide the lower courts, and Justices sometimes develop substantive judicial philosophies to guide them in this task. 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 would employ as a district court judge.

Do you believe originalism should be used to interpret the Constitution? If so, how and in what form (i.e., original intent, original public meaning, or some other form)?

Response: I believe that district court judges should interpret the Constitution in a manner that is wholly consistent with Supreme Court precedent. I am aware that the Supreme Court has employed originalism when interpreting various constitutional provisions. *See, e.g., U.S. v. Jones*, 132 S. Ct. 945, 949 (2012) (Fourth Amendment); *Citizens United v. Federal Election Comm'n*, 558 U.S. 310, 906 (2010) (First Amendment); *District of Columbia v. Heller*, 554 U.S. 570, 576-600 (2008) (Second Amendment); *Crawford v. Washington*, 541 U.S. 36, 42-57 (2004) (Confrontation Clause); *Alden v. Maine*, 527 U.S. 706, 715-724 (1999) (Eleventh Amendment). Moreover, while the Court has primarily evaluated the original public meaning of the text of the constitutional provision at issue, *see Jones*, 132 S. Ct. at 949, 953; *Heller*, 554 U.S. at 576-77, Supreme Court cases also sometimes refer to the original intent of the Framers, *see Crawford*, 541 U.S. at 53-54, 59, 61. If confirmed as a district court judge, I would follow the analysis of binding Supreme Court precedents when applicable to the cases before me, and I would apply those precedents without regard to any personal view of how the Constitution should be interpreted.

If a decision is precedent today while you're going through the confirmation process, under what circumstance would you overrule that precedent as a judge?

Response: District court judges must strictly apply precedents and cannot overrule them under any circumstances.

Congressional Power

Explain whether you agree that "State sovereign interests . . . are more properly protected by procedural safeguards inherent in the structure of the federal system than by judicially created limitations on federal power." *Garcia v. San Antonio Metro Transit Auth.*, 469 U.S. 528, 552 (1985).

Response: In *Garcia*, the Supreme Court assessed whether Congress's application of federal wage and hour protections to municipal employees pursuant to the Fair Labor Standards Act contravened any constitutional limit on federal power. I do not believe that it is appropriate for me to express any personal view of the *Garcia* case or the policy matter that the quoted statement addresses. If confirmed as a district court judge, I would strictly adhere to the binding precedents of the Supreme Court in this area, including cases in which the Court has interpreted the Tenth Amendment as a limit on Congress's power for the protection of state sovereign interests. *See, e.g., Printz v. United States*, 521 U.S. 898 (1997); *New York v. United States*, 505 U.S. 144 (1992).

Do you believe that Congress' Commerce Clause power, in conjunction with its Necessary and Proper Clause power, extends to non-economic activity?

Response: The Supreme Court has not categorically excluded non-economic activity from Congress's reach under the Commerce Clause, in conjunction with its Necessary and Proper Clause power. *See United States v. Morrison*, 529 U.S. 598, 613 (2000); *see also Gonzales v. Raich*, 545 U.S. 1, 37 (2005) (Scalia, J., concurring) ("Congress may regulate even noneconomic local activity if that regulation is a necessary part of a more general regulation of interstate commerce."). Nevertheless, the Court has thus far generally "upheld Commerce Clause regulation of intrastate activity only where that activity is economic in nature." *Morrison*, 529 U.S. at 613; *see also United States v. Lopez*, 514 U.S. 549, 561 (1995). In this regard, the Court has held that the Commerce Clause authorizes the regulation of only three categories of activity: (1) "the use of the channels of interstate commerce," (2) "the instrumentalities of interstate commerce, or persons or things in interstate commerce" and activities that threaten such instrumentalities, persons or things, and (3) activities that "substantially affect interstate commerce." *United States v. Lopez*, 514 U.S. at 558-59 (1995). This is binding precedent, and if confirmed as a district court judge, I would strictly adhere to it as applicable to any case before me without regard to any personal opinion about the scope of Congress' power under the Commerce Clause.

Presidential Power

What are the judicially enforceable limits on the President's ability to issue executive orders or executive actions?

Response: The Supreme Court has addressed the scope of the President's power to issue executive orders or undertake executive actions, with and without congressional authorization. *See Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952); *see also Medellin v. Texas*, 552 U.S. 491 (2008); *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004); *Dames & Moore v. Regan*, 453

U.S. 654 (1981). Broadly speaking, “[t]he President’s authority to act, as with any exercise of governmental power, ‘must stem either from an act of Congress or from the Constitution itself.’” *Medellin*, 552 U.S. at 524 (citation omitted). The judicially enforceable limits on the President’s ability to act thus include circumstances in which the President acts without express constitutional or statutory authority, or when the executive action impermissibly interferes with the functions that the Constitution assigns to another branch of government, or when the executive action otherwise violates a constitutional or statutory provision.

Individual Rights

When do you believe a right is "fundamental" for purposes of the substantive due process doctrine?

Response: The Supreme Court has generally defined fundamental rights protected by substantive due process as those liberties that are “deeply rooted in this Nation’s history and traditions,” *Moore v. City of East Cleveland*, 431 U.S. 494, 503 (1977), and among the “fundamental” rights that the Supreme Court has recognized are the rights of family autonomy, custody, travel, access to courts, and voting. District courts should interpret the Constitution in a manner that is wholly consistent with Supreme Court precedents, and if confirmed, I would follow Supreme Court precedent with respect to the evaluation of rights for the purpose of any substantive due process case, as I would with any other Supreme Court case.

When should a classification be subjected to heightened scrutiny under the Equal Protection Clause?

Response: The Supreme Court has established that certain classifications—primarily distinctions that the government makes based on suspect classifications such as race, national origin, and gender, or classifications that significantly burden a fundamental right—are subject to a heightened level of scrutiny under the Equal Protection Clause. *See City of Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432, 440-42 (1985); *Zablocki v. Redhail*, 434 U.S. 374, 388 (1978). District courts should interpret the Constitution in a manner that is entirely consistent with Supreme Court precedents, and if confirmed, I would follow Supreme Court precedent with respect to the evaluation of classifications and tiers of scrutiny for the purpose of the Equal Protection Clause, as I would with any other Supreme Court case.

Do you "expect that [15] years from now, the use of racial preferences will no longer be necessary" in public higher education? *Grutter v. Bollinger*, 539 U.S. 306, 343 (2003).

Response: In *Grutter*, the Supreme Court emphasized that “race-conscious admissions policies must be limited in time,” 539 U.S. at 342, and it posited that the law school involved in that case likely would be able to achieve its interest in a diverse student body, without employing such policies, in the relatively near future. I have no particular insight into the future need for, or ramifications of, the continued use of race in admissions. I am aware that the Supreme Court is currently revisiting the issue of the constitutionality of race-conscious admissions policies in public higher education, and if confirmed as a district court judge, I would apply any binding precedent in this area of the law.

Written Questions of Senator Jeff Flake
Ketanji Jackson
Nominee, United States District Judge for the District of Columbia
U.S. Senate Committee on the Judiciary
January 25, 2013

1. What qualities do you believe all good judges possess?

Response: 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. A good judge also has the ability to treat everyone who appears before her with dignity and respect. She should have a calm, even-tempered, and thoughtful demeanor, and should rule efficiently and decisively. Additionally, a good judge must be an effective communicator, both orally and in writing.

a. How does your record reflect these qualities?

Response: As a result of prior legal training and professional experience, I am able to evaluate complex legal arguments and have developed excellent oral and written communication skills. In my current position, I am also required to look objectively at data and the law and to make fair and unbiased policy determinations. (Although a district court judge is not a policymaker, the skills I employ when evaluating sentencing-related facts and applying federal law are similar to the detached, objective evaluations that a good judge makes.) In addition, as a former advocate in both public and private practice, I have had the privilege of working with people from all walks of life. I understand the importance of patience in relating to other people, and I make it a priority to treat others with respect, no matter who they are.

2. Do you believe judges should look to the original meaning of the words and phrases in the Constitution when applying it to current cases?

Response: I believe that district court judges should interpret the Constitution in a manner that is wholly consistent with Supreme Court precedent. The Supreme Court has relied upon the original meaning of the words and phrases in the Constitution when conducting its constitutional analysis in various cases. *See, e.g., U.S. v. Jones*, 132 S. Ct. 945, 949, 953 (2012); *District of Columbia v. Heller*, 554 U.S. 570, 576 - 600 (2008). If confirmed as a district court judge, I would follow the reasoning of binding Supreme Court precedents when applicable to the cases before me, and I would apply them without regard to any personal view of how the Constitution should be interpreted.

a. If so, how do you define original meaning originalism?

Response: "Original meaning" originalism is a form of textualism that bases constitutional interpretation on the ordinary meaning of the terms used in the Constitution as understood by average people at the time of the Founding.

3. **In Federalist Paper 51, James Madison wrote: “In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself.” In what ways do you believe our Constitution places limits on the government?**

Response: Our entire constitutional framework is fairly characterized as having been designed to limit the power of the federal government. For example, the powers afforded to Congress are specifically enumerated (*see* Art I, sec. 8), and Congress is prohibited from exercising any power that is not so designated. *See McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 405 (1819) (“The principle, that [Congress] can exercise only the powers granted to it . . . is now universally admitted.”). Various constitutional provisions also specifically proscribe government action in a number of respects (*see, e.g.*, Art I, sec. 9), including the first ten amendments, which essentially constitute a series of prohibitions against the exercise of government power in a manner that intrudes upon the liberty of individual citizens. Moreover, the Constitution places limits on the government insofar as it divides power between the states and the federal government, and also among the three branches of the federal government, to ensure that the functions of each branch are distinct and constrained and that no one branch can consolidate all power in itself. There are also numerous provisions in the Constitution that detail the authorized democratic process—*e.g.*, provisions that require government officials to be “chosen” by the people, secure for United States citizens the right to vote, and establish specifically the manner of election and limit office holders’ duration of service. These, too, serve as significant constitutional constraints on the scope, size, and composition of government.

- a. **How does the Judicial Branch contribute to this system of checks and balances?**

Response: The Judiciary contributes to the constitutional system of checks and balances because judges have the power to decide when, and under what circumstances, the Constitution’s limits have been reached.

4. **Since at least the 1930s, the Supreme Court has expansively interpreted Congress’ power under the Commerce Clause. Recently, however, in the cases of *United States v. Lopez*, 514 U.S. 549 (1995) and *United States v. Morrison*, 529 U.S. 598 (2000), the Supreme Court has imposed some limits on that power.**

- a. **Some have said the Court’s decisions in *Lopez* and *Morrison* are inconsistent with the Supreme Court’s earlier Commerce Clause decisions. Do you agree? Why or why not?**

Response: *Lopez* and *Morrison* marked the first time in nearly 60 years that the Supreme Court invalidated a federal statute as exceeding the power of Congress under the Commerce Clause. The Court’s opinions in those cases distinguished, but did not purport to overrule, prior precedents.

b. In your opinion, what are the limits to the actions the federal government may take pursuant to the Commerce Clause?

Response: The Supreme Court has concluded that the Commerce Clause authorizes the federal government to regulate only three categories of activity: (1) “the use of the channels of interstate commerce,” (2) “the instrumentalities of interstate commerce, or persons or things in interstate commerce” and activities that threaten such instrumentalities, persons or things, and (3) activities that “substantially affect interstate commerce.” *United States v. Lopez*, 514 U.S. 549, 558-59 (1995). This is binding precedent, and if confirmed as a district court judge, I would strictly adhere to it as applicable to any case before me without regard to any personal opinion about the scope of Congress’ power under the Commerce Clause.

c. Is any transaction involving the exchange of money subject to Congress’s Commerce Clause power?

Response: No.

5. What powers do you believe the 10th Amendment guarantees to the state? Please be specific.

Response: The text of the Tenth Amendment says that the states retain all powers “not delegated to the United States by the Constitution, nor prohibited by it to the States.” Without specifically defining the full scope of the authority that is reserved for the states by virtue of the Tenth Amendment, the Supreme Court has indicated that the states’ residual powers are “significant” and “inviolable,” *New York v. United States*, 505 U.S. 144, 156, 188 (1992), and also that “[t]he principles of limited national powers and state sovereignty are intertwined,” *Bond v. United States*, 131 S. Ct. 2355, 2366 (2011). Moreover, the Court has characterized the powers that the Tenth Amendment reserves for the states as a “mirror image” of the powers that the Constitution grants to the federal government. *New York*, 505 U.S. at 156 (“If a power is delegated to Congress in the Constitution, the Tenth Amendment expressly disclaims any reservation of that power to the States; if a power is an attribute of state sovereignty reserved by the Tenth Amendment, it is necessarily a power the Constitution has not conferred on Congress.”). District court judges are bound by the Supreme Court’s precedents regarding the scope of state power under the Tenth Amendment, and if confirmed as a district court judge, I would faithfully apply the Supreme Court’s precedents in this area, as I would any other Supreme Court case.

Senator CARDIN. Thank you. Ms. Jackson.

**STATEMENT OF KETANJI BROWN JACKSON, NOMINEE TO BE A
MEMBER OF THE U.S. SENTENCING BOARD**

Ms. JACKSON. Yes, sir. Senator, thank you very much for this opportunity to appear before the Committee today. I appreciate it. And I would like to start by thanking the President for nominating me to this position. I'd also like to thank the Chairman of the Committee and the Ranking Member, Senator Sessions.

I also appreciate the opportunity to introduce my family, beginning with my husband, Dr. Patrick Jackson, who is my support system for 13 years and a wonderful father to our two young daughters, who could not be here today, but are hopefully hard at work doing their homework right now.

I would also like to introduce my parents, Johnny and Ellery Brown, who have come here from Miami, Florida, to support me. My parents-in-law, Gardner and Pamela Jackson, who have come here from Boston, Massachusetts. My brother, Second Lieutenant Ketajh Brown, who is a member of the Maryland Army National Guard, who served in Iraq and who graduated from officer candidate school 2 weeks ago; his supportive girlfriend, Olga Butler; and, my wonderful brother-in-law and sister-in-law, Dana and William Jackson.

Other than that, Mr. Chairman, I don't have a statement, but I would like to say that if I am fortunate enough to be confirmed, I look forward to working again with the excellent staff at the Sentencing Commission. And I'm happy to take any questions that you might have.

[The biographical information of Ketanji Brown Jackson follows.]

Senator CARDIN. Well, thank you and we appreciate both of you introducing your families. It is a pleasure to have you all here in our Committee.

Ms. Robinson, if I just could begin with you. If you could just share with us, what would be your priorities, if confirmed to this position? How do you see the Office of Juvenile Justice and Delinquency Prevention, a very important part of local governments?

Give us a little idea about some of the priorities that you would look at within your portfolio of responsibilities, whether you think there is a need to change the way the priority decisions are made. How do you intend to work with the Judiciary Committee in carrying out that responsibility?

Ms. ROBINSON. Certainly, I'd be happy to. And, Senator, if I could first say, also, that I overlooked one of my family members, because I didn't know he was coming. I'd also like to introduce my brother, Peter Overby, who is seated over at the press table, because he's a member of the press. And he didn't tell me he was going to be coming.

Senator, if I'm lucky enough to be confirmed, I would want to emphasize these priorities: One of the key areas that OJP works in, of course, is partnership with the field. So I would say I'd give strong importance to strategic partnerships with state, local and tribal officials in working to reduce crime across the country.

Of course, this is a key area in which OJP has always worked, but I think there is much more that can be done to strengthen the way in which OJP—and you mentioned OJJDP, and that's a key part of this, particularly with the very difficult problems of youth violence that have so recently been highlighted just in the last few days—ways in which we can make sure that officials around the country can access the resources available through OJP and OJJDP.

In a second area, I want to make sure that what we're doing at OJP is based on what we know from science. I know that Senator Specter mentioned that, and this is an area that Senator Sessions and I have discussed in the past.

Is what we're doing based on the best evidence? We shouldn't be spending taxpayer dollars unless we know that it's on areas that really work. So that would be a second area of priority.

A third area of priority would be to ensure, working closely with the Inspector General, that we're ensuring that we're good stewards of Federal taxpayer dollars and guarding against abuse and fraud with those dollars.

Senator CARDIN. Well, the juvenile justice issues are really important. We are struggling with that in this Committee. We have had some legislation that we are considering.

If I had to pick the two areas we probably spend the most time, it would probably be juvenile justice and the drug issues, dealing with recidivism, dealing with drug treatment, dealing with how we handle the drug issues.

So you are going to get a lot of requests in both of these areas. For example, drug courts.

Ms. ROBINSON. Yes.

Senator CARDIN. Give me your thoughts as to how you would encourage, and I hope you would do this, a larger interest among the

local governments so that we can have better choices? I mean, the more interest you have, the more closely you can work with the local agencies, the better pool of requests we are going to have, the better programs we get, the best practices we all learn from each other's states.

Drug courts are working well in some states. Other states need help. How do you see your role in trying to bring this together?

Ms. ROBINSON. Senator, I think one way that OJP can do that better, if I am confirmed, I would want to set up what I call a "what works clearinghouse." I think OJP has not, in the past, done a good enough job in distilling information about the innovative programs out there that really are working well.

Have we really distilled the information from research on how well drug courts are reducing recidivism and reducing drug use? Let's help people, let's say, in Des Moines find out how the drug court in Denver is working well—or the one in Philadelphia—and show people over in Pittsburgh, just as examples.

I think if they can see how their peers around the country are using this in an effective way, not necessarily just a Federal agency telling them, but their peers in another jurisdiction, then that's a good selling point.

And if they can see the percentage reductions in recidivism, that's a selling point to their own city councils when Federal funding may run out.

Senator CARDIN. And you have a large workforce that is part of the office. Some are represented by AFSCME. Can you tell me how you would plan to work with the workers and their representatives in order to have unity for the purpose of the goal of the agency?

Ms. ROBINSON. Yes, Senator. When I was at OJP back in the 1990's, I had a very good working relationship with the union. I met regularly with the president of the union then, who was Stu Smith. We didn't always agree on every issue, but it was very good communication. And if I am confirmed, I would plan to have that same kind of regular communication and working relationship.

I believe very strongly in a fair workplace and ensuring that our managers and our supervisors at OJP are people who are fair in the way that they go about managing the workplace and that they have the training to ensure that they're good managers.

Senator CARDIN. Thank you. Ms. Jackson, I want to talk a little bit about sentencing with you. There is one issue that has been of foremost interest in this Committee, and that is disparity between crack and powder cocaine.

Now, these are statutes. So the sentence disparity needs to be corrected by Congress, I understand that. But the Sentencing Commission needs to take a look at that and is taking a look at it.

How do you see your role on the Sentencing Commission dealing with disparities in our system that are impossible to justify?

Ms. JACKSON. Well, Senator, thank you for your question. If I am fortunate enough to be confirmed, I believe that my role, along with the other commissioners, would be to look at the research, to look at the data, to consider the statistics and determine whether or not the disparities that are reflected in the data have some justification in the purposes of sentencing.

That's part of the role of the commission in setting Federal sentencing policy and it's certainly something that I know that at least with respect to crack and—the crack-powder disparity, the commission has looked at and was very forward thinking about addressing that particular disparity.

Senator CARDIN. And I do hope that our Committee will be able to deal with that issue. There is a lot of work being done by many members of our Committee to try to bring us together on that issue.

Do you have a view in regards to the Supreme Court decision in 2005, the Booker case, which held that the guidelines are not mandatory?

Ms. JACKSON. Well, it's a complicated decision, as you know, that has different aspects to it. I believe that at the end of the day, the remedial half of the opinion was the correct outcome given the constitutional holding.

And the guidelines, as you say, are now advisory and I do think that, as a result, there is additional statistical data that the commission can collect about what judges are actually doing in these cases where they now have the opportunity to sentence outside of the guidelines under the statute directly.

Senator CARDIN. Senator Webb has introduced legislation for us to take a look at the criminal justice system and our sentencing and penal issues. If that legislation is successful, your commission will have an important role in helping that study go forward.

Can you just share with me your thoughts as to Senator Webb's request that we take a more comprehensive look at our sentencing and penal policies in America?

Ms. JACKSON. Well, Senator Webb's proposal I have not studied in detail, but it certainly is a part of a national dialog that's going on right now with regard to Federal sentencing. And I believe that to the extent that his commission and working group is able to come up with proposals as to how to address sentencing, then that would certainly be welcome in the overall debate about what needs to be done now.

Senator CARDIN. Thank you very much. Senator Sessions.

Senator SESSIONS. Sentencing is such a big deal. You have got a 98 percent conviction rate. The real question in most cases is how much time will a person serve.

I am absolutely convinced, from my experience, that the fact that we have a lot of people in jail for fairly long periods of time has been a factor in—the predominant factor, in my view, in that decline in crime. Murder rates in a lot of areas are half what they were. Crime in general is down.

I became a United States Attorney in the early 1980s and people were terrified over crime. It is not as intense today and we have done some things right. But nobody should serve longer in the slammer than makes sense.

That is why I have supported substantial reductions in the crack cocaine penalties and I am working with a number of people to see if we can reach an accord. I have been supporting that for 6 years and never have gotten anything passed yet, maybe more than 6 years.

I am a little worried about where we are heading with the sentencing guidelines. Essentially, we need not go back to the situation in which two defendants are in the courthouse and one is down the hall before Judge X and one before Judge Y and they get five times the sentence for the same offense.

So the guidelines—*Booker* has opened up some real challenges for us and I hope that you will work on that.

Ms. Robinson, I really appreciated your talking about science, because what kind of defendants repeat and which ones, if you release, are likely to go back and commit serious crimes again are big factors. I support the drug courts. Senator Cardin, I really do. I think they work pretty well, but they are done quite differently in different cities.

I guess I really liked your answer to say, "Well, which one is working best?" And should we not be able to advise a community who is going to establish a drug court, especially if they are going to get a Federal grant, to ask them whether—are they going to comply with the best data we have out there on how to conduct that drug court.

Do you agree that we can do a better job of that, Ms. Robinson?

Ms. ROBINSON. Yes, Senator, I very much do. And I think a key part of what the Federal Government does best with these kinds of grants is provide technical assistance with them, which goes directly to your point.

And one of the key things about technical assistance is that the best way to provide it is to not have it be conducted by Federal employees from Washington, but have it conducted by people who are professionals from jurisdictions out in America who are doing this kind of work.

So we arrange it from an agency in Washington, but it's actually conducted out in the field by professionals, again, from one jurisdiction, maybe from Denver, going over to Des Moines or wherever.

Senator SESSIONS. I think that is a good idea and I would support that. I remember, and I have shared this story with you, Mr. Chairman, but Fred Thompson was elected to this body before I was. He chaired the Subcommittee on Juvenile Crime. At the time, there was a big emphasis on what to do about juvenile crime.

He said the only thing he was sure of when I took over that Subcommittee was that we did not know enough about why juveniles commit crime and if the Federal Government wanted to do something worthwhile, we would do some really aggressive studies into that, because 99.99 percent of juvenile cases are tried in state courts, not Federal courts. I always thought that was pretty commonsensical.

Do you think we know enough about juvenile crime, its causes, the recidivism possibilities? Do we provide enough data and information for individual juvenile judges and probation officers and juvenile prison systems around the country?

Ms. ROBINSON. No, Senator, I do not. I think we have——

Senator SESSIONS. You were there for 8 years.

Ms. ROBINSON. Seven years.

Senator SESSIONS. Seven years. What can we do to learn more about it?

Ms. ROBINSON. Well, I think we know some things, but we need to know much more. There is very little research money actually appropriated by Congress to look into these things. There's a lot of—

Senator SESSIONS. A lot of the money that goes to Office of Justice Programs, which you administer, are earmarked or directed to things other than research and development?

Ms. ROBINSON. That's correct. Most of it goes into programmatic money, which is very important, but a very small percentage goes to research.

Senator SESSIONS. Now, you say programmatic. Is that money that goes to state and local jurisdictions mostly?

Ms. ROBINSON. Correct.

Senator SESSIONS. To help them start a drug court or run one.

Ms. ROBINSON. Yes.

Senator SESSIONS. Or a juvenile program.

Ms. ROBINSON. Or for the Byrne grants, for example, for law enforcement task forces and those kinds of things.

Senator SESSIONS. So tell us, be honest with you, at the time of our budget, if we had to choose, it seems to me we would do better to investigate rigorously some of the programs that are being tried all over America and see if we cannot help give good advice, even if we had to reduce some of the grant money or program money.

Ms. ROBINSON. The fact is that even a doubling or a tripling of the research funding would make a tremendous difference, because it's not a tremendous amount of money. But even putting \$20 million more or \$10 million more into research could create a great deal more knowledge about these issues and really inform the spending of the program dollars.

Senator SESSIONS. I also appreciate your willingness to examine, Mr. Chairman, the operation and structure of Office of Justice Programs. It has been cobbled together by this legislation, gets passed and we are all proud of it, and we get a director in charge of it, director in charge of this one, and they have interest groups and everything, and then, at some point, you say it is time to run this thing more streamlined and we can be more efficient and be more productive, usually somebody hollers and objects and it is difficult to get anything done.

But I hope that you would continue your willingness to examine how to, as you just said, make sure we get the best use of the taxpayers' money. Will you do that for us?

Ms. ROBINSON. I would be happy to continue those discussions with the Committee, of course.

Senator SESSIONS. I know you had some good ideas on how we could improve the structure of that when you were part of the Clinton Administration and afterwards, too, you have testified here before our Committee on that.

So, Mr. Chairman, I think we have one of the best nominees of the Clinton Administration. I think you did a great job and managed well and worked hard and were focused on doing the right things and I think it gives us an opportunity, as the Committee, to listen to your advice and suggestions and see if we cannot help you do your job better, because as this system has developed over

the years, it is not as productive, I think, as it should be. Thank you.

Senator CARDIN. Senator Sessions, let me agree with you. Your timing is perfect, because the budget is on the floor as we speak, being managed by my colleague from Maryland, Senator Mikulski and Senator Shelby. You are correct. We generally get involved with that as we put another little wrinkle into the program rather than looking at the overall effect.

I am very encouraged by Ms. Robinson's responses, because the purpose of the agency, the Office of Justice Programs, is to make sure that there is a national benefit to this. If it was just a funding program, we could just figure out a formula and save a lot of time.

But we are trying to make the benefit, so states can benefit from other states and that there are national strategies to help states, which are the primary agencies that deal with these problems, that there is a sharing of information and there is a more effective way for a state or local government to deal with these issues.

So I think Senator Sessions is absolutely right and, Ms. Robinson, we really do look forward to your recommendations in this area. I think we all are trying to get a better effectiveness on the use of these Federal funds. It really should not be just who can get as many earmarks to their states as possible, but how we can best utilize the funds to deal with this National priority of reducing juvenile crime and adult crime and make our communities safer in the most cost-effective way.

So I just wanted to add my support to Senator Sessions' comments.

Senator SESSIONS. What is the total OJP budget?

Ms. ROBINSON. For 2009, it was \$2.8 billion.

Senator SESSIONS. So I am not saying any of this is wasted, although I am sure some is not spent well, but the idea that we do not have enough money to do good research raises questions, because \$10 million or \$20 million could substantially increase your ability to do research out of a multi-billion dollar budget indicates that Congress probably needs to examine how we allocate the money.

Senator CARDIN. I think that is our responsibility, you are correct. Let me thank both of our nominees. The record will remain open for 1 week, without objection. I will submit statements from—I understand, Ms. Robinson, you have an opening statement to submit for the record. That will be included in the record.

With that, the Committee will stand adjourned.

[Whereupon, at 5:24 p.m., the hearing was adjourned.]

[Questions and answers and submissions for the record follow.]

QUESTIONS AND ANSWERS

Responses of Ketanji Brown Jackson

Nominee to be a Member of the United States Sentencing Commission
to Written Questions for the Record from Senator Jeff Sessions

1. Pursuant to the Supreme Court's decision in *United States v. Booker*, the federal sentencing guidelines are advisory, rather than mandatory. Under the current system, it appears to me that as long as the sentencing judge (1) correctly calculates the guidelines, and (2) appropriately considers factors set forth in 18 U.S.C. 3553(a), he or she may impose any sentence ranging from probation to the statutory maximum. Following the Supreme Court's decision in *Gall v. United States*, appellate courts must apply the highly deferential "abuse of discretion" standard when reviewing these sentencing decisions. As a result, district court judges may impose virtually any sentence, and as long as the decision is procedurally sound, there is virtually no substantive review on appeal.

- a. Do you agree that the sentence a defendant receives for a particular crime should not depend on the judge he or she happens to draw?

Yes, I agree that a defendant's sentence for a particular crime should not depend on the judge who sentences him or her. The federal sentencing system should embody the principle that similar offenders who commit similar crimes should be treated similarly.

- b. Do you believe the current sentencing structure undermines several of the key goals of the Sentencing Reform Act of 1984, specifically, reducing unwarranted sentencing disparity?

There are clear indications that the post-*Booker* advisory guidelines scheme is less effective at reducing sentencing disparities among similarly-situated defendants than the pre-*Booker* mandatory guidelines regime. One of the stated purposes of the guidelines under the Sentencing Reform Act of 1984 was to "provide certainty and fairness in meeting the purposes of sentencing" by "avoiding unwarranted sentencing disparities among defendants," 28 U.S.C. § 991(b)(1)(B), and it is fair to say that the current advisory sentencing structure makes achievement of that statutory goal more difficult than the mandatory sentencing system that Congress originally envisioned.

2. Statistics compiled by the U.S. Sentencing Commission suggest that the rate of sentences imposed below the guideline range has risen dramatically post-*Booker*. (Not including government sponsored sentences below range, such as those where the defendant receives credit for substantial assistance.) For instance, according to the Commission's 2009 Third Quarter Preliminary Report, a national comparison of sentences shows that district court judges imposed sentences below the guidelines range approximately 16% of the time. That is nearly four times as many below

range sentences than were reported for the first quarter of 2005, when the percentage was 4.3%. *Booker* was decided in January of 2005.

- a. **How would you propose we address what appears to be the rise in below range sentences, and the sentencing disparities that will necessarily accompany this rise?**

Any proposal to address the apparent rise in below-range sentences and sentencing disparities would need to be based on aggregated data over time and must reflect realistic views about whether the current guidelines system can adequately reduce unwarranted disparities while providing judges with sufficient flexibility to impose fair sentences. Thus, if confirmed, I would want to continue gathering data, information, and opinions about the operation of the guidelines—as the Commission is currently doing through its regional hearings and data-analysis divisions—and consider structural and substantive amendments to the guidelines themselves. If those were not sufficiently effective, I would consider fashioning a broader legislative proposal to address sentencing disparities under the advisory system in the aftermath of *Booker*.

- b. **Do you believe that Congress should consider statutory reform that would create a binding but constitutional system?**

I would certainly consider the creation of a binding and constitutional federal sentencing guidelines system. I believe that Congress should wait in its consideration of statutory reforms, however, to determine if acceptably consistent, predictable, and fair sentencing results can be achieved under the current advisory scheme and to get the results of the Commission's ongoing review.

The Commission is currently holding regional hearings across the country and receiving broad input from prosecutors, defense counsel, judges, and academics regarding the direction and future of federal sentencing. I would expect that the Commission plans to revisit the guidelines, both structurally and substantively, as a result of what it learns from this extensive information-gathering mission. If the guidelines are adjusted to reflect the new reality of the advisory system and to take into account the views of criminal justice practitioners regarding the appropriate sentences for various crimes, it is possible that the rate of judicial imposition of below-guideline sentences may decline, resulting in a reduction in sentencing disparities that would render congressional intervention unnecessary.

Congress should, of course, remain ever mindful of unacceptable disparities in sentencing that persist over time and that undermine the public's perception of the fairness of the system as a whole. Statutory reforms that reestablish a constitutional and binding sentencing system might prove necessary if the advisory guideline system itself cannot address and resolve the problem of unwarranted and unjustified sentencing disparities.

1105

No. 09-6338

IN THE
Supreme Court of the United States

PERCY DILLON,
Petitioner,
v.

UNITED STATES OF AMERICA,
Respondent.

**On Writ of Certiorari
to the United States Court of Appeals
for the Third Circuit**

**BRIEF FOR THE
UNITED STATES SENTENCING COMMISSION
AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT**

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QUESTION PRESENTED

Amicus will address the following question:

Whether, in a sentence reduction proceeding under 18 U.S.C. § 3582(c)(2), the district court has authority to reduce a sentence of imprisonment in a manner inconsistent with the United States Sentencing Commission's policy statement at § 1B1.10 of the Guidelines Manual.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iii
INTEREST OF <i>AMICUS CURIAE</i>	1
STATEMENT	2
A. The Commission’s Amendment To The Guidelines Applicable To Crack Cocaine Offenses	2
B. The Commission’s Determination To Make The Crack Cocaine Amendment Retroactive	3
SUMMARY OF ARGUMENT	8
ARGUMENT	10
I. THE COMMISSION PROPERLY CAR- RIED OUT ITS STATUTORY DUTIES UNDER 28 U.S.C. § 994(u) BY PROM- ULGATING THE POLICY STATE- MENT AT USSG § 1B1.10.....	10
A. Section 1B1.10 Specifies “In What Circumstances” And “By What Amount” Sentences May Be Reduced Based On A Guideline Amendment.....	11
B. <i>Amici</i> ’s Procedural Challenge To § 1B1.10 Has No Merit	14
II. THE LIMITED SCOPE OF § 3582(c)(2) PROCEEDINGS PERMITS THE COMMISSION TO MAKE INFORMED RETROACTIVITY DECISIONS	18
CONCLUSION.....	22

TABLE OF AUTHORITIES

	Page
CASES	
<i>Braxton v. United States</i> , 500 U.S. 344 (1991)	1, 12, 13
<i>Kimbrough v. United States</i> , 552 U.S. 85 (2007)	2
<i>Mistretta v. United States</i> , 488 U.S. 361 (1989)	1
<i>Rita v. United States</i> , 551 U.S. 338 (2007)	1
<i>United States v. Booker</i> , 543 U.S. 220 (2005)	1, 4, 10
<i>United States v. Bravo</i> , 203 F.3d 778 (11th Cir. 2000).....	20
<i>United States v. Cunningham</i> , 554 F.3d 703 (7th Cir.), <i>cert. denied</i> , 129 S. Ct. 2826, 2840 (2009)	10
<i>United States v. Doe</i> , 564 F.3d 305 (3d Cir.), <i>cert. denied</i> , 130 S. Ct. 563 (2009)	10
<i>United States v. Dublin</i> , 572 F.3d 235 (5th Cir.), <i>cert. denied</i> , 130 S. Ct. 517 (2009).....	10
<i>United States v. Dunphy</i> , 551 F.3d 247 (4th Cir.), <i>cert. denied</i> , 129 S. Ct. 240 (2009).....	10
<i>United States v. Edwards</i> , No. 97-60326, 1998 WL 546471 (5th Cir. Aug. 6, 1998) (judgment noted at 156 F.3d 182)	20
<i>United States v. Fanfan</i> , 558 F.3d 105 (1st Cir.), <i>cert. denied</i> , 130 S. Ct. 99 (2009).....	10
<i>United States v. Fox</i> , 583 F.3d 596 (9th Cir. 2009).....	10
<i>United States v. Hasan</i> , 245 F.3d 682 (8th Cir. 2001).....	18

<i>United States v. Hicks</i> , 472 F.3d 1167 (9th Cir. 2007).....	10
<i>United States v. Jordan</i> , 162 F.3d 1 (1st Cir. 1998).....	20
<i>United States v. Legree</i> , 205 F.3d 724 (4th Cir. 2000).....	20
<i>United States v. Melvin</i> , 556 F.3d 1190 (11th Cir.), <i>cert. denied</i> , 129 S. Ct. 2382 (2009).....	10
<i>United States v. Reddick</i> , 53 F.3d 462 (2d Cir. 1995).....	21
<i>United States v. Rhodes</i> , 549 F.3d 833 (10th Cir. 2008), <i>cert. denied</i> , 129 S. Ct. 2052 (2009)	10
<i>United States v. Savoy</i> , 567 F.3d 71 (2d Cir.), <i>cert. denied</i> , 130 S. Ct. 342 (2009)	10
<i>United States v. Starks</i> , 551 F.3d 839 (8th Cir.), <i>cert. denied</i> , 129 S. Ct. 2746 (2009).....	10
<i>United States v. Tidwell</i> , 178 F.3d 946 (7th Cir. 1999)	20
<i>United States v. Townsend</i> , 98 F.3d 510 (9th Cir. 1996)	20
<i>United States v. Whitebird</i> , 55 F.3d 1007 (5th Cir. 1995)	20

CONSTITUTION, STATUTES, REGULATIONS,
AND RULES

U.S. Const. amend. VI.....	10, 20
Administrative Procedure Act, 5 U.S.C. § 553	8, 9, 14
Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207.....	2
Sentencing Reform Act of 1984, Pub. L. No. 98-473, Tit. II, Ch. II, 98 Stat. 1837, 1987	1, 2, 3, 18
28 U.S.C. §§ 991-994	1
28 U.S.C. § 991(b)(1)(B).....	2
28 U.S.C. § 991(b)(1)(C).....	2
28 U.S.C. § 994(a)(2).....	13
28 U.S.C. § 994(a)(2)(C).....	13
28 U.S.C. § 994(o)	2, 12
28 U.S.C. § 994(p)	2
28 U.S.C. § 994(u).....	3, 8, 10, 11, 12, 14, 19
28 U.S.C. § 994(x)	14
18 U.S.C. § 3006A(c)	20
18 U.S.C. § 3553(a)	13
18 U.S.C. § 3582(c)(2)	7, 8, 9, 10, 11, 12, 13, 14, 18, 19, 20, 21
United States Sentencing Comm'n, Guidelines Manual § 1B1.10 cmt. n.3 (Nov. 1, 2007)	17
United States Sentencing Comm'n, Guidelines Manual (Nov. 1, 2009): § 1B1.10	3, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 21

§ 1B1.10 cmt. background.....	4, 18
§ 1B1.10(a)	11
§ 1B1.10(b)	11
§ 1B1.10(b)(2)(A).....	11, 17
§ 1B1.10(a)(2).....	3, 11
§ 1B1.10(c)	3, 11
App. C:	
Amend. 706 (effective Nov. 1, 2007)	2, 3, 4
Amend. 712 (effective Mar. 3, 2008).....	7, 16
Amend. 713 (effective Mar. 3, 2008).....	4, 6, 19
Fed. R. Crim. P. 43(b)(4).....	20
Sup. Ct. R. 37.6	1
United States Sentencing Comm’n Rules of Practice and Procedure (2007)	15
Rule 4.1	4

LEGISLATIVE MATERIALS

S. Rep. No. 98-225 (1983), <i>as reprinted in</i> 1984 U.S.C.C.A.N. 3182	18
---	----

ADMINISTRATIVE MATERIALS

72 Fed. Reg. 41,794 (July 31, 2007)	4, 5
Letter from Hon. Paul Cassell, Chair, Com- mittee on Criminal Law, to Hon. Ricardo H. Hinojosa, Chair, USSC (Nov. 2, 2007), <i>available at</i> http://www.ussc.gov/pubcom_ Retro/PC200711_004.pdf.....	5, 15

Letter from David Debold and Todd Bussert, Co-Chairs, Practitioners Advisory Group, to Hon. Ricardo H. Hinojosa, Chair, USSC (Oct. 31, 2007), <i>available at</i> http://www.ussc.gov/pubcom_Retro/PC200711_002.pdf	15
Letter from Jon M. Sands, Federal Public and Community Defenders, to Hon. Ricardo H. Hinojosa, Chair, USSC (Oct. 31, 2007), <i>available at</i> http://www.ussc.gov/pubcom_Retro/PC200711_003.pdf	16
Memorandum from Glenn Schmitt et al., USSC, to Hon. Ricardo H. Hinojosa, Chair, USSC (Oct. 3, 2007), <i>available at</i> http://www.ussc.gov/general/Impact_Analysis_20071003_3b.pdf	6, 19
United States Sentencing Comm'n:	
<i>Preliminary Crack Cocaine Retroactivity Data Report</i> (Jan. 2010), <i>available at</i> http://www.ussc.gov/USSC_Crack_Retroactivity_Report_2010_January.pdf	7, 19
Public Meeting Minutes (Dec. 11, 2007), <i>available at</i> http://www.ussc.gov/MINUTES/20071211_Minutes.pdf	5
<i>Report to the Congress: Cocaine and Federal Sentencing Policy</i> (May 2002), <i>available at</i> http://www.ussc.gov/r_congress/02crack/2002crackrpt.pdf	3
<i>Report to the Congress: Cocaine and Federal Sentencing Policy</i> (May 2007), <i>available at</i> http://www.ussc.gov/r_congress/cocaine2007.pdf	3

<i>Special Report to the Congress: Cocaine and Federal Sentencing Policy</i> (Feb. 1995), available at http://www.ussc.gov/ crack/exec.htm	3
<i>Special Report to the Congress: Cocaine and Federal Sentencing Policy</i> (Apr. 1997), available at http://www.ussc.gov/ r_congress/newcrack.pdf	3

INTEREST OF *AMICUS CURIAE*¹

The Sentencing Reform Act of 1984 (“SRA”) charged the United States Sentencing Commission (the “USSC” or the “Commission”) with the duty to create, review, and revise the Federal Sentencing Guidelines (“Guidelines”), 28 U.S.C. §§ 991-994, and “granted the Commission the unusual explicit *power* to decide whether and to what extent its amendments reducing sentences will be given retroactive effect, 28 U.S.C. § 994(u).” *Braxton v. United States*, 500 U.S. 344, 348 (1991). The Commission accordingly has a direct interest in this case, which concerns sentence modification proceedings conducted in response to its decision to make an amendment to the Guidelines retroactive. The Commission previously submitted briefs in this Court as *amicus curiae* on issues of paramount importance to the Commission’s mission and functions in *Rita v. United States*, 551 U.S. 338 (2007); *United States v. Booker*, 543 U.S. 220 (2005); and *Mistretta v. United States*, 488 U.S. 361 (1989).

¹ Pursuant to Supreme Court Rule 37.6, counsel for *amicus* represents that it authored this brief and that no person or entity other than *amicus* or its counsel made a monetary contribution to the preparation or submission of the brief. Counsel for *amicus* represents that counsel for all parties have consented to the filing of this brief, and letters reflecting their consent have been filed with the Clerk.

STATEMENT

A. The Commission's Amendment To The Guidelines Applicable To Crack Cocaine Offenses

Under the SRA, the Commission is charged with “establishing sentencing policies and practices” that “provide certainty and fairness in meeting the purposes of sentencing.” 28 U.S.C. § 991(b)(1)(B). The SRA directs the Commission to ensure that federal sentencing policies “reflect . . . advancement in knowledge of human behavior as it relates to the criminal justice process” and to measure the effectiveness of sentencing practices in meeting the purposes of sentencing. *Id.* § 991(b)(1)(C). The Commission accordingly has the obligation periodically to “review and revise” the Guidelines “in consideration of comments and data coming to its attention.” *Id.* § 994(o). The Commission must submit to Congress its amendments to the Guidelines; the amendments are subject to disapproval by Congress for 180 days, after which time they take effect. *See id.* § 994(p).

The amendment to the Guidelines at issue in this case concerns offenses involving crack cocaine. *See* USSG App. C, amend. 706 (effective Nov. 1, 2007). Under the Anti-Drug Abuse Act of 1986, Congress set mandatory minimum penalties for crack cocaine (or “cocaine base”) offenses that “treated every gram of crack cocaine as the equivalent of 100 grams of powder cocaine.” *Kimbrough v. United States*, 552 U.S. 85, 95-96 (2007). The Commission initially incorporated that “100-to-1” ratio into the Guidelines, but, based on further research and study, came to the view that the extent of this disparate treatment was

no longer supportable.² In the absence of any legislative action by Congress, in 2007, the Commission adopted an amendment that reduced the base offense level for most crack cocaine offenders by two levels. See USSG App. C, amend. 706 (effective Nov. 1, 2007).

B. The Commission's Determination To Make The Crack Cocaine Amendment Retroactive

1. When a Guideline amendment “reduces the term of imprisonment recommended in the guidelines applicable to a particular offense or category of offenses,” the SRA requires that the Commission “specify in what circumstances and by what amount” the sentences of prisoners serving terms of imprisonment for those offenses should be lowered. 28 U.S.C. § 994(u). Section 1B1.10 of the Guidelines Manual implements that directive and provides that a sentence reduction is appropriate only if one of the amendments “listed in subsection (c) [of § 1B1.10] is applicable to the defendant” and “ha[s] the effect of lowering the defendant’s applicable guideline range.” USSG § 1B1.10(a)(2). Section 1B1.10(c) thus identifies those amendments that the Commission has determined, pursuant to § 994(u), should be applied retroactively.

Section 1B1.10 also explains the criteria that the Commission uses for deciding whether to give an

² See USSC, *Special Report to the Congress: Cocaine and Federal Sentencing Policy* (Feb. 1995), available at <http://www.ussc.gov/crack/exec.htm>; USSC, *Special Report to the Congress: Cocaine and Federal Sentencing Policy* (Apr. 1997), available at http://www.ussc.gov/r_congress/newcrack.pdf; USSC, *Report to the Congress: Cocaine and Federal Sentencing Policy* (May 2002), available at http://www.ussc.gov/r_congress/02crack/2002crackrpt.pdf; USSC, *Report to the Congress: Cocaine and Federal Sentencing Policy* (May 2007), available at http://www.ussc.gov/r_congress/cocaine2007.pdf.

amendment retroactive effect. Those criteria include “the purpose of the amendment, the magnitude of the change in the guideline range made by the amendment, and the difficulty of applying the amendment retroactively to determine an amended guideline range.” *Id.* § 1B1.10 cmt. background. In considering the difficulty of applying an amendment retroactively, the Commission considers not only how difficult applying the amendment would be in an individual case, but also the overall impact of a potential retroactivity decision on the federal criminal justice system.

To inform the Commission’s deliberations, particularly with respect to that third enumerated factor, the Commission typically performs an analysis that estimates the number of offenders potentially eligible to seek a reduced sentence if the Commission were to make the amendment retroactive. It then projects release dates for those eligible offenders.³ Using those criteria, the Commission has exercised its authority to make an amendment retroactive judiciously. Prior to *Booker*, the Commission had voted to apply only 24 of its amendments retroactively.

2. Following its submission of the crack cocaine amendment to Congress, the Commission published a Federal Register notice seeking public comment on whether the amendment should be given retroactive effect. *See* 72 Fed. Reg. 41,794 (July 31, 2007). Cognizant of the potential impact that Amendment 706 could have on the federal criminal justice system if applied retroactively, the Commission also requested comment regarding “whether, if it amends § 1B1.10(c)

³ *See, e.g.*, USSG App. C, amend. 713, Reason for Amendment (effective Mar. 3, 2008); *see also* USSC Rules of Practice and Procedure 4.1 (2007).

to include [the crack cocaine] amendment, it also should amend § 1B1.10 to provide guidance to the courts on the procedure to be used when applying an amendment retroactively under 18 U.S.C. 3582(c)(2).” *Id.*

The Commission received “more than 33,000 pieces of public comment concerning the issue of retroactivity,” representing each of the major participants in the federal criminal justice system.⁴ Although many comments favored making the amendment retroactive, they also reflected concern for the procedures that would apply in the event of retroactive application. As the Committee on Criminal Law of the Judicial Conference of the United States stated: “[t]he Committee’s recommendation [in favor of retroactive application of the crack cocaine amendment] rests on the hope that the Commission will implement procedures to reduce the administrative burden on the federal judiciary associated with the resentencings that would attend retroactive application.”⁵

In addition to soliciting public comment, the Commission held a full-day hearing in Washington, D.C., where it heard testimony from many participants in the federal criminal justice system, including the judicial branch, representatives of the executive branch, private practitioners and representatives of federal public defenders, academics, and various community groups.

⁴ U.S. Sentencing Commission Public Meeting Minutes at 6 (Dec. 11, 2007), *available at* http://www.ussc.gov/MINUTES/20071211_Minutes.pdf.

⁵ Letter from Hon. Paul Cassell, Chair, Committee on Criminal Law, to Hon. Ricardo H. Hinojosa, Chair, USSC, at 1 (Nov. 2, 2007) (“Cassell Letter”), *available at* http://www.ussc.gov/pubcom_Retro/PC200711_004.pdf.

3. The Commission also analyzed and considered the potential impact on the prison population and the federal court system of applying the crack cocaine amendment retroactively.⁶ The Commission's analysis was based expressly on its understanding of "the constraints imposed by 18 U.S.C. § 3582(c)(2) and § 1B1.10" limiting "the extent of any reduction under § 3582(c)(2) to the amended guideline range." Schmitt Memorandum at 4. Accordingly, the data considered by the Commission when it voted on retroactivity of the crack cocaine amendment "account[ed] only for the application of the two-level reduction provided by the crack cocaine amendment and [did] not assume any other reduction in the sentence." *Id.*

The Commission's analysis estimated that, of the 31,323 crack cocaine offenders sentenced between October 1, 1991, and June 20, 2007, and who were identified as imprisoned, 19,500 "would be eligible to seek a reduced sentence if the Commission were to make the 2007 crack cocaine amendment retroactive" and that "[t]hese offenders would be released over a period of more than three decades." *Id.* at 4-5. Further, the Commission estimated that "the average sentence reduction for those offenders who appear to be eligible to seek a reduced sentence would be 27 months (from 152 months to 125 months)." *Id.* at 23.

4. After considering the data and public input, the Commission voted on December 11, 2007, to give the crack cocaine amendment retroactive effect as of March 3, 2008. *See* USSG App. C, amend. 713, Reason for Amendment (effective Mar. 3, 2008). The

⁶ *See* Memorandum from Glenn Schmitt et al., USSC, to Hon. Ricardo H. Hinojosa, Chair, USSC (Oct. 3, 2007) ("Schmitt Memorandum"), *available at* http://www.ussc.gov/general/Impact_Analysis_20071003_3b.pdf.

Commission also voted to amend § 1B1.10 to “clarify when, and to what extent, a reduction in the defendant’s term of imprisonment is consistent with the policy statement and is therefore authorized under 18 U.S.C. § 3582(c)(2).” *Id.*, amend. 712, Reason for Amendment (effective Mar. 3, 2008).

5. Since its decision to make the crack cocaine amendment retroactive, the Commission has compiled “data concerning recent court decisions considering motions to reduce the length of imprisonment for certain offenders convicted of offenses involving crack cocaine prior to November 1, 2007.”⁷ As of January 13, 2010, district courts had addressed and decided 23,471 motions brought under 18 U.S.C. § 3582(c)(2) during the approximately 22 months that the amendment had been in effect. *See* 2010 Report, Table 1. Of those 23,471 motions, district courts had granted 15,501 sentence reductions pursuant to the Commission’s crack cocaine amendment and denied an additional 7,970 such motions. *See id.*⁸ The average reduction in sentence was 25 months, compared to the 27 months the Commission had projected. *See id.*, Table 8.

⁷ USSC, *Preliminary Crack Cocaine Retroactivity Data Report* 1 (Jan. 2010) (“2010 Report”), available at http://www.ussc.gov/USSC_Crack_Retroactivity_Report_2010_January.pdf.

⁸ Of those 7,970 motions, 6,763 were denied because the defendant was not eligible for a sentence reduction; 944 of those motions were brought by defendants whose offense(s) did not involve crack cocaine. *See id.*, Table 9.

SUMMARY OF ARGUMENT

I.A. Under 28 U.S.C. § 994(u), if the Commission reduces the recommended Guideline range applicable to a certain offense, it must “specify in what circumstances and by what amount” those sentences should be reduced for those serving terms of imprisonment for that offense. The Commission’s policy statement at § 1B1.10 of the Guidelines Manual carries out those tasks by providing that a court may grant a sentence reduction under a Guideline amendment only if the Commission has designated that amendment as appropriate for retroactive application (“in what circumstances”) and that a court may not reduce a defendant’s sentence below the amended Guideline range (“by what amount”). *Amici*’s various arguments that courts are free to regard those limitations as non-binding are unpersuasive and contradicted by the express terms of 28 U.S.C. § 994(u) and 18 U.S.C. § 3582(c)(2).

B. The Commission properly adhered to procedural requisites in formulating its decision. The Commission correctly forecast the thousands of requests for sentence modification that have been filed in response to the retroactive effect of the crack cocaine amendment. The Commission’s amendments to § 1B1.10 were adopted to clarify any ambiguities in the policy statement that could lead to unnecessary litigation and confusion, and in turn could hinder the federal courts’ ability to process the cases and to release those prisoners who would benefit from retroactive application of the amendment.

In amending § 1B1.10, the Commission was not required to use the notice-and-comment procedures of the Administrative Procedure Act (“APA”), 5 U.S.C. § 553. The Commission’s organic statute is clear

that the APA applies only to promulgation of Guidelines and that the Commission should implement its authority under 18 U.S.C. § 3582(c)(2) through promulgation of a policy statement. Nevertheless, the Commission sought and received public comment on the changes to § 1B1.10 using the same procedures through which it obtained public comment on the crack cocaine amendment itself. Furthermore, the revisions merely clarified the appropriate circumstances for sentence modifications.

II. A significant factor in the Commission's consideration of whether to make a Guideline amendment retroactive is the effect retroactivity would have on the court system's ability to administer justice. Because courts of appeals have generally treated sentence reduction proceedings under 18 U.S.C. § 3582(c)(2) as having a limited scope that does not entail a complete resentencing, the Commission has been able to predict with a high degree of accuracy what consequences to the judicial system are likely to flow from retroactive treatment of specific Guideline amendments. That assessment would be extremely difficult, if not impossible, to conduct if the Commission could not reasonably predict the extent of the reduction that could be granted to an eligible defendant or the nature and extent of the resulting proceedings. The regime that petitioner seeks – in which any amendment made retroactive would potentially afford each eligible defendant a full resentencing – likely would have the effect of diminishing retroactivity's usefulness as a tool for promoting fairness in sentencing and avoiding unwarranted disparities.

ARGUMENT

I. THE COMMISSION PROPERLY CARRIED OUT ITS STATUTORY DUTIES UNDER 28 U.S.C. § 994(u) BY PROMULGATING THE POLICY STATEMENT AT USSG § 1B1.10

By its terms, § 3582(c)(2) grants a district court authority to reduce a sentence only “if such a reduction is consistent with applicable policy statements issued by the Sentencing Commission.” 18 U.S.C. § 3582(c)(2). The Commission joins in respondent’s arguments as to why applying § 3582(c)(2) as written is consistent with the Sixth Amendment and this Court’s holding in *United States v. Booker*, 543 U.S. 220 (2005).⁹ The Commission will address here certain of the non-constitutional, alternative arguments advanced by the Federal Defenders as *Amici Curiae*

⁹ That is the “nearly unanimous position” of the courts of appeals, which have held that “*Booker* does not alter the mandatory character of Guideline § 1B1.10’s limitations on sentence reductions.” *United States v. Dublin*, 572 F.3d 235, 238 (5th Cir.) (per curiam), *cert. denied*, 130 S. Ct. 517 (2009); *see also United States v. Fanfan*, 558 F.3d 105, 109-10 (1st Cir.), *cert. denied*, 130 S. Ct. 99 (2009); *United States v. Savoy*, 567 F.3d 71, 73 (2d Cir.) (per curiam), *cert. denied*, 130 S. Ct. 342 (2009); *United States v. Doe*, 564 F.3d 305, 313-14 (3d Cir.), *cert. denied*, 130 S. Ct. 563 (2009); *United States v. Dunphy*, 551 F.3d 247, 252-55 (4th Cir.), *cert. denied*, 129 S. Ct. 240 (2009); *United States v. Cunningham*, 554 F.3d 703, 706-07 (7th Cir.), *cert. denied*, 129 S. Ct. 2826, 2840 (2009); *United States v. Starks*, 551 F.3d 839, 841-42 (8th Cir.), *cert. denied*, 129 S. Ct. 2746 (2009); *United States v. Rhodes*, 549 F.3d 833, 839-41 (10th Cir. 2008), *cert. denied*, 129 S. Ct. 2052 (2009); *United States v. Melvin*, 556 F.3d 1190, 1192-93 (11th Cir.), *cert. denied*, 129 S. Ct. 2382 (2009). *But see United States v. Hicks*, 472 F.3d 1167, 1169-72 (9th Cir. 2007). In *United States v. Fox*, 583 F.3d 596 (9th Cir. 2009), the Ninth Circuit granted initial hearing en banc to consider whether to overrule *Hicks*; that review has been stayed pending the Court’s resolution of this case.

in Support of Petitioner (“*Amici*”). *Amici*’s arguments are unpersuasive.

A. Section 1B1.10 Specifies “In What Circumstances” And “By What Amount” Sentences May Be Reduced Based On A Guideline Amendment

1. Section 994(u) specifically directs that, “[i]f the Commission reduces the term of imprisonment recommended in the guidelines applicable to a particular offense or category of offenses,” the Commission “shall specify in what circumstances and by what amount the sentences of prisoners serving terms of imprisonment for the offense may be reduced.” 28 U.S.C. § 994(u). In response to that directive, the Commission promulgated § 1B1.10.

Section 1B1.10(a) specifies “in what circumstances” (28 U.S.C. § 994(u)) an amendment may be applied retroactively, by providing that a defendant is eligible for a § 3582(c)(2) reduction only if an “amendment[] listed in subsection (c) [of § 1B1.10] is applicable to the defendant” and “ha[s] the effect of lowering the defendant’s applicable guideline range.” USSG § 1B1.10(a)(2). Section 1B1.10(c) lists those amendments that the Commission has determined are appropriate for retroactive application. Petitioner and his *Amici* do not dispute that § 1B1.10 is binding in this respect – a court is not free to grant a sentence reduction under § 3582(c)(2) based on an amendment to the Guidelines that the Commission has not listed in § 1B1.10(c).

Section 1B1.10(b) specifies, in conjunction with the substantive amendment itself, “by what amount” (28 U.S.C. § 994(u)) the amendment should be given retroactive effect. Section 1B1.10(b)(2)(A) provides generally that “the court shall not reduce the defen-

dant's term of imprisonment . . . to a term that is less than the minimum of the amended guidelines range," as determined with the benefit of the amendment. Section 1B1.10 thus carries out precisely what § 994(u) directs the Commission to do when a Guideline amendment has the effect of reducing the recommended sentencing range for an offense or category of offenses.

2. Despite that direct relationship, *Amici* argue that the Commission's authority under § 994(u) is merely a "supplement" to its authority to amend the Guidelines under § 994(o) and that § 994(u) does not confer on the Commission any authority to issue policy statements that are "applicable" under the last clause of § 3582(c)(2). *Amici* Br. 14-19. In short, *Amici* acknowledge (at 18-19) that the Commission is authorized to "specify" in what circumstances and by what amount an amendment shall have retroactive effect, but argue that the Commission lacks authority to make such a specification in a way that matters – through a "policy statement" that is "applicable" under § 3582(c)(2). The argument thus implies that, in § 994(u), Congress charged the Commission with a pointless duty. That construction is untenable.

Any suggestion that § 1B1.10 does not *implement* § 994(u) is foreclosed by this Court's decision in *Braxton v. United States*, 500 U.S. 344 (1991). As this Court explained, "Congress has granted the Commission the unusual explicit *power* to decide whether and to what extent its amendments reducing sentences will be given retroactive effect, 28 U.S.C. § 994(u). This power *has been implemented in USSG § 1B1.10*, which sets forth the amendments that justify sentence reduction." *Id.* at 348 (second emphasis added). Although § 1B1.10 has been amended

since *Braxton*, it was then – and is now – a “policy statement,” which is “applicable” under § 3582(c)(2).

3. *Amici* next make the (seemingly contradictory) argument that, *because* § 1B1.10 is a policy statement, it cannot be binding on district courts under § 3582(c)(2). *Amici* point out that § 994(a)(2)(C) expressly authorizes the Commission to issue policy statements regarding, among other issues, “the sentence modification provisions set forth in section[] . . . 3582(c) of title 18,” 28 U.S.C. § 994(a)(2)(C), and contend that, because certain other of the policy statements authorized by § 994(a)(2) are “non-binding,” § 1B1.10 should be regarded as non-binding by association. *Amici* Br. 27-29. That argument is similarly unpersuasive.

Although petitioner’s *Amici* are correct that § 994(a)(2) authorizes the Commission to issue policy statements regarding a number of other statutory provisions, § 3582(c)(2) is unique in expressly requiring a court to act “consistent with” those policy statements. The binding nature of § 1B1.10 thus comes not from § 994(a)(2), but from § 3582(c)(2) itself.

Amici seek to avoid § 3582(c)(2)’s consistency requirement by re-writing it. *Amici* suggest (at 12) that Congress must have contemplated that the policy statements referenced in § 3582(c)(2) would contain only general “guidance in the exercise of discretion,” rather than any specific binding directives. In *Amici*’s view, therefore, “consistent with” can be read to require merely that the court “consider” the Commission’s policy statements, as would be the case under 18 U.S.C. § 3553(a). But Congress expressly directed the Commission to “*specify* in what circumstances and *by what amount*” an otherwise final sen-

tence could be reduced. 28 U.S.C. § 994(u) (emphases added). That directive clearly instructed the Commission to supply concrete and binding limits on a district court's discretion to reduce a sentence. Moreover, had Congress intended the court only to "consider" the Commission's policy statements, it knew how to say so. Section 3582(c)(2) requires a court to "consider[] the factors set forth in section 3553(a) to the extent that they are applicable." 18 U.S.C. § 3582(c)(2). But Congress chose instead to make *consistency* with the Commission's policy statements a condition to the court's power to act regarding sentence reductions: a court may grant a reduction only "if such a reduction is consistent with applicable policy statements issued by the Sentencing Commission." *Id.*

B. *Amici's* Procedural Challenge To § 1B1.10 Has No Merit

Amici's final argument is that § 1B1.10 is invalid because the Commission failed to comply with the notice-and-comment provisions of the APA, 5 U.S.C. § 553. That argument fails for at least three reasons.

1. Because § 1B1.10 is a policy statement, rather than a Guideline, notice-and-comment procedures were not required when the statement was amended in 2007. The Commission's organic statute, 28 U.S.C. § 994(x), makes clear that "[t]he provisions of section 553 of title 5, relating to publication in the Federal Register and public hearing procedure," are applicable only "to the promulgation of guidelines pursuant to this section," not to the issuance of policy statements. By *Amici's* own argument, the Commission's amendments to § 1B1.10 are not "guidelines" and therefore are not subject to the notice-and-comment requirements of the APA.

2. Although in no way required, the Commission nevertheless sought and received public comment on changes to § 1B1.10 during its retroactivity deliberations. Consistent with its Rules of Practice and Procedure, the Commission twice requested public comment on possible changes to § 1B1.10 that would prevent motions seeking sentence reductions under the amended Guideline from unnecessarily burdening the courts and the probation system. The Commission received comment on possible changes from a variety of groups and individuals in the federal criminal justice system. As noted, the Committee on Criminal Law of the Judicial Conference of the United States recommended that the Commission give the crack cocaine amendment retroactive application and urged the Commission to “implement procedures to reduce the administrative burden on the federal judiciary.” Cassell Letter at 1. In particular, the Committee emphasized its view that “a defendant’s presence is *not* required for a reduction of sentence under 18 U.S.C. § 3582(c)” and that the reduction “could be a simple, clerical procedure.” *Id.* at 5.

Contrary views were expressed as well. For example, the Practitioners Advisory Group, one of the Commission’s standing advisory groups, stated that “motions under section 3582(c)(2) are uniquely committed to the discretion of the courts” and, as such, “it would be better to leave the courts with the greatest possible flexibility in applying section 1B1.10.”¹⁰ The Federal Public and Community Defenders also weighed in on the issue, recommending

¹⁰ Letter from David Debold and Todd Bussert, Co-Chairs, Practitioners Advisory Group, to Hon. Ricardo H. Hinojosa, Chair, USSC, at 4 (Oct. 31, 2007), *available at* http://www.ussc.gov/pubcom_Retro/PC200711_002.pdf.

only that the Commission “include in the commentary to § 1B1.10 a general recommendation that courts should at least reduce each eligible defendant’s offense level by two levels in accordance with the amendment and to the extent consistent with § 3582(c).”¹¹ In their view, any other changes that would “provide specific guidance to courts in applying the amendment – or to limit its applicability in any way – would intrude upon the district court’s statutory authority.”¹² Indeed, contrary to *Amici*’s argument, every interested party, including *Amici* themselves, had the opportunity to provide comment and in fact did so.

The Commission took all of those views into account in adopting the 2007 amendments to § 1B1.10. To the extent notice-and-comment procedures were required, the Commission satisfied any such obligation here.

3. More fundamentally, the 2007 revisions to § 1B1.10 did not require notice-and-comment procedures because they did not alter the substance of that provision. Rather, the 2007 amendments “clarified] when, and to what extent, a reduction in the defendant’s term of imprisonment is consistent with the policy statement and is therefore authorized under 18 U.S.C. § 3582(c)(2).” USSG App. C, amend. 712, Reason for Amendment (effective Mar. 3, 2008). In large measure, those changes consisted of moving existing language from the “commentary” section

¹¹ Letter from Jon M. Sands, Federal Public and Community Defenders, to Hon. Ricardo H. Hinojosa, Chair, USSC, at 10 (Oct. 31, 2007), *available at* http://www.ussc.gov/pubcom_Retro/PC200711_003.pdf.

¹² *Id.*

into the body of the policy statement itself for ease of reference.

A comparison of the amended version of § 1B1.10 with the prior version of the policy statement on a provision-by-provision basis demonstrates the Commission's intent to clarify the application of the policy statement. Each of the critical portions of the policy statement that affects the extent of the reduction available to an eligible defendant has a substantially equivalent predecessor in the previous version of § 1B1.10. In particular, the provision at issue here that limits the available reduction to the minimum of the amended Guideline range, § 1B1.10(b)(2)(A), effective March 3, 2008, provides:

Except as provided in subdivision (B), the court shall not reduce the defendant's term of imprisonment under 18 U.S.C. § 3582(c)(2) and this policy statement to a term that is less than the minimum of the amended guideline range determined under subdivision (1) of this subsection.

The 2007 version of § 1B1.10 contained the following statement in the commentary at Application Note 3:

Under subsection (b), the amended guideline range and the term of imprisonment already served by the defendant limit the extent to which an eligible defendant's sentence may be reduced under 18 U.S.C. § 3582(c)(2).

There is no substantive difference between the statement that the amended Guideline limits the permitted reduction and the statement that a court may not reduce a sentence below the amended Guideline range. Because the prior version of § 1B1.10 also would have prevented the district court from reducing petitioner's sentence below the amended Guide-

line range, *see United States v. Hasan*, 245 F.3d 682, 686 (8th Cir. 2001) (en banc) (interpreting prior version of § 1B1.10 to limit “the relief which can be given to a prisoner at a § 3582(c)(2) resentencing” to the amended Guideline range unless a departure had been granted at the original sentencing), *Amici’s* procedural challenge to the 2007 amendments fails.

II. THE LIMITED SCOPE OF § 3582(c)(2) PROCEEDINGS PERMITS THE COMMISSION TO MAKE INFORMED RETROACTIVITY DECISIONS

A. Given the extraordinary nature of the remedy and the impact it has on the finality of sentences, the Commission exercises its authority regarding retroactivity with great care. The Commission has articulated three primary factors it considers when assessing whether a particular amendment should be applied retroactively: “the purpose of the amendment, the magnitude of the change in the guideline range made by the amendment, and the difficulty of applying the amendment retroactively to determine an amended guideline range.” USSG § 1B1.10 cmt. background.

The last two factors take into account any burdens that might be imposed on the judicial system. As noted in the Senate report on the SRA, frequent grants of retroactivity to small changes in the Guidelines could present a burden to the judicial system.¹³ A difficult calculation not only can increase the burden on courts as to the decision required in each individual case, but also can lead to a large number of motions from ineligible defendants because of un-

¹³ *See* S. Rep. No. 98-225, at 180 (1983), *as reprinted in* 1984 U.S.C.C.A.N. 3182, 3363.

certainty as to which defendants are eligible to seek a reduction under § 3582(c)(2).

In exercising its authority under § 994(u), the Commission carefully considers such possible effects in conjunction with the purpose of the amendment. With regard to the crack cocaine amendment, the Commission estimated that almost 20,000 defendants would be eligible for retroactive application of the crack cocaine amendment. The Commission nonetheless decided that retroactive application was appropriate because (among other reasons) “the magnitude of the change in the guideline range, *i.e.*, two levels, is not difficult to apply in individual cases” and because “the Commission received persuasive written comment and testimony . . . that the administrative burdens of applying Amendment 706 retroactively are manageable.” USSG App. C, amend. 713, Reason for Amendment (effective Mar. 3, 2008). The Commission’s estimates of these impacts have proved remarkably accurate. As noted, the Commission projected that 19,500 offenders would be eligible for the reduction, and 15,501 sentence reductions have been granted thus far; the average reduction has been 25 months, compared to the 27 the Commission predicted. *See* 2010 Report, Tables 1, 8; Schmitt Memorandum at 4-5, 23. Moreover, the clarity of § 1B1.10’s limitations on eligibility for, and the extent of, any reduction assisted the courts in disposing of 6,763 motions by defendants who did not qualify for a sentence reduction. *See* 2010 Report, Table 9.

B. The Commission’s analysis of the effects of retroactivity was based on the Commission’s view that § 1B1.10 would continue to apply as written – *i.e.*, defendants would get the benefit of the new amendment, but no other aspects of their sentences

would be subject to review. In that respect, the Commission relied on the near-consensus of circuit precedent regarding § 3582(c)(2) proceedings, which has long held that sentence modifications under that statute are not a “do-over of an original sentencing proceeding.” *United States v. Legree*, 205 F.3d 724, 730 (4th Cir. 2000) (internal quotation marks omitted).¹⁴

In particular, the defendant has no right to a hearing and no right to be present in court for the sentence modification. *See id.*; *United States v. Edwards*, No. 97-60326, 1998 WL 546471, at *3 (5th Cir. Aug. 6, 1998) (judgment noted at 156 F.3d 182 (table)); *see also* Fed. R. Crim. P. 43(b)(4) (“A defendant need not be present [when] . . . [t]he proceeding involves the correction or reduction of sentence under Rule 35 or 18 U.S.C. § 3582(c).”).

Nor does the Sixth Amendment right to counsel extend to such proceedings. *See United States v. Townsend*, 98 F.3d 510, 512 (9th Cir. 1996) (per curiam); *see also Legree*, 205 F.3d at 730 (holding that due process did not require court to appoint counsel or hold a hearing to resolve § 3582(c)(2) motion); *United States v. Tidwell*, 178 F.3d 946, 949 (7th Cir. 1999) (“The judge can appoint counsel for a movant, but need not do so.”); *United States v. Whitebird*, 55 F.3d 1007, 1011 (5th Cir. 1995) (holding that 18 U.S.C. § 3006A(c) did not entitle a defendant to appointed counsel for purposes of filing a § 3582(c)(2)

¹⁴ *See also, e.g., United States v. Bravo*, 203 F.3d 778, 781 (11th Cir. 2000) (“[A] sentencing adjustment undertaken pursuant to Section 3582(c)(2) does not constitute a de novo resentencing.”); *United States v. Jordan*, 162 F.3d 1, 4 (1st Cir. 1998) (“To the extent that [the defendant] is arguing that . . . there is fully *de novo* resentencing under § 3582(c)(2), that is surely wrong.”).

motion); *United States v. Reddick*, 53 F.3d 462, 464 (2d Cir. 1995) (same).

C. These (and similar) considerations make § 3582(c)(2) proceedings quite different from plenary sentencing proceedings. The flexibility attendant to such § 3582(c)(2) proceedings significantly reduces the systemic burdens the Commission must weigh in considering whether to make an amendment retroactive. The narrowly limited scope of § 3582(c)(2) proceedings also enables the Commission to evaluate more accurately the effects of deciding to make an amendment retroactive.

The dramatic expansion and alteration in the scope of § 3582(c)(2) proceedings sought by petitioner would shift that balance in important ways. Accurate assessments about the effects of retroactivity decisions would be very difficult, if not impossible, for the Commission to make. And increased uncertainty as to the likely effects of making an amendment retroactive would weigh against making Guideline amendments retroactive in the future. Thus, as respondent correctly points out, the consequence of the regime that petitioner seeks “would be to diminish Section 3582(c)(2)’s value as a mechanism for granting leniency to defendants who, like petitioner, would seek the benefit of the Sentencing Commission’s decision to lower Guidelines ranges.” Resp. Br. 37.

For the foregoing reasons, and for those stated in the Brief for the United States, the Court should hold that a district court’s exercise of discretion to reduce an otherwise final sentence must be consistent with 18 U.S.C. § 3582(c)(2) and therefore with § 1B1.10 of the Guidelines Manual.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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