



## Few public defenders become federal judges. Ketanji Brown Jackson would be the Supreme Court's first

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Heather Pinckney's Zoom call had gone silent by the time President Joe Biden announced Ketanji Brown Jackson as his nominee to the Supreme Court.

It was during the weekly meeting of the Black Public Defender's Association, which Pinckney founded and leads as executive director.

"There was this moment we were kind of like silent and unbelievably excited and happy, emotional," Pinckney recalled.

Those present in the meeting – policy experts, communications specialists, project managers as well as public defenders – had heard rumors of the selection that morning. But as **Biden made the official announcement**, it became real.

"Finally, there was going to be someone that looked like us and had a background that was what we were like on the Supreme Court," she said.

Biden selecting Jackson to replace **retiring Justice Stephen Breyer** was historic not only because she was the first Black woman nominated to the court, but also the first public defender. Typically, the federal bench has seen few criminal defense lawyers, let alone public defenders. Jackson is among **a wave of former public defenders** selected for judgeships by this administration.

"She certainly exemplifies President Biden's revolutionary approach to professional diversity on our court," said Chris Kang, the cofounder and chief counsel of Demand Justice, a progressive judicial reform organization.

According to **a study by the libertarian think tank Cato Institute**, prosecutors dominate the ranks of the judiciary. As of April 2021, 318 former prosecutors were sitting as federal judges, more than one-third of the 880 total across the country. This was followed by 243 lawyers who had represented the government as "noncriminal courtroom advocates". Among the smallest fractions of those who became federal judges were former criminal defense attorneys – about 76 total – and former public defenders, who numbered only 58, less than 7 percent of all judges.

Part of the wide discrepancy can be attributed to former President Donald Trump, who appointed 10 times as many prosecutors as former criminal defense attorneys and public defenders, the institute found. But the lop-sided ratio pre-dates Trump. Before he took office, prosecutors still outnumbered public defenders by a 4-to-1 ratio.

This difference can also be seen on the Supreme Court. Among the nine justices are three former prosecutors – Neil Gorsuch, Sonia Sotomayor and Samuel Alito – who have been appointed by both Democratic and Republican presidents.

However, the Biden administration has made some changes in who they're nominating to the federal bench.

“Biden has nominated more public defenders than prosecutors, and that is really revolutionary in terms of how we see the criminal, legal system and how judges from different perspectives are going to approach the law,” Kang said.

He said by his organization's tally, 30 percent of Biden's nominations for federal judges have been former public defenders, a “completely different shift from even past Democratic presidents.”

Insha Rahman, vice president of advocacy and partnerships at the Vera Institute, said that historically, the path to becoming a judge in local, state and federal courts was to be a prosecutor, work for a large law firm or become a litigator for the government.

“Then, if you bide your time, check the right boxes, maybe you will be considered for a nomination,” Rahman said. “And so, who is kept out of that?”

This would be: former public defenders, civil rights lawyers and those who work for organizations like the NAACP Legal Defense Fund that challenge the government, along with any other lawyers “haven't taken this sort of traditional path.”

Kang said these lawyers are subjected to more scrutiny about their fairness or impartiality—something prosecutors or corporate lawyers or less likely to be asked as they are considered for judgeships.

“Almost nobody ever asks a prosecutor or a corporate lawyer whether or not they could be fair, as if those are neutral professions or neutral sort of perspectives,” said Kang.

“I think that sort of is baked into, if not the political conversation, the broader legal establishment that this sort of given as an assumption that public defenders and civil rights lawyers have to overcome.”

Biden first pledged to nominate a Black woman for the high court during his 2020 presidential campaign. In the history of the Supreme Court, all but seven out of 115 justices have been white men. Only four have been women. Only two are Black – Clarence Thomas, a sitting justice, and the late Thurgood Marshall – who was himself 55 years ago the last former criminal defense lawyer appointed. Just one, Sotomayor, is a Latina.

And while Sotomayor was also a historic selection, Jackson's elevation to the Supreme Court could help improve the judiciary, said Vincent Southerland, an assistant professor of clinical law at New York University School of Law.

"If we want to really figure out how to address the things that are most challenging in our society then we need to get the people who are who have been the most marginalized, the most oppressed, [and] have faced discrimination in the most virulent ways," Southerland said. "I feel like Black women fit that category of folks."

Biden's plans to change the judiciary have also gone beyond that particular promise. Weeks before Biden was sworn into office, **his incoming White House counsel wrote** to Democratic senators asking for judicial nominations that were professionally diverse. This meant a list of candidates beyond the usual prosecutors that overrepresented the judiciary, and that included criminal defense lawyers, civil rights attorneys and former public defenders like Jackson.

Kang said that Biden's desire for professional diversity on the bench is the result of the nation's shift on criminal justice reform, which includes growing recognition that the existing system is unfair and in need of change. "The politics of criminal justice reform have changed," he said, public defenders are "out there defending the Constitution and the rights of everybody."

Even as Republicans try to ramp up their concerns about public defenders being soft on crime, "I think that those attacks are falling on deaf ears now more than ever before," he added.

Southerland agreed, saying the conversation around law and policy has been affected by changes in American culture, including the past 10 years of Black Lives Matter protests.

"I do think that the movement has shifted the entire conversation and brought a new level of awareness and consciousness around racial justice ... we were working kind of in a vacuum before," he said.

If confirmed, Jackson's immediate impact will still be limited as a member of what would be a three-member liberal wing outnumbered by the six conservative justices nominated by Republican presidents.

Still, Jackson will still be heard in her possible dissents and – importantly –her presence in the court deliberations could influence majority decisions.

"I think her time as a public defender allows her to bring the perspective from the other side, which is representing an actual client," Pinckney said.

"As a [public defender] she would have had to go perhaps to the jail and see her clients talk to them, make sure they understood what the appeal was she was writing and the issues involved and get their perspective on those things," she said. "Those things matter when you have a Supreme Court justice."

When Jackson appeared on television or in media coverage after her historic nomination, Pinckney said she saw something she hadn't seen before: a Black woman, who looked like her, being considered for what many lawyers would consider the most important job in their field.

“If you were to see me, I am a dark-skinned Black woman who at the time had little faux locs in my hair. I wear glasses consistently, so there was this moment of — I’d be looking at ... someone who very much looked like me,” she said.

Rahman, a former public defender, said that diversity in the legal system does not always lead to different outcomes. She cited research that juries with **people with criminal convictions are not more likely to acquit a defendant**. But having a more diverse set of professional experience and expertise on the Supreme Court could “**lead to more nuanced, thoughtful discussions and deliberations** about the issue in front of the judges,” she said.

Though Jackson’s confirmation would be a win for those seeking better representation of public defenders, it’s also not a guarantee the trend will continue. The politics that have made public defenders and criminal defense lawyers more difficult to confirm have not completely changed. Some of earliest lines of attack against Jackson have focused on her record of representing criminal suspects.

Shortly after her nomination was announced, the **Republican National Committee issued a statement** criticizing her public defender experience, specifically citing her work representing detainees being held at Guantanamo Bay.

Southerland said Jackson’s nomination hearings will likely be an indicator of how future public defenders will be treated and whether more will be nominated to judgeships.

“Her nomination is certainly going to provide a blueprint for Republicans and conservatives going forward, attacking people who are public defenders, who are potential appointees and may eventually ascend to the bench,” Southerland said.

Pinckney is aware of the attacks public defenders receive in the public square, including in depictions in the popular media where public defenders are “the ones with holes in their shoes, case jackets and not knowing what’s going on.”

The depictions don’t bother her, Pinckney said, nor does she think it affects most public defenders. But it’s frustrating that public defenders don’t get respect, she added, saying that they “probably don’t do it for the love, they do it for the people.”

“We know that we’re literally out there trying to save lives.”

Still, there was a reason her Zoom call, full of Black public defenders, went silent as Jackson’s nomination was formally announced. Jackson’s possible elevation to the high court is a high honor, and one which no Black woman and no public defender has been given before. It would also show that a less conventional path to important positions is possible.

Having Jackson in that space, Pinckney said, would be validating that “you can serve people and can take care of those that had been treated wrongly by this system and it’s not the normal path that many people would take to the Supreme Court.”

“And it’s notable that Jackson uses her background proudly. I think is a badge of honor for the rest of us.”

