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JUDICIAL DETACHMENT: MYTH OR REALITY?

A Supreme Court candidate gets slammed for liberal bias

For Police Issues by Julius (Jay) Wachtel. In his prior life as a Fed your writer frequently authored detailed affidavits while seeking arrest and search warrants for gun crimes. But the sworn declaration he just downloaded from the D.C. Federal court's PACER website is by far the most nauseating such document that he's ever read (case no. 1:13-cr-00244-KBJ).

In 2013 the Washington D.C. FBI Child Exploitation Task Force was tipped that someone had been uploading videos to the Internet showing naked "prepubescent boys" engaging in oral and anal sex. An undercover D.C. police detective subsequently exchanged emails with the suspect, Wesley Hawkins, 18. Hawkins wrote that "he likes children ages 11 to 17, and that he has videos to share." And he did, sending on two "of a prepubescent male masturbating."

Other tips led to the discovery of two-dozen-plus videos and still images uploaded by Hawkins that depicted male and female children and prepubescent boys flaunting their intimate parts and engaging in oral and anal sex. In June 2013 officers served a search warrant at his residence. They turned up a laptop replete with child pornography. It reportedly included:

> "24:06 minute video depicting an approximately 12 year-old male masturbating before a web camera; 1:57 minute video depicting an approximately 8 year-old male masturbating before a web camera; 11:47 minute video depicting an approximately 11 year-old male masturbating and being anally penetrated by an adult male; 15:19 minute video depicting two approximately 11 year-old males

masturbating and performing sexual acts on each other; 7:51 minute video depicting an approximately 12 year-old male masturbating...."

Note that at least one video featured an "adult male" participant (no, it wasn't Hawkins). Hawkins initially denied everything. But he soon conceded that his laptop held some deeply incriminating goods.

    He wasn't accused of actually taking the videos. Still, by posting and sharing them he had participated in a process that can profoundly damage children. Hawkins soon pled guilty to one count of possessing child pornography [18 USC 2252A(a)(5)(B)]. Since some of the affected minors were less than twelve years of age, he could have hypothetically drawn as many as twenty years. Sentencing-wise, several potential enhancements *did* apply:

> ...the material involved prepubescent minors or minors under the age of 12 (+2); the offense involved distribution (+2); the material portrayed sadistic or masochistic conduct (+4); the offense involved the use of a computer (+2); the offense involved 600 or more images (+5)...

Given Hawkins' lack of a prior criminal record, Sentencing Commission guidelines called for a range of 97 to 121 months imprisonment. His youth and cooperation, though, led prosecutors to recommend a more lenient disposition: twenty-four months custody followed by 96 months of supervised release.

    So what did Hawkins actually *get*? Well, some of our readers likely know. But don't fret: we'll return to Mr. Hawkins in a moment.

    On January 27, 2022 U.S. Supreme Court Justice Stephen Breyer revealed that after twenty-seven years on the nation's high court, he was ready to retire. Less than a month later President Joe Biden announced that in line with his pledge to appoint a Black woman as the next Justice, he had selected D.C. Circuit Court of Appeals Justice Ketanji Brown Jackson to fill the vacancy. His official statement led off with the two core principles that everyone hopes underlie judicial decisionmaking:

> Because of her diverse and broad public service, Judge Jackson has a unique appreciation of how critical it is for the justice system to be *fair and impartial* [emphasis ours]. With multiple law enforcement officials in her family, she also has a personal understanding of the stakes of the legal system. After serving in the U.S. Army and being deployed to Iraq and Egypt, Jackson's brother

served as a police officer in Baltimore and two of her uncles were police officers in Miami.

As one would expect, Justice Jackson's qualifications are indeed awesome. Even so, President Biden knows that given the constituencies that some Senators must please, her confirmation could present a struggle even within the "Blues." And with the Senate evenly split, literally every vote "counts." That, in turn, may explain why the President's comments emphasized that Justice Jackson has family ties to, well, *the cops*.

Nominated by President Bill Clinton, Justice Breyer was considered a "Blue" sort. Ditto his anointed successor. Her selection reflects the Red/Blue, right/left, conservative/liberal ideological divide that Professor Richard Hasen claims ("Polarization and the Judiciary") has long guided the selection of State and Federal judges and justices, deeply affecting outcomes in fraught areas such as guns, abortion and affirmative action. As for the Supreme Court, professors Neal Devins and Lawrence Baum ("Split Definitive: How Party Polarization Turned the Supreme Court into a Partisan Court") conclude that its decisions have closely tracked Party lines for over a decade:

> Since 2010, when Elena Kagan replaced John Paul Stevens, all of the Republican-nominated Justices on the Supreme Court have been to the right of all of its Democratic-nominated Justices. This pattern is widely recognized, but it is not well recognized that it is unique in the Court's history. Before 2010, the Court never had clear ideological blocs that coincided with party lines.

Professors Andrew Martin and Kevin Quinn devised a widely accepted approach that uses Supreme Court decisions to scale Justices' ideological preference, from the most liberal (-5.0) to the most conservative (+5.0). An M-Q score gets assigned to each Justice at the end of every term. Check out our lead graphic. Excepting Justices Gorsuch, Kavanaugh And Barrett, who began in 2016, 2018 and 2020 respectively, the left-side score represents the year 2010. Here's a companion visual that tracks M-Q's thru 2020:
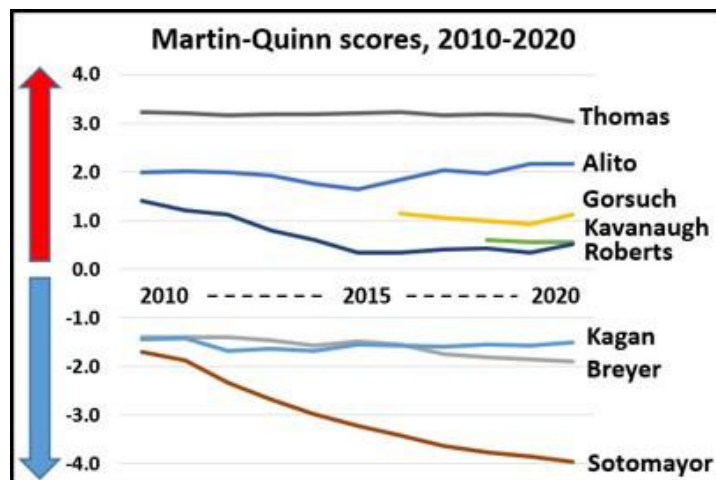
With a couple of exceptions (note Roberts' moderation and Sotomayor's plunge from moderately liberal to off-the-charts) M-Q scores remain remarkably consistent, term-in and term-out. But put decisions aside. In "Split Definitive" Professors Devins and Baum highlight the salience of ideology by analyzing Justices' preferences when it comes to hiring clerks. This graphic depicts the proportion of clerks during the 2005-2016 terms who had served lower-court judges appointed by Republicans.
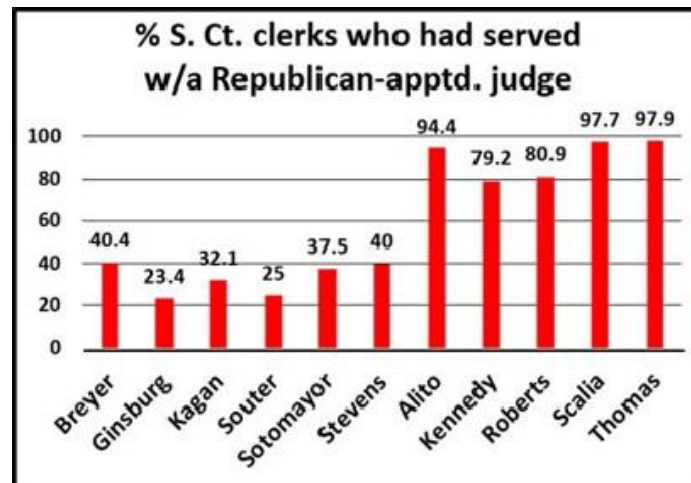
It's clear that the conservative Justices (the five on the right) were determined to hire clerks with "Red" backgrounds, while their liberal colleagues preferred those of the "Blue" persuasion.

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That Justices are ideologically split is old news. (For a list of relevant articles and news pieces click here.) Indeed, it's assumed that each will come down on a certain side in every ideologically-charged decision. Here, for an example, is an extract from a recent story in the *Los Angeles Times* about a case before the Court. Apparently, the California business community (read: conservative-leaning) is challenging a State law, which has been backed by State court decisions, that lets workers sue employers even though they supposedly agreed when hired that all disputes would be arbitrated:

> The court's conservative justices said little during Wednesday's argument in Viking River Cruises vs. Moriana, while the three liberals spoke in defense of the California law. "This is the state's decision to enforce its own labor laws in a particular kind of way," Justice Elena Kagan said.

California is reportedly the only State that does that. Its high court refused to hear an appeal, but the U.S. Supreme Court has taken on the case. Given its present conservative

majority (and Justice Kavanaugh's mention that "California is an outlier here") a business-friendly ruling seems likely.

But what does judicial ideology have to do with our (hopefully, one-time) fan of child pornography? A lot. You see, Wesley Hawkins' three-month sentence, whose length was *one-eighth* of what the prosecutor recommended, was handed down by D.C. Court of Appeals Justice – now, Supreme Court nominee – Ketanji Brown Jackson while she served as a D.C. District Court judge. Justice Jackson, who began her Government career as a Federal Public Defender, has been severely criticized by Republicans for demonstrating "empathy" (i.e., leniency) when sentencing Hawkins and other child pornographers.

27	*Filed:*	11/22/2013	⬤ Judgment
	Entered:	11/25/2013	
28	*Filed:*	11/22/2013	⬤ Statement of Reasons
	Entered:	11/25/2013	

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This document is not available.

We downloaded several documents from Mr. Hawkins' criminal case. This graphic depicts two of the final entries on the index page: the judgment (click here for the document) and an accompanying "Statement of Reasons." Ostensibly, the latter would have explained Judge Jackson's pronounced "downward departure" from the two-year term recommended by prosecutors, which was itself substantially less than what Sentencing Commission guidelines prescribe. Alas, clicking on the link returned "not available."

So we turned to *FactCheck.org*. Their extensive coverage of the case includes Justice Jackson's explanation of her sentencing sentencing decision during questioning by her most ardent antagonist, Senator Josh Hawley (R-Mo). Here's a brief extract:

> I remember in that case that defense counsel was arguing for probation, in part because he argued that here we had a very young man just graduated from high school. He presented all of his diplomas and certificates and the things that he had done and argued consistent with what I was seeing in the record that this particular defendant had gotten into this in a way that was, I thought, inconsistent with some of the other cases that I had seen.

FactCheck looked into seven child-pornography sentences that supposedly reflect Justice Jackson's excessively forgiving nature. Our graph orders them according to the

recommended sentence under the guidelines (black bar), from the least severe (left) to the most (right). Mr. Hawkins' case is the fourth.
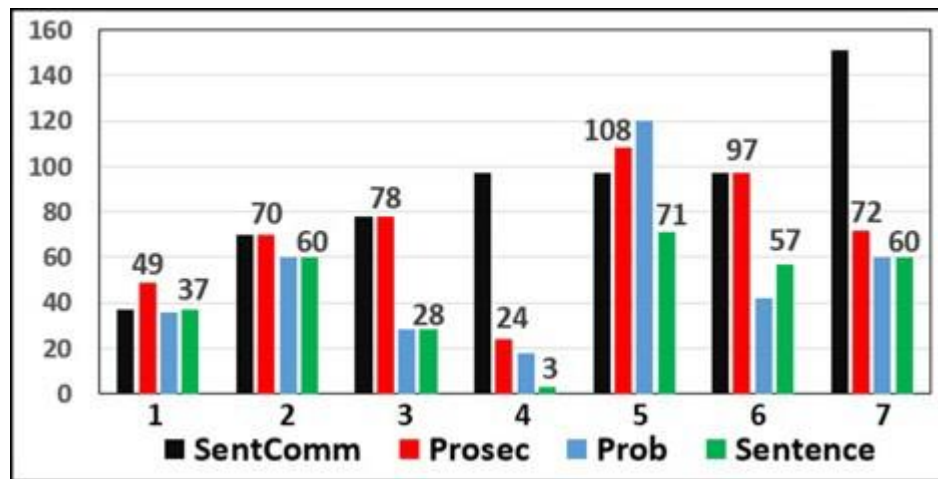
In each, the actual sentence given by then-judge Jackson was less than what prosecutors had sought, and in four cases (#3, #4, #5 and #6) substantially so.

Justice Jackson has said that her sentences were not overly lenient. "Nothing could be further from the truth," she insists. Yet her obvious empathy for the accused has become a "flashpoint." It's not that she ignores victims. While sentencing Mr. Hawkins she agonized about "children who are being trapped and molested and raped for the viewing pleasure of people like yourself." The case file included a statement from one of the youths depicted in the images which "describes how being a victim of child pornography has affected many areas of the victim's life, including the victim's inability to trust adults and struggle with anger issues." Yet then-Judge Jackson held back. "You were only involved in this for a few months...Other than your engagement with the undercover officer, there isn't an indication that you were in any online communities to advance your collecting behavior."

Did Mr. Hawkins' sentence convey a sufficiently stern warning? Perhaps not. According to a *Washington Post* investigation (it's otherwise very favorable to the Justice) a probation document filed as Mr. Hawkins' term of supervision neared its end reported that "despite being in treatment for more than five years [Mr. Hawkins] continues to seek out sexually arousing, non-pornographic material and images of males 13 to 16-years-old." He had to serve his last six months of release in a halfway house.

Over the years we've repeatedly mentioned the "tendency to seek out information and interpret events in a way that affirms one's predilections and beliefs." That nasty interloper – its official title is "confirmation bias" – can affect most anyone, from out-

and-out ideologues to supposedly objective, data-driven scientists. And, as our graphs seem to demonstrate, Supreme Court justices. But Justice Jackson denied that she purposely aligned with either the "Reds" or the "Blues":

> I decide cases from a neutral posture. I evaluate the facts, and I interpret and apply the law to the facts of the case before me, without fear or favor, consistent with my judicial oath.

Might she prove an exception to the rule?

Ask us in a couple years, once her M-Q scores are in.