March 18, 2022

The Honorable Richard J. Durbin
Chair
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

The Honorable Charles E. Grassley
Ranking Member
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Chairman Durbin, Ranking Member Grassley, and members of the Committee:

As you consider Judge Ketanji Brown Jackson's nomination to be an Associate Justice of the Supreme Court of the United States, I hope you will find useful these observations about the professional diversity she would bring to that venerable institution. As a constitutional litigator and criminal justice scholar, the composition of the federal judiciary—and particularly the Supreme Court—is of keen professional interest to me. For the reasons set forth below, I believe Judge Jackson would lend an important perspective to the Court's work that is currently missing and has been historically underrepresented.

A grossly imbalanced federal judiciary and Supreme Court

Among the most important duties of a federal judge is to decide cases involving the exercise of government power over the lives of individuals. This includes ensuring that public officials obey the Constitution and that the government respects the rights of criminal defendants and others whose freedom it seeks to restrict. In order to do that job effectively, judges must be perceived as genuinely neutral arbiters who will not place their thumbs on either side of the scales of justice, whether intentionally or unwittingly.

In that regard, one of the most notable things an informed citizen would perceive about our judiciary is the extraordinary overrepresentation of former prosecutors and other courtroom advocates for government at all levels, including the Supreme Court. Indeed, as documented in a Cato Institute study that I authored in 2019 and updated last spring, the ratio of former prosecutors to former criminal defense lawyers on the federal bench is *four to one*, and the ratio of all former courtroom advocates for government (including but not limited to former prosecutors) to former civil liberties lawyers, public defenders, and private criminal defense attorneys is a staggering *seven to one*.[1]

Among the nine sitting Supreme Court justices there are two former prosecutors, and all of the justices save one—Justice Barrett—served as courtroom advocates for government at some point during their legal careers. By contrast, there are no public defenders on the Supreme Court, no civil rights lawyers, and none of the justices has ever done significant criminal defense work.

[1] Clark Neily, *Are a Disproportionate Number of Federal Judges Former Government Advocates?*, Cato Institute (updated May 2021). Available at https://www.cato.org/study/are-disproportionate-number-federal-judges-former-government-advocates.

Indeed, there has not been a Supreme Court justice with real experience representing criminal defendants since Thurgood Marshall retired from the Court more than thirty years ago.

That is an extraordinary imbalance on a Court that regularly decides cases about such weighty matters as our right to be free from unreasonable searches and seizures under the Fourth Amendment, the government's obligation to provide a fair adjudicative process to criminal defendants, the meaning and scope of federal laws that impose some of the world's longest prison sentences, and of course appeals involving the ultimate sanction, capital punishment.

For better or worse, America is the most carceral nation on the planet. We lock up both a larger proportion and a higher absolute number of our citizens than any other country, and we have an incarceration rate about six times that of other liberal democracies such as Canada, Australia, and England.[2] American police make more than ten million arrests every year, each of which presents the potential for a criminal prosecution; a fine, fee, forfeiture, or prison sentence; and also a civil rights violation. The idea that the judicial body with ultimate responsibility for overseeing our quarter-trillion-dollar-per-year criminal justice system[3] would feature the perspective of multiple former prosecutors but zero former defense attorneys seems self-evidently infirm.

In sum, the federal judiciary has far more judges who spent their formative years advocating *for* the prerogatives of government than judges who formerly represented individuals seeking to vindicate their rights *against* government. Given her background as a public defender, Judge Jackson's appointments to both the D.C. District Court and the D.C. Circuit helped ameliorate that imbalance, albeit incrementally. By contrast, the confirmation of a *Justice* Jackson to the Supreme Court would represent not merely an incremental change, but a substantial—and salutary—enhancement to that institution.

The importance of professional diversity on the judiciary

I have spent the bulk of my career as a public interest lawyer, first with the Institute for Justice, and for the past five years with the Cato Institute. During that time I helped litigate the *Kelo* eminent domain case[4] and the *Heller* gun case,[5] and most recently I orchestrated Cato's national campaign to eliminate qualified immunity.[6] Before that I was a law clerk to Judge Royce Lamberth on the United States District Court for the District of Columbia—the same court to which Judge Jackson was initially appointed.

That professional experience has taught me two particularly relevant things about judges and courts: First, it is impossible to predict how a judge will rule in a given case simply by virtue of

[2] *See, e.g.*, World Population Review, *Incarceration Rates by Country 2022*, available at https://worldpopulationreview.com/country-rankings/incarceration-rates-by-country.
[3] Urban Institute, *Criminal Justice Expenditures: Police, Corrections, and Courts*, available at https://www.urban.org/policy-centers/cross-center-initiatives/state-and-local-finance-initiative/state-and-local-backgrounders/criminal-justice-police-corrections-courts-expenditures.
[4] *Kelo v. City of New London*, 545 U.S. 569 (2005).
[5] *District of Columbia v. Heller*, U.S. 554 U.S. 570 (2008).
[6] Cato Institute, *Cato Leads the National Campaign to Eliminate Qualified Immunity* (June 22, 2020), available at https://www.cato.org/publications/publications/cato-campaign-qualified-immunity.

his or her prior professional experience; and second, it is nevertheless critical for any court to be composed of judges representing a broad array of personal, professional, and intellectual experiences. That's because every court is, like every legislative body, more than just a group of solitary individuals going about their business in relative isolation. Instead, judges and justices are engaged in a constant dialogue with one another as they seek to understand the pertinent facts of the cases before them and determine how to most faithfully apply the relevant law in order to reach the correct resolution. With appellate courts—and especially the U.S. Supreme Court—that is an inherently iterative process in which jurists discuss and debate cases among themselves and their law clerks, explain their holdings in written decisions, and publicly critique one another's reasoning in dissenting or concurring opinions.

Judges who work on a court lacking in professional diversity will necessarily miss opportunities to hear the perspective of colleagues who have firsthand experience working on different sides of the various matters that come before the court. Whether it's labor versus management, consumers versus corporations, or defendants versus prosecutors, there is no sound reason for a court to consist disproportionately of judges who worked on one side of those divides, but there are very good reasons to prefer a court composed of judges from both sides (and also from neither side). This is true not simply because of the varying professional experiences those judges will have had, but also because of the personal convictions and worldviews that motivate different people to choose different career paths.

For example, reasonable people can certainly disagree about the tradeoffs involved in energy production and whether courts should be relatively more attuned to ecological concerns on the one hand or the economic benefits of low-cost power on the other. In my own career as a constitutional litigator, I consistently chose to represent individuals against state actors based on my personal beliefs about the relative underenforcement of constitutional limits on government power discussed in my 2013 book *Terms of Engagement: How Our Courts Should Enforce the Constitution's Promise of Limited Government*. Undoubtedly, I would pledge to be a neutral arbiter were I ever appointed to the bench, but it would be fallacious to suggest that the same deep-seated convictions that inclined me to a career in public interest law would have no influence on my perspectives as a judge. But the way to address that dynamic is not to disqualify people of strong convictions from serving as judges; instead, it's to ensure that courts consist of people with a variety of different experiences, perspectives, beliefs, and yes, convictions.

Judge Jackson's prior work on criminal matters is a strong plus, not a minus

As noted above, we have 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. And while there have been some unfortunate attacks recently on other nominees due to their experience as public defenders, there appears to be a consensus among the public and among the members of this Committee that there is nothing condemnable about Judge Jackson's service with the federal public defender's office and that she is instead to be commended for that work.

That said, some have expressed concern about Judge Jackson's decision to continue representing Guantanamo prisoners—work she initially undertook and developed an expertise in as a public defender—when she entered private practice. This strikes me as an unfortunate perspective that is difficult to reconcile with our nation's longstanding commitment to due process and the rule of law.

In thanking President Biden for nominating her to the Supreme Court, Judge Jackson described America as "the greatest beacon of hope and democracy the world has ever known." Certainly she is right about that, and one of the reasons we earned that status is that, unlike most other countries, we don't merely profess a commitment to "liberty and justice for all"—*we strive to deliver it*. Among other things, this means ensuring that even those whom we have accused of committing terrorist acts against our nation and who have expressed hatred and disdain for our core constitutional values nevertheless receive due process of law when they are apprehended and taken into American custody.

Those who question Judge Jackson's commitment to law and order by virtue of her advocacy on behalf of detainees while in private practice (including an amicus brief she prepared for the Cato Institute and others in 2009[7]) 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.

I thank you for the opportunity to share these thoughts regarding Judge Jackson's historic nomination to the Supreme Court of the United States.

Sincerely,

/s/

Clark M. Neily III
Senior Vice President for Legal Studies
Cato Institute

[7] Amicus Brief of the Cato Institute, *et al*., in *Al-Marri v. Spagone*, No. 08-368 (Jan. 28, 2009), available at https://www.cato.org/sites/cato.org/files/pubs/pdf/al_marri_v_USN.pdf.