

Opinion: Republicans attack Ketanji Brown Jackson for being right about Guantanamo

By Radley Balko

March 1, 2022 at 5:07 p.m. EST

Even before President Biden had officially nominated D.C. federal appeals court judge Ketanji Brown Jackson to the U.S. Supreme Court, Republicans and right-wing media had already taken aim at her record as a criminal defense attorney. More specifically, groups opposing Jackson's nomination have zeroed in on Jackson's advocacy on behalf of terrorism suspects at Guantánamo Bay. In every respect, the attacks are nonsense.

One line of attack appears to be that Jackson tried *too* hard when representing terrorism suspects. The Republican National Committee said Jackson's "advocacy for these terrorists was 'zealous,' going beyond just giving them a competent defense." The quote of "zealous" is from the Washington Free Beacon — one of a host of conservative outlets (plus at least one Republican member of Congress) who have invoked the word to criticize Jackson.

But Jackson worked in the D.C. public defender's office. And according to D.C. Bar's rule of professional conduct, "a lawyer shall represent a client zealously and diligently within the bounds of the law." The far-right site Law Enforcement Today invoked other buzzwords, accusing Jackson of being "active and dedicated" while representing terror suspects. Again, according to the D.C. Bar, "A lawyer should act with commitment and dedication to the interests of the client." To attack Jackson as "zealous" and "active" is literally attacking her for doing her job.

Her critics retort that her advocacy for Guantánamo detainees continued beyond her time as a public defender, when she had no choice in clients, to her tenure in private practice. She has been criticized, for example, for writing amicus briefs in two cases before the Supreme Court, one urging the justices to halt the indefinite detainment of U.S. residents captured on U.S. soil, and the other arguing Guantánamo detainees have a right to challenge their detainment in federal court. But she wrote the first brief for the libertarian Cato Institute and the conservative Rutherford Institute. The latter was written on behalf of a group of retired federal judges — seven of whom were appointed by Republicans. The Supreme Court ultimately came down on the side of Jackson and those judges. All in all, her private sector work was neither extensive nor radical.

As for those she defended, when Biden nominated Jackson to the D.C. Court of Appeals, some Republicans criticized her for representing Khi Ali Gul, a former prisoner at Guantánamo Bay. Conservative media outlets have since touted the government's allegations against Gul: that he led a terrorism cell in Afghanistan, hosted a gathering at his home to plan a terrorist attack and once met with Osama bin Laden. But because there was no trial to adjudicate those claims, we don't know how reliable they are. Though Gul provided names and contact information of witnesses he said would clear his name, the U.S. government never attempted to contact them.

Instead, Gul was detained at Gitmo for 12 years. For nearly all of that time he was confined to his cell 23 hours per day. In 2014, he was repatriated to Afghanistan after the Pentagon determined he was a "low" threat to the United States. Six federal agencies signed off on his release. There's no evidence he has engaged in terrorism since.

Aside from Jackson's representation of detainees, the Daily Caller, the Free Beacon, and the RNC have also attacked her for alleging torture, breaches of attorney-client privilege, and other prosecutorial misconduct at Guantánamo. They've pointed to Bush administration-era court rulings and reports by the Pentagon, the Justice Department and other agencies to portray Jackson as some conspiracy-spouting radical.

But subsequent reports, leaks and testimonials show Jackson was right. In 2007, the Guantánamo chief of prosecutors resigned, alleging the Pentagon had set up a rigged system all but guaranteed to prevent acquittals. In 2017, the head of the defense counsel at the prison — a Marine Corps general — was himself imprisoned for 21 days for defending the right of detainees to confer with their attorneys without government surveillance.

As for evidence of torture, according to a 2008 report by the DOJ Inspector General, FBI agents repeatedly warned that the CIA was torturing terrorism suspects, including sexually humiliating them and "short-shackling them to the floor for many hours in extreme heat or cold." The treatment of detainees was so bad, agents started a "war crimes file" to document abuses for later prosecution, though they were later ordered to shut it down.

The vast majority of Guantánamo detainees ended up at the prison because of bounties paid to police, military officials and residents of foreign countries. Only about 5 percent were captured by U.S. troops or intelligence officials. Many were detained on hearsay evidence alone. Pentagon documents published by WikiLeaks in 2011 concluded at least 150 prisoners were innocent — or about 1 in 5 — and 380 more were low-level foot soldiers who presented little threat. Some detainees have spent years, some more than a decade, at the prison even after they were cleared for release.

The dysfunction, abuse and injustice-by-design at Guantánamo motivated seven military *prosecutors* to resign their positions or request transfers, most at the expense of their own careers. Military defense attorneys and Guantánamo guards have also resigned or spoken out about the abuses they witnessed.

This past year, Sen. Ben Sasse (R-Neb.) asked Jackson why she didn't resign as Gul's public defender, but not for the reasons those military prosecutors, guards and defense attorneys

resigned. Instead, Sasse suggested that representing Gul “would result in him returning to his terrorist activities.” Sasse’s morally vacuous, fact-free posturing is typical of the attacks on Jackson since her nomination. None of this is surprising, but it’s still an embarrassment — one we’ll see more of at Jackson’s confirmation hearings later this year.