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Why Sen. Lindsey Graham stormed out of Supreme Court hearings over Guantánamo Bay detainees

Ketanji Brown Jackson's defense of prisoners became a flashpoint during her confirmation.

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During a Supreme Court confirmation hearing Tuesday, Sen. Lindsey Graham, a South Carolina Republican, confronted nominee Ketanji Brown Jackson's record of defending detainees at Guantánamo Bay at the height of the Iraq War.

After Senate Judiciary Chairman Dick Durbin, an Illinois Democrat, defended her record, Graham stormed out.

He took umbrage with an amicus brief she filed in 2009 on behalf of the libertarian Cato Institute, the Christian civil liberties nonprofit Rutherford Institute and the bipartisan Constitution Project. The brief challenged the indefinite detention of Ali Saleh Kahlah al-Marri, a Qatari national who was accused of providing material support to al-Qaeda on U.S. soil. He was detained at Guantánamo for conspiracy from 2003 to 2009, where he was categorized as an "enemy combatant." Until 2009, he hadn't received a fair trial.

The Republican senator was particularly disturbed by the brief's assertion that detainees on the base shouldn't be held indefinitely.

"We hold enemy combatants as long as they're a threat," Graham said during the hearing. "There is no magic passage of time that you've got to let them go."

He also said one of the petitions for habeas corpus she filed accused the United States of "acting as war criminals" for the indefinite detention. (Durbin later clarified that one of her clients had alleged that the U.S. government sanctioned torture, which constitutes war crimes under the Alien Tort Statute, against the detainees.)

"Look at the friggin' Afghan government," he protested before storming off the dais. "It's made up of former detainees at Gitmo. This whole thing by the left about this war ain't working."

Before he left, Jackson attempted to explain the logic behind her amicus brief. The law governing Guantánamo Bay was "very uncertain" during the Iraq War, she said. "This was brand new. And people were trying to figure out what are the limits of executive authority in this context."

Republicans signaled ahead of the hearing they might dive into this area of Jackson's past. From 2005 to 2007, Jackson represented four Guantánamo Bay detainees as a federal public defense lawyer. The cases included an al-Qaeda bomb expert, an intelligence officer for the Taliban, a farmer associated with the Taliban and a Saudi Arabian man trained to fight the U.S. military in Afghanistan. Jackson continued some of the work on behalf of detainees while in private practice at the firm Morrison & Foerster when she joined in 2007.

"Guantánamo was created in significant part because it was located outside of the United States," Oona Hathaway, an international law professor at Yale Law School and member of an international law advisory council to the State Department since 2005, told Grid. "They thought that if they created a detention facility in Cuba, the courts wouldn't be able to reach it."

During his meeting with Jackson before the hearings, Missouri Republican Sen. Josh Hawley said that he considered her continued work for the detainees "a little concerning."

"This criticism misses one critical point," Durbin said after Graham's questioning. "The right to counsel is a fundamental part of our constitutional sentence system, even for the most unpopular defendants."

Guantánamo Bay is a legal anomaly

After 9/11, the Bush administration began holding the relevant detainees at Guantánamo Bay in January 2002, partly to evade the watchful eye of U.S. law. Domestic criminal laws at the time didn't apply to foreign nationals, so President George W. Bush and his coterie sought to create an extrajudicial site to interrogate terror suspects.

"Until 2004, it was undetermined whether the courts had jurisdiction over Gitmo, and whether detainees had any legal process available to them," David Luban, a law professor at Georgetown Law School, wrote in an email.

A series of Supreme Court rulings from 2004 to 2008 sought to hash out this uncharted legal terrain: In Rasul v. Bush and Hamdi v. Rumsfeld in 2004, the court held that foreign and U.S.-citizen detainees, respectively, had rights to challenge their detention. In later cases, Hamdan v. Rumsfeld in 2006 and Boumediene v. Bush in 2008, the court held that congressional efforts to limit challenges through the Detainee Treatment Act of 2005 and Military Commissions Act of 2006, respectively, did not supplant the ability of courts to hear detention challenges through the fundamental constitutional habeas right.

"The controversial questions at issue were things like: what kind of evidence would it take to show that they were not being legally held?" Luban said. "How much did courts have to take the government's word about what they knew about the detainees?"

Closing Guantánamo Bay and finding a legal resolution for the detainees there was a big goal of the Obama administration, in large part to signal a symbolic break with the Bush administration's extrajudicial approach to the War on Terror. However, the lack of a cohesive legal framework made resolving these cases difficult, and the detention facility remains open to this day. Thirty-nine people remain held there, and nine died while in custody.

While the debate over whether Guantánamo detainees have a right to a fair trial — and what that trial consists of — has since been settled under the law, "all these questions were up in the air" when Jackson defended her clients, Luban said.

Most habeas petitioners succeeded in district court, only for their rulings to be reversed by the D.C. Circuit Court. In 2012, the D.C. Circuit ruled that trial courts must grant the government's evidence as a "presumption of regularity" or assume that the government acquired evidence presented in court honestly and ethically. "That pretty much ended the habeas victories," Luban said.

But as John Bellinger III, a former State Department counsel who helped develop the legal framework for Guantánamo Bay detention, noted, public defenders have always received criticism for defending unpopular clients — even in this country's founding.

"That goes all the way back to John Adams at the beginning of the Republic, defending British citizens [accused in the Boston Massacre] in the new United States," he said.

Republicans have hammered this point before

Conservatives have criticized public defenders for this kind of work for years. In 2010, then-Attorney General Eric Holder gave Republican Sen. Chuck Grassley of Iowa a list of lawyers recently hired to work for the Justice Department. Nine of them had defended or advocated for Guantánamo detainees.

Within a few weeks, the conservative advocacy group Keep America Safe, founded by Liz Cheney before she was elected to Congress, released a video questioning the hires, calling seven of the attorneys the "al Qaeda Seven" in the press. A group of lawyers, including Bellinger, Brookings Institution Senior Fellow Benjamin Wittes and former U.S. solicitor general Kenneth Starr, penned an open letter denouncing the criticism.

"Whatever systems America develops to handle difficult detention questions will rely, at least some of the time, on an aggressive defense bar," they wrote, "those who take up that function do a service to the system."

Some conservatives believe that people held at the military base should stay there indefinitely for the sake of national security. During the hearing, Graham claimed that 31 percent of the detainees that have been released have gone back to terrorist organizations. (The actual recidivism rate is 17 percent.) "I hope they all die in jail if they're going to go back to kill Americans," the senator said. "It won't bother me one bit if 39 of them die in prison."