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Junking Judicial Activism

As President Trump's executive order suspending the highly controversial (and highly dangerous) refugee program continues to work its way through the labyrinth of federal courts from one coast to the other, the question at the forefront of nearly every conversation about the subject is, "Is the executive order constitutional?" There is a principle, though, that says if you start by asking the wrong question, you are bound to end up with the wrong answer. The *real* question that needs to be answered before it affects this and other issues (as it has been doing for over 200 years) is, "Do federal courts (in general) and the Supreme Court (in specific) have the sole authority to interpret the Constitution and decide what is and is not constitutional?"

Case in point: ObamaCare. By overlooking the fundamental question and allowing the erroneous assumption that the Supreme Court is the final arbiter of what the Constitution means, the American people wound up with the wrong answer: that the misnamed and deliberately misguided Patient Protection and Affordable Care Act is constitutional. It is important to remember that the federal courts — Supreme and inferior — are part of the federal government; to accept the idea that they alone have the authority to interpret the Constitution is to allow the federal government of the United States unilateral authority to decide the boundaries of its own authority. Nothing could be further from the mind of the Founding Fathers, as we will see from their own writings later in this article.

The misbegotten notion that the Supreme Court — and by extension the inferior federal courts — has the unquestionable authority to interpret the Constitution (and thereby decide what is and is not constitutional) does not come from the Constitution itself, but from a decision made by — you guessed it — the Supreme Court. This gift from the court to itself dates back to the early days of the Republic. In 1803, while deciding the case *Marbury v. Madison*, the Supreme Court did not limit itself to deciding merely the case before it, but also whether or not the law in the case — Sec. 13 of the Judiciary Act of 1789 — was constitutional.

While the court's decision in *Marbury* marked the beginning of the federal judiciary as the final arbiter of what is and is not constitutional, President Thomas Jefferson disagreed with the court laying claim to that power. Jefferson wrote to Chief Justice John Marshall, "You seem to consider the judges as the ultimate arbiters of all constitutional questions; a very dangerous doctrine indeed, and one which would place us under the despotism of an oligarchy." Jefferson went on to write that since judges are "not responsible, as the other functionaries are, to the elective control" and have "the same passions for party, for power, and the privilege" as other men, "The Constitution has erected no such single tribunal,

knowing that to whatever hands confided, with the corruptions of time and party, its members would become despots."

That Jefferson's predictions have come true is a revelation to no one who pays attention. Given the propensity of federal judges to interpose their own agendas rather than apply the clear language of some laws — and the fact that those interpositions almost invariably lead to greater restrictions on the God-given liberties of American citizens — perhaps "despots" is the best word to describe them.

Coupled with — and growing out of — the error of allowing the federal judiciary to act as the final word on the meaning and application of the Constitution are the twin evils of case law and judicial activism. When a court makes a decision based on case law instead of the actual law as it is written, laws become pliable and are bent to the will of those shaping them. The result is that — in essence — the actual law is replaced by the most recent interpretation, which is in turn based on the previous interpretation. That this is the antithesis of what the Founding Fathers intended is obvious from Article I, Sec. 1: "All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives."

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If all of the legislative power granted by the Constitution belongs to Congress, then it is simple logic — and even simpler math — that none belongs to the judiciary. But by taking the power unto itself to be the sole decider of the meaning of the Constitution and then basing decisions on the precedent set by previous decisions, the federal judiciary has become the Great Lawgiver.

This cycle lends itself to its evil twin: judicial activism. In fulfillment of Jefferson's warning that judges "would become despots" if allowed unilateral authority to interpret the Constitution, there seems today to be a constant flow of activist judges who read into both the law and the Constitution what they want to see there. That President Trump's executive order to temporarily halt the refugee program has been stymied by being branded "unconstitutional" is a good illustration.

As this writer wrote in an online article for The New American dated February 10, 2017:

> On Thursday, the 9th Circuit Court of Appeals kept to its activist ways by refusing to allow President Trump's executive order suspending the controversial U.S. refugee program to be in effect as it continues to wind its way through the courts. The three-judge panel that denied the administration's request to lift the temporary restraining order on the executive order was unanimous in its decision.

The three judges on that panel — William Canby Jr., a Jimmy Carter appointee; Richard Clifton, a George W. Bush appointee; and Michelle Friedland, a Barack Obama appointee — wrote in their decision that the executive order likely violates "what due process requires, such as notice and a hearing prior to restricting an individual's ability to travel." The decision also says, "it is the Government's burden to make 'a strong showing that [it] is likely to' prevail against the States' procedural due process claims" and that the court is "not persuaded that the Government has carried its burden for a staying appeal."

What each of those judges chose to ignore is the fact that the presidents who appointed each of them issued similar "travel bans" during their times in the Oval Office. None of those bans were considered "unconstitutional." But then, none of those presidents were Donald Trump. This is a clear case of

judicial activism coming from a court that is famous for judicial activism. In fact, the Ninth Circuit Court of Appeals is one of the most overruled courts in the land. Between 2010 and 2015, the Supreme Court overturned about 80 percent of the cases it heard arising from the Ninth Circuit. Granted, the Supreme Court only hears cases where there are problems, but 80 percent is still an incredibly high failure rate.

Since the Constitution grants Congress alone the power to legislate, many representatives and senators spend a lot of time bemoaning the fact that too many judges customarily usurp that power. The solutions proposed are almost always at least as bad as the problem and lend themselves to a further perpetuation of the problem. Congress passes new laws — taking even more power to itself — rather than simply asserting its authority to limit the power of the judicial branch. The result is a federal government with greater and greater power and a people with fewer and fewer liberties. Then the cycle comes around again when the courts reinterpret those new laws, again legislating from the bench.

One example can be seen in the way the 1996 Defense of Marriage Act (DOMA) — defining marriage at the federal level as the union of one man and one woman — was struck down by the Supreme Court in 2013 as unconstitutional. The court then stood DOMA on its head when it ruled in 2015 that state laws defining marriage similarly were also unconstitutional — opening the floodgates for homosexual "marriage." By seeking to take power over that which the Constitution does not list as a federal power (the definition of marriage), Congress stacked the deck in favor of activist judges who were only too glad to deal a crooked hand to the American people.

While the Constitution offers solutions to reining in the out-of-control judiciary, Congress — benefiting from the expansion of government power — neglects or outright refuses to apply those solutions. And since — as Jefferson pointed out in 1803 — judges are "not responsible, as the other functionaries are, to the elective control" because they are appointed and not elected, it is up to the people to put pressure on those who are elected — and therefore able to be replaced in the next election — to begin applying those constitutional solutions.

Before we get into those solutions, let's spend a few minutes unpacking the issues we've already covered. If — as this writer has asserted — the judicial branch does not have sole authority to interpret the Constitution, what other bodies share in that authority? Fortunately, the Founding Fathers did not expect the American people to ratify the Constitution "to find out what's in it." Instead, they wrote prolifically on the meaning and application of the Constitution — both during and after the ratification process. In those writings, they said that the power to interpret that founding document belongs to the legislative, executive, and judicial branches of the federal government, the states, and the people. The following is just a brief sampling of those writings:

• In *The Federalist*, No. 32, Alexander Hamilton wrote, "But as the plan of the convention aims only at a partial union or consolidation, the State governments would clearly retain all the rights of sovereignty which they before had, and which were not, by that act, exclusively delegated to the United States."

• In *The Federalist*, No. 33, Hamilton wrote, "If the federal government should overpass the just bounds of its authority and make a tyrannical use of its powers, the people, whose creature it is, must appeal to the standard they have formed, and take such measures to redress the injury done to the Constitution as the exigency may suggest and prudence justify."

• In *The Federalist*, No. 78, Hamilton wrote, "[The judiciary] may truly be said to have neither FORCE nor WILL, but merely judgment; and must ultimately depend upon the aid of the executive arm even for

the efficacy of its judgments." (Emphasis in original.)

• In *The Federalist*, No. 81, Hamilton wrote, "In the first place, there is not a syllable in the plan under consideration which directly empowers the national courts to construe the laws according to the spirit of the Constitution, or which gives them any greater latitude in this respect than may be claimed by the courts of every State."

• In a 1789 speech before Congress, James Madison said, "Nothing has yet been offered to invalidate the doctrine that the meaning of the Constitution may as well be ascertained by the Legislative as by the Judicial authority."

• Madison also told Congress, "I acknowledge, in the ordinary course of government, that the exposition of the laws and Constitution devolves upon the judicial. But I beg to know upon what principle it can be contended that any one department draws from the Constitution greater powers than another in marking out the limits of the powers of the several departments."

• In the Virginia Resolution of 1798, Madison wrote, "In case of a deliberate, palpable, and dangerous exercise of other powers [by the federal government], not granted by the said compact [the Constitution], the states, who are parties thereto, have the right, and are in duty bound, to interpose, for arresting the progress of the evil, and for maintaining, within their respective limits, the authorities, rights and liberties, appertaining to them."

• In an 1804 letter to Abigail Adams, Thomas Jefferson wrote, "But the opinion which gives to the judges the right to decide what laws are constitutional and what not, not only for themselves in their own sphere of action but for the Legislature and Executive also in their spheres, would make the Judiciary a despotic branch."

From these few, brief quotes, it is evident that the Founding Fathers gave the United States a Constitution they intended to be interpreted by all three branches of the federal government, the states, and the people. That the Supreme Court decided in 1803 that it alone has that power does nothing to change the truth — even if it has obscured that truth.

As a direct result of that truth being obscured, judicial activism has become the norm. In fact, it is so common, so pervasive, it is rarely understood or recognized when it is seen. *Black's Law Dictionary* defines judicial activism as a "philosophy of judicial decision-making whereby judges allow their personal views about public policy, among other factors, to guide their decisions." A good example would be *Roe v. Wade*, where the Supreme Court "found" in the Constitution something that is simply not there — the "right" to murder the unborn. And having "found" that "right," the court went on to overstep even the most fundamental principle of its purpose by extending that "right" beyond those involved in the case before it, thus striking down all state laws forbidding abortion.

Roe is far from the only example. News cycle after news cycle is filled with examples of judges "legislating from the bench." The case of President Trump's executive order is — as this writer asserted above — yet another glaring example. In that case, judges in lower federal courts "found" (and the Ninth Circuit Court assented to) something in the Constitution's guarantee of due process that was never found when other presidents also stopped permitting travel into the United States from countries known to be hostile to this country.

President Trump's executive order temporarily suspending travel to the United States from seven

countries known for being hotbeds of terrorism was reasonable considering that a review of information compiled by the Senate Subcommittee on Immigration and the National Interest in 2016 showed that since 9/11, 72 individuals who were in the United States from those seven countries have been convicted in terrorism cases.

His executive order was also constitutional. Article IV, Section 4 says:

> The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence.

Furthermore, the president's actions were considered constitutional when done by presidents Carter (in 1980), Bush (in 2002), *and* Obama (in 2011 and 2015). They just weren't considered constitutional when done by Trump. And there's the rub. Constitutionality is not a matter of who (or which party) holds the office and issues the directives; it is a matter of what the Constitution allows and requires. As already shown, protecting the United States against an enemy invasion falls neatly into the category of that which is constitutional. Unfortunately, the activist judges who claim to have the only decoder ring that works to read the Constitution claim otherwise.

The fruit of judicial activism is never good; in this case it is dangerously bad.

So, what constitutional remedies are there to correct federal judicial activism and reform the judiciary? There are four. They are:

• Dissolve courts

• Impeach judges

• Restrict the appellate and original jurisdiction of the courts

• Nullification

First, it should be understood that when representatives and senators bemoan the evils of activist judges and propose new laws or amendments to the Constitution, they are playing a shell game with the American people. They already have the power, granted by the Constitution, to address those abuses — whether committed by lower federal courts or by the Supreme Court itself. To begin with, Article III of the Constitution creates the Supreme Court and *allows* Congress to create inferior courts. Article III, Section 1 says:

> The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

So the Constitution did not create the lower federal courts; Congress did. And what Congress created, Congress can uncreate.

That means that *every federal court* except the Supreme Court exists at the sufferance of Congress. If the representatives and senators who spend so much time using the activism of judges as a pretext for increasing the power of Congress really wanted to rein in judicial activism, Congress could simply dissolve any and all federal courts that practice judicial activism. No impeachment, no trial, no

recourse; just a downsizing of their jobs. They could just turn their robes in and go home.

The Ninth Circuit Court would be a great starting place.

The greatest upside to Congress doing this would be that, in one cataclysmic moment, judges in federal courts all over the country would realize that they could be next and would — if only to protect their jobs — dust off their copies of the Constitution and read over their job descriptions to make sure they are with the program.

Of course, impeachment is the more granular option. It is relatively rare for federal judges to be impeached, but it is not unheard of. One notable case involved G. Thomas Porteous, a judge of the U.S. District Court of the Eastern District of Louisiana who had lied to Congress during confirmation, accepted bribes, perjured himself during his own personal bankruptcy proceedings, and engaged "in a pattern of conduct that is incompatible with the trust and confidence placed in him as a Federal judge." Appointed by President Bill Clinton in 1994, Porteous was impeached by the House of Representatives in March 2010 and convicted by the Senate in December 2010. He was removed from the bench and disqualified forever from holding any office of honor or profit under the United States.

Since Article III says, "The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour," the bar for impeaching a judge is lower than that for impeaching a congressman or president. While Porteous was removed for actions involving actual crimes, the only job security guaranteed to federal judges by the Constitution is "during good behaviour." So when a judge legislates from the bench, he or she should be impeached, tried, found guilty of a lack of "good behaviour," and sent packing. As with the option of dissolving courts, it would likely only take making examples of a few judges to send a clear message that judicial activism will not be tolerated. On the flip side, as long as Congress refuses to use its power to dissolve courts and its power to impeach judges, it continues to send a message that judicial activism is a fringe benefit of serving on the bench.

Congress also has the power to restrict the jurisdiction of federal courts. Article III, Section 2, Clause 2 says:

> In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

Since Congress is given the power to make "exceptions" and "regulations" that remove or restrict the "appellate jurisdiction" of the Supreme Court and has the same and more authority over the inferior courts, there is no need for those courts — the Supreme Court included — to be allowed to continue behaving like black-robed high priests. Since Congress recognizes that it has this power (it has used it numerous times), there is no excuse for it not to use this power to curtail the abuses of the courts in other cases. Since Congress created all federal courts inferior to the Supreme Court, Congress can determine their jurisdictions, appellate or otherwise.

Congress has used its Article III power to restrict the jurisdiction of federal courts (including the Supreme Court) more times than space in this article allows this writer to cover in any detail. Two examples, though, should suffice to prove the point. As part of the REAL ID Act of 2005, which took effect May 11, 2005, Congress legislated that construction of a border fence near San Diego should go forward with "expeditious construction." Construction of the fence had already been ordered, but had

been held up for years by environmental lawsuits. In the REAL ID Act, Congress included a provision that "no court … shall have jurisdiction to hear any cause or claim" to stop construction of the fence.

Also, the Detainee Treatment Act of 2005 included a provision that "no court, justice or judge shall have jurisdiction to hear or consider" applications for habeas corpus or "any action against the United States" brought by alien suspects detained at Guantanamo Bay. The point is that Congress has this power, knows it has this power, and has used this power. It is time for Congress to use it in a way that restores the proper balance of power between the branches of the federal government.

Under a president such as Donald Trump — who, whatever his other failings may be, has shown his strong willingness to stand for the life of the unborn — Congress should pass a simple law removing the jurisdiction of the federal courts — Supreme Court included — to hear any case arising from the states concerning abortion laws. That one act of Congress would undo *Roe* and remove the illusion that only a future decision by the court can strike down a decision that has already cost the lives of more than 60 million unborn babies.

Of course this would have the added benefit of removing another illusion: the importance of Supreme Court appointments. Gone would be the argument that American voters have to choose between a greater evil and a lesser evil when selecting a president because "the next president could appoint as many as (fill in the blank) justices."

While the first three solutions are in the hands of Congress, the final one belongs to the states. Nullification of unconstitutional federal laws is a power derived from the very foundational principles upon which this country was founded. The Declaration of Independence asserts that to secure fundamental, God-given rights, "Governments are instituted among Men, deriving their just powers from the consent of the governed." The consent of the governed is important in that it has the flow of power in the correct order. Since that power flows from the people to the government — and not the other way around — the people are the masters and the government is the servant.

In forming the United States under the Constitution, it was understood that the federal government would only have those powers explicitly spelled out in the Constitution as belonging to it. Otherwise, those powers belonged to the states, which were already the creation of the people — unless the people had reserved those powers by not granting them to the states. To break it down, the people — who possess the power — created the states; the states, in turn, created the federal government. Since power flows from the people, the states cannot give the federal government what the people have reserved and the federal government cannot take power not given — explicitly, in writing — in the Constitution.

Nullification essentially denies the federal government any authority to enforce any federal law it does not have the specific authority to pass. This principle is addressed in the Kentucky and Virginia Resolutions of 1798 and 1799. Thomas Jefferson — who, having written the Declaration of Independence, may have known a thing or two about the subject — wrote the Kentucky Resolution while James Madison — who, having pulled together the Constitutional Convention, which he documented with copious notes, may also be considered an expert on both the proper role of government (in general) and the Constitution (in specific) — wrote the Virginia Resolution. In the turbulent times of the Alien and Sedition Acts, the Kentucky and Virginia Resolutions promoted the idea that state legislatures have the authority and the duty to nullify unconstitutional federal laws. As quoted

above, Madison wrote in the Virginia Resolution, "In case of a deliberate, palpable, and dangerous exercise of other powers [by the federal government], not granted by the said compact [the Constitution], the states, who are parties thereto, have the right, and are in duty bound, to interpose, for arresting the progress of the evil, and for maintaining, within their respective limits, the authorities, rights and liberties, appertaining to them."

Jefferson explained what it would look like for states "to interpose, for arresting the progress of the evil, and for maintaining, within their respective limits, the authorities, rights and liberties, appertaining to them." In the Kentucky Resolution he wrote:

> RESOLVED: That the principle and construction contended for by sundry of the state legislatures, that the general government is the exclusive judge of the extent of the powers delegated to it, stop nothing short of despotism; since the discretion of those who administer the government, and not the constitution, would be the measure of their powers:
> That the several states who formed that instrument, being sovereign and independent, have the unquestionable right to judge of its infraction; and that a nullification, by those sovereignties, of all unauthorized acts done under colour of that instrument, is the rightful remedy.

The great benefit of nullification — besides setting aside whatever unconstitutional law it would specifically address — is that it would put the federal government on notice that further encroachments into unconstitutional territory will be dealt with likewise.

Of course, nullification by the state legislatures of unconstitutional federal laws requires state legislators to be aware of what the Constitution says and means. It also requires that they are willing to stand up to the federal government, even when Uncle Sam attempts to "persuade" them to go along with unconstitutional laws and programs by either offering taxpayer money for those programs or by threatening to withhold funding for other programs. State legislatures need to be reminded that no one will ever slay a beast while suckling at its teat.

All four of these solutions require one thing in common: an informed electorate elevating men and women of high character to elected office and then holding them accountable to perform their duties to rein in an out-of-control federal government. When that informed electorate is finally full up of the abuses of the judiciary, the day will come when judicial activism and other judicial abuses will be a thing of the past. Life, Liberty, and Property will again be protected by a government that has been shown its proper place.

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