

The SCOTUS Shortlist and Immigration: What Their Previous Rulings Reveal

Executive Summary

Based on public reporting, President Joe Biden has identified a shortlist of highly credentialed and exceptionally well-qualified Black women – Judge Ketanji Brown Jackson, Justice Leandra Kruger, and Judge J. Michelle Childs – to serve on the United States Supreme Court following Justice Stephen Breyer’s retirement. With distinguished service in private practice, public service, and on the bench, each of these women would bring a wealth of diverse experience to the Court.

As President Biden evaluates each candidate, he will assess how her past writings and decisions clarify her judicial philosophy, and how that philosophy might inform her rulings if confirmed. Given the increasing frequency with which federal courts are called upon to resolve questions of immigration law and immigrants’ rights, it is in the immigrant justice movement’s interest to do the same.

This is especially true since Congress has functionally abdicated its traditional role in immigration policy through inertia and inaction. Presidential administrations of both parties increasingly rely on executive action to advance their immigration priorities, and disputes over the legality of their actions often wind up in court. At the state level, Republican officials have either implemented policies that harm immigrant communities or filed suit against pro-immigrant policies. Inevitably, these challenges make their way to our federal courts – and often all the way to the Supreme Court.

Immigrant justice advocates understand the impact Supreme Court decisions have firsthand – from positive rulings on DACA and the census to negative decisions on the Muslim Ban and Remain in Mexico. And while this nominee will not alter the current balance of the Supreme Court, she will have a hand in shaping the law around immigrants’ rights for decades to come.

At this crucial moment, the National Immigration Law Center has carefully researched and analyzed each potential nominee’s past rulings in immigration-related cases. The findings are as follows:

Judge Ketanji Brown Jackson (U.S. Court of Appeals for the D.C. Circuit) has the most developed record on immigration-related matters, and her record is mixed.

- Notably, whether ruling for or against immigrants, Judge Jackson has consistently acknowledged the humanity of immigrants by declining to refer to them as “aliens” or “illegals;”
- In a close call, Judge Jackson asserted the power of the federal court to check the Trump administration’s abuse of executive authority in expanding expedited removals; and

- After the Trump administration changed documents so that they incorrectly stated asylum law, Judge Jackson held the Trump administration accountable by requiring it to provide relief for those harmed by the administration misstating the law.
- However, Judge Jackson rejected a challenge to two Trump-era immigration programs that improperly prevented asylum seekers from consulting with a lawyer;
- Judge Jackson denied a challenge to Trump's border wall, holding that the challenged statutes were exempt from judicial review.

On the U.S. District Court for the District of Columbia, Judge Jackson was bound by circuit and Supreme Court precedent. As a Justice, she would be setting precedent. If she is the nominee, a deeper inquiry into her record on immigration related issues will be required.

Judge J. Michelle Childs (District Court for the District of South Carolina) has only ruled on a few immigration-related cases, and the most substantive of those decisions raises concerns about her deference to executive power.

- Judge Childs deferred to a federal agency that had failed to evaluate the work authorization for an undocumented immigrant who was the victim of a crime. By failing to intervene, she effectively permitted the agency to either delay or never issue the authorization.
- However, Judge Childs allowed a lawsuit from a foreign-born doctor to proceed in which he claimed his employer was illegally changing his job requirements and threatening to terminate his work visa if he did not comply.

If Judge Childs is selected, her record warrants a deeper examination of her rulings around workers' and immigrants' rights, as well as her jurisprudence around the degree of deference afforded to federal agencies.

As a member of the California Supreme Court, Justice Leondra Kruger's relevant opinions generally concern the intersection of state law and immigration and demonstrate an awareness of the challenges immigrants face in asserting their rights.

- Justice Kruger authored a unanimous decision allowing an undocumented immigrant to withdraw a guilty plea after he was merely advised that his plea might result in his removal from the country. Justice Kruger wrote this was inadequate to satisfy the legal requirement that immigrants be advised of immigration consequences of certain convictions.
- In another unanimous decision, Justice Kruger held that a father who had abandoned his daughter at birth was not an essential party in her custody case. This finding allowed the child's special immigrant juvenile case to move forward.

With a thinner record on immigration issues and fewer rulings implicating federal law, the nomination of Justice Kruger should prompt further inquiry into how she approaches administrative and constitutional law.

Subsequent sections of this report will provide additional analysis and commentary on cases and decisions from each potential nominee.

Ketanji Brown Jackson

Make the Road New York v. McAleenan

Prior to 2019, individuals located within 100 miles of the border and who had been in the United States for fewer than 14 days and those who arrived by sea were subject to a process called expedited removal, in which the person could be deported without first receiving the full procedure and requirements of a removal hearing. In 2019, the Trump administration sought to dramatically expand expedited removal to include any undocumented person found *anywhere* in the United States who had been in the country for less than two *years*.

Advocacy groups challenged that dramatic and harmful expansion in *Make the Road New York v. McAleenan*¹. Judge Jackson ruled against the Trump administration, finding that it likely violated administrative law by skipping necessary steps to justify the policy change and that it failed to properly consider the revised policy's impact, including failing to seek public input.

The administration argued that the expedited removal statute banned federal courts from reviewing the government's actions. While Judge Jackson acknowledged the statute's limitation on court review, she determined that the statute only barred courts from reviewing the substance and merits of the policies but not their procedures. Though the D.C. Circuit reversed Judge Jackson's decision, her underlying opinion demonstrates her commitment to check improper executive action.

Kiakombua v. Wolf

The Trump administration rewrote guidance and training materials for several federal agencies' adjudicators (staff who preside over immigration services), including U.S. Citizenship and Immigration Services (USCIS) and Customs and Border Protection (CBP). The administration routinely added in legally misapplied and improper requirements to re-issued training materials to ensure that adjudicators were forced to deny relief to people who would otherwise be successful asylum candidates.² One change, the administration's rewriting of USCIS's guidance for conducting credible fear interviews,³ guaranteed that many people with credible fear of return to their home countries would still be deported.

¹ *Make the Road N.Y. v. McAleenan*, 405 F. Supp. 3d 1 (D.D.C. 2019).

² NILC and its partners challenged other examples of this misuse of guidance materials. In *Khudheyer v. Cuccinelli*, NILC sued challenging intentional misstatements pertaining to the Public Charge rule plainly designed to increase adjustment of status denials. <https://www.nilc.org/issues/economic-support/khudheyer-v-cuccinelli/>. That case was assigned to Judge Jackson but was rendered moot by other issues before Judge Jackson ruled on the matter. Likewise, in *Pars Equality Center v. Nielsen*, NILC continues to challenge the illicit guidance materials utilized by the Department of State to ensure that Muslim Ban waivers were the exception and not the rule. <https://www.nilc.org/issues/litigation/pars-equality-center-v-pompeo/>.

A group of individuals sued after their asylum applications were denied under the improperly updated USCIS guidance despite the violence they were subjected to by local gangs and the government in their home countries in *Kiakombua v. Wolf*.³

Judge Jackson ruled in favor of the individuals, holding that the updated guidance “plainly contradict[ed] the unambiguous text of the [law] ... and [that] nothing in Defendants’ motion and argument demonstrate[d] that the [updated guidance] Lesson Plan faithfully describe[d] ... how USCIS asylum officers are supposed to identify a noncitizen who has a credible fear of persecution.”

Judge Jackson recognized the harmful impact inflicted by the Trump administration in this case. Some of the plaintiffs had already been deported under the unlawful, updated guidance, which led Judge Jackson to not only order that the policy be vacated, but also required the government to return the removed plaintiffs back to the United States. She also prohibited the government from using the unlawful denials in the future against the plaintiffs.

Las Americas Immigrant Advocacy Center v. Wolf

In *Las Americas Immigrant Advocacy Center v. Wolf*, Judge Jackson denied relief to people impacted by the Trump administration’s attacks on asylum.⁴ The *Las Americas* case was about another expansion of expedited removal. Specifically, the Trump administration created a pair of new programs, the Prompt Asylum Claim Review (PACR) and Humanitarian Asylum Review Process (HARP), that shortened the amount of time asylum seekers could prepare for their credible fear interviews, which would determine whether they were subject to the rapid removal, to one day.

During that single day, the asylum seekers were held in CBP custody instead of Immigration and Customs Enforcement (ICE) custody. CBP facilities are and have been historically inhumane.⁵ Detainees had less phone access, which effectively reduced and often eliminated their ability to contact attorneys or loved ones. Advocates challenged the administration’s practice of holding asylum seekers in CBP custody, which cut off legally required access to counsel.

Disappointingly, Judge Jackson ruled that the government was permitted to detain individuals in those conditions despite the likely impact on their right to consultation before their credible fear interview. Specifically, Judge Jackson ruled that the statute made the right to consultation dependent on the detention facility’s capacity. By narrowly focusing on which agency should hold plaintiffs in custody instead of the argument about access within the facilities, Judge Jackson ruled that the lack of access

³ 498 F. Supp. 3d 1 (D.D.C. 2020).

⁴ 507 F. Supp. 3d 1 (D.D.C. 2020).

⁵ For example, NILC and its partners were required to engage in years of litigation, culminating in an eventual trial, to secure a Court order requiring CBP to offer such minimal necessities to detained people as blankets, beds, toiletries, and medical visits. <https://www.nilc.org/issues/immigration-enforcement/jdoeivjohnson/>.

to means of communication and counsel did not make CBP custody improper. This ruling allowed the former administration to continue depriving asylum seekers of their right to speak to anyone, including counsel, before their credible fear interview while they were held in substandard facilities.

Center for Biological Diversity v. McAleenan

Judge Jackson's other immigration-related ruling was one of several legal challenges to President Trump's proposed border wall. In *Center for Biological Diversity v. McAleenan*,⁶ environmental groups sued in response to Secretary McAleenan's decision to waive various legal requirements – including environmental impact assessments – to build the wall. The environmental groups raised the significant harm likely to stem from the project.

Judge Jackson ruled in the Trump administration's favor, holding that the court was precluded by statute from hearing similar cases challenging the Secretary's decisions to waive key laws to build the border wall. Judge Jackson concluded that based on both statutory language and congressional policy, the Secretary of Homeland Security had unfettered discretion to waive laws regarding border barriers in the case's location and that there was thus no basis for the plaintiffs' lawsuit.

Judge J. Michelle Childs

Pandya v. Cuccinelli

Judge Childs' opinion in *Pandya v. Cuccinelli*⁷ stands out among her immigration related decisions. In *Pandya*, an individual who was a crime victim and his spouse sought to require USCIS to stop delaying review of the couple's U-visa applications⁸ and/or to decide the individuals' work authorization applications during the review. The couple had been waiting for almost three years for USCIS to enable them to work pending resolution of their visa application.

The government sought to have the case dismissed, arguing that the court was not permitted to issue relief on either the timeframe or work authorization request. Judge Childs rejected the government's claim regarding the long delay of visa processing, stating that agency delays could surpass a reasonable amount of time. However, she then rejected the couple's effort to receive work authorization.

Judge Childs noted that there was no precedential case requiring her to adopt a specific interpretation and that other courts had reached opposing decisions on the same question. In the end, Judge Childs adopted USCIS' interpretation, determining that

⁶ 404 F. Supp. 3d 218 (D.D.C. 2019).

⁷ Case No. 5:20-cv-01541-JMC, 2021 WL 119304 (D.S.C. Jan. 13, 2021).

⁸ U visas are a category of visa available to crime victims intended to ensure that a person's status does not prevent their seeking assistance if impacted by a crime.

because USCIS has extensive discretion in whether to grant work authorization for U-visa applicants, USCIS is also allowed to not rule on work authorization. This is troubling because Judge Childs had a choice and could have just as easily ruled to instead hold USCIS accountable to grant work authorization to the plaintiff under the referenced statute.

Antonatos v. Waraich

Judge Childs's most positive immigration ruling occurred in *Antonatos v. Waraich*. In *Antonatos*, a Panamanian citizen sued his employer, alleging that his employer was mistreating him by making him work extra hours without compensation and that his employer was using threats to end the individual's work visa to require enduring that treatment.

The doctor contended that this mistreatment constituted a violation of the Trafficking Victims Protection Act of 2000. That act forbids obtaining labor in violation of labor or immigration laws "by means of the abuse or threatened abuse of law or legal process." The employer attempted to dismiss the case, arguing primarily that failing to abide by the employment contract terms could not constitute abuse of the law or legal process. Judge Childs ruled in favor of the plaintiff, holding that the conduct could constitute a violation of the act, and allowing the case to proceed onward.

Justice Leandra Kruger

Bianka M. v. Superior Court

Justice Kruger's most significant immigration decision is *Bianka M. v. Superior Court*.⁹ In *Bianka M.*, lawyers representing an undocumented immigrant child sought an order from a California trial court establishing her mother as her guardian. They sought to show that her father, who remained outside of the United States, had abandoned her and was not one of her guardians. The requested order could have given the child the ability to receive *Special Immigrant Juvenile (SIJ)* status.

The initial trial court rejected the request, stating that the court could not issue an order establishing the child's mother as her sole guardian without the father's participation, as it deemed the child's father beyond the court's jurisdiction. The appellate court agreed and also didn't grant the requested order as the order's only purpose would be to obtain SIJ status, which the court believed that the order didn't justify.

Justice Kruger authored an opinion for the Supreme Court's unanimous reversal. Her opinion held that because there would be no harm or obligation imposed on the child's father and because he was aware of the proceedings, his participation was not required. Justice Kruger further explained that the sole question for the court was whether the

⁹ 423 P.3d 334 (Cal. 2018).

child met the requirements of the state statute regarding abandonment, and that it was not the court's jurisdiction to decide whether USCIS should accordingly grant SIJ status.

People v. Patterson

In another unanimous opinion, *People v. Patterson*,¹⁰ Justice Kruger authored an opinion requiring greater clarity and certainty when a person accused of a crime may face immigration-related consequences for a conviction. In *Patterson*, the government charged a non-citizen man with various criminal charges. The government offered the man a “take-it-or-leave-it” plea agreement on a timeline that prevented him from consulting with his immigration attorney before the deadline.

Rather than risk trial and a potentially harsher sentence, the man proceeded without his immigration attorney's advice. At his plea hearing, the court advised the man that his plea “may” carry immigration consequences. However, the man subsequently learned that his plea guaranteed that he would be removed and thus sought to withdraw his plea under California law.

Justice Kruger's opinion held that, in advising a person of their conviction's potential immigration related consequences, merely advising somebody that they may be removed wasn't sufficient. Her opinion noted that was especially true in circumstances like *Patterson*, where the end result would be a definite removal.

¹⁰ 391 P.3d 1169 (Cal. 2017).