



The Problem With GOP Attack On Jackson Immigration Ruling

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During Judge Ketanji Brown Jackson's U.S. Supreme Court confirmation hearings, the nominee ably defended her record against several Republican lines of attack. But the Republicans' choice to criticize one ruling in particular stands out as especially hypocritical.

Judge Jackson's 2019 *Make the Road New York v. McAleenan* decision in the U.S. District Court for the District Of Columbia temporarily halted a Trump administration immigration policy.[1] But evaluating the case on the basis of its principles rather than its policy outcome shows that it actually furthered the separation of powers ideals that Republicans claim to support.

Make the Road was a challenge to the Trump administration's expansion of expedited removal procedures for people in the country unlawfully. A 1996 immigration law had established these expedited proceedings, which afford significantly fewer procedural rights than formal removal.[2]

Those subject to expedited removal are not provided the right to counsel, the right to appear before an immigration judge, or the right to appeal and seek judicial review, unless they claim asylum.[3] It is thus of enormous policy significance who is and who is not eligible for expedited removal.

But when faced with that policy decision in 1996, Congress punted. Rather than spell out a clear dividing line, Congress left that decision to the executive branch. The law gave one official — originally the attorney general, now the U.S. Department of Homeland Security secretary — the "sole and unreviewable discretion" to decide how broadly to apply it.[4]

The secretary may choose to apply expedited removal to "any or all aliens" who cannot claim lawful status by document or oath and who cannot affirmatively show they have been in the country for at least two years.[5] And the secretary can change his mind and modify the scope of eligibility "at any time." [6]

Over the years, the executive branch has used this delegation of power to repeatedly redefine the scope of expedited removal, setting dividing lines based on means of arrival, duration of residence, and distance from the border.[7] In 2019, the Trump administration eliminated these distinctions and expanded eligibility to its statutory maximum.[8]

That 2019 expansion prompted a lawsuit that found its way to Judge Jackson's D.C. district court. Among other claims, the challengers argued that the DHS secretary did not adequately justify and explain his decision and thereby violated the Administrative Procedure Act, a law that sets baseline procedural standards for executive rulemaking.[9]

Judge Jackson agreed, blocking the expansion.[10] She wrote that although Congress gave the agency "the ultimate authority to make the decision," it did not give the agency "sole discretion to determine the manner in which that decision will be made." [11]

As Judge Jackson explained, the APA's procedural mandates "prevent arbitrary decision Thomas Berry making by unelected government officials" and thus "operate as safeguards of individual liberty." [12] She therefore declined to interpret the statute as superseding the APA in the absence of explicit statutory text to that effect. [13]

But the U.S. Court of Appeals for the D.C. Circuit reversed that judgment, holding that the APA's rules did not apply. [14] The appeals court held that the immigration law "provides no discernible standards by which a court could evaluate the Secretary's judgment," and that "the Secretary is under no duty to consider the views of others." [15]

The court further held that the grant of "sole and unreviewable discretion" did supersede the APA, because explaining the decision to the public and taking feedback "would be an empty, yet time-consuming, exercise." [16]

Since Judge Jackson's nomination, the Republican National Committee has cited this case as a supposed example of Jackson's rulings that "favor the left." [17] The Senate Judiciary GOP accused Jackson of "disregarding the text and plain meaning of the law" and called the D.C. Circuit's decision a "forceful rebuke." [18]

During Judge Jackson's nomination hearings, Sen. Chuck Grassley, R-Iowa, asked her incredulously to "explain why you believed a federal court could review something Congress called 'unreviewable?'" [19] And Sen. Lindsey Graham, R-S.C., denounced her for ignoring "the plain language of the statute" to reach "a conclusion because you disagreed with the Trump Administration," calling it "Exhibit A of a judge ignoring limitations placed in the law by Congress to get a result they wanted." [20]

These criticisms are short-sighted and misguided. The presumption of APA reviewability that Judge Jackson applied in *Make the Road* is an important means of checking excessive executive branch power. That presumption forces Congress to speak explicitly and disclaim APA review by name if it wishes to delegate policymaking power that is not only unguided but also unaccountable to the public.

And that presumption accords with a trend recently championed by Trump-appointed Justice Neil Gorsuch: greater judicial scrutiny of laws that threaten the separation of powers.

In the 2019 *Gundy v. United States* decision, Justice Gorsuch explained in a dissent that "the Constitution entrusted all of the federal government's legislative power to Congress," thus ensuring "that only the people's elected representatives may adopt new federal laws restricting liberty." [21]

To the framers of the Constitution, its "detailed and arduous processes for new legislation" were "bulwarks of liberty." [22] That is why Congress cannot "pass off its legislative power to the executive branch," even if it wants to. [23]

To enforce this principle, known as the "nondelegation doctrine," Justice Gorsuch urged that courts should examine whether "the policy judgments" underlying an agency rule were made by

Congress or the executive branch.[24] If the latter, the rule represents an unconstitutional delegation of legislative power.

And by any measure, the rules governing eligibility for expedited removal fail that test. As the D.C. Circuit acknowledged, "neither the statutory text nor structure" provided any "legal standards constraining the Secretary's discretionary judgment." [25]

A strong case can thus be made that all laws that provide no meaningful principles for judicial review unconstitutionally violate the nondelegation doctrine, including the expedited removal law. As law professor Thomas Merrill has succinctly summarized, "Congress must supply an intelligible principle to guide executive action," but "the unreviewability doctrine says that if Congress supplies no principle at all the action is unreviewable." [26]

Although the challengers in *Make the Road* did not make an explicit nondelegation claim, Judge Jackson recognized that separation of powers concerns were at play. She noted that the presumption of APA reviewability is even more important when Congress delegates "a substantial amount of discretion to make a consequential policy determination." [27] And she highlighted prior decisions explaining that APA review aims to "reintroduce public participation and fairness to affected parties after governmental authority has been delegated to unrepresentative agencies." [28]

Even if that is not the check that the Constitution's framers designed, it is still better than a delegation with no checks at all.

Judge Jackson thus applied a strong presumption that Congress intended to at least require a reasoned and publicly accountable agency decision. And in doing so, she employed what Justice Gorsuch called "a canon of statutory construction ... in service of the constitutional rule" of nondelegation.

In another context, Senate Republicans have recognized the value and importance of such canons. Forty-seven Republican senators — including all 11 on the Senate Judiciary Committee — joined an amicus brief in *National Federation of Independent Business v. U.S. Department of Labor* opposing the Biden administration's Occupational Safety and Health Administration's vaccine mandates. [29]

That brief encouraged the Supreme Court to avoid "nondelegation problems" by interpreting the statute with a presumption against major policy delegations. [30] The brief explained that such a presumption prevents courts "from assuming congressional intent to delegate authority" and also ensures "that Congress does not confer authority on an agency by accident." [31]

These senators had it right in their brief. To preserve the separation of powers, courts should apply strong presumptions against wholesale and unconstrained delegation of major policy decisions. And that is exactly what Judge Jackson did in *Make the Road*.

Portraying that decision as nothing more than a loss for the Trump administration ignores the broader principles at stake. Conservatives, libertarians and originalists who care about preserving the Constitution's limitations on the executive branch should praise Judge Jackson's careful approach, not condemn it.

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