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Why Ketanji Brown Jackson's time as a public defender matters

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The last two times that Judge Ketanji Brown Jackson went through the Senate confirmation process, one part of her résumé drew particular scrutiny from Republicans: her work as a federal public defender.

“I have questions about your views on the rights of detainees, and that in turn causes some concern about how you will handle terrorism cases that may come before you if you are confirmed,” Sen. Charles Grassley (R-IA) said at a hearing in 2012, when Jackson, now President Joe Biden’s nominee to replace Justice Stephen Breyer on the Supreme Court, was confirmed as a federal district court judge.

“Have you ever represented a terrorist at Guantánamo Bay?” asked Sen. Tom Cotton (R-AR) during her confirmation hearing for the DC Circuit Court of Appeals last year. Would Jackson’s work “result in more violent criminals — including gun criminals — being put back on the streets?” Sen. Ben Sasse (R-NE) asked in a written follow-up questionnaire.

As Supreme Court confirmation hearings begin Monday, Jackson’s background could come under attack again. But that very work is one reason putting Jackson on the bench would be historic.

During Jackson’s time as a federal public defender, a job she held from 2005 to 2007, she represented some of the country’s most vulnerable people, which has given her a perspective that would be unique on the current Supreme Court. And because people of color are disproportionately arrested, prosecuted, and locked up, her work is also inextricably tied up with the fight for racial justice.

The pipeline from being a corporate attorney or prosecutor to judge is robust. By contrast, the public-defender-to-judge pipeline barely exists.

The Center for American Progress reported in 2020 that only about 1 percent of all federal appellate judges spent the majority of their careers as public defenders or legal aid attorneys.

And only about 8 percent of all federal judges are former public defenders, experience that researchers say can make a difference in sentencing. A recent study, examining millions of sentences handed down by district court judges, found that former public defenders were somewhat less likely to sentence someone to incarceration. (Jackson has not spent most of her career as a public defender, but she continued to advocate for criminal defendants as a private corporate attorney and at the federal Sentencing Commission, which reduced sentences in guidelines for drug offenses during her tenure as vice chair.)

Jackson defended Khi Ali Gul, a man whom the US government considered an “enemy combatant,” wading into a new area of the law when she advocated for his right to challenge his imprisonment at Guantánamo Bay, Cuba. She filed briefs and assisted in cases on behalf of an indigent parent in a child custody proceeding and a pregnant juvenile who was a victim of human trafficking.

“100% percent of my time was devoted to the disadvantaged,” Jackson wrote of her time as a public defender.

Jackson would be the first public defender on the Court in a generation

If confirmed, Jackson would be the first justice in more than 30 years with significant experience representing criminal defendants. The last was Justice Thurgood Marshall, the first Black Supreme Court justice, who left the court in 1991 after serving for 24 years.

The parallel to Marshall is noteworthy, said April Frazier Camara, the president and CEO of the National Legal Aid & Defender Association and a co-founder of the Black Public Defender Association. The work Marshall did before he joined the court had a lasting influence on his perspective and decisions.

Before he joined the Court, Marshall “represented indigent people who were oftentimes accused of capital offenses in the South — some very socially unpopular clients like Black men who had death penalty cases after being accused of raping white women,” she said, noting that the charges were often inflated or unsupported.

In 1941, Marshall defended young illiterate Black sharecropper W.D. Lyons, who was falsely accused of three counts of murder. Police beat him and coerced his confession.

Though Marshall lost the case, it galvanized him to take on the most obscure cases in an effort to extend equal protection of the law to all people regardless of their race. And even after arguing *Brown v. Board of Education* in 1954 before the Supreme Court, in which he invalidated segregation in public schools under the 14th Amendment — one of the Court’s landmark decisions — Marshall was met with resistance at his 1967 confirmation hearing from Southern senators who questioned his record.

North Carolina Sen. Sam Ervin, for example, expressed concern that “the easiest way to destroy the Constitution” was to have it “manned by judges who will not exercise judicial self-restraint.”

Nevertheless, Marshall was confirmed; by the time he retired, he had become known as “the Great Dissenter” on a court that had grown increasingly conservative.

Marshall worked as a public defender well before *Gideon v. Wainwright* established in 1963 that guarantee of counsel for criminal defendants is a fundamental right.

“Back then, the structured public defender system that we have now wasn’t in place,” Camara said. “He was really filling a gap.”

By the time Jackson became a public defender, the system had more of a structure — a job in the federal defender’s office was competitive — but a stigma in representing criminal defendants remained. Still, the value of seeing the justice system from the perspective of defendants has not diminished. “For Judge Jackson to walk in those shoes and actually serve a person that’s accused of an offense, there’s an intimate understanding of how important it is that our legal system, specifically judges, ensure that every person’s rights are fully recognized,” Camara said.

Why public defenders matter, including on the Supreme Court

When Jackson responded to Sasse’s questions last year, she likened her intent as a public defender to that of the framers of the Constitution: “In order to guarantee liberty and justice for all, the government has to provide due process to the individuals it accuses of criminal behavior, including the rights to ... competent legal counsel.”

Public defenders, who are appointed by the courts to represent people who cannot afford a lawyer, uphold one of the most basic rights afforded by the Constitution: that people put on trial for a crime will have the assistance of counsel to defend themselves. They do not have the power to choose the indigent criminal defendants whom they represent, and they must take any and every case given to them.

“One of the unique things about the public defender role is it’s really one of the only jobs that’s guaranteed by the Constitution,” said Vida Johnson, a professor of law at Georgetown University and former public defender at the federal public defender’s office. “The Sixth Amendment provides that people who can’t afford a lawyer will be given one. Public defenders play this enormously important role in the legal system, and without it, the system couldn’t function.”

Jackson worked for DC’s Office of the Federal Public Defender from 2005 to 2007, when she left for the corporate law firm Morrison & Foerster.

A.J. Kramer, the current federal public defender and the federal public defender who assigned Jackson’s cases, said she had no choice in who she represented. But when Jackson applied for the role, she specifically requested to work on appeals — seeking relief for people who had already been convicted in federal court.

“I think she believed it was her strength, where she could best use her writing abilities and her ability to analyze,” Kramer said. Like any other public defender, her responsibility was to look at

the record of the case and decide what issues needed to be raised before a higher court. She ultimately argued before the appeals courts about 10 times.

“Being a public defender and working from within the system gives someone a full grasp of how the criminal justice system works because you get to see the people involved on both sides, from the prosecutor’s perspective and the client’s,” Kramer said. “You really get to see that clients are human beings.”

Former defense attorneys have direct experience with the perspectives of people arrested and incarcerated, a population with a disproportionate number of people of color. Public defenders also represent the majority of people who come before the court in criminal cases.

“In addition to having this perspective about what it means to be a person accused of a crime, what it means to be a poor person accused, and what it means to be a poor person of color accused of a crime, Jackson also brings the perspective of what prosecutors do and the role that prosecutors play in our criminal legal system,” Johnson said.

This is key since federal prosecutors are known for using harsh tactics in federal court and have lobbied Congress to get high statutory maximum sentences and mandatory minimums for a number of crimes to have leverage over criminal defendants, Johnson said, adding, “Judge Jackson will really have this very interesting perspective that no other justice would have.”

Plus, there’s the added layer of Jackson’s gender and racial identity in the context of her public defender experience.

“As a Black public defender, this work is professional, but it is also personal. It’s hard for you to find a Black public defender or maybe even a Black attorney who does not have a loved one who is directly impacted specifically by the criminal legal system,” Camara said.

While Jackson served as a federal public defender, her uncle, Thomas Brown Jr., was serving a life sentence in Florida for a nonviolent drug offense, which President Obama later commuted. Two of her other uncles served in law enforcement — one worked as a sex crimes detective in Miami-Dade County and the other became chief of the Miami Police Department. Her brother served as a police officer in Baltimore, including time in an undercover drug sting unit; he also joined the National Guard and led two battalions during tours of duty in Iraq and the Sinai Peninsula.

“We uniquely understand what it means to work within those systems every day with a law degree,” Camara said. “But then we return home to communities where we see the very real experience of what mass incarceration means for our communities. Public defenders, Black public defenders, Black woman public defenders, are uniquely qualified to be fair and just.”

Jackson’s public defender caseload

Legal experts who spoke to Vox argue that there's no real reason to inspect the cases that Jackson worked on as a public defender; after all, like other public defenders, she was assigned her cases and did not choose her clients.

"The views that were expressed were the views of my clients. I represented them in that capacity and the briefs did not necessarily represent my personal views," Jackson said in a 2012 confirmation hearing.

But even if she did not choose her own cases, how she argued them can shed light on her thinking, including how she used her power as a public defender to call out procedural errors on the part of prosecutors and judges.

"The Court is grappling with doing novel criminal justice issues all the time, whether that is Fourth Amendment cases or taking up issues related to constitutional policing," said Daniel Goldberg, the legal director of Alliance for Justice, a progressive advocacy organization. "Jackson has seen these issues from a broad perspective — as a litigator, as a policy maker and as a judge. The Court currently lacks this multi-faceted perspective."

One case that has attracted much attention is that of Khi Ali Gul, the Guantánamo Bay detainee. Jackson made her way to the public defender's office after the Supreme Court ruled in *Rasul v. Bush* in 2004 that detainees on the base in Cuba could challenge their detainment in federal court.

"Our office had a number of these cases. It was a brand new area of law so nobody really knew what the law was. We didn't yet know what claims or issues we could raise," Kramer said.

But as cases arose, the office needed someone to help with this legal work. "It was complex and very novel. It required somebody who had a brilliant legal mind. It was assigned to Ketanji," Kramer said. "She did not ask for it."

Gul was seeking habeas corpus review of his classification as an "enemy combatant" and his detention in Guantánamo Bay. In a brief filed in 2005, Jackson argued that Gul lacked the ability to "vindicate his rights under domestic and international law" since he was being held at Guantánamo without being charged with an offense, appearing before a military or civil tribunal, or being given access to counsel.

The United States was holding Gul "virtually incommunicado," Jackson wrote, not informing him of his rights under the Constitution, the standards of the US military, the Geneva Convention, and other international law. She argued his rights to "freedom from torture" and from "cruel, inhuman, and degrading treatment" had been violated and that he was suffering from severe physical and psychological abuse as a result of being locked in his cell for 23 hours a day.

The case was later consolidated with other detainee cases; Gul was sent back to Afghanistan in 2015, following a 2009 executive order from President Obama that initiated a review of cases like Gul's. In an effort to close the Guantánamo Bay prison, Gul's transfer was unanimously approved by the many departments commissioned to review the case.

Jackson considered the case career-defining. Although she wasn't able to see Gul's case through while she was a public defender, she continued to advocate on behalf of Guantánamo detainees, co-writing Supreme Court amicus briefs for two cases (*Boumediene v. Bush* and *Al-Odah v. United States*) while at Morrison & Foerster. She also co-wrote a brief on behalf of the libertarian Cato Institute and other groups in 2009, arguing that the US did not have the authority to detain lawful residents as enemy combatants.

"I believe that I was assigned to work on these amicus briefs because of the knowledge of the military tribunal processes that I had accumulated from my prior work as an assistant federal public defender," Jackson wrote.

When asked whether she was concerned that her work for Gul would return him to "his terrorist activities," Jackson explained that her brother was deployed in Iraq when she represented Gul, giving her a deeper understanding of the US's detention of people in Guantánamo.

"In the wake of the horrific terrorist attacks in September of 2001, I was also among the many lawyers who were keenly aware of the threat that the 9-11 attacks had posed to foundational constitutional principles, in addition to the clear danger to the people of the United States," she wrote. But she maintained that as an attorney, her duty was to "represent her clients zealously."

The case showed how Jackson handled a new and quickly evolving area of law. In other moments in her time as a public defender, she worked on behalf of criminal defendants seeking to appeal their convictions.

In 2007, Jackson convinced a three-judge panel to vacate the conviction of her client Andrew J. Littlejohn III. Littlejohn had been convicted of unlawfully possessing a gun as a felon after police found a gun hidden in his home.

Jackson, upon appealing the case, argued that the jury selection process had been flawed — the trial judge asked potential jurors questions in a matter that allowed them to avoid answering whether they had relatives who were police officers, a detail, that if true, could make them biased against the defendant. The judges unanimously ruled that the trial violated Littlejohn's Sixth Amendment right to an impartial jury.

In 2006, Jackson secured a plea deal for a man accused of threatening to blow up the federal courthouse in DC. Jackson argued that since he did not act on the threat, most of the charges against him should be dropped. Prosecutors agreed, and a sentencing judge determined that the time he served in pretrial detention was sufficient and ensured the man moved to Florida — away from the people he threatened — and seek out counseling, according to the Washington Post. Jackson got the government to back down in favor of an order that took the defendant's state of mind into account.

In 2005, Jackson's advocacy overturned the conviction of former lawyer Navron Ponds who had been convicted of five felony counts of tax evasion (he owed over \$117,000 after failing to file federal personal income taxes for several years) in connection to accepting a Mercedes-Benz that the mother of a drug dealer gifted him as a retainer. Ponds was sentenced to 20 months in prison.

Jackson argued in an appeal that prosecutors violated Ponds's Fifth Amendment right against self-incrimination when they required that he turn over certain personal records. "Because the government has failed to show with reasonable particularity that it knew of the existence and location of most of the subpoenaed documents, we hold that Ponds' act of production was sufficiently testimonial to implicate his right against self-incrimination," the panel of judges wrote. They sent the case back to the lower district court, where Ponds was sentenced to probation.

The Supreme Court's work on criminal cases often doesn't get the same attention as its highest-profile decisions, and typically the bulk of its workload is civil actions. But the Court encounters cases involving criminal law frequently: in 2020, according to Harvard Law Review, the Court considered two state criminal cases; six appeals on federal incarceration; and seven federal criminal cases. Their decisions can be life or death, if dealing with an inmate facing execution; they can affect how criminal cases are handled across the country.

But for the past three decades, no one on the Court has had public defender experience representing the people who are most affected by its decisions in criminal cases like this. Public defenders — and those who believe that it's past time to bring greater diversity to the Supreme Court — see Jackson's potential appointment as an opportunity for America to bolster its ideals.

"We claim that the goals of the criminal legal system are fairness and justice," Camara said. "Public defenders stand up every day to make sure that those principles are actually realized by people who are oftentimes disproportionately facing targeted racism and other inequities."

When Jackson's record has come under scrutiny in the past, she has never expressed regret. Instead, she spoke about the valuable perspective she gained from the work. When questioned last year by senators about why she decided to spend her time defending criminals, she wrote: "I lacked a practical understanding of the actual workings of the federal criminal justice system, and I decided that serving 'in the trenches,' so to speak, would be helpful."

Ultimately, she said, it was about giving clients a fair chance under the law. In her questionnaire, she wrote that she saw her work as promoting "core constitutional values."

"The government cannot deprive people who are subject to its authority of their liberty without meeting its burden of proving its criminal charges," she wrote, continuing: "Every person who is accused of criminal conduct by the government, regardless of wealth and despite the nature of the accusations, is entitled to the assistance of counsel."