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Prospectively Appointing Jackson To High Court Is Unlawful

By **John Reeves** (April 19, 2022, 11:28 PM EDT)

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On Tuesday, it was reported that President Joe Biden signed a document prospectively appointing Judge Ketanji Brown Jackson to the U.S. Supreme Court, while also maintaining that Judge Jackson would not actually assume the duties of a Supreme Court associate justice until Justice Stephen Breyer retires.[1]

Biden did so on the basis of a White House Office of Legal Counsel legal opinion dated April 6, concluding that the president may prospectively appoint Judge Jackson to be an associate justice of the U.S. Supreme Court following her U.S. Senate confirmation.[2]

In other words, the opinion concludes that the president may appoint — and not just nominate — Judge Jackson to the Supreme Court prior to Justice Stephen Breyer actually stepping down from the court. But the opinion also maintains that such a prospective appointment will not become effective until Justice Breyer actually retires. It is only then that Judge Jackson will actually assume a position on the court.

The opinion goes on to conclude that the only limitation to such prospective appointments is that they must take effect within the president's current four-year term of office. So long as the president has "appointment authority at the time the vacancy is expected to arise," the prospective judicial appointment is valid.

Following the opinion's release, but prior to the announcement of Biden's prospective appointment, conservative commentator Ed Whelan wrote an article for National Review in which he "wondered whether the OLC position contradicts Marbury v. Madison," without arriving at any conclusion on the matter, although he did strongly suggest that to be the case.[3]

Whelan is far too modest in his article — the OLC's opinion is directly repugnant to the 1803 Supreme Court decision Marbury v. Madison[4] and the relevant portions of the U.S. Constitution it interprets.

There is no question that a president may prospectively nominate, and that the Senate may prospectively confirm, Judge Jackson to the court ahead of Justice Breyer's announced retirement. But the president cannot prospectively appoint Judge Jackson to the court prior to Justice Breyer actually retiring as the act of appointment is the legal mechanism by which a nominee is immediately vested with the judicial office in question. There is no possibility of putting off the effect of the appointment. To hold otherwise, as the OLC opinion does, raises gravely troubling issues regarding presidential discretion

over the appointment process.

Even worse, Biden's attempt to prospectively appoint Judge Jackson to the court raises a serious question about her legitimacy as an associate justice. As explained further below, Biden should withdraw his purported conditional appointment, wait until Justice Breyer actually retires, and only then appoint her to the court, thus putting to rest any question about the matter. Unless Biden does so, his purported conditional appointment is a legal nullity.

Presidential Discretion

Following Senate confirmation of a nominee to the Supreme Court, the president still retains discretion over whether to appoint the nominee to the bench.

Contrary to popular belief, Senate confirmation of a nominee to the Supreme Court does not elevate that nominee to the lifetime judicial office. There still remains the final act of appointment, which the president carries out by signing the nominee's judicial commission.[5]

The Constitution makes clear this distinction between a nomination and an appointment, declaring that the president "shall nominate, and, by and with the advice and consent of the senate, shall appoint ... all ... officers of the United States."[6]

Under Marbury v. Madison, the president is vested with discretion not only over whether to nominate a particular individual to the judiciary, but also over whether to appoint that individual to the position upon Senate confirmation. Writing for the court, then-Chief Justice John Marshall describes a judicial nomination as being "the sole act of the President, and ... completely voluntary."[7]

Marshall likewise describes the appointment as being "the act of the President, and [it] is also a voluntary act, though it can only be performed by and with the advice and consent of the [S]enate."[8] As such, "the discretion of the executive is to be exercised until the appointment has been made."[9]

But once the president exercises his discretion and signs the commission appointing a Senate-confirmed nominee to the bench, the nominee is vested with the judicial office as a matter of right, and the president's control over the process comes to an end: "[H]aving once made the appointment, his power over the office is terminated in all cases, where, by law, the officer is not removable by him."[10]

Consider an extreme hypothetical — the Senate confirms a nominee to the Supreme Court, but following confirmation and prior to appointment facts emerge demonstrating beyond any doubt that the nominee is, in fact, a mass murderer. Suppose, furthermore, that the nominee openly admits to being a mass murderer, yet still claims a right to sit on the court in light of the Senate's confirmation.

So long as the president has not yet signed the nominee's commission, the president could refuse the appointment, withdraw the nomination and nominate a new candidate in place of the murderer. But if, on the other hand, the president has already appointed the nominee to the bench through the signing of the commission, the president would have no authority to remove the murderer from the court — the only way to do so would be through impeachment.

While this is an extreme hypothetical, it illustrates a basic point: Unless and until the president signs the commission, a Senate-confirmed nominee to the Supreme Court is not actually on the court. But once the president signs the commission, he loses any discretion over whether to vest the nominee with the

position, as in signing the commission he is, in fact, vesting the nominee with the position on the court.

OLC Opinion Contradicts Marbury

Under Marbury, appointment to a judicial office takes immediate effect and cannot be delayed, contrary to the conclusions of the OLC opinion.

The OLC opinion recognizes all of the above — that is, it recognizes that the act of appointing a Senate-confirmed nominee to the Supreme Court is a discretionary power vested with the president, and that the president's discretion ends upon signing the commission making the appointment. But the opinion then concludes that Biden may prospectively appoint Judge Jackson to the court before Justice Breyer — the individual she is replacing — actually retires from the court.

The opinion insists that in making such a prospective judicial appointment, Biden would not actually be placing Judge Jackson on the court at that time, and that the appointment would not become effective until Justice Breyer actually retires from the court. This opinion cannot be squared with what Marbury holds regarding the nature of an appointment to a judicial office.

In Marbury, Chief Justice Marshall emphasized that the act of appointment is synonymous with actually vesting the appointee with the judicial office. He wrote that upon the president making the appointment, "[t]he right to the office is then in the person appointed, and [the appointee] has the absolute, unconditional, power of accepting or rejecting it."[11]

Even if the appointee declines to accept the appointment, this does not change the fact that the appointee was, in fact, actually vested with the judicial office: "As [the appointee] may resign, so may he refuse to accept: but neither the one, nor the other, is capable of rendering the appointment a non-entity."[12]

If the appointee declines the office, "the successor is nominated in place of the person who has declined to accept, and not in the place of the person who had been previously in office, and had created the original vacancy."[13]

Marbury's line of reasoning simply cannot be squared with the OLC opinion's conclusion that Biden may prospectively appoint Judge Jackson to the Supreme Court before Justice Breyer's retirement. An appointment to a judicial office is effective immediately. It cannot be conditioned on the occurrence of a subsequent event. Otherwise, the appointee would not be entitled to the judicial office as a matter of right.

But right now, there is no vacancy on the court, and consequently no judicial office that Biden may vest Judge Jackson with as a matter of right. Biden's prospective appointment of Judge Jackson to the court amounts to the legal nullity. Unless and until Biden signs a commission following Justice Breyer's retirement, Judge Jackson will not be an associate justice on the court, and Breyer's seat will remain vacant.

As if that was not troubling enough, OLC's opinion and Biden's prospective appointment raise grave problems going forward for presidential discretion in making judicial appointments. The OLC opinion acknowledges that the president's discretion comes to an end when he signs the commission appointing an individual to the bench, even if it is a prospective judicial appointment.

This would seem to indicate that, once the president has made such a prospective judicial appointment, he cannot revoke it, even if he were to attempt to do so prior to its effective date.

The OLC opinion states that so long as the prospective appointment is set to come into effect within the president's current four-year term, the prospective appointment is valid. But it is difficult to see what relevance a four-year term period has in this context.

If the president were to die or resign — much less change his mind — after signing the prospective appointment but before it is set to come into effect, under the OLC opinion his successor could not prevent the appointment from taking place, even if the new president believed that a different individual should fill the upcoming court vacancy.

Yet under Biden's actions and the OLC opinion, the new president would have no authority to revoke the prospective judicial appointment, despite the fact that no vacancy exists at this point and despite the fact that presidents have always had discretion over whether to appoint a Senate-confirmed nominee to the court.

If the OLC's opinion is correct, furthermore, why should it matter whether the president's prospective appointment will become effective within the president's current four-year term? The opinion gives no reason for limiting its rationale to this time limit. If the OLC's opinion is taken to its logical conclusion, it would allow Biden to nominate and, following Senate confirmation, prospectively appoint a successor to Justice Clarence Thomas, even though Justice Thomas has given no indication he intends to retire in the near future.

Even if Justice Thomas does not retire for another 15 years (he is currently 73), the OLC's opinion would allow Biden to prospectively appoint a successor to Justice Thomas right now, effectively hamstringing whoever is actually president at the time Justice Thomas actually announces his retirement. Because Biden's prospective appointment of Justice Thomas' successor would already be in place, the sitting president would have no authority to choose somebody else to fill Justice Thomas' office. As absurd as such a situation sounds, it is the logical conclusion of the OLC's opinion.

Biden Should Rescind the Prospective Appointment and Wait

Biden should rescind his prospective appointment and refrain from signing the commission appointing Judge Jackson to the Supreme Court until after Justice Breyer actually retires.

It is difficult to understand why Biden has taken such a convoluted course of action in seeking to place Judge Jackson upon the court. A Bloomberg News article suggests that it "might eliminate any theoretical possibility of the Senate trying to reconsider her confirmation." But if Justice Breyer retires no later than mid-July 2022, it is difficult, if not impossible, to see how the Senate's composition could change by that point to put her appointment in jeopardy.

The fact remains that by attempting to prospectively appoint Judge Jackson to the court, Biden has committed a legal nullity. Unless and until Biden signs a commission appointing Judge Jackson to the court following Justice Breyer's retirement, Justice Breyer's seat will remain open, regardless of whether Judge Jackson appears to actually be a member of the court. Indeed, a succeeding president could make the legitimate argument that Justice Breyer's office remains open, despite Judge Jackson purporting to being Justice Breyer's successor.

If Biden is serious about appointing Judge Jackson to the court, and if he is serious about maintaining the court's legitimacy, he should rescind his prospective appointment and refrain from appointing Judge Jackson to the court until after Justice Breyer's retirement takes effect. He owes it both to Judge Jackson herself and to the country to ensure there is no doubt as to the validity of Judge Jackson's appointment. Marbury v. Madison demands no less.[14]

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[1] The Bloomberg News story is available here.

[2] A PDF version of the opinion is available here.

[3] Whelan's article for National Review is available here.

[4] Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).

[5] Marbury, 5 U.S. at 157.

[6] U.S. Const. Art. 2 §2.

[7] Marbury, 5 U.S. at 155.

[8] Id.

[9] Id. at 162.

[10] Id.

[11] Id.

[12] Id. at 161.

[13] Id. at 161-162.

[14] On April 18, Ed Whelan published a short article on National Review arriving at this same conclusion. His article is available here.