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Biden’s Supreme Court Shortlist Has Limited Administrative Law Expertise, NCLA Report Shows

Washington, DC (February 10, 2022) – President Biden has vowed that he will appoint the first Black woman justice to fill the U.S. Supreme Court seat of Justice Stephen Breyer. Taking him at his word, NCLA has only evaluated Black female candidates this time around in assessing potential nominees. The [report](#) compiled by attorneys at the New Civil Liberties Alliance, a nonpartisan, nonprofit civil liberties group, goes beyond race and gender, and examines each potential nominee’s interpretation of administrative power issues, to the extent possible based on public information, including any record of questioning judicial deference in favor of agencies.

The report released today reveals that Biden’s potential nominees mostly lack a large enough body of significant judicial opinions or publications to draw any definitive conclusions regarding their views on administrative law. Where any indications are available, they show limited interest in challenging long-standing doctrines like *Chevron*. NCLA evaluated the opinions, legal writings, and statements of six rumored frontrunners for the Supreme Court vacancy: Judge Ketanji Brown Jackson, Judge Julianna Michelle Childs, Judge Candace Rae Jackson-Akiwumi, Justice Leondra Kruger, Judge Eunice C. Lee, and Vice President Kamala Harris.

NCLA strongly encourages the appointment of federal judges who are willing to protect people’s civil liberties from unlawful administrative power. The principal threat to individual liberty in America today is the coalescence of legislative, executive, and judicial power in independent agencies and executive departments. A main reason for the aggregation of such unlawful power has been the judiciary’s unwillingness to force administrative agencies to abide by the strictures of the Constitution. Hence, NCLA hopes that President Biden will identify a nominee who is not bashful about reining in agencies’ efforts to exert power that Congress never gave them.

NCLA released the following statement:

“President Biden’s vow to nominate a Black woman justice is quite a turnaround from when he filibustered the nomination of Janice Rogers Brown to the U.S. Court of Appeals for the District of Columbia Circuit—in large part to minimize her chances of being named to the Supreme Court by President George W. Bush. Individuals should not be nominated to the Supreme Court—nor denied appointment to the Supreme Court (or lower courts)—based on their gender or race. Whomever President Biden nominates, that person’s qualifications should be evaluated based on their record as a lawyer and a judge.”

— **Mark Chenoweth, Executive Director and General Counsel, NCLA**

The following excerpts from NCLA’s report summarize the evaluations of the candidates:

Hon. Ketanji Brown Jackson: “Judge Brown Jackson shows no inclination to challenge long-standing doctrines like *Chevron*. ... She does appear to apply *Chevron* actively rather than passively and cannot be accused of using it as a ‘rubber stamp’ for agency action. She also leans wherever possible toward jurisdiction in the district court and avoids declining jurisdiction to send litigants to the mercies of the agencies. ... [S]he challenges the government in oral argument and does not appear to be on the ‘Government team’ during litigation.”

Hon. Julianna Michelle Childs: “As a District Court Judge, Judge Childs has written over 2,000 orders and opinions. As a matter of course, she has dealt with claims of ‘arbitrary and capricious’ administrative actions, and deference to administrative decisions. In her writings, she has not expressed strong views—or any views for that matter—on the ideology of the ‘administrative state.’ She is a trial judge who decides the cases in front of her based on the plain meaning of the law or, if there is a legal question, the law as determined, in her words, by the Supreme Court and Fourth Circuit.”

Hon. Candace Rae Jackson-Akiwumi: “Judge Jackson-Akiwumi has written virtually nothing that provides insight regarding her views on the administrative state. The information she submitted to the Senate Judiciary Committee suggests that she has never published an academic article, including during her service on the YALE LAW REVIEW. She worked as an assistant federal public defender in Chicago from 2010 to 2020, a period that covered most of the years between her clerkships and her appointment as a judge. ... Her views are likely to become much more apparent after her judicial tenure has lengthened and she has had an opportunity to write decisions on administrative law issues.”

Hon. Leondra Kruger: “Justice Kruger’s judicial writings on administrative power offer some evidence that she may be amenable to limiting agency power in certain circumstances, but her sparse record makes it impossible to predict her views with confidence. Justice Kruger appears to value individual rights in the criminal-enforcement context, but it is unclear if this would extend to administrative enforcement. Her self-identification as a judicial institutionalist suggests she would be unwilling to reverse precedent that empowers the administrative state. If confirmed, she may be inclined to work with justices of opposing views to craft narrower and thus more incremental decisions.”

Hon. Eunice C. Lee: “Judge Lee was appointed to the Second Circuit by President Biden on the recommendation of Senator Chuck Schumer of New York. She was confirmed 50-47 (Three Republicans did not vote). She was an assistant federal defender in New York for 20+ years. ... The absence of any significant judicial opinions or publications makes drawing meaningful conclusions regarding Judge Lee’s views impossible. She is nearly a cipher when it comes to administrative law and the various government deference doctrines, for example. As a criminal defense attorney, her experience with administrative law is virtually zero.”

Vice President Kamala Harris: “Vice President Harris has never been a judge, so there are no judicial opinions to analyze to determine how she would perform on the bench. We are not aware of any scholarly writings by Ms. Harris, such as law review articles. ... The lack of judicial opinions or legal publications make any conclusion regarding Vice President Harris’s views on the administrative state unreliable. She took positions as District Attorney and Attorney General of California that largely sided with the government against those accused of wrongdoing. If she were appointed to the United States Supreme Court, that track record might not bode well for those who find themselves facing enforcement actions from administrative agencies.”

Read NCLA’s full report [here](#).

ABOUT NCLA

[NCLA](#) is a nonpartisan, nonprofit civil rights group founded by prominent legal scholar [Philip Hamburger](#) to protect constitutional freedoms from violations by the Administrative State. NCLA’s public-interest litigation and other pro bono advocacy strive to tame the unlawful power of state and federal agencies and to foster a new civil liberties movement that will help restore Americans’ fundamental rights.

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