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Written Testimony of

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Before the United States Senate Committee on the Judiciary**

The Nomination of Ketanji Brown Jackson to Be an
Associate Justice of the Supreme Court of the United States

March 24, 2022

My name is Steve Marshall, and I serve as the Attorney General for the State of Alabama. I am a career prosecutor, having previously served as the District Attorney for my home county for sixteen years, and now as Attorney General for the last five.

I am here today as a representative of the community of experienced and dedicated prosecutors who are gravely concerned about the direction our country is heading in when it comes to public safety and law and order.

As members of the United States Senate Judiciary Committee, you are likely well-acquainted with the wave of lawlessness that has swept across our nation these past few years, leading to a surge in criminality and crime—including, most banefully, a dramatic spike in homicides—unseen since the 1990s. While the lawmaking branches of our State and Federal governments are responsible for setting the policies that will alleviate or exacerbate this grim reality, this week presents an important opportunity to discuss the role that the judiciary plays in the criminal-justice system and the effect judges' decisions have on public safety. It is time we explore whether or not an individual's personal philosophy regarding the criminal-justice system should be among the considerations for judicial nominees that have recently been limited to more academic questions of stare decisis, *Chevron* deference, and executive privilege.

Not only does Judge Jackson's nomination come at a time when crime and punishment is ranked as a top issue—if not *the* top issue—by Americans from both political parties, but she has received the strident support of activist groups with views about our criminal-justice system that are far outside the mainstream. This is a cause for concern. Perhaps I am mistaken, but I do not recall the last three Democratic nominees to the United States Supreme Court—namely, Justice Sotomayor, Justice Kagan, and now-Attorney General Garland—being met with this level of enthusiasm from similar circles.

To quote one such activist, the executive director of a group calling to “defund the police”:¹ “We’re in a moment where there has been an active movement to reform our broken criminal-justice system. . . . In some ways, this appointment signals the administration’s commitment to pursuing criminal-justice reform at the highest level, and that’s, I think, incredibly unique.”²

Though I vehemently disagree with his assessment that our criminal-justice system is “broken,” I share his observation that this appointment may well be intended to initiate a fundamental transformation of our criminal-justice system—or, as Judge Jackson once described it, a “fundamental redesign” of the system.³

The Anti-Incarceration Movement

“A movement has blossomed in which formerly incarcerated people lead alongside diverse and influential allies, powerfully capturing what’s at stake: that runaway use of incarceration dehumanizes poor people and people of color, damages already marginalized communities, does not advance public safety, and siphons public resources with no social benefit.”

—Vera Institute of Justice⁴

“What is new . . . is that many of the ideas that animate the abolitionists ‘are now finding their way into established criminal justice structures’—not just scholars and activists but also prosecutors questioning whether crimes should be prosecuted and judges seeking out-of-court remedies.”

—The Marshall Project⁵

“At its core, abolitionist politics are inspired by the necessity for what Martin Luther King, Jr., described as the ‘radical reconstruction’ of the entirety of U.S. society. They intend to promote systemic thinking instead of our society’s obsession with ‘personal responsibility.’”

—The New Yorker⁶

Traditional understandings of law and order and “paying one’s debt to society” have eroded extensively over the last ten to fifteen years. What started in the early 2000s as a perspective shared only by far-left ideologues, the rhetoric of the anti-incarceration movement has now permeated debates over criminal-justice policy from California to Alabama, and certainly within the halls of

¹ @OurRevolution, TWITTER (Apr. 17, 2021, 1:10 PM), <http://twitter.com/OurRevolution/status/1383483019072196613> [<http://perma.cc/7YWB-GBAF>] (“We stand with those protesting our policing & ‘justice’ system. It’s time for change. #DefundThePolice #BlackLivesMatter”).

² Kelsey Reichmann, *Ketanji Brown Jackson’s Historic Nomination Puts Public Defender Experience on Center Stage*, COURTHOUSE NEWS SERVICE (Feb. 25, 2022), <http://www.courthousenews.com/ketanji-brown-jacksons-historic-nomination-puts-public-defender-experience-on-center-stage/> [<http://perma.cc/MWM3-QY62>].

³ *Hearing Before the U.S. Sentencing Comm’n* 317 (Feb. 16, 2012) (statement of Ketanji Brown Jackson, Vice Chairwoman, U.S. Sentencing Comm’n), http://www.ussc.gov/sites/default/files/Transcript_5.pdf [<http://perma.cc/WV4Y-UMEN>].

⁴ *Ending Mass Incarceration*, VERA INSTITUTE OF JUSTICE, <http://www.vera.org/ending-mass-incarceration> [<http://perma.cc/Y5HU-YNZK>] (last visited Mar. 21, 2022).

⁵ Bill Keller, *What Do Abolitionists Really Want?*, MARSHALL PROJECT (June 13, 2019), <http://www.themarshallproject.org/2019/06/13/what-do-abolitionists-really-want> [<http://perma.cc/AN57-WTSY>].

⁶ Keeanga-Yamagata Taylor, *The Emerging Movement for Police and Prison Abolition*, NEW YORKER (May 7, 2021), <http://www.newyorker.com/news/our-columnists/the-emerging-movement-for-police-and-prison-abolition> [<http://perma.cc/YDF2-MLDS>].

Congress. The founding principle of personal responsibility as the greatest guarantor of freedom has been increasingly disregarded, first by the criminals themselves, and more recently by policymakers. This (misplaced) guilt-driven, rather than data-driven, response to crime and punishment now plagues both political parties. The activist groups that push these reforms, many of which litigate against my state, often work across the aisle in the name of compassion to chip away at the prescribed punishment for crimes—always advocating compassion for perpetrators, never their victims.

The “Most Vulnerable”

“[Judge Ketanji Brown Jackson’s] years of experience representing the most vulnerable as a public defender and working to address disparities in federal criminal sentencing on the U.S. Sentencing Commission will be a welcome addition to the court.”

—Earthjustice⁷

“In the fight for justice for LGBTQ+ communities, the lives of our most vulnerable, especially trans and nonbinary youth, may need the highest rule of law to secure their protections. . . . And with Judge Jackson on the highest bench in the land, we know there’s a qualified defender for LGBTQ+ protections on our side.”

—Gay, Lesbian & Straight Education Network⁸

“[Judge Ketanji Brown Jackson] has given voice to the voiceless and . . . ha[s] stood up for some very vulnerable populations, whether it’s Guantanamo detainees, whether it’s immigrants, whether it’s criminal defendants. . . . It’s going to be especially important for progressives to stand up and make sure she gets on the court.”

—Our Revolution⁹

“The voice of Black public defenders, who fight for justice daily and intimately know the ramifications of the law on our most vulnerable and marginalized communities, is a needed voice on the high court. We commend President Biden for . . . sending a message to Black public defenders across the country who are in the trenches fighting against massive systems that oppress communities of color, that their work is seen, their voices are heard, and their contribution is valuable.”

—Black Public Defender Association¹⁰

⁷ Press Release, Earthjustice, Earthjustice Applauds the Historic Nomination of Judge Ketanji Brown Jackson to the U.S. Supreme Court (Feb. 25, 2022), <http://earthjustice.org/news/press/2022/earthjustice-applauds-the-historic-nomination-of-judge-ketanji-brown-jackson-to-the-u-s-supreme-court> [<http://perma.cc/B99Q-SAE7>].

⁸ Press Release, Gay, Lesbian & Straight Education Network, GLSEN Applauds Historic Nomination of Judge Ketanji Brown Jackson (Mar. 1, 2022), <http://www.glsen.org/news/statement-historic-nomination-judge-ketanji-brown-jackson-us-supreme-court> [<http://perma.cc/RQY6-HZGM>].

⁹ Kelsey Reichmann, *supra* note 2.

¹⁰ Press Release, Demand Justice, Public Defense Community Speaks Out About Historic Ketanji Brown Jackson Nomination (Feb. 28, 2022), <http://demandjustice.org/public-defense-community-speaks-out-about-historic-ketanji-brown-jackson-nomination/> [<http://perma.cc/692A-8LNS>].

“With her exceptional qualifications and record of evenhandedness, Judge Ketanji Brown Jackson will be a Justice who will uphold the Constitution and protect the rights of all Americans, including the voiceless and vulnerable.”

—Senate Majority Leader Chuck Schumer¹¹

Because the support for Judge Jackson repeatedly references her serving as a voice for the most vulnerable, we should be interested in exploring whether her zeal is equally fervent for another class of our most vulnerable—victims of violent crime. At a time when our country has no problem assigning the label of “victim” to any and every person who might be offended by another’s point of view, the plights of actual victims of violent crime—those who have been abused and assaulted, robbed and raped, maimed and murdered—are conspicuously absent from far too many criminal-justice discussions on “compassion” or “protecting society’s most vulnerable.” Strikingly, while the race and socioeconomic status of offender populations are often offered as a damning rebuke of a biased criminal-justice system, the race and socioeconomic status of victims—which is often identical to the criminal’s—receives not even a passing mention.

A 2018 report by the Bureau of Justice Statistics found that the offender was of the same race or ethnicity as the victim in 70% of violent incidents involving black victims, 62% of those involving white victims, 45% of those involving Hispanic victims, and 24% of those involving Asian victims.¹² Further, the same report showed that the largest percentage of violent-crime victims, 40.8%, were from households with an income of less than \$25,000 annually.¹³

A recent report published by the Center for Victim Research aimed to better understand who experiences violent victimization and who accesses victim-support services. The report found that “over the past four decades, blacks’ risk for [being victimized by] serious violence have remained roughly 1.5 to 2 times greater than those of whites, and risks among Hispanics have been roughly 1.2 to 1.5 times greater than those of whites.”¹⁴ Examining data from 2010 to 2015, the same study found that American Indians report rates of serious violence that are approximately 2.4 times (or 140%) greater than those of non-Hispanic whites.¹⁵ Finally, the report found that “the overall risk of violent victimization is highest among persons who are younger, male, black, living in the poorest households, and living in urban areas” and that “age and household income have the strongest association with violence risk, followed by residential location, race, ethnicity, and sex.”¹⁶

¹¹ Press Release, Chuck Schumer, Majority Leader, Senate, Majority Leader Schumer Statement on President Biden’s Nomination of Judge Ketanji Brown Jackson to the United States Supreme Court (Feb. 25, 2022), <http://www.democrats.senate.gov/newsroom/press-releases/majority-leader-schumer-statement-on-president-bidens-nomination-of-judge-ketanji-brown-jackson-to-the-united-states-supreme-court> [<http://perma.cc/96YD-LB6X>].

¹² RACHEL E. MORGAN & BARBARA A. OUDEKERK, BUREAU OF JUST. STAT., U.S. DEP’T OF JUSTICE, CRIMINAL VICTIMIZATION, 2018, at 13 (2019).

¹³ *Id.* at 10.

¹⁴ HEATHER WARNKEN & JANET L. LAURITSEN, CENTER FOR VICTIM RESEARCH, WHO EXPERIENCES VIOLENT VICTIMIZATION AND WHO ACCESSES SERVICES? 10–11 (2019).

¹⁵ *Id.* at 11.

¹⁶ *Id.* at 13.

This data raises important questions about the common progressive argument that offenders are due compassion (leniency) because of their perceived vulnerabilities, while victims of violent crime—who are innocent and would be similarly identified as vulnerable by any other measure—are not due even greater compassion. Without positing any conclusory statement on Judge Jackson’s appreciation for the realities reflected in the aforementioned data, I will simply mention that her law review note does not “give a voice to the voiceless” when it comes to sexual victimization. In that note, as you are likely now aware, Jackson questioned the necessity of sex-offender community notification requirements, which have traditionally received bipartisan support, and concluded that they are unconstitutional (they are not). Remarkably, the words “victim” and “vulnerable” do not appear a single time.¹⁷

Compassionate Release

Judge Jackson has been criticized for using “compassionate release”¹⁸ to free prisoners, particularly at the height of the coronavirus pandemic. This has gained attention likely due to her stated belief that “the obvious increased risk of harm that the . . . pandemic poses to individuals who have been detained in the District’s correctional facilities reasonably suggests that *each and every criminal defendant* who is currently in D.C. DOC custody . . . should be released.”¹⁹ While this quote has garnered recent attention and may well evidence an extreme viewpoint, in reviewing her use of “compassionate release,” it was another quote that caught my attention.

In *United States v. Johnson*, Judge Jackson opened her opinion by asserting, with attribution to the *New York Times*, that “with the First Step Act of 2018, Congress enacted ‘the most substantial change[] in a generation to the tough-on-crime prison and sentencing laws that ballooned the federal prison population and created a criminal justice system that many . . . view[ed] as costly and unfair.’”²⁰ Judge Jackson’s record of using “compassionate release” is certainly ripe for review and critique, but perhaps more so is her nod to the reference of an “unfair” justice system—a belief that could reasonably be perceived as influencing her use of discretion to find a “compelling reason” for release.

As this Committee knows well, by enacting the First Step Act, Congress expanded the availability of “compassionate release” for offenders.²¹ Specifically, a motion for “compassionate release” no longer has to be made by the director of the federal prison bureau.²² Instead, such a motion may be made by the defendant “after the defendant has fully exhausted all administrative rights to

¹⁷ Note, *Prevention Versus Punishment: Toward a Principled Distinction in the Restraint of Released Sex Offenders*, 109 HARV. L. REV. 1711 (1996).

¹⁸ 18 U.S.C. § 3582(c)(1)(A).

¹⁹ *U.S. v. Wiggins*, 2020 WL 1868891 (April 10, 2020) (emphasis added). It should be noted that Judge Jackson went on to concede that the judiciary was required to make an individualized assessment of the detained person’s risk to the community before granting release.

²⁰ *U.S. v. Johnson*, 464 F.Supp.3d 22 (2020) at 25; Nicholas Fandos, *Senate Passes Bipartisan Criminal Justice Bill*, N.Y. TIMES (Dec. 18, 2018), <http://www.nytimes.com/2018/12/18/us/politics/senate-criminal-justice-bill.html> [<http://perma.cc/3NKG-QAY6>].

²¹ The First Step Act of 2018 (Pub. L. No. 115-391 (2018)) went into effect on December 21, 2018. It authorizes “defendants” (i.e., offenders) to file a motion for compassionate release “after the defendant has fully exhausted all administrative rights to appeal a failure of the Bureau of Prisons to bring a motion on the defendant’s behalf or the lapse of 30 days from the receipt of such a request by the warden of the defendant’s facility, whichever is earlier.”

²² *Id.*

appeal a failure of the Bureau of Prisons to bring a motion on the defendant's behalf or the lapse of 30 days from the receipt of such a request by the warden of the defendant's facility, whichever is earlier."²³ Data from the United States Sentencing Commission reflects that 98% of the motions for "compassionate release" granted by the D.C. Circuit from 2020 and 2021 were filed by defendants.²⁴

In one such example, Judge Jackson granted the "compassionate release" of an inmate who was serving thirty-five-to-life (a sentencing scheme that existed prior to the abolition of federal parole) for killing a U.S. Marshal and assaulting three other Marshals.²⁵ In granting the inmate's motion for "compassionate release," over the objection of the government and the Marshals Service, Judge Jackson cited the inmate's age,²⁶ time served, and health issues that would make him more at risk for complications from COVID-19.²⁷

In another example, and again over the government's objection, Judge Jackson released an inmate from pre-trial detention who had been charged with the distribution of fentanyl on the basis of his status as an asthmatic incarcerated during a period of "unknowns" about COVID-19.²⁸ Though the offense in the above example resulted in the loss of yet another life of a law enforcement officer—an offense punishable by death—this case troubles me in a different way, as Judge Jackson's stated reasons for release were far less compelling. As I read this decision, it seems to me that Judge Jackson arrived at her decision by downplaying the circumstances of the crime and the actual charge—a charge of selling, giving, or transferring a substance that is roughly 100 times more potent than morphine and can be lethal at a dosage of only two milligrams (the weight of a mosquito). The presence of fentanyl also poses a unique risk to law enforcement, who can be harmed by unknowingly handling or inhaling it. Conversely, the judge found that the defendant's asthma—a condition that affects one in twelve Americans, presumably including those in prison²⁹—"could" heighten his risk of harm from COVID and thus made him eligible for pre-trial release.³⁰

²³ Section 603 of the First Step Act amended section 3582(c)(1)(A) of title 18.

²⁴ U.S. Sentencing Commission Compassionate Release Data Report, Calendar Years 2020 to 2021 (September 2021), Table 4, <http://www.ussc.gov/sites/default/files/pdf/research-and-publications/federal-sentencing-statistics/compassionate-release/20210928-Compassionate-Release.pdf> [<http://perma.cc/XXD5-D3D5>].

²⁵ U.S. v. Greene, 516 F. Supp.3d 1 (February 2, 2021).

²⁶ Interestingly, in a separate report on the recidivism of violent offenders, the Sentencing Commission found that while an increase in the age of an offender typically accompanies a decrease in the risk of reoffending, violent offenders had higher re-arrest rates than non-violent offenders in every age group. For offenders sixty years of age and older, a staggering 25% of these individuals were rearrested. *See* Recidivism of Federal Violent Offenders Released in 2010, Key Finding #5 at page 6, U.S. Sentencing Commission (February 2022), http://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2022/20220210_Recidivism-Violence.pdf [<http://perma.cc/5CW7-PQCY>].

²⁷ U.S. v. Greene, 516 F.Supp.3d 1 (February 2, 2021).

²⁸ U.S. v. Dabney, 2020 WL 1867750 (April 13, 2020) at 3.

²⁹ <http://www.cdc.gov/nchs/fastats/asthma.htm>

³⁰ *Id.* at 2.

Justifying her decision by deeming the defendant’s distribution of fentanyl a “one-off incident,”³¹ she further observed that “there was no evidence of violence in [the defendant’s record],” despite the fact that he could be seen holding a firearm in a rap video that had been posted to YouTube.³²

Let me be clear, these decisions are concerning as a matter of Judge Jackson’s judgment, but not because she violated federal law in granting early release—it appears she did not. For example, when Congress initially established the means by which a court could reduce an inmate’s term of imprisonment, it gave courts discretion to be exercised for “extraordinary and compelling reasons.”³³ Of course, at that time, such a motion was very rarely before the court. By later granting inmates the means to file their own motions without also reining in judicial discretion, Congress should have foreseen that judges could use this tool in precisely the way that Judge Jackson did.

I publicly opposed the First Step Act at the time of its passage and saw this provision as one of its more glaring miscalculations. Whatever the outcome of Judge Jackson’s confirmation vote, I urge this Committee to reconsider the expansion of “compassionate release” and to move quickly to repeal or restrict its use in this manner.

Comparison to Justice Stephen Breyer

As this Committee prepares to make a recommendation to the full Senate on whether or not Judge Jackson will replace Justice Stephen Breyer, for whom she clerked, it is important to consider what is uniquely at risk when it comes to matters of criminal justice in his absence.

Around the time of Justice Breyer’s retirement announcement, I read a tribute to him penned by the Dean of the University of California, Berkeley, School of Law, Erwin Chemerinsky, entitled “Justice Breyer Is a Model for All Who Sit on a Judicial Bench.”³⁴ In the opinion piece, he refers to Justice Breyer as a “moderate liberal” and goes on to tout the Justice’s liberal bona fides on the death penalty, the Second Amendment, and abortion.³⁵ However, as evidence of Justice Breyer’s perceived moderation, Chemerinsky points out that the Justice joined his conservative colleagues in a number of important criminal-procedure cases.³⁶ These cases are worth reviewing.

In *Maryland v. King*, the Supreme Court considered the constitutionality of a Maryland law that allowed law enforcement to swab (for DNA), involuntarily, individuals arrested for certain crimes of violence.³⁷ In the case at hand, Maryland law enforcement used DNA from a swab to ultimately charge the defendant with first-degree rape. In a 5-4 decision, Justice Breyer joined Chief Justice Roberts and Justices Kennedy, Thomas, and Alito to uphold the law, in part, due to the State’s

³¹ U.S. v. Dabney, 2020 WL 1867750 (April 13, 2020) at 3.

³² *Id.*

³³ 18 U.S.C. § 3582(c)(1)(A).

³⁴ Erwin Chemerinsky, *Justice Breyer Is a Model for All Who Sit on a Judicial Bench*, ABA JOURNAL (Feb. 2, 2022), <http://www.abajournal.com/columns/article/chemerinsky-justice-breyer-is-a-model-for-all-who-sit-on-a-judicial-bench> [http://perma.cc/TEH6-5NW7].

³⁵ *Id.*

³⁶ *Id.*

³⁷ 569 U.S. 435 (2013).

legitimate interest in determining what level of risk an individual poses to the public and whether or not the individual can be safely released from custody.

In *Navarette v. California*, the Supreme Court considered the constitutionality of the police using a caller's anonymous allegation of reckless driving as the basis for a traffic stop.³⁸ In this case, a caller to the county dispatch office complained of a reckless driver who had run the caller off the road at a particular mile marker. The caller provided the vehicle's license-plate number, which was used to stop the vehicle and yielded the discovery of four large bags of marijuana. In another 5-4 decision, Justice Breyer joined with the majority in finding that the call provided the officer with necessary reasonable suspicion for the stop.

In *Utah v. Strieff*, the Supreme Court considered the constitutionality of admitting evidence discovered in a search that was incident to a lawful arrest on an outstanding warrant, but that came about as a result of an initial stop that was determined to be unlawful. In this case, a detective received an anonymous tip that drugs were being sold out of a nearby residence. He surveilled the house for several days and noticed frequent guests coming and going after brief visits. The detective stopped an individual seen leaving the home and discovered that he had an outstanding warrant. During a search following the man's arrest, drug paraphernalia was found on his person. In a 5-3 decision, Justice Breyer joined the majority opinion, which weighed the costs of excluding the evidence against the benefits and found that, given the absence of flagrant police misconduct, the evidence was properly admitted.

Widely known as a consensus builder, Justice Breyer's decisions in these cases seem to suggest an inherent confidence in the United States criminal-justice system, a willingness to carefully balance public safety concerns against the rights of the accused, and perhaps most remarkably, a perceived acknowledgement that proactive policing improves public safety. Importantly, these are concepts with which the vast majority of the American public strongly agrees. It is unclear to me whether Judge Jackson shares these views, but it is important for senators to have clarity on this before she is confirmed. The insistence by far-left activists to replace Justice Breyer with a more radical candidate, whether or not that accurately describes Judge Jackson, should be soundly rejected in the name of moderation and for the good of public safety.

Conclusion

Much as the view that America is unexceptional undermines our Constitution, frustrates our foreign policy, and poisons our educational institutions, the view that our criminal-justice system is inherently broken and biased undermines the rule of law, respect for law enforcement officials, and ultimately the safety of the public it is designed to protect.

I have heard nothing during this week of hearings to alleviate my fear that Judge Jackson indeed believes that a "fundamental redesign" is needed in our criminal-justice system and that she would be inclined to use her position on the Court to this end. For this reason, I oppose the nomination of Judge Jackson to the United States Supreme Court.

³⁸ 572 U.S. 393 (2014).