



# Why This Is Biden's Best Bet for Supreme Court Nomination

Eleanor Clift

Thu, February 24, 2022, 4:51 AM

There's been remarkably little open lobbying on behalf of the three known SCOTUS finalists, but lines are being drawn and clear preferences are emerging with the decision expected any day. Twenty-eight organizations that represent criminal defense attorneys, public defenders, and human rights groups sent a letter to President Joe Biden urging him to name Judge Ketanji Brown Jackson, a former public defender, to fulfill his promise to diversify the federal courts away from prosecutors.

The letter reminds Biden that he started his career as a public defender, and it would be fitting for him as the first president with that background to make this historic pick even more meaningful.

Jackson is thought to be one of three finalists in Biden's search to fill the seat vacated by liberal Justice Stephen Breyer. And while Biden's choice of a Black woman will be a first for SCOTUS, the ideological balance of the court will remain stubbornly unchanged at 6-to-3, which explains why the Republicans aren't making a lot of noise about it. A fight would only energize progressives when Republicans would rather go after Biden on other grounds more favorable to them for the midterms.

## White Men Can't Wait to Get Mad About a Black Woman Supreme Court Justice

For long-time Supreme Court watchers, the quiet is unnerving as the fault lines emerge among Democrats picking sides among the three finalists.

Jackson, 51, is clearly preferred by the progressive community and is likely to be the most easily confirmed. She's gone through three Senate confirmations, the most recent in June of last year for the U.S. District Court of Appeals when she received three Republican votes from Senators Lindsey Graham, Susan Collins, and Lisa Murkowski. The letter endorsing Jackson from civil rights and justice advocates makes the point that there hasn't been anyone on the court with a criminal defense background since Thurgood Marshall retired in 1991. A civil rights pioneer, he was put on the court by President Lyndon Johnson, so it's been a while.

Even the Cato Institute, a conservative libertarian think tank, says the courts need more civil rights attorneys and public defenders. One-time prosecutors outnumber former defense lawyers by a ratio of 4-to-1, with those who have represented government in criminal or civil proceedings outnumbering those litigating against the government by a ratio of 7-to-1. In an opinion piece, Cato notes that Justice Sandra Day O'Connor wrote that Marshall, who came to the court after a career as a civil rights attorney, "imparted not only his legal acumen" to his colleagues, "but also his life experiences, constantly pushing and prodding us" not to ignore the "power of moral truth" in the cases before the court.

Still, if Jackson is the one, Democrats don't expect Republicans to fold without a fight. The most obvious opening for the GOP is to focus less on her and instead aim their fire at Biden for being "soft on crime" and choosing a public defender at a time when violent crime is on the rise.

Judge J. Michelle Childs, 55, has a significant core of support from people who would like the court diversified to include someone who went to state schools. Unfortunately for her, that group is not very large in Washington circles. And while bringing diversity in terms of background is a factor, it doesn't pack a wallop politically. Working people without a college degree who have deserted the Democratic Party are not going to be pulled back by a state school grad making it into the rarefied confines of the Harvard and Yale crowd.

Childs' biggest fans are Rep. James Clyburn and Sen. Lindsey Graham. A SCOTUS seat for Childs would feed the GOP narrative that Biden is the puppet and Clyburn the puppeteer. If it doesn't go his way, Clyburn seems OK with that, saying last week that his advocacy is not an ultimatum.

Childs would get at least two GOP votes, maybe more, but her past work on behalf of corporations fighting unions has labor quietly opposing her. And for a president who has promised to invigorate unions, that could be a deal breaker.

Leondra R. Kruger, now 46, was only 38 when Governor Jerry Brown appointed her in 2014 to the California Supreme Court, where she is an associate justice. She has the backing of what is considered the elite lawyer set in Washington. People who worked with her when she was an assistant to the solicitor general in the Obama administration, and then a deputy assistant attorney general at the Justice Department all think the world of her.

She argued 12 cases before the U.S. Supreme Court, and she has a record of notable rulings in California, but if she's nominated, her entire hearing will be about one case—a religious liberty case that pitted Hosanna-Tabor Evangelical Lutheran Church and School against the Equal Employment Opportunity Commission. Kruger argued that federal anti-discrimination laws should apply to a fired employee but SCOTUS in a unanimous 9-0 dismissal authored by Chief Justice John Roberts concluded that the employee had violated church rules prohibiting suing over workplace matters, and that the case tested a federal rule that allows churches to make employment decisions without government interference. The rebuttal was so resounding coming from the left and right that the Obama administration had to fight off accusations that it opposed religious freedom.

Since Kruger's name surfaced as a SCOTUS contender, her boss at the time, Solicitor General Donald Verrilli, has said he devised the strategy on the case and Kruger was merely following instructions. He says he regrets his decision on the case, calling it tone-deaf on issues of religious liberty. Still, Republicans are not going to let Kruger off the hook if she's nominated. She did the oral arguments.

While not being privy to the internal arguments at the White House, or what Biden might be thinking as he juggles a foreign policy crisis, if he's looking for the smoothest ride politically, Jackson checks more boxes than the others. Emily Galvin-Almanza with Partners for Justice is among the signatories to the letter urging Jackson's nomination. She told The Daily Beast she wants a voice on the court who is listening to the people most harmed by our system, and she wants to tell the public defenders she works with: "Look at Judge Jackson. This is where this path can lead."

It's noteworthy that this decision will be coming in the same time frame Biden is dealing with a foreign policy crisis because other than war and peace, there is no more consequential decision than who gets to sit on the Supreme Court.