

## The Confirmation Hearings of Judge Ketanji Brown Jackson

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**[00:00:00] Jeffrey Rosen:** Hello, friends. I'm Jeffrey Rosen, President and CEO of the National Constitution Center. And welcome to We the People, a weekly show of constitutional debate. The National Constitution Center is a nonpartisan, nonprofit, chartered by Congress to increase awareness and understanding of the constitution among the American people. This week, the Senate Judiciary Committee held confirmation hearings for the Supreme Court nomination of Judge Ketanji Brown Jackson. We've convened two law professors and Supreme Court experts who know judge Jackson's work well and who follow the hearings closely. Dear We the People listeners, the goal of this conversation is to take a deep dive into the hearings to explore what we learned from them. Melissa Murray is the Frederick I. and Grace Stokes Professor of Law and Faculty Director of the Birnbaum Women's Leadership Network at NYU Law. She's also one of the hosts of Strict Scrutiny. Melissa, welcome back to We the People. It's such an honor to have you.

**[00:01:00] Melissa Murray:** Thanks for having me again, Jeff.

**[00:01:02] Jeffrey Rosen:** And Lisa Tucker is an Associate Professor of Law at the Thomas R. Kline School of Law at Drexel University. She's also the editor of Hamilton and the Law: Reading Today's Most Contentious Legal Issues through the Hit Musical. Lisa, thank you so much for joining.

**[00:01:15] Lisa Tucker:** Thank you, Jeff. It's been an exciting week.

**[00:01:18] Jeffrey Rosen:** Lisa, you were in the hearing room for the entire hearing, as you've known Judge Jackson for 25 years, you were students together at Harvard Law School, and the goal of this conversation is to explore what we learned about Judge Jackson and her judicial philosophy from the hearings. After sitting through the hearings in person and, and you just you turned from Washington DC, what was, for you, the most revealing and illuminating exchange in the hearings?

**[00:01:47] Lisa Tucker:** You know, there were a couple of them. Um, I think a couple of times when ... the, the moment that stands out the most to me in terms of the Republicans questioning Judge Jackson, um, was when, I believe it was Josh Holly asked her, um, you know, "Can we go through this sentencing thing again? Can we go through the child pornography again? Why were you so below the guidelines?" And she finally said, "I'm gonna stand on my answer." Um, she had been asked repeatedly about this, and, and one thing I think we need to think about is that

because so few district court judges, trial judges are nominated for the Supreme Court. Right now we have Judge Jackson and we also ... Justice Sotomayor was a trial court judge, that this line of questioning wouldn't even come up for almost any nominee. Uh, but it did for Judge Jackson and they were very insistent that she admit to something. Right?

**[00:02:44]** And finally she just said, you know, and I think it's very hard thing to do when this is the job that you've waited for your whole life to just say, "You know, I'm done. I've, I've answered your question." Uh, the other moment that stood out and I think it stood out to everybody across the country, I know my children who are in college were blowing up my phone, wanting to talk to me about it, uh, was when Cory Booker, uh, directly addressed Judge Jackson. And I can tell you, I was sited almost exactly halfway in between them, so Cory Booker was about 10 feet on one side and, and Ketanji was about 10 feet on the other side. And that moment was s- so profound seeing them connect and having him say, "You are a great American." It was just a moment that I will never forget. And seeing her finally be able to be the, the emotional and compassionate person that she is in addition to the incredibly brilliant analytical logical person, where she just had this moment of being human, it was really beautiful.

**[00:03:52] Jeffrey Rosen:** Thank you so much for sharing both of those moments. Melissa, if you had to pick one or two exchanges in the hearings, what do you think were most revealing?

**[00:04:02] Melissa Murray:** Well, I agree with Lisa that the exchange with Senator Booker was, um, not only poignant, but in light of everything that had preceded it, it was very much a bomb for the audience as much as it was for judge Jackson, I would imagine. And I think as a black woman, I was especially moved, that this was the only other black person in the room in a position of authority and he was choosing in that moment to stand with her, um, in the face of what had been some, I think, quite disrespectful questioning from some of the Republican senators. So I thought that was a really interesting moment, um, one that I think highlights some of the racial dynamics of the Senate in that chamber.

**[00:04:43]** Uh, but the other point I wanted to make, a- and the other moment that stood out to me was an exchange with Senator Sasse from Nebraska. He asked her to identify the judge or justice on whom she modeled her own jurisprudence, and she was very forthright. Um, "I am my own woman. I am my own judge. And my philosophy is my own. I'm not modeling myself on anyone else." And I thought you really saw the heart of a trial judge on display, where she talked about how she approached cases, um, how deep into the record she went, her insistence on maintaining neutrality and putting aside her own views to treat each litigant fairly and to make sure that she fairly heard and fairly relayed and communicated in her decision-making the substance of their claims. And again, Lisa is exactly right. We don't often see this in confirmation hearings because so often we are talking to appellate judges, but this is exactly what a trial judge does, and I think it was a really great public education moment for the country about the various courts in our federal system.

**[00:05:51] Jeffrey Rosen:** Thank you so much for that and for highlighting the fascinating exchange with Senator Sasse. I'm gonna read a little bit more of Judge Jackson's response to Senator Sasse, uh, which you just highlighted. "I'm focused on the text of any statute or

constitutional provision. I'm looking as appropriate to the intentions of the people who wrote the words because I've used statutory interpretation, constitutional interpretation, those exercises consistent with my limited authority, and I'm conscious of not interpreting those texts consistent with what I believe the policies should be, or what I think the outcome should be. I'm trying every case that involves that kind of interpretation to assess what it is that the parties who wrote the text intended. That's part of the judging responsibility that isn't really captured by something like originalism and living constitution, and I believe the constitution is fixed in its meaning. I believe it's appropriate to look at original intent, original public meaning, history structure and precedent. All of these are tools that judges use.

**[00:06:51]** Lisa, really, that's a deep and fascinating answer. What did you make of it? Words like original, public meaning jumped out, the rejection of either originalism or living constitutionalism, but saying the constitution is fixed in its meaning. What did that exchange tell you about Judge Jackson's approach to interpreting statutes in the Constitution?

**[00:07:10] Lisa Tucker:** Well, the first thing that I thought was that, I think it's really hard for almost anybody to articulate exactly how it is that we approach our jobs and to have such a clear cut game plan, to have, you know, I do this and then I do this and then I do this. And it's been said in the media, um, by some of her clerks or I think actually Judge Jackson has said it herself, that her clerks are like, you know, Judge, all your opinions sound the same. And she says that's because she approaches every case in the same way. Um, I think that it also displays somebody who's very thoughtful. At one point she got a question of, um, you know, in year one on the bench and then on year five at the bench, how, how have you grown? And she said, "You know, year one, I didn't know everything. I really had to develop this methodology and this methodology really works for me."

**[00:08:02]** And then the other thing I thought, Jeff, was that, um, if this were just a written statement, if you had read out that statement and you hadn't said Judge Jackson said it, I think that the conservatives on the committee would've loved that statement. This would've been the judge they wanted, the justice they wanted. Um, there's so much there that resonates with conservatives, from text to original meaning. And a couple times they pressed her about, well, you know, how do you know our intent? And she said, "Well, a lot of times the statute has a purpose statement." [laughs] Indeed it does. Um, so the fact that they kept coming back and kept going, well, you know, they seemed so suspicious, but I think it was because i- i- it seemed so concrete and it seemed in line with their values too.

**[00:08:52] Jeffrey Rosen:** Fascinating. Melissa, what do you make of Lisa's interesting suggestion that if, if judge Jackson were the conservative nominee, her approach would be congenial to conservatives? Um, she had another illuminating discussion of her methodology with Senator Durbin, where she said, "What I do is I essentially follow three steps. First, I clear my mind of any preconceived notions and set aside my personal views. Second, there's the inputs, there's the factual record from the parties. And the third step is the interpretation and application of the law to the facts. And that's where I'm observing constraints on my judicial authority and the adherence to text is a consistent feature, a, a constraint on my authority." Um,

what did that say to you and where would that put her in comparison to other justices like Justices Kagan and Sotomayor when it comes to interpretation?

**[00:09:43] Melissa Murray:** When she said this, Jeff, I sort of imagined a little Justice Kagan angel on her shoulder whispering, "We are all textuals now." Um, and I think that's right. Uh, you know, it- it's not the conservatives who have a monopoly on textualism or original intent. Um, progressives very much adhere to the text of statutes. They just admit that ... a- a- and the constitution itself, they just recognize that text is limited in some cases and ambiguous in many cases, and that does require interpretation. And, you know, I'm reminded of an earlier confirmation when, then Judge, now Chief Justice, John Roberts insisted that he was merely an umpire calling balls and strikes. I think she made waste of that. You can't just be an umpire calling balls and strikes. You are restrained and limited in your role by the text of whether it's a statute or the Constitution, but there has to be some interpretation, and, and she said that too.

**[00:10:40]** So while the Constitution is fixed in its meaning, we often have to think about what that meaning might mean for circumstances that the framers did not contemplate. And she talked about that with regard to ... for example, to cellphone use, like the framers did not imagine that we would be walking around with computers in our pockets. What does it mean to have a cellphone for purposes of a search or a seizure in the fourth amendment? And I thought it was a really smart and nuanced answer, um, one that suggests that she's not someone who's going to be easily pinned down, and I think that was by design. She's someone whose sensibilities, I think, could be congenial for progressives as well as for conservatives.

**[00:11:22] Jeffrey Rosen:** Fascinating. Uh, you're so insightful to imagine Justice Kagan's important mind, we're all textuals now, we're all originalists now. And also to note that cell phone exchange, which evoked one with ... Justice [Gosed 00:11:38] said nearly the same thing that the, um, framers laid down certain values and you interpret them in light of new technologies like cell phones. Lisa, let me ask you about an exchange with Senator Grassley, where he asked her, "Do you believe the Constitution is a living document whose meaning evolves over time?" And she said, "I do not believe there's a living constitution in the sense that it's changing and infused with my own policy perspective or the perspective of the day. Instead, the Supreme Court has made clear when you're interpreting the Constitution, you're looking at the text at the time of the founding and what the meaning was then as a constraint on my authority." What'd you make of that?

**[00:12:13] Lisa Tucker:** So, yeah. Um, I think it, it ... there might be some progressives who would sit up and be a little alarmed when she said, uh, "I don't believe that the constitution is a living document. I don't believe it, it changes with the times." But I think she went on to say that, um, "Yes, we do look to the original meaning. We do look to what was intended at the time of the founding, at the time of the framing, but we also look to how the Supreme Court has interpreted this document since then." And she made a really important point over and over and over again, that yes, it's fixed, but the court has been called upon for 200 and however many years to interpret what it means, as Melissa said, the ambiguous terms, she talked a lot for example about ordered liberty, um, and that not only is she looking at the document, but that she

is faithful to and committed to following the precedent of the people on the court who went before her.

**[00:13:15]** And I think that that's really important to court legitimacy. Um, you know, there are a lot of scholars out there, um, a lot of commentators out there who say, you know, the court ... you, you change one person and the court is totally different. And to some extent that's true in terms of their inner workings and stuff. But it's one court, and I know that chief Justice John Robert really cares about making sure that as an institution, the court continues on and, and doesn't change, um, in its legitimacy or in its perspective, every time somebody rotates out and somebody new rotates in. So the fact that she was emphasizing that, yes, one of the reasons that this works is because we have had 200 years of interpretation and I'm really committed to following what the court has said. And then also if I could add that she knew so much about so many cases and so many definitions ... you know, I turned to, um, her high school friend ... you've seen the picture where she's got the book and he's got the Pooh Bear? It's the debate picture, right? So he was there, we were sitting together.

**[00:14:23]** And somebody asked her about, well, what's an enemy combatant. And you know, I, I turned to him in and I said, you know, I consider myself fairly literate in the law, but I couldn't just pull out of my pocket the definition of an enemy combatant. I'd probably wanna go look that up. She knew, she knew how hostilities, you know, how is this working and everything. They asked her about Brandenburg. They asked her about, you know, New York Times v. Sullivan. Everything. She just knew it and knew it really well. And then was able to boil it down in a way, that A, went back to her methodology, I look at it this way, we take the law, we take the facts, we see where that takes us, and B, for the huge American public who was watching this historic moment and this blown my mind, how many people who could not be less interested in the law are blowing up my phone saying this was so important to me. That not only did they see this unbelievable role model in front of them, but they actually learned a little bit about the law because she [laughs] was so good at articulating it.

**[00:15:28] Jeffrey Rosen:** Wonderfully said. And these hearings are indeed a constitutional education. If you take the time to dig into the transcript and to listen to them, which is exactly what we're doing now, I'm so grateful to both of you. Um, Melissa, Lisa mentioned the question of judicial legitimacy, and that was a question Senator Klobuchar asked Judge Jackson about. Senator Klobuchar said, "What rule do you think narrow rulings play in helping to maintain the legitimacy of the court?" And Judge Jackson said, "If there were big shifts in terms of legal principles and doctrines and whatnot, it could lead to people not understanding that judges are ruling on legal principles. It could lead to undermining public confidence, thinking the judges are interjecting their own policy preferences rather than following the law in terms of their rulings." Melissa, what did you make of Judge Jackson's thoughts about judicial legitimacy?

**[00:16:17] Melissa Murray:** I think it was very hard to not understand her response in the context of what is currently happening or what is likely to happen at the court this term, a- as, as we all know, and I think it was Senator Blackburn who brought it up. The court is currently considering a case, Dobbs v. Jackson Women's Health Organization, where it seems quite likely to overrule Roe v. Wade and Planned Parenthood v. Casey, or at the very least to significantly

disrupt the extent jurisprudence around abortion. And that question was pointed from Senator Klobuchar and I think it got a very pointed response from Judge Jackson. And I, I, I think she's right.

**[00:16:58]** Um, when there are major shifts in jurisprudence, like for example, overruling a precedent that has been in place for almost 50 years, I, I think it is hard for the public to understand that as proceeding from a legitimate and valid interpretation of the Constitution, as opposed to proceeding from some kind of external factor, like the change and shift in the court's personnel itself. And so I think she was making the case for incremental moves. Um, and it was hard to not understand that case for incremental moves to be, um, anything but about what is currently happening at the court.

**[00:17:38] Jeffrey Rosen:** Thanks for that. There were several questions of course, about Roe and Casey in response to Senator Feinstein. Judge Jackson said Roe and Casey had a settled law of the Supreme Court concerning the right to terminate pregnancy, but Senator Marsha Blackburn said the court is currently considering or reconsidering whether the Constitution protects the right to abortion. If you're concerned, you'll be in a position to apply the court's decision. And Judge Jackson said, "Whatever the Supreme court decides will be the precedent of the Supreme court, will be worthy of respect in the sense that it is precedent. And I will commit to treating it as I would in the other precedent." Lisa, what did you make of the exchanges about Roe?

**[00:18:16] Lisa Tucker:** You know, Jeff, confirmation hearings serve two purposes and one much less than the other these days. Uh, the first is to assess the qualifications of the nominee and to assess the judicial temperament of the nominee. And that's the one that, you know, it's supposed to be advice and consent and all that. And, you know, I think it was Joe Biden who said about 30 years ago, that what we're actually doing is a Kabuki dance. And I think when we're getting these questions about Roe, the senators on the Committee are, are, well educated, of course they know that Dobbs is at the Supreme Court right now. And so to some extent, they are doing two things. Uh, number one, they're speaking to their constituents and not actually to Judge Jackson, they are voicing, you know, uh, Senator Blackburn said several times, "I am a pro-life woman." They want their constituents to hear that. Um, and they wanna do it in a way that's a sound bite that can be edited for the evening news for their constituents. That's very important to them.

**[00:19:17]** And then they're kind of looking for a reaction from the nominee. Um, you know, the nominees are so well prepared that it would be astonishing if the nominee, Judge Jackson, in this case, were to get rattled. But I kept thinking they want a Jack Nicholson moment, you know, "You can't handle the truth." Um, you know, at one point, Senator Blackburn talked about an effective abortion, um, which was a term I had actually never heard before. She said that some fetuses will survive the abortion and then you have to kill them. Um, and when they were throwing that out or throwing out some of the stuff about sex crimes, it seemed to me that it was really for a shock value rather than out of any expectation or interest in this nominee actually answering the questions.

**[00:20:07]** But I do think that they also wanted to remind us that we are at a moment in time, where with the majority on the Supreme Court, all of those unenumerated rights that they were talking about and asking her about over and over and over again, the Republicans are reminding us, they are at risk. We're gonna try to get rid of them. And the Democrats are trying really hard to say, but in doing so, does that affect the legitimacy of the court? And one of the things that, um, Ju- Judge Jackson talked about a lot was reliance, reliance, um, as being a factor in overturning precedent, right, where the country has relied on these unenumerated rights, um, largely substantive due process rights, um, that the court has articulated and relied upon, and the American public has relied upon. So, um, I think that they were asking the questions signaling that you're not gonna be able to change this, and we're still doing what our constituents want us to do, but the, the Democrats even knowing that, were trying to say, but, but these unenumerated rights are super important and you're gonna follow precedent on those too.

**[00:21:20] Jeffrey Rosen:** Thank you so much for that. Uh, Melissa, you have observed that this was the first post Roe confirmation hearing in the sense that Roe may soon be narrowed or overturned. Tell us what you meant by that and, and also what you made of senators like Senator Blackburn pressing for the overturning, not only of Roe, but also of *Griswold v. Connecticut*, the case that protected the right to privacy, that nominees from Chief Justice Roberts to Justice Alito had previously embraced.

**[00:21:49] Melissa Murray:** So I think we have to understand this hearing in the context of previous hearings, and the elephant in the room in all of those earlier hearings was obviously Roe and abortion. Um, it may not have been explicit, but every time a question was asked about stare decisis, infidelity to precedent in the rule of law, the underlying subtext was, will you be a vote to overrule or uphold Roe? That's the hidden subtext. Everyone understands it. But here we are now in 2022, the court seems poised to dismantle Roe a- and maybe even to overturn it entirely. And so this is a post Roe confirmation. Abortion rights, as we know it, are not really on the table in the way that they were in those earlier confirmation hearings. I'm thinking about Brett Kavanaugh's confirmation, for example, where there were those protestors pro-choice protestors, clad in red handmade robes. Like, we're not seeing that in part because the battle has already been joined on that issue a- and it's in the court's hands now.

**[00:22:50]** But Lisa is exactly right when she says that we are still hearing about these unenumerated rights and in particular, the right of privacy, because even though abortion is on the chopping block, it was never the end game. And the senators are tipping their hand about what the post Roe legal landscape is going to look like. And it's not simply going to be interjurisdictional conflicts over abortion. It's going to be actual substantive conflicts over these unenumerated rights that we value and that we take for granted that proceed from the right to privacy. It's not just about abortion. And so we heard discussion of parental rights and we've, you know, there are, there are not so idle threats to this going on right now, if you think about the Texas law that prevents parents from providing their children with gender affirming therapies, that is about the question of parental rights. And we had Republican senators suggesting that because they were not explicit in constitutional texts, protections for parental prerogatives are out the window.

**[00:23:51]** We also heard discussion of the right to marry, um, Senator John Cornyn of Texas explicitly discussed *Obergefell v. Hodges*, the 2015 case that legalized same sex marriage around the country. He questioned Judge Jackson about her views of that decision and whether or not a decision rooted in an unenumerated right, um, could be valid. We also ... her discussion from Senator Blackburn, as you mentioned, about contraception in *Griswold v. Connecticut* in 1965 case that not only permitted married couples to use contraception, it also announced the right of privacy from which so many of these rights of intimate life that we take for granted precede.

**[00:24:30] Lisa Tucker:** And if I may just echo something that Melissa just said. Um, one of the very poignant ones that we saw a very personal application of in this courtroom was, um, the living example of *Loving v. Virginia*. Judge Jackson has been married for 20 some odd years to her husband who is white, his family came over on the Mayflower, basically, um, and, uh, she actually made a joke during the hearings about, you know, here was this prep school guy, you know, [laughs]. I didn't know what was going on. Um, and that actually, you know, i- in a world before privacy, that marriage could have been forbidden.

**[00:25:12] Jeffrey Rosen:** Wow. Um, Melissa, your reflections on that family dynamic and, and then the many remarkable exchanges about what Judge Jackson learned from her own family, her mother and her father and her brother.

**[00:25:27] Melissa Murray:** So we've often heard about a nominee's family in these confirmation hearings. The family is often flanking the nominee. Um, and you know, this was perhaps most profoundly viewed in the Amy Coney Barrett nomination and confirmation when her seven children really became a focal point, and, and it really was sort of the supermom narrative of a woman with seven children who, despite the rigors of parenthood, had nevertheless managed to get to the very top of the legal profession. Um, we haven't had the democratic senators emphasizing the fact of Judge Jackson's motherhood to quite the same degree as we saw in the Barrett hearings, but she herself has centered her motherhood, a- and more importantly made clear in, in a way that I think Justice Barrett did not, that it was very hard to combine marriage, motherhood, and meaningful work in the le- legal profession.

**[00:26:21]** And there was such a poignant moment where she was speaking to her daughters and she said, "I fully admit, I have not always gotten this balance right, but I, I love you fiercely." And I think every mother who works outside of the home and who struggles to reconcile family responsibilities with work responsibilities felt that in her bones. I know, I know I did. And I thought that was an incredibly important moment, again, a public education for the country, that there is no having it all. Um, you know, she's had difficulty doing this. And a lot of her career, including her stint as a public defender was in the search of meaningful work that could also be happily combined with her family responsibilities.

**[00:27:06]** And to that end, she also emphasized the example of her parents and her brother and her uncles, all of whom were dedicated public servants and instilled in her a desire for, and indeed, a need to be a part of that commitment to public service. And she talked about her parents who were public school teachers, and then her father later went to law school part-time,



and ultimately became the lawyer for the school board in Miami, and that was what directly inspired her decision to become a lawyer.

**[00:27:37]** She also spoke of these uncles who were law enforcement officers, including one who became the Chief of Police in Miami, and how they would come to family gatherings and put their service weapons high on a shelf so the children couldn't get them, but they understood in a, a very profound way, the important service that these members of their family were providing to the public. And then of course, she spoke about her brother who is 10 years younger than she is, who not only saw the example of their uncles, but followed them, um, first going into military service and then later as a law enforcement officer in Baltimore. And so she's learned a lot from her family. She centered her family. I'm not sure we saw the senators centering family in quite the same way we have seen in earlier confirmations.

**[00:28:21] Jeffrey Rosen:** Thank you very much for that and for putting all of those important moments in the hearings on the table, uh, she, she introduced several of them in her opening statement where she recalled, as you said, her father with his stacks of law books on the kitchen table and her daughters, uh, I know it hasn't been easy as I've tried to navigate the challenges of juggling my career in the motherhood. And I fully admit, I didn't always get the balance right, but I hope you've seen it with hard work, determination, and love, can be done. Lisa, when you listen to the opening statement and all of those important questions in her biography, knowing her as you do, what did you think the significance was?

**[00:28:58] Lisa Tucker:** I think that ... and I'm gonna say her name, Ketanji, because that's how I've always known her. It's gonna be really weird to go to Justice Jackson. You know, our kids are the same age. Two of our girls were born the same week. Um, and I have seen her as a parent. Um, and I, I think, you know, we ... the catch phrase for, you know, maybe just before our generation was quality time, but I've seen that with her and I know how much it matters, and I know that being a parent, um, has, has informed, as Melissa said, for example, finding a job that was workable within the framework of being a mother. And don't forget that her husband is a cancer surgeon. So he's not gonna be able to pick the kids up from school necessarily either. In fact, he's in surgery today [laughs], um, after this crazy week that they've had. You know, sitting next to her parents and her brother in, in the hearing room, the quiet pride that they felt for her and the quiet love that she had for them, and then the, the photo that's going around social media today that everyone keeps sharing with me is of Layla, her 18 year old daughter, looking at her and smiling with just enormous pride.

**[00:30:15]** And I think that tells all of us that we all make sacrifices. And I think it's really important, and Melissa, I'd like to hear from you as a mom, and Jeff, you're a dad, right, we can't leave the dads out of this conversation, that being perfect is not something we should ask our children to aspire to be. And so when she said I've made mistakes, I think that in and of itself is role modeling. We're gonna make mistakes. We're not always gonna get it right. And yet look what we can still do. And her parents, you know, sitting next to them ... I- I'm gonna go back to quiet, just this beautiful expression of love on their faces, looking at their daughter, and I have no doubt that they would've had that same expression if she had been being awarded teacher of the year, or, you know, had just won, uh, an Olympic gold medal, like this is their kid.

**[00:31:09]** And I think one of the [laughs] things that happens is that we forget, and I've spent a lot of my career trying to remind the public that Supreme Court justices are human beings. They are human beings. They are not demigods in their marble palace on the hill. And so for me, what was so important about this was, was seeing the humanity, seeing the humanity, knowing she's only 51, um, you know, Layla's going to college next year, so she'll have a little bit of an empty nest, but knowing that this struggle is only started, right, that now she's gonna be on the Supreme Court. Like, how the heck do you juggle that with being a mom? And you, you just do your best.

**[00:31:53]** Um, so for me, it, it, it was profound. And, and I think the other thing that's profound is, um, you know, over and over again, the senators were saying, you know, you're such an inspiration to this group, you're such an inspiration to that group. I'm getting all these letters, they kept holding up letters. And another reason we need to remember that she's a human being is, what an unbelievably huge responsibility that is for her? You know, when Justice O'Connor was nominated to the court, people would always say, "How does it feel to be the first woman on the Supreme Court?" And her answer was always, "Being the first is not what's most important. The most important thing is not to be the last." And I think that we're gonna see that with Ketanji, that she is going to ... she's blazing this path, and it's a huge responsibility to be a role model, but also to make sure that the generation who comes after her is going to have the same opportunity and, and eyes are gonna be on her. History will have its eyes on you.

**[00:32:54] Jeffrey Rosen:** Beautifully put. Thank you so much for all of that. Melissa, you, you, you wrote before the hearings about the significance of the fact that she would be the second working mom on the court and after hearing the hearings, what are your further reflections and, and, and also reflections on the remarkable exchange with Senator Booker, where he asked her about the most important values she inherited from those folks over there, her parents, and she talked about a number of bedrock values growing up at a time of segregation, "On that hope and dream, I was born here with an African name that my parents gave to me to demonstrate their pride, their pride, and who they were and hoped in what I could be."

**[00:33:35] Melissa Murray:** I don't think that the points she made about being a mother and the struggle can be overlooked. It was an incredibly important exchange. We are currently at a moment in our country where we have seen the biggest disruption in women's working lives, um, since perhaps women have entered the workforce. More women have left the workforce because of the pandemic than at any other point in our history. And so we are actively having this conversation about what a society needs to do to be able to support the incredibly difficult work of raising children while also maintaining economic productivity. And I thought it was both profound and a profound service that she was very clear that this was a struggle, because it is a struggle for so many people, and we haven't often gotten the chance to see that. Um, the other women nominees have either not had children or their children were grown and gone by the time they found themselves before the Senate Judiciary Committee.

**[00:34:36]** So she may be soon to be an empty nester, but she's reflecting on the fact this was a real struggle for her, and it wasn't always assured that her ascent to the pinnacle of her profession was likely. It was a very remote possibility, given all of the challenges in her way, um, not the least of which, uh, race and gender in addition to the struggle and juggle of motherhood. But I

really loved the exchange between her and Senator Booker, because it really gave her an opportunity to emphasize her values and the values that she shared with her family. And this idea of not just pride in herself, but this sort of collective racial pride, I thought was really important because she's not just going to be the second working mother on that court, she's going to be the second African American on that court and the invocation of her parents and their experience of segregation and their desire, and indeed, will to move beyond it, I think, puts her in a really interesting conversation with the court's other black member, Justice Clarence Thomas, who is of her parents' generation.

**[00:35:44]** And there's a really interesting exchange that the biographers, um, justice Thomas's biographers interviewed Judge Jackson well before she was a judge about her time on the Supreme Court, as a clerk to Justice Breyer, where she had lunch with Justice Thomas. And they recount her basically saying, "You know, here I was sitting across from this man who looked like my father, who sounded a little bit like my father in terms of the timber of his voice, but what was coming out of his mouth is nothing like what my parents talked about and certainly nothing that was familiar to me."

**[00:36:17]** And so she is not only going to be, I think, along with Justice Barrett, um, a working mother on the court, she's going to be a counterpoint to Justice Thomas' vision of racial justice, and she's going to be coming from the perspective of someone who is of the post brown generation, someone who has been reared and schooled in integrated settings, who has benefited from diversity in the classroom setting, um, just in terms of what she has been exposed to in, in addition to where she has been permitted to go. And I think that's going to be a very different perspective than what we've seen. I think it's going to be an important counterpoint to what Justice Thomas will be bringing to the table.

**[00:36:58] Jeffrey Rosen:** Thanks so much for that. Lisa, there were other important exchanges about Judge Jackson's family. Senator Ossoff asked her about her brother who served in the Baltimore Police Department, and she talked about how it was a very stressful period for the family because of the dangers of law enforcement. And she also talked, again in response to Senator Booker, about the very personal effects of crime that she experienced in her own family. So tell us about those exchanges and their significance.

**[00:37:27] Lisa Tucker:** I think that Senator Ossoff, and, and this was, um, Senator Ossoff's first confirmation hearing for a Supreme Court justice. So, um, and I was sitting just like inches away from him and he was so focused, and, and I thought really well spoken, um, in talking to her, um, I think that there were two things that he wanted to get across. Um, again, going back to this idea of humanity, um, you know, so many of the other senators had been talking about law enforcement as it's this wonderful thing and it's this lofty thing and it's this service thing, and, and yay, police officers. And I think that Judge Jackson embraced that, but then, and exactly what you said, Jeff, also said, "This is hard. This is a big deal." Um, she said, you know, he went to college and when he got out, he decided what he wanted to do was join the police department and he could have done a lot of other things, but this is what he chose. And when he went, um, after 9/11, to fight in the Middle East, he could have been a radio transmitter, but no, he chose to go into the line of fire. That was what he thought was important to do to defend America.

**[00:38:39]** So I think that acknowledging, just like Melissa said, acknowledging how hard it is to be a working mom, but also saying, with service comes sacrifice, right, and that this was hard for the family to know that he was in danger. I, I also think that the Democrats really wanted, um, this to, to be discussed over and over again about her family in law enforcement, and of course the fraternal order of police who have endorsed her, and, um, Senator Booker talked about noble, the Black Law Enforcement organization, um, endorsing her, backing her, because of some of the Republicans questions about her somehow being soft on crime.

**[00:39:21]** And for ... to really, um, say that she understands what it means to be a law, law enforcement officer. And she sees that perspective. She has that lived experience, uh, of being involved, very closely connected to law enforcement. But then she also said that she really made an effort to talk to criminal defendants and that her own experience being a public defender really informed her thinking about how to be a trial court judge dealing with criminal defendants, because she saw as a, as a public defender, how often the defendants didn't necessarily understand why they were there or what the process was. And so really wanting to talk to them a- and help them. And that dual perspective is something that's so unusual.

**[00:40:15]** Uh, we know she's the first public defender on the court, uh, but to have really both perspectives that have been an integral part of her life is something that, that probably does make her, her thinking very, very balanced. Um, I think there was real admiration. I think they wanted to say to this family and not just a perfunctory or sort of, you know, uh, performative way. Your story is amazing and you have raised an amazing daughter, and we are so privileged to be in the same room with her.

**[00:40:49] Jeffrey Rosen:** Thank you for identifying that really interesting dynamic of her background in law enforcement with her family on the one hand and as a public defender on the other. It was so striking, as you say, when she said that she saw it was her role as a judge to explain the system to the defendants. They didn't feel like they were victims, but instead understood how the constitution worked. And then there was a very interesting exchange with Senator Blumenthal, where she asked whether it was ... why it was important for defendants to be vigorously represented, and she talked about the importance of protections for criminal defendants in the Constitution, we have provisions about limited government in the fourth amendment, the fifth amendment, the sixth amendment, the eighth amendment, these provisions are crucial, and it is zealous defense counsel that ensures the government's protecting those rights. Melissa, what did you hear about those really interesting cross currents about her views about law enforcement and about criminal defense?

**[00:41:44] Melissa Murray:** So I was reminded of some of the answers that Justice Sotomayor had earlier given in her 2009 confirmation hearing about her work on the District Court, and she was explaining her opinions. Um, you know, I think there had been some criticism that her ... her opinions were workmanlike, and she said, "They might be workmanlike because my job is to explain to the litigants that they have been fairly heard so that they understand that they have not merely been pawned in the system, but they've actually been heard by the system." And I saw a similar thread to the comments that Justice Jackson offered. And she went even, I think, in a more pointed direction a- and sort of specifically talked about the importance of that kind of

transparency in the context of criminal justice. And she not only related it to the idea that litigants must understand that the court understood them and took them seriously and took them ... and took their claims at their word, but that the very purposes of the criminal justice system depend on that kind of transparency.

**[00:42:45]** I, I think at one point she noted that criminal defendants are not likely to accept their punishment and to move toward rehabilitation if they think they have been unfairly treated. And so she works very hard to make sure that they understand what is happening in the process, that they're not being railroaded, that they are being heard, and ultimately if they are being sentenced, why the sentence is fair, given the circumstances. And so, you know, she was putting the judge in the whole process, not merely as someone who ultimately levies a sanction, but as an integral part of this process of not only punishing, but perhaps even rehabilitating those who are in the criminal justice system. And I thought it was a really important and perhaps unprecedented exchange. Um, I don't recall ever having an exchange like that in a confirmation hearing. And again, I think that goes to Lisa's point. We have never really had someone with this kind of extensive experience in the criminal justice system, whether as a judge or as a public defender, uh, to make these arguments before the Senate Judiciary, and indeed, the American public.

**[00:43:56] Jeffrey Rosen:** Thank you very much for all that. Lisa, of course there was much discussion in the hearings about Judge Jackson's, uh, sentences as a trial judge, um, but one exchange that jumped out to me was her exchange with Senator Cotton about a case involving, uh, Mr. Young, a defendant who'd filed for compassionate release during COVID and the facts were complicated, but she explained that she found extraordinary and compelling, the fact that between the 20 year sentence, I gave him originally in a compassionate release motion, Congress changed the law and decided that the old crime for which his sentence had been bumped up was no longer eligible for the increase. And one of the things Congress says to judges, take care about the fact that the person you're sentencing is being treated differently than someone else who committed the same crime. I, I was struck by the care with which she explained the decision and, and the theme that she returned to again and again, "I'm doing what Congress is telling me. I'm staying in my lane, a- as I sentence, I'm following the factors that Congress gave me." Uh, what do you think of that case and were there any other sentencing cases that jumped out of view?

**[00:45:00] Lisa Tucker:** Yeah. So she was describing how, in the meanwhile, when this gentleman came back to her asking for compassionate release, that Congress had changed the law. And what Senator Cotton kept coming back to was, "But Congress was explicit that we didn't make it retroactive." And she said, "Okay, but what Congress has also been explicit about are these extraordinary and compelling circumstances and that that is within my discretion as a judge to find those extraordinary compelling circumstances." I also think that ... I'm, I'm wondering if I just sort of felt it or if I actually heard it, that, um, in that exchange, she was acknowledging, you know, reasonable minds could disagree on this point.

**[00:45:44]** And we heard her say a couple of times when she was asked, for example, about her reversal record, and, you know, there was this other case where, um, I think it was Senator Graham was saying over and over again, you know, "The DC circuit said, it could not be clearer

and yet you didn't read it that way." And she said, instead of trying to defend herself, she just said, "You know, to me, that's a sign that the system is working, that there are systems of review and that reasonable minds can disagree." And she also pointed out that on the Supreme Court, most decisions, the ones that don't make the big headlines, the ones that we don't hear Nina Totenberg talking about on the radio, are often 9-0, or 8-1, that this split on the court, the 5-4 are on these big headline cases, abortion, first amendment, um, you know, search and seizure, and that even in those circumstances, reasonable minds can disagree, and that it's the process of thinking through it. That is so important.

**[00:46:51]** And so she said, "You know, this is the way I thought about that. Here's the way I thought about extraordinary and compelling circumstances." And that same thing about compassionate leave came up again, when they were taking a sentence out of one of her opinions, seemingly out of context, I did not have the opinion in front of me, but she knew exactly what they were talking about, when I think it was Senator Blackburn read to her, um, you know, you said that during this time of COVID, you know, all prisoners should be released because they can't keep themselves apart or whatever. And, and then Judge Jackson came back and said, "Yeah, but you're not re- reading what I said two, two sentences later, which was, we can't do that. In an ideal world, we would have a way to deal with this. We would be able to let everybody go, we'd be able to separate them more. We're not in an ideal world. We're, we're in a situation where we have to do our very best.

**[00:47:44]** So I'm saying, you know, I'm not gonna get it perfect. I can't get it exactly right. I'm doing the best I can and I'm doing that, you know, circling back to where we started this conversation with a real methodology. I'm not doing this off the cuff. I'm not doing this because of what I think. I'm doing it in a principled way." Um, so I actually, you know, thought that that moment, um, was a good one because I think that, you know, admitting fallibility and saying, you know, I'm, I'm not perfect, I'm not always gonna get it right, but I do do my best to think through these things in a logical way. I think that's an important message.

**[00:48:25] Jeffrey Rosen:** Thank you so much for that. On the question of sentencing, we, we can't play Hamlet without the prince. So Melissa, I'll ask you about the extensive exchanges about her sentences in child pornography cases. When you cut through the political posturing, did we learn anything about Judge Jackson's approach to the law from the, from the cases themselves?

**[00:48:46] Melissa Murray:** I'm not sure that we did, other than that she is someone who views her role as a trial court judge, who is required to meet out these criminal sentences, um, as bound by the tax of the statute, which as she noted repeatedly is written by Congress and not by her. So to the extent there is any discretion there, it is discretion that has been provided and indeed is bounded by the restraints that Congress has imposed. And, you know, she made a lot of different points here about how she goes about this, um, that she's trying to affect the purposes of punishment, affect the purposes of the statute, but also to take into account all of the circumstances of the particular crime. And much of this questioning came from Missouri, Senator Josh Holly, who seemed really interested into sort of getting out there the idea of, um, you know, perhaps Judge Jackson was soft on child pornographers, was soft on pedophilia, I

believe he was the one who invoked the term pedophilia. What we did not hear as a, a public listening was the idea that the creation of sentences, the imposition of a criminal sentence is not something that a Supreme Court justice will ever do.

**[00:50:03]** The court is by and large, a court of appellate jurisdiction rather than original jurisdiction. Um, and she's not really going to ever be in a position as a justice of the Supreme Court to meet out a sentence, although she will review these sentences. And I think she was suggesting that her approach would be to do what she had done as a District Court judge, which is to look at what Congress has provided, look at what the guidelines, uh, suggest to think about the probation department's report and all of the various things that District Court judges do on a regular basis.

**[00:50:34]** Um, I couldn't help, but think that harping on this idea that she was "soft on crime" was not really about her at all. She was just merely a vessel for a discussion of this view that Democrats are soft on crime. And this is really political theater that is being put in place for the 2022 midterms and perhaps will be reprised in the 2024 presidential election. I thought the specific invocation of the term pedophile and pedophilia was perhaps a dog whistle to some of the QAnon elements of the conservative block that have emphasized that there is perhaps some underground cabal of Democrats who were engaged in the trafficking of children. So in many ways, I think this entire line of questioning was not particularly productive in terms of illuminating the public, but also perhaps really dangerous in terms of Judge Jackson's personal safety.

**[00:51:32] Jeffrey Rosen:** Thank you very much for that. Well, this has been a superb conversation and it's vindicated my faith that if you take the time to dig into the transcripts of these hearings and listen to them closely, you can in fact learn a great deal about the character, temperament, and philosophy of the nominee. That's why dear We the People listeners we've chosen to have, have two, uh, scholars who know Judge Jackson and her work well, ra- rather than a point ... counterpoint debate, because I wanted you to get the highlights from the hearings, if you haven't had the time to listen to all of them yourself, um, as we've tried to do this week. So it's now time for closing thoughts in this absolutely wonderful discussion. And I'll ask you each, whether there any other final moments that you wanna highlight as being very illuminating, and what you learned from the hearings about the justice that Justice Jackson, who she's confirmed is likely to be. Lisa, response to you.

**[00:52:27] Lisa Tucker:** I think that what I saw, um, and you know, what I learned, even though I know her personally quite well, um, was a person who has stamina. You know, this was 18, 19 hours of sitting in the seat with a light on her and all these cameras around her, and, um, having to think on her feet and not with people who wanted the best for her all the time. Um, we saw stamina, we saw resolve, we saw deep education in the way she was able to describe legal concepts and really new case law inside and out. And we saw somebody who is a very hard worker, who's really gonna try to address people's concerns. And I think, you know, some people are gonna say, "Wow, she may not always come out the way I would really want her to", and I think people on both sides of the aisle might have suspected that after listening to her.

[00:53:34] But I think what we saw was somebody who, um, is going to be able to talk to fellow justices and get along with them and think hard with them. And as she said to, maybe it was Senator Padilla, she does a lot of speaking, she goes to schools, she talks to kids, and that those kids and their parents are already getting so unbelievably excited. You know, Lin-Manuel Miranda has often said about Hamilton, which we're all fans of, that Hamilton is the story of America then told by America now. And I think Ketanji Brown Jackson is America now.

[00:54:19] **Jeffrey Rosen:** Wonderful. Thank you for that. Melissa, last words in this great discussion. To you, uh, any final moments from the hearings you wanna highlight and your concluding thoughts about the kind of justice that Judge Jackson, if she's confirmed to the Supreme Court is likely to be.

[00:54:33] **Melissa Murray:** Well, I think one moment that we haven't talked about that is worth noting is when Senator Booker said to Judge Jackson, "You have earned that seat. You are worthy." And I think it was a necessary intervention to make because there has been so much discussion of the circumstances of her nomination. So much has been said about the president's pledge to nominate a black woman to that seat. And I think he was making clear, and I think her performance during this entire gauntlet made clear that this is not a question of affirmative action or "playing the race card". She does deserve to be there. She was incredibly prepared. She was unflappable. Her performance was absolutely superlative. And again, um, and to borrow some lyrics from Hamilton, I'm absolutely delighted that she is going to be in the room where it happens because her voice is needed there. And I think it's pretty much a fait accompli that she is going to be a justice of the Supreme Court, and I think that's a really profound statement about the country, about where we are, where we're going, and I look forward to it.

[00:55:41] **Jeffrey Rosen:** Thank you so much, Lisa Tucker and Melissa Murray, for a deep, close, and careful reading and discussion of the confirmation hearings of Justice Jackson. On behalf of We the People listeners, thank you for taking the time to follow the hearing so closely and help us understand that so well. Thank you so much for joining.

[00:56:02] **Lisa Tucker:** Thank you, Jeff. This was so much fun.

[00:56:04] **Melissa Murray:** Likewise, Jeff. Thank you.

[00:56:07] **Jeffrey Rosen:** Today's show was produced by Melody [Raul 00:56:10] and engineered by Kevin Kilburn, research was provided by Kevin Claus, Ruben Aguirre, Sam Desai, and Lana [Oreck 00:56:17]. Please rate, review and subscribe to We the people on Apple Podcast and recommend the show to friends, colleagues, or anyone who's eager for a weekly dose of constitutional illumination conversation and debate. And always remember that the National Constitution Center is a private nonprofit. And to show your support and dedication to constitutional education, please consider a gift of any amount, \$5, \$10, or more, please go to [constitutioncenter.org/wethepeople](https://constitutioncenter.org/wethepeople), all one word, all lower case, and donate what you can. Thank you so much for learning along with us. Hope you found the deep dive into the hearing transcripts illuminating and look forward to seeing you next week. On behalf of the National Constitution Center, I'm Jeffrey Rosen.



