



Senate Republicans Plot Ugly Attacks On Ketanji Brown Jackson For Gitmo Work

Criticizing the Supreme Court nominee for defending Guantánamo detainees undermines due process protections and ignores the fact that most people held at the detention facility were released with no finding of wrongdoing.

Jessica Schulberg

March 18, 2022

Senate confirmation hearings for Supreme Court nominee Ketanji Brown Jackson are set to begin Monday, and Republicans are already signaling their plan to attack her for providing legal representation to people imprisoned at Guantánamo Bay. In doing so, lawmakers are revealing a belief that certain people don't deserve a quality legal defense — undermining a key pillar of the U.S. judicial system.

The GOP concedes that in her role as a Washington, D.C., public defender, Jackson did not choose her clients, but nonetheless accuses her of being too enthusiastic in their defense. “Jackson’s advocacy for these terrorists was ’zealous,’ going beyond just giving them a competent defense,” the Republican National Committee says on its website in a takedown of Jackson.

The implication is that Jackson should not have tried as hard at her job because of who she was representing: brown men from predominantly Muslim countries held without charge in an offshore detention facility. The D.C. bar’s rules of professional conduct explicitly instruct lawyers to represent their clients “zealously and diligently.” Even if every person held at Guantánamo Bay had committed acts of terrorism, they would be entitled to vigorous representation.

“That concept is fundamentally American, going back to John Adams’ representation of the British soldiers after the Boston Massacre,” said Alka Pradhan, a human rights lawyer who has represented several people imprisoned at Guantánamo Bay.

Perhaps aware of the flawed logic of attacking a public defender for capably representing her assigned clients, some Republican lawmakers are focusing their criticism on Jackson’s decision to continue her Guantánamo work after she left the public defender’s office and became a private attorney.

“She volunteered to continue that representation in private practice, which I think is interesting,” said Sen. Josh Hawley (R-Mo.). “And frankly, from my point of view, a little concerning.”

(Hawley’s views on law and order appear somewhat muddled. He infamously saluted rioters who stormed the U.S. Capitol on Jan. 6, 2021, and recently began selling a coffee mug depicting that salute.)

Sen. John Cornyn (R-Texas.) told reporters that he was “curious” how Jackson ended up on Guantánamo cases and said “it might make a difference to me whether it was something she sought out.”

Lawyers often choose to represent people who have done horrible things in order to uphold a basic principle of due process, and to ensure that the government always adheres to it. Further, the idea that every person detained at Guantánamo Bay had done something wrong is patently false. Of the nearly 780 people detained there over the years, nearly all have been deemed safe to release, and very few have been charged with a crime.

In the spring of 2002, Maj. Gen. Michael Dunlavey, then the operational commander of Guantánamo Bay, traveled to Afghanistan to complain that too many “Mickey Mouse” detainees were being sent to the offshore prison. Even President George W. Bush knew that most of the Guantánamo detainees should not have been there, a senior Bush administration aide wrote in a 2010 court declaration.

By August 2002, it was apparent “that many of the prisoners detained at Guantánamo had been taken into custody without regard to whether they were truly enemy combatants, or in fact whether many of them were enemies at all,” wrote Lawrence Wilkerson, former chief of staff to Colin Powell, in the 2010 court filing. Adding to the problem, Wilkerson wrote, was that many Guantánamo detainees ended up in U.S. custody after being turned over in exchange for bounties, sometimes as much as \$5,000 per person.

“In numerous habeas corpus cases, we have proven over and over and over again that the U.S. paid bounties for detainees at Guantánamo Bay to partners in Pakistan,” Pradhan said. “Defense at Guantánamo Bay is not only necessary because everyone deserves a lawyer, but it underscores the fact that if we did not have representation of these people, a lot of these mistakes would not have been discovered, which fundamentally undermines the entire justice system.”

As a public defender, Jackson represented an Afghan national named Khi Ali Gul, who was detained without charge and confined to his cell for 23 hours a day. Gul has said that he actually fought *with* U.S. forces in Tora Bora, Afghanistan, and that he was wrongfully detained. He was freed from Guantánamo in 2014, after nearly 12 years of detention — and several years after an Obama administration task force determined him safe to release. There is no evidence that he has engaged in terrorism since. In a Senate Judiciary Committee questionnaire, Jackson listed Gul’s defense as one of the 10 most significant cases she has handled.

As a private lawyer, Jackson co-wrote two amicus briefs for Guantanamo cases. One, filed on behalf of the Cato Institute, the Constitution Project and the Rutherford Institute, argued that the U.S. government’s executive branch did not have the authority to indefinitely detain without charge people who were lawfully in the U.S. The second was filed on behalf of 20 former federal judges in support of the petitioners in *Boumediene v. Bush*, a landmark Supreme Court ruling that people held at Guantánamo as enemy combatants had the right to challenge their detention in federal court.

Boumediene v. Bush “reaffirmed this concept of habeas corpus,” Pradhan said. “The idea that anyone — whether the Jan. 6 perpetrators or the Proud Boys and Black Americans who protest — would not be able to challenge the basis of their detention is contrary to U.S. history and U.S. values.”

But Republicans nevertheless plan to make a major issue of this legal work at Jackson’s hearings.

“I think you’ll hear more about her Guantánamo Bay representation,” Cornyn said this week.