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March 17, 2022

MEMORANDUM

TO: Tribal Leaders
National Congress of American Indians – Project on the Judiciary

FROM: Joel West Williams, Senior Staff Attorney, Native American Rights Fund

RE: The Nomination of Ketanji Brown Jackson to the Supreme Court of the United States: An Indian Law Perspective

I. Introduction

On February 25, 2022, President Biden nominated Judge Ketanji Brown Jackson of the United States Court of Appeals for the District of Columbia Circuit (D.C. Circuit) to serve as an Associate Justice on the Supreme Court of the United States (U.S. Supreme Court), to fill the vacancy that will be created by the pending retirement of Justice Stephen Breyer, for whom Judge Jackson clerked. On March 21, 2022, the Senate Judiciary Committee will convene hearings to consider her nomination. If confirmed, Judge Jackson would be the first Black woman to serve on the Court, and the sixth woman.

Judge Jackson has spent the past nine years as a federal judge, first on the United States District Court for the District of D.C. (D.C. District Court), and then on the D.C. Circuit. Prior to her nomination to the D.C. District Court, she completed three federal judicial clerkships, worked as a federal public defender for two years, served as the United States Sentencing Commission (U.S. Sentencing Commission) as an attorney and later as Vice Chair, and spent a few years in private practice.

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Because Judge Jackson has spent most of her judicial career as a federal district court judge, it is challenging to distill her judicial philosophy.¹ As she observed in her district court confirmation hearing, district court judges are “less likely to develop substantive judicial philosophies” than are appellate court judges.² District court judges hear fewer legally novel cases, are more constrained by precedent, render more procedural decisions, and most often apply settled law to a specific dispute.³ Although Judge Jackson currently serves as an appellate court judge, she joined the D.C. Circuit less than nine months ago and so has authored only three signed opinions (two majority opinions and one concurrence).

This memorandum is intended to provide Tribal leaders with background on Judge Jackson, and in particular her record on Indian law. As more fully discussed below, Judge Jackson issued two opinions involving Indian law, Indian tribes or individual Indians during her time on the D.C. District Court, and none during her time on the D.C. Circuit. In presentations she gave while serving on the U.S. Sentencing Commission, she demonstrated some familiarity with one Indian law case: *Ex Parte Crow Dog*, 109 U.S. 556 (1883). She also likely had some exposure to Indian law during her clerkship with Justice Breyer. However, due to the nature of judicial clerkships, we cannot know her views on, or even whether she was involved in, the Indian law cases that came before the Court that term.

II. A Brief Biography

Judge Jackson was born on September 14, 1970, in Washington, D.C., and raised in Miami, Florida. Her father was an attorney for the Miami-Dade County School Board, and her mother was high school principal. She graduated from Miami Palmetto Senior High School in 1988 and obtained her A.B. *magna cum laude* in Government from Harvard-Radcliffe College in 1992. She worked for about a year as a researcher and staff reporter for *Time* magazine before attending Harvard Law School. At Harvard Law School, she was the supervising editor of the *Harvard Law Review*, and graduated *cum laude* in 1996.

After graduating from law school, Judge Jackson clerked first for Judge Patti B. Saris of the U.S. District Court for the District of Massachusetts, then for Judge Bruce M. Selya of the U.S. Court of Appeals for the First Circuit, and finally for Associate Justice Stephen G. Breyer of the Supreme Court of the United States. In the year between her clerkships with Judge Selya and Justice Breyer, Judge Jackson was an attorney with Miller Cassidy Larroca & Lewin LLP.

Following her clerkships, Judge Jackson worked as an Assistant Special Counsel at the U.S. Sentencing Commission and as an associate with two law firms (one specializing in white-collar

¹ CONG. RSCH. SERV., LSB10701, THE SUPREME COURT NOMINATION OF JUDGE KETANJI BROWN JACKSON: INITIAL OBSERVATIONS 2 (2022).

² *Id.*

³ *Id.*

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criminal defense, and the other focusing on the negotiated settlement of mass-tort claims). She then served as an Assistant Federal Public Defender in the District of Columbia before spending three years at Morrison & Foerster LLP, where her practice focused on criminal and civil appellate litigation. In 2010, she was appointed as a Commissioner and Vice Chair of the U.S. Sentencing Commission; she continued in that role until December 2014.

In 2013, she received her commission as a District Judge for the D.C. District Court and was elevated to the D.C. Circuit in June of 2021, where she sits today. In addition to her current service as a judge on the D.C. Circuit, Judge Jackson is a member of the Judicial Conference Committee on Defender Services, the Board of Overseers of Harvard University, and the Council of the American Law Institute. She also serves on the board of Georgetown Day School and the United States Supreme Court Fellows Commission.

She is married to Patrick G. Jackson and they have two children.

III. Judge Jackson's Indian Law Record and Experience

Judge Jackson's Indian law record and experience is summarized below, beginning with her most recent position as a judge on the D.C. Circuit.

A. D.C. Circuit Court of Appeals (2021-present):

To date, no Indian law cases have come before Judge Jackson during her brief tenure on the D.C. Circuit.

B. D.C. District Court (2013-2021)

Of the more than 500 opinions that Judge Jackson authored while a D.C. District Court judge, two involved Indian tribes or Indian law issues:

***Fredericks v. United States Dep't of the Interior*, No. 20-CV-2458 (KBJ), 2021 WL 2778575 (D.D.C. July 2, 2021).** Children of a deceased member of the Three Affiliated Tribes of the Fort Berthold Reservation sought to cancel an oil and gas lease on land belonging to their father and held in trust by the Department of the Interior (DOI). They argued that the lease was invalid under the Fort Berthold Mineral Leasing Act, and that, pursuant to the American Indian Probate Reform Act (AIPRA), existing lease proceeds should be distributed to them rather than to their late father's non-member widow. In this specific proceeding, the decedent's children sought a preliminary injunction preventing the DOI from distributing the lease proceeds until the court decided the merits of their lawsuit. Judge Jackson denied the injunction on two grounds: (1) that, after applying *Chevron* deference to the DOI's interpretations of AIPRA, the plaintiffs were unlikely to succeed

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on the merits; and (2) that the plaintiffs’ asserted “irreparable harms” (distribution of proceeds to the decedent’s wife) were not “irreparable” because the plaintiffs could file – indeed, had filed – a claim to recover their losses in the Court of Federal Claims.

***Mackinac Tribe v. Jewell*, 87 F. Supp. 3d 127 (D.D.C. 2015).** The Mackinac Tribe, which is not federally recognized, sought (1) a judicial declaration that it was entitled the benefits provided federally recognized tribes under the Indian Reorganization Act, and (2) an injunction requiring the Secretary of the Interior to assist the Tribe in organizing the constitutional election required to form a recognized Tribal government. The DOI asserted that the suit was barred either by sovereign immunity or by the Tribe’s failure to exhaust its administrative remedies, i.e., the federal recognition process set forth in 25 C.F.R. Part 83. Judge Jackson ruled that the suit was not barred by sovereign immunity because it came under the Administrative Procedure Act’s waiver of sovereign immunity. However, she rejected the Tribe’s argument that its 1855 treaty with the United States was sufficient to confer federal recognition and concluded that the Tribe must exhaust administrative remedies by pursuing the federal recognition process under 25 C.F.R. Part 83 before bringing suit in federal court.

C. United States Sentencing Commission (2010-2014)

Our research did not reveal any involvement with Indian law issues while on the U.S. Sentencing Commission. However, she gave several presentations during this period that used the example of *Ex Parte Crow Dog*, 109 US 556 (1883), to illustrate differing approaches to sentencing criminal defendants.⁴ In the presentations, she briefly described the political rivalry that led to Crow Dog killing Spotted Tail. She then explains that her interest in this story begins at the “sentencing” phase and the differences between the punishment the Tribe meted out and the one that the federal government sought to impose. The Tribe, in Judge Jackson’s retelling, was most concerned about preserving harmony within the Lower Brule community for the survival of the Tribe as a whole, and so sought a solution that would best reconcile Crow Dog’s and Spotted Tail’s families. Thus, Crow Dog was required to pay cash, horses, and other supplies to his victim’s family as compensation. The United States, by contrast, prosecuted Crow Dog for murder in federal court and sought the death penalty. She highlights two questions raised by Crow Dog’s case that she believes resonate throughout the federal sentencing process today: (1) what constitutes a fair punishment, and (2) whether punishment is best determined on a localized, case-by-case basis or by a centralized entity like the Sentencing Commission.

⁴ See *Nomination of Ketanji Brown Jackson to be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary*, 117th Cong. ____ (2022) (written attachments to Senate Judiciary Questionnaire submitted by Judge Ketanji Brown Jackson, Nominee), available at <https://www.judiciary.senate.gov/imo/media/doc/Jackson%20SJQ%20Attachments%20Final.pdf> (at *743, *875, *921 of linked PDF).

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D. Of Counsel, Morrison & Foerster (2007-2010)

Our research did not identify any Indian law matters or cases involving Indian tribes handled by her during the time at this law firm.

E. Assistant Public Defender, Office of the Federal Public Defender (D.C.) (2005-2007)

Our research did not identify any Indian law matters or cases involving Indian tribes handled by her during the time as a federal public defender.

F. Assistant Special Counsel, U.S. Sentencing Commission (2003-2005)

Our research did not identify any Indian law matters or cases involving Indian tribes handled by her during her time as counsel for the U.S. Sentencing Commission.

G. Feinberg Group, LLP (now Feinberg Rozen, LLP) (2002-2003)

Our research did not identify any Indian law matters or cases involving Indian tribes handled by her during the time at this law firm.

H. Goodwin Procter LLP (2000 – 2002)

Our research did not identify any Indian law matters or cases involving Indian tribes handled by her during the time at this law firm.

I. Clerk to Justice Stephen Breyer (1999-2000)

During the term that Judge Jackson clerked for Justice Breyer, the U.S. Supreme Court heard two Indian law cases: *Rice v. Cayetano*, 528 U.S. 495 (2000), and *Arizona v. California*, 530 U.S. 392 (2000). In *Rice*, the Court held that a Hawaiian constitutional provision restricting participation in Office of Hawaiian Affairs elections to only qualified “Hawaiians” was a race-based voting qualification that violated the Fifteenth Amendment. *Arizona* was one installment in a long-running water rights dispute; the Court ruled that tribal claims for expanded water rights were not precluded, and it approved settlements of those claims. Justice Breyer was in the majority in both decisions, voting against the Native Hawaiian interests in *Rice*, and in favor of the tribal interests in *Arizona*. However, he did not author an opinion in either case. In addition, although a law clerk may be assigned to perform research on, write memoranda about, and discuss with her Justice any case that comes before the Court during the term of her clerkship, we cannot know the extent of Jackson’s involvement (if any) in these cases.

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J. Miller Cassidy Larroca & Lewin LLP (1998-1999)

Our research did not identify any Indian law matters or cases involving Indian tribes handled by her during the time at this law firm.

K. Clerk to Bruce Selya (First Circuit) (1997-1998)

No Indian law cases were identified that came before Judge Selya during this time.

L. Clerk to Judge Patti Saris (District of Massachusetts) (1996-1997)

No Indian law cases were identified that came before Judge Saris during this time.

IV. Should Indian Country Support or Oppose Judge Jackson's Confirmation?

One way to consider a nominee's potential impact on the Court is by comparison to the justice they will replace. If confirmed, Judge Jackson would replace Justice Stephen Breyer, who often is viewed as a moderate-to-liberal justice whose "pragmatic" judicial approach is informed by broad context, consideration of the practical consequences of judicial decisions, and "prefer[ring] standards, which would allow judges to consider all the relevant circumstances, over strict rules."⁵ Justice Breyer has a mixed Indian law record, voting in favor of tribal interests about 54% of the time while on the Court.⁶

Comparing Judge Jackson and Justice Breyer is difficult, both regarding their respective judicial philosophies and with regard to Indian law specifically. As discussed above, it is challenging to distill Judge Jackson's judicial philosophy because most of her judicial experience is as a trial court judge. Likewise, it is difficult to discern her understanding and approach to federal Indian law. Although she decided two cases as a federal district court judge that involved Indian law and in both ruled against the Indian parties, those opinions do not offer much insight into how she may approach Indian law issues that are likely to come before the U.S. Supreme Court. Both cases were fact-specific applications of statutes and did not require an understanding or application of broader Indian law principles. And in neither case did she bar relief altogether: one was a preliminary determination based, in part, on the availability of monetary relief at the Court of Federal Claims, and the other required administrative exhaustion prior to pursuing the claim in federal court.

⁵ CONG. RSCH. SERV., LSB10691, JUSTICE BREYER RETIRES: INITIAL CONSIDERATIONS 1 (2022).

⁶ This record situates Justice Breyer in the center on Indian law and Tribal issues on the current court. By comparison, as of the close of the October Term 2020 (considering only their votes while on the Supreme Court), Justice Gorsuch had voted in favor of Tribal interests 89% of the time, Justice Kagan 79%, and Justice Sotomayor 78%, while Chief Justice Roberts had voted in favor of Tribal interests 25% of the time, Justice Alito 23%, and Justice Kavanaugh 17%.

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Her use of *Crow Dog* as an illustration of differing approaches to criminal “sentencing” may suggest some understanding of the unique contexts in which Indian law principles arise. However, it does not tell us how she might, for example, prioritize competing governmental interests often at issue in modern Indian law cases or how she thinks about tribal sovereignty more generally.

Because her record on Indian law and tribal issues is limited, it is difficult to predict how she might think about foundational Indian law principles and whether her elevation to replace Justice Breyer may shift the Court’s balance regard to Indian law or impact the Court’s approach to Indian law questions. NARF, in conjunction with the National Congress of American Indians, will monitor the upcoming confirmation hearings closely and evaluate Judge Jackson’s responses to questions posed by the Senate Judiciary Committee.