

# Grandstanding or Gotcha: Asking Ketanji Brown Jackson “Can You Provide a Definition for the Word ‘Woman’?”

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**A**t Ketanji Brown Jackson’s Supreme Court confirmation hearing on March 22, 2022, she was asked, “Can you provide a definition for the word ‘woman’?”<sup>1</sup> Jackson responded, “I can’t . . . Not in this context. I’m not a biologist.”<sup>2</sup> This essay considers the political pragmatism of the question, Jackson’s response, the significance of defining such a term in U.S. jurisprudence, and what the ideal response for Jackson would have been.

Considering the unique incentives facing the Republican senators at the hearing, the question was likely an effective one to ask. The Democrats had the necessary votes to confirm Jackson without any Republican support. In 2021, she was confirmed to the U.S. Court of Appeals with some Republican votes.<sup>3</sup> At her Supreme Court confirmation hearing, she provided very conservative-friendly answers regarding an originalist judicial philosophy.<sup>4</sup> And there was little else in her record to attack her on, as attempts to impugn Jackson on her sentencing in child pornography cases<sup>5</sup> and representation of Guantanamo Bay inmates were largely unsuccessful.<sup>6</sup> Additionally,

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<sup>1</sup> Jonathan Weisman, *A Demand to Define ‘Woman’ Injects Gender Politics into Jackson’s Confirmation Hearings*, N.Y. TIMES (Mar. 23, 2022), <https://perma.cc/YH4P-UH6F>.

<sup>2</sup> Myah Ward, *Blackburn to Jackson: Can You Define ‘the Word Woman’?*, POLITICO (Mar. 22, 2022, 10:38 PM EDT), <https://perma.cc/2X6Q-ELVZ>.

<sup>3</sup> *Roll Call Vote 117th Congress - 1st Session*, U.S. SENATE, <https://perma.cc/J8JR-RJ4M> (last visited Oct. 12, 2023).

<sup>4</sup> Randy E. Barnett, *Ketanji Brown Jackson and the Triumph of Originalism*, WALL ST. J. (Mar. 24, 2022, 6:38 PM ET), <https://perma.cc/TFQ8-KY4Z>.

<sup>5</sup> Devin Dwyer, *Fact Check: Judge Ketanji Brown Jackson Child Porn Sentences ‘Pretty Mainstream’*, ABC NEWS (Mar. 21, 2022, 9:02 PM), <https://perma.cc/N95U-5M3Z>.

<sup>6</sup> Jessica Gresko & Mark Sherman, *Judge Jackson Grilled on Guantanamo Detainee Representation*,

focusing on “culture wars” issues has largely proven effective for Republicans.<sup>7</sup> For example, Republicans at the confirmation hearing also asked about transgender athletes, an issue that Independents largely support the conservative position on.<sup>8</sup> Public interest in the various topics brought up during the hearing appears to bear this out. A Google search for “Ketanji Brown Jackson what is a woman” returns 21,600,000 results.<sup>9</sup> But searches for “Ketanji Brown Jackson Guantanamo Bay” and “Ketanji Brown Jackson child pornography” only return 112,000 and 4,290,000 results, respectively.<sup>10</sup> Conservatives often use the question “what is a woman” to place liberals between a rock and a hard place. A feature-length documentary by conservative Matt Walsh based entirely on this one question is set to come out in May 2022.<sup>11</sup>

Conservative media outlets and commentators criticized Jackson’s response to the question. Former Trump advisor, Stephen Miller, said that “if you don’t know what a woman is, you shouldn’t be in any position of responsibility . . . .”<sup>12</sup> Conservative satire site *The Babylon Bee* had a field day with parody headlines such as “Kindergartener Granted PhD in Biology After Correctly Distinguishing Boy from Girl.”<sup>13</sup> While the question may have been effective given the incentives Republican senators face—such as primary challenges from their base—it may not have been effective in changing overall public opinion on the confirmation. A poll taken after the confirmation hearing shows widespread support for Jackson’s appointment to the Supreme Court.<sup>14</sup>

Jackson was likely wise not to engage with the question. There were

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ASSOCIATED PRESS (Mar. 22, 2022), <https://perma.cc/3EED-GFHD>.

<sup>7</sup> Alex Samuels & Amelia Thomson-DeVeaux, *Why Democrats Keep Losing Culture Wars*, FIFTYEIGHT (Feb. 3, 2022, 6:00 AM), <https://perma.cc/G8CC-2B6P> (highlighting issues that include critical race theory, transgender rights, and cancel culture).

<sup>8</sup> Taylor Orth, *On Issues Relating to Transgender Youth, Democrats and Republicans Are Far Apart*, YOU GOV (Mar. 21, 2022, 5:56 PM GMT-4), <https://perma.cc/JTB6-R8CN> (finding that only 22% of independents support transgender student athletes being allowed to play on teams that match their gender identities).

<sup>9</sup> Google Search, GOOGLE, <https://perma.cc/B87G-BZH5> (search “Ketanji Brown Jackson what is a woman?”) (last visited Oct. 12, 2023).

<sup>10</sup> Google Search, GOOGLE, <https://perma.cc/CL6F-B25H> (search “Ketanji Brown Jackson Guantanamo Bay,” and “Ketanji Brown Jackson child pornography”) (last visited Oct. 12, 2023).

<sup>11</sup> Matt Walsh, *Official Teaser: “What is a Woman?”*, YOUTUBE (Mar. 24, 2022), <https://perma.cc/G2XE-23XE>.

<sup>12</sup> Mark Moore & Samuel Chamberlain, *Judge Jackson Declines to Define ‘Woman,’ Says She’s ‘Not a Biologist’*, N.Y. POST (Mar. 23, 2022, 9:12 AM), <https://perma.cc/XY37-9G3R>.

<sup>13</sup> *Kindergartener Granted PhD in Biology After Correctly Distinguishing Boy from Girl*, THE BABYLON BEE (Mar. 24, 2022), <https://perma.cc/B9B8-G9KC>.

<sup>14</sup> John Fritze, *Two-Thirds of Americans Back Judge Ketanji Brown Jackson for Supreme Court*, Poll Shows, USA TODAY (Mar. 30, 2022, 6:02 AM EST), <https://perma.cc/PG6H-9DCE>.

already enough Democratic votes to confirm her to the Court, so a defensive, run-out-the-clock strategy focusing on not making a blunder that would change the likely outcome of confirmation was sensible. Allowing herself to be dragged into the deep waters of defining gender would likely only harm her chances of being confirmed. The prudence of a “less is more” approach to answering such a question was demonstrated by the unnecessary addition in Jackson’s response, “I’m not a biologist.” This clearly implies that the female gender is defined by their biology, which is a very controversial position.<sup>15</sup> This additional comment is even more problematic for Jackson because she had just finished making multiple references to groups of people she classified as “women,” likely without first consulting a biologist.<sup>16</sup>

The perfect response to this question may depend on the ultimately unknowable nuanced goals Jackson held for the hearings. These goals could include some combination of being appointed to the Supreme Court, serving as a role model for Black women, furthering the cause of liberal jurisprudence, and maximizing the potential for her ability to persuade the other Justices once appointed to the Court. Regardless, a better response to the question would have likely been: “This is an issue that comes up in a variety of contexts in the law and will almost certainly come before the Supreme Court in the near future. Therefore, I cannot comment on the matter during these hearings.” Such a response implies that Jackson is knowledgeable about this legally relevant distinction but is simply withholding an answer, which is a frequent occurrence in Supreme Court confirmation hearings.<sup>17</sup> Jackson could have potentially also explained that defining terms is generally the job of the legislative branch—of whom the person asking the question was a member—and not the judicial branch.

This strategy of refusing to answer—which is acceptable in confirmation hearings—rather than stating, “I can’t . . . I’m not a biologist,” would have likely not received any media attention. And if the Republican senator had pressed the issue further, this could have been used as evidence of treating Jackson, a Black woman, more harshly than other nominees who likewise

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<sup>15</sup> See, e.g., Simón(e) D Sun, *Stop Using Phony Science to Justify Transphobia*, SCI. AM. (June 13, 2019), <https://perma.cc/9QCM-DA3J>.

<sup>16</sup> See Elle Purnell, *If Ketanji Brown Jackson Doesn’t Know What a ‘Woman’ Is, Why Does She Use the Word so Much?*, THE FEDERALIST (Mar. 23, 2022), <https://perma.cc/HEL3-EV4Q> (providing examples, including caselaw, about protecting “the right to terminate a woman’s pregnancy” and “[B]lack women in the civil rights movement”).

<sup>17</sup> See, e.g., *The Ginsburg Standard: No Hints, No Forecasts, No Previews . . . and No Special Obligations*, U.S. SENATE COMM’N ON THE JUDICIARY (Sept. 4, 2018), <https://perma.cc/K63C-BGQ3> (providing quotes from now sitting Supreme Court Justices regarding how, at their confirmation hearings, they would not answer questions about issues that may come before the Court).

refused to answer numerous questions.<sup>18</sup> However, Jackson might have received feedback that her “I’m not a biologist” response was beneficial, as she provided the same response to a different question the next day. When asked whether a twenty-week-old fetus is capable of acquiring its own food, shelter, and clothing to live completely independently, Jackson responded, “Senator, I’m not a biologist. I haven’t studied this. I don’t know.”<sup>19</sup>

A refusal from Jackson to engage with the question is even more justified when one considers how frequently the issue of defining gender is involved in legal considerations, some of which may come before the Supreme Court. The following is a sampling of potential legal issues involving the definition of “woman”:

- Government incentives for women-owned businesses;
- Separate prisons for men and women;
- Gender-based affirmative action hiring and college admissions issues;
- Legitimacy of police searches when a suspect is identified by gender;
- Medical insurance coverage of gender reassignment surgery;
- Identifying a hate crime when the victim was targeted for their gender;
- Validity of differential pricing, such as when women receive a discount on car insurance;
- Whether transgender people must register for the draft;<sup>20</sup>
- Indecent exposure, public decency, and voyeurism statutes that refer to “female breasts”;<sup>21</sup>
- Bathroom access;
- Title IX and admissions into all-women’s colleges and fraternities and sororities;<sup>22</sup> and
- Title VII protection from discrimination on the basis of sex<sup>23</sup>

Additionally, courts often consider statistical gender imbalances in rendering their decisions.<sup>24</sup>

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<sup>18</sup> See *id.*

<sup>19</sup> Moore & Chamberlain, *supra* note 12.

<sup>20</sup> See Michael Conklin, *How Transgender and Non-Binary People Are Ignored in the Male-Only Military Draft Debate*, 2021 U. ILL. L. REV. ONLINE 215 (2021), <https://perma.cc/U9R8-DDTQ>.

<sup>21</sup> See Video Voyeurism Prevention Act of 2004, 18 U.S.C. § 1801 (2018).

<sup>22</sup> See Paul G. Lannon, *Transgender Student Admissions: The Challenge of Defining Gender in a Gender Fluid World*, BOS. B. J., Spring 2015, at 6.

<sup>23</sup> 42 U.S.C. § 2000e-2(a)(1) (2018).

<sup>24</sup> See, e.g., *Rizo v. Yovino*, 887 F.3d 453, 468 (9th Cir. 2018) (citing studies that women lose \$840 billion each year because of the gender wage gap).

Issues surrounding the distinction between sex and gender and the different legal standards for determining what constitutes a woman are complex and rapidly evolving. This essay has focused mainly on the pragmatism behind why it was advantageous for Republicans to ask such a loaded question and Jackson to avoid answering. It is beyond the scope of this essay to address whether a political process that incentivizes these two results is ultimately beneficial.