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Jackson Hearing Highlights Line Between Lawyer's Duty, Beliefs

March 22, 2022

While questioning Judge Ketanji Brown Jackson on Tuesday, Sen. Lindsey Graham (R-S.C.) suggested that lawyers share the opinions expressed in amicus briefs filed on behalf of their clients.

But he also suggested lawyers' personal views shouldn't be assumed based on their representation of criminal defendants, particularly when—as was the case with Jackson—the attorney is a public defender whose job it is to represent clients who can't otherwise afford an attorney.

“I represented anybody who came in the door, whether I liked them or not,” Graham said of his time as an attorney in the Air Force.

In both cases, attorneys are advocating on behalf of clients. So which one is it?

Graham said Jackson's friend-of-the-court brief in a case about terror detainees at Guantanamo Bay, Cuba, would put the U.S. in the “untenable position” of having to release terror suspects who might reengage in terror activities or disclose sensitive material. The brief was filed on behalf of conservative groups, like the Cato Institute, which frequently files amicus briefs at the Supreme Court.

“You sign on to a brief making that argument but say it's not your position?” Graham asked Jackson. “Why would you do that if it's not your position?”

Jackson pushed back against the assertion that as the author of the brief it represented her views. “I would refer you to the same sorts of statements that Chief Justice Roberts made when he came before the committee, which is that lawyers represent clients,” Jackson responded.

JP Schnapper-Casteras, who before starting his own firm filed numerous amicus briefs while at the NAACP Legal Defense and Educational Fund, said Jackson got it right.

In amicus practice, “you write an appellate brief on behalf of a client and often they already have a particular set of themes they'd like to present to the Court,” Schnapper-Casteras said.

But law professor Josh Blackman, who has also filed Supreme Court amicus briefs on behalf of the Cato Institute, said amicus work is different than client representation. “I think there is a stronger argument that the lawyer agrees with the client's position,” Blackman said, noting that attorneys often seek out those representations.

Schnapper-Casteras also said Jackson has represented an array of groups from Cato, to the Women's Bar Association, to former federal judges, before the Supreme Court.

For a court that receives on average about 800 amicus briefs every year, "that appreciation for ideologically and thematically diverse amici strikes me as quite useful, regardless of the context," he said.