

John Roberts and Justice Jackson

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Thanks to the many who have written me to note that Supreme Court nominee Judge John G. Roberts, Jr. is an on-the-record admirer of Justice Robert H. Jackson.

For those who have not seen it, that record is one sentence in Roberts's 2003 written testimony to the Senate Judiciary Committee, which was then considering his nomination to be a judge of the U.S. Court of Appeals for the D.C. Circuit. In that testimony, then attorney Roberts wrote the following: "I admire the judicial restraint of Holmes and Brandeis, the intellectual rigor of Frankfurter, the common sense and pragmatism of Jackson, the vision of John Marshall."

This small Roberts sentence suggests some important things—indeed, credentials—about Judge Roberts as a prospective Supreme Court justice:

1. Roberts can write with clarity, elegance and knowledge. In this sentence, he carefully paired relevant judicial qualities with their leading exemplars, demonstrating something about what he values in his craft, the levels at which he thinks and his comfortably deep knowledge of Court history.
2. Roberts can write his own stuff. His sentence about judicial heroes is so subjective and selective that it seems unlikely to have been penned by a ghost.
3. Roberts knows, at least generally, his Jackson. Although Jackson's 13-year record as a Supreme Court justice might also be described as exemplifying "restraint," and although he definitely brought "intellectual rigor" to his 40-year legal career and, particularly at Nuremberg, embodied "vision," Robert Jackson plainly was the common sense, pragmatic person, lawyer and judge of his times. Jackson was the

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lawyer who succeeded in all aspects of diverse private practice, the national government official who won battles by winning majorities, the diplomat who marshaled an unprecedented alliance of international law, the world prosecutor who carried his (and history's) burden of proof, and a judge who understood the principles, responsibilities and legitimate contending forces that defined his realm. In all of this, Jackson had an eye for what was reasoned and workable and disdain for undertakings that were merely personal, unwise, excessive or just plain woolly.

4. Roberts values common sense and pragmatism—why else mention them, especially because he still could have invoked Jackson for another of his virtues (e.g., his writing ability)? The importance of pragmatism and common sense in judging are not as uncontroversial, even among judges, as one might think, but Roberts viewed them as worthy and mentionable.

Roberts's admiration for Jackson in his judicial pragmatism and common sense is not all that links them. Roberts clerked for then-Justice Rehnquist, who of course came to Washington as a Jackson law clerk from early 1951 until summer 1953. Before clerking for Rehnquist, Roberts clerked for Circuit Judge Henry Friendly, who famously, and Jackson-like, wrote his own opinions. In the 1920s, Friendly had been a Harvard Law School student of Professor Felix Frankfurter, who later became Jackson's closest Supreme Court colleague. After his clerkships, Roberts served in the U.S. Department of Justice in the Office of the Solicitor General, which Jackson of course headed from 1938 until 1940 and regarded as his most important, satisfying position in DOJ even though he next became Attorney General. Roberts was born in Buffalo, New York; Jackson, early in his legal career, spent a year or so living in Buffalo, practicing law with a local firm and, for the first time, gaining experience as an appellate advocate. Jackson, like Roberts, later argued dozens of Supreme Court cases before he was nominated to join its bench. There has been, in sum, a lot of Jackson and his heritage in the environments that have shaped Judge Roberts.

In John Roberts's 2003 Senate Judiciary Committee confirmation hearing, which lasted only one day, Robert Jackson's name did not come up. This time around, it might make a fit topic, and a real role model, for more detailed public discussion.