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SUMMARY

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On February 25, 2022, President Joe Biden announced his nomination of Judge Ketanji Brown Jackson to serve as Associate Justice of the Supreme Court of the United States. If confirmed, Judge Jackson would fill the vacancy expected with the retirement of Associate Justice Stephen G. Breyer in summer 2022, at the end of the Supreme Court's term. Judge Jackson would be the first Black woman to serve on the Supreme Court.

Judge Jackson has been a judge on the U.S. Court of Appeals for the District of Columbia Circuit since 2021, having also been nominated to that court by President Biden and confirmed by the Senate. Before that, she was a judge on the U.S. District Court for the District of Columbia, appointed by President Barack Obama in 2013. The nominee earned her law degree from Harvard Law School, and clerked for three federal judges, including Justice Breyer. In addition to her judicial experience, Judge Jackson has spent time in private practice at several law firms, served on the U.S. Sentencing Commission, and worked as a federal public defender—an experience that no current or former Justice has had.

It is difficult to predict with certainty how a prospective Supreme Court Justice might vote in cases that come before the Court, and history shows that the votes of a Justice do not always match public expectations for a nominee. Predictions may be even more difficult when, as with Judge Jackson, a nominee's experience as a judge has been gained mainly on a trial court rather than an appellate court. The role of a trial court judge is substantially different from the role of an appellate judge in ways that may make the judge's underlying judicial philosophy less apparent.

Despite this difficulty, Judge Jackson has written many decisions during her tenure on the federal bench, and those decisions may provide insight into her approach to resolving legal questions. After providing some context for Judge Jackson's nomination, this report offers an overview of her jurisprudence. It reviews broad areas of judicial philosophy that may apply in many cases, such as constitutional interpretation, statutory interpretation, and stare decisis. It then discusses the nominee's decisions in particular areas of law that appear most often in her decisions as a judge, or that are of particular interest to Congress.

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Introduction

On February 25, 2022, President Joe Biden announced his nomination of Judge Ketanji Brown Jackson to serve as Associate Justice of the Supreme Court of the United States.[1] Since June 2021, Judge Jackson has served as a judge on the U.S. Court of Appeals for the District of Columbia Circuit (D.C. Circuit);[2] prior to that, she was a trial judge on the U.S. District Court for the District of Columbia (District of D.C.) for more than eight years.[3] If confirmed, Judge Jackson would be the first Black woman, the third Black person overall, and the sixth woman overall, to serve on the Supreme Court.[4]

Judge Jackson would succeed Associate Justice Stephen G. Breyer, for whom she previously served as a law clerk.[5] In remarks upon her nomination, Judge Jackson praised Justice Breyer as exemplary for his "civility, grace, pragmatism, and generosity of spirit," and President Biden suggested that his nominee for Justice Breyer's seat would share those qualities.[6] Some commentators have speculated that Judge Jackson would vote similarly to Justice Breyer in deciding cases, and would often find herself in the minority on a court with six Justices appointed by Republican Presidents.[7]

As some past Justices have demonstrated, however, it can be difficult to predict how an individual Justice will decide particular cases after joining the Court. Differences in legal philosophy can lead judges to different conclusions, even when those judges have been appointed by Presidents of the same party (or even the same President). For example, the rise of textualism as a predominant mode of legal reasoning in recent decades may point to a difference between Judge Jackson's jurisprudence and that of Justice Breyer, whose legal philosophy developed in a period where other modes of legal thought held greater sway among judges and legal academics.[8]

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[1] *See* PN1783, Ketanji Brown Jackson – Supreme Court of the United States, 117th Cong. (received Feb. 28, 2022); Press Release, Remarks by President Biden on His Nomination of Judge Ketanji Brown Jackson to Serve as Associate Justice of the U.S. Supreme Court (Feb. 25, 2022), https://www.whitehouse.gov/briefing-room/speeches-remarks/2022/02/25/remarks-by-president-biden-on-his-nomination-of-judge-ketanji-brown-jackson-to-serve-as-associate-justice-of-the-u-s-supreme-court/ [hereinafter *White House Remarks*]. *See generally* CRS Legal Sidebar LSB10701, *The Supreme Court Nomination of Judge Ketanji Brown Jackson: Initial Observations*, coordinated by Valerie C. Brannon; CRS Legal Sidebar LSB10702, *Judge Ketanji Brown Jackson: Selected Primary Material*, by Juria L. Jones and Laura Deal.

[2] 167 CONG. REC. S4511 (daily ed. June 14, 2021) (confirmation of Judge Jackson to the D.C. Circuit). References in this report to a particular "Circuit" refer to the U.S. Court of Appeals for that particular circuit.

[3] 159 CONG. REC. S2436 (daily ed. Mar. 22, 2013) (confirmation of Judge Jackson to the U.S. District Court).

[4] Nora McGreevy, *What to Know About Judge Ketanji Brown Jackson's Historic Nomination to the Supreme Court*, SMITHSONIAN (Mar. 1, 2022), https://www.smithsonianmag.com/smart-news/judge-ketanji-brown-jackson-could-make-history-as-the-first-black-woman-supreme-court-justice-180979644/.

[5] *White House Remarks*, *supra* note 1. On January 27, 2022, Justice Breyer informed President Biden that he intended to retire from active service when the Supreme Court rises for summer recess in 2022, "assuming that by then [his] successor has been nominated and confirmed." Press Release, Justice Breyer Retirement Announcement (Jan. 27, 2022). For information and analysis about Justice Breyer's jurisprudence upon his announcement, see CRS Legal Sidebar LSB10691, *Justice Breyer Retires: Initial Considerations*, by Valerie C. Brannon et al.

[6] *White House Remarks*, *supra* note 1.

[7] *See, e.g.*, Robert Barnes, *Jackson's Nomination is Historic, but Her Impact On Supreme Court in Short Term Likely Will Be Minimal*, WASH. POST (Feb. 25, 2022), https://www.washingtonpost.com/politics/2022/02/25/ketanji-jackson-impact-on-supreme-court/; Adam Liptak, *A Groundbreaking Nomination Who's Unlikely to Reshape the Supreme Court*, N.Y. TIMES (Feb. 25, 2022), https://www.nytimes.com/2022/02/25/us/politics/supreme-court-jackson-future.html.

[8] *See* Diarmuid F. O'Scannlain, *"We Are All Textualists Now": The Legacy of Justice Antonin Scalia*, 92 ST. JOHN'S L. REV. 303, 304 (2017) (noting Associate Justice Elena Kagan's comment that "we're all textualists now"); *see also* CRS

This report provides an overview of Judge Jackson's legal philosophy, as gleaned from her decisions on the district court and the court of appeals and her other writings and public statements. After providing biographical information about Judge Jackson,[9] the report offers context for understanding how a judge's background might inform analysis or predictions about her potential contributions to the Supreme Court.[10] In particular, it discusses how Judge Jackson's record as a district court judge might compare to the experience that prior nominees had on the courts of appeals.[11] The report then reviews decisions by Judge Jackson that may provide insight into broad areas of judicial philosophy, such as constitutional interpretation, statutory interpretation, and stare decisis.[12] Finally, the report explores selected legal topics that appear in Judge Jackson's decisions and that may be of particular interest to Congress as it considers her nomination.[13]

This report focuses primarily on the substance of Judge Jackson's judicial decisions. Although the report also refers to some materials that Judge Jackson wrote prior to joining the bench, it does not provide a full review of those materials, particularly materials she prepared while representing clients. That is because when an attorney acts as an advocate for a party in litigation, her arguments on behalf of that party may provide limited insight into her own views and preferences.[14]

Biographical Information

Judge Jackson's academic credentials and professional experience are, in many ways, similar to those of other Justices who have joined the Supreme Court in recent years.[15] An academic

Legal Sidebar LSB10676, *The Modes of Constitutional Analysis: Textualism (Part 2)*, by Brandon J. Murrill;CRS Report R45153, *Statutory Interpretation: Theories, Tools, and Trends*, by Valerie C. Brannon; *see* "Statutory Interpretation" *infra*.

[9] *See* "Biographical Information" *infra*.

[10] *See* "Making Predictions About Nominees" *infra*.

[11] *See* "Evaluating the Work of a U.S. District Judge" *infra*.

[12] *See* "Judge Jackson's Judicial Philosophy" *infra*.

[13] *See* "Selected Topics" *infra*.

[14] During his 2005 confirmation hearing, Chief Justice John Roberts testified that the principle "that you don't identify the lawyer with the particular views of the client, or the views that the lawyer advances on behalf of the client, is critical to the fair administration of justice." *Confirmation Hearing on the Nomination of John G. Roberts, Jr., to be Chief Justice of the United States Before the S. Comm. on the Judiciary*, 109th Cong. 254 (2005). Other Justices have made similar statements. *See Confirmation Hearing on the Nomination of Hon. Sonia Sotomayor, to be an Associate Justice of the Supreme Court of the United States Before the S. Comm. on the Judiciary*, 111th Cong. 143 (2009); *The Nomination of Elena Kagan to be an Associate Justice of the Supreme Court of the United States Before the S. Comm. on the Judiciary*, 111th Con. 170 (2010); *Confirmation Hearing on the Nomination of Hon. Neil M. Gorsuch, to be an Associate Justice of the Supreme Court of the United States Before the S. Comm. on the Judiciary*, 115th Cong. 179 (2017). For an alternate perspective, see William G. Ross, *The Questioning of Lower Federal Court Nominees During the Senate Confirmation Process*, 10 WM. & MARY BILL RTS. J. 119, 161 (2001) (acknowledging that "most lawyers advocate positions about which they hold indifferent or conflicting opinions," but suggesting that a "nominee who consistently has acted as an advocate for particular positions or causes is likely to have personal sympathy for such positions or causes").

[15] *See, e.g.*, CRS Report R46562, *Judge Amy Coney Barrett: Her Jurisprudence and Potential Impact on the Supreme Court*, coordinated by Valerie C. Brannon, Michael John Garcia, and Caitlain Devereaux Lewis; CRS Report R45293, *Judge Brett M. Kavanaugh: His Jurisprudence and Potential Impact on the Supreme Court*, coordinated by Andrew Nolan; CRS Report R44778, *Judge Neil M. Gorsuch: His Jurisprudence and Potential Impact on the Supreme Court*, coordinated by Andrew Nolan.

standout, she moved between public service and the private sector before gaining judicial experience in the federal courts.

Judge Jackson was born in Washington, D.C., in 1970 and then lived in Miami, Florida.[16] She received her undergraduate degree *magna cum laude* from Harvard University in 1992. After a year working as a journalist for *Time*, she entered Harvard Law School, where she served as a supervising editor of the *Harvard Law Review*. She earned her law degree *cum laude* in 1996. Judge Jackson clerked for three federal judges appointed by Presidents of both parties: Judge Patti B. Saris of the U.S. District Court for the District of Massachusetts; Judge Bruce M. Selya of the First Circuit; and Justice Breyer of the Supreme Court.[17]

Before and after her Supreme Court clerkship, Judge Jackson was an associate attorney at several private law firms in Boston and Washington, D.C.[18] From 2003 to 2005, she was an Assistant Special Counsel for the U.S. Sentencing Commission, an independent agency in the judicial branch that Congress created in 1984 to address federal sentencing disparities.[19] In 2005, she joined the Office of the Federal Public Defender in the District of Columbia, representing indigent criminal defendants in appeals before the D.C. Circuit. Judge Jackson spent an additional three years as counsel at the Washington, D.C. law firm of Morrison & Foerster LLP, with a practice focusing on appellate litigation, and then returned to the Sentencing Commission as a Commissioner and Vice Chair from 2010 to 2014.[20]

One aspect of Judge Jackson's background that differs from most current Justices is her experience in criminal defense.[21] If confirmed to the Supreme Court, Judge Jackson would be the first Justice to have served as a federal public defender.[22] She would also be the second Justice (after Justice Breyer) to have served on the Sentencing Commission.[23]

Judge Jackson was first nominated by President Barack Obama to the District of D.C. in 2012. The Senate returned her nomination to the President because it failed to take action on the

[16] In addition to sources cited in the footnotes, biographical information in this section is drawn from the following sources: *Ketanji Brown Jackson*, U.S. COURT OF APPEALS FOR THE D.C. CIR., https://www.cadc.uscourts.gov/internet/home.nsf/Content/VL+-+Judges+-+KBJ (last visited Mar. 3, 2022); S. COMM. JUDICIARY, 117th Cong., QUESTIONNAIRE FOR NOMINEE TO THE SUPREME COURT, https://www.judiciary.senate.gov/jackson-sjq-scotus (last visited Mar. 3, 2022) [hereinafter *Senate Judiciary Questionnaire*].

[17] Judge Saris was appointed to the U.S. District Court by President Bill Clinton. *See Judge Patti B. Saris*, U.S. DIST. CT. FOR THE DIST. OF MASS., https://www.mad.uscourts.gov/boston/saris.htm (last visited Mar. 3, 2022). Judge Selya was appointed to both the U.S. District Court and the First Circuit by President Ronald Reagan. *See Bruce M. Selya*, U.S. COURT OF APPEALS FOR THE FIRST CIR., https://www.ca1.uscourts.gov/bruce-m-selya (last visited Mar. 3, 2022). Justice Breyer was appointed to the First Circuit by President Jimmy Carter, and then to the Supreme Court by President Clinton. *See Breyer, Stephen Gerald*, FED. JUDICIAL CTR., https://www.fjc.gov/history/judges/breyer-stephen-gerald (last visited Mar. 3, 2022).

[18] *See Senate Judiciary Questionnaire*, *supra* note 16, at 2–3.

[19] *About*, U.S. SENTENCING COMM'N, https://www.ussc.gov/about-page (last visited Mar. 3, 2022); *see also* CRS Report R41696, *How the Federal Sentencing Guidelines Work: An Overview*, by Charles Doyle.

[20] *See Senate Judiciary Questionnaire*, *supra* note 16, at 1–4.

[21] Associate Justice Samuel Alito and Associate Justice Sonia Sotomayor served as federal or state prosecutors prior to joining the bench; Justice Breyer was formerly a Watergate Assistant Special Prosecutor. *See Current Members*, SUPREME COURT OF THE U.S., https://www.supremecourt.gov/about/biographies.aspx (last visited Mar. 3, 2022).

[22] *See* Press Release, President Biden Nominates Judge Ketanji Brown Jackson to Serve as Associate Justice of the U.S. Supreme Court (Feb. 25, 2022), https://www.whitehouse.gov/briefing-room/statements-releases/2022/02/25/president-biden-nominates-judge-ketanji-brown-jackson-to-serve-as-associate-justice-of-the-u-s-supreme-court/.

[23] *Former Commissioner Information*, U.S. SENTENCING COMM'N, https://www.ussc.gov/about/who-we-are/commisioners/former-commissioner-information (last visited Mar. 3, 2022).

nomination before the 112th Congress adjourned.[24] President Obama renominated her to the bench in 2013, and the Senate confirmed her by voice vote.[25]

During her time on the bench, Judge Jackson has held teaching affiliations with Harvard Law School and George Washington University Law School. She has served on the Executive Committee and Board of Overseers of Harvard University, the Council of the American Law Institute, and other professional organizations related to criminal justice, administrative law, and the Supreme Court.[26]

After serving on the district court bench for more than eight years, Judge Jackson was nominated to the D.C. Circuit by President Biden in 2021. The Senate confirmed her on June 14, 2021, by a vote of 53-44.[27]

Making Predictions About Nominees

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

First, a Supreme Court nominee's background and past statements may not be a reliable guide to how the nominee will approach future cases. The Supreme Court often confronts novel or unusual legal questions that may differ substantially from those a nominee has previously considered, meaning the nominee may have no prior statements on some subjects.[28] In addition, history provides multiple examples of Supreme Court Justices whose decisions on the Court surprised observers familiar with their pre-confirmation reputations.[29] For example, Associate Justice Felix Frankfurter, who had a reputation as a "progressive" legal scholar prior to his appointment to the Court in 1939,[30] disappointed some early supporters by subsequently becoming a voice for judicial restraint and caution when the Court reviewed laws that restricted civil liberties during World War II and the early Cold War era.[31] Associate Justice Harry Blackmun served on the

[24] 159 CONG. REG. S24 (Jan. 3, 2013).

[25] 159 CONG. REC. S2436 (daily ed. Mar. 22, 2013).

[26] *See Senate Judiciary Questionnaire*, *supra* note 16, at 4–6.

[27] 167 CONG. REC. S4511 (daily ed. June 14, 2021).

[28] *See* "Evaluating the Work of a U.S. District Judge" *infra*.

[29] Christine Kexel Chabot & Benjamin Remy Chabot, *Mavericks, Moderates, or Drifters? Supreme Court Voting Alignments, 1838–2009*, 76 MO. L. REV. 999, 1021 (listing Justices William J. Brennan Jr., Tom C. Clark, Felix Frankfurter, Oliver Wendell Holmes Jr., John McLean, James Clark McReynolds, Stanley Forman Reed, David Souter, John Paul Stevens, Earl Warren, and James Moore Wayne as examples of jurists who "disappointed" the expectations of the President who appointed them to the Court); *see also The Judicial Nomination and Confirmation Process: Hearings Before the Subcomm. on Admin. Oversight & the Courts, S. Comm. on the Judiciary*, 107th Cong. 195 (2001) (statement of Douglas W. Kmiec, Dean & St. Thomas More Professor of Law, The Catholic University of America) (similar).

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

[31] *See* Rauh, *supra* note 30, at 220 ("But . . . a deep belief in judicial restraint in all matters overtook even [Justice Frankfurter's] lifelong dedication to civil liberties."); *see, e.g.*, Korematsu v. United States, 323 U.S. 214, 225 (1944)

Eighth Circuit for a decade prior to his appointment to the Court in 1970 and was considered a "strict constructionist" by President Richard Nixon.[32] In 1973, however, he authored the majority opinion in *Roe v. Wade*,[33] and at the time of his retirement he was generally considered one of the more liberal voices on the Court.[34] Associate Justice Anthony Kennedy, appointed by President Ronald Reagan, was often characterized as the Court's "swing vote" in his later years on the bench,[35] frequently aligning with the more conservative wing of the Court, but sometimes joining the more liberal wing in closely divided cases.[36]

Even a Justice with a significant judicial record and a well-defined judicial philosophy may employ that philosophy to reach results that do not align with the Justice's perceived political alignment. One of President Donald Trump's nominees to the Supreme Court, Associate Justice Neil Gorsuch, served on the Tenth Circuit for just over a decade prior to his nomination.[37] In 2020, commentators expressed surprise when Justice Gorsuch—"widely considered one of the more conservative justices on the Supreme Court"—wrote the majority opinion in *Bostock v. Clayton County*, which held that a federal law prohibiting employment discrimination on the basis of sex also protected gay and transgender employees.[38] Some scholars, however, saw Justice Gorsuch's opinion as driven by a textualist approach to statutory interpretation and were not surprised by the outcome in the case.[39]

Second, even if it were possible to predict how an individual Supreme Court Justice would vote in future matters, each Justice decides cases as part of a multi-member panel where her single vote generally does not determine how any given matter will be decided. A single Justice's impact on the Court thus depends in part on the Court's composition as a whole and her relationships with the other Justices. As Associate Justice Byron White once noted, "every time a new justice comes to the Supreme Court, it's a different court."[40] If confirmed, Judge Jackson would join a court that has already undergone significant recent changes: Justice Breyer's retirement will

(Frankfurter, J., concurring) (contending that the validity of the Japanese-American civilian exclusion order was the "business" of Congress and the Executive, not the Court); W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 646 (1943) (Frankfurter, J., dissenting) (arguing for the constitutionality of a World War II-era law requiring students to salute the flag); Dennis v. United States, 341 U.S. 494, 556 (1951) (Frankfurter, J., concurring) (upholding the conviction of three defendants under the Smith Act for conspiracy to organize the Communist Party as a group advocating the overthrow of the U.S. government by force).

[32] *See* BOB WOODWARD & SCOTT ARMSTRONG, THE BRETHREN: INSIDE THE SUPREME COURT 97 (1979).

[33] 410 U.S. 113 (1973).

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

[35] *See generally* CRS Report R45256, *Justice Anthony Kennedy: His Jurisprudence and the Future of the Court*, by Andrew Nolan, Kevin M. Lewis, and Valerie C. Brannon.

[36] *See, e.g.*, Roper v. Simmons, 543 U.S. 551 (2005); United States v. Windsor, 570 U.S. 744 (2013); Obergefell v. Hodges, 576 U.S. 644 (2015).

[37] *See* CRS Report R44778, *Judge Neil M. Gorsuch: His Jurisprudence and Potential Impact on the Supreme Court*.

[38] 140 S. Ct. 1731, 1737 (2020); CRS Legal Sidebar LSB10496, *Supreme Court Rules Title VII Bars Discrimination Against Gay and Transgender Employees: Potential Implications*, by Jared P. Cole; *See* Harper Neidig & John Kruzel, *Gorsuch Draws Surprise, Anger With LGBT Decision*, THE HILL (June 15, 2020), https://thehill.com/regulation/court-battles/502834-gorsuch-draws-surprise-anger-with-lgbt-decision; Robert Barnes, *Neil Gorsuch? The Surprise Behind the Supreme Court's Surprising LGBTQ Decision*, WASH. POST (June 16, 2020), https://www.washingtonpost.com/politics/courts_law/neil-gorsuch-gay-transgender-rights-supreme-court/2020/06/16/112f903c-afe3-11ea-8f56-63f38c990077_story.html.

[39] Ezra Ishmael Young, *Bostock is a Textualist Triumph*, JURIST (June 25, 2020, 3:53 PM), https://www.jurist.org/commentary/2020/06/ezra-young-bostock-textualist-triumph.

[40] David B. Rivkin Jr. & Andrew M. Grossman, *A Cautiously Conservative Supreme Court*, WALL ST. J. (July 1, 2021).

create the fourth vacancy on the High Court in the past five years.[41] Thus, even before Justice Breyer's retirement, Court observers were engaged in analysis and debate over whether and how the Court as a whole has changed its approach to certain legal issues in recent years.[42]

Some commentators have suggested that joining a Supreme Court where three of nine Justices were appointed by Democratic presidents could limit Judge Jackson's influence on the Court in the short term.[43] One such commentator speculated that if Judge Jackson is confirmed, "[t]here will still be only three liberals on the court, specializing in writing dissents."[44] History paints a more nuanced picture, however. The previous vacancy on the High Court, caused by the death of Associate Justice Ruth Bader Ginsburg in September 2020, resulted in the confirmation of Associate Justice Amy Coney Barrett to fill the seat.[45] At the time, some predicted that if Justice Barrett was confirmed, the Court would routinely decide cases by 6-3 votes, with the three Justices nominated by Democratic presidents in dissent.[46] Although the Court did reach some 6-3 decisions along perceived partisan lines during Justice Barrett's first term,[47] the most common outcome was for the Justices to reach a decision unanimously; less than a quarter of cases were divided 6-3 or 5-3.[48] This is largely consistent with past trends. One Court observer reports that since 2010, 46% of the Court's decisions have been unanimous,[49] and since Chief Justice John Roberts joined the Court in 2005, the Court has decided 20% of its cases 5-4.[50] Even when the Court issues closely divided opinions, the divides may not track the Justices' perceived partisan alignment.[51]

Moreover, a Justice who frequently finds herself in the minority may nonetheless influence the Court in various ways.[52] In the short term, she may work with colleagues to reach compromise

[41] *See Justices 1789 to Present*, SUPREME CT. OF THE U.S., https://www.supremecourt.gov/about/members_text.aspx (last visited Mar. 8, 2022).

[42] *See, e.g.*, Aziz Huq, *The Roberts Court is Dying. Here's What Comes Next.*, POLITICO (Sept. 15, 2021); Moira Donegan, *The US Supreme Court is Deciding More and More Cases in a Secretive 'Shadow Docket'*, THE GUARDIAN (Aug. 31, 2021); Erwin Chemerinsky, *Precedent Seems to Matter Little in the Roberts Court*, ABA J. (June 3, 2021); Jonathan Skrmetti, *The Triumph of Textualism: "Only the Written Word Is the Law"*, SCOTUSBLOG (June 15, 2020), https://www.scotusblog.com/2020/06/symposium-the-triumph-of-textualism-only-the-written-word-is-the-law.

[43] *See, e.g.*, *Biden Is Expected to Nominate Ketanji Brown Jackson to the Supreme Court*, NPR (Feb. 25, 2022) (describing Judge Jackson's effect on the Court's composition as "[n]ot much in terms of the overall ideological balance [because t]here will still be a 6-3 super majority for conservatives because she's replacing Justice Breyer, a fellow liberal who's retiring").

[44] Barnes, *supra* note 7.

[45] *See Barrett, Amy Coney*, FED. JUD. CTR., https://www.fjc.gov/history/judges/barrett-amy-coney (last visited Mar. 8, 2022).

[46] *E.g.*, Linda Greenhouse, *The Supreme Court Is Now 6-3. What Does That Mean?*, N.Y. TIMES (Nov. 5, 2020).

[47] *See, e.g.*, Brnovich v. Democratic Nat' Comm., 141 S. Ct. 2321 (2021); Jones v. Mississippi, 141 S. Ct. 1307 (2021). *See generally*, *Stat Pack for the Supreme Court's 2020–21 Term*, SCOTUSblog (July 2, 2021), https://www.scotusblog.com/wp-content/uploads/2021/07/Final-Stat-Pack-7.6.21.pdf [hereinafter *Stat Pack*].

[48] Kalvis Golde, *In Barrett's First Term, Conservative Majority is Dominant but Divided*, SCOTUSBLOG (July 2, 2021), https://www.scotusblog.com/2021/07/in-barretts-first-term-conservative-majority-is-dominant-but-divided/.

[49] *Stat Pack*, *supra* note 47.

[50] Golde, *supra* note 48.

[51] *See, e.g.*, Home Depot U.S.A., Inc. v. Jackson, 139 S. Ct. 1743, 1747–51 (2019) (majority opinion of Thomas, J., joined by Ginsburg, Breyer, Sotomayor, and Kagan, JJ.) (holding that a third-party counterclaim defendant may not remove a case to federal court under either the general removal statute or the Class Action Fairness Act); Mont v. United States, 139 S. Ct. 1826 (2019) (majority opinion of Thomas, J., joined by Roberts, C.J,. and Ginsburg, Alito, and Kavanaugh, JJ.) (holding that a period of supervised release may be tolled if the defendant is charged with another crime and placed in pretrial detention).

[52] *See, e.g.*, Ruth Marcus, *I've Covered the Supreme Court for Years. Here's What to Know about Jackson's*

decisions that garner support from a broader group of Justices. Justice Breyer, Judge Jackson's mentor and possible predecessor on the Court, spent his entire career on the Court on panels where Democratic appointees were in the minority, but he authored opinions or cast deciding votes in a number of high-profile cases.[53] In the long term, even if Justice is often in the minority, that Justice may shape the development of the law by authoring separate opinions.[54] Concurrences or dissents in cases involving statutory interpretation may encourage Congress to enact legislative reforms.[55] Separate opinions may also persuade courts to adopt the author's preferred approach in future cases.[56]

Evaluating the Work of a U.S. District Judge

Judge Jackson's experience on the federal bench is somewhat different from that of most recent Supreme Court nominees. Like eight Justices on the current Court, Judge Jackson has been nominated to the Supreme Court while serving on one of the federal courts of appeals.[57] Several of the current Justices had long track records on a court of appeals that could be evaluated at the time of their nomination to the Supreme Court, while others (similar to Judge Jackson) had a relatively short appellate-court tenure before their nomination.[58] Among the current Justices, however, only Associate Justice Sonia Sotomayor shares Judge Jackson's experience as a U.S. District Judge.[59] Understanding the work of a district court judge—particularly in the District of D.C.—and how that work differs from the work of an appellate judge is important to evaluating Judge Jackson's judicial experience.

The Role of a U.S. District Judge

The district courts "have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States," with limited exceptions.[60] Accordingly, federal civil cases typically begin with the filing of a complaint in the court of a relevant district.[61] Federal criminal

Nomination, WASH. POST (Feb. 28, 2022), https://www.washingtonpost.com/opinions/2022/02/28/ruth-marcus-ketanji-brown-jackson-supreme-court/; *13 Legal Experts on How Breyer's Replacement Will Change the Court*, POLITICO (Jan. 27, 2022) https://www.politico.com/news/magazine/2022/01/27/breyer-supreme-court-nominee-successor-00000019 (last accessed Mar. 8, 2022).

[53] Brent Kendall, Jess Bravin, & Laura Kusisto, *Justice Breyer's Retirement Could Reshape Supreme Court's Liberal Wing*, WALL ST. J. (Jan. 27, 2022), https://www.wsj.com/articles/justice-breyers-retirement-could-reshape-supreme-courts-liberal-wing-11643298816.

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

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

[56] Gass & Robertson, *supra* note 54.

[57] *See Current Members*, SUPREME COURT OF THE U.S., https://www.supremecourt.gov/about/biographies.aspx (last visited Mar. 3, 2022). Only Justice Kagan, who was the Solicitor General of the United States at the time of her nomination, had no experience as an appellate judge.

[58] *Id.* For example, Justice Alito served on the Third Circuit from 1990 to 2006 before his nomination to the Supreme Court, while Associate Justice Clarence Thomas served on the D.C. Circuit from 1990 to 1991. *Id.*

[59] *Id.*

[60] 28 U.S.C. § 1331; *but see id.* § 1251.

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

cases likewise generally begin in the district court with jurisdiction over the place of arrest.[62] District courts, therefore, are the first to analyze most issues that may ultimately be reviewed by courts of appeals or the Supreme Court.

The role of a district court judge differs substantially from the role of a judge on a federal court of appeals. In contrast to appeals courts, which typically consider written arguments and may have limited contact with the parties and their attorneys, district courts "manage the daily rough and tumble of litigation."[63] The district courts act as finders of fact—that is, they take testimony, establish a record of evidence, and resolve disputed factual issues when it is necessary to decide a case—while the courts of appeals generally do not.[64] In some cases, a district court judge will take testimony in a bench trial and resolve disputed factual issues herself, while in other cases, the judge will empanel and instruct a jury.[65] The district court's fact-finding role drives a significant amount of litigation activity that is unique to trial practice, including document discovery and deposition discovery, which the judge oversees.[66] Many judges have standing orders, unique to their courtrooms, to help them manage this process.[67] Separate case management orders are often used in complex cases with many parties and claims, and judges have wide discretion to tailor such orders to the case before them.[68]

In some ways, this role vests the district court judge with more independence than an appellate judge. The courts of appeals generally recognize that it is not their role to "second-guess[] conscientious district court judges," each of whom "must strive to manage his or her calendar efficiently."[69] On a wide range of matters, including many procedural and case management questions, and even findings of fact, the courts of appeals focus not on how they might have resolved an issue in the first instance, but only on whether the district court abused its own discretion.[70] The district court judge also often sits alone; she has no need to tailor her opinions to win the support of a colleague.

There are other ways, however, in which a trial court judge is more constrained than an appellate judge. District court judges are solely responsible for a high volume of cases, many of which may be legally straightforward or frivolous.[71] A typical district court case also often results in more rulings and orders than a typical appeal, including rulings on motions to dismiss, discovery

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

[63] Simonoff v. Saghafi, 786 F. App'x 582, 584 (6th Cir. 2019).

[64] *Compare, e.g.*, FED. R. CIV. P. 39 (providing for jury trial or bench trial of issues of fact), *with* FED. R. APP. P. 10 (providing for court of appeals review based on the record).

[65] *See* FED. R. CIV. P. 38, 39.

[66] *See, e.g.*, FED. R. CIV. P. 37 (authorizing the district court to sanction parties for violations of the discovery rules).

[67] *See* Kimberly A. Jolson, *The Power of Suggestion: Can a Judicial Standing Order Disrupt a Norm?*, 89 U. CINN. L. REV. 455, 459 (2021).

[68] *See, e.g.*, Hamer v. LivaNova Deutschland GmbH, 994 F.3d 173, 178 (3d Cir. 2021).

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

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

[71] In the federal district courts as a whole, 517 cases per active judge were terminated in 2021, and 1,115 cases per active judge remained pending at the end of the year. In the District of D.C., 276 cases per active judge were terminated in 2021, and 386 cases per active judge remained pending at the end of the year. *Statistics & Reports: United States District Courts—National Judicial Caseload Profile*, U.S. CTS., https://www.uscourts.gov/sites/default/files/data_tables/fcms_na_distprofile1231.2021.pdf.

matters, summary judgment, and pretrial issues.[72] Some issues—for example, the admission of a piece of evidence or a particular jury instruction—may arise as one of many decisions to be made quickly during a trial; the importance of any particular decision may not be immediately evident.

In some cases, district court judges consider purely legal questions on written submissions, take time to consider their rulings, and issue detailed opinions deciding or dismissing cases on legal grounds. Those decisions, however, are subject to the binding precedent of both the Supreme Court and the relevant court of appeals, and therefore may not reflect the district court judge's own view of the law.[73] Judge Jackson herself has noted that, unlike a Supreme Court Justice, a district court judge is not called upon to articulate "broader legal principles to guide the lower courts," and therefore is less likely to "develop substantive judicial philosophies to guide [herself] in this task."[74]

District court decisions are also reviewed more frequently than appellate decisions,[75] which may encourage a district court judge facing a new legal issue to be more cautious or attempt to predict how an appeals court would decide the question. Indeed, some observers have discussed the rate at which Judge Jackson's decisions have been reversed by the D.C. Circuit, although others, including Judge Jackson herself,[76] believe that reversal rates are not a very meaningful way to analyze a judge's record.[77] This report does not attempt to identify a quantitative method of

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

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

[74] S. COMM. JUDICIARY, 117th Cong., COMMITTEE QUESTIONNAIRE ATTACHMENTS at 499 (responses to questions by Senator Ted Cruz), https://www.judiciary.senate.gov/imo/media/doc/Jackson%20SJQ%20Attachments%20Final.pdf (last visited Mar. 9, 2022) [hereinafter *Senate Judiciary Attachments*]. The *Senate Judiciary Attachments* are a collection of documents that Judge Jackson appended to her Committee questionnaire, including a wide variety of materials, some of which were previously submitted to the Committee or are also available from other sources. Notably for purposes of this report, it also includes Judge Jackson's responses to written questions posed by Members of the Senate Judiciary Committee during the confirmation process for Judge Jackson's prior judicial nominations; citations herein to the *Senate Judiciary Attachments* identify those responses.

[75] A final district court decision, and some interlocutory decisions, may be appealed to the court of appeals, which must consider the appeal if certain requirements are met. *See* FED. R. APP. P. 3 (appeals as of right). In contrast, review beyond the initial appellate panel is discretionary and rare. A panel decision in the court of appeals may be reheard by the full court sitting en banc. *See* FED. R. APP. P. 35 (en banc determinations); *Statistics & Reports: Table B-10*, U.S. CTS., https://www.uscourts.gov/statistics-reports/caseload-statistics-data-tables?tn=b-10&pn=All&t=All&m%5Bvalue%5D%5Bmonth%5D=&y%5Bvalue%5D%5Byear%5D= (showing that 28,445 appeals were terminated by panel decision during the 12 months ending September 30, 2021, and only 40 cases were terminated by en banc decision). Decisions of the courts of appeals may also be reviewed by the Supreme Court on a discretionary basis. *See* SUP. CT. R. 10; *Supreme Court 2020 Term—The Statistics*, 135 HARV. L. REV. 491, 498 (2021) (calculating that the Court granted 1.4% of petitions for review during the 2020 Term).

[76] *See Senate Judiciary Attachments*, *supra* note 74, at 410–11 (response to questions from Senator Chuck Grassley) ("Looking only at the number of reversals relative to the number of decisions that are 'actually appealed' merely assesses a losing party's odds of being successful if an appeal is sought; that computation does not account for the overall number of opinions that the judge has issued and the fact that a losing party may choose to forego an appeal for a number of reasons, including the recognition that the ruling is correct and would be sustained on appeal. . . Not all reversals are equivalent.").

[77] *See, e.g.*, *Reversal Rates Imperfect Tool For Judging Supreme Court Nominees*, BLOOMBERG L. (Feb. 10, 2022), https://news.bloomberglaw.com/business-and-practice/reversal-rates-imperfect-tool-for-judging-supreme-court-nominees.

calculating the results of appeals from the nominee's decisions. Instead, the report provides qualitative discussions of cases in which Judge Jackson was reversed on appeal.

The Unique Nature of the District of D.C.

Another element to consider in evaluating Judge Jackson's record as a judge is the unique nature of the U.S. District Court for the District of Columbia.[78] Observers have long recognized that the D.C. Circuit has a different kind of docket, providing a different kind of judicial experience than other federal courts of appeals.[79] The same is true of the district court in Washington, D.C., due to the high percentage of cases filed there that involve the federal government.

The District of D.C., like other federal courts, is a court of limited jurisdiction.[80] The District of D.C.'s location, however, has given rise to its special role (along with the D.C. Circuit) in "overseeing the coordinate branches—the executive and legislative branches."[81] Historically, the District of D.C. has decided many constitutional issues related to the separation of powers, executive privilege and accountability, and Congress's impeachment power.[82] The D.C. federal courts have also "reviewed countless actions of administrative agencies and have contributed significantly to the development of what we have come to call 'administrative law.'"[83] Although the D.C. Circuit is perhaps most notable in this respect due to its exclusive jurisdiction over many types of agency cases,[84] Congress also provided that the District of D.C. either has exclusive jurisdiction or is an appropriate venue for a variety of civil actions involving government agencies, Congress, foreign governments, and private parties.[85]

Court statistics reflect the District of D.C.'s focus on cases civil involving the United States. The District of D.C. plays a disproportionately large role in deciding civil cases involving the government compared to other federal district courts: Over the five calendar years between 2017 and 2021, about 1% of all civil cases in the federal district courts were filed in the District of D.C., but about 4.5% of all civil cases involving the United States were filed in that district. [86] In

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

[79] *See, e.g.*, Roberts, *supra* note 78, at 388–89; Eric M. Fraser, et al., *The Jurisdiction of the D.C. Circuit*, 23 CORNELL J. L. & PUB. POL'Y 131, 132 (2013).

[80] *See, e.g.*, Home Depot U.S.A., Inc. v. Jackson, 139 S. Ct. 1743, 1746 (2019).

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

[82] *See id.* at 564–74.

[83] *Id.* at 575.

[84] *See* Roberts, *supra* note 78, at 389.

[85] *See, e.g.*, 2 U.S.C. § 922(a)(1) (providing that any Member of Congress may bring an action in the District of D.C. to challenge Presidential budget sequestration orders); 15 U.S.C. § 146a (providing that the District of D.C. has concurrent jurisdiction over suits involving a China Trade Act corporation); 28 U.S.C. § 1365(a) (providing that the District of D.C. has exclusive jurisdiction over actions brought by the Senate or its committees to enforce a subpoena); *id.* § 1391(f)(4) (providing jurisdiction in the District of D.C. for civil actions against a foreign state); 30 U.S.C. § 1276(a)(1) (providing for exclusive review in the District of D.C. over national regulations promulgated by the Department of the Interior related to surface coal mining); 52 U.S.C. § 10310(b) (providing that the District of D.C. has exclusive jurisdiction to issue certain declaratory judgments related to voting rights).

[86] *See Statistics & Reports: Table C-3*, U.S. CTS., https://www.uscourts.gov/statistics-reports/caseload-statistics-data-tables. Table C-3 provides the number of filed civil cases for all district courts, and for each jurisdiction, in the

turn, those cases make up a disproportionately large share of the docket in the District of D.C., compared to other kinds of cases: Civil cases involving the government constituted about 13% of all civil cases filed in the federal district courts during that period, but more than 56% of civil cases in the District of D.C.[87] As a result, the issues of most interest to Congress may appear more often in Judge Jackson's record on the bench than in those of judges in different districts.

Judge Jackson's Judicial Philosophy

Judge Jackson has said that she follows a specific methodology when deciding cases, "looking only at the arguments that the parties have made, at the facts in the record of the case, and at the law as [she] understand[s] it," including governing statutes and binding precedent.[88] By focusing on these factors and "methodically and intentionally setting aside personal views," the nominee has attempted to achieve "fidelity to the rule of law" and "rule without fear or favor."[89] Citing the necessity of adhering to the rule of law, she has stressed the importance of judicial independence from the political branches.[90] At the same time, Judge Jackson has stated that her prior professional experiences have influenced her approach to judging.[91] As an example, she said that as a public defender, she discovered that many of her clients did not understand the criminal proceedings they had personally experienced; accordingly, as a district court judge, she took "extra care to communicate with the defendants" in her courtroom, ensuring that they understood the process and the reasons for their prosecution.[92]

Constitutional Interpretation

One of the most critical jobs of a Supreme Court Justice is to assess the constitutionality of government action.[93] Where the constitutional text is ambiguous or silent, many Supreme Court Justices have developed methods to determine the meaning of constitutional provisions.[94] For example, some constitutional scholars and Justices have espoused "originalism," an approach that focuses on the original public meaning of the constitutional text at the time of the Founding.[95]

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categories of "Total Civil Cases," "Total U.S. Civil Cases," and "Total Private Civil Cases." CRS aggregated the subtotals in each of those three categories for each calendar year ending December 31, 2017 through December 31, 2021, to derive the percentages cited in the text.

[87] *See id.*

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

[89] *Id.*; *see also Senate Judiciary Attachments*, *supra* note 74, at 451 (responses to questions from Senator Mike Lee) (stating that "empathy should not play a role in a judge's consideration of a case" because judges have "a duty to decide cases based solely on the law, without fear or favor, prejudice or passion"); *id.* at 502 (responses to questions from Senator Jeff Flake) ("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.").

[90] *See D.C. Circuit Confirmation Hearing*, *supra* note 88.

[91] *Id.*

[92] *Id.*

[93] *See, e.g.*, Marbury v. Madison, 5 U.S. (1 Cranch) 137, 178 (1803) ("The judicial power of the United States is extended to all cases arising under the constitution.").

[94] *See generally* CRS Report R45129, *Modes of Constitutional Interpretation*, by Brandon J. Murrill.

[95] *See, e.g.*, Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 856–57 (1989); Lucia v. SEC, 138 S. Ct. 2044, 2056 (2018) (Thomas, J., concurring); *see generally* CRS Legal Sidebar LSB10677, *The Modes of*

Other jurists have argued for more pragmatic approaches, looking to the likely practical consequences of a constitutional construction and what an interpretation would mean for the functioning of the government.[96] Justice Breyer, in particular, has described U.S. constitutional history as "a quest for . . . workable democratic government protective of individual personal liberty."[97] Reflecting his pragmatic attitude toward legal questions, Justice Breyer emphasizes that "institutions and methods of interpretation must be designed in a way such that this form of liberty is sustainable over time and capable of translating the people's will into sound policies."[98]

Judge Jackson has resolved relatively few cases involving open constitutional questions, offering somewhat limited insight into what mode of constitutional interpretation she might follow in future cases. During her D.C. Circuit confirmation hearing, the nominee suggested she would approach constitutional interpretation by looking to the text and its original meaning, following the Supreme Court's lead.[99] Likewise, during her earlier district court confirmation, she stated she does not agree with a "living Constitution" approach, saying instead that, while "courts must apply established constitutional principles to new circumstances, . . . the meaning of the Constitution itself does not evolve."[100]

The constitutional issues Judge Jackson confronted as a district court judge largely involved relatively settled precedent from the Supreme Court or lower courts, and did not require her to engage in novel constitutional analysis.[101] Nonetheless, some of those cases, including the few that required a more rigorous analysis, are discussed in more detail later in this report.[102]

Statutory Interpretation

A judge's approach to statutory interpretation can provide significant insight into her jurisprudence, and examples of cases requiring statutory interpretation are much more common in the district court than constitutional cases. Many judges today lean towards one of two schools of statutory interpretation.[103] Textualism focuses more on a statute's text, asking how a reasonable person might understand the law's words,[104] while purposivism places more emphasis on a statute's purpose, asking what problem Congress was trying to solve and how the law achieves that goal.[105]

Constitutional Analysis: Original Meaning (Part 3), by Brandon J. Murrill.

[96] *See, e.g.*, Richard A. Posner, *What Has Pragmatism to Offer Law?*, 63 S. CAL. L. REV. 1653, 1657 (1990); Free Enter. Fund v. Pub. Co. Acct. Oversight Bd., 561 U.S. 477, 514 (Breyer, J., dissenting); *see generally* CRS Legal Sidebar LSB10679, *The Modes of Constitutional Analysis: Pragmatism (Part 5)*, by Brandon J. Murrill.

[97] STEPHEN BREYER, ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION 34 (2008).

[98] *Id.* at 16.

[99] *D.C. Circuit Confirmation Hearing*, *supra* note 88.

[100] *Senate Judiciary Attachments*, *supra* note 74 (responses to questions by Senator Tom Coburn).

[101] *See, e.g.*, Las Ams. Immigrant Advoc. Ctr. v. Wolf, 507 F. Supp. 3d 1, 19 (D.D.C. 2020) (rejecting due process challenge to agency policy under "binding" Supreme Court precedent); *see generally* CRS Legal Sidebar LSB10678, *The Modes of Constitutional Analysis: Judicial Precedent (Part 4)*, by Brandon J. Murrill.

[102] *See* "Civil Rights and Qualified Immunity," "Rights of the Accused," "First Amendment," and "Separation of Powers" *infra*.

[103] *See generally, e.g.*, CRS Report R45153, *Statutory Interpretation: Theories, Tools, and Trends*, by Valerie C. Brannon, "Major Theories of Statutory Interpretation."

[104] *See, e.g.*, Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, *in* A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 22 (Amy Gutmann ed., 1997).

[105] *See, e.g.*, HENRY M. HART JR. & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND

Judge Jackson may differ from Judge Breyer, whom she has been nominated to replace, in her approach to statutory interpretation. Justice Breyer employs a purposivist approach, following the "Legal Process" school of thought that approached statutory interpretation with the assumption that Congress is "made up of reasonable persons pursuing reasonable purposes reasonably."[106] Accordingly, Justice Breyer approaches difficult statutory questions by looking to Congress's purpose and "the practical consequences that are likely to follow from Congress' chosen scheme," and seeking a construction that serves that purpose.[107]

Judge Jackson has written that "the North Star of any exercise of statutory interpretation is the intent of Congress, as expressed in the words it uses."[108] Interpreting statutes as a district court judge, Judge Jackson was often bound by prior Supreme Court and D.C. Circuit cases,[109] but at times also engaged in original statutory construction. Like most modern judges, Judge Jackson has stressed the primacy of the law's text and structure in statutory interpretation.[110] A number of her opinions rely on a statute's "plain language"[111] and engage in close readings that, for example, stress Congress's use of a specific verb tense[112] or a singular pronoun.[113] She has also looked to established canons of construction,[114] such as the principle that no statutory language should be rendered superfluous.[115]

APPLICATION OF LAW 1148 (William N. Eskridge Jr. & Phillip P. Frickey eds., 1994).

[106] John F. Manning, Chevron *and the Reasonable Legislator*, 128 HARV. L. REV. 457, 457 (2014) (quoting Hart & Sacks, *supra* note 105, at 1378); *see also* Stephen Breyer, *On the Uses of Legislative History in Interpreting Statutes*, 65 S. CAL. L. REV. 845, 853–54 (1992) ("Sometimes [a court] can simply look to the surrounding language in the statute or to the entire statutory scheme and ask, 'Given this statutory background, what would a reasonable human being intend this specific language to accomplish?'").

[107] United States v. Arthrex, Inc., 141 S. Ct. 1970, 1988 (2021) (Breyer, J., concurring in the judgment in part and dissenting in part).

[108] Am. Meat Inst. v. U.S. Dep't of Agric., 968 F. Supp. 2d 38, 56 (D.D.C. 2013), *aff'd*, 746 F.3d 1065 (D.C. Cir. 2014).

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

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

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

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

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

[114] *See generally, e.g.*, CRS Report R45153, *Statutory Interpretation: Theories, Tools, and Trends*, by Valerie C. Brannon, "Canons of Construction."

[115] Watervale Marine Co. v. U.S. Dep't of Homeland Sec., 55 F. Supp. 3d 124, 145 (D.D.C. 2014), *aff'd on other*

When the statutory text does not provide a complete or definitive answer, however, the nominee has also used the tools of purposive interpretation, asking what outcome a "rational legislature" would have sought[116] and whether a particular interpretation serves Congress's purpose.[117] Accordingly, in one case, she enjoined portions of executive orders she decided reflected "*a decidedly different policy choice*" from the one Congress expressly adopted.[118] Further, like Justice Breyer,[119] Judge Jackson has sometimes looked to legislative history to help determine the meaning of statutory language.[120]

Two relatively narrow and complex statutory interpretation disputes demonstrate Judge Jackson's holistic approach to statutory interpretation. The first, *R.J. Reynolds Tobacco Co. v. United States Department of Agriculture*, involved a statutory provision requiring tobacco manufacturers and importers to make subsidy payments to tobacco growers.[121] The statute required the Commodity Credit Corporation (CCC) to base those payments on all "relevant information," and the legal question was whether that phrase allowed the CCC to consider only information that was "precise and verified by another federal agency."[122] Judge Jackson agreed that it did.[123] She looked first to the statute's "plain text," citing canons of construction and a legal dictionary to hold that the term "other relevant information" should include only information that was *similar* to the categories of agency-substantiated information specifically enumerated earlier in the statute.[124] The nominee then concluded that the law's purpose confirmed this textual interpretation, noting that Congress

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

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

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

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

[119] *See, e.g.*, Breyer, *supra* note 106, at 847 (defending the "careful use" of legislative history).

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

[121] 130 F. Supp. 3d 356, 358 (D.D.C. 2015).

[122] *Id.* at 370.

[123] *Id.* at 371.

[124] *Id.* at 373.

had not given the CCC the authority to engage in independent substantiation, and it would "make[] eminent sense" for Congress to intend the agency "to rely only on information that other federal law enforcement agencies . . . have already verified."[125]

The second example is the first of Judge Jackson's several opinions in *Alliance of Artists & Recording Cos. v. General Motors*.[126] This case involved the Audio Home Recording Act, a federal law requiring manufacturers and distributors of "digital audio recording devices" to implement certain technologies and pay per-device royalties.[127] At issue in the case was whether in-vehicle systems produced "digital audio copied recordings," a question that itself turned on whether a digital audio copied recording also had to be a "digital music recording."[128] The defendant car manufacturers argued that their in-vehicle systems were not covered because they did not generate output that met the statutory definition of "digital music recording."[129]

Judge Jackson agreed with the defendants, pointing to language in the statutory definition and other sections of the law that seemed to assume that digital audio copied recordings were themselves digital music recordings.[130] For example, she noted that a remedial provision authorized courts to order the destruction of any noncompliant digital audio recording device or digital musical recordings, without specifically referencing digital audio copied recordings.[131] In her view, it made "little sense that Congress would only authorize a court to seize or destroy the [device] and its input (the [digital music recordings]), while leaving the illegal copies . . . unscathed."[132] Instead, the more natural reading was that a digital audio copied recording was a type of digital music recording that could also be destroyed under the remedial provision.[133] The nominee also said this reading was consistent with the law's purpose; the legislative history confirmed that the text was "the carefully calibrated result of extensive legislative negotiations."[134] After further proceedings in the case, Judge Jackson granted summary judgment in favor of the auto manufacturers.[135] On appeal, the D.C. Circuit affirmed the grant of summary judgment, citing the nominee's analysis favorably in several instances.[136]

Stare Decisis

In addition to general theories about constitutional and statutory interpretation, past Supreme Court decisions play an important role in a judge's legal reasoning. District courts and courts of appeals are bound by the controlling decisions of the superior federal courts: the appeals courts must follow Supreme Court precedent, and district courts must follow decisions of both the Supreme Court and the U.S. Court of Appeals for the circuit in which they sit.[137] The Supreme

[125] *Id.* at 373–74.

[126] All. of Artists & Recording Cos., Inc. v. Gen. Motors Co., 162 F. Supp. 3d 8 (D.D.C. 2016).

[127] *Id.* at 8–9.

[128] *Id.* at 17.

[129] *Id.*

[130] *Id.* at 18–19.

[131] *Id.* at 19.

[132] *Id.*

[133] *Id.*

[134] *Id.*

[135] All. of Artists & Recording Cos., Inc. v. Gen. Motors Co., 306 F. Supp. 3d 422, 425 (D.D.C. 2018).

[136] All. of Artists & Recording Cos., Inc. v. DENSO Int'l Am., Inc., 947 F.3d 849, 862, 865, 867 (D.C. Cir. 2020).

[137] *See, e.g.*, Patterson v. United States, 999 F. Supp. 2d 300, 310 (D.D.C. 2013) (quoting Owens-Ill., Inc. v. Aetna Cas.

Court, by contrast, is not so bound. Instead, the Justices generally follow prior decisions of the Supreme Court under the non-binding doctrine of stare decisis. The Court has explained that stare decisis is, "in English, the idea that today's Court should stand by yesterday's decisions."[138] The Court generally adheres to its prior decisions absent "a 'special justification'—over and above the belief 'that the precedent was wrongly decided.'"[139] But the Court has also emphasized that stare decisis is not "an inexorable command."[140] The principle is at its weakest in constitutional cases, because Congress cannot "abrogate" an erroneous constitutional interpretation as it could a decision involving a statute.[141]

The doctrine of stare decisis, and a judicial nominee's views on the doctrine, are potentially relevant across all areas of the Court's jurisprudence. For example, a nominee's prior statements about stare decisis (if any) could illuminate how the nominee would approach prior decisions that she considers to be wrongly decided and whether the nominee believes the strength of precedent might be different for statutory and constitutional cases.[142]

Judge Jackson's prior decisions and public statements offer limited guidance on these questions, but generally reflect the thorough consideration of applicable precedent.[143] One of her district court decisions includes significant discussion of stare decisis. In *Committee on the Judiciary v. McGahn*, Judge Jackson looked to a prior D.C. district court decision that she viewed as "compelling (albeit, admittedly, not controlling)," and she applied that precedent in a manner she deemed "consistent with stare decisis principles" to help resolve a high-stakes separation of powers dispute.[144] Quoting the Supreme Court, she recognized that stare decisis "promotes the

& Sur. Co., 597 F. Supp. 1515, 1520 (D.D.C. 1984)).

[138] Kimble v. Marvel Ent. LLC, 576 U.S. 446, 455 (2015).

[139] *Id.* at 455–56 (quoting Halliburton Co. v. Erica P. John Fund, Inc., 573 U.S. 258, 266 (2014)).

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

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

[142] In past hearings, Senators have asked nominees, including Judge Jackson, whether there are particular cases that they believe were wrongly decided. Judge Jackson has generally followed the practice established by other nominees of declining to answer such questions, except with respect to the seminal cases of *Marbury v. Madison*, *Brown v. Board of Education*, and *Loving v. Virginia*. *See Senate Judiciary Attachments*, *supra* note 74, at 460 (responses to questions from Senator Ben Sasse). Judge Jackson's decision in *Maryland v. U.S. Department of Education*, No. 17-cv-2139, 2020 WL 7773390 (D.D.C. Dec. 29, 2020) shows the nominee's adherence to binding authority coupled with a willingness to express her concerns with such precedent. In *Maryland*, the D.C. Circuit vacated a district court decision by Judge Jackson and remanded the case with instructions to dismiss as moot. *See id.* at *1 (citing *Maryland v. U.S. Dep't of Educ.*, No. 20-5268, 2020 WL 7773390 (D.C. Cir. Dec. 22, 2020)). Judge Jackson heeded the appellate court's directions on remand and dismissed the case as moot, but wrote an opinion objecting to the vacatur. *See id.* at *5–7; *see also* "Civil Procedure and Jurisdiction" *infra*.

[143] *See, e.g.*, *Senate Judiciary Attachments*, *supra* note 74, at 454 (responses to questions from Senator Mike Lee) ("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.").

[144] Comm. on Judiciary, U.S. House of Representatives v. McGahn, 415 F. Supp. 3d 148, 173 (D.D.C. 2019), *rev'd*, 973 F.3d 121 (D.C. Cir. 2020), *rev'd en banc*, 968 F.3d 755 (D.C. Cir. 2020). For additional discussion of the *McGahn* decision, including its subsequent history in the district court and court of appeals, see "Standing" and "Separation of Powers" *infra*.

evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process."[145] She further opined that the doctrine "performs a limiting function" that supports the constitutional separation of powers, because "deciding a legal issue anew each time that same question is presented, without any reference to what has been done before, nudges a court outside of its established domain of 'say[ing] what the law is[,]' and into the realm of legislating what the law should be."[146]

Two additional decisions by Judge Jackson contain more limited discussion of stare decisis. In *Patterson v. United States*, the nominee held that the U.S. Park Police who arrested an individual for using profanity in a public park violated clearly established law under the First and Fourth Amendments.[147] Rejecting the government's argument that the plaintiff could not pursue a First Amendment claim, Judge Jackson explained, "the D.C. Circuit has expressly recognized that there is a First Amendment right not to be arrested in retaliation for one's speech where there is otherwise no probable cause for the arrest, . . . and this Court cannot ignore the D.C. Circuit's binding precedent."[148] In *Morgan v. U.S. Parole Commission*, Judge Jackson dismissed a prisoner's civil suit in part on the grounds of *res judicata*—the legal doctrine that "bars relitigation of claims or issues that were or could have been litigated in a prior action."[149] Holding that prior litigation in West Virginia federal court barred the plaintiff's claim under the Ex Post Facto Clause, Judge Jackson observed, "this Court sees nothing inherently unfair or untoward about the application of past precedent to address a constitutional question; after all, adherence to precedent is venerated practice of the state and federal courts."[150]

Judge Jackson also made statements on the subject of precedent in response to questioning during her confirmation hearings to the district court and the D.C. Circuit. For instance, when asked about stare decisis during her district court confirmation, she responded that the doctrine "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."[151] When asked during her confirmation to the D.C. Circuit how she would define "judicial activism," she responded in part:

> While [a] judge may acknowledge the force of contrary positions regarding the legal issues in dispute, the result that a judge reaches must be consistent with the requirements of the law, as set forth in the binding precedents of the Circuit and the Supreme Court. Judicial activism occurs when a judge who is unwilling or unable to rule as the law requires and instead resolves cases consistent with his or her personal views.[152]

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

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

[147] 999 F. Supp. 2d 300, 315 (D.D.C. 2013). For additional discussion of Patterson, see "Civil Rights and Qualified Immunity" and "First Amendment" *infra*.

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

[149] 304 F. Supp. 3d 240, 246 (D.D.C. 2016).

[150] *Id.* at 251.

[151] *Senate Judiciary Attachments*, *supra* note 74, at 488 (responses to questions from Senator Amy Klobuchar).

[152] *Id.* at 413 (responses to questions from Senator Chuck Grassley). *See also id.* at 13 ("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

Addressing the question of when it is appropriate for a federal circuit court to overrule its own precedents, she explained: "D.C. Circuit precedents make clear that it is appropriate for that court, sitting en banc, to overturn its own precedents only in a narrow set of circumstances," including when required by intervening developments in the law, when a prior holding on an important question of law was fundamentally flawed, or "where the precedent may be a positive detriment to coherence and consistency in the law, either because of inherent confusion created by an unworkable decision, or because the decision poses a direct obstacle to the realization of important objectives embodied in other laws."[153]

Selected Topics

The remaining sections of this report each focus on an issue that appears in Judge Jackson's record as a judge or public official. That focus necessarily omits some topics that may be of interest to Congress if Judge Jackson's professional background and judicial experience do not provide an adequate basis for analysis. For example, CRS has identified no decisions by Judge Jackson that address the issue of reproductive rights. This report also does not focus on certain topics, such as local D.C. law or private disputes under contract and tort doctrines, which may be less relevant to Congress as it considers a Supreme Court nominee.

Administrative Law

The D.C. federal courts have an "outsized role" in administrative law,[154] with cases involving executive branch authority comprising a significant portion of their dockets.[155] Judge Jackson's district court opinions reflect that focus. A number of her opinions have considered the application of the Administrative Procedure Act (APA), which generally governs judicial review of agency action,[156] and various judicially created doctrines that apply to review of agency actions.[157] This report's discussion focuses primarily on issues relating to justiciability and substantive review of agency decisions, but Judge Jackson has faced a wide variety of administrative law issues, including cases challenging agency procedures.[158] She has also

would not be proper for a circuit court judge to depart from Supreme Court precedent when ruling in a case.").

[153] *Id.* at 462 (responses to questions from Senator Ben Sasse) (quoting United States v. Burwell, 690 F.3d 500, 504 (D.C. Cir. 2012)) (internal quotations omitted).

[154] Aaron L. Nielson, *D.C. Circuit Review – Reviewed: The Second Most Important Court?*, YALE J. REG.: NOTICE & COMMENT (Sept. 4, 2015), https://www.yalejreg.com/nc/d-c-circuit-review-reviewed-the-second-most-important-court-by-aaron-nielson/; *see* "The Unique Nature of the District of D.C." *supra*.

[155] *See* Roberts, *supra* note 78, at 376–77; Brett M. Kavanaugh, *The Courts and the Administrative State*, 64 CASE W. RES. L. REV. 711, 715 (2014) ("[T]he bread and butter of [the D.C. Circuit docket is its] . . . administrative law docket.).

[156] 5 U.S.C. §§ 701–706; *see generally* CRS Report R44699, *An Introduction to Judicial Review of Federal Agency Action*, by Jared P. Cole.

[157] *See generally* CRS Report R44954, *Chevron Deference: A Primer*, by Valerie C. Brannon and Jared P. Cole.

[158] *See, e.g.*, AFL-CIO v. NLRB, 466 F. Supp. 3d 68, 92 (D.D.C. 2020) (holding that an agency rule should have gone through notice-and-comment rulemaking because it was not merely a procedural rule); Clarian Health W., LLC v. Burwell, 206 F. Supp. 3d 393, 397 (D.D.C. 2016) (holding that agency statements in an instruction manual were substantive rules that should have gone through notice-and-comment rulemaking), *rev'd*, 878 F.3d 346 (D.C. Cir. 2017).

resolved cases involving broader oversight issues[159] and a large number of disputes involving the interpretation and application of the Freedom of Information Act.[160]

Justice Breyer has been generally deferential to federal agencies' exercises of their statutorily delegated authority.[161] Some legal commentators have suggested Judge Jackson's record is less deferential due to her willingness both to extend judicial review to agency actions and to enforce procedural and substantive limitations on agency authority.[162]

Justiciability and Agency Discretion

A threshold question in many cases challenging agency action is whether Congress has chosen to delegate authority to an agency in a way that is effectively unreviewable in court.[163] The APA does not apply to, and thus does not provide a cause of action for judicial review of, "agency action" that "is committed to agency discretion by law."[164] However, as the Supreme Court has stated, the APA "embodies the basic presumption of judicial review to one 'suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute.'"[165] The Supreme Court has therefore explained in recent years that it reads the APA's statutory exception "quite narrowly," so that agency actions are reviewable except in the "rare" case of administrative decisions that are "traditionally left" to agency discretion.[166] This is true even when an agency acts pursuant to a "broad" grant of authority that entails significant discretion.[167]

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[159] *See* "Separation of Powers" *infra*.

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

[161] CRS Legal Sidebar LSB10691, *Justice Breyer Retires: Initial Considerations*, by Valerie C. Brannon et al.

[162] *See* Jimmy Hoover, *Ketanji Brown Jackson No 'Rubber Stamp' For Gov't Agencies*, LAW360 (Mar. 3, 2022), https://www.law360.com/publicpolicy/articles/1470007/ketanji-brown-jackson-no-rubber-stamp-for-gov-t-agencies?nl_pk=77a8fbcd-0ce9-4d0f-a0ac-3a4c7fd100a8.

[163] *See generally* CRS Report R44699, *An Introduction to Judicial Review of Federal Agency Action*, by Jared P. Cole. A somewhat related issue is administrative exhaustion: a judicially enforced doctrine requiring parties to exhaust any available administrative procedures provided by statute or regulation before they may challenge an agency decision in court. *See, e.g.*, Mackinac Tribe v. Jewell, 87 F. Supp. 3d 127, 130–31 (D.D.C. 2015) (dismissing lawsuit seeking tribal recognition because the Mackinac Tribe had not exhausted administrative remedies), *aff'd*, 829 F.3d 754 (D.C. Cir. 2016).

[164] 5 U.S.C. § 701(a)(2). The APA also does not apply "to the extent that statutes preclude judicial review." *Id.* § 701(a)(1).

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

[166] Dep't of Homeland Sec. v. Regents of the Univ. of Cal., 140 S. Ct. 1891, 1905 (2020) (internal quotation marks omitted) (concluding that the Deferred Action for Childhood Arrivals (DACA) program was more than a non-enforcement policy of the type traditionally held to be committed to agency discretion by law and that rescission of DACA was therefore subject to APA review); *see also, e.g.*, Weyerhaeuser Co. v. U.S. Fish & Wildlife Serv., 139 S. Ct. 361, 370–72 (2018) (explaining that the Court has found an issue to be committed to agency discretion in "few cases"); CRS Legal Sidebar LSB10536, *Judicial Review of Actions Legally Committed to an Agency's Discretion*, by Daniel J. Sheffner.

[167] Dep't of Com. v. New York, 139 S. Ct. 2551, 2568 (2019) (stating that, though the Census Act "confers broad

Judge Jackson's opinions considering whether an action is committed to agency discretion by law, and therefore unreviewable in court, reflect a case-by-case assessment of the APA's applicability. When Department of Health and Human Services (HHS) grantees challenged HHS's termination of their grants, Judge Jackson recognized that an agency's decision of how best to use appropriated funds can be an example of an action that is committed to agency discretion by law.[168] However, HHS had promulgated regulations limiting its discretion to terminate grants, providing "meaningful standards" on which to base judicial review under the APA.[169] She went on to hold that HHS had not provided the "reasoned analysis" of its decision that the APA requires.[170]

In another case, the nominee held that though a statute gave the Secretary of the Department of Homeland Security (DHS) the "sole and unreviewable discretion" to designate categories of aliens as subject to expedited removal,[171] this provision did not grant "sole discretion to determine the *manner* in which that decision will be made."[172] According to Judge Jackson, this meant that although they could not challenge which categories of persons DHS had chosen to designate as subject to expedited removal, plaintiffs could maintain claims that DHS's designation violated the APA's procedural requirements.[173] On appeal, the D.C. Circuit rejected that conclusion, holding instead that Congress's broad delegation "confine[d] the judgment to the Secretary's hands and, in so doing, inescapably [sought] to withdraw the decision from APA review"—not only barring review of the decision's substance, but also making APA procedural requirements inapplicable to such cases.[174]

The nominee has also concluded that some cases presented the "rare" instance of an action that was committed to an agency's discretion by law. In a case challenging the Department of the Interior's refusal to exclude an area from a critical habitat designation under the Endangered Species Act, Judge Jackson reasoned that the statute did not "'provide a standard by which to judge'" the exclusion decision.[175] Examining a statute providing that the U.S. Coast Guard "may" grant departure clearance to a vessel suspected of violating certain environmental laws "upon the filing of a bond or other surety satisfactory to the Secretary,"[176] Judge Jackson likewise found no APA cause of action for plaintiffs challenging the decision to impose additional, nonfinancial

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authority on the Secretary" for census matters, the Act did not provide unbounded discretion, and the taking of the census was not an area "traditionally committed to agency discretion"); *see also* Citizens to Pres. Overton Park, Inc. v. Volpe, 401 U.S. 402, 410 (1971) (explaining that an action is committed to agency discretion where relevant statutes are "drawn in such broad terms that in a given case there is no law to apply" (internal quotation marks omitted)).

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

[169] *Id*. at 83.

[170] *Id.* at 84.

[171] *See* "Immigration" *infra*.

[172] Make the Rd. N.Y. v. McAleenan, 405 F. Supp. 3d 1, 39 (D.D.C. 2019), *rev'd and remanded sub nom*. Make the Rd. N.Y. v. Wolf, 962 F.3d 612 (D.C. Cir. 2020).

[173] *Id*. at 43.

[174] *See Make The Rd. N.Y.*, 962 F.3d at 632, 634.

[175] Otay Mesa Prop., L.P. v. U.S. Dep't of the Interior, 144 F. Supp. 3d 35, 64 (D.D.C. 2015) (quoting Cape Hatteras Access Pres. All. v. U.S. Dep't of the Interior, 731 F. Supp. 2d 15, 29 (D.D.C. 2010)). At the time, Judge Jackson's conclusion was consistent with decisions reached in another judicial circuit. *See* Bear Valley Mut. Water Co. v. Jewell, 790 F.3d 977, 990 (9th Cir. 2015). In 2018, however, the Supreme Court reached the opposite conclusion. *See* Weyerhaeuser Co. v. U.S. Fish & Wildlife Serv., 139 S. Ct. 361, 370–72 (2018).

[176] 33 U.S.C. § 1908(e).

conditions for departure clearance.[177] The nominee concluded the statute's text and structure gave her no standards by which to assess the clearance decision, because even when the vessel owner posted a satisfactory "bond or other surety," the agency was not required to grant clearance.[178] On appeal, the D.C. Circuit disagreed with Judge Jackson, holding that the APA's committed-to-agency discretion exception did not foreclose a claim premised on the theory that nonfinancial conditions exceeded the Coast Guard's authority.[179]

Considering a distinct but related issue, Judge Jackson held in *Center for Biological Diversity v. Zinke* that the APA did not authorize relief in a lawsuit seeking to compel the Department of the Interior to complete an assessment of its environmental review policies.[180] She noted that, although the APA authorizes courts to "compel agency action unlawfully withheld or unreasonably delayed,"[181] Supreme Court precedent allowed judicial review only of "a *discrete* agency action that it is *required* to take."[182] The nominee found that the claim before her did not meet this standard, holding that while the governing statute required agencies to revise their environmental review policies as necessary, it did not prescribe "any discrete agency action," and set "no fixed end point."[183] Discussing the respective roles of courts and administrative agencies, Judge Jackson said in *Center for Biological Diversity* that "courts do not, and cannot, police agency deliberations as a general matter."[184] In her view, "meddling in an agency's tentative, internal deliberations absent a clear-cut legal mandate to do so risks upsetting the balance between the judicial and administrative functions that Congress struck in the APA."[185]

Agency Statutory Interpretations and *Chevron* Deference

To carry out the tasks delegated to them by Congress, federal agencies must interpret the statutes authorizing their actions. Courts reviewing agency actions sometimes give special deference to agencies' interpretations of the statutes they administer, rather than adopting a different judicial interpretation. Specifically, under a framework outlined by the Supreme Court in *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, courts engage in a two-step analysis to determine whether to defer to an agency interpretation in an area where Congress has delegated administrative authority to the agency.[186] First, courts ask whether the statute is clear, in which case "the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress."[187] This first step requires the court to engage in an ordinary statutory-interpretation

[177] Watervale Marine Co. v. U.S. Dep't of Homeland Sec., 55 F. Supp. 3d 124, 133 (D.D.C. 2014), *aff'd on other grounds*, 807 F.3d 325 (D.C. Cir. 2015).

[178] *Watervale Marine Co*., 55 F. Supp. 3d at 142 (stating even if, as plaintiffs contended, the statute authorized the imposition of financial conditions only, the "Achilles heel" of plaintiffs' reviewability argument was that the "statute nevertheless appears to permit the Coast Guard to deny departure clearance altogether, or to require some additional conditions before making the clearance decision").

[179] *Watervale Marine Co*., 807 F.3d at 330.

[180] 260 F. Supp. 3d 11, 16 (D.D.C. 2017).

[181] 5 U.S.C. § 706(1).

[182] *Ctr. for Biological Diversity*, 260 F. Supp. 3d at 20 (quoting Norton v. S. Utah Wilderness All., 542 U.S. 55, 64 (2004)).

[183] *Id.* at 27.

[184] *Id.* at 29.

[185] *Id.*

[186] 467 U.S. 837, 842–43 (1984).

[187] *Id.* at 842.

inquiry, using the "traditional tools of statutory construction."[188] If the statute is ambiguous, however, courts proceed to step two, in which they will defer to the agency's interpretation so long as it is reasonable.[189] If a court reaches the second step, *Chevron* instructs it to defer even if the court does not believe the agency's interpretation is the *best* construction of the statute[190]—it merely needs to be "permissible."[191]

Chevron deference is premised on the idea that when Congress delegates authority to agencies, it intends for agencies to fill in any "gap[s]" in the statute through reasonable interpretation.[192] The Supreme Court instructed in *Chevron* that judges should leave these open policy choices to the political branches, which are more politically accountable and have greater institutional competence to weigh policy considerations.[193]

A number of jurists, including a few sitting Supreme Court Justices, have criticized *Chevron* deference and the presumption that Congress intended agencies, rather than courts, to resolve statutory ambiguity.[194] Accordingly, some judges have arguably narrowed the application of *Chevron* deference over the past decade or so, in part by finding more readily that a statute is unambiguous at *Chevron*'s first step.[195] In addition, the Court has recently considered cases raising the "major questions doctrine," which can also narrow the circumstances in which *Chevron* applies by demanding a clear statement from Congress when it delegates to agencies the authority to resolve questions of major economic and political significance.[196]

As a district court judge, Judge Jackson was bound by governing precedent to apply *Chevron*'s two-step framework to evaluate agency interpretations of statutes they administer. Accordingly, in a number of cases, the nominee concluded that a statute failed to address the precise question before the court and deferred to the agency's reasonable construction of that statute.[197] For example, in *American Meat Institute v. U.S. Department of Agriculture (USDA)*, a case discussed later in this report,[198] the nominee rejected a challenge to an agency regulation requiring "country-of-origin labeling" for certain commodities.[199] The plaintiffs argued that the regulation went beyond the governing statute by requiring additional information and by banning the commingling of animal cuts from different countries of origin.[200] On both issues, Judge Jackson

[188] *Id.* at 843 n.9.

[189] *Id.* at 843.

[190] *See, e.g.*, Entergy Corp. v. Riverkeeper, Inc., 556 U.S. 208, 218 (2009).

[191] *Chevron U.S.A., Inc.*, 467 U.S. at 843.

[192] *Id.* at 843–44.

[193] *Id.* at 865–66.

[194] *See, e.g.*, CRS Legal Sidebar LSB10204, *Deference and its Discontents: Will the Supreme Court Overrule Chevron?*, by Valerie C. Brannon and Jared P. Cole.

[195] *See id.*

[196] *See id.*; *see also, e.g.*, Nat'l Fed'n of Indep. Bus. v. OSHA, 142 S. Ct. 661, 667–68 (2022) (Gorsuch, J., concurring).

[197] *See, e.g.*, Las Ams. Immigrant Advoc. Ctr. v. Wolf, 507 F. Supp. 3d 1, 30 (D.D.C. 2020) (concluding agency interpretation authorizing the placement of asylum seekers subject to expedited removal in Customs and Border Protection facilities was reasonable in light of Congress's clear intent as demonstrated in text and Supreme Court precedent); Otsuka Pharm. Co. v. Burwell, 302 F. Supp. 3d 375, 394, 399 (D.D.C. 2016) (concluding statute governing exclusivity periods for new drugs did not unambiguously bar agency's reading, looking to law's text, structure, and legislative history, and upholding agency interpretation as reasonable), *aff'd*, 869 F.3d 987 (D.C. Cir. 2017).

[198] *See* "First Amendment" *infra*.

[199] 968 F. Supp. 2d 38, 68 (D.D.C. 2013) (holding the plaintiffs were unlikely to succeed on their statutory challenges and denying preliminary injunction), *aff'd*, 746 F.3d 1065 (D.C. Cir. 2014).

[200] *Id.* at 52.

concluded at *Chevron*'s first step that Congress had not expressly spoken to the precise question and, at *Chevron*'s second step, held that the statutory text likely supported the agency's reading.[201] In a couple of other cases, the nominee expressly concluded that deference was appropriate because Congress delegated broad authority to the agency, and the agency previously exercised that authority in such a way as to develop expertise on the debated issue—making *Chevron*'s underlying presumption explicit.[202]

In a few cases, Judge Jackson held that agency interpretations were not entitled to deference under the *Chevron* framework. In a 2014 case, for instance, she ruled that the U.S. Food and Drug Administration acted improperly when it refused to recognize that a drug was entitled to a marketing exclusivity period—a result that, in her view, the statute unambiguously required under *Chevron*'s first step.[203] More recently, in *Kiakombua v. Wolf*, Judge Jackson vacated a 2019 U.S. Citizenship and Immigration Services manual governing "credible fear" determinations used by immigration authorities to assess whether asylum claims of persons placed in expedited removal would receive further review.[204] She believed that portions of the manual were "manifestly inconsistent with the two-stage asylum eligibility framework" established by the unambiguous governing statute, seemingly failing *Chevron*'s first step, and other portions were "unreasonable interpretations of the . . . statutory scheme," failing *Chevron*'s second step.[205]

Review of Agency Decisions as Arbitrary or Capricious

In cases where an agency's statutory interpretation is not subject to review under *Chevron*, the APA provides standards for courts to review agency action. Notably, the APA instructs courts to hold unlawful any agency action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[206] This "arbitrary and capricious" review can overlap with a *Chevron* step-two analysis because both evaluate the substance of an agency's reasoning and its compliance with governing law.[207] But it also encompasses inquiry into whether the agency's decision is supported by the administrative record and whether the agency has adequately explained its reasoning.[208]

The scope of arbitrary-and-capricious review "is narrow," and the court will not "substitute its judgment for that of the agency."[209] Accordingly, for example, Judge Jackson rejected an arbitrary-and-capricious challenge to an agency rule prescribing procedures for the election of

[201] *Id.* at 53–68. In evaluating the second statutory issue, the nominee also noted that the law's legislative history "amply support[ed]" a reading concluding that Congress did not address commingling. *Id.* at 65.

[202] *See Las Ams. Immigrant Advoc. Ctr.*, 507 F. Supp. 3d at 31; Am. Fed'n of Gov't Emps. v. Trump, 318 F. Supp. 3d 370, 386 (D.D.C. 2018), *rev'd and vacated*, 929 F.3d 748 (D.C. Cir. 2019).

[203] Depomed, Inc. v. U.S. Dep't of Health & Human Servs., 66 F. Supp. 3d 217, 233 (D.D.C. 2014).

[204] 498 F. Supp. 3d 1, 11 (D.D.C. 2021).

[205] *Id.* at 38; *see also id.* at 43 (stating that the manifestly inconsistent portions contradicted the law's "unambiguous text"); *id.* at 44 (saying that "in *Chevron* . . . parlance," the unreasonable provisions "exceeded the reasonable boundaries of any ambiguity to be found in the statute and related regulations").

[206] 5 U.S.C. § 706(2)(A).

[207] *See, e.g.*, Judulang v. Holder, 565 U.S. 42, 52 n.7 (2011). *See also, e.g.*, Otay Mesa Prop., L.P. v. U.S. Dep't of the Interior, 344 F. Supp. 3d 355, 366 (D.D.C. 2018) ("[T]his Court has determined that, even after granting the [Fish and Wildlife Service] the deference that it is due under *Chevron*, the agency's identification of the geographical area occupied by the Riverside fairy shrimp was unreasonable and therefore arbitrary and capricious, which means that the resulting occupied critical habitat determination violated the APA.").

[208] *See* Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 42–43 (1983).

[209] *Id.* at 43.

employee representatives for collective bargaining because she believed the agency had sufficiently explained its reasoning and demonstrated its consideration of relevant factors.[210]

By contrast, Judge Jackson has concluded that an agency violates the APA's arbitrary-and-capricious standard when it "changes course abruptly without a well-reasoned explanation for its decision" or acts "contrary to its own regulations."[211] In the nominee's first opinion for the D.C. Circuit, *American Federation of Government Employees v. Federal Labor Relations Authority* (FLRA), she held that the FLRA violated the APA when it failed to sufficiently justify its decision to raise the threshold for collective bargaining for certain federal employees.[212] The nominee described the FLRA's statement announcing the new policy as "cursory," finding it failed to acknowledge or justify the agency's departure from "thirty-five years of precedent" following a different standard.[213] Her opinion for the panel concluded that the agency did not sufficiently explain "the purported flaws" of its prior standard.[214] In her view, the FLRA's attempted explanations were inconsistent and lacked merit, seeming to "simply . . . demonstrate how" the prior standard worked rather than demonstrating it was "unworkable."[215] Nor did the FLRA sufficiently explain why the new standard was "better."[216]

Business and Employment Law

While serving on the district court, Judge Jackson adjudicated numerous business-related claims, including litigation between businesses and disputes between employers and employees. The nominee's written decisions in these cases largely involve motions to dismiss and motions for summary judgment filed by employer defendants. Many of these cases were resolved in favor of the employer, particularly those decided at summary judgment.[217]

Though both dismissal and summary judgment may conclude a case, their ramifications are often different: a court may dismiss claims *without prejudice* and thereby allow a plaintiff to refile the claims,[218] whereas summary judgment fully and finally resolves claims.[219] Judge Jackson on

[210] AFL-CIO v. NLRB, 471 F. Supp. 3d 228, 234 (D.D.C. 2020).

[211] Pol'y & Rsch., LLC v. U.S. Health & Hum. Servs., 313 F. Supp. 3d 62, 67 (D.D.C. 2018); *see also id.* at 74–75 (holding that shortening project periods for HHS grants "without explanation and in contravention of the regulations was an arbitrary and capricious act in violation of the APA"). *See also, e.g.*, XP Vehicles, Inc. v. Dep't of Energy, 118 F. Supp. 3d 38, 79 (D.D.C. 2015) (allowing arbitrary-and-capricious challenge to proceed where the plaintiffs alleged that, in evaluating a grant application, the agency "relied on impermissible considerations," such as political connections, "that ran counter to the evidence before it and the applicable regulations").

[212] 25 F.4th 1, 2–3 (D.C. Cir. 2022).

[213] *Id.* at 11–12.

[214] *Id.* at 5.

[215] *Id.* at 5–7.

[216] *Id.* at 10.

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

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

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

several occasions has indicated a reluctance to dispose entirely of employee claims at the motion to dismiss stage, preferring to allow discovery before reaching a final decision.[220]

The nominee's analysis in *Ross v. U.S. Capitol Police*, an employment discrimination case, provides an illustration.[221] In *Ross*, Judge Jackson addressed a motion to dismiss that the U.S. Capitol Police asked to be treated in the alternative as a motion for summary judgment.[222] Judge Jackson first observed that binding precedent counsels district court judges to adjudicate summary judgment motions "after the plaintiff has been given adequate time for discovery."[223] The nominee considered that general principle to be especially important in employment discrimination cases, where a plaintiff's success often depends on the fact-intensive question of whether a defendant's proffered reasons for taking an employment action are pretextual.[224] As Judge Jackson observed, without the benefit of discovery:

> it is hard to fathom that the plaintiff would be able to present any evidence related to the employer's reasons for the adverse employment action *at all*, much less evidence that would be a sufficient basis upon which a rational jury could conclude that "the defendant intentionally discriminated [or retaliated] against the plaintiff."[225]

Based on this analysis, Judge Jackson concluded that a motion for summary judgment was premature, ultimately denying the motion to dismiss with respect to the plaintiff's discrimination and retaliation claims.[226]

By contrast, Judge Jackson reached a different conclusion in *Crawford v. Johnson*.[227] In that case, DHS filed a motion to dismiss, or in the alternative for summary judgment, with respect to employment discrimination claims brought under Title VII of the Civil Rights Act by the plaintiff, James Crawford, based on three incidents.[228] The motion turned on the legal question of whether Crawford failed to exhaust his administrative remedies by including the three incidents in the attachments to his formal Equal Employment Opportunity (EEO) complaint, rather than in the complaint itself.[229] Judge Jackson determined that information contained only in exhibits was not incorporated into the complaint.[230] To reach this conclusion, the nominee first looked to the language of the statute's exhaustion requirement, which requires that an EEO complaint "contain

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

[221] 195 F. Supp. 3d 180 (D.D.C. 2016).

[222] *Id.* at 188.

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

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

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

[226] *Id.* at 194, 201.

[227] 166 F. Supp. 3d 1 (D.D.C. 2016), *rev'd in part sub nom.* Crawford v. Duke, 867 F.3d 103 (D.C. Cir. 2017).

[228] *Id.* at 4; *see* 42 U.S.C. § 2000e-16(c) (providing that an employee may only file a civil action once the employee has undertaken necessary administrative steps).

[229] *Crawford*, 166 F. Supp. 3d at 4.

[230] *Id.* at 9.

such information and be in such form as the [EEO Commission] requires."[231] Turning to EEO Commission regulations, Judge Jackson observed that an EEO complaint must "describe generally the action(s) or practice(s) that form the basis of the complaint."[232] After considering relevant court decisions, Judge Jackson held that information about these incidents included only in exhibits was insufficient for Crawford to have exhausted his administrative remedies.[233] Accordingly, she granted DHS's motion for summary judgment.[234] On appeal, the D.C. Circuit reversed Judge Jackson's decision in part, holding that Crawford's claims on two of the three instances could proceed.[235] Relying on D.C. Circuit case law and authority from other federal courts of appeals, the D.C. Circuit concluded that exhibits are "part of the complaint itself" for exhaustion purposes.[236]

At first blush, the outcomes in *Ross* and *Crawford* may appear to be in tension with each other. Judge Jackson's approach in both of these cases, however, may reflect a common approach that focuses on the value of a consistent judicial and administrative process. In *Ross*, her decision to deny summary judgment and allow discovery on some claims was based on what she characterized as the court's "ordinary practice" in adjudicating employment discrimination claims.[237] Judge Jackson dismissed other claims in *Ross* based on a failure to adhere to a statutorily-prescribed process.[238] In *Crawford*, Judge Jackson granted summary judgment before discovery occurred, but that decision was based solely on Crawford's alleged failure to comply with the required process, rather than the substance of his claims.[239]

Judge Jackson's decision in *Njang v. Whitestone Group, Inc.* also illustrates this approach.[240] *Njang* involved employment discrimination claims brought under both Title VII of the Civil Rights Act and 42 U.S.C. § 1981, a federal statute that prohibits racial discrimination. One issue in *Njang* was whether six months was a "reasonable" period in which to bring an action under either Title VII or Section 1981.[241] On a motion for summary judgment, Judge Jackson held that six months was a reasonable period in which to bring Section 1981 claims because the statute, which was silent on the question, lacked "features that would make filing a claim within six months impracticable, such as an administrative exhaustion requirement."[242] Conversely, "the procedure for bringing a Title VII claim is far more involved and time-consuming than the procedure for bringing a Section 1981 claim," and requiring that process to be completed in six

[231] *Id.* (quoting 42 U.S.C. § 2000e-5(b)).

[232] *Id.* (quoting 29 C.F.R. § 1614.106(c)).

[233] *Id.* at 9–10 (citing Dick v. Holder, 80 F. Supp. 3d 103, 112–13 (D.D.C. 2015)).

[234] *Id.* at 4.

[235] Crawford v. Duke, 867 F.3d 103, 116 (D.C. Cir. 2017).

[236] *Id.*

[237] Ross v. U.S. Capitol Police, 195 F. Supp. 3d 180, 194 (D.D.C. 2016).

[238] *Id.* at 196 (holding plaintiff failed to satisfy procedural prerequisites for two of his three claims).

[239] *See Crawford*, 166 F. Supp. at 9; *see also, e.g.*, Lawson v. Sessions, 271 F. Supp. 3d 119, 130 (D.D.C. 2017) (dismissing Title VII claims for failure to exhaust). *Contra* Nagi v. Chao, No. 16-2152, 2018 WL 4680272, at *3 (D.D.C. Sept. 28, 2018) (dismissing hostile work environment claims because "the complaint's allegations . . . fail to state a plausible claim for relief under a hostile work environment theory").

[240] 187 F. Supp. 3d 172 (D.D.C. 2016).

[241] *See id.* (citing Order of United Com. Travelers of Am. v. Wolfe, 331 U.S. 586, 608 (1947) (holding that a contractual term shortening the time for bringing an action is only enforceable "if the shorter period itself [is] a reasonable period")).

[242] *Id.* at 178 (citing Taylor v. W. & S. Life Ins. Co., 966 F.2d 1188, 1205 (7th Cir. 1992)).

months would have "the practical effect of waiving employees' substantive rights under Title VII."[243]

Another case, *Ross v. Lockheed Martin*, involved a proposed class action alleging employment discrimination under Title VII.[244] In *Lockheed*, two plaintiffs negotiated a $22.8 million settlement on behalf of a proposed class of African-American employees who received negative performance ratings while employed by the defendant.[245] Judge Jackson declined to certify the class preliminarily or approve this settlement, finding that the settlement agreement was unfair to members of the proposed class.[246] She focused on the settlement agreement's requirement that class members release the defendant from "*all* types of racial discrimination claims," including those unrelated to the class action claims.[247] Judge Jackson was unequivocal in condemning the scope of this release:

> [I]t is shocking to this Court that counsel for the putative class members would contend that a release this broad and consequential is a "fair" bargain as it relates to the absent individuals whose potential legal claims are effectively extinguished by it.[248]

This problem was compounded by the "minuscule amount of information" that the settlement would provide to class members, even though failing to respond to a notice of the class action would preclude them from receiving compensation.[249]

Judge Jackson's decision in *Lockheed* was adverse to the named plaintiffs, but her analysis in refusing to approve the proposed settlement was rooted in concerns about the case's impacts on unnamed class members. This may fit within an overall pattern in Judge Jackson's employment-law decisions, which includes decisions favorable to employers *and* employees that frequently turn on procedural grounds.[250]

Judge Jackson has written fewer decisions involving disputes between businesses, and thus patterns are harder to divine. In a trademark infringement and unfair competition case, the nominee issued a ruling in favor of the plaintiff following a full bench trial.[251] In another case involving a conflict between a restaurant and its franchisee, Judge Jackson ruled that the restaurant had violated certain state laws regarding disclosure and registration of its franchise

[243] *Id.* at 180.

[244] 267 F. Supp. 3d 174, 178 (D.D.C. 2017).

[245] *Id.*

[246] *Id.* at 201.

[247] *Id.* at 202.

[248] *Id.*

[249] *Id.* at 202–03.

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

[251] Yah Kai World Enters., Inc. v. Napper, 195 F. Supp. 3d 287 (D.D.C. 2016).

agreement with state authorities, but determined that these violations had not harmed the franchisee.[252]

Civil Procedure and Jurisdiction

The Supreme Court routinely hears cases involving questions of federal court jurisdiction (the power of federal courts to decide cases) and civil procedure (the statutes and rules governing how cases are litigated in federal court). In recent years, many decisions on those subjects have been unanimous or near-unanimous.[253] During this period, however, the Court has also closely divided on certain procedural questions,[254] including in ways that perhaps do not align with a conventional view of the Court's 5-4 decisions.[255]

Particularly in her role as a district court judge, Judge Jackson has resolved many cases on procedural grounds. Some of those cases offer limited insight into how the nominee would approach cases on the Supreme Court if confirmed: the lower federal courts consider a significant volume of claims that are legally straightforward or even frivolous. Judge Jackson dismissed dozens of cases for failure to state a valid claim for relief or satisfy minimum pleading requirements.[256] A number of Judge Jackson's procedural rulings, however, implicate important questions about the role and authority of the federal courts and may offer some guidance on how she might rule on future procedural matters. This section examines a selection of the nominee's decisions on general procedural issues before looking at two specific areas of interest: standing and sovereign immunity.

One procedural issue that has received significant attention from courts and commentators in recent years is the appropriate scope of injunctive relief in challenges to government action. Much of this discussion centers on nationwide injunctions, court orders that bar the government from enforcing a challenged law or policy with respect to all persons, regardless of whether they are parties to the litigation.[257] The Supreme Court has considered multiple cases involving nationwide injunctions in recent years, and several Justices have opined on the practice in

[252] A Love of Food I, LLC v. Maoz Vegetarian USA, Inc.,70 F. Supp. 3d 376, 405 (D.D.C. 2014).

[253] *See, e.g.*, Ford Motor Co. v. Mont. Eighth Jud. Dist. Ct., 141 S. Ct. 1017, 1022 (2021) (unanimous; Barrett, J., not participating) (addressing personal jurisdiction); Fort Bend Cnty., Tex. v. Davis, 139 S. Ct. 1843, 1846 (2019) (unanimous) (addressing the forfeiture of arguments); Frank v. Gaos, 139 S. Ct. 1041, 1046 (2019) (per curiam) (eight-Justice majority remanding to court of appeals to address constitutional standing questions); Nutraceutical Corp. v. Lambert, 139 S. Ct. 710, 715 (2019) (unanimous) (addressing whether a deadline is subject to equitable tolling); New Prime Inc. v. Oliveira, 139 S. Ct. 532, 537, 539 (2019) (seven-Justice majority; Kavanaugh, J., not participating) (addressing which issues are appropriate for courts and arbitrators to decide); Henry Schein, Inc. v. Archer & White Sales, Inc., 139 S. Ct. 524, 529 (2019) (unanimous) (same).

[254] *See, e.g.*, Lamps Plus, Inc. v. Varela, 139 S. Ct. 1407, 1419 (2019) (majority opinion of Roberts, C.J., joined by Thomas, Alito, Gorsuch, and Kavanaugh, JJ.) ("Courts may not infer from an ambiguous agreement that parties have consented to arbitrate on a classwide basis.").

[255] *See* Home Depot U.S.A., Inc. v. Jackson, 139 S. Ct. 1743, 1747–51 (2019) (majority opinion of Thomas, J., joined by Ginsburg, Breyer, Sotomayor, and Kagan, JJ.) (holding that a third-party counterclaim defendant may not remove a case to federal court under either the general removal statute or the Class Action Fairness Act).

[256] *E.g.*, Shaw v. Ocwen Loan Servicing, LLC, No. 14-cv-2203, 2015 WL 4932204, at *1 (D.D.C. Aug. 18, 2015) (dismissing complaint *sua sponte* under Federal Rules of Civil Procedure 8(a) and 12(b)(6)); Pencheng Si v. Laogai Rsch. Found., 71 F. Supp. 3d 73, 79 (D.D.C. 2014) (granting in part motion to dismiss False Claims Act claims for failure to comply with the pleading requirements of Federal Rule of Civil Procedure 9(b)). *See also* "The Role of a U.S. District Judge" *supra*.

[257] *See generally* CRS Report R46902, *Nationwide Injunctions: Law, History, and Proposals for Reform*, by Joanna R. Lampe.

separate opinions, but a majority of the Supreme Court has yet to issue clear guidance on the overall legal status of nationwide injunctions.[258]

Judge Jackson considered the proper scope of an injunction against the government in the 2019 case *Make the Road New York v. McAleenan*.[259] In that case, the nominee held that a DHS policy designating for expedited removal certain persons who entered the United States unlawfully was likely issued in violation of the APA and must be enjoined.[260] Having determined that an injunction was warranted, Judge Jackson rejected the government's argument that any injunction should be limited to barring enforcement against the plaintiffs before the court.[261] She noted: "Ordinarily, in the wake of an unfavorable judgment from a federal court regarding procedural claims brought under the APA, agency actors willingly refrain from imposing on anyone the rule that a federal court has found to be unlawful."[262] The government's request to continue to enforce the policy against non-parties, she reasoned, was

> a terrible proposal that is patently inconsistent with the dictates of the law. Additionally, it reeks of bad faith, demonstrates contempt for the authority that the Constitution's Framers have vested in the judicial branch, and, ultimately, deprives successful plaintiffs of the full measure of the remedy to which they are entitled.[263]

On appeal, the D.C. Circuit reversed Judge Jackson's decision, holding that the agency's action was not subject to judicial review. Having done so, the appeals court did not address the scope of injunctive relief that would be available.[264]

Judge Jackson's time on the district court appears to have given her a keen understanding of the practical impact of appellate court procedural rulings. In both district court and D.C. Circuit decisions, she has expressed strong views on appeals court rulings that vacate district court decisions. As one example, in *Maryland v. U.S. Department of Education*, Judge Jackson dismissed for lack of standing a challenge by state attorneys general to the Department's failure to implement certain regulations concerning deceptive marketing by for-profit colleges.[265] While an appeal of that district court ruling was pending, a new rule rescinding the regulations took effect, and the states requested that the D.C. Circuit vacate the district court's order because the case was moot. In a summary order, the D.C. Circuit granted the motion for vacatur and remanded the case to the district court with instructions to dismiss as moot.[266] Vacatur meant that the district court opinion on standing had no legal effect, including as precedent, even though the court of appeals had not reviewed the substance of the opinion or determined whether it was erroneous.

Judge Jackson heeded the appellate court's directions on remand, but wrote an opinion, "from the standpoint of the district court," objecting to the vacatur.[267] She asserted that the D.C. Circuit's

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[258] *See id.* at 10.

[259] 405 F. Supp. 3d 1 (D.D.C. 2019), *rev'd sub nom.* Make The Road N.Y. v. Wolf, 962 F.3d 612 (D.C. Cir. 2020); *see also "Immigration"* section.

[260] *Id.* at 44–66.

[261] *Id.* at 66.

[262] *Id.*

[263] *Id.*

[264] *Make The Road N.Y.*, 962 F.3d at 618. *But see id.* at 647 & n.16 (Rao, J., dissenting) (finding "especially problematic" the district court's entry of a nationwide injunction).

[265] 474 F. Supp. 3d 13, 20 (D.D.C. 2020), *vacated*, No. 20-5268, 2020 WL 7868112 (D.C. Cir. Dec. 22, 2020).

[266] Maryland v. U.S. Dep't of Ed., No. 20-5268, 2020 WL 7868112 (D.C. Cir. Dec. 22, 2020).

[267] Maryland v. U.S. Dep't of Ed., No. 17-cv-2139, 2020 WL 7773390, at *1 (D.D.C. Dec. 29, 2020).

willingness to grant vacatur in such cases "appears to have resulted in the seemingly unnecessary nullification of a district court's contribution to the body of common law reasoning concerning Article III standing."[268] The nominee's opinion, drafted more like a dissent than a typical trial court opinion, warned that the practice of vacatur "rewards gamesmanship concerning complex mootness questions, raises the specter of [an] end-run around established norms of appellate procedure, . . . and has significant downstream consequences."[269]

Judge Jackson remained interested in the issue of vacatur after her appointment to the D.C. Circuit. In February 2022, Judge Jackson sat on a motions panel of the D.C. Circuit that issued an order dismissing an appeal as moot, but denied a request to vacate the underlying district court judgment.[270] The nominee filed an opinion concurring in the panel's disposition, emphasizing that vacatur of a district court decision that has become moot is an extraordinary remedy that should be granted only when required out of fairness to the parties.[271] She asserted that "rote vacatur of district court opinions, without merits review and simply because the dispute is subsequently mooted, is inconsistent with well-established principles of appellate procedure and practice."[272] Judge Jackson wrote:

> [T]he dispute-and-decision bell cannot be unrung—there was a dispute and someone was declared the winner. Written opinions are the most accurate historical record of what the supervising court thought of those events. And in a common law system of case-by-case adjudication, that history need not, and should not, be cavalierly discarded.[273]

These opinions on the subject of vacatur provide insight into Judge Jackson's views not only on a narrow issue of appellate procedure, but also on the respective roles of district and appellate courts and the value of precedents as part of an ever-growing body of case law.

More generally, Judge Jackson's procedural decisions evince care and attention to detail, even in cases that are legally straightforward. In one case, for instance, Judge Jackson considered claims by unrepresented individuals challenging the foreclosure on their home.[274] A magistrate judge determined that the plaintiffs had failed to serve the defendants properly and recommended that the case be dismissed. The nominee reviewed the magistrate judge's findings and agreed that service had been defective.[275] However, she further concluded that the plaintiffs, who were not represented by counsel, "were never given a clear explanation of *why* their prior attempts at service were deemed deficient, and they were not provided the customary notice of the consequences of their failure to effect proper service upon Defendants."[276] She thus declined to dismiss the case and granted the plaintiffs "one more opportunity to effect proper service."[277]

In another case, the nominee granted in part and denied in part a motion to dismiss employment discrimination and retaliation claims by a former D.C. public school teacher.[278] Although she

[268] *Id*.

[269] *Id.*

[270] I.A. v. Garland, No. 20-5271, 2022 WL 696459, at *1 (D.C. Cir. Feb. 24, 2022).

[271] *Id.* at *3 (statement of Jackson, J.).

[272] *Id.*

[273] *Id.* at 3–4.

[274] Raja v. Fed. Deposit Ins. Corp., No. 16-cv-0511, 2018 WL 818393, at *1 (D.D.C. Feb 12, 2018).

[275] *Id.*

[276] *Id.*

[277] *Id.*

[278] Willis v. Gray, No. 14-cv-1746, 2020 WL 805659, at *1 (D.D.C. 2020).

observed that the complaint was "not a model of clarity," Judge Jackson parsed each claim to determine which claims were precluded by past litigation, which were time-barred, and which could proceed.[279]

In a 2017 environmental case, Judge Jackson granted a motion to transfer litigation involving elk feeding sites in Wyoming to the Wyoming District Court, holding that such matters were "plainly local in character and were best left to Wyoming's courts."[280] The nominee declined to criticize prior District of D.C. decisions that emphasized the "iconic" nature and national significance of the Jackson elk, but wrote that the narrow question before her was only whether the litigation was "necessarily national in scope."[281]

In another case, Judge Jackson denied a motion to dismiss as duplicative in a case where similar claims were pending in both the District of D.C. and the District of West Virginia.[282] While she critiqued the government's motion to dismiss as "a calculated attempt to force [the plaintiff] to pursue its APA claims in federal court in West Virginia, despite the fact that [the plaintiff] has selected the instant forum and without due regard to the most pertinent equitable considerations," she ultimately declined to endorse either party's position in full.[283]

In a 2017 tort case, *Washington Metropolitan Area Transit Authority (WMATA) v. Ark Union Station, Inc.*, Judge Jackson declined to dismiss a claim in which WMATA alleged that the defendant's negligence caused a water leak that damaged Metro facilities.[284] The nominee held that, under a provision of the D.C. Code based on the common law *nullum tempus* doctrine, the statute of limitations did not run against WMATA because the agency's negligence suit sought to vindicate public rights.[285] While Judge Jackson stated she was "extending the benefit of *nullum tempus* to WMATA in this case," she emphasized that her holding was rooted in authoritative interpretations of D.C. law from the D.C. Court of Appeals and was limited to the tort claims before her.[286]

Standing

One key procedural issue that has arisen in a number of Judge Jackson's cases is standing—the constitutional requirement that any plaintiff who sues in federal court must have a concrete, personal interest in the litigation, rather than simply raising a generalized policy objection or other grievance.[287] To establish standing, a plaintiff must show that she has suffered (or will imminently suffer) an injury in fact that is caused by the defendant and can be redressed by a favorable court decision.[288] If the plaintiff cannot demonstrate standing, the federal courts lack

[279] *Id.* at *5.

[280] W. Watersheds Project v. Tidwell, 306 F. Supp. 3d 350, 363 (D.D.C. 2017).

[281] *Id.* at 363.

[282] Coal River Mountain Watch v. U.S. Dep't of the Interior, 146 F. Supp. 3d 17, 19–20 (D.D.C. 2015).

[283] *Id.* at 20.

[284] 268 F. Supp. 3d 196, 200 (D.D.C. 2017).

[285] *Id.* at 200; *see also id.* at 201 (explaining under the *nullum tempus* doctrine, a sovereign is immune from statutes of limitations).

[286] *Id.* at 211.

[287] Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992); *see also* "Standing and Procedural Issues in Environmental Law Cases" *infra*.

[288] *Lujan*, 504 U.S. at 560–61.

jurisdiction to consider the claim.[289] The doctrine of standing, although procedural on its face, implicates broader questions about the public's access to the courts and the constitutional limits of judicial review.

Recognizing those broader questions, Judge Jackson has at times authored decisions that discuss the standing doctrine's origin and purpose. In a 2015 decision, Judge Jackson cited constitutional text, judicial precedents, and a law review article by the late Associate Justice Antonin Scalia and explained that the "standing doctrine is primarily rooted in the concern for maintaining the separation of powers."[290] The nominee further opined that constitutional standing "acts as a gatekeeper, opening the courthouse doors to narrow disputes that can be resolved merely by reference to facts and laws, but barring entry to the broad disquiets that can be resolved only by an appeal to politics and policy."[291] In another case, she wrote: "Boiled to bare essence, then, 'the standing question is whether the plaintiff has alleged such a personal stake in the outcome of the controversy as to warrant [her] invocation of federal-court jurisdiction and to justify exercise of the court's remedial powers on [her] behalf.'"[292]

Under this rationale, Judge Jackson has held that plaintiffs without a sufficiently personal stake in a case did not have standing. For instance, in *New England Anti-Vivisection Society v. U.S. Fish & Wildlife Service*, Judge Jackson ruled that an animal welfare organization lacked standing to challenge the grant of a wildlife export permit to transfer chimpanzees to a zoo in the United Kingdom.[293] While she noted that the plaintiffs raised "persuasive" arguments on the merits, Judge Jackson held those plaintiffs "*themselves* must have a concrete and particularized injury in fact that is actual or imminent, that is fairly traceable to Defendants' actions, and that a federal court's decision can redress."[294] Likewise, in *Feldman v. Bowser*, Judge Jackson rejected a D.C. taxpayer's challenge to the D.C. Local Budget Autonomy Amendment Act of 2012 and large portions of the D.C. budget enacted pursuant to the Act.[295] Finding that the plaintiff sought broadly "to challenge the *method* by which the District enacts its budget,"[296] she wrote that "this Court is not persuaded that it should *expand* the reach of the narrow standing exception available to municipal taxpayers" without more precedential support.[297]

The doctrine of standing also governs access to courts by establishing when an association may sue to protect the rights of its members. In *Equal Rights Center v. Uber Technologies, Inc.*, Judge Jackson considered claims that Uber discriminated against wheelchair users in violation of the Americans with Disabilities Act and the D.C. Human Rights Act.[298] The nominee held that a non-profit organization dedicated to combatting disability discrimination had associational standing to

[289] *Id.* at 561.

[290] Food & Water Watch, Inc. v. Vilsack, 79 F. Supp. 3d 174, 185 (D.D.C. 2015), *aff'd*, 808 F.3d 905 (D.C. Cir. 2015).

[291] *Id.* at 186. Judge Jackson cited this language in a number of her subsequent decisions. *See, e.g.*, Fed. Forest Res. Coal. v. Vilsack, 100 F. Supp. 3d 21, 34 (D.D.C. 2015); Cal. Clinical Lab. Ass'n v. Sec. of Health & Human Servs., 104 F. Supp. 3d 66, 74 (D.D.C. 2015).

[292] *California Clinical Laboratory Ass'n*, 104 F. Supp. 3d at 74 (quoting Warth v. Seldin, 422 U.S. 490, 498–99 (1975)) (alteration in original).

[293] 208 F. Supp. 3d 142, 148 (D.D.C. 2016); *see also* "Standing and Procedural Issues in Environmental Law Cases" *infra*.

[294] *New England Anti-Vivisection Soc'y*, 208 F. Supp. 3d at 148.

[295] 315 F. Supp. 3d 299, 302 (D.D.C. 2018).

[296] *Id.* at 309.

[297] *Id.* at 312.

[298] 525 F. Supp. 3d 62, 66 (D.D.C. 2021). For additional discussion of the substantive claims in this case, see "Civil Rights and Qualified Immunity" section.

challenge Uber's policies. This was in part because one of the non-profit's members alleged she was "plausibly deterred from attempting to use Uber's service" because she believed the company would not accommodate her disability, and thus had incurred "a sufficient injury in fact to support a finding that she has standing to sue in her own right."[299]

One high-profile case discussed in greater detail elsewhere in this report raised a substantial standing question.[300] In *Committee on the Judiciary v. McGahn*, Judge Jackson held that a congressional committee had standing to sue in federal court to enforce a subpoena issued to an executive branch official.[301] In response to a claim that the Committee had not suffered an injury giving rise to standing, the nominee wrote that "no federal judge has ever held that defiance of a valid subpoena does not amount to a concrete and particularized injury in fact."[302] She further opined that this was "perhaps for good reason: if defiance of duly issued subpoenas does not create Article III standing and does not open the doors of the court for enforcement purposes, it is hard to see how the wheels of our system of civil and criminal justice could keep turning."[303]

Sovereign Immunity and Suits Against Foreign Defendants

Two distinct but related procedural issues that Judge Jackson has confronted in multiple cases involve questions of when sovereign entities are immune from suit[304] and when U.S. federal courts can hear claims involving foreign parties. These questions overlap when a U.S. court considers whether to exercise its authority over a foreign sovereign.[305]

One of Judge Jackson's opinions for the D.C. Circuit raised procedural issues implicating the relationship between different federal courts as well as questions related to foreign sovereign immunity. In *Wye Oak Technology, Inc. v. Republic of Iraq*, a D.C. Circuit panel including Judge Jackson considered the government of Iraq's claim of sovereign immunity in a contract dispute with an American defense contractor.[306] The case initially proceeded in a Virginia federal court and before the Fourth Circuit. The Fourth Circuit allowed the claim against Iraq to proceed, applying an exception to the Foreign Sovereign Immunities Act (FSIA) for claims arising from a foreign sovereign's commercial activities.[307] Following transfer to the District of D.C., the district court held that the "law of the case" doctrine required the D.C. federal courts to follow the Fourth Circuit's ruling.[308] The district court also agreed with the Fourth Circuit's substantive holding that the FSIA's commercial activity exception applied.[309]

On appeal, the D.C. Circuit reversed. In an opinion authored by Judge Jackson, the court held that the law of the case doctrine did not control the D.C. Circuit's FSIA analysis, in part because the Fourth Circuit and the D.C. federal courts confronted the sovereign immunity claim at different

[299] *Equal Rights Ctr.*, 525 F. Supp. 3d at 79.

[300] *See* "Standing" *supra*; "Separation of Powers" *infra*.

[301] 415 F. Supp. 3d 148, 154 (D.D.C. 2019).

[302] *Id.* at 189.

[303] *Id.*

[304] For discussion of the related doctrine of qualified immunity, see "Civil Rights and Qualified Immunity" *infra*.

[305] In addition to the cases discussed below, see, e.g., Mohammad Hilmi Nassif & Partners v. Republic of Iraq, No. 17-cv-2193, 2020 WL 1444918 (D.D.C. Mar. 25, 2020).

[306] 24 F.4th 686 (D.C. Cir. 2022).

[307] Wye Oak Tech., Inc. v. Republic of Iraq, 666 F.3d 205, 207 (4th Cir. 2011).

[308] Wye Oak Tech., Inc. v. Republic of Iraq, No. 10-cv-1182, 2019 WL 4044046, at *23 (D.D.C. Aug. 27, 2019).

[309] *Id.*

stages in the litigation.[310] Looking to the FSIA's text, judicial precedent, and legislative history, the D.C. Circuit further held that the Fourth Circuit improperly applied the FSIA exception.[311] However, concluding that another clause of the commercial activity exception might apply, the panel remanded the case to the district court for further consideration.[312]

In an earlier district court case, *SACE S.p.A. v. Republic of Paraguay*, Judge Jackson considered a dispute over the interpretation of the FSIA that she described as an issue of first impression in the D.C. federal courts.[313] The case involved a purported waiver of sovereign immunity by a government official who lacked authority to effect such a waiver. Looking to persuasive authority from other circuits, the nominee held that the suit must be dismissed because "the waiver provision of the FSIA requires actual authority to waive the foreign state's sovereign immunity."[314]

In *Youssef v. Embassy of United Arab Emirates*, Judge Jackson considered an age discrimination claim from a former employee of the United Arab Emirates' (UAE) Embassy in Washington, D.C.[315] The UAE and the Embassy claimed sovereign immunity under the FSIA. They also argued that the claim must be dismissed under the federal enclave doctrine, which provides that when the federal government acquires land from a state, "any state law that is enacted *after* the federal government acquires the property is generally inapplicable on that property."[316] Judge Jackson rejected both claims, holding that the case fell within the FSIA's commercial activity exception, and that the federal enclave doctrine does not apply to the D.C. laws.[317]

In *Azima v. RAK Investment Authority*, Judge Jackson denied a motion to dismiss Computer Fraud and Abuse Act claims on the grounds of sovereign immunity.[318] In their dispute over whether the FSIA exception for commercial activity applied, the parties disagreed as a factual matter about where an alleged computer hacking took place. Judge Jackson declined to resolve the factual dispute, holding that

> the text, structure, and purpose of the FSIA's commercial activity exception all point to the conclusion that, rather than mandating identification of the location of the foreign sovereign's allegedly tortious act, Congress's primary concern is ensuring that a lawsuit can be maintained if the foreign sovereign acts in a commercial capacity and undertakes a harmful act that occurs in, or impacts, the United States.[319]

In another case, Judge Jackson disposed of claims against foreign defendants without reaching the question of sovereign immunity.[320] In *In re Air Crash Over Southern Indian Ocean*, the nominee

[310] *Wye Oak*, 24 F.4th at 697.

[311] *Id.* at 700. *Wye Oak* provides one example of Judge Jackson's willingness to use a variety of tools in statutory interpretation. *See also* "Statutory Interpretation" *supra*.

[312] *Wye Oak*, 24 F.4th at 703.

[313] 243 F. Supp. 3d 21, 35–36 (D.D.C. 2017).

[314] *Id.* at 24.

[315] No. 17-cv-2638, 2021 WL 3722742 (D.D.C. Aug. 23, 2021).

[316] *Id.* at *10.

[317] *Id.* at *1.

[318] 305 F. Supp. 3d 149, 154 (D.D.C. 2018), *rev'd*, 926 F.3d 870 (D.C. Cir. 2019).

[319] *Id.* at 171. *Azima* also raised the question of whether the suit against the foreign sovereign should take place in the United Kingdom pursuant to the forum-selection clause in an agreement between the parties. Judge Jackson held that the forum-selection clause did not apply. *Id.* at 172–76. On that issue, however, the nominee was later reversed by the D.C. Circuit. *See* Azima v. RAK Inv. Auth., 926 F.3d 870 (D.C. Cir. 2019).

[320] *In re* Air Crash Over Southern Indian Ocean, 352 F. Supp. 3d 19, 52–53 (D.D.C. 2018) (holding that existence of

considered numerous claims arising from the disappearance of Malaysia Airlines Flight MH370. She granted the defendants' motion to dismiss on the ground of *forum non conveniens*, holding that Malaysia provided an available and adequate alternative forum for the litigation.[321] After analyzing at length multiple factors that weighed for and against dismissal, she concluded that none of the claims at issue were "ultimately more conveniently litigated in the United States than in Malaysia."[322]

Other Judge Jackson opinions involved claims of sovereign immunity by domestic state actors.[323] For instance, in *Mackinac Tribe v. Jewell*, the Secretary of the Interior raised a sovereign immunity defense in a suit seeking federal recognition of an Indian tribe.[324] Judge Jackson held that the United States had waived sovereign immunity with respect to the suit, but ultimately dismissed it on other grounds.[325] In *Doe v. WMATA*, a passenger who was sexually assaulted on a Metro train sued WMATA, alleging the agency was negligent in failing to prevent the assault.[326] Judge Jackson granted WMATA's motion to discuss, holding that "WMATA has sovereign immunity . . . under well-established precedents that demarcate the boundaries of governmental and proprietary agency functions."[327]

Civil Rights and Qualified Immunity

Judge Jackson has considered a number of civil rights cases, including claims against both private entities and state actors.[328] The nominee's decisions in this area demonstrate her review of the facts in each case and analysis of the applicable legal precedents. However, because these cases are often highly fact-dependent, it is difficult to discern broader trends.

As one example, in *Pierce v. District of Columbia*, Judge Jackson considered disability discrimination and retaliation claims brought by a deaf man who was incarcerated in the D.C. Correctional Treatment Facility without accommodations such as access to an American Sign Language interpreter.[329] Judge Jackson ruled in favor of the plaintiff on his discrimination claims, finding dispositive the fact that prison staff "did *nothing* to evaluate [the plaintiff's] need for accommodation, despite their knowledge that he was disabled."[330] Rejecting as "preposterous" the government's claim that the plaintiff had not requested accommodations for his disability, she held that "the failure of prison staff to conduct an informed assessment of the abilities and accommodation needs of a new inmate who is obviously disabled is intentional discrimination in the form of deliberate indifference . . . as a matter of law."[331]

sovereign immunity questions was one factor that weighed against U.S. courts considering the case), *aff'd*, 946 F. 3d 607 (D.C. Cir. 2020).

[321] *Id.* at 37.

[322] *Id.*

[323] Sovereign immunity is also the basis for qualified immunity for government officials, which is treated separately in this report. *See* "Civil Rights and Qualified Immunity" *infra*.

[324] 87 F. Supp. 3d 127, 130 (D.D.C. 2015).

[325] *Id.* at 130.

[326] 453 F. Supp. 3d 354, 359 (D.D.C. 2020).

[327] *Id.* at 364.

[328] In addition to the cases discussed in this section, see "Business and Employment Law" *supra*.

[329] 128 F. Supp. 3d 250, 253 (D.D.C. 2015).

[330] *Id.* at 254.

[331] *Id.* at 268.

In civil rights litigation against the government, Judge Jackson was often required to determine whether the defendants could benefit from qualified immunity—the legal doctrine holding that government officials performing discretionary duties are immune from suit unless they violate clearly established law.[332] Judge Jackson rejected a qualified immunity defense in *Patterson v. United States*, holding that U.S. Park Police who arrested an individual for using profanity in a public park violated clearly established law under the First and Fourth Amendments.[333] The nominee explained that there was "no dispute about the 'clearly established' nature of the basic rights at issue."[334] She further held that "no reasonable officer could conclude that [the plaintiff's] conduct was likely to produce violence or otherwise cause a breach of the peace, as required to justify either punishing his speech under the First Amendment or arresting him for disorderly conduct" under D.C. law.[335]

In *Robinson v. Farley*, Judge Jackson denied a motion to dismiss an array of statutory, constitutional, and common law claims arising from the arrest of an intellectually disabled man.[336] The nominee rejected the defendants' argument that the complaint must specify which law enforcement officers engaged in what alleged misconduct, stating that such a requirement could not "possibly be the state of the law."[337] She explained that, on a motion to dismiss, before the plaintiffs could develop their factual claims through discovery, "it is impossible to imagine that a complaint involving the allegedly wrongful conduct of a number of police officers could ever contain the specificity that Defendants here say is required. And, indeed, existing precedent clearly indicates that no such pleading standard exists."[338] Judge Jackson also rejected the defendants' attempt to raise "a fleeting 'qualified immunity' reference that is entirely devoid of any relevant substance," which she characterized as duplicating their specificity argument rather than properly addressing the requirements of qualified immunity.[339]

In other cases, Judge Jackson has accepted defendants' claims of qualified immunity. For instance, in *Pollard v. District of Columbia*, Judge Jackson dismissed on qualified immunity grounds claims arising from the arrest of an intellectually disabled man on drug charges.[340] Judge Jackson held that the arresting officers were entitled to qualified immunity on several claims because the plaintiffs identified no infringement of the arrestee's rights, let alone one that violated clearly established law.[341] Similarly, in *Kyle v. Bedlion*, Judge Jackson granted summary judgment in favor of the government on claims of false arrest and use of excessive force in violation of the Fourth and Fifth Amendments.[342] The nominee concluded that the Fifth Amendment did not apply to the plaintiff's claims and, even if the Fourth Amendment could apply to the claims, the

[332] Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982). Qualified immunity analysis requires more than simply determining whether the defendant government official violated the Constitution, because "a government official who violates the constitution will be protected if his or her actions were reasonable in light of clearly established law and the information the official possessed when he or she acted." *Watson v. City of Kansas City*, 857 F.2d 690, 697 (10th Cir. 1988).

[333] 999 F. Supp. 2d 300, 303 (D.D.C. 2013).

[334] *Id.* at 312.

[335] *Id.* at 315.

[336] 264 F. Supp. 3d 154, 156 (D.D.C. 2017).

[337] *Id.* at 160.

[338] *Id.*

[339] *Id.* at 162.

[340] 191 F. Supp. 3d 58, 63 (D.D.C. 2016), *aff'd*, 698 F. App'x 616 (D.C. Cir. 2017).

[341] *Id.* at 68.

[342] 177 F. Supp. 3d 380, 384 (D.D.C. 2016).

defendant officers were entitled to qualified immunity because they did not violate a Fourth Amendment right that was "clearly established."[343]

Outside the qualified immunity context, in *Jackson v. Bowser*, the nominee considered constitutional and common law claims against public and private actors involved in redevelopment projects in the District of Columbia that allegedly caused displacement of low-income residents, minorities, and seniors.[344] Judge Jackson dismissed the case, holding that the private defendants were not state actors subject to suit for constitutional violations and, with respect to the government defendants, the plaintiff "failed to plead sufficient facts to support a plausible inference that a District policy or custom caused him to suffer a constitutional injury."[345]

In *Rothe Development, Inc. v. Department of Defense*, Judge Jackson considered an equal protection challenge under the Fifth Amendment's Due Process Clause to a provision of the Small Business Act that established a business development program for socially and economically disadvantaged small business concerns.[346] The nominee rejected the challenge, holding that the plaintiff's facial challenge required showing that "no set of circumstances" existed under which the challenged provision would be valid, or that the provision lacked "any plainly legitimate sweep," and plaintiff failed to meet that high bar.[347] The D.C. Circuit affirmed Judge Jackson's judgment, albeit on different grounds, and the Supreme Court denied review.[348]

Finally, in a discrimination case against a private defendant, Judge Jackson considered claims that Uber discriminated against wheelchair users in violation of the Americans with Disabilities Act and the D.C. Human Rights Act.[349] After holding that the plaintiff organization had standing to sue,[350] as discussed above, Judge Jackson rejected Uber's arguments that the relevant anti-discrimination statutes did not apply to the company, holding that the plaintiff made sufficiently plausible claims of discrimination to survive a motion to dismiss.[351]

[343] *Id.* at 389. Having dismissed the plaintiff's federal claims, the nominee declined to exercise pendent jurisdiction over the remaining D.C. law tort claims. *Id.* at 399–400.

[344] No. 1:18-cv-1378, 2019 WL 1981041, at *1 (D.D.C. 2019).

[345] *Id.* at *6. Having dismissed the plaintiff's federal claims, the nominee declined to exercise pendent jurisdiction over the remaining D.C. common law claims. *Id.* at *11.

[346] 107 F. Supp. 3d 183, 187 (D.D.C. 2015), *aff'd*, 836 F.3d 57 (D.C. Cir. 2016).

[347] *Id.* at 207.

[348] Rothe Dev., Inc. v. U.S. Dep't of Defense, 836 F.3d 57, 63 (D.C. Cir. 2016), *cert denied*, 138 S. Ct. 354 (2017).

[349] Equal Rights Ctr v. Uber Techs., Inc., 525 F. Supp. 3d 62, 66 (D.D.C. 2021).

[350] *Id.* at 79. For additional discussion of the portion of the decision focused on standing, see *supra* "Standing."

[351] *Equal Rights Ctr.*, 525 F. Supp. 3d at 81–89.

Criminal Law and Procedure

Over the course of her academic[352] and legal career,[353] Judge Jackson worked on criminal law and procedure issues from a number of different perspectives.[354] For example, from 2005 to 2007, Judge Jackson was an assistant federal public defender in the appellate division of the office of the D.C. Federal Public Defender,[355] where she represented indigent clients in appeals stemming from, among other things, alleged firearms, tax evasion, and fraud offenses.[356] As an assistant federal public defender, Judge Jackson also "represented a detainee seeking habeas review of his classification as an 'enemy combatant' and his resulting detention at the United States Naval Station in Guantanamo Bay, Cuba."[357]

In private practice, Judge Jackson worked on criminal appeals[358] and authored amicus briefs for Supreme Court cases on issues such as permissible exclusions under the Speedy Trial Act[359] and whether automatic vehicle searches subsequent to the arrest of the vehicle's occupant are compatible with the Fourth Amendment.[360] This section of the report focuses primarily on Judge Jackson's work for the U.S. Sentencing Commission and as a district court judge.[361]

Substantive Criminal Law

Due to the nature of federal district court work, Judge Jackson has presided over a number of criminal cases that did not result in substantial written opinions, including several cases she identified as "significant" on the Senate Judiciary Committee's questionnaires submitted in

[352] Judge Jackson authored scholarly articles as a law student with a criminal law focus. *See, e.g.*, *Prevention Versus Punishment*, *supra* note 120 (exploring boundary between regulation and punishment in the context of sex offender legislation and concluding that in determining how to classify a given statute, a court should look to the effect of a sanction and whether it implicates constitutional provisions); *Racketeer Influenced and Corrupt Organizations Act (Rico)—Scope of Liability After* Reves v. Ernst & Young*—Second Circuit Holds Liable Only Those Who Operate or Manage the Enterprise; First Circuit Extends Liability to All in Chain of Command*, 108 HARV. L. REV. 1405 (1995) (evaluating two federal circuit court opinions regarding the extent of RICO liability for low-level employees, and critiquing a First Circuit opinion holding that RICO prosecution is permissible for "every enterprise employee who is within the 'chain of command'"). Judge Jackson's interest in criminal law issues was evident even as an undergraduate. *See Senate Judiciary Attachments*, *supra* note 74, at 104 (undergraduate senior thesis addressing the plea bargain process).

[353] Judge Jackson has been a panelist and presenter on a number of criminal law and procedure topics. *See generally Senate Judiciary Questionnaire*, *supra* note 16, at 9–22.

[354] *See* "Biographical Information" *infra*.

[355] CRS Legal Sidebar LSB10702, *Judge Ketanji Brown Jackson: Selected Primary Material*, by Juria L. Jones and Laura Deal.

[356] *Senate Judiciary Questionnaire*, *supra* note 16, at 140–43.

[357] *Id.* at 141.

[358] *Id.* at 127.

[359] Brief for the National Association of Criminal Defense Lawyers as Amicus Curiae in Support of Petitioner, Bloate v. United States, 559 U.S. 196 (2010).

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

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

conjunction with her judicial nominations.[362] For instance, in *United States v. Welch*,[363] the so-called "Pizzagate" case, the defendant, driven by rumors of a child sex-trafficking ring being operated out of a Washington, D.C. restaurant, walked into the restaurant with a firearm, fired several rounds, and pointed the weapon at an employee.[364] The defendant ultimately pled guilty to federal and D.C. criminal charges and was sentenced by Judge Jackson to concurrent sentences of 24 and 48 months in prison, both within applicable U.S. Sentencing Guidelines (Guidelines) ranges.[365]

In *United States v. Wolfe*,[366] the defendant, the former Director of Security for the U.S. Senate Select Committee on Intelligence, ultimately pled guilty to making a false statement to the FBI, in violation of 18 U.S.C. § 1001, in relation to an investigation into his contacts with reporters.[367] In the course of pretrial proceedings, Judge Jackson denied the defendant's motion seeking an order that the President and others refrain from commenting publicly on the case.[368] Following the defendant's guilty plea, Judge Jackson sentenced the defendant to a within-Guidelines term of two months of imprisonment, rejecting the government's request for an upward departure.[369]

Judge Jackson's written opinions in criminal law cases provide limited insight into how she might treat particular substantive issues as a Supreme Court Justice. As previously explained, district courts are constrained by Supreme Court and appellate precedent, and are often charged with the resolution of factual disputes or the application of settled legal rules that may not suggest a particular judicial philosophy or approach.[370] These aspects of district court work are reflected in the nominee's decisions in many criminal cases.

In *United States v. Johnson*, for example, the defendant filed a motion for a new trial after being convicted by a jury of various federal and D.C. weapons charges based on his possession of improvised explosive devices (IEDs), among other things.[371] The defendant argued that the government failed to adduce evidence at trial that the IEDs at issue met the relevant legal definitions of "weapon of mass destruction" and "destructive device."[372] Judge Jackson proceeded through various portions of the trial transcript in order to show that "the government did, in fact, introduce uncontradicted evidence during trial that both IEDs" had the requisite characteristics for the jury to find that they met those definitions.[373] The nominee thus concluded that the defendant's motion failed to meet the "heavy burden" of demonstrating the jury's verdict

[362] *Senate Judiciary Questionnaire*, *supra* note 16, at 92–102; S. COMM. JUDICIARY, 117th Cong., QUESTIONNAIRE FOR JUDICIAL NOMINEES, at 70–79, https://www.judiciary.senate.gov/imo/media/doc/Jackson%20Senate%20Judiciary%20Questionnaire1.pdf (last visited Mar. 9, 2022) [hereinafter *D.C. Circuit Questionnaire*].

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

[364] *Senate Judiciary Questionnaire*, *supra* note 16, at 100–01.

[365] *Id.* The U.S. Sentencing Guidelines, promulgated by the U.S. Sentencing Commission, establish sentencing policies and practices for federal courts. *See Guidelines*, U.S. SENTENCING COMM'N, https://www.ussc.gov/guidelines.

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

[367] *D.C. Circuit Questionnaire*, *supra* note 362, at 78.

[368] *Id.*

[369] *Id.*

[370] *See* "The Role of a U.S. District Judge" *supra*.

[371] No. 15-CR-125, 2019 WL 3842082, *1 (D.D.C. Aug. 15, 2019), *aff'd in part and vacated in part*, 4 F.4th 116 (D.C. Cir. 2021).

[372] *Id.*

[373] *Id.* at *3.

should be overturned, as doing so would "require the Court to ignore or discount the bulk of the government's evidence at trial."[374]

One case in which Judge Jackson was called upon to address an unsettled legal question, *United States v. Hillie*, concerned the scope of federal prohibitions on the production and possession of child pornography.[375] The defendant in the case moved to dismiss the charges against him on several federal child-pornography counts; the motion turned on the meaning of the statutory phrase "lascivious exhibition."[376] To interpret that phrase, Judge Jackson relied on a set of non-dispositive, guiding factors referred to as the "*Dost* factors," which include consideration of "whether the visual depiction is intended or designed to elicit a sexual response in the viewer," among other things.[377] The nominee acknowledged that the courts of appeals had different opinions about the usefulness of the *Dost* factors, and she recognized that the D.C. Circuit had not yet taken a position on the question.[378] Judge Jackson decided to rely on the *Dost* factors because those factors captured relevant contextual information that could be helpful in evaluating the "elusive concept" of lasciviousness, at least in some cases.[379] Accordingly, referencing the factors, the nominee concluded that a reasonable jury could find the videos at issue to constitute "lascivious exhibition," emphasizing the need to account for the defendant's intent to gain sexual gratification from what was filmed, rather than the victim's actions or state of mind.[380] The defendant was subsequently convicted of seven federal child-pornography counts, but a divided panel of the D.C. Circuit vacated those convictions on appeal based on insufficient evidence.[381] Although the panel majority disavowed reliance on the *Dost* factors and rejected the view that "lascivious exhibition" could be based on the defendant's intended sexual gratification,[382] one judge on the panel "vigorously" dissented, pointing out that "most circuits" view the *Dost* factors as appropriate and several other circuits had read the relevant statute "not to require that lasciviousness be exhibited by the minor."[383]

Pretrial, Post-Conviction, and Compassionate Release

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

Many of Judge Jackson's release decisions were rendered in the context of the COVID-19 pandemic; although she addressed the implications of the pandemic in the course of her opinions, she did not rely on it to grant release automatically. For instance, in *United States v. Lee*, an inmate in pretrial detention on federal weapons charges sought emergency release in March 2020 under legal provisions (1) permitting a detention determination to be reopened if new information

[374] *Id.* at *4.

[375] United States v. Hillie, 289 F. Supp. 3d 188, 190 (D.D.C. 2018), *vacated in part*, 14 F.4th 677 (D.C. Cir. 2021).

[376] *See* 18 U.S.C. § 2256.

[377] *Hillie*, 289 F. Supp. 3d at 195.

[378] *Id.* at 195–96.

[379] *Id.* at 197.

[380] *Id.* at 200–01.

[381] United States v. Hillie, 14 F.4th 677, 680 (D.C. Cir. 2021).

[382] *Id.* at 687–93.

[383] *Id.* at 696, 699, 702 (Henderson, J., dissenting).

surfaces that has a "material bearing" on "whether there are conditions of release that will reasonably assure the appearance of such person as required and the safety of any other person and the community," and (2) authorizing temporary release when "necessary for preparation of [one's] defense or for another compelling reason."[384] Judge Jackson wrote that there was no doubt the spread of COVID-19 was new information and acknowledged that COVID-19 potentially could be a "compelling reason" for release of "*certain* defendants" with, for instance, "underlying medical conditions that make them especially vulnerable to the virus."[385] However, the opinion concluded that the pandemic did not have a "material impact" on any of the factors that led the inmate to be confined initially, and the danger posed by his release would still be "substantial."[386] Judge Jackson also held that the pandemic was an insufficiently compelling reason at the time to release an "otherwise healthy and potentially violent" defendant "based solely on the generalized risks that COVID-19 admittedly creates for all members of our society."[387]

In contrast, two weeks after her opinion in *Lee*, Judge Jackson granted pretrial release to an inmate detained on drug charges under the "material bearing" authority described above.[388] Again applying the factors bearing on the propriety of pretrial detention, Judge Jackson's opinion recognized, among other things, that several D.C. weapons charges against the inmate had subsequently been dropped; there was little record evidence that the inmate would pose a threat to the community; and the inmate had demonstrated an underlying medical condition (asthma) that could heighten his risk of harm due to COVID-19 while in pretrial detention.[389] As such, the nominee ordered the inmate's pretrial release on high-intensity supervision.[390]

Judge Jackson's compassionate release decisions reflect similar attention to case-specific circumstances. The federal compassionate release statute authorizes a federal court to reduce a term of imprisonment if consistent with Sentencing Commission policy statements and statutory sentencing factors when "extraordinary and compelling reasons warrant such a reduction," among other things.[391] In at least two decisions in 2020, Judge Jackson granted compassionate release to federal offenders based in part on the COVID-19 pandemic after examining factors specific to each offender. She wrote in *United States v. Johnson*, for instance, that "the prevalence of a novel and potentially deadly strain of coronavirus" in the inmate's prison facility, coupled with a preexisting medical condition that put him at higher risk of harm, qualified as an extraordinary and compelling reason for sentence reduction; she also decided that "none of the considerations concerning the purposes of punishment" in the statutory sentencing factors she was required to consider called for maintenance of the original prison term.[392] In so doing, Judge Jackson also

[384] 451 F. Supp. 3d 1, 5 (D.D.C. 2020) (quoting 18 U.S.C. § 3142(f), (i)).

[385] *Id.* at 8–9.

[386] *Id.* at 9.

[387] *Id.* at 9; *see also* United States v. Wiggins, No. 19-CR-258, 2020 WL 1868891, at *6 (D.D.C. Apr. 10, 2020) (recognizing grave risk of harm to inmates from COVID-19 and district court authority to grant release pending sentencing for "exceptional reasons," but concluding that individual assessment of danger from release and other factors warranted continued confinement); United States v. Leake, No. 19-CR-194, 2020 WL 2331918, at *1 (D.D.C. May 10, 2020) (reopening pretrial detention determination based on COVID-19 pandemic and substantiation of asthma condition, but concluding that statutory factors still weighed in favor of detention and compelling reason for temporary release had not been shown).

[388] United States v. Dabney, No. 20-CR-027, 2020 WL 1867750, at *1 (D.D.C. Apr. 13, 2020).

[389] *Id.* at *2–3.

[390] *Id.* at *4.

[391] 18 U.S.C. § 3582(c).

[392] 464 F. Supp. 3d 22, 27 (D.D.C. 2020); *see also* United States v. Dunlap, 485 F. Supp. 3d 129 (D.D.C. 2020) (reducing sentence after concluding that COVID-19 pandemic and underlying health conditions were extraordinary and

agreed with other District of D.C. decisions (but in opposition to some decisions in other jurisdictions) that a statutory exhaustion requirement for compassionate release motions could be waived.[393]

In *United States v. Sears*, by contrast, Judge Jackson denied compassionate release of an inmate with medical conditions, such as diabetes mellitus and asthma, that he claimed placed him at greater risk of serious complications from COVID-19.[394] The nominee's opinion recognized that the inmate's "serious underlying medical conditions," in "conjunction with the COVID-19 pandemic and the prevalence of that disease in the facility where he is housed," qualified as extraordinary and compelling reasons under the compassionate release statute justifying release.[395] However, the Judge's opinion concluded that reduction of the inmate's sentence would not comport with statutory sentencing factors concerning the purposes of punishment, citing the "extremely serious" nature of the inmate's crime (distribution of child pornography), his high risk of reoffending and lack of sex offender treatment while in federal custody, and the risk to the community if he were released.[396]

In a compassionate release decision unrelated to the COVID-19 pandemic, Judge Jackson granted release to a 72-year-old prisoner with serious medical conditions who fatally shot a U.S. Marshal in 1971, but had since been deemed "completely reformed" by numerous federal corrections officers.[397] Because the offender in the case was serving time in federal prison for D.C. Code offenses, Judge Jackson had to determine whether the federal or D.C. Code's compassionate release provision governed.[398] Based on "foundational principles of federal-court jurisdiction,"[399] the nominee's opinion concluded that the federal provision applied and, in light of the offender's advanced age, long period of incarceration, and deterioration in health, he should be released.[400]

Asset Forfeiture

Judge Jackson's judicial writing in asset forfeiture cases is limited, and thus it is difficult to draw broad conclusions as to how she might evaluate legal issues in this area as a Supreme Court Justice. That said, in one notable written opinion, Judge Jackson rejected what she deemed a "novel" government effort to use the criminal forfeiture statutes to obtain a money judgment that, in her view, would constitute "improper double counting."[401] In the case, *United States v. Young*, the government seized over two kilograms of heroin from the defendant.[402] After the defendant was convicted of possession with intent to distribute that heroin, the government sought a forfeiture order encompassing a money judgment in the amount of $180,000—"an amount equal to the estimated value of the two kilograms of heroin that had been seized"—on the theory that

compelling reason, and that statutory factors did not call for continued incarceration).

[393] *Johnson*, 464 F. Supp. 3d at 28.

[394] No. 19-CR-021, 2020 WL 3250717, at *1 (D.D.C. June 16, 2020).

[395] *Id.* at *2.

[396] *Id.* at *2–3.

[397] United States v. Greene, 516 F. Supp. 3d 1, 4 (D.D.C. 2021).

[398] *Id.* at 5.

[399] *Id.* at 15.

[400] *Id.* at 28.

[401] 330 F. Supp. 3d 424, 426 (D.D.C. 2018).

[402] *Id.*

the defendant had used that amount of money "to facilitate the commission of his crime" within the meaning of the relevant forfeiture statute.[403]

Judge Jackson issued an opinion in *Young* forcefully rejecting the government's theory, writing that there was "no statutory or common-sense justification for the government's suggestion that it is authorized *both* to seize contraband drugs *and also* to obtain a money judgment for the amount that the defendant allegedly used to purchase those very same drugs."[404] The nominee wrote that the request bore "no relationship to the usual purpose of money judgments in the criminal forfeiture context, which is to prevent the dissipation of illegal proceeds by an offender who might otherwise profit from his ill-gotten gains," and had "absolutely no support in the text of the applicable criminal forfeiture statute."[405] In reaching these conclusions, Judge Jackson examined the underlying "concerns that Congress sought to address" through the relevant forfeiture provisions, noting that the history of the provisions reflected congressional interest in preventing criminal defendants from "evad[ing] the economic impact of criminal forfeiture by rendering . . . forfeitable property unavailable."[406] But, according to the nominee, the amount of money the government sought in the present case was not unavailable or "missing in any meaningful sense," as the government alleged that the defendant used it to purchase the heroin that had already been seized.[407] As such, in Judge Jackson's view, the government's effort ran into a "significant double-counting problem" that is "considered especially taboo in the context of criminal punishment," and "[n]othing in the statute even remotely" suggested "that Congress intended this result."[408]

Sentencing

Before becoming a federal judge, Judge Jackson was involved in sentencing issues through her work on the U.S. Sentencing Commission, a congressionally-created independent agency in the judicial branch with the mission of providing certainty, consistency, and fairness in sentencing.[409] From 2003 to 2005, Judge Jackson worked as assistant special counsel to the Commission, where she drafted proposed amendments to the U.S. Sentencing Guidelines and analyzed federal sentencing law and policy, among other things.[410] Judge Jackson returned to the Commission in 2010 as a Vice Chair and Commissioner responsible for assessment, drafting, and enactment of changes to the Guidelines.[411] In that capacity, the nominee had a role in considering and implementing federal sentencing policy on a number of notable issues.[412]

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[403] *Id.* at 427 (citing 21 U.S.C. § 853(a)(2)).

[404] *Id.* at 430.

[405] *Id.*

[406] *Id.* at 431–32.

[407] *Id.* at 433.

[408] *Id.* at 435–36.

[409] 28 U.S.C. § 991. For an overview of the U.S. Sentencing Commission and its Sentencing Guidelines, see generally CRS Report R41696, *How the Federal Sentencing Guidelines Work: An Overview*, by Charles Doyle.

[410] *Senate Judiciary Questionnaire*, *supra* note 16, at 127.

[411] *Id.* at 23; CRS Legal Sidebar LSB10702, *Judge Ketanji Brown Jackson: Selected Primary Material*, by Juria L. Jones and Laura Deal.

[412] *See, e.g.*, U.S. SENTENCING COMM'N, PUBLIC MEETING MINUTES (Apr. 6, 2011) (supporting changing Guidelines thresholds for crack cocaine and expressing view that issue of whether baseline should be higher than mandatory minimums is a discussion that implicates offenses involving other controlled substances); Transcript of Record at 59–60, U.S. Sentencing Commission (Apr. 10, 2014) (discussing proposed amendment to Drug Quantity Table in Guidelines and explaining the nominee's "strong belief that lowering the Base Offense Levels for drug penalties is

For example, the Fair Sentencing Act of 2010 increased the quantities of crack cocaine required to trigger mandatory minimum sentences and directed the Commission to promulgate consistent Guidelines and conforming amendments.[413] In implementing that directive, the Commission evaluated whether to make retroactive the reductions to recommended crack cocaine sentences under the relevant Guideline.[414] Judge Jackson voted in favor of retroactivity.[415] In a Commission hearing on the issue, the nominee explained that her decision rested on several bases, including hearing testimony; "thousands of letters and pieces of written public comment" received by the Commission; an "analysis of the relevant data"; and "a thorough evaluation of the guideline amendment in light of the established criteria by which the Commission makes retroactivity determinations."[416] Judge Jackson also emphasized the Commission's statutory duty under 28 U.S.C. § 994(u) to consider retroactivity when it reduces the term of recommended imprisonment.[417] The nominee also noted that "Congress's clear purpose in enacting" the statute was to require the Commission to make "immediate conforming reductions in the guidelines" to address the fair sentencing issue of the disparity in sentences between crimes involving crack versus powder cocaine.[418] Judge Jackson explained her belief that federal judges were well positioned to make case-specific judgments about a particular offender's dangerousness, and to reserve sentence adjustments for a particular defendant where it was "warranted and . . . the risk to public safety is minimal."[419]

In 2014, the Commission again faced a question involving retroactivity in the crack cocaine context: whether to make retroactive a Guideline provision offering a sentence reduction for those who offered substantial assistance to the government.[420] Judge Jackson voted against the amendment, noting her belief that it was inconsistent with statutes, the Guidelines, and congressional intent, and would create unwarranted sentencing disparities between those already sentenced and those sentenced in the future.[421]

Judge Jackson also had the opportunity to consider issues related to the Guidelines as a federal judge. For instance, in *United States v. Terry*, Judge Jackson considered an inmate's challenge to a sentencing enhancement he received under the Guidelines' career offender provision.[422] The inmate argued that the Supreme Court's opinion in *Johnson v. United States*[423]—which invalidated a provision of a federal statute on vagueness grounds—rendered his sentence pursuant

necessary in order for the guideline system to work properly").

[413] Fair Sentencing Act of 2010, Pub. L. No. 111-220, 124 Stat 2372 (2010). For additional background, see generally CRS Legal Sidebar LSB10611, *Crack Cocaine Offenses and the First Step Act of 2018: Overview and Implications of Terry v. United States*, by Michael A. Foster and Joanna R. Lampe.

[414] U.S. SENTENCING COMM'N, PUBLIC MEETING MINUTES (June 30 2011).

[415] *Id.*

[416] Transcript of Record at 12–13, U.S. Sentencing Commission (June 30, 2011).

[417] *Id.* at 10–11.

[418] *Id.* at 13.

[419] *Id.* at 14–15.

[420] Transcript of Record at 18–26, U.S. Sentencing Commission (Apr. 10, 2010).

[421] *Id.*

[422] No. 14-CR-00009, 2020 WL 7773389, at *1 (D.D.C. Dec. 29, 2020) (citing U.S. SENT'G GUIDELINES MANUAL § 4B1.1(a) (U.S. SENT'G COMM'N 2013)).

[423] 576 U.S. 591, 597 (2015).

to a similar provision in the Guidelines unlawful.[424] Judge Jackson disagreed based on subsequent Supreme Court precedent clarifying that the *Johnson* holding does not apply to the Guidelines.[425]

In *United States v. Crummy*, Judge Jackson examined how certain Guidelines provisions should apply to a defendant convicted of wire fraud conspiracy in connection with his role in wrongfully procuring government contracts reserved for "small, disadvantaged businesses" through the Small Business Administration's Section 8(a) program.[426] *Crummy* involved a question on which federal circuits had split: whether Section 8(a) contracts count as government benefits when adjusting a sentence to reflect the amount of loss to the government.[427] The Guidelines specify that in the context of government benefits the relevant loss is, at a minimum, the value of the benefits obtained.[428] Judge Jackson concluded that Section 8(a) contracts are not government benefits for sentencing purposes, observing that Section 8(a) contracts are dissimilar to grants, loans, and other items listed as benefits by the Guidelines.[429] Instead, the nominee concluded that a separate provision of the Guidelines applied to the calculation of loss for Section 8(a) contracts.[430]

In addition to Guidelines issues, Judge Jackson's sentencing-related opinions have also included matters such as restitution. In *United States v. Fields*, Judge Jackson rejected a defendant's claim for post-sentence relief from a judgment of restitution.[431] The nominee concluded that the defendant failed to meet her statutory burden of establishing a material change in economic circumstance for an adjustment to restitution or inability to pay interest on the restitution, as required for a waiver of interest.[432]

Judge Jackson's varied experiences with sentencing issues arose during questioning in her nomination hearing for the D.C. Circuit. The nominee's statements reinforced the view she expressed before the Sentencing Commission that federal judges are able to make appropriate case-specific determinations in sentencing. In response to a question from one Senator, Judge Jackson contrasted herself with another jurist who believes that judicial discretion should be further constrained on sentencing issues.[433] The nominee said it is her "hope and faith" that "judges will constrain themselves to an extent when they get the information that they need."[434]

Rights of the Accused

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

[424] *Terry*, 2020 WL 7773389, at *1.

[425] *Id.* at *3.

[426] 249 F. Supp. 3d 475, 476–77 (D.D.C. 2017).

[427] *Id.* at 487.

[428] *Id.* at 481 (citing U.S. SENT'G GUIDELINES MANUAL § 2B1.1 cmt. n.3(F)(ii) (U.S. SENT'G COMM'N)).

[429] *Id.* at 482.

[430] *Id.* at 481 (citing U.S. SENT'G GUIDELINES MANUAL § 2B1.1 cmt. n.3(E) (U.S. SENT'G COMM'N)).

[431] No. 99-CR-0286, 2020 WL 32990, at *3 (D.D.C. Jan. 2, 2020).

[432] *Id.*

[433] *D.C. Circuit Confirmation Hearing*, *supra* note 88.

[434] *Id.*

In *United States v. Hillie*, Judge Jackson dismissed several child-pornography counts of an indictment that she concluded "fail[ed] to provide minimally required factual information."[435] The nominee emphasized that a facially valid indictment is needed to guarantee "core constitutional protections" of notice under the Sixth Amendment and to guard against "abusive criminal charging practices" under the Fifth Amendment.[436] She concluded that the indictment in the case "clearly fail[ed] to satisfy these basic constitutionally mandated principles" by omitting factual allegations that would apprise the defendant of the nature of the charges against him.[437] According to Judge Jackson, the counts at issue simply repeated the "generic words" of the child pornography statutes at issue, which she viewed as insufficient given the broad framing of those statutes.[438] This lack of specificity, she wrote, rendered the charging document "deficient with respect to the Fifth Amendment's right to be tried only upon charges found by a grand jury" and also risked subjecting the defendant to multiple punishments for the same offense or "future prosecution for conduct arising out of these same charges" in violation of the Fifth Amendment's Double Jeopardy Clause.[439]

In a case addressing different Fifth Amendment protections, *United States v. Richardson*, Judge Jackson denied a motion to suppress statements that the defendant claimed were the product of custodial interrogation by law enforcement without constitutionally-required *Miranda* warnings.[440] The defendant was detained in the living room of the apartment she occupied with her boyfriend while law enforcement officers searched the apartment for drugs and guns.[441] In the course of the search, an officer discovered a handgun hidden in a laundry basket, and the defendant made several statements that the handgun was hers.[442] Judge Jackson determined that it was "abundantly clear" that the defendant was in custody when she made the incriminating statements.[443] However, the nominee ultimately concluded that *Miranda* warnings were not required because the defendant "was not being subjected to police interrogation at the time she made the statements,"[444] based on testimony indicating the defendant volunteered the statements in an atmosphere that was neither "inherently coercive" nor designed "to elicit an incriminating response" from her.[445]

Judge Jackson also issued a number of opinions on Fourth Amendment issues. For example, in *United States v. Fajardo Campos*, the nominee denied a defendant's motion to suppress electronic communications that had been intercepted from the defendant's mobile device pursuant to Title III of the Omnibus Crime Control and Safe Streets Act of 1968.[446] *Fajardo Campos* raised a matter of first impression: whether a court with jurisdiction to approve the interception of wire

[435] 227 F. Supp. 3d 57, 62 (D.D.C. 2017).

[436] *Id.* at 69–70.

[437] *Id.* at 72.

[438] *Id.* at 73, 76.

[439] *Id.* at 78–79. Judge Jackson dismissed the relevant counts without prejudice. *Id.* at 82. The government obtained a superseding indictment and the defendant was eventually convicted of violating the child-pornography statutes at issue, among other things, although those convictions were recently vacated on appeal as described previously. *See* "Substantive Criminal Law" *supra*.

[440] 36 F. Supp. 3d 120, 122 (D.D.C. 2014).

[441] *Id.* at 123–26.

[442] *Id.*

[443] *Id.* at 129.

[444] *Id.* at 131.

[445] *Id.*

[446] No. 1:16-CR-00154, 2018 WL 6448633, at *1 (D.D.C. Dec. 10, 2018).

communications (like telephone calls) may also have jurisdiction to approve the interception of electronic communications (like texts and emails).[447] Judge Jackson concluded that such "listening post" jurisdiction encompassed electronic communications, finding no "principled basis for distinguishing electronic communications from wire communications in this respect."[448] The nominee also held that the government could establish the statutory requirement that interception was necessary merely by showing that traditional investigative techniques had failed and would fail "'to disclose the *full nature and extent* of the conspiracy' of which the target is alleged to be a part."[449]

Several of Judge Jackson's other Fourth Amendment opinions have involved motions to suppress physical evidence. In *United States v. Miller*, Judge Jackson denied a defendant's motion to suppress a firearm he claimed was the product of an unlawful seizure.[450] The defendant argued he had been unlawfully seized when police officers "approached him in an unmarked vehicle while he was walking down the sidewalk and repeatedly asked him whether or not he was carrying a gun."[451] Judge Jackson disagreed, concluding that under binding precedent, the "Fourth Amendment seizure occurred only when [the officer] physically restrained and arrested [the defendant] following [the defendant's] admission that he had a gun, and at *that* point, [the officer] plainly had probable cause to justify Miller's arrest."[452]

In *United States v. Leake*, Judge Jackson denied the suppression motion of a defendant who claimed that officers violated his Fourth Amendment rights when they entered his apartment building's laundry room, arrested him without sufficient cause, and used excessive force.[453] Judge Jackson concluded that the defendant lacked standing to challenge the officers' entry to the apartment building's laundry room because it was a space in which he lacked a common law property-interest, the right to exclude individuals, or a reasonable expectation of privacy.[454] The nominee also determined that when one of the officers grabbed the defendant's arm, it amounted to an investigatory stop justified by reasonable suspicion of criminal activity given that the defendant was standing in a suspicious position holding a "small clear plastic baggie in his hand."[455] Judge Jackson also determined that the officers did not use excessive force by tackling the defendant when he tried to flee (and then fight) the officers.[456]

In *United States v. Turner*, Judge Jackson denied a defendant's motion to suppress evidence as the fruit of a defective search warrant.[457] Judge Jackson concluded that the information in the warrant—a confidential informant's reports of drug activity by the defendant in the place to be searched—sufficiently supported probable cause.[458]

[447] *Id.*

[448] *Id.*

[449] *Id.* (quoting United States v. Brown, 823 F.2d 591, 598 (D.C. Cir. 1987)).

[450] No. 16-CR-0072, 2016 WL 8416761, at *1 (D.D.C. Nov. 11, 2016), *aff'd*, 739 F. App'x 6 (D.C. Cir. 2018).

[451] *Id.*

[452] *Id.*

[453] No. 19-CR-194, 2020 WL 3489523, at *1 (D.D.C. June 26, 2020).

[454] *Id.* at *7–8.

[455] *Id.* at *10.

[456] *Id.* at *12.

[457] United States v. Turner, 73 F. Supp. 3d 122, 124 (D.D.C. 2014).

[458] *Id.* at 126.

Environmental Law

During her tenure on the District of D.C., Judge Jackson presided over numerous environmental cases addressing a wide range of issues. Many of these cases addressed the scope of agency authority under an environmental statute or the legality of a specific agency action, and have also implicated broader questions of administrative law, such as standing to sue and standards for judicial review.[459]

As with other areas of law discussed in this report, many of Judge Jackson's rulings are focused on the specific facts at issue in a given case, making it difficult to draw generalizations about her approach to substantive environmental law or review of federal agency action more broadly. For this reason, it is difficult to predict the impact her confirmation would have on the Supreme Court's environmental law jurisprudence. The nominee's analysis tends to focus closely on consideration of applicable statutory and regulatory text, as well as evaluation of whether the litigants have satisfied relevant procedural requirements. Judge Jackson's environmental law opinions do not appear to show a clear orientation in favor of environmental groups, business interests, or the government.

In one case that went to the Supreme Court, Judge Jackson addressed whether the Territory of Guam could recoup costs from the United States for the cleanup of a contaminated landfill under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA).[460] CERCLA provides two different avenues for parties to recover cleanup costs from other potentially responsible parties: cost-recovery actions and contribution actions.[461] These two avenues are mutually exclusive; if a party has "resolved" its liability to the United States for some or all of a response action, it must proceed with a contribution action and is barred from proceeding with a cost-recovery action.[462]

In *Guam v. United States*, Judge Jackson ruled that Guam could pursue a cost-recovery claim against the United States, despite an earlier consent decree addressing Clean Water Act violations at the landfill.[463] Analyzing the plain meaning of the relevant statutory terms and considering relevant caselaw and factual history, the nominee held that the earlier consent decree did not "resolve" Guam's liability for purposes of triggering a contribution claim.[464] On appeal, the D.C. Circuit acknowledged that Judge Jackson's opinion was "thorough," but reversed and remanded the case, holding that Guam could not seek cost recovery, and that its contribution claim was time-barred.[465] However, in a unanimous opinion, the Supreme Court reversed the D.C. Circuit's judgment, agreeing with Judge Jackson that Guam's cost-recovery claim could proceed.[466]

In another case , Judge Jackson ruled in favor of the government in a challenge to the waiver of environmental laws in connection with the construction of a stretch of border wall in New

[459] *See* "Standing" and "Administrative Law" *supra*.

[460] Guam v. United States, 341 F. Supp. 3d 74, 76–77 (D.D.C. 2020), *rev'd*, 950 F.3d 104 (D.C. Cir. 2020), *rev'd*, 141 S. Ct. 1608 (2021).

[461] 42 U.S.C. §§ 9607(a)(4)(B), 9613(f).

[462] *See* Whittaker Corp. v. United States, 825 F.3d 1002, 1007 (9th Cir. 2016) ("[E]very federal court of appeals to consider the question . . . has said that a party who may bring a contribution action for certain expenses must use the contribution action, even if a cost recovery action would otherwise be available.").

[463] *Guam*, 341 F. Supp. 3d at 84.

[464] *Id.* at 92–97.

[465] Guam v. United States, 950 F.3d 104 (D.C. Cir. 2021).

[466] Guam v. United States, 141 S. Ct. 1608, 1611 (2021).

Mexico. In *Center for Biological Diversity v. McAleenan*, an environmental advocacy group challenged DHS's waiver of 25 statutes, including the National Environmental Policy Act (NEPA) and the Endangered Species Act (ESA), pursuant to Section 102 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA).[467] IIRIRA requires DHS to construct hundreds of miles of new fencing and permits DHS to waive "all legal requirements" necessary to ensure expeditious construction of the security barriers.[468] Section 102(c) also limits federal court jurisdiction to claims alleging that DHS violated the Constitution in acting pursuant to IIRIRA, and precludes all other claims.[469]

In granting the government's motion for summary judgment, Judge Jackson held that the plaintiffs failed to state plausible constitutional claims regarding the waiver's permissibility, particularly in light of a persuasive prior District of D.C. ruling.[470] Additionally, and focusing on the text of IIRIRA Section 102(c)(2), the nominee ruled that the court lacked jurisdiction to review the plaintiffs' claims that the DHS Secretary acted in excess of his delegated powers because such *ultra vires* claims were barred under the statute.[471]

Standing and Procedural Issues in Environmental Law Cases

Environmental cases often turn on whether a plaintiff has the right to bring a lawsuit in the first place. Judge Jackson has authored opinions in various district court cases that addressed whether a plaintiff had standing to bring a lawsuit challenging an environmental regulation or federal agency action. For example, in *New England Anti-Vivisection Society v. U.S. Fish and Wildlife Service* (FWS), discussed above, Judge Jackson ruled that an animal welfare organization lacked standing to challenge a wildlife export permit to transfer chimpanzees to a zoo in the United Kingdom.[472] Similarly, in 2015, Judge Jackson held that a coalition of associations and industry groups did not have standing to challenge a U.S. Forest Service rule addressing management planning for national forests.[473] The nominee held that the plaintiffs failed to demonstrate the rule would actually cause a harmful reduction in timber harvest and land use, and thus failed to identify an injury in fact.[474]

By contrast, Judge Jackson found that plaintiffs in a Clean Air Act-related dispute did have standing. The plaintiffs represented a steel manufacturing plant that had asked the U.S. Environmental Protection Agency to object to a Clean Air Act permit for another nearby facility. In plaintiffs' view, granting the permit would have increased area-wide emissions in a way that would require them to reduce their own emissions to comply with applicable statutory

[467] 404 F. Supp. 3d 218, 223–24 (D.D.C. 2019); Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA), Pub. L. No. 104-208, div. C, § 102(b), as amended by the REAL ID Act of 2005, Pub. L. No. 109-13, div. B, § 102; the Secure Fence Act of 2006, Pub. L. No. 109-367, § 3; and the Consolidated Appropriations Act, 2008 Pub. L. No. 110-161, div. E, § 564(a) (codified at 8 U.S.C. § 1103 note).

[468] IIRIRA § 102(c)(1).

[469] *Id.*

[470] *Ctr. for Biological Diversity*, 404 F. Supp. 3d at 244–50 (discussing Defenders of Wildlife v. Chertoff, 527 F. Supp. 2d 119, 120–21 (D.D.C. 2007)).

[471] *Id.* at 237–42.

[472] 208 F. Supp. 3d 142, 148 (D.D.C. 2016); *see* "Standing" *supra*.

[473] Fed. Forest Res. Coal. v. Vilsack, 100 F. Supp. 3d 21, 26 (D.D.C. 2015).

[474] *Id.* at 38.

requirements.[475] Judge Jackson concluded that the plaintiffs alleged a concrete, particularized, and imminent injury, and that the suit could proceed.[476]

Scope of Agency Authority and Obligations

Some of Judge Jackson's rulings in environmental cases relate to the scope of an agency's obligations as prescribed by statutes and regulations. As one example, in *Center for Biological Diversity v. Zinke*, Judge Jackson dismissed a lawsuit seeking to compel the Department of the Interior to review its procedures for implementing NEPA.[477] NEPA requires agencies to evaluate the environmental impacts of certain "major federal actions."[478] After the Deepwater Horizon oil spill, environmental groups sued to force the Department to review its procedures for implementing the statute, and specifically its practice of issuing offshore oil and gas drilling permits without first conducting a site-specific NEPA review. Judge Jackson held that while the agency had an "ongoing obligation" to review its NEPA policies, the regulations governing that review did not require the agency to complete its review, announce the results, or actually revise its policies.[479] The nominee also held that an agency's obligation to review its NEPA policies did not constitute a "discrete" agency action that a federal court could supervise in performing its judicial-review function under the APA.[480]

In another example, the nominee denied a motion for a preliminary injunction in a case challenging whether the government had adequately assessed the environmental impacts of a domestic oil pipeline on mostly privately-owned land.[481] While her decision examined all of the factors used to assess whether a preliminary injunction is warranted, Judge Jackson focused in particular on the likelihood of success on the merits, concluding that the plaintiffs failed to show that either NEPA or the Clean Water Act required further environmental review of the project.[482] Judge Jackson wrote: "While the Court is aware of the potential negative environmental consequences that can accrue from the construction and operation of a large oil pipeline, it is also hesitant to weigh these possibilities too heavily without more evidence linking them to this particular pipeline project."[483]

In a later decision in the same case, Judge Jackson ruled in favor of the government, holding there was no obligation on federal agencies to review the pipeline project's environmental impact, in part because there had been no "major federal action" that would trigger NEPA review.[484] The nominee described NEPA as a "means of informing agency officials about the environmental consequences of major actions that the federal government is poised to take," rather than "a

[475] Nucor Steel – Ark. v. Pruitt, 246 F. Supp. 3d 288 (D.D.C. 2017).

[476] *Id.* at 303. *See also* Otay Mesa Prop., L.P. v. U.S. Dep't of the Interior, 144 F. Supp. 3d 35, 56–58 (D.D.C. 2015) (holding that developer had standing to challenge rule including its property in the designation of critical habitat pursuant to the Endangered Species Act).

[477] 260 F. Supp. 3d 11, 16 (D.D.C. 2017).

[478] 42 U.S.C. § 4332(2)(C).

[479] *Ctr. for Biological Diversity*, 260 F. Supp. 3d at 22–27.

[480] *Id.* at 16.

[481] Sierra Club v. U.S. Army Corps of Eng'rs, 990 F. Supp. 2d 9, 13 (D.D.C. 2013).

[482] *Id.* at 25–38.

[483] *Id.* at 43.

[484] Sierra Club v. U.S. Army Corps of Eng'rs, 64 F. Supp. 3d 128, 144–50 (D.D.C. 2014), *aff'd*, 803 F.3d 31 (D.C. Cir. 2015).

mechanism for instituting federal evaluation and oversight of a private construction project that Congress has not seen fit to authorize the federal government to regulate."[485]

Judge Jackson's analysis in cases considering the validity of agency action has often involved a close reading of statutory and regulatory text. In addition to *Guam*, discussed above, Judge Jackson issued two decisions reviewing a FWS rule designating part of a developer's property as a critical habitat for an endangered shrimp species pursuant to the ESA. First, in 2015, she upheld FWS's economic analysis and its decision not to conduct an analysis of the challenged designation under NEPA, but she also held that additional fact-finding was necessary to evaluate whether all of the land that FWS identified as watershed was properly designated.[486] In a subsequent decision in 2018, Judge Jackson held that the FWS's critical habitat designation, which included both a pool occupied by the shrimp and upland watershed areas for the pool, was improper.[487] Concluding that FWS unreasonably determined that "occupied" critical habitat included areas where the shrimp were not located, Judge Jackson noted that "[t]here is nothing about the ESA's use of 'occupied,' or the plain meaning of that term, or, quite frankly, common sense, that permits this result."[488] Judge Jackson further held that FWS failed to make the statutorily required findings necessary for designating the land as "unoccupied" critical habitat.[489]

First Amendment

As discussed above,[490] Judge Jackson has not confronted many open constitutional questions during her judicial tenure; however, she did resolve a few cases dealing with the First Amendment's Free Speech Clause. The nominee does not appear to have issued any opinions interpreting other provisions of the First Amendment,[491] although in her confirmation hearing to the D.C. Circuit, she stated that "religious liberty . . . is a foundational tenet of our entire government," citing Supreme Court precedent interpreting the Constitution.[492]

Perhaps the nominee's most notable First Amendment case is *American Meat Institute v. USDA*, in which she rejected a free speech challenge to a USDA rule requiring "country-of-origin labeling" for certain commodities.[493] Generally, commercial disclosure requirements are subject either to an intermediate level of constitutional review, or to a more lenient standard known as *Zauderer* review.[494] The more lenient standard applies only to a subset of commercial disclosure

[485] *Id.* at 157.

[486] Otay Mesa Prop., L.P. v. U.S. Dep't of the Interior, 144 F. Supp. 3d 35, 55–56 (D.D.C. 2015).

[487] Otay Mesa Prop., L.P. v. U.S. Dep't of the Interior, 344 F. Supp. 3d 355, 359 (D.D.C. 2018).

[488] *Id.* at 370.

[489] *Id.* at 374–78. As another example, Judge Jackson granted summary judgment in favor of the government in a challenge to the National Oceanic and Atmospheric Administration's assessment of a $127,000 civil penalty for violating the Marine Mammal Protection Act (MMPA). Pac. Ranger, LLC v. Pritzker, 211 F. Supp. 3d 196, 201–02 (D.D.C. 2016). Judge Jackson concluded that the plain text of a safe-harbor provision in the MMPA applied only to accidental or non-intentional takings (defined as harassing, hunting, capturing, or killing) of any marine mammal in the course of commercial fishing operations, and did not apply when a commercial fisherman knowingly set purse seine fishing gear on whales. *Id.* at 219.

[490] *See* "Constitutional Interpretation" *supra*.

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

[492] *D.C. Circuit Confirmation Hearing*, *supra* note 88.

[493] 968 F. Supp. 2d 38, 42 (D.D.C. 2013), *aff'd*, 746 F.3d 1065 (D.C. Cir. 2014).

[494] Zauderer v. Off. of Disciplinary Couns., 471 U.S. 626, 651 (1985); *see generally* CRS Report R45700, *Assessing Commercial Disclosure Requirements under the First Amendment*, by Valerie C. Brannon.

requirements, and comes from a case in which the Supreme Court upheld an advertising regulation that compelled only "factual and uncontroversial information about the terms under which . . . services [were] available."[495] Judge Jackson had to determine which of these two standards governed review of the USDA's labeling requirement. The nominee also had to interpret ambiguous D.C. Circuit precedents further limiting *Zauderer* review only to disclosure requirements that targeted deceptive or *possibly* deceptive speech.[496] Ultimately, she concluded that the more lenient standard applied, following a broader application of *Zauderer*, and held that the regulation was likely constitutional.[497]

Judge Jackson's district court ruling in *American Meat Institute* was affirmed by a three-judge panel of the D.C. Circuit.[498] The First Amendment ruling was later confirmed by the D.C. Circuit sitting en banc in an opinion holding that *Zauderer* "reache[s] beyond problems of deception."[499] The ruling also appears consistent with the views of the Justice that Judge Jackson is nominated to replace: Justice Breyer has expressed concern about subjecting "ordinary" disclosure requirements to heightened scrutiny, cautioning against an approach that would "create serious problems" by "threaten[ing] considerable litigation over the constitutional validity of much, perhaps most, government regulation."[500]

A number of other First Amendment claims Judge Jackson resolved involved more straightforward applications of existing precedent. For example, the nominee relied on Supreme Court opinions and other federal court rulings to hold that a panhandling ordinance might be an unconstitutional content-based regulation of speech.[501] In another case, Judge Jackson held that a person arrested for using profanity in a public park sufficiently pled a violation of his constitutional rights because an arrest for speech that did not "implicate a substantial likelihood of violence, provocation, or disruption" violated the First Amendment.[502]

Finally, one issue that has garnered increased attention in recent years is First Amendment limitations on defamation liability.[503] Broadly, while the First Amendment allows liability for defamatory statements, the Constitution sets a higher standard for public officials attempting to prove that a statement about their official conduct was defamatory.[504] According to the Supreme Court, this higher standard is necessary to safeguard "debate on public issues" and the right to criticize government action.[505] The Court subsequently extended this heightened standard from

[495] *Zauderer*, 471 U.S. at 651.

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

[497] *Id.* at 50.

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

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

[500] Nat'l Inst. of Fam. & Life Advocs. v. Becerra, 138 S. Ct. 2361, 2380 (2018) (Breyer, J., dissenting).

[501] Brown v. Gov't of D.C., 390 F. Supp. 3d 114, 117 (D.D.C. 2019) (denying motion to dismiss).

[502] Patterson v. United States, 999 F. Supp. 2d 300, 313 (D.D.C. 2013) (denying motion to dismiss civil constitutional claims on the basis of qualified immunity); *see also* "Civil Rights and Qualified Immunity" *supra*.

[503] *See, e.g.*, James Freeman, *Sarah Palin, the New York Times and the Oops Defense*, WALL ST. J. (Feb. 9, 2022), https://www.wsj.com/articles/sarah-palin-the-new-york-times-and-the-oops-defense-11644457557; Genevieve Lakier, *Is the Legal Standard for Libel Outdated? Sarah Palin Could Help Answer*, WASH. POST (Feb. 11, 2022), https://www.washingtonpost.com/outlook/2022/02/03/sullivan-nyt-palin-free-press/.

[504] N.Y. Times Co. v. Sullivan, 376 U.S. 254, 279–80 (1964). Public officials must show that an allegedly defamatory statement "was made with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not." *Id.*

[505] *Id.* at 270, 279–80.

government officials to all "public figures."[506] Two sitting Supreme Court Justices have criticized this public-figure doctrine, suggesting it is inconsistent with original understandings of the First Amendment.[507]

Judge Jackson applied this heightened standard in *Zimmerman v. Al Jazeera America*, a lawsuit in which two Major League Baseball players claimed that a documentary purporting to investigate "doping" in professional sports contained false and defamatory statements about the players' alleged use of performance-enhancing drugs.[508] There was no dispute that the players were public figures who had to meet the heightened standard for defamation.[509] The nominee allowed the players' defamation claim against the film's producers to proceed, concluding the players met the heightened pleading standard.[510] She dismissed other claims, including a claim against the producers for a news article and claims against the film's narrator.[511] These dismissals did not rely on the heightened standards for public figures; instead, Judge Jackson held that the claims did not satisfy the requirements for an ordinary defamation claim.[512] The nominee's opinion applied binding precedent without raising questions about its validity, as is common for district court judges, particularly if the parties do not challenge the governing standard.[513]

Immigration

Judge Jackson has also written few opinions addressing immigration law topics. This relative dearth of opinions is perhaps not surprising, given how Congress has structured judicial review of immigration matters. Federal district courts do not review orders of removal entered in particular immigration proceedings; such review occurs, instead, in the court of appeals for the judicial circuit in which the immigration judge completed proceedings.[514] For nearly all of her judicial tenure, Judge Jackson served as a federal district court judge,[515] a capacity in which she was not likely to consider individual immigration matters. Certain general, facial attacks to processes used by agencies involved in the administration of immigration laws are not channeled to the courts of appeals, however, and may be raised in district court.

Judge Jackson has written, among others, three opinions considering challenges to DHS's implementation of its expedited removal authority.[516] In two of three cases, Judge Jackson ruled

[506] *See* Gertz v. Robert Welch, 418 U.S. 323, 335 (1974).

[507] *See* Berisha v. Lawson, 141 S. Ct. 2424, 2425 (2021) (Thomas, J., dissenting from denial of certiorari); *id.* at 2429–30 (Gorsuch, J., dissenting from denial of certiorari). *Cf.* Elena Kagan, *A Libel Story:* Sullivan *Then and Now*, 18 L. & SOC. INQUIRY 197, 205 (1993) (asking whether "the Court . . . has extended the *Sullivan* principle too far").

[508] 246 F. Supp. 3d 257, 263 (D.D.C. 2017). The complaint also alleged false light invasion of privacy claims, which were subject to similar First Amendment considerations. *Id.* at 274.

[509] *Id.* at 263.

[510] *Id.* at 283.

[511] *Id.* at 264.

[512] *See id.* at 275–76.

[513] Quoting D.C. Circuit precedent, Judge Jackson did note that "the 'standard of actual malice is a daunting one,' *as it should be*, because defamation claims necessarily implicate a defendant's First Amendment rights." *Id.* at 284 (emphasis added) (quoting Jankovic v. Int'l Crisis Grp., 822 F.3d 576, 590 (D.C. Cir. 2016)).

[514] 8 U.S.C. § 1252(b)(2); *see also id*. § 1252(b)(9) ("Judicial review of all questions of law and fact . . . arising from any action taken or proceeding brought to remove an alien from the United States . . . shall be available only in judicial review of a final order under this section.").

[515] *See* "Biographical Information" and "Evaluating the Work of a U.S. District Judge" *supra*.

[516] *See* 8 U.S.C. § 1252(e)(3) (permitting judicial review in the District of D.C. of determinations under expedited removal authority "and its implementation," but limited to whether, among other things, various agency actions to

in favor of challenges to DHS's implementation of the expedited removal authority brought by non-U.S. nationals or associations suing on their behalf. This sample size is too small to support firm predictions about how she might approach immigration law matters more generally, but the cases nonetheless bear on an area of law that is of perennial interest to Congress.

A person who is subject to a removal proceeding receives notice of the proceedings[517] and a hearing before an immigration judge, during which the person may be represented by counsel and is permitted to challenge the government's basis for removal.[518] A person designated by DHS as subject to *expedited* proceedings, by contrast, may be ordered removed "without further hearing or review" if an immigration officer determines the person "is inadmissible because she does not have a valid entry document or other suitable travel document, or because she has obtained a visa through misrepresentation."[519] Prior to 2019, DHS designated as subject to expedited removal only a subset of the statutory category of persons potentially removable under expedited procedures—generally those arriving at a port of entry or apprehended near the border shortly after surreptitiously entering the United State.[520] In 2019, DHS expanded its designations to include all persons in the statutory category, to include generally all non-U.S. nationals who had been present in the country for less than two years and either did not obtain valid entry documents or procured their admission through fraud or misrepresentation.[521]

In *Make the Road New York v. McAleenan*, Judge Jackson preliminarily enjoined DHS's 2019 expanded designation.[522] She concluded that the plaintiff associations would likely prevail on, among others, their claim that DHS's designation was arbitrary and capricious, because in arriving at its designation DHS considered "only the perceived shiny bright spots" of an expanded designation.[523] DHS made no attempt to "forecast the storm clouds" the new designation might spawn.[524] Judge Jackson wrote that "an agency cannot possibly conduct reasoned, non-arbitrary decision making concerning policies that might impact *real* people and not take such *real life circumstances* into account."[525] These unexamined circumstances included alleged flaws with the existing expedited removal process,[526] the "real-world consequences" of the designation for those potentially subject to the proceedings,[527] and the prospect that removal would "cause trauma" to both persons removed—"who may have been living and working in the United States for a

implement the expedited removal authority are "in violation of law").

[517] *Id*. § 1229(a).

[518] *Id*. § 1229a(a), (b)(4).

[519] Make the Rd. N.Y. v. Wolf, 962 F.3d 612, 619 (D.C. Cir. 2020) (internal quotation marks omitted).

[520] *See, e.g*., Designating Aliens for Expedited Removal, 69 Fed. Reg. 48,877, 48,878 (Aug. 11, 2004) (designating, for expedited removal purposes, an alien who is inadmissible and who, not being admitted or paroled, is encountered by an immigration officer within 100 miles of the U.S. international land border who fails to satisfy an immigration officer that he or she has been physically present in the United States continuously for 14 days prior to the encounter).

[521] Designating Aliens for Expedited Removal, 84 Fed. Reg. 35,409, 35,409 (July 23, 2019).

[522] 405 F. Supp. 3d 1, 59 (D.D.C. 2019), *rev'd and remanded sub nom*. Make the Rd. N.Y. v. Wolf, 962 F.3d 612 (D.C. Cir. 2020). The D.C. Circuit reversed Judge Jackson's entry of a preliminary injunction in favor of plaintiffs, concluding, in part, that DHS's 2019 designation was not subject to review under the APA. *See Make the Rd. N.Y.*, 962 F.3d at 635. *See also* "Civil Procedure and Jurisdiction" *supra*.

[523] *Make the Rd. N.Y.*, 405 F. Supp. 3d at 56.

[524] *Id*.

[525] *Id*. at 55.

[526] *Id.* at 53.

[527] *Id*. at 56–57 (listing burdens DHS's expanded designations would impose on noncitizens as including having to "avoid immigration officials entirely" and "carry around documents establishing one's continuous presence or lawful status at all times in perpetuity").

significant period of time"—and to their "households, neighborhoods, communities, workplaces, cities, counties, and States."[528]

In a second case, *Kiakombua v. Wolf*, Judge Jackson considered DHS's processing of asylum claims from persons subjected to expedited removal.[529] If a noncitizen facing expedited removal expresses an intent to apply for asylum or a fear of persecution, the person is referred to an asylum officer for a credible-fear interview intended to screen for potentially meritorious asylum claims.[530] In *Kiakombua*, plaintiffs challenged a U.S. Citizenship and Immigration Services training manual that instructed screening officers on how to conduct those interviews. Agreeing with the plaintiffs, Judge Jackson explained that the manual's flaws included importing into the credible-fear interview requirements that properly applied only in the second step of the asylum process, a "full hearing before an immigration judge."[531]

In a third case, however, *Las Americas Immigrant Advocacy Center v. Wolf*, Judge Jackson dismissed a lawsuit challenging programs established in 2019 to speed up the processing of asylum claims in expedited proceedings.[532] Plaintiffs claimed that the new programs interfered with asylum seekers' statutory opportunity to consult with counsel prior to a credible-fear interview. Under the challenged programs, detained asylum seekers received one full calendar day to prepare for credible-fear interviews and were held in Customs and Border Protection (CBP) facilities.[533] CBP facilities offered fewer opportunities for asylum seekers to consult with a persons of their choosing about the asylum process—including an attorney—than did the Immigration and Customs Enforcement (ICE) facilities where they were held before DHS instituted the new programs.[534]

Though Judge Jackson had "no doubt" that detainees facing these conditions "are severely limited in their ability to locate and communicate with counsel,"[535] she concluded the statute made the consultation right "subordinate" to Congress's goal of holding prompt removal proceedings and that the scope of the consultation right was determined by the facility holding the noncitizen.[536] Judge Jackson decided that Congress had not plainly spoken to the question of where "noncitizens subject to expedited removal are to be detained," whether in CBP or in ICE facilities.[537] Given this silence, DHS could reasonably conclude that CBP facilities provided "legally sufficient" consultation opportunities prior to a credible fear interview, particularly because Congress clearly intended that expedited removal processes would be "highly truncated and subject to fewer procedural guarantees than formal removal proceedings."[538]

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[528] *Id*. at 58–59.

[529] 498 F. Supp. 3d 1, 41–49 (D.D.C. 2020).

[530] 8 U.S.C. § 1225(b)(1)(A)(ii).

[531] *Kiakombua*, 498 F. Supp. 3d at 40, 45 (stating that the manual's directive requiring a noncitizen to establish "facts" that "satisfy every element" of an asylum claim during the initial credible-fear interview was "tantamount to making asylum applicants prove that they *are* a refugee during their credible fear interviews, even though Congress has made abundantly clear that a noncitizen need only carry *that* burden *after* she has shown a credible fear of persecution and has been placed in full removal proceedings" (internal quotation marks omitted)).

[532] 507 F. Supp. 3d 1, 40 (D.D.C. 2020).

[533] *Id*. at 9.

[534] *Id*. at 12–14.

[535] *Id*. at 18.

[536] *Id*. at 25.

[537] *Id*. at 26.

[538] *Id*. at 29–30.

Labor Law

Judge Jackson has authored several decisions involving labor law, including her first decision as an appeals court judge.[539] As with her employment cases,[540] her labor decisions frequently turn on matters of procedure. In particular, several decisions address whether the parties have attempted to resolve their dispute using agreed-upon mechanisms, such as arbitration, prior to filing suit.

Judge Jackson's decisions in these cases demonstrate a respect for prior agreements to resolve disputes outside of court. In a dispute between two unions affiliated with the AFL-CIO, the nominee granted summary judgment for the union defendant after determining that both unions were bound by an article in the AFL-CIO constitution requiring arbitration in conflicts between affiliates.[541] Similarly, in *Unite Here Local 23 v. I.L. Creations of Maryland, Inc.*, Judge Jackson rejected an employer's motion to vacate an award granted at arbitration.[542] She took the additional step of awarding the union attorneys' fees, determining that by requiring the union to obtain a court order to enforce the arbitration award, the employer's position "would completely undermine the purposes of arbitration."[543]

Judge Jackson's decision in *District No. 1, Pacific Coast District, Marine Engineers' Beneficial Ass'n, AFL-CIO v. Liberty Maritime Corp*. provides additional insight.[544] In *Liberty Maritime*, both the plaintiff union and defendant employer filed cross-motions for summary judgment in claims arising from the parties' collective bargaining negotiations. The central question at issue was whether the parties were required to arbitrate their claims under the parties' collective bargaining agreement (CBA).[545] This question, in turn, depended on whether the CBA expired during the pendency of the parties' negotiations.[546] Rather than resolve this question, Judge Jackson determined that questions of interpretation, including whether the CBA had expired, were themselves questions for arbitration, in accordance with the CBA's "broad" arbitration clause.[547] Accordingly, Judge Jackson's decisions may indicate a reluctance to involve federal courts in matters that the parties have previously committed to resolve in arbitration.

In *American Federation of Government Employees, AFL-CIO v. Trump*, a case involving a challenge to certain executive orders relating to the federal civil service and collective bargaining rights, Judge Jackson rendered a decision somewhat less approving of alternate dispute procedures, albeit in the unique context of a substantial separation of powers issue.[548] In resolving the roles and powers of the three branches in this dispute, the nominee held that Congress had not precluded federal court jurisdiction over the challenge to the executive orders.[549] As one of several factors leading to this conclusion, Judge Jackson observed that while the President

[539] Am. Fed'n of Gov't Emps., AFL-CIO v. FLRA, 25 F.4th 1 (D.C. Cir. 2022).

[540] *See* "Business and Employment Law" *supra*.

[541] Dist. No. 1, Pac. Coast Dist., Marine Eng'rs' Beneficial Ass'n, AFL-CIO v. Am. Mar. Officers, 75 F. Supp. 3d 294, 308 (D.D.C. 2014).

[542] 148 F. Supp. 3d 12, 20–21 (D.D.C. 2015).

[543] *Id.* at 24.

[544] 70 F. Supp. 3d 327 (D.D.C. 2014), *aff'd*, 815 F.3d 834 (D.C. Cir. 2016).

[545] *Id.* at 338–39.

[546] *Id.* at 345.

[547] *Id.* Judge Jackson acknowledged that her conclusions were in tension with those of an earlier district court decision in the same matter by a different judge, but she held this previous decision was not "law-of-the-case." *Id.* at 349–50.

[548] 318 F. Supp. 3d 370 (D.D.C. 2018); *see also* "Separation of Powers" *infra*.

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

possesses some inherent authority to act in the field of federal labor-management relations,[550] the exercise of that authority may be constrained where Congress has legislated pursuant to its own enumerated powers.[551] The nominee held that portions of these particular executive orders were invalid because they conflicted with congressional intent, "eviscerat[ing] the right to bargain collectively" that Congress enshrined in statute.[552]

On review, the D.C. Circuit disagreed with Judge Jackson's jurisdictional ruling, holding that the plaintiffs' claims instead had to follow a statutory administrative review process.[553] Though this decision may stand in contrast to Judge Jackson's other decisions that look more favorably on administrative review processes, this may be due to the unusual separation of powers concerns, which are not typically present in labor cases.

Second Amendment

The Supreme Court's recent decisions in Second Amendment cases have been closely divided, with Justice Breyer authoring and joining dissents in 5-4 decisions in *District of Columbia v. Heller* (which recognized that the Second Amendment protects an individual right to keep and bear arms for certain purposes)[554] and *McDonald v. City of Chicago* (which recognized that the Second Amendment applies to state and local gun laws by way of the Fourteenth Amendment).[555] It is unclear whether Judge Jackson's views on the Second Amendment would align with those of Justice Breyer. In written responses to questions from several Senators in relation to her nomination to the D.C. Circuit, Judge Jackson stated that, as a federal judge, the Supreme Court's Second Amendment precedents were "binding" on her and she "would be required to apply them in any case" implicating "a restriction or limitation on a person's individual right to own a firearm."[556] Judge Jackson's nomination records do not appear to reveal her personal views on the Second Amendment or the permissible scope of firearms regulation, however,[557] and it does not appear that she has authored judicial opinions addressing the Second Amendment's substance.

In *Baisden v. Barr*, Judge Jackson presided over a lawsuit brought by a man convicted of federal tax evasion who sought relief from the federal prohibition on firearm possession by convicted felons.[558] The plaintiff cited a statutory exemption for certain "offenses relating to the regulation of business practices," and alleged that the federal prohibition violated his "Second Amendment right to keep and bear arms."[559] Judge Jackson granted the government defendants' motion to dismiss the case based on the threshold, jurisdictional determination that the plaintiff's allegations

[550] *Id.* at 412.

[551] *Id.* at 417.

[552] *Id.* at 381.

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

[554] 554 U.S. 570, 626–27 (2008); *id.* at 636 (Stevens, J., dissenting); *id.* at 681 (Breyer, J., dissenting).

[555] 561 U.S. 742, 912 (2010) (Breyer, J., dissenting).

[556] *Senate Judiciary Attachments*, *supra* note 74, at 434 (responses to questions from Senator Ted Cruz); *see also id.* at 475 (responses to questions from Senator Thom Tillis) ("As a sitting federal judge, I am bound to apply faithfully all binding precedents of the D.C. Circuit and the Supreme Court, including all precedents that pertain to the Second Amendment individual right to keep and bear arms.").

[557] *See id.* at 427 (responses to questions from Senator Tom Cotton) ("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.").

[558] No. 19-CV-3105, 2020 WL 6118181, at *1 (D.D.C. Oct. 16, 2020) (referring to 18 U.S.C. § 921(a)(20)(A)).

[559] *Id.* at *2 (quoting Compl. ¶ 1).

were insufficient to establish standing to bring his claims.[560] The nominee wrote, "in the abstract, [the plaintiff's] inability to possess a firearm lawfully *might* qualify as a cognizable injury in fact" for standing purposes, but the plaintiff failed to allege "any specific facts concerning whether he ever owned a firearm or possessed a permit, ever used a firearm or intended to use one, or ever wished or desired to possess one in the future."[561]

Separation of Powers

As part of her prior confirmation proceedings, Judge Jackson described the Constitution's separation and allocation of powers among the three branches of the federal government as playing an "essential role in our constitutional scheme."[562] Referring to Supreme Court case law and Founding-era writings, she characterized this division of power as having two purposes.[563] The nominee explained that the Constitution's separation of national powers establishes a system of "checks and balances" to prevent the "autocracy" that would result from an overconcentration of power in any one branch.[564] She also noted that this separation of powers was intended to promote "a workable government."[565] Since being confirmed to the federal bench, Judge Jackson has considered separation of powers questions in a handful of cases, which offer examples of how she might approach such issues, if confirmed.

Committee on the Judiciary v. McGahn[566] is arguably the most significant of these cases—indeed, it is perhaps the most significant case that Judge Jackson decided on the district court, given its implications for Congress's ability to obtain information concerning executive branch activities. The case arose from a subpoena issued by the House Committee on the Judiciary to former White House Counsel Donald F. McGahn, seeking McGahn's production of documents and testimony.[567] President Trump instructed McGahn not to testify, because, as a former senior advisor, McGahn allegedly had absolute testimonial immunity.[568] The Judiciary Committee eventually filed suit, asking Judge Jackson to declare that McGahn's refusal to testify was "without legal justification" and to order his testimony.[569] After considering two substantial separation of powers arguments, Judge Jackson held that McGahn did not have absolute

[560] *Id.* at *1.

[561] *Id.* at *4. Judge Jackson dismissed the plaintiff's complaint without prejudice. The plaintiff subsequently filed an amended complaint, which the defendants again moved to dismiss, but Judge Jackson was appointed to the D.C. Circuit before she could rule on the sufficiency of the allegations in the amended complaint. *See* First Amended Complaint, Baisden v. Barr, No. 19-CV-3105 (D.D.C. Nov. 6, 2020); Motion to Dismiss for Lack of Jurisdiction, Baisden v. Barr, No. 19-CV-3105 (D.D.C. Dec. 2, 2020).

[562] *See Senate Judiciary Attachments*, *supra* note 74, at 450 (responses to questions from Senator Mike Lee).

[563] *See id.*

[564] *Id.*; *see also id.* at 503 (responses to questions from Senator Jeff Flake) (characterizing the Constitution's separation of national powers as ensuring "that the functions of each branch are distinct and constrained and that no one branch can consolidate all power in itself").

[565] *Id.* at 450 (responses to questions from Senator Mike Lee) (quoting Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635 (1952) (Jackson, J., concurring)).

[566] Comm. on Judiciary, U.S. House of Representatives v. McGahn, 415 F. Supp. 3d 148 (D.D.C. 2019). The case's subsequent procedural history is described later in this section. *See also* "Standing" *supra*.

[567] *McGahn*, 415 F. Supp. 3d at 157.

[568] *Id.* at 158 (asserting this alleged immunity as to McGahn's "official duties" (internal quotation marks omitted)).

[569] *Id.* at 162–63. The Judiciary Committee and the executive branch reached an agreement regarding McGahn's production of subpoenaed documents. *See id.* at 159–60.

testimonial immunity and would have to appear before the Judiciary Committee and either answer questions or invoke an applicable privilege.[570]

First, the executive branch contended that the district court lacked subject matter jurisdiction to consider the Judiciary Committee's subpoena enforcement action. In part, the executive branch argued that interbranch information disputes were of a type not "traditionally thought capable of resolution through the judicial process."[571] The Supreme Court has refused to "resolve disputes that are not justiciable" so as to maintain the Judiciary's proper place in the constitutional system—ensuring "the independence of the Judicial Branch by precluding debilitating entanglements between the Judiciary and the two political Branches" while also preventing "the Judiciary from encroaching into areas reserved for the other Branches."[572] The executive branch contended that this was such a dispute.

Judge Jackson rejected the executive branch's justiciability argument. She reasoned that a subpoena enforcement dispute was "not a political battle at all," but instead raised "garden-variety legal questions"—such as the validity and enforceability of a subpoena and its recipient's "legal duty to respond"—"that the federal courts address routinely and are well-equipped to handle."[573] The nominee also concluded that under D.C. Circuit precedent, a dispute between the executive branch and Congress over a subpoena's enforceability was "a fully justiciable one."[574] Although, as a historical matter, courts rarely resolved interbranch information disputes, Judge Jackson concluded this history did not demonstrate the federal courts' *inability* to resolve such disputes, but rather that the executive branch had "wisely picked its battles."[575] In other contexts, the federal courts had "adjudicated disputes" that impacted "the divergent interests of the other branches," and the Supreme Court had "never suggested that the Judiciary has the power to perform its constitutionally assigned function only when it speaks to private citizens."[576] Judge Jackson also concluded that adjudicating the Judiciary Committee's claim would be consistent with the Constitution's system of checks and balances.[577] The political branches could function better if the court resolved the particular legal dispute—McGahn's obligation, if any, to appear for testimony—that had them at loggerheads.[578]

Second, the executive branch argued that the Judiciary Committee lacked standing and a cause of action to enforce the subpoena, because no statute expressly authorized the suit and no such

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[570] *Id.* at 154–55, 215 ("Notably, whether or not the law requires the recalcitrant official to release the testimonial information that the congressional committee requests is a separate question, and one that will depend in large part on whether the requested information is itself subject to withholding consistent with the law on the basis of a recognized privilege."); *see also* CRS Legal Sidebar LSB10373, *Congressional Subpoenas of Presidential Advisers: The Impact of Committee on the Judiciary v. McGahn*, by Todd Garvey.

[571] *McGahn*, 415 F. Supp. 3d at 176.

[572] Mistretta v. United States, 488 U.S. 361, 385 (1989).

[573] *McGahn*, 415 F. Supp. 3d at 177.

[574] *Id.* at 178–79 (discussing United States v. Am. Tel. & Tel. Co., 551 F.2d 384, 391 (D.C. Cir. 1976) (action brought by the executive branch to enjoin a telephone company's compliance with a congressional subpoena issued by a House subcommittee that intervened in the case to defend its subpoena)).

[575] *Id.* at 181.

[576] *Id.* at 184.

[577] *Id.*

[578] *Id.*; *see also id.* at 185 ("DOJ's artificial limit on the federal courts' jurisdiction to consider disputes between the branches seemingly *decreases* the incentive for the Legislature or the Executive branch to behave lawfully, rather than bolsters it, by dramatically reducing the potential that a federal court will have occasion to declare conduct that violates the Constitution unlawful.").

authorization could be implied in the Committee's favor.[579] Citing separation of powers concerns, the executive branch argued that a court should be particularly reluctant to "imply a cause of action" arising under the Constitution "for the benefit of one political Branch against the other."[580]

Judge Jackson disagreed, writing that defiance of a valid subpoena was an injury in fact[581] and that "Article I of the Constitution is all the cause that a committee of Congress needs to seek a judicial declaration from the court regarding the validity and enforceability of a subpoena that it has allegedly issued in furtherance of its constitutional power of inquiry."[582] The nominee found no separation of powers impediment to this conclusion. The nominee wrote that there was no reason why "the Constitution should be construed to command" that a committee of Congress should have less of an opportunity to have its subpoenas enforced than a private litigant.[583] The possibility that Congress could exert other powers to win compliance with its subpoena (e.g., withholding appropriations) was likely impractical and, in any event, "irrelevant" to the cause-of-action question.[584] Reaching the merits, the nominee concluded that McGahn lacked absolute testimonial immunity.[585]

McGahn went on to receive extensive consideration in the D.C. Circuit.[586] A divided, three-judge panel first disagreed with Judge Jackson's conclusion that defiance of a subpoena constituted an injury that confers standing,[587] but the D.C. Circuit sitting en banc vacated the D.C. Circuit panel opinion[588] and affirmed Judge Jackson's standing holding.[589] Next, the D.C. Circuit panel took up the question whether the Committee has a cause of action to enforce its subpoena, and it again disagreed with Judge Jackson.[590] The en banc court vacated that panel opinion as well and agreed to reconsider the cause-of-action question,[591] but it ultimately dismissed the appeal at the parties' request.[592]

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[579] *See id*. at 193–94.

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

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

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

[583] *See id*. at 196.

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

[585] *Id*. at 199–214.

[586] *See* CRS Legal Sidebar LSB10432, *Resolving Subpoena Disputes Between the Branches: Potential Impacts of Restricting the Judicial Role*, by Todd Garvey.

[587] Comm. on Judiciary v. McGahn, 951 F.3d 510, 516 (D.C. Cir. 2020).

[588] U.S. House of Representatives v. Mnuchin, No. 19-5176, 2020 WL 1228477 (D.C. Cir. Mar. 13, 2020).

[589] Comm. on Judiciary of U.S. House of Representatives v. McGahn, 968 F.3d 755, 760–61 (D.C. Cir. 2020) (en banc).

[590] Comm. on Judiciary of U.S. House of Representatives v. McGahn, 973 F.3d 121, 125 (D.C. Cir. 2020).

[591] Order at 1, Comm. on the Judiciary of the U.S. House of Representatives, No. 19-5331 (D.C. Cir. filed Oct. 15, 2020)

[592] Order at 1, Comm. on the Judiciary of the U.S. House of Representatives, No. 19-5331 (D.C. Cir. filed July 13, 2021).

Throughout her opinion in *McGahn*, Judge Jackson reasoned that when a federal court is presented with a legal question—even one concerning relations among the political branches—separation of powers principles generally do not stand as an impediment to the court resolving that dispute;[593] rather, the court's exercise of jurisdiction "advances" the system of checks and balances.[594] In other cases, however, the nominee has recognized that the inverse is true—that when a case does *not* present a legal question, a federal court could encroach on powers vested in another branch if it were to adjudicate the suit. As the Supreme Court has explained, the political question doctrine is a "function of the separation of powers"[595] and serves to exclude from "judicial review those controversies which revolve around policy choices and value determinations constitutionally committed for resolution to the halls of Congress or the confines of the Executive Branch."[596] In *Mobarez v. Kerry*, American citizens and lawful permanent residents sued the United States to compel their evacuation from war-torn Yemen. Judge Jackson viewed that suit as raising "quintessential" political questions.[597] In their substance, the claims questioned "the Executive Branch's discretionary decision to refrain from using military force to implement an evacuation."[598] Judge Jackson held that a district court lacks jurisdiction to review such discretionary decisions, given the Constitution's commitment of national security and foreign affairs decisions to the political branches.[599]

Judge Jackson has also considered claims attacking the President's authority to take particular actions. In May 2018, President Trump asserted that he had "both the statutory and constitutional authority to direct the manner of executive agencies' collective bargaining negotiations" and, to that end, issued three executive orders related to collective bargaining procedures, official time issues, and employee discipline.[600] Unions representing federal employees sued, claiming in part that the executive orders exceeded the President's authority because they conflicted with statute.[601] Judge Jackson wrote that the relative powers of all branches of federal government played a role in the case, including:

> [T]he power of the Judiciary to hear cases and controversies that pertain to federal labor-management relations; the power of the President to issue executive orders that regulate the conduct of federal employees in regard to collective bargaining; and the extent to which Congress has made policy choices about federal collective bargaining rights that supersede any presidential pronouncements or priorities.[602]

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[593] *See McGahn*, 415 F. Supp. 3d at 154 ("Jurisdiction exists because the Judiciary Committee's claim presents a legal question, and it is 'emphatically' the role of the Judiciary to say what the law is." (quoting Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803)).

[594] *Id*.

[595] Baker v. Carr, 369 U.S. 186, 210 (1962).

[596] Japan Whaling Ass'n v. Am. Cetacean Soc., 478 U.S. 221, 230 (1986).

[597] 187 F. Supp. 3d 85, 88, 92 (D.D.C. 2016).

[598] *Id*. at 93.

[599] *See id*. at 94 ("Evaluating Plaintiffs' claims would involve calling into question the prudence of the political branches in matters of foreign policy or national security constitutionally committed to their discretion." (internal quotation marks omitted)); *see also id.* at 91 (explaining that "the President has plenary and exclusive power in the international arena and acts as the sole organ of the federal government in the field of international relations" (internal quotation marks omitted)).

[600] Am. Fed'n of Gov't Emps., AFL-CIO v. Trump, 318 F. Supp. 3d 370, 394 (D.D.C. 2018), *rev'd and vacated*, 929 F.3d 748 (D.C. Cir. 2019); *see also* "Labor Law" *supra*.

[601] *Am. Fed'n of Gov't Emps., AFL-CIO*, 318 F. Supp. 3d at 391.

[602] *See id.* at 379.

After concluding that she had jurisdiction over the unions' claims,[603] Judge Jackson proceeded to consider their merits. To gauge a President's statutory authority, the nominee explained that "a court must analyze the organic statute that supposedly confers statutory authority upon the President, assess the scope of a given executive order, and check for inconsistencies between the statute and the executive order."[604] A President's claims of "inherent constitutional authority," on the other hand, were to be analyzed under the "well-known tripartite framework" set forth in Associate Justice Robert Jackson's 1952 concurrence in *Youngstown Sheet & Tube Co. v. Sawyer*.[605] Under the *Youngstown* framework, a court assesses a President's authority by asking whether the President acted pursuant to express or implied authority from Congress, in the absence of "either a congressional grant or denial of authority," or in conflict with Congress's express or implied will.[606]

On the merits, Judge Jackson concluded that the President had authority to "issue executive orders regarding federal labor-management relationships" prior to the 1978 enactment of the Federal Service Labor-Management Relations Statute (FSLMRS).[607] She further determined that the FSLMRS did not purport to divest the President of this preexisting authority.[608] The core merits issue in the case, then, was whether the President's executive orders conflicted with statute, in which case the executive orders would be *ultra vires*—that is, in excess of legal authority. For a variety of reasons, Judge Jackson concluded that aspects of the executive order conflicted with FSLMRS, and thus were *ultra vires*.[609] On appeal, the D.C. Circuit concluded that Judge Jackson lacked jurisdiction over the unions' claims because Congress had established an "exclusive statutory scheme" providing for administrative review; thus, the "district court had no power to address the merits of the executive orders."[610]

Since her confirmation to the D.C. Circuit, Judge Jackson has also served on appellate panels that considered separation of powers questions. In *Trump v. Thompson*, the nominee joined an opinion that allowed the Archivist of the United States to disclose to Congress documents that were generated during the Trump Administration, and as to which President Biden had determined executive privilege was not justified.[611] The *Thompson* panel recognized that an implied executive privilege was "'inextricably rooted in the separation of powers,'" and that "former Presidents retain for some period of time a right to assert executive privilege over documents generated during their administrations."[612] The panel concluded, though, that significant factors likely favored disclosure of these documents[613] and that former President Trump had not carried

[603] *Id*. at 397–409.

[604] *Id*. at 393.

[605] *Id*. (citing Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 634 (1952) (Jackson, J., concurring)).

[606] *Id*. (internal quotation marks omitted).

[607] *Id*. at 413.

[608] *Id*. at 416 ("[G]iven the widely-known sweeping exercise of presidential prerogative to regulate federal labor-management relations that preceded the FSLMRS, Congress' silence on the issue of the President's authority to continue to act in this arena speaks volumes about whether it actually intended to oust the President entirely from this sphere.").

[609] *See, e.g., id*. at 425–26 (concluding executive order provisions that removed from negotiation topics that were placed "on the bargaining table in the FSLMRS" as mandatory or permissive subjects of bargaining "reduces the scope of the protected right to bargain in an impermissible manner").

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

[611] 20 F.4th 10, 17 (D.C. Cir. 2021).

[612] *Id*. at 25–26 (quoting United States v. Nixon, 418 U.S. 683, 708 (1974)).

[613] *Id*. at 33 (citing President Biden's determination that an assertion of privilege "is not in the best interests of the United States," Congress's showing that the information sought was "vital to its legislative interests," and the ongoing

his burden "of at least showing some weighty interest in continued confidentiality that could be capable of tipping the scales back in his favor."[614]

Tables of Selected Cases

In preparing this report, CRS reviewed all decisions that were identified in the LEXIS and Westlaw commercial databases as written by Judge Jackson. As discussed in the "Role of a U.S. District Judge" section, not all of those opinions contain legal reasoning that may provide insight into Judge Jackson's jurisprudence. The tables below identify all of the nominee's D.C. Circuit opinions, and those selected district court opinions that CRS analyzed in this report because they contained substantial legal reasoning on topics of interest to Congress. Decisions are listed in reverse chronological order, with the most recent decisions listed first, and some district court cases appear on the list twice if they resulted in multiple opinions that were selected for inclusion. The "Section(s)" column directs the reader to discussions or citations of the case in this report.

Table 1. All Opinions Authored by Judge Jackson on the D.C. Circuit

Case	Holding	Section(s)
I.A. v. Garland, 2022 WL 696459 (2022)	Vacatur of a district court decision is an extraordinary remedy and should not be granted solely because a dispute has become moot (concurring opinion).	Civil Procedure and Jurisdiction
Wye Oak Tech., Inc. v. Republic of Iraq, 24 F.4th 686 (2022)	The law-of-the-case doctrine did not govern the court's analysis of the FSIA's application to a dispute between an American defense contractor and a foreign government, and the district court incorrectly applied the FSIA's commercial activity exception. Remanded to the district court to determine whether a different clause of the commercial activity exception applied.	Approaches to Statutory Interpretation; Civil Procedure and Jurisdiction
Am. Fed'n of Gov't Emps., AFL-CIO v. FLRA, 25 F.4th 1 (2022)	FLRA decision to raise the threshold for collective bargaining for certain federal employees was arbitrary and capricious in violation of the APA.	Administrative Law; Labor Law

Source: Congressional Research Service.

accommodation process between the political branches).

[614] *Id.* at 38. Following an adverse D.C. Circuit ruling, former President Trump asked the Supreme Court to prevent disclosure of the contested records pending the Court's review. In a brief unsigned order, the Court declined the former President's request. Trump v. Thompson, 142 S.Ct. 680 (2022). The Court also stated that because the D.C. Circuit ruled that former President Trump's assertion of privilege would have failed even if he were the incumbent, the circuit court's discussion of when executive privilege claims could properly be asserted by former presidents was non-binding dicta. The Court later denied a petition of certiorari to review the D.C. Circuit decision. No. 21-932, 2022 WL 516395 (Mem) (U.S. Feb. 22, 2022).

Table 2. Selected Opinions Authored by Judge Jackson on the District of D.C.

Case	Holding	Subsequent History	Section(s)
Youssef v. Embassy of United Arab Emirates, 2021 WL 3722742 (2021)	Age discrimination claim by embassy employee fell within the FSIA's commercial activity exception, and federal enclave doctrine did not preclude the plaintiff's claim under the D.C. Human Rights Act.		Civil Procedure and Jurisdiction
Osvatics v. Lyft, Inc., 535 F. Supp. 3d 1 (2021)	Lyft was entitled to arbitration of claims alleging that the company violated D.C. law by failing to provide paid sick leave to rideshare drivers.		Approaches to Statutory Interpretation
Equal Rights Ctr. v. Uber Techs., Inc., 525 F. Supp. 3d 62 (2021)	Plaintiff organization had standing to sue rideshare provider over failure to accommodate wheelchair users, and the plaintiff made sufficiently plausible claims of discrimination to survive a motion to dismiss.		Approaches to Statutory Interpretation; Civil Procedure and Jurisdiction; Civil Rights and Qualified Immunity
United States v. Greene, 516 F. Supp. 3d 1 (2021)	Prisoner's motion for compassionate release was granted; the motion must be construed as a motion under federal law (rather than under the D.C. Code) because the sentence was imposed in federal court.		Criminal Law and Procedure
Maryland v. U.S. Dep't of Educ., 2020 WL 7773390 (2020)	Claims would be dismissed on mootness grounds, as directed by the D.C. Circuit, in an opinion expressing concerns about the D.C. Circuit's vacatur practice.		Stare Decisis; Civil Procedure and Jurisdiction
United States v. Terry, 2020 WL 7773389 (2020)	Motion to vacate sentence was untimely because the new right recognized in *United States v. Johnson*, 576 U.S. 591 (2015), did not apply to the residual clause of the career offender guideline.		Criminal Law and Procedure
Las Ams. Immigrant Advoc. Ctr. v. Wolf, 507 F. Supp. 3d 1 (2020)	Plaintiff failed to show that new DHS programs for processing asylum claims, which allegedly interfered with the right to consult with an attorney concerning credible-fear interviews, violated statute or the Due Process Clause.	*appeal filed*, No. 20-5386 (D.C. Cir. Dec. 30, 2020)	Approaches to Constitutional Interpretation; Administrative Law; Immigration
Kiakombua v. Wolf, 498 F. Supp. 3d 1 (2020)	Portions of a DHS manual governing credible-fear determinations were either inconsistent with unambiguous governing law or unreasonable interpretations of the law.	*appeal dismissed sub nom.* Kiakombua v. Mayorkas, No. 20-5372, 2021 WL 3716392 (D.C. Cir. July 19, 2021)	Approaches to Statutory Interpretation; Administrative Law; Immigration

Case	Holding	Subsequent History	Section(s)
Baisden v. Barr, 2020 WL 6118181 (2020)	Pro se plaintiff, seeking declaratory and injunctive relief allowing him to possess a firearm, failed to demonstrate standing because he did not allege that he ever owned or used a firearm or wished to possess one in the future.		Second Amendment
Campaign for Accountability v. U.S. Dep't of Just., 486 F. Supp. 3d 424 (2020)	Plaintiffs plausibly alleged that DOJ Office of Legal Counsel (OLC) opinions relating to inter-agency disputes must be affirmatively disclosed under the Freedom of Information Act (FOIA), but other types of OLC opinions included in their complaint did not qualify for affirmative disclosure.		Administrative Law
United States v. Dunlap, 485 F. Supp. 3d 129 (2020)	Prisoner was entitled to compassionate release based on COVID-19 pandemic coupled with serious preexisting underlying medical conditions.		Criminal Law and Procedure
Maryland v. U.S. Dep't of Educ., 474 F. Supp. 3d 13 (2020)	States lacked standing to challenge Department of Education regulation at issue in the case.	*vacated*, No. 20-5268, 2020 WL 7868112 (D.C. Cir. Dec. 22, 2020)	Civil Procedure and Jurisdiction
AFL-CIO v. Nat'l Labor Relat. Bd. (NLRB), 471 F. Supp. 3d 228 (2020)	NLRB rule prescribing procedures for the election of employee representatives for collective bargaining was not arbitrary and capricious and satisfied the APA's reasoned-decisionmaking requirement.	*appeal filed*, No. 20-5226 (D.C. Cir. July 29, 2020)	Approaches to Statutory Interpretation; Administrative Law
United States v. Leake, 2020 WL 3489523 (2020)	Officers' actions were reasonable for Fourth Amendment purposes and the defendant lacked Fourth Amendment standing to challenge the officers' presence in the building.		Criminal Law and Procedure
United States v. Sears, 2020 WL 3250717 (2020)	Defendant was not entitled to compassionate release due to risk of reoffending and to the community.		Criminal Law and Procedure
AFL-CIO v. NLRB, 466 F. Supp. 3d 68 (2020)	NLRB violated the APA by failing to follow notice-and-comment procedures to adopt a rule prescribing procedures for the election of employee representatives for collective bargaining. National Labor Relations Act did not bar district court jurisdiction over the claim.	*appeal filed*, No. 20-5223 (D.C. Cir. July 24, 2020)	Approaches to Statutory Interpretation; Administrative Law
Manus v. Hayden, 2020 WL 2615539 (2020)	Record in employment discrimination case was insufficient to show that plaintiff engaged in protected activity or was constructively discharged.		Business and Employment Law
United States v. Johnson, 464 F. Supp. 3d 22 (2020)	Defendant was entitled to compassionate release based on COVID-19 pandemic and preexisting medical conditions.		Criminal Law and Procedure

Case	Holding	Subsequent History	Section(s)
United States v. Leake, 2020 WL 2331918 (2020)	Defendant had failed to establish compelling reasons and weight of statutory factors in motion for emergency relief.		Criminal Law and Procedure
United States v. Dabney, 2020 WL 1867750 (2020)	Defendant was entitled to pretrial release, based on COVID-19 pandemic and underlying medical condition.		Criminal Law and Procedure
United States v. Wiggins, 2020 WL 1868891 (2020)	Defendant was not entitled to release to home confinement pending sentencing, notwithstanding COVID-19 pandemic.		Criminal Law and Procedure
United States v. Lee, 451 F. Supp. 3d 1 (2020)	Pandemic alone was not sufficient to warrant release of an otherwise healthy and potentially violent defendant.		Criminal Law and Procedure
Mohammad Hilmi Nassif & Partners v. Republic of Iraq, 2020 WL 1444918 (2020)	The court lacked jurisdiction to enforce a Jordanian judgment because the defendants had not been properly served.		Civil Procedure and Jurisdiction
Doe v. Wash. Metro. Area Transit Auth. (WMATA), 453 F. Supp. 3d 354 (2020)	WMATA was entitled to governmental function sovereign immunity in claims alleging negligence in failing to prevent a sexual assault on a Metro train.		Civil Procedure and Jurisdiction
Willis v. Gray, 2020 WL 805659 (2020)	Plaintiff's claims regarding a D.C.-wide reduction in force were precluded by prior litigation and other claims were barred by statute of limitations, but discriminatory termination claims could proceed.		Business and Employment Law; Civil Procedure and Jurisdiction
United States v. Fields, 2020 WL 32990 (2020)	Defendant failed to establish material change in economic circumstances sufficient to justify modifying restitution sentence.		Criminal Law and Procedure
Comm. on Judiciary, U.S. House of Representatives v. McGahn, 415 F. Supp. 3d 148 (2019)	The court had jurisdiction over subpoena enforcement action brought by the House Committee on the Judiciary against former White House Counsel Don McGahn, and McGahn had no absolute testimonial immunity based on his status as a senior advisor to the President.	Please see "Separation of Powers" *supra* for discussion of multiple stages of review on appeal.	Stare Decisis; Civil Procedure and Jurisdiction; Separation of Powers
Keister v. AARP Benefits Comm., 410 F. Supp. 3d 244 (2019)	By signing a separation agreement, plaintiff waived rights to bring claims for disability benefits.	*aff'd*, 839 F. App'x 559 (D.C. Cir. 2021)	Business and Employment Law
Make the Road N.Y. v. McAleenan, 405 F. Supp. 3d 1 (2019)	The court had jurisdiction over challenge to DHS's notice expanding eligibility for expedited removal, and the plaintiffs were likely to succeed on merits of their claim that the policy violated the APA.	*rev'd and remanded sub nom.* Make the Rd. N.Y. v. Wolf, 962 F.3d 612 (D.C. Cir. 2020)	Administrative Law; Civil Procedure and Jurisdiction; Immigration

Case	Holding	Subsequent History	Section(s)
Ctr. for Biological Diversity v. McAleenan, 404 F. Supp. 3d 218 (2019)	Environmental group plaintiff could not bring, and district court lacked jurisdiction over, statutory claims challenging the waiver of environmental laws to construct border barriers. Plaintiff failed to state constitutional claims.	*cert. denied*, 141 S. Ct. 158 (2020)	Approaches to Statutory Interpretation; Environmental Law
United States v. Johnson, 2019 WL 3842082 (2019)	The government adduced evidence that explosive devices met requisite legal definitions in charged criminal offenses.	*aff'd in part and vacated in part*, 4 F.4th 116 (D.C. Cir. 2021)	Criminal Law and Procedure
Barber v. D.C. Gov't, 394 F. Supp. 3d 49 (2019)	Plaintiff had not sufficiently pled constitutional or tort claims against employer, but could proceed on employment discrimination claims.		Business and Employment Law
Brown v. Gov't of D.C., 390 F. Supp. 3d 114 (2019)	Plaintiff plausibly claimed that a D.C. panhandling ordinance was an unconstitutional content-based regulation of speech.		First Amendment
Jackson v. Bowser, 2019 WL 1981041 (2019)	Private defendants were not state actors subject to suit for constitutional violations, and the plaintiff failed to plead sufficient facts to support a claim against the government defendants.		Civil Rights and Qualified Immunity
United States v. Fajardo Campos, 2018 WL 6448633 (2018)	Wiretap results could be admitted because the wiretaps were "necessary" given the failure of other traditional methods for determining the scope of a drug trafficking organization; the issuing judge in Arizona had jurisdiction over the request made under Title III of the Omnibus Crime Control and Safe Streets Act of 1968,; and the Title III request was sufficiently particular for Fourth Amendment purposes.		Criminal Law and Procedure
In re Air Crash Over Southern Indian Ocean, 352 F. Supp. 3d 19 (2018)	Malaysia provided an available and adequate forum for the claims arising from the disappearance of Malaysia Airlines Flight MH370.	*aff'd*, 946 F.3d 607 (D.C. Cir. 2020)	Civil Procedure and Jurisdiction
Guam v. United States, 341 F. Supp. 3d 74 (2018)	Guam could proceed with cost-recovery claim against the United States under CERCLA for the cleanup of a contaminated landfill, because a 2004 consent decree did not "resolve" Guam's liability to the United States for some or all of a response action.	*rev'd*, 950 F.3d 104 (D.C. Cir. 2020), *rev'd*, 141 S. Ct. 1608 (2021)	Environmental Law
Nagi v. Chao, 2018 WL 4680272 (2018)	Plaintiff's complaint did not state a claim for hostile work environment, but discriminatory and retaliatory non-selection claims could proceed.		Business and Employment Law

Case	Holding	Subsequent History	Section(s)
Otay Mesa Prop., L.P. v. U.S. Dep't of the Interior, 344 F. Supp. 3d 355 (2018)	In challenge to ESA rule designating critical habitat of endangered shrimp, FWS improperly included as "occupied" critical habitat areas where shrimp were not located, and failed to support designation of those areas as "unoccupied" critical habitat.		Administrative Law; Environmental Law
United States v. Young, 330 F. Supp. 3d 424 (2018)	Government was not entitled to a money judgment of $180,000, because the government had already obtained as contraband the heroin that this sum was used to acquire.		Criminal Law and Procedure
Am. Fed'n of Gov't Emps. v. Trump, 318 F. Supp. 3d 370 (2018)	The court had subject matter jurisdiction over dispute concerning executive orders related to federal labor-management relations. The executive orders exceeded the President's authority because they conflicted with statutory provisions concerning labor issues.	*rev'd and vacated*, 929 F.3d 748 (D.C. Cir. 2019)	Approaches to Statutory Interpretation; Administrative Law; Labor Law; Separation of Powers
Feldman v. Bowser, 315 F. Supp. 3d 299 (2018)	Taxpayer lacked standing to challenge the D.C. Local Budget Autonomy Amendment Act of 2012 and large portions of a budget enacted pursuant to the Act because she sought to challenge the budgeting process as a whole rather than alleging discrete expenditures were unlawful.		Civil Procedure and Jurisdiction
Pol'y & Rsch., LLC v. U.S. Dep't of Health & Human Servs. (HHS), 313 F. Supp. 3d 62 (2018)	HHS's termination of Teen Pregnancy Prevention Program grants was both judicially reviewable and arbitrary and capricious given the standards set for termination of grants in HHS regulations.	*appeal dismissed*, No. 18-5190, 2018 WL 6167378 (D.C. Cir. Oct. 29, 2018)	Administrative Law
Azima v. RAK Inv. Auth., 305 F. Supp. 3d 149 (2018)	FSIA's commercial activity exception applied to UAE investment authority that allegedly hacked plaintiff's computer, regardless of where the hacking took place; *forum non conveniens* did not require the case to proceed in the United Kingdom.	*rev'd*, 926 F.3d 870 (D.C. Cir. 2019)	Civil Procedure and Jurisdiction
Raja v. Fed. Dep. Ins. Co., 2018 WL 818393 (2018)	Unrepresented individuals challenging the foreclosure on their home failed to serve the defendants properly, but would be given one more chance to effect service.		Civil Procedure and Jurisdiction
United States v. Hillie, 289 F. Supp. 3d 188 (2018)	A reasonable jury could find charged offenses involved child pornography.	*vacated in part*, 14 F.4th 677 (D.C. Cir. 2021)	Criminal Law and Procedure
W. Watersheds Project v. Tidwell, 306 F. Supp. 3d 350 (2017)	Litigation involving elk feeding sites in Wyoming must be transferred to the Wyoming District Court because such matters were "plainly local in character and were best left to Wyoming's courts."		Civil Procedure and Jurisdiction
Brick v. Dep't of Just., 293 F. Supp. 3d 9 (2017)	FBI's explanation for FOIA redactions was insufficient to allow meaningful judicial review.		Administrative Law

Case	Holding	Subsequent History	Section(s)
Tyson v. Brennan, 306 F. Supp. 3d 365 (2017)	Religious discrimination claims under Title VII of the Civil Rights Act of 1964 survived motion to dismiss.		First Amendment
Campaign for Accountability v. U.S. Dep't of Just., 278 F. Supp. 3d 303 (2017)	FOIA permitted broad, prospective injunctive relief not limited to production of individual documents, but plaintiffs failed to identify an ascertainable set of records that were plausibly subject to FOIA's reading-room requirement.	*aff'd sub nom.* Citizens for Resp. & Ethics in Wash. v. U.S. Dep't of Just., 846 F.3d 1235 (D.C. Cir. 2017)	Approaches to Statutory Interpretation; Administrative Law
Sheridan v. U.S. Off. of Pers. Mgmt. (OPM), 278 F. Supp. 3d 11 (2017)	OPM correctly concluded source code for software used to conduct background checks was exempt from FOIA and adequately complied with FOIA production requirements.		Administrative Law
Lawson v. Sessions, 271 F. Supp. 3d 119 (2017)	Plaintiff had not exhausted her administrative remedies with respect to Title VII failure to hire claims, but could proceed on Age Discrimination in Employment Act claims and retaliatory interference claims.		Business and Employment Law
Robinson v. Farley, 264 F. Supp. 3d 154 (2017)	Complaint raising statutory, constitutional, and common law claims against law enforcement officers arising from the arrest of an intellectually disabled man need not specify which officers engaged in what alleged misconduct in order to survive a motion to dismiss.		Civil Rights and Qualified Immunity
WMATA v. Ark Union Station, Inc., 268 F. Supp. 3d 196 (2017)	Under provision of the D.C. Code based on the common law *nullum tempus* doctrine, the statute of limitations did not run against WMATA because the agency's negligence suit sought to vindicate public rights.		Civil Procedure and Jurisdiction
Ross v. Lockheed Martin Corp., 267 F. Supp. 3d 174 (2017)	Employees failed to demonstrate requisite commonality for class certification in proposed class action and failed to preliminarily show that terms of proposed settlement were fair, reasonable, and adequate.		Business and Employment Law
Ctr. for Biological Diversity v. Zinke, 260 F. Supp. 3d 11 (2017)	Department of the Interior had an ongoing obligation to review its NEPA policies, but was not required to complete its review, announce the results, or actually revise its policies; the agency's review obligation was not the type of discrete agency action supervisable by a federal court.		Administrative Law; Environmental Law
United States v. Crummy, 249 F. Supp. 3d 475 (2017)	The government benefits rule under criminal sentencing guidelines did not apply to procurement frauds involving contracts awarded under the Section 8(a) program, and the loss amount should have been reduced by the fair market value of the services rendered.		Criminal Law and Procedure

Case	Holding	Subsequent History	Section(s)
Zimmerman v. Al Jazeera Am., LLC, 246 F. Supp. 3d 257 (2017)	Only some of Major League Baseball players' defamation and false light of privacy claims against the makers of a documentary contained sufficient allegations to survive motion for summary judgment.		First Amendment
Nucor Steel–Ark. v. Pruitt, 246 F. Supp. 3d 288 (2017)	Plaintiffs had standing in suit seeking to compel Environmental Protection Agency to object to a Clean Air Act permit for a nearby steel manufacturing plant, where issuance of permit would effectively require plaintiffs to reduce emissions at their own manufacturing plant.		Environmental Law
SACE S.p.A. v. Republic of Paraguay, 243 F. Supp. 3d 21 (2017)	Actual authority was required for an agent of a foreign state to waive foreign sovereign immunity under the FSIA.		Civil Procedure and Jurisdiction
United States v. Hillie, 227 F. Supp. 3d 57 (2017)	Criminal indictment for child pornography charges lacked adequate factual detail as to charged offenses.		Criminal Law and Procedure
United States v. Miller, 2016 WL 8416761 (2016)	Evidence in criminal prosecution based on unlawful firearm possession was admissible.	*aff'd*, 739 F. App'x 6 (D.C. Cir. 2018)	Criminal Law and Procedure
Pac. Ranger, LLC v. Pritzker, 211 F. Supp. 3d 196 (2016)	Marine Mammal Protection Act safe-harbor provision applied only to accidental or non-intentional taking of marine mammals in the course of commercial fishing operations, and did not apply to knowing takes of whales.		Environmental Law
New England Anti-Vivisection Soc'y v. U.S. Fish & Wildlife Serv., 208 F. Supp. 3d 142 (2016)	Animal welfare organization lacked standing to challenge FWS's failure to collect information in connection with export permit to transfer chimpanzees to a zoo in the United Kingdom.		Civil Procedure and Jurisdiction; Environmental Law
Gov't Accountability Project v. Food & Drug Admin. (FDA), 206 F. Supp. 3d 420 (2016)	Summary judgment was not warranted for either party in dispute over FDA's compliance with a FOIA request.		Approaches to Statutory Interpretation
Clarian Health W., LLC v. Burwell, 206 F. Supp. 3d 393 (2016)	Qualifying criteria for outlier-payment reconciliation were substantive rules that should have gone through notice-and-comment rulemaking proceedings.	*rev'd*, 878 F.3d 346 (D.C. Cir. 2017)	Approaches to Statutory Interpretation; Administrative Law
Otsuka Pharm. Co., Ltd. v. Burwell, 302 F. Supp. 3d 375 (2016)	FDA reasonably interpreted the scope of a drug's exclusivity benefit as limited and approved a drug with a different active moiety.	*aff'd*, 869 F.3d 987 (D.C. Cir. 2017)	Administrative Law
Yah Kai World Wide Enters., Inc. v. Napper, 195 F. Supp. 3d 287 (2016)	Food market operator's use of Everlasting Life service mark was likely to cause consumer confusion.		Business and Employment Law

Case	Holding	Subsequent History	Section(s)
Ross v. U.S. Capitol Police, 195 F. Supp. 3d 180 (2016)	Employer's motion to dismiss would not be treated as a motion for summary judgment, and employee's complaint was sufficient to allow discrimination and retaliation claims to proceed.		Business and Employment Law
Pollard v. District of Columbia, 191 F. Supp. 3d 58 (2016)	Arresting officers were entitled to qualified immunity on several claims because the plaintiffs identified no infringement of the arrestee's rights, let alone one that violated clearly established law.	*aff'd*, 698 F. App'x 616 (D.C. Cir. 2017)	Civil Rights and Qualified Immunity
Njang v. Whitestone Grp., Inc., 187 F. Supp. 3d 172 (2016)	Six-month limitations period contained in employment contract was not reasonable for plaintiff's Title VII discrimination claim, but was reasonable for claims under 42 U.S.C. § 1981.		Business and Employment Law
Mobarez v. Kerry, 187 F. Supp. 3d 85 (2016)	The court lacked jurisdiction over claim that sought to compel evacuation of U.S. citizens and others from Yemen because the claims involved political questions.		Separation of Powers
Morgan v. U.S. Parole Comm., 304 F. Supp. 3d 240 (2016)	Prisoner's suit alleging his parole revocation violated the Ex Post Facto Clause was barred by sovereign immunity and *res judicata*.	*appeal dismissed*, No. 16-5081 (D.C. Cir. June 23, 2016)	Stare Decisis
Kyle v. Bedlion, 177 F. Supp. 3d 380 (2016)	Fifth Amendment did not apply to plaintiff's claims of false arrest and use of excessive force, and plaintiff failed to plead a violation of clearly established law under the Fourth Amendment.	*appeal dismissed*, No.16-7040, 2016 WL 6915562 (D.C. Cir. Oct. 26, 2016)	Civil Rights and Qualified Immunity
Crawford v. Johnson, 166 F. Supp. 3d 1 (2016)	Employee failed to establish that he exhausted administrative remedies with respect to alleged Title VII violations.	*rev'd in part sub nom.* Crawford v. Duke, 867 F.3d 103 (D.C. Cir. 2017)	Business and Employment Law
All. of Artists & Recording Cos. v. Gen. Motors Co., 162 F. Supp. 3d 8 (2016)	A digital audio copied recording must itself be a digital music recording to be covered by the Audio Home Recording Act.		Approaches to Statutory Interpretation
Alma v. Bowser, 159 F. Supp. 3d 1 (2016)	Plaintiff's mistakenly naming incorrect party would be remedied by substituting correct party, rather than dismissing action.		Business and Employment Law
Unite Here Local 23 v. I.L. Creations of Md. Inc., 148 F. Supp. 3d 12 (2015)	Arbitrator ruling for a union in a dispute over a collective bargaining agreement was entitled to deference, and union was entitled to attorneys' fees.		Labor Law
Coal River Mountain Watch v. U.S. Dep't of the Interior, 146 F. Supp. 3d 17 (2015)	Equities weighted against dismissal of claims, even though similar claims were pending in both the District of D.C. and the District of West Virginia.		Civil Procedure and Jurisdiction

Case	Holding	Subsequent History	Section(s)
Otay Mesa Prop., L.P. v. U.S. Dep't of the Interior, 144 F. Supp. 3d 35 (2015)	U.S. Fish and Wildlife performed adequate economic analysis associated with designation of critical habitat for endangered shrimp, and was not required to conduct NEPA analysis for designation. Additional fact-finding was necessary, however, to evaluate whether the FWS had properly designated land identified as watershed.		Administrative Law; Environmental Law
R.J. Reynolds Tobacco Co. v. U.S. Dep't of Agric., 130 F. Supp. 3d 356 (2015)	Federal agency correctly excluded certain evidence in calculating subsidy payments under the Fair and Equitable Tobacco Reform Act of 2004.		Approaches to Statutory Interpretation
Pierce v. District of Columbia, 128 F. Supp. 3d 250 (2015)	Incarceration of deaf man without accommodations, such as access to an American Sign Language interpreter, and without attempt to evaluate his need for accommodation, constituted discrimination.		Civil Rights and Qualified Immunity
Shaw v. Ocwen Loan Servicing, LLC, 2015 WL 4932204 (2015)	Complaint dismissed sua sponte under Federal Rules of Civil Procedure 8(a) and 12(b)(6).		Civil Procedure and Jurisdiction
XP Vehicles, Inc. v. Dep't of Energy, 118 F. Supp. 3d 38 (2015)	Plaintiffs plausibly claimed that the Department of Energy acted arbitrarily and capriciously by using certain loan programs to reward political patrons. No cause of action was available for constitutional claims alleging due process and equal protection violations.		Administrative Law
Rothe Dev., Inc. v. Dep't of Def., 107 F. Supp. 3d 183 (2015)	Equal protection challenge to a provision of the Small Business Act that established a business development program for socially and economically disadvantaged small business concerns failed to meet the high bar for a facial constitutional challenge.	*aff'd*, 836 F.3d 57 (D.C. Cir. 2016)	Civil Rights and Qualified Immunity
Cal. Clinical Lab. Ass'n v. Sec'y of HHS., 104 F. Supp. 3d 66 (2015)	Plaintiffs lacked standing to bring certain challenges to Medicare coverage determinations made by private entities, and the court lacked subject matter jurisdiction over the remaining claims.	*appeal dismissed*, No. 15–5206, 2015 WL 9009746 (D.C. Cir. Oct. 30, 2015)	Civil Procedure and Jurisdiction
Fed. Forest Res. Coal. v. Vilsack, 100 F. Supp. 3d 21 (2015)	Coalition of associations and industry groups failed to identify an injury in fact and lacked standing to challenge U.S. Forest Service rule addressing management planning for national forests.		Civil Procedure and Jurisdiction; Environmental Law
Mackinac Tribe v. Jewell, 87 F. Supp. 3d 127 (2015)	United States' waiver of sovereign immunity under APA extended to claim against Secretary of Department of the Interior seeking tribal recognition, but the tribe failed to exhaust administrative remedies.	*aff'd*, 829 F.3d 754 (D.C. Cir. 2016) (per curiam)	Administrative Law; Civil Procedure and Jurisdiction
Food & Water Watch, Inc. v. Vilsack, 79 F. Supp. 3d 174 (2015)	Plaintiffs lacked standing to challenge poultry processing regulations.	*aff'd*, 808 F.3d 905 (D.C. Cir. 2015)	Civil Procedure and Jurisdiction

Case	Holding	Subsequent History	Section(s)
Dist. No. 1, Pac. Coast Dist., Marine Eng'rs' Beneficial Ass'n, AFL-CIO v. Am. Mar. Officers, 75 F. Supp. 3d 294 (2014)	Plaintiff union had not reasonably attempted to exhaust contractually-required arbitration procedures prior to filing suit.	*appeal dismissed*, No. 15–7001, 2015 WL 4075840 (D.C. Cir. May 28, 2015)	Labor Law
United States v. Turner, 73 F. Supp. 3d 122 (2014)	Information in warrant was sufficient to support probable cause to search.		Criminal Law and Procedure
Kyle v. Bedlion, 2014 WL 12539324 (2014)	Denied motion for partial summary judgment in wrongful arrest case.		Criminal Law and Procedure
Pencheng Si v. Laogai Rsch. Found., 71 F. Supp. 3d 73 (2014)	False Claims Act claim failed to comply with the pleading requirements of Federal Rule of Civil Procedure 9(b).		Civil Procedure and Jurisdiction
A Love of Food I, LLC v. Maoz Vegetarian USA, Inc., 70 F. Supp. 3d 376 (2014)	Franchisee was entitled to summary judgment on failure-to-register and failure-to-disclose claims, but could not show damages. Franchisor was entitled to summary judgment on claim related to unlawful representations. Material factual issues prevented summary judgment on other false representation claims.		Approaches to Statutory Interpretation; Business and Employment Law
Dist. No. 1, Pac. Coast Dist., Marine Eng'rs' Beneficial Ass'n, AFL-CIO v. Liberty Maritime Corp., 70 F. Supp. 3d 327 (2014)	Whether a collective bargaining agreement had expired was a matter the parties had agreed to arbitrate.	*aff'd*, 815 F.3d 834 (D.C. Cir. 2016)	Labor Law
Depomed, Inc. v.HHS., 66 F. Supp. 3d 217 (2014)	Governing statute unambiguously required FDA to grant marketing exclusivity to drug that FDA had cleared for sale and designated an orphan drug.	*appeal dismissed*, No. 14–5271, 2014 WL 5838247 (D.C. Cir. Nov. 7, 2014)	Approaches to Statutory Interpretation; Administrative Law
Sierra Club v. U.S. Army Corps of Eng'rs, 64 F. Supp. 3d 128 (2014)	Federal agencies were not obligated to review environmental impact of a domestic oil pipeline to be constructed on mostly privately-owned land, in part because there had been no "major federal action" that would trigger NEPA review.	*aff'd*, 803 F.3d 31 (D.C. Cir. 2015)	Environmental Law
Watervale Marine Co., Ltd. v. U.S. Dep't of Homeland Sec., 55 F. Supp. 3d 124 (2014)	U.S. Coast Guard's determination of the conditions upon which foreign vessels would be released from custody after violating certain pollution rules was nonjusticiable as committed to agency discretion by law.	*aff'd on other grounds sub nom.* Watervale Marine Co. v. U.S. Dep't of Homeland Sec., 807 F.3d 325 (D.C. Cir. 2015)	Approaches to Statutory Interpretation; Administrative Law
United States v. Richardson, 36 F. Supp. 3d 120 (2014)	Defendant's statements made during the execution of a search warrant, while the defendant was in custody, were not the product of police interrogation.		Criminal Law and Procedure

Case	Holding	Subsequent History	Section(s)
Sickle v. Torres Advanced Enter. Sols., LLC, 17 F. Supp. 3d 10 (2013)	Plaintiffs could not bring retaliatory termination claims without first exhausting administrative remedies under the Longshore and Harbor Workers' Compensation Act.	*aff'd in part and rev'd in part*, 884 F.3d 338 (D.C. Cir. 2018)	Business and Employment Law
Patterson v. United States, 999 F. Supp. 2d 300 (2013)	Police officers were not entitled to qualified immunity on First and Fourth Amendment claims and false arrest claims arising out of arrest for using profanity in a public park.		Stare Decisis; Civil Rights and Qualified Immunity; First Amendment
Sierra Club v. U.S. Army Corps of Eng'rs, 990 F. Supp. 2d 9 (2013)	Plaintiffs failed to establish that federal law required further environmental review of the environmental impacts of a domestic oil pipeline, and failed to demonstrate imminent irreparable harm from construction of the pipeline.		Environmental Law
Am. Meat Inst. v. U.S. Dep't of Agric. (USDA), 968 F. Supp. 2d 38 (2013)	First Amendment, statutory, and APA claims challenging a USDA country-of-origin labeling requirement were unlikely to succeed on their merits.	*aff'd*, 746 F.3d 1065 (D.C. Cir. 2014)	Approaches to Statutory Interpretation; Administrative Law; First Amendment

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