



## **Transcript: The Beat with Ari Melber, 3/22/22**

**Guests: Yodit Tewolde, Judith Browne-Dianis**

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Confirmation hearings continue for Supreme Court nominee Ketanji Brown Jackson.

**JUDGE KETANJI BROWN JACKSON, SUPREME COURT NOMINEE:** In as neutral and consistent a manner as I can, because that is the duty and requirement of the judicial oath.

I'm also very conscious of the limits of judicial authority, of the restrictions that exist in the law to prevent me as a judge from becoming a policymaker. This means that I carefully scrutinize my jurisdiction.

It means that I look at the text and focus on the text and the intentions of the legislatures that drafted that provision or the intentions of the framers that put forward that constitutional principle.

It means I'm looking at precedent. If I was fortunate enough to be confirmed to the Supreme Court, I would be upholding the principles of stare decisis as I consider the precedents and making sure that the court is putting forward consistent and predictable rulings.

**ARI MELBER, MSNBC HOST:** You're watching MSNBC's live coverage of the confirmation hearing of Judge Ketanji Brown Jackson. This is Ari Melber.

We will continue our live coverage right now on THE BEAT. We're listening to hearing.

And soon, in the upcoming break, we will be joined by our experts for legal analysis.

**JACKSON:** ... to ensure public confidence in my rulings as a judge.

**SEN. MAZIE HIRONO (D-HI):** Judge Jackson, I have sat on this committee now for a number of years.

And as some of my colleagues continue to try to pin labels on the nominees who come before us, frankly, I find your methodology to be as succinct a definition of what would lead a judge to come up with fair and objective results. I thank you for that.

As a lower court judge, you were generally bound by the Supreme Court's and the D.C. Circuit's precedents. That certainly won't be the case if you are confirmed to the Supreme Court. And the Supreme Court can overturn its own precedents.

That's why I found your analysis in *Committee on the Judiciary vs. McGahn* instructive. In that case, you had a precedent, *committee on the judiciary v. Miers*, that had already confronted the issues you faced.

However, it was another district court decision, and you were not bound by it. You nonetheless followed that precedent. Why did you find that opinion so persuasive?

JACKSON: Well, Senator, in the law, there are different kinds of precedent. And, by that, I mean, there's vertical precedent, which is what people are most familiar with.

There are cases that are handed down by higher courts, the appellate court, the Supreme Court, and those bind the lower courts, so that, even if you disagree with them, you have to follow them because they're binding precedent.

But there's also horizontal precedent. It too is about maintaining consistency and predictability in the rule of law. And what that means is, when you are in a district, there are many judges. And if someone else in your district has handled a case that comes out or that involves the same issues and comes out in a certain way, you, as the second judge, have to contend with that ruling.

You can't ignore the fact that there is precedent in your district that handles the case in a particular way. And with respect to the *McGahn* case, the precedent wasn't just close. It was nearly identical.

The *Miers* case involved the former White House counsel and the argument by the executive that the former White House counsel had absolute immunity in -- with respect to a request by the legislature that she provide testimony.

My case involved a former White House counsel who was claiming absolute immunity at the request of the executive in response to a legislative subpoena.

In both cases, not only was the absolute immunity issue on the table, but, in both cases, the same threshold issues about whether or not there was jurisdiction in the court because the legislature had standing or didn't have standing, which is -- which was the argument that was being made, the same question about whether the court could hear a dispute between the legislature and the executive branch.

[18:05:15]

All of those issues had previously been considered by my colleague in the district court. And he wrote an extensive -- I'm talking about Judge Bates -- he wrote an extensive opinion analyzing each of the issues.

And so, at a minimum, as the second judge dealing with these exact same issues, I had to look at what he did and decide, was it persuasive, did I agree? And I did.

HIRONO: Judge Jackson, of course, if there had been a vertical precedent, i.e., from the Supreme Court or the circuit court, that was on point to your McGahn situation, yes, you would have had to follow that precedent, but there wasn't.

And so you followed a reasoning by another district judge. That made a lot of sense to me. And that certainly makes sense to me.

You discussed stare decisis and the importance of precedent in your opinion. And this is what you wrote -- quote -- "It is interesting to note that the doctrine of stare decisis performs a limiting function that reflects the foundational principles that undergird the federal government's tripartite constitutional system. This is 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 saying what the law is and into the realm of legislating what the law should be."

I know that you have been asked the questions about the importance of precedent before, but maybe you can just tell us one more time why precedent is important in our judicial system.

JACKSON: Thank you, Senator.

Our judicial system is one that is designed to uphold the rule of law. Unlike other systems in other societies, some other societies, we believe that we have a government of laws, and not men. And yet there are men and women who are acting as judges in the context of our system.

What precedent does is ensure that there's consistency across the different individuals who are tasked with the solemn responsibility of interpreting the law. It ensures that there's public confidence that the law is what is guiding judges in their decision-making, and not just their own individual views.

And so it's crucial for maintaining public confidence, maintaining stability in the law, establishing a system that has predictability in it, all of which supports confidence in the judiciary, which is the currency of the judicial branch.

HIRONO: Because of the importance of precedents in promoting confidence, et cetera, we know people need to know what the law is.

And so precedent is important on this -- on that score. And if you are confirmed to the Supreme Court, what factors would you consider before overturning precedent?

JACKSON: Well, there are many factors that the Supreme Court considers, and not just whether they think a prior precedent is wrong. That is one of the factors.

The court has said that a precedent that is egregiously wrong is one that is subject to reconsideration. But in order to actually make the determination about overturning it, in addition to it being wrong, the court considers whether or not there's been reliance on that precedent, and if so, how much.

The court considers whether or not the precedent is workable. Sometimes, the court will issue a ruling in a case, and it turns out that it's not actually functioning in the way that the court intended. And so that might be a reason to revisit it.

The court considers whether or not other precedents in the area have shifted, such that the foundation for the particular precedent is no longer sustainable. And the court considers whether there are changes in the facts that relate to that precedent or a new understanding of the facts that relate to a precedent.

[18:10:00]

All of those factors are things that a court takes into -- that the Supreme Court takes into account when it decides whether or not to revisit a precedent.

HIRONO: Therefore, the court should consider all of those factors. I would say reliance factors loom large, as far as I'm concerned, before overturning a precedent.

But, basically, if you have five members of the court deciding to overturn a precedent, they can do so, right?

JACKSON: Under our scheme, yes, under the Constitution.

HIRONO: So we're seeing more and more precedents being asked to be overturned.

An analysis by national affairs found that, since 2017, when justice Gorsuch was appointed to the court, the court has shown -- and I quote -- an increasing readiness to overturn precedent" -- end quote.

This is true for both longstanding precedents and those that are just a few years old. For example, in 2018, Janus decision, the court overturned a 41- year-old precedent called Abood. That decision weekend public sector unions. Justice Alito first signaled that he wanted conservative anti-union groups to challenge Abood in his 2012 decision in Knox vs. SEIU.

This is called signaling. And Justice Alito definitely signaled his desire to re visit the Abood decision.

So, yes, these groups, they got the message. They brought case after case to meet the criteria that Justice Alito laid out. And although they came close in 2016, Justice Scalia's death left the court stuck in a 4-4 decision in a case called Friedrichs v. California Teachers Association.

Basically, the minute Justice Gorsuch was confirmed, the court finally had a conservative 5-4 majority to overturn Abood, and the result was Janus.

I followed these lines of cases very closely. So that is what happened. They waited for Justice Gorsuch and, boom, 5-4 against unions.

In another example, the court's acknowledged four most conservative justices, Thomas, Alito, Gorsuch, and Kavanaugh, dissented in June Medical, voting to overturn a precedent banning burdensome and unnecessary restrictions placed on abortion providers.

This particular precedent was only 4 years` old. Now the court is poised to overturn Roe v. Wade, even though women have relied on their constitutional right to have an abortion for nearly 50 years.

Of course, I`m not suggesting that Supreme Court decision or precedents are sacrosanct, because I`m thankful the court can and did revisit precedents like Plessy vs. Ferguson that were wrong the day they were decided, but justices should not be seen to be advancing their individual political or ideological agendas, at the expense of individual rights and precedents that people have relied on.

One result of the court`s new approach is that people`s view of the court is changing for the worst. A recent Pew poll found that 44 percent of Americans now disapprove of the Supreme Court. This is up 15 points from August 2020, shortly before the late Justice Ruth Bader Ginsburg died and Amy Coney Barrett was appointed to fill her seat.

I think court watchers acknowledge there is an ideologically -- ideological split in this current Supreme Court, when we are seeing more cases decided on ideological bases, not on the facts and the law. I think it leads to the American people questioning whether the court is a fair and objective arbiter of cases in controversy.

You were asked earlier today about your representation of Guantanamo detainees. Just to make it clear, as a federal public defender, you were assigned to represent Guantanamo detainees. Is that right?

JACKSON: That is correct, Senator.

HIRONO: And then, while at Morrison & Foerster, you also did pro bono work for Guantanamo detainees. Were you assigned to do that work as well?

JACKSON: So, there was one detainee who I had represented as a federal public defender who was brought into my firm`s practice, unbeknownst to me.

[18:15:10]

And when I arrived at the firm, the attorneys who were working on that case recognized that I had previously been a lawyer who had represented this particular detainee, and asked if I would help with his habeas petition at that stage.

HIRONO: I think you have clarified that earlier today.

And you served as counsel of record on amicus briefs related to detention. I think that was brought out today.

JACKSON: Yes.

HIRONO: Were you working on behalf of detainees at that point or were you working on behalf of other groups or individuals?

JACKSON: I was working on behalf of other groups or individuals in -- with respect...

HIRONO: Were they retired judges?

JACKSON: I -- yes, there three briefs in total, two different cases.

And one of the briefs that I filed was on behalf of 20 retired federal judges, including one who was a partner at my firm at the time and who wanted to make a particular argument to the court concerning the detention process.

HIRONO: And these were judges that were nominated by various presidents. So it must have been a diverse group. And they asked you to do the brief.

JACKSON: And they did, yes.

HIRONO: So as part of your work at the law firm, a responsibility of your employment, you were assigned to work with this diverse group of retired judges and to represent conservative or libertarian organizations such as the Cato Institute and the Rutherford Institute, to advocate their views.

JACKSON: Yes.

The other two briefs that I filed were at the cert stage and then at the merits stage of a case that was eventually mooted, but my clients in those cases were a diverse group of organizations, including the Cato Institute, the Rutherford Institute and the Constitution Project.

HIRONO: Members of this committee know full well that lawyers are of -- we are -- we have to follow the codes of professional conduct, which says that we have to zealously represent our clients. And that's what you were doing with regard to the detainees.

And I would just want to note that some of the very senators who are openly questioning you for representing defendants or detainees have in the past made the argument that judicial nominees should not be opposed for the arguments they make in the course of representing clients.

I'm going to quote one of my colleagues: "I have been a military lawyer for almost 30 years. I represented people as a defense attorney in the military that were charged with some pretty horrific acts. And I gave them my all. This system of justice that we're so proud of in America requires the unpopular to have an adequate and -- an advocate. And every time a defense lawyer fights to make the government do their job, that defense lawyer has made us all safer."

Do you agree with that?

JACKSON: I do, Senator.

HIRONO: In 2012, prominent conservative lawyers signed a letter defending attorneys who have represented Guantanamo detainees.

In part, the letter said -- quote -- "The American tradition of zealous representation of unpopular clients is at least as old as John Adams' representation of the British soldiers charged in the Boston Massacre. Good defense counsels is key to ensuring that military commissions, federal juries and federal judges have access to the best arguments and most rigorous factual

presentation before making crucial decisions that affect both national security and paramount liberty interests" -- end quote.

So, the quote that I read isn't the first time that my colleagues on the other side of the aisle have tried to say that your representation and your work as a public defender somehow, I don't know, disqualifies you or makes you leaning one way or the other.

So, you have made it very clear that that is not what you are about. I just have one more question in the remaining time.

Oh, I'm sorry. I'm over.

SEN. RICHARD DURBIN (D-IL): Senator, I'm sorry. We're on a roll call.

HIRONO: I'm on such a roll.

(LAUGHTER)

DURBIN: You're on a roll, and we're on a roll call.

HIRONO: Yes. Thank you. I apologize.

SEN. TED CRUZ (R-TX): Mr. Chairman -- Mr. Chairman, before we break, if I could ask one question of the chairman.

DURBIN: Sure.

CRUZ: Senator Hirono just made reference to the recommendations of the probation office in five of these cases. To the best of my knowledge, those probation recommendations are not in the record. I haven't seen them. My staff Hasn't seen them.

[18:20:02]

And that raises two questions, number one, whether the White House is providing differential material on this nominee's background to Democratic members than Republican members, because I don't know where Senator Hirono would get access to them, other than from the White House.

But, secondly, regardless of whether it's differential, would the chairman agree that there is considerable focus on these cases and the committee, both sides, should have access to the presentence reports and to see the underlying facts?

Judge Jackson has said she was following the facts and the factors in those cases.

DURBIN: Senator, you know we completed discovery before we started this hearing.

CRUZ: Mr. Chairman, how did Senator Hirono get this information that Republicans have not been given?

DURBIN: I'm not going to entertain this. We have been through discovery.

CRUZ: Do you have access to them?

DURBIN: I don't know that I do. I really don't.

CRUZ: Can we ask Senator Hirono how she got access to them?

DURBIN: I'm sorry to interrupt you, Senator, but I want to make an announcement.

We're going to have a 10-minute break. Members are going to head to the floor.

CRUZ: So, you're going to keep differential access to this information?

DURBIN: I don't -- I'm not sure what differential access is. I will take -- I will look it up.

We have a vote on the floor. It will take about 10 minutes. So, 10 to 15 minutes. Relax.

And then we're going to come back. And we have two senators, Cotton and Booker, who will be recognized, and then take a break for dinner.

And then we're going to try to still finish tonight with two remaining senators, Senator Ossoff and Tillis, who are going to be first thing in the morning.

So, we stand in recess.

MELBER: We have been listening to confirmation hearings of Judge Ketanji Brown Jackson.

You heard the chairman gavel into the recess there.

I'm Ari Melber. This is THE BEAT.

And we're going to give you a real breakdown now with some of the time we have. We have been covering, of course, the hearings for President Biden's nominee to the Supreme Court. This has been the first day of the questioning, which is why THE BEAT is reporting from Washington night with some very special guests right here to break down this hearing in a moment.

Now, here's what you need to know about the news that has emerged. There are a few takeaways. First, at this point, Judge Jackson is on track for confirmation to the Supreme Court. She's been sober, poised and largely unflappable throughout this day. There are no public signs of cracks in the Democrats' coalition to get her confirmed.

Second, there are signs of Judge Jackson may draw fewer votes in the 53 that she did get in her last Senate confirmation for her current job, because Republicans appeared largely united on this committee in challenging her judgment and her alleged views, like Senator Graham, who did vote for her last year, but today was questioning her advocacy for Guantanamo detainees and, at one point, ultimately just marching out of the hearing.

(BEGIN VIDEO CLIP)

SEN. LINDSEY GRAHAM (R-SC): These were five people that we had in our control that are now helping the Taliban run the country.

As an American, does that bother you?



JACKSON: Well, obviously, Senator, any repeated criminal behavior or repeated attacks, acts of war bother me. Yes.

(CROSSTALK)

GRAHAM: Well, it bothers me.

While I will not hold it against you, nor should I, the fact that you represented Gitmo detainees, I think it's time to look at this system anew, folks.

(END VIDEO CLIP)

MELBER: Another takeaway, there were several Republican senators who used this hearing to go after more general culture and hot button issues, almost more than they went after the judge.

That may be good news for her. Take what might come to be known as the little baby portion of this hearing, Ted Cruz attacking Critical Race Theory and literally displaying pictures of cartoon babies from children's books to discuss whether babies are -- quote -- "racist or not."

This baby talk overlaps with repeated attacks on how the judge has sentenced criminal defendants, Republicans arguing not only that she might be somehow soft on crime, but that perhaps she is pro-criminal. It was a framework pushed by Cruz and then, more recently, if you have been watching, Josh Hawley, which linked to broader conservative arguments that we may hear going into the midterms about something that is true, which is that crime is on the rise in America.

(BEGIN VIDEO CLIP)

CRUZ: In 100 percent of the cases, was the evidence less than the prosecutors asked for?

JACKSON: Senator, the evidence in this -- these cases are egregious. Judges have to take into account the personal circumstances of the defendant, because that's a requirement of Congress.

SEN. JOSH HAWLEY (R-MO): You had discretion in these cases. And you used your discretion to choose the sentences that you did.

JACKSON: This is not done at the level of...

(CROSSTALK)

HAWLEY: But you had discretion, Judge? You admit that, right? I just want to be clear.

JACKSON: Senator, sentencing is a discretionary act of a judge, but it's not a numbers game.

(END VIDEO CLIP)

MELBER: That exchange there brings us to one final takeaway today before I bring in our guests

And that's just how often the judge seemed to breeze through much of the questioning, offering either crisp legal answers or policy deflections.

And she said under oath it was her duty to avoid offering any policy opinions, basically drawing a line between what politicians may prefer -- that`s their job -- and what judges do. That`s their job.

[18:25:12]

It was dry and, at times, even kind of boring, perhaps deliberately so.

(BEGIN VIDEO CLIP)

JACKSON: I am particularly mindful of not speaking to policy issues. Our obligation as judges is not to create policy. I believe that judges are not policymakers.

GRAHAM: That`s the way the system works. Are you OK with that?

JACKSON: As a policy matter, Senator, I`m not speaking to my views.

GRAHAM: Does that make sense to you as a way to deal with these detainees?

JACKSON: Senator, I`m not in a position to speak to the policy.

(END VIDEO CLIP)

MELBER: And it went like that over and over.

I`m excited to tell you we have some great guests to get into this big day in Washington, Judith Browne-Dianis, civil rights lawyer, executive director of the Advancement Project, and "Washington Post" columnist and longtime MSNBC analyst E.J. Dionne.

Welcome to both of you.

E.J. DIONNE, MSNBC ANALYST: Great to be with you.

JUDITH BROWNE-DIANIS, CO-DIRECTOR, ADVANCEMENT PROJECT: Thanks. Great to be here.

MELBER: What did we see there?

BROWNE-DIANIS: Well, we see -- we have seen a lot of things throughout the day.

First, she was great. She answered the questions. She made sure that they understood what her role is as a judge. She said, stay in my lane. I am not a policymaker.

But what we also have seen is that the Republicans are making all the arguments for the midterms. They`re talking about Critical Race Theory. They are talking about soft on crime. And she keeps staring them back to, look at my record, over 500 decisions that we could be talking about.

MELBER: Right.

And that was something that I thought she did quite effectively. A lot of the Republican questioning, to be fair, just sort of walked around her record. Grassley and others didn't really try to land these punches.

What does break through is what we see from some of the more bombastic senators, E.J.

And you have covered a lot of hearings. We all remember when John Roberts was asked about racist babies.

(LAUGHTER)

MELBER: I'm kidding. It didn't happen.

(CROSSTALK)

BROWNE-DIANIS: It didn't happen.

Let me play it and get your response, because it is that ridiculous. Here we go.

(BEGIN VIDEO CLIP)

CRUZ: Do you agree with this book that is being taught with kids that babies are racist?

JACKSON: Senator, I do not believe that any child should be made to feel as though they're racist, or though they are not valued, or though they are less than.

They don't come up in my work as a judge, which I'm, respectfully, here to address.

CRUZ: OK, good.

JACKSON: I am...

CRUZ: Then let's go back to your work as a judge.

(END VIDEO CLIP)

DIONNE: I thought that was one of her best answers in two different ways.

One is, she answered the question that shouldn't have been asked. But then she, in the most polite possible way, essentially said to Senator Cruz, what the heck are you asking me this question for? I'm here to talk as a judge.

And she did that all day long. My favorite exchange is one you will never show on television, because it was kind of boring and academic. But it was when Senator Sasse started asking her about originalism. And it was actually a very substantive exchange, which I suspect is going to be shown in a lot of law schools someday.

And it just showed how smart she was and that she sort of explained originalism, Justice Scalia's idea, probably better than most conservative law professors could explain originalism.

I think what you were seeing is Cruz and Hawley practicing lines for the 2024 Republican primary. Clearly, they want to be out there at the edges.

But I think the other thing you saw is, they don't really have anything on her.

BROWNE-DIANIS: Right.

DIONNE: And that's why they got to go to these child pornography cases, where, in fact, she did give some pretty tough sentences, and why, and also for 2022 elections, they're doing the CRT thing and the soft-on-crime thing, although there are times when you wanted to ask, would they be going so hard on CRT if she were not a black woman appointee?

BROWNE-DIANIS: That's right. That's right.

DIONNE: I don't know the answer to that question.

But it's a question that came -- I suspect crossed a lot of people's minds.

BROWNE-DIANIS: Yes, that reminded -- and that exchange reminded me -- and even the questions about Dred Scott reminded me of being in law school and the microaggressions that black people experience, black women in particular, from law professors.

I mean, I remember being asked my first day of property in my second year a question, a hypothetical that had to deal with drugs in a car. And all the other white students got other kinds of hypotheticals that had nothing to do with criminal activity.

[18:30:13]

And I remember saying to the professor, I can't answer that hypothetical because I cannot relate to it.

And so this is the kind of questioning that she is receiving that is really targeting her, but is also targeting their base, because they want their base to know that we are on it with this Critical Race Theory thing, and we're going to fight for it.

And it's playing into racial fears and racial threats and the concerns about the 2022 midterms.

MELBER: What did you think of the way she handled a lot of these queries?

BROWNE-DIANIS: I mean, I was impressed.

Listen, she has the temperament to be a Supreme Court justice...

DIONNE: Yes, right.

BROWNE-DIANIS: ... patience, the wherewithal, to stick through it and to answer the questions, and to bring it back to, why are we here? We're here to talk about my decisions, about my record, and about what I would be doing on the Supreme Court.

DIONNE: And she was so red, white and blue.

The way she talked about America, the way she talked about the founders, the way she talked about our history -- her family and law enforcement has come up. I mean, she everything she did was a sort of straight up contradiction to what they were trying to do to her.

And I think it was pretty effective. For anybody out there who is not dug in against her, I think she did herself an enormous amount of good with undecided folks out there. I don't think that matters. I agree with what you said at the beginning. I think she has the votes already.

But I think she may have made it easier for at least a couple of Republicans to vote for her. And I hope they do. I think it would be better for the Republican Party not to go up against this really qualified woman as a bloc.

MELBER: Well, and that's why we look at the math. I mean, everyone's supposed to start from scratch, but 53 looks like a ceiling, because why would a Republican senator voted against her for a lesser job...

BROWNE-DIANIS: That's right.

MELBER: ... twist themselves in public a pretzel to do that?

Now, Lindsey Graham was one of those right. Whatever one thinks of him, he was one of those last time.

BROWNE-DIANIS: Right.

MELBER: We got the feeling as he marched out the place today that he might not be there this time. Take a look.

(BEGIN VIDEO CLIP)

GRAHAM: I'm suggesting failed miserably. And advocates to change the system, like she was advocating, would destroy our ability to protect this country.

We're at war. We're not fighting a crime. Look at the frigging Afghan government. It's made up of former detainees at Gitmo. This whole thing by the left about this war ain't working.

(END VIDEO CLIP)

MELBER: And then you will watch. He's -- and he's out of there. He's out of there, which is a little -- mild breach of decorum.

(LAUGHTER)

MELBER: I want to say this as...

BROWNE-DIANIS: A little dramatic.

MELBER: Yes, a little dramatic.

But I want to say this as precisely as possible. The legal jurisprudential point that he raises, that there is a legitimate debate between using laws of war or due process rights in a new field of battle, right, when you have these endless wars on terror, is totally fair.

BROWNE-DIANIS: Right.

MELBER: That's a real debate in law and politics.

BROWNE-DIANIS: Right.

MELBER: He referred to all that. How that attached to her, I couldn't make heads or tails of because he kept hitting her on, well, what about this and that?

And she said, well, I'm not going to announce a new war policy, be it on Gitmo or Ukraine.

(CROSSTALK)

BROWNE-DIANIS: That is not my job. That is not my job in the circuit court. It is not my job as a lawyer, and it's not my job on the Supreme Court.

DIONNE: And I thought Senator Hirono made a great point that we just saw before we came on, which is a lot of good conservative libertarians said it was good to represent Guantanamo detainees. That is what the American system is supposed to be about.

BROWNE-DIANIS: That's right.

DIONNE: And I thought that was in a sense a repost to what had happened earlier.

MELBER: Yes.

And it spoke to some of the frustration, because, again, Senator Graham's statement as a floor speech or a statement in the military committee would be fine, because that's what Congress does. It didn't really land with, and what does this have to do with her?

BROWNE-DIANIS: Right.

MELBER: And she kept saying, yes, I'm not here -- I'm not cosigning either way. In fact, I'm getting ready to potentially, again, if she holds the votes, serve on the court.

I want to thank both of you for being on set with us in Washington.

BROWNE-DIANIS: Thank you. Thank you.

MELBER: I got two more guests standing by.

My thanks to Judith Browne-Dianis and E.J.

And, by the way, E.J.'s book, brand-new, "100% Democracy: The Case for Universal Voting," you can get that right now. Google it and grab it.

Now we turn to two other experts who've been standing, prosecutor Yodit Tewolde. She's also "Making the Case" on the Black News Channel, and Chai Komanduri, who's advised Barack Obama and other Democratic campaigns.

Welcome to both of you.

I want to go right into the Hawley of it all. Here was Josh Hawley.

I think we have Josh Hawley. Not ready. Do we not have it? We don't have Josh Hawley, but I'm going to read from, Yodit, just to make sure everyone's caught up on it.

[18:35:00]

He came really the hardest I think of anyone thus far today in the questioning. And at one point, he says, "Judge, with all due respect, I will be direct with you. I am questioning your judgment. That's what I'm doing. I'm questioning not your excellence as a judge, but you had discretion."

And he argues she used it wrongly in those very tough cases regarding basically the abuse of children in photography that then is used as -- quote, unquote -- "child pornography."

Walk us through that. And for viewers who might have been watching and said, gosh, where's this coming from, what is this all about, all your analysis, please, Yodit.

YODIT TEWOLDE, CRIMINAL DEFENSE ATTORNEY: Listen, for anybody to suggest that Judge Jackson would condone or be soft on those who abuse children is just -- it's just utterly ridiculous, OK?

No one knows Judge Jackson's case file better than her. And for Hawley to suggest that all she needs is a sentencing guideline is misinformed. And she -- and Judge Jackson threw it back to Congress and said, you laid out factors for judges to consider, and it doesn't just stop at sentencing guidelines. We have to actually factor in the circumstances and the nature of each case.

You can't treat cases as a one-size-fits-all. And Judge Jackson said it best. This isn't a numbers game. But let's just take this all back, though, Ari. At the end of the day, there is a coalition. The National Coalition Against Domestic Violence, the nation's leading voice against domestic abuse, endorsed Judge Jackson. So there's no argument. They need to move on.

MELBER: Yes. You mentioned and the police cred that she has as well, a positive statement from the Fraternal Order of Police.

And she really parried a lot of this really well, as I mentioned, just with our coverage with the other guest.

Chai, I go to you not for the law of it, but the politics of it, which was not on the menu, but seemed all over the place, with senators ordering off the menu and bringing in the politics.

What did you think of what the Republican Party was doing today? And did they land their goals, even if they didn't move any votes against her?

CHAI KOMANDURI, DEMOCRATIC STRATEGIST: No, I thought this was a terrible messaging fail on the part of the GOP.

I thought the questions were all over the place. And I think their initial strategy, which was basically to link CRT to Judge Jackson -- E.J. Dionne said, I don't know if she wasn't a black woman, if she would get all these questions about CRT.

I will say conclusively right now, this is about her being a black woman. And this is about basically causing -- calling her -- basically casting her as a radical, as a black radical who is out

to get white people. That is specifically what they have tried to do. And it's specifically what the CRT attacks are trying to do.

They are trying to build on what Glenn Youngkin did in Virginia last November, and really linking that to Judge Jackson. And so the RNC today just tweeted out this little meme saying, KBJ should be CRT. That is that is specifically what the strategy is.

The problem has been that only Marsha Blackburn and Ted Cruz really seem to have gotten the memo and are staying on this point. The rest of the senators appear to be departing from these talking points, for very good reasons. It's really ugly.

I mean, quite frankly, it looked like I saw Ted Cruz commit a hate crime in that hearing room. The -- it was McCarthyism at its worst, where he was sort of insinuating that just because she was on this Georgetown day school board that she's responsible for every little thing in every little book that's been written there.

Spoiler alert: Judge Jackson is not going to Supreme Court to call babies racist. That is not what she's going to be doing. But that is exactly what Ted Cruz wants to do. He wants to gin up white grievance. Him and Marsha Blackburn and the GOP want to gin up white grievance ahead of the midterm and link Judge Jackson to that cause.

It's really was, frankly, disgusting and ugly to watch.

MELBER: Yes, that's your strong take on it.

And, Yodit, I want to bring you into that, because the entire obsession here with what is fundamentally a graduate education pedagogy, something that is a part of a somewhat obscure, but a part of academics, and that was sort of thrown at her as if this was relevant, it does seem a reach.

As Chai says, it relates potentially to the identity, the race of the nominee, which should be out of bounds. And, second, it seems like a reach because she's a sitting judge. So, if you want to talk about civil rights law, or affirmative action, or any number of those types of issues, that would be a more substantive way to get to it.

Yodit, as Chai emphasizes, that's not how Senator Cruz did it. And that's why it seemed really absurdist, if it wasn't so serious, but McCarthyist to say, oh, because you were affiliated with a school that might have had this book, here's this book, here's the baby cartoon. Have you or did you ever get involved in these children's books?

[18:40:00]

And you sort of say, what a decade is it?

TEWOLDE: And you notice that Judge Jackson had to pause, take a deep breath, and always addressed each senator by saying, "Respectfully."



Understand that this is an overqualified candidate, right, who had to remain calm, cool, collected, knowledgeable, professional, in the face of underqualified men who were throwing irrelevance and uninformed attacks on everything but what she was there to do.

And she did a great job by saying, listen, none of that has anything to do with why I'm here. None of that has anything to do with my job as a judge.

And so this was just a desperate attempt by these Republicans, who knew that they have absolutely nothing. I mean, Judge Jackson is basically unimpeachable, right? She's had over 500 decisions that she's made. She's had pages and pages of rulings, and in an attempt to be transparent. She wanted people to understand why she made decisions the way that she did.

None of these senators, you can tell, read those decisions. They were misinformed. They were trying to misinform and confuse the American people, rather than, honestly, rallying behind one of the most qualified individuals for the High Court. And, instead, political posturing is what you got.

MELBER: And we're watching the committee room here. Folks may recall that Chairman Durbin is going to bring back the committee into session here after their vote. And we will cut in, in the moment that happens to bring it to viewers live.

Chai, we talked about what the Republicans are doing. What do you think the Biden White House is getting out of this thus far? What are they thinking, given that you have worked with some of those folks?

KOMANDURI: I think this has been a tremendous win for Joe Biden. And, quite frankly, he really needs it. It's been a very tough couple of months for Joe Biden and for the Biden White House.

This is an outstanding nominee. I think she has shown poise and grace. And it is really -- she's a great face for the kinds of people that Joe Biden and the White House want to bring into the U.S. government. And what a contrast it is, from, say, Brett Kavanaugh.

And I think that was a very good point that was just made about how she kept such great poise. She could not do what Brett Kavanaugh did. She is not allowed, as a black woman, to do that.

I felt a tremendous anger watching Ted Cruz's questions directed at her. I can only imagine what black women across America felt when they saw those questions directed at her. But, boy, she showed a lot of calm, a great demeanor.

And Ted Cruz wanted the Brett Kavanaugh moment. He wanted to have that, so he could use that to leverage that to help try to sink this nomination in some way. But she didn't give it to him. And I think all credit to her and all credit to the Biden White House for putting forward a great nominee.

MELBER: Yes, and with the caveat that I...

(CROSSTALK)

MELBER: ... I will have to jump in if the senators start speaking there. We're watching Durbin. Go ahead, Yodit.

TEWOLDE: No, Ari, I just wanted to say, Chai, thank you for saying that, because this black woman trope that we're angry when we try to assert ourselves, is something that I'm sure Judge Jackson has to really tread lightly on.

And she's done such a remarkable job so far.

MELBER: Yes.

And I see -- we're watching the chairman there. He's refueling. And it is a long day. I see some what appear to be mixed nuts and some water. That's part of the reporting.

Yodit, again, in the moment until we start, what did you think of that long pause? On social media, many people in -- not just people in politics or the public realm, but people talked about, in their workplace, recognizing the pause, and the way she felt she had to conduct herself.

TEWOLDE: I mean, we couldn't conduct ourselves the way Brett Kavanaugh did, right? He became emotional, because, if we were to become emotional, we'd be unhinged, we'd be angry black women.

And that sigh was something that we could all, black women, really relate to at work in corporate America, that microaggression that we always have to really recognize and be very careful in addressing, because, again, we are the ones to blame, and not the actual aggressor.

So, she basically let out a sigh that we all did, and we could all relate. And that was, I think that she deserved a breather, and to really collect ourselves, and really think to herself, how do I address this individual and also maintain this temperament that a Supreme Court justice is supposed to have?

And that's why she's such a great nominee.

MELBER: As you say, that was the mix of the human moment and the poise, the sort of sobriety that she's evinced throughout this.

Chai, I mentioned the Biden White House. We were down there in the room today covering this. And we saw the former senator that they have tapped who's been working with the nominee. What do you think about what were clearly some of the telegraphed lines, which, again, is the prep of all this, because they clearly decided, in the same way that then-nominee John Roberts once said he was an umpire.

And then we heard umpire, balls and strikes, 20 times. She decided to say she's not making policy decisions. And we heard that a lot today and may continue to hear it tonight.

[18:45:08]

KOMANDURI: Yes, I think that there was a very clear strategy that they had to make her a nominee who could appeal to the widest possible audience, not a nominee that was kind of nominees that Trump put forward, who were only designed to appeal to a MAGA base.

I think that there was a very clear intention to do that. And I think that she really succeeded. I mean, there`s no way you could watch these hearings and think this is not someone who was extremely qualified to be on the U.S. Supreme Court.

And I think that was a tremendous win for her. And I think it was a tremendous win for the country.

MELBER: Yes.

We did have some sound, a clip I wanted to get to if we have time, which was her discussing choice, Roe, and Planned Parenthood, which are lines of law on women`s rights and choice that are currently very much up for debate, given where the state of the law is in some of these state attacks.

And so, again, I`m telling viewers, you see what I see. We see the chairman, but we don`t see -- we don`t have eyes on the nominee yet. We will cut in as needed.

But I want to play a little bit of Judge Jackson speaking about that line of women`s rights precedents that are really under legal assault, so a very hot issue if she reaches the court. Let`s take a listen.

(BEGIN VIDEO CLIP)

JACKSON: Roe and Casey are the settled law of the Supreme Court concerning the right to terminate a woman`s pregnancy.

They have established a framework that the court has reaffirmed. And in order to revisit, as Justice Barrett said, the Supreme Court looks at various factors, because stare decisis is a very important principle.

(END VIDEO CLIP)

MELBER: Yodit, in a relatively short statement that was a good amount of legal jargon, walk us through what she was saying there, why it matters.

TEWOLDE: Well, basically, she`s saying that, with this issue of abortion that, like you said, is still currently under attack, this is something that there`s precedent there.

And she`s she`s saying that there is a respect, that this issue has already been decided.

MELBER: Right.

TEWOLDE: And there is a process in which -- sorry, Ari. Go ahead.

MELBER: I`m cutting in, as I reserved the right to do.

We`re going to listen now to Judge Jackson with questioning coming up from Senators Booker and Cotton.

Let`s listen in.

DURBIN: ... to be paired in the morning with Senator Ossoff for the morning show.

SEN. MARSHA BLACKBURN (R-TN): Yes, Mr. Chairman, I just felt like we should -- it`s on. My voice is just soft.

I felt like we should finish tonight.

DURBIN: We`re trying to...

BLACKBURN: I know.

DURBIN: Senator, there are a lot of people involved in this decision. I`m doing my best.

BLACKBURN: I fully appreciate that.

DURBIN: And you asked to be on the program tonight, and we`re going to put you on the program.

BLACKBURN: And I appreciate that. Thank you.

DURBIN: OK, good.

Senator Cotton.

CRUZ: Mr. Chairman, before we start this questioning, right before the break, I asked the chairman about -- Senator Hirono had referenced five probation reports that were not in the record.

And I asked the chairman whether the Democrats had access to information about Judge Jackson`s judicial record that Republicans did not. You did not answer me at the time. But as we returned...

DURBIN: I can you an answer. I can you an answer.

CRUZ: OK. Well, hold on.

Let me finish my question. When we returned, and when we walked in, each of the Republicans was handed this piece of paper, which is the first time any of us have ever seen, which is a chart of probation recommendations. We were just told that the White House gave it to Democrats earlier today.

I don`t know if that`s true or not. And what I would ask you is that, is there anything else that Democrats have access to in this case that they`re not sharing with Republicans on this committee?

And, Mr. Chairman, how would you have reacted if, say, during the Kavanaugh confirmation, the White House shared judicial materials with Republicans and did not share it with Democrats? I'm pretty confident you would have expressed extraordinary displeasure at that.

DURBIN: If I recall, there was some discovery issues in the Kavanaugh case involving several years of his performance in the White House, which your own counsel decided we couldn't...

(CROSSTALK)

CRUZ: But, sure, that's disclosure to the whole committee.

DURBIN: Yes. That's right.

CRUZ: And in this case, is there anything else that Democrats have access to of Judge Jackson's record that you have not shared with Republicans on this committee, and, in particular, the presentence reports?

URBAN: No, I...

CRUZ: I suspect, if they were helpful, you would have made them public. So the fact that you haven't raises an inference that they're not helpful to the case you're making.

DURBIN: Senator, you always draw your own inferences. And I know where most of them head, I will just tell you that the information that we received from the White House, I'm told everyone had access to if they wanted, and now you have it just a matter of hours after we have received it, exactly...

(CROSSTALK)

CRUZ: So, is there anything else Democrats have that Republicans do not from Judge Jackson's record?

DURBIN: Not to my knowledge.

SEN. JOHN KENNEDY (R-LA): Mr. Chairman, could I ask a question you about this?

[18:50:00]

KENNEDY: I want to be sure I understand.

The handout that I just saw, the White House gave to some of us earlier today, but not all of us?

DURBIN: We -- it was available, I'm told. The information was available to anyone who requested it. The White House...

KENNEDY: So, you had to be clairvoyant and know they had it.

DURBIN: Not, no clairvoyance. I think it's pretty obvious, Senator. If...

CRUZ: How would you know to request it?

DURBIN: You would know it after senator Hawley launched his attack on the judge.

At that point, all of this information became relevant to countering...

(CROSSTALK)

KENNEDY: So I would be expected to say, geez, after Senator Hawley asked questions, I better call the White House and see if they can help me research this?

(CROSSTALK)

DURBIN: No. There`s this point.

The point I`m getting to is -- and you know as a good lawyer what you do during discovery. I wasn`t aware of the fact that this was available. The White House requested it, received it. We asked for a copy. And within an hour or two, you received the same copy.

(CROSSTALK)

KENNEDY: Let me finish. When did you all get your copy?

DURBIN: Sometime today.

KENNEDY: Sometime today? That covers a lot of ground.

DURBIN: I don`t have any personal knowledge of this. I will be honest with you.

KENNEDY: You don`t have any personal what?

DURBIN: Knowledge.

CRUZ: Does your staff?

KENNEDY: Does your staff know?

DURBIN: They haven`t...

CRUZ: They`re standing behind you.

DURBIN: Yes, I have talked to them earlier.

SEN. CORY BOOKER (D-NJ): Mr. Chairman. I`m so sorry. I just want to make this a partisan issue if it doesn`t have to be. My staff just says we just got it 10 minutes ago as well. So I`m very upset. I join Ted Cruz.

DURBIN: Good.

UNIDENTIFIED MALE: Mr. Chairman...

DURBIN: That`s an alliance that`s well-known.

BOOKER: Yes. Yes.

SEN. MIKE LEE (R-UT): Mr. Chairman. I do think it`s significant.

We have had no reference to presentence reports. And we have got this material that references recommendations made by the Office of Adult Probation and Parole.

DURBIN: We don't have presentence reports.

LEE: Well, OK, but we have got critical information that is contained within them.

The recommendation made by the Office of Adult Probation and Parole in these cases is something that's drawn from the presentence report. It seems to me that if we're going to have a jot-for-jot selective incorporation of information in there, we ought to have access to the whole report.

So I respectfully request that we be given access to these reports. They have been made now by a member of the committee, in reliance on information that we haven't had access to. And I think we need to be given those.

You can't -- you can't...

DURBIN: Senator, I'd like to draw this to a conclusion. I can tell you what I know and...

LEE: Well, so would I.

DURBIN: And here's the point.

Most of this information was published in "The Washington Post" five days ago, all right? This is not confidential information. When the Hawley attack on the judge started, we requested more information, the White House did, and then shared it with us within the day. And you now have the same copy that we have. End of story.

LEE: Is it fair for you to characterize Senator Hawley's questions or the questions raised by any of us as an attack?

It's not a personal attack. This is a legitimate question regarding our sentencing, regarding the most heinous crimes imaginable.

(CROSSTALK)

DURBIN: Oh, come on.

LEE: No, these were legitimate questions, Mr. Chairman. Don't call them attacks.

DURBIN: Well, I can just tell you, I have characterized them as attacks and other things as well. I think it's pretty clear what's going on here.

And now you have all the information we have. Is that enough?

CRUZ: So, Mr. Chairman, for example, in the questioning about the Hawkins case, Judge Jackson said she relied on the factors, relied on probations' recommendation.

We just found out in what you just handed us that, in the Hawkins case, the probation office recommended 18 months, and Judge Jackson only sentenced him to three months. That's -- you can get more than that almost for a speeding ticket.

DURBIN: Senator...

CRUZ: And this committee, given that she raised it as the basis for her sentence, it is highly relevant to the committee's analysis to see what the presentence report says. Why did the probation office recommend 18 months, and she only sentenced to three months?

DURBIN: March 19, "Washington Post": "In the case of U.S. vs. Hawkins, a sex offender had multiple images of child porn over 18. Sentencing guidelines called for sentence up to 10 years. Judge Jackson sentenced the perpetrator to only three months in prison."

CRUZ: Those facts, we knew. It's the probation recommendation.

DURBIN: Yes.

CRUZ: We don't dispute that the guidelines said 10 years, and she sentenced him to three months.

DURBIN: I'm sorry. I didn't finish reading it.

"The government probation both recommended sentences well below the guidelines. The government recommended 24 months. Probation recommended 18 months. The defense recommended one day."

I'm telling you it was published in a newspaper. Now...

CRUZ: Well, I can't help what is leaked to the newspaper or not.

This committee -- you keep referencing discovery. This is not litigation. This is a committee of the United States Senate, where both sides of the aisle have a right to access to the record, and we're carrying out our constitutional duty of advice and consent.

DURBIN: I will tell you this. For some reason, your side didn't request the information.

CRUZ: But how would we know to request?

So I'm hereby requesting all other information you magically have that you haven't told us you have and you're not sharing with the other side.

DURBIN: So noted. So noted for the record.

[18:55:00]

We will continue with the questioning.

Senator Cotton.

CRUZ: And we're requesting the presentence reports in particular, which are highly relevant to the issues before this committee.



DURBIN: Senator Cotton, please proceed.

We don't have any presentence reports.

SEN. TOM COTTON (R-AR): Judge, I'd like to talk about crime.

In 2019, there were about 16,000 murders in America. In 2020, there were more than 20,000. That's a 25 percent increase in one year. 2021 data isn't complete, but we know many cities have reached record levels of murder, including Philadelphia, Atlanta and Milwaukee.

At the same time, the prison population has decreased by about 14 percent, in part from pandemic policies, but also from fewer prosecutions and weaker sentencings.

Think it's safe to say there's a surge in crime, especially violent crime and murder, across America. You have noted that some members of your family have law enforcement backgrounds, and I honor them and thank them for their service.

Does the United States need more police or fewer police?

JACKSON: Thank you, Senator.

As you just noted, I have law enforcement in my background. And I am very familiar with the problems that crime cause in the communities where we live.

COTTON: OK, Judge, I'm sorry. We have a few minutes here.

You have a lifetime appointment if you're confirmed. I asked a simple either/or question. Does the United States need more or fewer police?

JACKSON: Senator, the determination about whether there should be more or fewer police is a policy decision by another branch of government.

It is not something that judges have control over. And I will stay in my lane in terms of the kinds of things that are properly in the judicial branch.

COTTON: OK, if you don't want to address whether the United States needs more or fewer police, we will move on to sentencing, which is certainly in your lane.

There has been a lot of talk about criminal justice and sentencing approaches and theories today. In general, is someone more likely or less likely to commit a crime if they know that they will be caught, convicted and sentenced?

JACKSON: Senator, what is in my lane is the consideration of particular cases, of prosecutions.

COTTON: Judge, you have spoken a lot today about criminal sentencing, about the theory of sentencing. You have written a lot about it in your record. It is a very simple question.

If someone more likely or less likely to commit crime if they're more certain that they're going to be caught, convicted and sentenced?

JACKSON: Senator, I am aware from my work on the Sentencing Commission, and not as a judge, that there is research into recidivism rates, into rehabilitation, into the factors that go into a determination about whether someone is more or less likely to commit crime.

Part of what Congress has taken into account when it determined that one of the purposes of punishment is deterrence is the idea that, if someone is convicted and punished, they will be deterred from committing other crimes.

COTTON: And you have mentioned that, and you have written about that in your writings. There`s four purposes of punishment. One of those is deterrence.

Isn`t it inherent in the concept of deterrence that people are less likely to commit crime if they`re more likely to get caught, convicted incidents? Why can`t you just say that`s the case?

JACKSON: Senator, it`s not that I`m avoiding saying that`s the case.

COTTON: No, that`s exactly -- Judge, that`s exactly what you`re doing.

I`m asking a very simple question. In general, is someone more likely or less likely to commit a crime if they know they`re going to be caught, convicted and sentenced? It`s the heart of deterrence theory.

JACKSON: It`s very difficult to answer questions in general, when you`re asking about things like phenomena related to crime.

It`s the theory behind deterrence that, by punishing someone, they will be less likely to commit the crime in the future. That is a theory that undergirds...

COTTON: Do you think that theory is correct?

JACKSON: Senator, there is research that supports that deterrence is something that can occur. Does it occur in every case? I can`t say that.

COTTON: OK.

Let`s turn to something more concrete then. Do you know how long the average inmate convicted for a murder serves in prison in America?

JACKSON: No, I don`t.

COTTON: The answer is 17 years, on average. Is 17 years too long or not long enough for a criminal to spend in prison for murder?

JACKSON: Senator, these are policy questions, whether they`re in the province of the Sentencing Commission in terms of recommendations, whether they are in Congress.

They`re not the kinds of things that I can opine about.

COTTON: So, you don`t want to opine on whether 17 years is too long or too short a sentence for murder?