



## **Ketanji Brown Jackson Defended People Suspected of Terrorism. Good.**

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There are likely some areas in which one could take issue with Supreme Court nominee Ketanji Brown Jackson's judicial methodology. Unfortunately, the people watching her confirmation hearing learned little about what those might be.

That's partially because Senate Republicans opted to zero in on topics that carry political currency and play well with the cameras but do little to undermine or inform how Jackson would preserve constitutional rights from the country's highest court.

One such example came yesterday during an exchange between Jackson and Sen. Tom Cotton (R–Ark.), who railed into Jackson's role as a federal public defender. During that period, she helped represent clients at Guantanamo Bay, the military prison where the overwhelming majority of inmates are held indefinitely without being charged with a crime, much less convicted.

**Cotton:** Do you think most detainees at Guantanamo Bay were mostly terrorists or mostly, I don't know, innocent goat farmers?... Do you think America would be safer or less safe if we released all the detainees from Guantanamo Bay?

**Jackson:** Senator... I'm trying to figure out how to answer that question. 9/11 was a terrible attack on our country, and the executive branch, pursuant to authority that the Supreme Court said it had, designated people as enemy combatants and sent them to Guantanamo Bay. The Supreme Court also said that anyone that was so detained could seek review of their detention, and as a federal public defender, my role and responsibility was to make arguments in defense of the Constitution and in service to the court that was trying to assess—based on the authority given to it by the Supreme Court—whether or not people were adequately classified, what the legal circumstances were, how these habeas petitions were going to be processed. This was a series of legal challenges in a novel environment that federal public defenders and lawyers across

the country were engaged in helping the court to evaluate so that we can understand what the Constitution required in this time of emergency.

**Cotton:** OK, so no opinion on if America would be safer or less safe if we released all the detainees from Guantanamo Bay?

**Jackson:** Senator, America would be [safer] if we don't have terrorists out running around attacking this country, absolutely. America would also be more safe in a situation in which all of our constitutional rights are protected. This is the way our scheme works. This is how the Constitution that we all love operates. It's about making sure that the government is doing what it's supposed to do in a time of crisis. As Justice Gorsuch said, "The Constitution is not suspended in times of crisis." The government still has to follow the rules. And so criminal defense lawyers make sure that, in times of crisis, the government is following the rules.

There's a particular richness to a Republican senator weaponizing the right to defense counsel as an *affront* to the Constitution as opposed to something that's pivotal to our nation's charter. That's especially so when considering Cotton's stated litmus test for a justice, which he outlined at the start of Jackson's hearings: "I'm looking for a justice who will uphold the Constitution," he said Monday. "I'm looking for a justice who understands the Constitution means what it says and does not mean what it doesn't say."

Core to the Constitution, as Cotton knows, is the notion that those suspected of crimes are entitled to an attorney. That should also be at the center of any ideology that claims to care about "limited government" and protecting individual rights. Those rights should not apply only to the people he likes.

Cotton was not alone. In a similar vein, also in contention was Jackson's role in filing an *amicus* brief on behalf of the libertarian Cato Institute, the conservative-Christian Rutherford Institute, and the bipartisan Constitution Project in support of Guantanamo detainees who had been in the U.S. legally and who were arrested and indefinitely detained on suspicion alone.

"It's so unserious that it can only be received as disingenuous grandstanding," says Clark Neily, senior vice president of legal studies Cato, in reference to Jackson's exchanges with various Senate Republicans who implied that her work as a public defender made her unfit for the Supreme Court. "People who go after her for doing that work ought to think long and hard about whether they really want to send a message to some of the best and the brightest in next generation of lawyers that if you pick the wrong cause—it could be gun rights, school choice, religious freedom—that this is what you have in store for you."

In a letter to the Senate Judiciary Committee, attorneys who litigated on both sides of the Guantanamo issue sought to disabuse lawmakers of the idea that Jackson's work should be disqualifying. "The Guantanamo litigation has long attracted the best of the Bar. For the detainees, this includes many of the largest and most prestigious law firms in the country; for the Government, it includes some of the most experienced attorneys in the Department of Justice," wrote the cohort, which includes Peter Keisler, who served as an Attorney General under former President George W. Bush. "Reasonable minds can differ about how these questions should have

been answered. But securing these answers by orderly litigation in the federal courts, brought and defended by able and zealous advocates on both sides, including in multiple cases heard by the Supreme Court, is the process the Constitution envisions."

For a potential future Supreme Court justice, participating in that constitutional process is not a stain but a virtue—something that Republican senators might concede in most circumstances, had the cameras not been rolling.