



# **Ketanji Brown Jackson would be Supreme Court's first federal public defender, a line of attack for critics**

John Fritze and Kevin McCoy

March 15, 2022

WASHINGTON – Federal Park Police stormed into an apartment four miles east of the U.S. Capitol one fall morning in 2003. After using a battering ram and ordering everyone to get on the ground, police discovered a semi-automatic handgun tucked between some sheets in a laundry basket.

Despite a disagreement about who owned the 9 mm pistol, police arrested Andrew Littlejohn and a jury convicted him of a gun charge. When Littlejohn appealed he was assigned a public defender, a little-known Harvard-trained lawyer who today is poised to become an associate justice on the Supreme Court: Judge Ketanji Brown Jackson.

Jackson, whose work at the time focused on appeals, won the case. The Park Police dropped the charge and Littlejohn, who has since moved to Texas, has closely followed his former lawyer's career ever since.

"It's about time," Littlejohn said when asked for his reaction to President Joe Biden's decision to nominate Jackson to the high court. "She never tried to brush me off or duck my calls. That's what really stood out to me about her: She took the time when she didn't have to."

Now a federal judge on the same appeals court that considered Littlejohn's case, Jackson is being celebrated by supporters as the first former federal public defender nominated to the Supreme Court. Supporters say her two-and-a-half years doing that work will bring a much needed different perspective to a court where two current justices – Samuel Alito and Sonia Sotomayor – worked as prosecutors.

The last Supreme Court justice who had extensive criminal defense experience was Thurgood Marshall, nominated by President Lyndon Johnson in 1967.

But Jackson's defense work, and some of her former clients, are almost certain to create fireworks at her confirmation hearings that begin March 21. Jackson has faced many of the same questions – often from the same Republican members of the Senate Judiciary Committee – in previous confirmation hearings.

"Were you ever concerned that your work as an assistant federal public defender would result in more violent criminals – including gun criminals – being put back on the streets?" Sen. Ben

Sasse, R-Neb., pressed Jackson in written questions last year when the committee considered her for the U.S. Court of Appeals for the D.C. Circuit.

Jackson responded by noting that the "the government has to provide due process to the individuals it accuses of criminal behavior."

Sasse, who voted against Jackson, did not respond to a request for comment.

Martin Sabelli, a California attorney and former federal public defender, dismissed the line of attack as political theater. Public defense is built into the criminal justice system, he noted, and those who do the work are not responsible for their clients' actions.

"If we've got a constitutionally mandated function but nobody on the Supreme Court has that experience, that's a problem," Sabelli said. "The reality is, if you don't have life experiences in the well of the courtroom defending individuals, you miss a whole range of arguments and issues and implications of every decision you make."

Lori James-Townes, executive director of the National Association for Public Defense, agreed.

"Public defenders are the face of what criminal justice is particularly in communities that are disproportionately impacted by the criminal legal system," James-Townes said. "You want people who understand the intricacies of that system."

Yet the criticism directed at public defenders may explain why there are so few serving as judges today, experts say. Only about 6% of federal judges list "public defender" on their biographies, according to a review of Federal Judicial Center data. An analysis by the libertarian Cato Institute last year identified 318 federal judges with a background in prosecution compared with 58 who had served as public defenders.

"Politicians don't want to have a tough battle in the Senate," Sabelli said. "It's much easier to pick somebody who isn't going to draw that kind of fire."

Defending terrorists?

Minutes after Biden nominated Jackson for the Supreme Court, the Republican National Committee accused her of "defending terrorists" in a background document sent to journalists. The criticism echoed a line of questioning from Sen. Tom Cotton, R-Ark., at Jackson's confirmation hearing for the D.C. Circuit last year.

"In your career before you were a judge have you ever represented a terrorist at Guantanamo Bay?" Cotton asked Jackson during the April hearing.

"About 16 years ago when I was a federal public defender," Jackson said.

Cotton asked for the name of Jackson's client.

"Oh, senator," Jackson responded. "I don't remember the name."

The client was Khi Ali Gul, an Afghani man who was held at the U.S. military prison in Guantanamo Bay, Cuba, since 2003. In a court filing, he said he had been turned in to Americans by personal enemies and "was never an enemy of the United States." The government disagreed, categorizing him as an enemy combatant.

Jackson, working as a federal public defender in Washington, D.C., was assigned the case along with a colleague in the office, Mary Manning Petras, in late 2005, following a landmark Supreme Court ruling a year earlier permitting detainees to have their cases reviewed by federal courts.

A.J. Kramer, the top federal public defender for the District of Columbia since 1990, told USA TODAY that he assigned Jackson the case because she was "a very bright lawyer" and had gained experience serving as an attorney for the U.S. Sentencing Commission.

"The attorneys are assigned cases, they don't pick and choose," said Kramer. "If that were the case, we wouldn't be able to operate."

Jackson and another attorney filed a habeas corpus petition for Gul, asserting he had been unconstitutionally held in indefinite detention without being formally charged or granted access to a lawyer.

"He had no involvement, direct or indirect, in the terrorist attacks on the United States on September 11, 2001, the ensuing international armed conflict, or any act of international terrorism attributed by the United States to al Qaeda," Jackson and the other attorney told the U.S. District Court in Washington, D.C.

The case, and others like it, were bogged down in the federal court system amid motion filings and arguments. Jackson withdrew in late 2008 as she left the public defender's office to take a job in private practice. Six years later, in 2014, the Obama administration transferred Gul back to Afghanistan.

"It's the job of the public defender to take what comes through the door," said Andrew Koppelman, a professor of law and political science at Northwestern University. "So you can't attribute anything to her based on what cases come through the door any more than you can evaluate a judge based on what crimes were committed the year they were born."

The White House also pushed back on past criticism of the case.

"It is fundamental under the Constitution that every American has the right to a defense and that no one can be sentenced without due process," White House spokesman Andrew Bates said. "The real disagreement any person criticizing Judge Jackson on these grounds has is with the Constitution, not with her."

'Use their names'

It's not only Republicans who have peppered judicial nominees with questions about their clients. Democrats scrutinized several of President Donald Trump's nominees, including Judge Kyle Duncan, narrowly confirmed by the Senate in 2018 for a seat on the Louisiana-based U.S. Court of Appeals for the 5th Circuit.

Democrats noted that Duncan represented a Virginia high school that attempted to block a transgender boy, Gavin Grimm, from using the same restroom as cisgender boys.

"I'm sure Democrats will complain that we shouldn't hold a nominee responsible for her clients," Sen. Chuck Grassley, the top Republican on the Senate Judiciary Committee, said during Jackson's hearing last year. "Perhaps that once was true."

The difference, Jackson's supporters say, is that she didn't choose her cases.

In addition to Littlejohn and Gul, Jackson successfully defended a former attorney convicted of tax evasion after he accepted a Mercedes Benz as payment from a drug dealer and client. She also successfully represented a man who pleaded guilty in 2002 to possessing equipment to make fake IDs to defraud banks.

Because Jackson handled appeals, her cases turned on technical questions about how trials had been conducted. In the Littlejohn case, the judge used a compound question to assess how prospective jurors felt about law enforcement. Jurors were instructed to raise their hands only if they had a personal connection to a police officer – say, a spouse or sibling – and they also believed that connection would impair their impartiality.

The way the judge asked the question denied Littlejohn's attorneys the ability to assess for themselves a juror's relationship with police, a unanimous D.C. Circuit panel ruled.

Jackson told senators last year she had gained insight into the judicial system through her work as a public defender – not in terms of changing her view about how cases should be decided but rather in the way they are explained. She was struck, she said then, at how little criminal defendants understood about the legal system.

"Most of my clients didn't really understand what had happened to them," Jackson said. "They had just been through the most consequential proceeding in their lives and no one really explained to them what they were supposed to expect."

And that realization changed the way she did her job as a judge.

"I take extra care to communicate with the defendants who come before me in the courtroom," she said. "I speak to them directly and not just to their lawyers. I use their names. I explain every stage of the proceeding because I want them to know what's going on."