

The facts on Jackson's defense work for Gitmo detainees

By Lori Robertson

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In the first day of Supreme Court confirmation hearings for Judge Ketanji Brown Jackson on March 21, Republican Sen. Marsha Blackburn echoed a party talking point, saying that Jackson used her “time and talent not to serve our nation’s veterans or other vulnerable groups, but to provide free legal services to help terrorists get out of Gitmo and go back to the fight.”

Jackson was a federal public defender on four cases, in which the men were not convicted, and continued to represent one man when she worked for a private firm.

The Republican National Committee similarly tweeted on Feb. 25 that Jackson’s “record also includes defending terrorists.”

The RNC said in a March 21 press release that Jackson “was a ‘zealous’ advocate for several terrorists detained at Guantanamo Bay, including a Taliban intelligence officer who was likely a leader of a terrorist cell.”

Jackson, who was confirmed as a judge on the U.S. Court of Appeals for the District of Columbia Circuit in 2021, had used the word “zealously” in responding last year to senators’ questions about her work from 2005 to 2007 as an assistant federal public defender. When asked whether she had a “choice” of working on behalf of Khi Ali Gul, a Guantanamo detainee, and if she had considered “resigning from your position,” Jackson responded this way:

Jackson, 2021 responses to Senate questions: “Under the ethics rules that apply to lawyers, an attorney has a duty to represent her clients zealously, which includes refraining from contradicting her client’s legal arguments and/or undermining her client’s interests by publicly declaring the lawyer’s own personal disagreement with the legal position or alleged behavior of her client. Because these standards apply even after termination of the representation, it would be inappropriate for me to comment on whether I disagreed with Khi Ali Gul, found his alleged crimes offensive, or considered resigning my position as an Assistant Federal Public Defender based on any such disagreement or offense.”

She also said that “as an employee of the Office of the Federal Public Defender in Washington D.C., I worked with other assistant federal public defenders to represent some of the individuals designated as enemy combatants who were detained by the federal government without charge or trial at the U.S. Naval Base in Guantanamo Bay, Cuba, and whose legal claims for relief were being litigated in the federal courts in the District of Columbia.”

At that time, her brother was serving as an Army infantryman in Iraq.

“I was keenly and personally mindful of the tragic and deplorable circumstances that gave rise to the U.S. government’s apprehension and detention of the persons who were secured at Guantanamo Bay,” she wrote. “In the wake of the horrific terrorist attacks in September of 2001, I was also among the many lawyers who were keenly aware of the threat that the 9-11 attacks had posed to foundational constitutional principles, in addition to the clear danger to the people of the United States.”

The year before she joined the Office of the Federal Public Defender, the Supreme Court had ruled that foreign citizens held at Guantanamo had a right to challenge their detentions in U.S. courts.

In a June 2007 unclassified government document, posted online by the New York Times, Gul was identified as “an intelligence chief” for the Taliban and “the possible cell leader of a terrorist group.”

He was held for 12 years and released, along with three others, to Afghanistan by the U.S. in December 2014. At the time, a Reuters report quoted an administration official as saying these were “low-level” detainees who weren’t considered security risks. The Department of Defense said the detainees were “unanimously approved for transfer” by the Guantanamo Review Task Force, which consisted of six departments and agencies.

Jackson listed Gul’s case among the 10 “most significant litigated matters” she had handled, in a questionnaire for the Senate Judiciary Committee. In the case, she drafted a petition for a writ of habeas corpus — a petition that Gul be allowed to challenge his detention in court — and filed other motions.

“The case was ultimately consolidated with other similar habeas actions and transferred to a different district court judge for coordination and management,” she wrote.

The Associated Press reviewed three other Guantanamo cases on which Jackson worked. Khudai Dad was captured in 2002 and sent back to Afghanistan in 2006. He had been “assessed as being affiliated with the Taliban, having a possible position of authority in the Taliban,” by the Defense Department, and he was diagnosed with schizophrenia.

Tariq Mahmoud Ahmed Al Sawah, whom the federal government said admitted to being an “explosives trainer” for al Qaeda for about two years, was released to Bosnia and Herzegovina, where he had citizenship, in 2016 after the government’s Periodic Review Board determined that “detention of the detainee is no longer necessary to protect against a continuing significant threat to the security of the United States.”

Finally, Jabran al Qahtani traveled to Afghanistan from Saudi Arabia in 2001, and trained briefly with al Qaeda before being arrested in Pakistan. The U.S. dropped its charges against him in 2008, and he was sent back to Saudi Arabia in 2017.

In his comments in the first day of the Senate hearings, Sen. Lindsey Graham said: “The fact that you represented Gitmo detainees is not a problem with me. Everybody deserves a lawyer. You’re doing the country a great service when you defend the most unpopular people. But I do want to know about your amicus briefs after you’re no longer a defense counsel weighing into the Supreme Court about how they decide law of war issues. That matters a lot to me.”

In 2007, Jackson joined the firm Morrison & Foerster, where she continued to work on one of the Guantanamo cases, she said, because it was “assigned to my firm, unbeknownst to me.”

She also wrote amicus briefs — documents filed by those with an interest in a case but not directly involved in it — on behalf of the Constitution Project, Rutherford Institute and Cato Institute for an appeal challenging the detention, under suspicion of terrorism activity, of U.S. residents without charges or a trial.

She wrote another amicus brief on behalf of 20 retired federal judges for consolidated cases challenging the detention review system at Guantanamo. In that case, *Boumediene v. Bush*, the Supreme Court later ruled for the detainees, finding the Detainee Treatment Act wasn’t a substitution for the writ of habeas corpus.

Blackburn said Jackson’s legal work was to “help terrorists get out of Gitmo and go back to the fight.”

We asked her office whether there was evidence of any of the men on whose cases Jackson worked returning to terrorist activity. We didn’t get a response. According to a 2020 report by the Office of the Director of National Intelligence, made public in April 2021, 729 detainees have been transferred from Guantanamo as of Aug. 31, 2020, and 17.1% of them have been “confirmed of reengaging” in terrorist activities. Another 14.3% have been suspected of doing so.

Day Two: Jackson responds

In the second day of the Senate hearings, senators continued to ask Jackson about her work on the Gitmo cases.

Democratic Sen. Patrick Leahy talked about public defender work generally and the importance of the Sixth Amendment, which guarantees rights to criminal defendants, including the right to a lawyer. He then turned to Gitmo, saying it was “precisely the situation we want our best and our brightest lawyers to step into the fray however politically controversial, we have to make sure that we do not become unmoored from our core commitments of the rule of law.” He asked Jackson about her involvement in the cases.

Here is part of her response:

Jackson, March 22:

“In 2004, the Supreme Court ruled that the executive did have the authority to make those detentions [of enemy combatants at Guantanamo Bay] in one case and then in another case, the Supreme Court ruled that anyone so detained could file a legal challenge. They had habeas rights and as you know, habeas is in the Constitution. In 2005, I joined the Federal Public Defender’s Office, and those cases started coming in, the requests from detainees asking for legal representation consistent with our constitutional scheme to have help to file their habeas petitions. This was very early in the days of these kinds of legal actions; there was a lot unknown about what these petitions could look like, what arguments could be made, and considered by the court and perhaps most importantly, what the facts were related to any of these individuals, because almost everything was classified. So defense counsel was getting these people in with no information.

“I was in the appellate division of my office. And as an appellate defender, I worked on legal issues. ... I was paired with a trial defender who attempted to do the fact-gathering, who traveled to Guantanamo Bay. I never traveled there, anything like that. I worked on the law. And as you noted, the law was very uncertain. This was brand new, and people were trying to figure out what are the limits of executive authority in this context. We knew that the Constitution was not suspended, even though we had this emergency. So what did that mean with respect to these individuals?

“I filed, as a federal public defender, I was assigned to work on four cases. And I filed almost identical petitions because what you’re doing, especially when you have no facts, is just preserving legal arguments for your clients, that is consistent with what lawyers do.

“And then you mentioned private practice. So I went into private practice in, I believe it was, 2007. And by that time, lots of private practices around the country had started taking on these cases because there were lots of people who needed representation, and so pro bono practices were receiving requests, usually through nonprofits. And one of the individuals that I had represented as a defender ended up being assigned to my firm, unbeknownst to me.

“So I arrive at my firm, and the partners realized the same person was someone that, according to the docket, I had previously represented, and they asked if I would review some of his materials and continue the representation. That was the only person that I represented in the context of my private firm who was a detainee.

“I worked on a couple of habeas briefs for judges and for a variety of ... nonprofits including the Rutherford Institute, the Cato Institute and the Constitution Project, who were all interested in making arguments to the Supreme Court that was considering these very novel legal issues.”