View of President Biden's Potential Supreme Court Nominees through a Media Law Lens

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PRACTICES Media Entertainment and Sports, Anti-SLAPP and First Amendment Rights, U.S. Supreme Court

President Biden's first nominee to the Supreme Court could be a boon to the media law bar. Two of the leading contenders — D.C. Circuit Court of Appeals Judge Ketanji Brown Jackson and California Supreme Court Justice Leondra Kruger — worked as reporters before law school, and each has written opinions that promote government transparency and uphold key First Amendment protections. A third contender, U.S. District Judge J. Michelle Childs, has a more limited record on First Amendment issues.

Below is a look at some key media-related rulings from each possible nominee, with the caveat that their respective judicial philosophies on the First Amendment — and more broadly – remain something of a mystery.

Judge Ketanji Brown Jackson, D.C. Circuit Court of Appeals

Judge Jackson, 51, recently joined the D.C. Court of Appeals in June 2021, after seven years as a judge on the D.C. district court. Before taking the bench, she worked in both private practice and government service. Prior to entering Harvard Law School, Judge Jackson (then Ketanji Brown) worked for a year as a staff reporter and researcher at *Time* magazine in New York City. Jackson did not author any by-lined articles while at *Time*, but her writing on the bench has drawn particular praise, and she has a reputation for being "detailed and thorough, sometimes to a fault," according to the *New York Times*.

On more than one occasion when serving as a District Judge, Jackson has sided with First Amendment advocates in cases related to public transparency. In *Campaign for Accountability v. United States Dep't of Justice*, 486 F. Supp. 3d 424 (D.D.C. 2020), Judge Jackson held that the "seldom-litigated reading-room provision" of the Freedom of Information Act required disclosure of a broad swath of opinions by the White House Office of Legal Counsel. Jackson found that these records were likely "final opinions" under FOIA, and therefore had to be proactively disclosed under the reading-room rule. Her opinion, which covered nearly one-quarter of all OLC opinions sent to outside agencies, was hailed by the Knight Institute as a "groundbreaking decision" for transparency.

In another FOIA case, Jackson held that a transportation-safety blogger employed by a for-profit company qualified as a "a representative of the news media" under FOIA's fee-waiver provision. *Liberman v. U.S. Dep't of Transp.*, 227 F. Supp. 3d 1, 13 (D.D.C. 2016).

Judge Jackson has also taken an expansive view of First Amendment free-speech rights. Shortly after taking the bench in 2013, Judge Jackson allowed an Occupy D.C. protester to proceed with a First Amendment Bivens claim against D.C. Park Police, after he was arrested for allegedly using profanity. *Patterson v. United States*, 999 F. Supp. 2d 300 (D.D.C. 2013). Jackson also denied the

Defendants' qualified immunity claims, finding that the First Amendment right not to be arrested solely on the basis of non-inciting speech was "clearly established." *Id*. at 317.

Associate Justice Leondra Kruger, California Supreme Court

Justice Kruger, 45, also has experience in journalism, starting as a reporter with her high school newspaper in Pasadena, followed by two years at the *Harvard Crimson*, where she covered everything from campus glee clubs to Mitt Romney's unsuccessful 1994 U.S. Senate campaign in Massachusetts. After Harvard, Kruger went on to Yale Law School, a clerkship with Supreme Court Justice John Paul Stevens, and a stint at Wilmer, Cutler, Pickering, Hale and Dorr.

She served as an assistant Solicitor General in the Obama administration, arguing 12 cases before the U.S. Supreme Court, mostly related to criminal law matters. In 2014, Gov. Jerry Brown surprised the California political establishment by picking Kruger—then 38 years old and with no prior judicial experience--to fill an open seat on the state's Supreme Court.

In 2020, she drew praise from First Amendment advocates for her opinion in *Nat'l Lawyers Guild, San Francisco Bay Area Chapter v. City of Hayward*, 464 P.3d 594 (2020), in which the Court held that government agencies cannot charge members of the public for the costs of redacting police body-camera footage and other digital public records requested under California's Public Records Act. "Just as agencies cannot recover the costs of searching through a filing cabinet for paper records, they cannot recover comparable costs for electronic record," she wrote. *Id*. at 607. While the opinion was specific to California's statute, Kruger's interpretation was premised on the idea that charging for extraction "would make it more difficult for the public to access information kept in electronic format." The Electronic Frontier Foundation lauded the decision as "an unqualified victory for government transparency."

Justice Kruger also sided with Yelp in a dispute over whether the site should be forced to take down allegedly defamatory posts by the disgruntled client of a law firm. *Hassell v. Bird*, 420 P.3d 776 (2018). Kruger joined an opinion that held it would violate Section 230 of the Communications Decency Act of 1996 to force Yelp to remove the critical comments. But Kruger wrote separately to explain she would have resolved the issue on the "more basic" ground that Yelp did not have "its own day in court." *Id*. at 798. Kruger's concurrence was not a full-throated defense of Section 230, noting that its reach had "troubling consequences," but advising courts to "proceed cautiously lest we inadvertently forbid an even broader swath of legal action than Congress could reasonably have intended." *Id*. at 801–02.

Judge J. Michelle Childs, U.S. District Court of South Carolina

Judge J. Michelle Childs, 55, lacks the Ivy League degrees and Washington experience of Judge Jackson and Justice Kruger, but her supporters – most notably Rep. Jim Clyburn of South Carolina — have tried to position Childs' state-school background and years of trial court experience as an additional perspective to bring to the Court.

Judge Childs has heard fewer media-related cases than Judge Jackson and Justice Kruger, and her broad approach to First Amendment issues remains difficult to discern. But one clue may be her initial ruling in *Billioni v. York County*, No. 0:14-CV-03060-JMC, 2017 WL 2645737 (D.S.C. June 20, 2017). In that case, Judge Childs denied summary judgment to a South Carolina sheriff who was being sued by a jail employee who was fired for disclosing possible misconduct.

The Plaintiff, a supervisor with access to the jail's video system, had reviewed the tape of an inmate's death and discovered disturbing discrepancies with the official narrative. The employee relayed these concerns to his wife, who worked on the business-side at a local television station. She subsequently informed the station's reporting team, who began to ask uncomfortable questions about the sheriff's official narrative. When the plaintiff was interviewed by internal investigators, he denied that he had told anyone of his concerns about the inmate's death, before later admitting that he was, in fact, the source of the station's reporting.

Judge Childs found the Plaintiff was not acting in the course of his employment when he told his wife about the video, while they were at home and he was off-duty, and she held that the subject was a matter of public concern, since it involved potential misconduct by jail employees. In a brief *Pickering* analysis, she observed that the sheriff "did not make any showing of disruption within the [sheriff's office] due to the statements made by Plaintiff to his wife," and she allowed the employee's claims against the sheriff to proceed.

The Fourth Circuit subsequently took issue with Judge Childs' *Pickering* analysis, holding that she should have considered instead whether the sheriff "reasonably apprehended a disruptive effect." On remand, Judge Childs wrote that she was "constrained to find" that there was such reasonable apprehension, and that the Plaintiff's claims did not outweigh the Sheriff's interest in maintaining order. *Billioni v. York County*, No. 0:14-CV-03060-JMC, 2019 WL 5085413, at *4 (D.S.C. Oct. 10, 2019), aff'd sub nom. *Billioni v. Bryant*, 998 F.3d 572 (4th Cir. 2021) and aff'd sub nom. *Billioni v. Bryant*, 998 F.3d 572 (4th Cir. 2021). It is not clear which of these opinions reflects the kind of approach Childs would bring to the Supreme Court.