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## 4 issues that could come up in a Ketanji Brown Jackson confirmation fight

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The news that we'll have a vacancy on the Supreme Court is a little over 24 hours old, but there's already [arguably a favorite: U.S. Appeals Court Judge Ketanji Brown Jackson](#). In fact, Jackson has the distinction of perhaps having been the favorite before this vacancy ever came up. It makes sense for all kinds of reasons:

- President Biden has promised to pick a Black woman, [relatively few of whom serve as federal judges](#), and just last year he nominated her to a federal appeals court seat, which even at the time was seen as a potential steppingstone.
- She clerked for the man she would replace, Justice Stephen G. Breyer.
- She has already undergone two separate confirmation processes.

She could be difficult for Republicans to attack, having received a forceful endorsement for her first federal judgeship in 2012 [from then-Rep. Paul D. Ryan \(R-Wis.\)](#) — to whom she is related by marriage — and having gotten bipartisan support less than a year ago, when three Senate Republicans voted for her to join the appellate bench.

It's not clear at this point how much resistance Republicans would put up to her nomination, given it won't change the balance of power on the court and Democrats have the necessary 50 votes.

But as with any such pick, it's worth looking at any potential hurdles she might face. While both of her confirmations were relatively amicable affairs, Republicans have isolated a few things that could come up.

### **Her work on Guantánamo detainee cases**

One line of potential attack spanned both her confirmations, but without Republicans going at it too hard: her [representation of a Guantánamo Bay detainee, Khi Ali Gul](#).

She did so while serving as an assistant federal public defender — a case which she has testified she was assigned. (Public defenders have little say over such things, and lawyers often represent clients accused of awful things.) She also filed briefs in cases involving other Guantánamo detainees while working in private practice.

In her 2012 hearing, Sen. Charles E. Grassley (R-Iowa) invoked the issue and asked her to state whether she believed “that terrorists pose a danger to America” and “that the United States is at war against terrorists.” She responded affirmatively in both cases.

Last year this came up in questioning from multiple GOP senators.

“In your career before you were a judge, have you ever represented a terrorist at Guantánamo Bay?” Sen. John Cornyn (R-Tex.) asked. Jackson affirmed: “About 16 years ago, when I was a federal public defender.”

Sen. Ben Sasse (R-Neb.) asked Jackson in written questions whether she considered resigning from the Khi Ali Gul case and whether she was concerned her work as a public defender “would result in him returning to his terrorist activities.” (Sasse asked similar questions about the other Guantánamo cases.)

Jackson noted that her brother was serving in the U.S. Army in Iraq even at the time. She also said she “was keenly and personally mindful of the tragic and deplorable circumstances that gave rise to the U.S. government’s apprehension and detention of the persons who were secured at Guantánamo Bay.” She emphasized that her briefs in the other cases were on behalf of clients, including in one case the libertarian Cato Institute.

“In all of those situations, the views that were expressed were the views of my clients that I represented them in that capacity, and the briefs did not necessarily represent my personal views with regard to the war on terror or anything else,” Jackson said in 2012.

She emphasized that as a lawyer she was prohibited from expressing negative views of her past clients or their claims.

### **A sharp ruling against Trump**

Because Jackson has served on D.C. federal courts as a district judge and appellate judge, she has had occasion to decide cases involving Donald Trump during and after his presidency. The suggestion in some of the questioning at her second confirmation hearing seemed to be that perhaps she was serving a political side by ruling against Trump — especially in the terms she did.

In 2019, in her ruling against the White House’s claim that former White House counsel Donald McGahn had absolute immunity from congressional testimony, Jackson in [a sharply worded decision](#) wrote: “Stated simply, the primary takeaway from the past 250 years of recorded American history is that Presidents are not kings.”

During her confirmation for the appeals court, Sen. Thom Tillis (R-N.C.) asked Jackson in written questions about the lengthiness of that decision (120 pages, one of her longest), comparing it to Jackson’s statement at her confirmation hearing that it was “just another opinion.”

Jackson responded that it “was a lengthy opinion because it required me to resolve cross-motions for summary judgment concerning ‘three legal contentions of extraordinary constitutional significance.’ ”

Tillis also asked about her decision [being reversed](#), which it was on procedural matters. But at the time, it was still pending before the appeals court, before [a settlement was reached for McGahn to testify](#).

Since her confirmation to that higher court, Jackson served in recent months on a three-judge panel that ruled Congress could see Trump White House documents related to the Jan. 6 Capitol insurrection. That decision was [affirmed by the Supreme Court](#) last week.

### **Race issues**

The first major attack on Biden’s selection has come before he even made it: Some conservatives are crying foul that he has promised to pick a Black woman, saying it [amounts to reverse discrimination or affirmative action](#). They have done so despite multiple GOP presidents — Trump and Ronald Reagan — having themselves promised to pick women for the court. GOP senators asked Jackson last year how her race might inform her work as a judge and about racial disparities in criminal justice.

“Since our Democratic colleagues seem to be putting so much emphasis on race, I just want to ask this question,” Cornyn said, adding, “what role does race play, Judge Jackson, in the kind of judge that you have been and the kind of judge that you will be?”

“I don’t think that race plays a role in the kind of judge that I have been and that I would be, in the way that you asked that question,” Jackson responded. She said her race “would be inappropriate to inject in my evaluation of a case.”

Jackson did say, though, that she felt her experiences, including her different professional background than most nominees and her service as a district judge, “would bring value.”

Sen. Mike Lee (R-Utah) asked her whether “most racial disparities in criminal convictions and sentencing result from an unconscious racial bias of judges, juries and other judicial decision-makers.” Jackson said she wasn’t a social scientist but that one has “to think about [unconscious bias] when we are making decisions.”

### **Support from a court-packing group**

This last one came up a bit in her confirmation hearing last year. It has to do with a group that has endorsed and ran ads for her — Demand Justice — and has [pitched her as a future Supreme Court justice](#). The group has also supported adding justices to the Supreme Court in response to Republican gamesmanship in the confirmation process.

Tillis suggested its support for her might have resulted from her decision in the McGahn case. Jackson responded: “I know very well what my obligations are, what my duties are — not to rule with partisan advantage in mind, not to tailor or craft my decisions in order to try to gain influence or do anything on the sort.”

Cornyn asked her whether she agreed with Demand Justice’s statement that the Supreme Court is “broken.”

Jackson offered the kind of response one would expect in such a hearing: “Senator, I’ve never said anything about the Supreme Court being broken. Again, I’m not going to comment on the structure, the size — the functioning even — of the Supreme Court.”