



2017

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Recommended Citation

Paul Babie, *"Politics!": Of Course! A Reflection on Washington v. Trump*, 67 Emory L. J. Online 2001 (2017).

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“POLITICS!”? OF COURSE!

A REFLECTION ON WASHINGTON V. TRUMP

*Paul Babe**

ABSTRACT

Were the decisions in Washington v. Trump political? Of course they were! While some may not care to admit it, President Trump correctly identifies—albeit for the wrong reasons—the political nature of the decisions. Rather than rendering them illegitimate, as the President suggested, the political nature of the District Court and Ninth Circuit Court of Appeals decisions is the very essence of their legitimacy and validity. This Essay explains why.

We all know now, though the thought was once generally considered a heresy, that courts legislate in the process of developing the common law.¹

I. WASHINGTON V. TRUMP

On January 27, 2017, acting pursuant to section 212(f) of the Immigration and Nationality Act of 1952 and 3 U.S.C. § 301, President Donald Trump signed Executive Order 13769 (EO 13769), entitled “Protecting the Nation from Foreign Terrorist Entry into the United States.”² Among other things, EO 13769 suspended the United States Refugee Admissions Program for 120 days, restricted admission of citizens from seven Muslim-majority countries for ninety days, ordered a list of countries for entry restrictions after the initial ninety days, suspended admission of Syrian refugees indefinitely, and prioritized refugee claims by individuals from minority religions on the basis of religious-based persecution.³ The initial effect of EO 13769 resulted in the detention of people who were previously approved to travel to the United

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¹ Robert L. Hale, *Commissions, Rates, and Policies*, 53 HARV. L. REV. 1103, 1143 (1940).

² Exec. Order No. 13769, 82 Fed. Reg. 8,977 (Jan. 27, 2017). The order was promulgated pursuant to the Immigration and Nationality Act of 1952, 8 U.S.C. §§ 212(e) (2012).

³ Exec. Order No. 13769, 82 Fed. Reg. 8,977, 8,978–80 (Jan. 27, 2017).

States either at their departure airports or at airports upon arrival in the United States.⁴

Washington and Minnesota brought suit in the U.S. District Court for the Western District of Washington, arguing that EO 13769 was unconstitutional and illegal, and sought a temporary restraining order (TRO) to prevent its implementation pending the litigation on the merits.⁵ On February 3rd, U.S. District Judge Robart granted the nationwide TRO sought by Washington and Minnesota,⁶ and on February 9th, the United States Court of Appeals for the Ninth Circuit (Judges Canby, Clifton, and Friedland) unanimously upheld it.⁷

Pursuant to en banc procedure, all members of a Circuit Court of Appeals may rehear the original decision of a panel selected from that court;⁸ the U.S. Federal Rules of Appellate Procedure allow a Circuit Court to establish its own en banc procedure, which the Ninth Circuit has done.⁹ Pursuant to that procedure, following the issuance of a three-judge panel order or opinion, the parties are entitled to seek reconsideration before an en banc panel. Alternatively, another circuit judge may request that a vote be held on whether a decision should be reheard by an en banc panel, even if the parties have not requested it.¹⁰ Under this latter procedure, known as a “sua sponte en banc call,” the circuit judge who made the request is not identified and the parties are typically requested to provide their thoughts as to whether a case should be reheard en banc before the full Circuit Court conducts a vote.¹¹ An order of the

⁴ Michael D. Shear et al., *Judge Blocks Trump Order on Refugees Amid Chaos and Outcry Worldwide*, N.Y. TIMES (Jan. 28, 2017) <https://www.nytimes.com/2017/01/28/us/refugees-detained-at-us-airports-prompting-legal-challenges-to-trumps-immigration-order.html>.

⁵ *State v. Trump*, No. C17-0141JLR, slip op. at 1 (W.D. Wash. Feb. 3, 2017). Massachusetts, New York, Virginia and Washington, as well as San Francisco sued the federal government, alleging violations of the U.S. Constitution’s guarantees of religious freedom. Scott Malone & Dan Levine, *Challenges to Trump’s Immigration Orders Spread to More U.S. States*, REUTERS (Jan. 31, 2017, 9:24 AM) <http://www.reuters.com/article/us-usa-trump-immigration-sanfrancisco-idUSKBN15F2B1>; see Andrew Liptak, *In the Last 24 Hours, Four Federal Courts Have Objected to Trump’s Actions: Here’s Where We Stand*, VERGE (Jan. 29, 2017, 12:33 PM) <http://www.theverge.com/2017/1/29/14430082/four-federal-courts-ruled-trump-immigration-ban>.

⁶ *Trump*, No. C17-0141JLR, slip op. at 2–3.

⁷ *Washington v. Trump*, 853 F.3d 933 (9th Cir. 2017), *amended and superseded by* 858 F.3d 1168 (9th Cir. 2017).

⁸ 28 U.S.C. § 46(c) (2012).

⁹ FED. R. APP. P. 35 (providing rule for en banc determination); see also 9TH CIR. R. 35-1 (providing rule for petition for rehearing en banc); U.S. Court of Appeals for the Ninth Circuit, General Orders ch. 5 (providing general orders regarding en banc procedures).

¹⁰ Media Advisory, U.S. Courts for the Ninth Circuit, Ninth Circuit En Banc Procedure Summary (Feb. 10, 2017).

¹¹ *Id.*

Chief Judge or En Banc Coordinator makes the briefing request.¹² Upon receipt of the briefs filed by the parties, a vote is held.¹³ To succeed, such a vote must attract a majority of the twenty-nine active, non-recused judges of the Ninth Circuit to proceed to en banc reconsideration, which would include the Chief Judge and ten non-recused, randomly drawn judges.¹⁴

In the *Washington v. Trump* litigation, a Ninth Circuit judge made such a request, whereupon Chief Judge Sidney Thomas issued an order directing the parties to file briefs by February 16th.¹⁵ The motion failed, however, to attract a majority of votes,¹⁶ and due to the revocation and replacement of EO 13769 (see *infra*), on March 9th the United States moved voluntarily to dismiss its appeal in the matter.¹⁷ Nonetheless, on March 17th, Circuit Judges Reinhardt and Berzon wrote opinions concurring with the denial of en banc reconsideration, and Circuit Judges Kozinski, Bybee, and Bea wrote dissents.¹⁸ In so doing, those judges expressed views concerning the positions taken in the published opinion of Judges Canby, Clifton, and Friedland.¹⁹

While the en banc vote and voluntary dismissal in *Washington v. Trump* was working its way through the Ninth Circuit Court of Appeals, on March 6th, President Trump revoked EO 13769 and replaced it with Executive Order 13780 (EO 13780).²⁰ Like its predecessor, EO 13780 restricted admission to and halted new visa applications of citizens from six of the seven countries covered by EO 13769 for ninety days, ordered a list of countries for entry restrictions after the initial ninety days, and suspended admission of refugees for 120 days who do not possess either a visa or valid travel documents.²¹ EO 13780 contained no mention of prioritized refugee claims by individuals from minority religions on the basis of religious-based persecution.²²

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.* For en banc procedures and the empirical likelihood of en banc review, see JENNIFER BARNES BOWIE ET AL., *THE VIEW FROM THE BENCH AND CHAMBERS: EXAMINING JUDICIAL PROCESS AND DECISION MAKING ON THE U.S. COURTS OF APPEALS* 203–27 (2014).

¹⁵ Media Advisory, U.S. Courts for the Ninth Circuit, *supra* note 10.

¹⁶ *Washington v. Trump*, 853 F.3d 933, 935 (9th Cir. 2017).

¹⁷ Appellants’ Motion for Voluntary Dismissal, 853 F.3d 933 (2017) (No. 17-35015).

¹⁸ *Washington v. Trump*, 858 F.3d 1168 (9th Cir. 2017).

¹⁹ *See id.*

²⁰ Exec. Order No. 13780, 82 Fed. Reg. 13,209 (Mar. 6, 2017). The order was promulgated pursuant to the *Immigration and Nationality Act of 1952*, 8 U.S.C. §§ 212(e) (2012).

²¹ Exec. Order No. 13780, 82 Fed. Reg. 13,209 (Mar. 6, 2017). Iraq was left off the revised list. *Id.*

²² *Id.*

Immediately upon its promulgation, the State of Hawaii and the International Refugee Assistance Project (IRAP) brought suits against the United States in the U.S. District Court for the Districts of Hawaii and Maryland, respectively, claiming that EO 13780 was illegal and unconstitutional for the same reasons as those relied upon in the litigation involving EO 13769.²³ On March 15, the district court judges in both cases issued nationwide TROs with respect to parts of EO 13780, pending full review on the merits.²⁴ In doing so, District Judge Derrick Watson of Hawaii held that statements made by the President beyond the scope of EO 13780 indicated that it was likely motivated by anti-Muslim sentiment, in violation of the Establishment Clause of the U.S. Constitution.²⁵ District Judge Theodore Chuang in Maryland issued a TRO for the same reasons.²⁶ On March 17, the United States filed a notice of appeal of District Judge Chuang's Order in the U.S. Court of Appeals for the Fourth Circuit.²⁷ On March 29, Judge Watson issued an order converting the TRO granted in Honolulu on March 15 to a Preliminary Injunction.²⁸ The Fourth Circuit Court of Appeals upheld District Judge Chuang's order, finding that the travel ban imposed by EO 13780 "drips with religious intolerance, animus and discrimination."²⁹ The Ninth Circuit Court of Appeals soon followed the Fourth, upholding the injunction issued by District Judge Watson.³⁰ On June 26, the Supreme Court granted the United States' petitions for certiorari and consolidated the *IRAP* and *Hawaii* cases for oral argument, scheduled for the October Term 2017.³¹

²³ Richard Gonzales et al., *Trump Travel Ban Blocked Nationwide by Federal Judges in Hawaii, Maryland*, NPR (Mar. 15, 2017, 8:01 AM), www.npr.org/sections/thetwo-way/2017/03/15/520171478/trump-travel-ban-faces-court-hearings-by-challengers-today.

²⁴ *Id.*

²⁵ *State v. Trump*, 241 F. Supp. 3d 1119 (D. Haw. 2017).

²⁶ *Int'l Refugee Assistance Project v. Trump*, 241 F. Supp. 3d 539 (D. Md. 2017).

²⁷ *Notice of Appeal, Int'l Refugee Assistance Project v. Trump*, 241 F. Supp. 3d 539 (D. Md. 2017) (No. 8:17-CV-00361-TDC).

²⁸ *Order Granting Motion to Convert Temporary Restraining Order to a Preliminary Injunction, State v. Trump*, 241 F. Supp. 3d 1119 (D. Haw. 2017) (No. 17-00050 DKW-KSC).

²⁹ *Int'l Refugee Assistance Project v. Trump*, 857 F.3d 554, 572 (4th Cir. 2017), *vacated as moot*, No. 16-1436, 2017 WL 4518553 (Oct. 10, 2017); S.M., *Dripping with a Court's Contempt: An Appeals Court Deals Another Blow to Donald Trump's Travel Ban*, *ECONOMIST* (May 26, 2017), http://www.economist.com/blogs/democracyinamerica/2017/05/dripping-court-s-contempt?cid1=cust/ddnew/n/n/n/20170526n/owned/n/n/nw/n/n/ap/Daily_Dispatch/email&etear=dailydispatch.

³⁰ *Hawaii v. Trump*, 859 F.3d 741 (9th Cir. 2017), *cert. granted sub nom. Trump v. Int'l Refugee Assistance Project*, 137 S. Ct. 2080 (2017).

³¹ *Trump v. Int'l Refugee Assistance Project*, 137 S. Ct. 2080, 2086 (2017) (per curiam). The Court also granted the Government's stay applications with respect to the preliminary injunctions, narrowing the scope of the injunctions as to § 2(c) and § 6(a)–(b) of EO 13780, so as not to enforce those provisions against "foreign

On September 24, however, President Trump issued a revised version of the travel ban in Proclamation No. 9645 (EO-3),³² couched in terms similar to those found in the earlier two EOs, adding Chad, North Korea, and Venezuela, and removing Sudan from the list of countries for restricted admission. As a consequence of EO-3, the Supreme Court, which had scheduled the oral argument in the *IRAP* and *Hawaii* appeals for October 10, having sought written submissions from the parties, dismissed as moot and vacated the Fourth Circuit opinion in *IRAP*.³³ The Supreme Court is expected to do the same in the *Hawaii* appeal. Notwithstanding the mootness of those appeals, commentators expect the constitutionality of EO-3 ultimately to reach the Supreme Court, possibly as early as this year. Indeed, the process that will lead the EO-3 travel ban back to the Supreme Court began on October 17, when District Judge Watson in the U.S. District Court for the District of Hawaii issued a TRO of EO-3.³⁴

The complex litigation surrounding the three iterations of a travel ban promulgated by President Trump provides a fascinating account of the interplay between executive power and immigration. This Essay, however, focuses on President Trump’s comments as they relate to *Washington v. Trump*, the work of District Judge Robart and Circuit Judges in the Ninth Circuit Court of Appeals—both in the original opinion of Judges Canby, Clifton, and Friedland and in the en banc opinions of Judges Reinhardt,

nationals who have a credible claim of a bona fide relationship with a person or entity in the United States;” all other foreign nationals were left subject to the provisions of EO 13780. *Id.* at 2088. On June 29, Hawaii filed a Memorandum in Support of Emergency Motion to Clarify Scope of Preliminary Injunction. *State v. Trump*, No. 1:17-CV-00050-DKW-KSC (June 29, 2017) (seeking a clarification of the District Court’s injunction in response to the Trump Administration’s statements about its plans to implement the Executive Order in its entirety). The District Court of Hawaii denied the request on July 6. *State v. Trump*, No. 1:17-CV-00050-DKW-KSC, 2017 WL 2882696 (D. Haw. July 6, 2017) (having modified the preliminary injunction on June 19). The Ninth Circuit, in an order filed on July 7, dismissed the Government’s emergency appeal of the District Court’s July 6th order denying the request for clarification. *Hawaii v. Trump*, 863 F.3d 1102 (9th Cir. 2017). On July 19, the Supreme Court denied the Government’s motion seeking clarification of its order of June 26, and stayed the District Court’s March 29th order modifying the preliminary injunction with respect to refugees covered by a formal assurance pending resolution by the Ninth Circuit. *Trump v. Hawaii*, No. 16-1540 (16A1191), 2017 WL 3045234 (July 19, 2017). In an opinion filed on September 7, the Ninth Circuit affirmed the enforceable scope of the EO 13780, as found in the District Court’s March 29th order (as modified on June 19), and staying implementation of the EO with respect to both family members and refugees. *Hawaii v. Trump*, 871 F.3d 646 (9th Cir. 2017). On September 11th, the Supreme Court granted a partial stay of this second Ninth Circuit mandate with respect to refugees covered by a formal assurance of an agent. *Trump v. Hawaii*, No. 17A275, 2017 WL 3975174 (Sept. 11, 2017).

³² Proclamation No. 9645, 82 Fed. Reg. 45,161 (Sept. 24, 2017).

³³ *Trump v. Int’l Refugee Assistance Program*, No. 16-1436, 2017 WL 4518553 (Oct. 10, 2017).

³⁴ *Hawaii v. Trump*, No. 17-00050 DKW-KSC (Oct. 17, 2017).

Berzon, Kozinski, Bybee, and Bea. In a series of tweets, President Trump shared his thoughts about the work of these judges as the case progressed through the District and Ninth Circuit Courts.³⁵ The day after the District Court granted the TRO, February 4, President Trump tweeted five times:

The opinion of this so-called judge, which essentially takes law-enforcement away from our country, is ridiculous and will be overturned!³⁶

What is our country coming to when a judge can halt a Homeland Security travel ban and anyone, even with bad intentions, can come into U.S.?³⁷

Because the ban was lifted by a judge, many very bad and dangerous people may be pouring into our country. A terrible decision[.]³⁸

Why aren't the lawyers looking at and using the Federal Court decision in Boston, which is at conflict with ridiculous lift ban decision?³⁹

³⁵ Interestingly, President Trump failed to tweet in relation to the TROs issued by Judges Watson and Chuang, choosing instead to speak publicly in Nashville, Tennessee on March 15, saying that Judge Watson's TRO was "an unprecedented judicial overreach," threatening to appeal ultimately to the U.S. Supreme Court if necessary, in the interest of national security. Gene Johnson et al., *Trump's Muslim Rhetoric Key Issue in Travel Ban Rulings*, PBS NEWSHOUR (Mar. 17, 2017, 4:46 PM) <http://www.pbs.org/newshour/runtdown/trumps-muslim-rhetoric-key-issue-travel-ban-rulings/>.

³⁶ Donald J. Trump (@realDonaldTrump), TWITTER (Feb. 4, 2017, 5:12 AM), https://twitter.com/realDonaldTrump/status/827867311054974976?ref_src=twsrc%5Etfw&ref_url=http%3A%2F%2Fwww.mcclatchydc.com%2Fnews%2Fpolitics-government%2Fwhite-house%2Farticle130780834.html.

³⁷ Donald J. Trump (@realDonaldTrump), TWITTER (Feb. 4, 2017, 12:44 PM), https://twitter.com/realDonaldTrump/status/827981079042805761?ref_src=twsrc%5Etfw&ref_url=http%3A%2F%2Fwhatdidtrumpdotoday.com%2Fdonald-trump-february-4-2017%2F.

³⁸ Donald J. Trump (@realDonaldTrump), TWITTER (Feb. 4, 2017, 1:44 PM), https://twitter.com/realDonaldTrump/status/827996357252243456?ref_src=twsrc%5Etfw&ref_url=http%3A%2F%2Fwhatdidtrumpdotoday.com%2Fdonald-trump-february-4-2017%2F.

³⁹ Donald J. Trump (@realDonaldTrump), TWITTER (Feb. 4, 2017, 3:37 PM), https://twitter.com/realDonaldTrump/status/828024835670413312?ref_src=twsrc%5Etfw&ref_url=http%3A%2F%2Fwhatdidtrumpdotoday.com%2Fdonald-trump-february-4-2017%2F.

The judge opens up our country to potential terrorists and others that do not have our best interests at heart. Bad people are very happy!⁴⁰

And twice on February 5:

Just cannot believe a judge would put our country in such peril. If something happens blame him and court system. People pouring in. Bad!⁴¹

I have instructed Homeland Security to check people coming into our country VERY CAREFULLY. The courts are making the job very difficult!⁴²

On February 8, prior to the release of Ninth Circuit’s judgment upholding the TRO:

If the U.S. does not win this case as it so obviously should, we can never have the security and safety to which we are entitled. Politics!⁴³

Immediately after the unanimous judgment of the Ninth Circuit upholding the TRO on February 9, President Trump tweeted:

SEE YOU IN COURT, THE SECURITY OF OUR NATION IS AT STAKE!⁴⁴

⁴⁰ Donald J. Trump (@realDonaldTrump), TWITTER (Feb. 4, 2017, 4:48 PM), https://twitter.com/realDonaldTrump/status/828042506851934209?ref_src=twsrc%5Etfw&ref_url=http%3A%2F%2Fwhatdidtrumpdotoday.com%2Fdonald-trump-february-4-2017%2F.

⁴¹ Donald J. Trump (@realDonaldTrump), TWITTER (Feb. 5, 2017, 12:39 PM), https://twitter.com/realDonaldTrump/status/828342202174668800?ref_src=twsrc%5Etfw&ref_url=http%3A%2F%2Fwww.miamiherald.com%2Fnews%2Fpolitics-government%2Farticle130919284.html.

⁴² Donald J. Trump (@realDonaldTrump), TWITTER (Feb. 5, 2017, 12:42 PM), https://twitter.com/realDonaldTrump/status/828343072840900610?ref_src=twsrc%5Etfw&ref_url=http%3A%2F%2Fwww.miamiherald.com%2Fnews%2Fpolitics-government%2Farticle130919284.html.

⁴³ Donald J. Trump (@realDonaldTrump), TWITTER (Feb. 8, 2017, 4:03 AM), https://twitter.com/realDonaldTrump/status/829299566344359936?ref_src=twsrc%5Etfw&ref_url=http%3A%2F%2Fdonald.trumptwitter.online%2F2017%2F02%2Fwednesday-february-8-2017.html.

⁴⁴ Donald J. Trump (@realDonaldTrump), TWITTER (Feb. 9, 2017, 3:35 PM), https://twitter.com/realDonaldTrump/status/829836231802515457?ref_src=twsrc%5Etfw&ref_url=http%3A%2F%2Fwww.charlotteobserver.com%2Fnews%2Fpolitics-government%2Farticle131638449.html.

President Trump's tweets clearly sought to criticize the four federal judges involved in the District Court and the original opinion of the Ninth Circuit. The tweet of February 8 concludes with a single exclamatory word: "Politics!" President Trump delivered a speech a few hours after the February 8th tweet, in which "he called the hearing 'disgraceful,' complained that the courts are 'so political' and said that 'if these judges wanted to, in [his] opinion, help the court in terms of respect for the court, they'd do what they should be doing.'"⁴⁵

Taken together, the February 8th tweet and speech implied that these four judges were acting in a politically motivated way. In President Trump's view, these judges were acting in opposition to "the law;" in this case the protection of national security through the promulgation of an Executive Order pursuant to the Presidential power to so act conferred by Congress in the Immigration and Nationality Act of 1952.⁴⁶ Additionally, the February 8th tweet further implied that the judges would be acting extra-legally and illegitimately, particularly if the Ninth Circuit upheld the TRO. When considered within the context of the entirety of the tweets and their criticism of the judges involved, it appears as though the President intended to use "Politics!" in an equally critical way, implying that because the judges were somehow acting politically, they were also acting illegitimately, rendering their opinions invalid for that reason.

People who opposed EO 13769, commenting on the Trump litigation, seemed aghast that the President would refer to the courts as political entities, their actions motivated by, as President Trump put it, "Politics!" People who took that position argued that the courts were acting entirely legitimately, according to the principles of justice and the rule of law, as one would expect in a nation governed by laws and not by people.⁴⁷ Those who supported EO 13769, however, were equally dismayed, arguing that the courts were clearly acting politically and that they ought to be guided by the rule of law—by which it is presumably intended that the United States is a government of law, not of people.⁴⁸

⁴⁵ Editorial Board, Opinion, *After Mr. Trump's Din, the Quiet Grandeur of the Courts*, N.Y. TIMES (Feb. 8, 2017), <https://www.nytimes.com/2017/02/08/opinion/after-mr-trumps-din-the-quiet-grandeur-of-the-courts.html>.

⁴⁶ Exec. Order No. 13769, 82 Fed. Reg. 8,977 (Jan. 27, 2017) (preamble).

⁴⁷ See, e.g., Editorial Board, *supra* note 42; Melissa Coade, *Former Chief Justice Takes on Trump and the Rule of Law*, LAW. WKLY. (Feb. 14, 2017), http://www.lawyersweekly.com.au/news/20533-former-chief-justice-takes-on-trump-and-the-rule-of-law?utm_source=LawyersWeekly&utm_campaign=14_02_17&utm_medium=email&utm_content=1.

⁴⁸ See Mathew Ingram, *How Trump's Tweets Helped Convince the Appeals Court to Reject His Travel*

So, the question arises: Were the decisions in *Trump* political? Of course they were! While people of all political stripes may not care to admit it, President Trump was right about the political nature of the decisions. He was right, but for the wrong reasons. The political nature of these decisions, far from rendering them illegitimate and invalid, is the very essence of their legitimacy and validity. This Essay explains why. Part I set the scene by providing the background to the travel bans and the surrounding litigation. Part II theorizes the political nature of the work of courts. Part III considers how the opinions of the District Court and the Ninth Circuit—both the original panel and those of the judges who wrote as part of the en banc process—in *Washington v. Trump* demonstrate the political nature of a court’s work. Part IV concludes that the decisions are legitimate because they are political. Indeed, that is true of any such decision, including those given and those to come, as part of the litigation surrounding the travel ban.

II. ARE COURTS POLITICAL? OF COURSE THEY ARE!

There is ample evidence supporting the fact that what judges, especially American judges, do is political. *The Brethren*, written in 1979, offers an at once fascinating and astounding account of the inner workings of the U.S. Supreme Court.⁴⁹ It reveals that judgments depend on the same horse-trading and deal-making that one expects to find as part of the politicking that goes on every day in any legislature.⁵⁰ Again and again, the account highlights the importance of “counting votes” during the conferences at which justices decide who will write opinions in the cases before the Court, as if all that mattered was a form of democratic majoritarianism rather than the objectivity of justice and the rule of law.⁵¹

But perhaps such internal judicial democracy *is* happening. Justice William Brennan once referred to this vote counting as the “rule of five”:

At some point early in their clerkships, Brennan asked his clerks to name the most important rule in constitutional law. Typically they fumbled, offering *Marbury v. Madison* or *Brown v. Board of Education* as their answers. Brennan would reject each answer, in

Ban, FORTUNE (Feb. 10, 2017), <http://fortune.com/2017/02/10/donald-trump-appeals-court-tweets-travel-ban/>.

⁴⁹ See generally BOB WOODWARD & SCOTT ARMSTRONG, *THE BRETHREN: INSIDE THE SUPREME COURT* (1979).

⁵⁰ *Id.*

⁵¹ *Id.*

the end providing his own by holding up his hand with the fingers wide apart. This, he would say, is the most important rule in constitutional law. Some clerks understood Brennan to mean that it takes five votes to do anything, others that with five votes you could do anything.⁵²

That doesn't sound very much like an impartial and apolitical judge in a court made up of similarly independent jurists working from objective principles like justice, the rule of law, and government of law, not of people. It rather sounds a lot like a pork-barrelling, horse-trading, deal-making politician—as the justices themselves admit in *The Brethren*—“counting the votes” needed to get the deal done.⁵³

The American legal realists theorized this point in the 1920s and 1930s,⁵⁴ critiquing the Supreme Court, and its rejection of President Franklin Delano Roosevelt's New Deal legislation of the 1930s, on seemingly constitutional protection of the right to freedom of contract as enunciated in *Lochner v. New York*.⁵⁵ President Roosevelt threatened to “pack the Court”—with an additional Justice, up to a maximum of six, for every member of the court over the age of seventy years and six months⁵⁶—if it continued to strike down his legislation. The famous “switch in time that saved nine” occurred when Justice Owen Roberts of the U.S. Supreme Court, in the 1937 case *West Coast Hotel Co. v. Parrish*,⁵⁷ upheld the impugned law on seemingly the same constitutional grounds. The switch itself is today seen as a strategic (read political) move designed to save the nine-member Court.⁵⁸ This prompted the legal realists to argue that law was political, as demonstrated by Roberts's changed vote that saved the nine-member Supreme Court.⁵⁹

⁵² Mark Tushnet, *Themes in Warren Court Biographies*, 70 N.Y.U. L. REV. 748, 763 (1995).

⁵³ See WOODWARD & ARMSTRONG, *supra* note 49. See generally TERRI JENNINGS PERETTI, IN DEFENSE OF A POLITICAL COURT (1999).

⁵⁴ See, e.g., JEROME FRANK, LAW AND THE MODERN MIND (1930).

⁵⁵ *Lochner v. New York*, 198 U.S. 45 (1905).

⁵⁶ WILLIAM E. LEUCHTENBURG, THE SUPREME COURT REBORN: THE CONSTITUTIONAL REVOLUTION IN THE AGE OF ROOSEVELT 124 (1995) (summarizing the Judicial Procedures Reform Bill of 1937). See generally MARIAN C. MCKENNA, FRANKLIN ROOSEVELT AND THE GREAT CONSTITUTIONAL WAR: THE COURT-PACKING CRISIS OF 1937 (1st ed. 2002).

⁵⁷ *W. Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937).

⁵⁸ *A Stitch in Time Saves Nine*, GEORGE MASON U., http://mason.gmu.edu/~dcurrie/English_344/Photo_Remix.html (last visited Oct. 16, 2017).

⁵⁹ *Supreme Shifts*, WILSON Q., Winter 2006, at 68, 68–69.

In American legal realism one finds the intellectual origins of the critical legal studies (CLS) movement, which developed and sharpened the critique of law as a determinate body of rules.⁶⁰ A project aimed at revealing the hidden interests and class domination of law found in liberal legal institutions, “[a]t its most basic level, the CLS movement challenges society to consider some ultimate questions about the validity of its own institutions and to reconsider some past ‘ultimate answers’ upon which those institutions are based.”⁶¹ In short, the law was revealed to be part of the liberal (and today, neo-liberal) project designed to support and perpetuate those institutions of economic power that control society.

American legal realists and CLS scholars demonstrate that while we might speak of the determinacy of law—talk which can be summarized in phrases like “justice,” “precedent,” “rule of law,” or “government of law, not people”—this is nothing more than an idealized portrait of law and what judges do that seems anchored in those phrases.⁶² In fact, they are not so anchored; rather, they are entirely unanchored, indeterminate, and designed to support and reproduce power of all sorts in a society. This is what David Kairys calls the “idealized decision-making process:”

The separation of law from politics is supposedly accomplished and ensured by a number of perceived attributes of the legal decision-making process, including judicial subservience to the Constitution, statutes, and precedent; the quasi-scientific, objective nature of legal analysis; and the technical expertise of judges and lawyers. Together, these attributes constitute an idealized decision-making process in which (1) the law on a particular issue is preexisting, predictable, and available to anyone with reasonable legal skill; (2) the facts relevant to disposition of a case are ascertained by objective hearing and evidentiary rules that reasonably ensure that the truth will emerge; (3) the result in a particular case is determined by a rather routine application of the law to the facts;

⁶⁰ See, e.g., DUNCAN KENNEDY, *A CRITIQUE OF ADJUDICATION: {FIN DE SIÈCLE}* (1998); ROBERTO MANGABEIRA UNGER, *THE CRITICAL LEGAL STUDIES MOVEMENT 1–4* (Harvard Univ. Press 1986).

⁶¹ Jonathan Turley, *The Hitchhiker’s Guide to CLS, Unger, and Deep Thought*, 81 *Nw. U. L. Rev.* 593, 594 (1987).

⁶² DAVID KAIRYS, *THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE* 1, 5–6 (3d ed. 1998). The first scholar expressly to challenge concepts such as “liberty” and “freedom” was Robert Hale. See Robert L. Hale, *Coercion and Distribution in a Supposedly Non-coercive State*, 38 *POL. SCI. Q.* 470, 470 (1923).

and (4) except for the occasional bad judge, any reasonably competent and fair judge will reach the “correct” decision.⁶³

The truth, then, is this: to perpetuate the structures of power created and supported by the liberal project, judges do nothing like what this idealized portrait of the judicial process suggests. Rather:

The lack of required, legally correct rules, methodologies, or results is in part a function of the limits of language and interpretation, which are subjective and value laden. More importantly, indeterminacy stems from the reality that the law usually embraces and legitimizes many or all of the conflicting values and interests involved in controversial issues and a wide and conflicting array of “logical” or “reasoned” arguments and strategies of argumentation, without providing any legally required hierarchy of values or arguments or any required method for determining which is most important in a particular context. Judges then make choices, and those choices are most fundamentally value based, or political.⁶⁴

Do judges do this without even realizing it, through some sort of “false consciousness” into which judges are indoctrinated through learning the process of “legal reasoning”? Maybe.⁶⁵ But some argue that rather than working in good faith—with judges thinking that they really *are* dispensing justice according to the rule of law and a government of law and not of people—judges are in fact in denial of their true role, making law, and are therefore always acting in *bad* faith.⁶⁶ One of the earliest legal realists, Benjamin Cardozo, who later served on the Supreme Court, went one step further, writing simply that “[t]he law which is the resulting product [of the judge’s work] is not found, but made. The process, being legislative, demands the legislator’s wisdom.”⁶⁷ We can conclude, then, that any judge who denies that they make law is clearly in bad faith. The judge, being a legislator, makes law using the same political tools as any elected legislator.

⁶³ KAIRYS, *supra* note 62, at 2.

⁶⁴ KAIRYS, *supra* note 62, at 4.

⁶⁵ See generally LOUIS ALTHUSSER, ON THE REPRODUCTION OF CAPITALISM: IDEOLOGY AND IDEOLOGICAL STATE APPARATUSES (G.M. Goshgarian trans., Verso 2014) (1995).

⁶⁶ KENNEDY, *supra* note 60, at 19–20, 56, 194–200.

⁶⁷ BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 115 (13th prt. 1946).

Done in bad faith or not, all of this is simply the reality of the judicial process. Indeed, it forms an inherent part of a process involving conclusions deduced from entirely indeterminate rules of law,⁶⁸ used instrumentally to take into account considerations of fairness and public policy,⁶⁹ all of which is entirely divorced from morality.⁷⁰ But we need to be clear: this is not illegitimate, improper, or unjust. Instead, judges are *right* to operate in this way, for in so doing, they reinforce democracy by ensuring equality of participation in the political process.⁷¹ In short, there is a “compatibility of judicial review with the very principles of democracy.”⁷² The work of judges is inherently political for it ensures the workings of a democracy, especially one like the United States, which separates that power among three equal branches.

All of this is true whether the court is reaching a decision that appeals to the left or to the right. The work of judges is always political, which is why there is so much disagreement about the outcomes. There is simply no objectively right and objectively wrong answer. Rather, the answers depend entirely on indeterminate rules instrumentally applied without any anchor in objective norms of morality, such as justice or freedom. And so, reasonable people will disagree, which is what we expect from a robust political debate.

III. POLITICS IN THE NINTH CIRCUIT COURT OF APPEALS

A. *Judges Canby, Clifton, and Friedland*

Consider, then, the Ninth Circuit Court of Appeals’ treatment of the reviewability of the President’s power to promulgate an Executive Order on national security grounds in *Washington v. Trump*.⁷³ Before the court, the U.S. Government argued that:

[T]he district court lacked authority to enjoin enforcement of the Executive Order because the President has “unreviewable authority to suspend the admission of any class of aliens.” The Government

⁶⁸ KAIRYS, *supra* note 62, at 5–6.

⁶⁹ Brian Leiter, *American Legal Realism*, in *THE BLACKWELL GUIDE TO THE PHILOSOPHY OF LAW AND LEGAL THEORY* 53 (Martin P. Golding & William A. Edmundson eds., 2005).

⁷⁰ GEORGE C. CHRISTIE, *JURISPRUDENCE: TEXT AND READINGS ON THE PHILOSOPHY OF LAW*, 642–44 (1973).

⁷¹ See JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 105–79 (1981).

⁷² SANDRINE BAUME, *HANS KELSEN AND THE CASE FOR DEMOCRACY*, 53 (John Zvesper trans., ECPR Press 2011).

⁷³ *Washington v. Trump*, 847 F.3d 1151 (9th Cir. 2017).

d[id] not merely argue that courts owe substantial deference to the immigration and national security policy determinations of the political branches—an uncontroversial principle that is well-grounded in our jurisprudence. . . . Instead, the Government [took] the position that the President’s decisions about immigration policy, particularly when motivated by national security concerns, are unreviewable, even if those actions potentially contravene constitutional rights and protections. The Government indeed assert[ed] that it violates separation of powers for the judiciary to entertain a constitutional challenge to executive actions such as this one.⁷⁴

Not surprisingly, the Ninth Circuit rejected this argument, finding that there was no authority to support such unreviewability, a proposition that would run counter to the American constitutional democracy.⁷⁵ Instead, the Court found it is a fundamental principle of the U.S. system that the judiciary’s role is to interpret the law, a duty that sometimes involves the resolution of challenges to the constitutional authority of another branch of government.⁷⁶

The court’s duty to resolve such challenges, the Ninth Circuit held, extended to considerations of policy behind that promulgation.⁷⁷ Thus, while established jurisprudence might counsel deference to the political branches in matters of immigration and national security, “the Supreme Court has repeatedly and explicitly rejected the notion that the political branches have unreviewable authority over immigration or are not subject to the Constitution when *policymaking* in that context.”⁷⁸ The Ninth Circuit’s own jurisprudence “likewise ma[kes] clear that [a]lthough alienage classifications are closely connected to matters of foreign policy and national security, courts can and do review *foreign policy arguments* that are offered to justify legislative or executive action when constitutional rights are at stake.”⁷⁹ And most tellingly, the court stated expressly that in cases of such exercises of policymaking authority, “courts can and do review constitutional challenges to the *substance and implementation of immigration policy*.”⁸⁰ National security offers no

⁷⁴ *Trump*, 853 F.3d at 1161 (emphasis omitted).

⁷⁵ *Id.*

⁷⁶ *Id.* at 1161–62.

⁷⁷ *Id.* at 1162.

⁷⁸ *Id.* (emphasis added).

⁷⁹ *Id.* (second alteration in original) (emphasis added) (internal quotations omitted) (quoting *American-Arab Anti-Discrimination Comm. v Reno*, 70 F.3d 1045, 1056 (9th Cir. 1995)).

⁸⁰ *Id.* at 1163 (emphasis added).

reprieve from this conclusion; indeed, courts have reviewed exercises of authority predicated on this justification even in times of conflict.⁸¹

As such, the Ninth Circuit concluded that the policy decision that motivated the promulgation of EO 13769 was reviewable pursuant to its duty to resolve such challenges to the constitutional authority for the President to so act.⁸² The Ninth Circuit made no attempt to cover or veil the assertion that its role extends to the review of policy decisions.⁸³ Instead, it framed the nature of that role in terms that made clear that the judiciary is a fully equal branch of government along with the two political branches.⁸⁴ While it might have avoided expressly stating that it, too, was a political branch, the very fact of its review of a policy decision emerging from one of the political branches makes that fact obvious.⁸⁵ The Ninth Circuit was, indeed, acting politically in concluding that “although courts owe *considerable deference to the President’s policy determinations* with respect to immigration and national security, it is beyond question that the federal judiciary retains the authority to adjudicate constitutional challenges to executive action.”⁸⁶ Deference, yes; unreviewability of the policy decisions emerging from that process, no.

B. *Judges Reinhardt, Berzon, Kozinski, Bybee, and Bea*

The principal opinions in the en banc vote were those dissenting from the denial of reconsideration filed by Judges Kozinski (with which Judges Bybee, Callahan, Bea, and Ikuta concurred), Bybee (with which Judges Kozinski, Callahan, Bea, and Ikuta concurred), and Bea (with which Judges Kozinski, Callahan, and Ikuta concurred).⁸⁷ Two opinions concurring in the denial of en banc reconsideration were also filed by Judges Reinhardt and Berzon.⁸⁸ One might, of course, begin by saying that the very act of filing vigorous opinions either concurring or dissenting from the vote to allow en banc reconsideration is itself a political act. Generally, nothing really needs to be said by the judges participating in such a vote, and specifically in *Washington v. Trump*. This was especially so given that the United States had already withdrawn its appeal by the time the en banc opinions were filed.

⁸¹ *Id.*

⁸² *Id.* at 1164.

⁸³ *Id.*

⁸⁴ *Id.* at 1163.

⁸⁵ *Id.* at 1163–64.

⁸⁶ *Id.* at 1164 (emphasis added).

⁸⁷ *Washington v. Trump*, 858 F.3d 1168 (9th Cir. 2017) (en banc opinion).

⁸⁸ *See id.*

From that perspective, one might conclude that the en banc opinions constitute a form of political posturing by both majority and dissenting judges concerning the issues raised, signaling to future litigants how the Circuit might rule should the issue again reach it. Judge Berzon made that point this way: “There is no appeal currently before us, and so no stay motion pending that appeal currently before us either. In other words, all the merits commentary in the dissents filed by a small minority of the judges of this court is entirely out of place.”⁸⁹ Judge Reinhardt added that:

I concur in our court’s decision regarding President Trump’s first Executive Order—the ban on immigrants and visitors from seven Muslim countries. I also concur in our court’s determination to stand by that decision, despite the effort of a small number of our members to overturn or vacate it. Finally, I am proud to be a part of this court and a judicial system that is independent and courageous, and that vigorously protects the constitutional rights of all, regardless of the source of any efforts to weaken or diminish them.

Judge Kozinski’s diatribe, filed today, confirms that a small group of judges, having failed in their effort to undo this court’s decision with respect to President Trump’s first Executive Order, now seek on their own, under the guise of a dissent from the denial of en banc rehearing of an order of voluntary dismissal, to decide the constitutionality of a second Executive Order that is not before this court. That is hardly the way the judiciary functions. Peculiar indeed!⁹⁰

Judge Reinhardt supported the original published opinion of Judges Canby, Clifton, and Friedland, which, as we have seen, was political.⁹¹ But the question arises, what was “Judge Kozinski’s diatribe” and what does it say about “the way the judiciary functions”?⁹² In short, it reveals nothing less than Judge Kozinski engaging in political activity to no less an extent than Judges Canby, Clifton and Friedland. Taking no issue whatsoever with the fundamental power of the federal judiciary to review and adjudicate constitutional challenges to executive action, the dissenters quibbled on the constitutional merits. In fact, they went so far as to raise merits issues not

⁸⁹ *Id.* at 1169 (Berzon, J., concurring).

⁹⁰ *Id.* at 1168 (Reinhardt, J., concurring).

⁹¹ *See generally id.*

⁹² *Id.*

addressed by the original panel.⁹³ In fact, Judge Bybee wrote that his dissent was “not to say that presidential immigration policy concerning the entry of aliens at the border is immune from judicial review, only that our review is limited . . . and the panel held that limitation inapplicable”⁹⁴ or that judicial deference in immigration matters “does not mean that we have no power of judicial review at all, but it does mean that our authority to second guess or to probe the decisions of those branches is carefully circumscribed.”⁹⁵ Judge Bybee further wrote that:

The [original] panel began its analysis from two important premises: first, that it is an “uncontroversial principle” that we “owe substantial deference to the immigration and national security policy determinations of the political branches,” . . . second, that courts can review constitutional challenges to executive actions I agree with both of these propositions.⁹⁶

The difference is one of opinion as to the *extent* of the review, not whether review itself was possible, and that in turn meant, as Judge Bybee put it, the authority to second-guess or probe the decisions of the Executive, whatever set of standards found in previously decided cases one uses. Second-guessing or probing the policy decisions of the Executive? Whatever the standards selected for that exercise, it still sounds rather like politics.

For Judge Kozinski (and Judge Bea in a separate opinion),⁹⁷ such second-guessing or probing meant that the two key positions taken by Judges Canby, Clifton, and Friedland were problematic. First, that the original published opinion improperly relied on Due Process grounds for finding that EO 13769 would be unconstitutional on the merits, when in fact, “the vast majority of foreigners covered by the executive order have *no* Due Process rights.”⁹⁸ Second, that the original panel’s reliance on the Establishment Clause, drawing upon President Trump’s informal and unofficial statements made during the 2016 election campaign to support that ground, was “folly.”⁹⁹ Why? Because:

⁹³ *Id.* at 1169–71 (Berzon, J., concurring).

⁹⁴ *Id.* at 1175 (Bybee, J., dissenting) (citation omitted).

⁹⁵ *Id.* at 1178.

⁹⁶ *Id.* (citations omitted).

⁹⁷ *Id.* at 1185 (Bea, J., dissenting).

⁹⁸ *Id.* at 1171 (Kozinski, J., dissenting).

⁹⁹ *Id.* at 1173.

Candidates say many things on the campaign trail; they are often contradictory or inflammatory. No shortage of dark purpose can be found by sifting through the daily promises of a drowning candidate, when in truth the poor shlub's only intention is to get elected. No Supreme Court case—indeed no case anywhere that I am aware of—sweeps so widely in probing politicians for unconstitutional motives. And why stop with the campaign? Personal histories, public and private, can become a scavenger hunt for statements that a clever lawyer can characterize as proof of a -phobia or an -ism, with the prefix depending on the constitutional challenge of the day.¹⁰⁰

All right, that may not seem so political, right? Perhaps. Perhaps not. Yet consider Judge Kozinski's reason for why this matters:

This path is strewn with danger. It will chill campaign speech, despite the fact that our most basic free speech principles have their “fullest and most urgent application precisely to the conduct of campaigns for political office.” And it will mire us in a swamp of unworkable litigation. Eager research assistants can discover much in the archives, and those findings will be dumped on us with no sense of how to weigh them. Does a Meet the Press interview cancel out an appearance on Face the Nation? Does a year-old presidential proclamation equal three recent statements from the cabinet? What is the appropriate place of an overzealous senior thesis or a poorly selected yearbook quote?¹⁰¹

But is it the place of the courts to ensure that candidates either do or do not say things that they may or may not really mean, or that candidates may or may not make promises that they can or cannot keep? Judge Kozinski answers this question and, in so doing, implicates himself in the very political activity which he no doubt seeks to avoid: “Weighing these imponderables is precisely the kind of ‘judicial psychoanalysis’ that the Supreme Court has told us to avoid.”¹⁰² And yet, rather than remain silent on whether candidates may engage in whatever conduct they so choose on the campaign trail, Judge Kozinski seeks to ensure that such conduct is not inhibited, thus injecting the

¹⁰⁰ *Id.*

¹⁰¹ *Id.* (citations omitted).

¹⁰² *Id.* (citations omitted).

courts into politics in a way that the original panel of Judges Canby, Clifton, and Reinhardt seemingly avoided.

Perhaps most tellingly, even in filing a vigorous dissent, taking issue with the merits, Judge Bybee nonetheless concluded that:

The personal attacks on the distinguished district judge and our colleagues were out of all bounds of civic and persuasive discourse—particularly when they came from the parties. It does no credit to the arguments of the parties to impugn the motives or the competence of the members of this court; *ad hominem* attacks are not a substitute for effective advocacy. Such personal attacks treat the court as though it were merely a political forum in which bargaining, compromise, and even intimidation are acceptable principles. The courts of law must be more than that, or we are not governed by law at all.¹⁰³

Yes, the courts are arbiters of law, but Judge Bybee recognizes, too, that they are also a political forum. In this latter role, courts can, therefore, second-guess and probe the policy decisions of the other branches of government, with greater or lesser degrees of deference, to be sure, but second-guessing and probing all the same. Echoing Judge Reinhardt, this is all very peculiar indeed! Or, perhaps President Trump’s conclusion more aptly summarizes what happened in the Ninth Circuit: Politics!

V. CONCLUDING REFLECTION

Many people find repellent the values for which President Trump stands, and the policies motivated by those values. For that reason, some attempt to deny or reject the truth: law *is* politics, and what judges do—as they have done at every stage of the *Washington v. Trump*, *IRAP* and *Hawaii* litigations, and as the Justices of the Supreme Court may be called upon to do in respect of EO-3—is political, inherently so. That does not make the outcome any less legitimate. On the contrary, by second-guessing and probing its policy decisions, the courts strengthen democracy and the political process by ensuring that the Executive is held to appropriate constitutional standards; and by doing that, they act legitimately.

¹⁰³ *Id.* at 1185 (Bybee, J., dissenting).

Some may want to deny the legitimacy of the courts involving themselves in such second-guessing or probing of policy and political decisions. And that may be particularly so when one disagrees with the values of a President who relies upon broad unreviewable power in relation to immigration and national security, and when the motive for so doing seems punitive and motivated by animus towards a particular religion. Those same people, however, may be less inclined to do so when they agree with a President seeking to implement broadly egalitarian policies related to labor relations or health care, when the motive seems altruistic and just—whatever those concepts might mean. But that difference of opinion in no way obviates the fact that both outcomes are political, inherently so; of course they are.

Those who do not like President Trump's policy choices do not like to admit that the judges involved in the *Washington v. Trump* litigation were second-guessing and probing policy conclusions reached in the Executive branch. Yet none of those judges, at any point, ever doubted that they had the power to do so. Either way, make no mistake, the decisions of those judges *are* political, inherently so; and everyone knows it. Therein lies their legitimacy as part of the constitutional democratic process. However much President Trump might not like the outcome, and however much we may disagree with him, he was right about this: the decisions in *Washington v. Trump* are, in fact, "Politics!"