

## What Cruz, Hawley and Cotton got wrong about the rule of law

BY MICHAEL MCAULIFFE

*Guest Columnist*

Now that Judge Ketanji Brown Jackson has been confirmed by the Senate for the upcoming vacancy on the Supreme Court, theatrics of the confirmation hearings have ended. Putting aside both the good (the historic nature of Jackson's elevation) and the bad (the senatorial preening) of the confirmation, a real and present danger hovers in the air like the radioactive embers after a nuclear fireball.

The demonization of the criminal justice system will do more harm than almost any other aspect of the confirmation spectacle. Jackson was chided, and ultimately attacked, for her work as a public defender. Sens. Tom Cotton, Ted Cruz and Josh Hawley also pontificated about sentences she imposed as a trial judge in child pornography cases. The senators' lectures turned ugly and personal. Both angles of attack were framed to score political points, but they ignored everything of relevance to the issue of judicial conduct.

For example, when Sen. Cotton criticized Judge Jackson for her prior role as a public defender, other senators joined in a caustic chorus of complaints about such work being the cause of increased crime in America. Such statements are incendiary.

Public defenders don't choose their clients. Public defenders represent individuals charged with crimes who can't pay for a lawyer. The court orders the public defender's office to represent an individual defendant. The assignment isn't based on guilt or innocence, and it isn't dependent on whether a defendant's alleged crimes are violent or not.

The unrestrained debasement of a lawyer's advocacy on behalf of a client who is a criminal defendant is nothing short of a cynical assault on the American justice system. A person charged with a felony offense is entitled — indeed guaranteed — a lawyer committed to ensuring that the power exercised by prosecutors (and judges) is within the guardrails of the law.

This is no abstract principle observed from afar. It is the basic part of our promise to each other — the rich, the poor and everyone in between. A prosecutor gets power and resources and the mandate to charge people with crimes. The criminal defendant needs someone, trained in the law, who pushes back against that immense authority and discretion. Our whole criminal justice system is premised on this adversarial process. It is a defining characteristic of a democracy.

If your child was charged and at risk for imprisonment or worse, you wouldn't hesitate to support the right to counsel in a criminal case. Think of it this way — it's always personal to someone.

In addition to questioning the right to counsel, some Republican senators howled about Jackson's imposition of sentences in selected child pornography prosecutions. They argued that it was beyond horrible that the judge varied from the discretionary sentencing guidelines. Of course, what wasn't discussed were the specific facts of the cases or the reasons the judge had provided for the individual sentences. Or that the guidelines are discretionary for a reason — so that judges can tailor the sentence to the case, and not

simply a sum of numbers on a chart.

No one, much less a U.S. senator, should personally attack someone for doing a necessary, if at times unpopular, job in an ethical and professional manner. At the least, no senator should indulge in a quintessentially un-American impulse without being called to account. That some of the senators on the attack are also attorneys with pedigreed academic backgrounds (Cruz and Cotton — both Harvard Law) is outrageous, shameful even.

The danger is people will internalize the attacks on an emotional level and ignore the more demanding truths that come with democracy including the rule of law.

Sir Thomas More, in Robert Bolt's famous play (and movie) *A Man for All Seasons*, explained why as a lawyer and judge he'd give the protection of the law to everyone, even the devil. "This country's planted thick with laws ... and if you cut them down ... d'you really think you could stand upright in the winds that would blow then? Yes, I'd give the Devil benefit of law, for my own safety's sake."

Notably, More didn't couch his support of the rule of law in lofty principle, but in self-interest. That's a very republican idea, senators.

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