

## **Cruz and Cotton cut to the chase on GOP's suspicion of defense lawyers**

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Sen. Tom Cotton (R-Ark.) during Supreme Court nominee Ketanji Brown Jackson's confirmation hearing on March 22. (Demetrius Freeman/The Washington Post)

The seeds were planted last year, when at Ketanji Brown Jackson's confirmation hearings to a lower court, GOP senators peppered her with questions about her work on behalf of Guantánamo Bay detainees. They were fertilized and took root in the weeks before her Supreme Court hearings. And now, they've started to blossom, with senators from the Republican Party taking a remarkable posture toward the work of defense lawyers and public defenders.

In recent days, two GOP members of the Senate Judiciary Committee (who potentially have presidential aspirations) just came out and said it: It is bad that Ketanji Brown Jackson worked as a public defender, and people accused of awful crimes aren't necessarily entitled to defenses that are too zealous.

Sen. Ted Cruz (R-Tex.), for one, cast Jackson's work as a public defender as revealing a character flaw.

"People go and do that because their heart is with criminal defendants, their heart is with the murderers, with the criminals, and that's who they are rooting for," Cruz said on Fox News last weekend. He added that "public defenders often have a natural inclination in the direction of the criminal" and claims Jackson "carried it onto the bench when she became a criminal judge."

On Tuesday, Sen. Tom Cotton (R-Ark.) went so far as to liken Jackson's representation of Guantánamo detainees to representing Nazis in the Nuremberg Trials.

"You know, the last Justice Jackson" — Robert H. Jackson — "left the Supreme Court to go to Nuremberg and prosecute the case against the Nazis," Cotton said. "This Judge Jackson might have gone there to defend them."

Cotton took care to note not only the cases Jackson was assigned as a public defender, but also briefs she filed while in private practice. One was on behalf of 20 former federal judges who wanted to make a point about the admissibility of evidence gained via torture. Another was on behalf of outside groups, including the libertarian Cato Institute. In her hearings, Jackson said she was assigned the case while working for a big law firm, which had itself been assigned the case.

Republicans danced around these issues in Jackson's previous confirmation hearings: Sen. Ben Sasse (R-Neb.) asked whether she worried that her advocacy in such cases "would result in

[them] returning to [their] terrorist activities.” He also asked whether she considered resigning from the cases.

But at the time, they didn’t really drive this idea home.

That changed after Jackson’s nomination in late February. In the weeks that followed, Republicans took a tougher line on other Biden judicial nominees who had represented those convicted of crimes — suggesting they shouldn’t have taken the cases at all:

Last month, Sen. Tom Cotton (R-Ark.) asked Biden judicial nominee Nina Morrison, who worked for decades on the Innocence Project, which seeks to appeal convictions, “Are you proud that you encouraged such defiance in convicted murderers?”

And just a few weeks ago, Sen. Josh Hawley (R-Mo.) asked another nominee, Arianna Freeman, about having represented a convicted murderer and getting him off death row: “Do you regret trying to prevent this individual who committed these heinous crimes from having justice served upon him?” Sen. Ted Cruz (R-Tex.) told Freeman that she had “devoted your entire professional career to representing murderers, to representing rapists, representing child molesters.”

In Jackson’s Supreme Court hearings, they criticized her briefs on behalf of Guantánamo detainees, which alleged that the Bush administration had committed war crimes. The implication was that she shouldn’t have made such an accusation even if her clients wanted her to.

“You know, I’ve been a lawyer, too, but I don’t think it’s necessary to call the government a war criminal in pursuing charges against a terrorist,” Sen. Lindsey O. Graham (R-S.C.) said. “I just think that’s too far.”

In the recent past, some on the left have also raised questions about which clients a lawyer should represent. Harvard University removed a law professor from his position as dean amid campus backlash over his representation of Harvey Weinstein. Two prominent law firms also backed away from supporting President Donald Trump’s efforts to overturn the 2020 election results, after receiving criticism (including internally). And plenty on the left looked on gleefully as Trump lawyers faced legal repercussions for how they pursued his voter-fraud conspiracy theories.

But in that last example, the focus was on the content of the lawsuits — full of wild, debunked claims — rather than the decision to represent Trump in itself. (Cotton made a similar argument, focusing on the content of Jackson’s filings — but people have raised real questions about the propriety of the George W. Bush administration’s treatment of detainees.)

And right now, it’s not students or activists arguing that certain people or causes are undeserving of legal representation: These are U.S. senators.

Indeed, the latest comments from Cruz and Cotton seem to bring the attack to that logical, if stark, conclusion. But that conclusion rubs even some conservatives the wrong way.

The National Review’s Charles C.W. Cooke excorted Cruz for hypocrisy on Monday, noting that the Texas senator had defended things he didn’t believe in while serving as the state’s solicitor general — including, in one case, a law banning sex toys that Cruz later called “stupid.” (The libertarian Reason magazine declared: “Ted Cruz Hates Due Process.”) Cooke followed

that up by deeming Cotton's comments a "cheap shot." Even Fox News is suggesting Cotton perhaps went "too far."

Cotton's comparison, in particular, suffers from the fact that even the last Justice Jackson pushed for Nazi defendants' right to counsel — counsel funded by U.S. taxpayers, no less. (U.S. Army chaplains also counseled Nazi defendants at the trials.)

But most of all, this situation seems to invite the GOP to enunciate its position on whether lawyers should represent, or advocate on behalf of, disreputable clients — or whether lawyers should view that path as career suicide, should they wish to have a future in public life.

Should those interested in defending an alleged criminal — a defense the Constitution requires — understand it as tantamount to "rooting for" criminals? Should filing briefs that argue the finer legal points of a case involving terrorists, in a way that might benefit the defense, render you a terrorist sympathizer? Should you refuse to offer the kind of defense your client requests, even as the law requires you to provide a "zealous" defense, as it did with Jackson?

The lure of all of this is that it's super easy to demagogue. The problem is that it's super easy to demagogue.