

Judge Ketanji Brown Jackson and Her Antitrust Record

Judge Ketanji Brown Jackson, if confirmed, will certainly be personally challenged to follow Justice Stephen Breyer's antitrust legacy. Regardless of Jackson's unclear antitrust views, she should be questioned at her Senate confirmation hearing about them.

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By Carl W. Hittinger and Jeanne-Michele Mariani

President Joe Biden on Feb. 25, nominated federal appeals court Judge Ketanji Brown Jackson to the U.S. Supreme Court, the first Black woman selected to serve on this nation's highest court. Introducing Jackson at the White House, Biden declared, "I believe it's time that we have a court that reflects the full talents and greatness of our nation."

Biden also noted that Jackson has "a pragmatic understanding that the law must work for the American people" and "she strives to be fair, to get it right, to do justice."

Jackson joined the U.S. Court of Appeals for the District of Columbia Circuit in June 2021, after seven years as a trial judge on the District of Columbia federal court. Before taking the bench, Jackson served as an assistant federal public defender, a commissioner on the U.S. Sentencing Commission, a lawyer in private practice at several firms and a law clerk for Justice Stephen Breyer, whose big shoes she has been nominated to fill.

During her eight years on the D.C. district court, Jackson had to weigh in on thorny political cases during Donald Trump's presidency. Her confirmation will not tilt the ideological makeup of the court, which has a firm 6-3 conservative supermajority. Court-watchers expect she'll settle into the liberal minority alongside Justices Elena Kagan and Sonia Sotomayor and those who know her predict she'll seek consensus-building on the high court and look for realistic compromises with her conservative colleagues. Biden noted her consensus building reputation during his recent State of the Union address.

While much has been talked about regarding her historic nomination, it is difficult to determine where Jackson might fall on important issues related to antitrust. She was reassigned from a class-action lawsuit targeting Facebook, Google and Alphabet last June after being elevated to the

D.C. Circuit. And the remaining antitrust cases that she faced on the district court rarely delved into the substantive issues. Most opinions issued in this arena by Jackson dealt with procedural or jurisdictional issues. But at least one antitrust hawk is already a fan—Jonathan Kanter, the DOJ's head of antitrust and an outspoken skeptic of market concentration in the tech industry. Kanter has a long history representing tech companies, like Yelp and Microsoft, in lawsuits accusing Google of anti-competitive behavior. Kanter leads several Justice Department competition cases against big tech, including a monopoly lawsuit against Google alleging that the company maintains an illegal monopoly in the digital ads market. "Ketanji is a person of tremendous character and intellect," Kanter stated, adding that he "could not imagine a better selection."

While Jackson does not have a strong antitrust background in either private practice or on the bench, Breyer, her predecessor and former boss, has left an indelible mark on antitrust case law in this country. One of Breyer's best known antitrust opinions was for the majority in the court's landmark 2013 ruling in *Federal Trade Commission v. Actavis*. That case stemmed from the FTC's challenge of agreements ending patent litigation over the testosterone drug AndroGel that enforcers said delayed unfairly entry of generic versions.

The court found that payments made by a branded drug company to a would-be generic maker can, but do not always, violate antitrust law and need to be evaluated under the rule-of-reason standard for their competitive effects. Breyer's opinion in *FTC v. Actavis* has been lauded as one of the most significant antitrust rulings in the past generation.

Breyer also wrote the opinion for a unanimous court in *FTC v. AMG Capital* last year, affirming reversal of a \$1.3 billion restitution award in a game changing FTC case alleging

that payday loan companies controlled by race car driver Scott Tucker had deceived and overcharged customers. The court found the FTC lacked authority to seek restitution or disgorgement in federal court before prosecuting a case through its lengthy administrative proceedings, even though the agency had been operating under the impression that it could go directly to court for decades. While AMG was a consumer protection case, the FTC had employed the same authority in competition cases as well.

While Jackson was not a law clerk for Breyer during those major cases, she served as his clerk when he wrote an opinion dissenting in part from the majority in the court's 1999 seminal decision in *California Dental Association v. FTC*. That case involved an FTC action over advertising restrictions where the majority found the appeals court had improperly analyzed the restrictions through an abbreviated rule-of-reason test and sent it back down for a more thorough look. Breyer joined the majority in finding that the FTC did have jurisdiction over the nonprofit group, but said the so-called quick-look test employed by the lower court was adequate. The quick-look analysis was recently unanimously criticized by the Supreme Court in its *NCAA v. Alston* decision.

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members across both aisles for her intellectualism, writing capabilities and grace under pressure, the presence of the first Black woman on the court is not only precedential but will bring a fresh perspective to our judicial makeup from the top down. As will her real world practicing lawyer perspective and work in the trenches as a trial judge, that is often lacking in Supreme Court nominees. Like the historic appointment of Justice Thurgood Marshall, it will be interesting to see how this latest historic nomination changes the country's legal jurisprudence.

Stay tuned.

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