

# Justice for All

## Cato Scholars on Ketanji Brown Jackson's Confirmation

**O**n April 7, the Senate confirmed Ketanji Brown Jackson to serve as the next associate justice on the Supreme Court, to replace Justice Stephen Breyer on his retirement later this year. It is a historic occasion, the first time an African American woman will serve on the nation's highest court. Cato scholars, however, have focused attention on another historic aspect of Jackson's appointment. Clark Neily, Cato's senior vice president for legal studies, published a landmark study in 2019 (with updates in 2021) analyzing the background and prior experience of federal judges ("Are a Disproportionate Number of Federal Judges Former Government Advocates?"). Through a new method of analysis and comprehensive research on every current federal judge, Neily showed that former prosecutors and other government advocates outnumbered judges with any experience as defense attorneys or in litigating against the government. These results did not go unnoticed, and they have since been cited during the confirmation of a number of former defense attorneys and public defenders in particular to the federal bench.

One of those former public defenders will now join the Supreme Court. Jackson's background offers other reasons for hope for civil libertarians and criminal justice reformers. Among other firsts, she will also be the first justice to have authored a brief for the Cato Institute. In 2009, she submitted an amicus brief in the Fourth Circuit Court of Appeals on behalf of Cato, the Rutherford Institute, and the Constitution Project regarding the rights of a detainee at the Guantánamo Bay prison. The question that brief addressed was "whether the Executive's use of military power inside the United States to detain, without charge or trial, a person who is lawfully in the United States violates the Constitution where Congress has not expressly authorized such detention."

While some Republican opponents criticized her work for detainees in the war on terror, others saw a principled commitment to the Constitution's guarantees of due process of law. As far back as her college thesis, she was addressing a topic that is currently a priority for Cato's criminal justice efforts: the problem of coercive plea bargaining, where defendants are threatened with much harsher sentences to dissuade them from exercising their constitutional right to trial by jury.

Cato commentary on Jackson's nomination, as well as her past work with Cato, was repeatedly referred to during the hearings by both senators and Jackson herself, as well as in media coverage ranging from Fox News to the *New York Times*. On March 18, Neily offered his own views in a statement submitted to the Senate Judiciary Committee and also posted on the *Cato at Liberty* blog.

"I believe Judge Jackson would lend an important perspective to the Court's work that is currently missing and has been historically underrepresented," Neily wrote. "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. 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."

Jackson is not the only justice to have participated in Cato Institute activities. In 1992, future justice Neil Gorsuch coauthored a Cato policy analysis on term limits. Antonin Scalia, Clarence Thomas, and Stephen Breyer all spoke at Cato conferences before their nominations to the high court. ■

