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Bad Intentions: The Immigration Order, the Judicial Power, and the Rule of Law

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This spring, President Donald Trump and the courts have clashed over immigration and national security policy. Federal judges in the Ninth Circuit have blocked the President's executive order seeking temporarily to halt immigration from several countries. Although applauded by many, the actions of these judges are inconsistent with the proper use of the judicial power and with the rule of law itself.

According to the judges in question, the President's order amounts to a ban on Muslim immigration and therefore violates the First Amendment's prohibition of "an establishment of religion." This claim seems puzzling. The executive order does not purport to prohibit Muslim immigration, sets up no religious test to govern immigration policy, and affects only a handful of predominantly Muslim countries and then only for a short period of time. In fact, the order leaves untouched immigration from many countries with very large Muslim populations.

Nevertheless, these judges contend that the order's real and allegedly unconstitutional character can be inferred from things that Donald Trump said while he was running for the presidency. After all, candidate Trump did (briefly) call for a (temporary) halt to Muslim immigration into the United States. On this view, while the executive order is not on its face a Muslim ban, its author intended it to act as one, and this is a sufficient basis on which to hold that it violates the Establishment Clause.

Some commentators have found it strange that a judge would seek the meaning of a legal document not in its actual words but instead in the rhetoric of a heated political campaign. In truth, however, the judges opposing the President have not invented this kind of inquiry themselves. They are following a trail blazed in some of the Supreme Court's recent Establishment Clause rulings, such as *McCreary County v. ACLU of Kentucky*[1] and *Wallace v. Jaffree*,[2] which look beyond the bare actions of the government in search of impermissible intentions behind them.

Ultimately, however, the critics are right to find the judges' behavior questionable. The early Supreme Court, under the leadership of the greatest Chief Justice, encountered but rejected such an approach to legal and constitutional questions. By turning to John Marshall, we discover both the reasons why America's founding jurists resisted judicial inquiry into the personal intentions of the lawgiver and the dangers that arise when judges pursue such a method of interpretation.

Marshall on Motive and Intention

As Chief Justice of the Supreme Court, John Marshall confronted the question of whether a court could properly examine the legitimacy of a legal act on the basis of the personal motivations that had led up to it. This issue arose in 1810 in *Fletcher v. Peck*,[3] a case in which the Court considered a Georgia law annulling an earlier act that had provided for the sale of public lands—a transaction widely known to

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have been tainted by corruption in the legislature. The Court ultimately concluded that the law seeking to annul the sale violated the Contracts Clause of the Constitution. Along the way, however, the justices also considered whether knowledge of the corrupt motives of the legislators could itself be grounds on which to find the initial sale invalid. Marshall threw cold water on the idea.

Marshall noted that the Court would have to "approach with great circumspection" the question of whether "impure motives" among the legislators could constitute grounds on which to nullify a law. "It may well be doubted," he observed, "how far the validity of a law depends upon the motives of its framers, and how far the particular inducements, operating on members of the supreme power of a state" could be "examinable in a court of justice." Such a mode of inquiry involved many difficulties:

> If the principle be conceded, that an act of the supreme sovereign power might be declared null by a court, in consequence of the means which procured it, still would there be much difficulty in saying to what extent those means must be applied to produce this effect. Must it be direct corruption, or would interest or undue influence of any kind be sufficient? Must the vitiating cause operate on a majority, or on what number of the members? Would the act be null, whatever might be the wish of the nation, or would its obligation or nullity depend upon the public sentiment? If the majority of the legislature be corrupted, it may well be doubted, whether it be within the province of the judiciary to control their conduct, and, if less than a majority act from impure motives, the principle by which judicial interference would be regulated, is not clearly discerned.[4]

In sum, Marshall drew back from an inquiry into the motives of the lawmaker because it required the Court to ask questions to which there could be no clear answers.

Marshall and the Court faced a similar question a few years later in *Sturgis v. Crowninshield*.[5] Here the Court had to determine whether the Contracts Clause applied to insolvency laws. For Marshall and the Court, the clear words of the clause gave no reason to exempt insolvency laws from its operation if those laws went so far as to impair the obligations of existing contracts.

Nevertheless, some argued that those who wrote the Contracts Clause would not have intended its prohibition to extend that far. After all, the authors of the Constitution were more immediately concerned with a narrower class of abuses, and insolvency laws had been common in the colonies and the states ever since America had been settled. This argument claimed to discern the spirit of the clause in the intentions of those who wrote it and further claimed that the Court ought to prefer this spirit to the obvious meaning of the words themselves.

Marshall rejected this line of argument. He agreed that "the spirit of an instrument, especially of a constitution, is to be respected not less than its letter." He immediately added, however, that "the spirit is to be collected chiefly from its words." Marshall contended that it "would be dangerous in the extreme, to infer from extrinsic circumstances, that a case for which the words of an instrument expressly provide, shall be exempted from its operation."[6]

Marshall did not entirely foreclose the possibility of looking beyond the text. He said that it could be "justifiable" for a court to depart "from the obvious meaning" of the "words" of a legal instrument if those words themselves were to "conflict with each other." In that case, "construction" would be necessary to resolve inconsistencies in the law itself. Moreover, he added, a judge might depart from the plain meaning of the words in the extreme—and unlikely—case that applying them to the facts at hand would result in an "absurdity and injustice" so "monstrous that all of mankind would, without hesitation, unite in rejecting the application." Apart from such unusual circumstances, however, it would be improper for

1. *McCreary County v. ACLU of Kentucky*, 545 U.S. 844 (2005).
2. *Wallace v. Jaffree*, 472 U.S. 38 (1985).
3. *Fletcher v. Peck*, 10 U.S. 87 (1810).
4. Ibid.
5. *Sturgis v. Crowninshield*, 17 U.S. 122 (1819).
6. Ibid.

a court to disregard the "plain meaning of a provision" by claiming to "believe that the framers of the instrument could not intend what they say."[7]

Trump's Intentions

If we return to the present controversy, we see that according to John Marshall's standards, today's anti-Trump judges are acting improperly. The conditions that Marshall said could justify going beyond the words of the legal text do not exist in the case of the President's immigration order. The words of the executive order do not conflict with each other, nor would the enforcement of the order lead to an absurdity or injustice so gross that no one could approve it. Although one might doubt the necessity or propriety of the measure, one can hardly contend seriously that it is a flagrant absurdity or injustice to declare a temporary stop to immigration from a handful of countries known to have problems with terrorism.

At this point, one might well ask why modern judges should submit to Marshall's authority on this question. In response, we might observe that this reluctance to go beyond the words of the legal text is not just John Marshall's idiosyncratic preference. In both of the cases discussed above, Marshall was speaking for a large majority of the Supreme Court, including both Federalist and Jeffersonian appointees. To that extent, Marshall appears to have been speaking for the Founding generation's understanding of the proper exercise of the judicial power.

More important, Marshall's opinions in these cases provide reasons why such an interpretation—seeking intentions outside the words of the text—ought to be avoided. In *Sturgis v. Crowninshield*, Marshall suggested that this kind of judicial inquiry is "dangerous," and in *Fletcher v. Peck*, he explained why.

In *Fletcher*, Marshall noted that such a mode of interpretation quickly takes a court into a realm in which it can find no clear, consistent, and compelling justifications for the exercise of its power. As he observed, if the improper intentions of the legislators are grounds on which to invalidate an act undoubtedly within the power of the legislature, then the court will be obliged to figure out to what extent such corruption must go in order to nullify the law. Must it be total corruption or just undue influence? Must it infect the whole majority that passed the law or just certain members of it? There are no certain legal answers to such questions.

These problems arise even in the case of a legal document like the current executive order on immigration, produced under the authority of a single person, the President. It is commonplace for the motives or intentions of even a single actor to be complex.

Even if one were to concede, for example, that President Trump on some level intended his executive order to act as a limited "Muslim ban," it is obvious that he intended other things as well. He also surely intended to make the nation somewhat safer by more strictly regulating immigration from nations that have problems with terrorism. If courts go beyond the words of the order itself to find the "real" intention behind it, why should they privilege an intention they regard as unacceptable while discounting other intentions that are permissible?

In fact, no purely disinterested inquiry into the President's personal motives could possibly prove that he intended the order to act as a "Muslim ban." During the campaign, the President suggested the possibility of some such temporary measure. In the course of the campaign, however, he abandoned the idea and indicated that it had "evolved" into something else. And after being elected President, he issued the executive order itself—an act distinct from his campaign musings and one that, contrary to those musings, does not attempt to ban Muslims from entering the United States.

The judges who have blocked the order can plausibly contend that some anti-Muslim intention eventually led up to it. One could just as plausibly contend, however, that the order is not animated by such an intention precisely because criticism of the idea—both from his opponents and from his own advisers—had convinced the President that such a ban was not necessary or appropriate. The Administration contends that it does not intend the executive order to operate as any kind of Muslim ban. If one goes beyond the words of the text in search of the President's personal intentions, there is no reason to fasten upon what he said about his intentions a year ago and to ignore what he says about them now.

7. Ibid.
8. Alexander Hamilton, James Madison, and John Jay, *The Federalist*, ed. Jacob E. Cooke (Middletown, CT: Wesleyan University Press, 1961), p. 523.

Conclusion

The most authoritative commentary on the American judicial power—Alexander Hamilton's *Federalist* 78—assures us that judges will not exercise "will," but only "judgment."[8] Keeping that promise requires courts to work from objective facts—like the words of the law and the Constitution—that conduct them to rationally compelling outcomes and to avoid ambiguous and contestable phenomena—like the personal or subjective intentions of government officials—that can be manipulated to attain an outcome that the judges find politically desirable.

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