



Why Some Ardent Libertarians Support Judge Ketanji Brown Jackson's Confirmation

Hypocritical Republicans like Lindsey Graham and Ted Cruz refuse to acknowledge Brown's broad support from Bill of Rights advocates.

By John Nichols

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Republicans on the Senate Judiciary Committee are absolutely apoplectic about the fact that President Biden's Supreme Court nominee, Judge Ketanji Brown Jackson, has been endorsed by progressive groups that defend civil rights and civil liberties. Senator Lindsey Graham got downright emotional on the subject, declaring Jackson to be the choice of "these left-wing radical groups that would destroy the laws we know." Graham told the nominee during her confirmation hearing, "Every group that wants to pack the court, that believes this court is a bunch of right-wing nuts who are going to destroy America, that consider the Constitution trash, all wanted you picked."

The senator named names—citing groups such as Demand Justice and even the AFL-CIO—but he somehow forgot to mention the fact that Jackson, who currently serves on the US Court of Appeals for the D.C. Circuit, has been praised by scholars at the libertarian Cato Institute and by prominent libertarians such as former US Representative Justin Amash.

That's ironic. When he was bidding for the presidency in 2016, Graham sought to identify with the libertarian movement, which at the time was showing some strength within a Republican Party that had not yet veered onto the authoritarian course charted by Donald Trump. "Libertarians want oversight of government programs and making sure that your freedoms are not easily compromised," said Graham. "Count me in."

Texas Senator Ted Cruz, another 2016 contender, was even more aggressive in seeking to portray himself as a libertarian-leaning conservative who could be trusted to defend the freedoms outlined in the Bill of Rights. Before that year's New Hampshire primary, Cruz bragged about his "support on the libertarian side" and claimed he believed that, "There are all sorts of areas where the federal government has no business sticking its nose."

Cruz, who like Graham has aligned quite comfortably with Trump's authoritarianism and is now positioning for a potential 2024 presidential run, was still employing libertarian buzzwords in his grandstanding remarks at the opening of the Judiciary Committee hearing on Jackson's

nomination. Grimly theatrical, as always, the Texan demanded an answer to the question: “Will you protect freedom or restrict it?”

Cruz and his fellow Judiciary Committee Republicans, who have been busy this week attacking the first Black woman to be nominated for a place on the high court, are not practically or intellectually engaged with the issues of individual liberty that concern genuine champions of the Bill of Rights on the left or the right. If they were, they would recognize that the answer to the “protect freedom” question, based on Judge Jackson’s record, is “yes.” The jurist has a history of working as a federal public defender—as a lawyer in private practice and as a judge—to protect the freedoms outlined in the first ten amendments to the US Constitution, along with the ensuing amendments that sought to make real the full promise of those freedoms. Her track record of working as a federal public defender, as well as the principled positions she has taken in debates over sentencing and the treatment of detainees at the Guantanamo Bay detention camp, marks her as an active and thoughtful champion of civil liberties. So much so that genuine libertarians—a rare breed, to be sure—are quite enthusiastic about her nomination.

The Cato Institute, the think tank that declares its vision “is to create free, open, and civil societies founded on libertarian principles,” greeted President Biden’s nomination of the judge with an observation that “There are plenty of reasons to celebrate Judge Jackson’s nomination—most importantly, the professional diversity she would bring to the Court.” As the judge’s hearing approached, Clark M. Neily III, Cato’s senior vice president for legal studies, urged the Senate to confirm Biden’s nominee, noting that “Of course, as with any justice appointed by a Democratic or Republican president, we expect to have plenty of disagreements with a Justice Jackson; but as committed, consistent libertarians, we anticipate significant areas of agreement as well.”

Neily, a former constitutional litigator, submitted a letter to the Judiciary Committee’s ranking members in which he wrote that Jackson would bring “professional diversity” to a high court bench that has “not had a Supreme Court justice with significant criminal defense experience in more than 30 years.”

“That is highly unfortunate and should be remedied immediately. Of course, Judge Jackson supplies that corrective admirably, based on her experience as a federal public defender and her continued work representing criminal defendants in private practice after that,” explained Neily, whose letter suggested that Jackson understands that, “unlike most other countries, we don’t merely profess a commitment to ‘liberty and justice for all’—we strive to deliver it.”

Neily concluded with a sharp rebuke of the nominee’s critics:

Those who question Judge Jackson’s commitment to law and order by virtue of her advocacy on behalf of detainees [at the US government’s Guantánamo Bay prison facility] while in private practice (including an amicus brief she prepared for the Cato Institute and others in 2009) may wish to consider whether they really mean to convey to the brightest legal minds of the next generation that if you represent clients in connection with the “wrong” cause—whether that be detainees in the war on terror, gun owners exercising their Second Amendment rights, parents

seeking educational options for their children, or protesters at a political rally—you can forget about ever becoming a Supreme Court justice.

In her nomination speech, Judge Jackson humbly observed that her “life has been blessed beyond measure.” One of those blessings that all Americans share is to live in a country where we do not attack but rather honor our fellow citizens for upholding our nation’s finest traditions, including the constitutional guarantee that everyone has a right to zealous representation in our courts of justice.

Cato scholars are not the only libertarians who have kind words for Judge Jackson. Former representative Amash, a Michigan Republican who left the party during Trump’s presidency as it moved in an increasingly lawless and authoritarian direction, said this week, “Happy to see President Biden nominate someone to the Supreme Court who holds more than a few truly liberal views. Compare Ketanji Brown Jackson, a public defender who fought the government, to the last Democratic nominee, Merrick Garland, a stalwart defender of government abuses.” Amash was referring to the classical definition of liberalism—more commonly used in Europe than the United States—which places an especially high emphasis on individual liberty and government accountability.

Of course, praise from libertarians does not make Judge Brown a libertarian. Most indications are that she would join Associate Justices Sonia Sotomayor and Elena Kagan on the progressive end of the high court’s ideological spectrum. There are even analyses that suggest “Jackson could pull the [court’s] liberal bloc to the left.” What some of the nominee’s unexpected champions are betting, however, is that she will do so as a sincere and consistent civil libertarian in the tradition of former justices such as Thurgood Marshall, William Brennan Jr. and William O. Douglas. For those who genuinely respect the Bill of Rights, no matter what ideological label they wear, that is, indeed, something senators of both parties should note.