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JURISDICTION AND JUDICIAL SELF-DEFENSE

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INTRODUCTION

Recently, much of the legal community has been captivated by the rapid developments in *State of Washington v. Trump*,<sup>1</sup> the case challenging the legality of President Trump’s Executive Order 13,769 (“the Immigration Order”). Among other provisions, the Immigration Order temporarily suspended the refugee admissions program, blocked the entry of persons from designated Middle Eastern countries, and indefinitely suspended entry of Syrian nationals.<sup>2</sup>

A number of suits were brought challenging the legality of the action, including one by the State of Washington, which Minnesota later joined.<sup>3</sup> In the ten days following Washington’s filing suit to enjoin the Immigration Order, District Judge James Robart issued a nationwide temporary restraining order (“TRO”) against it,<sup>4</sup> the Government sought an emergency stay on appeal,<sup>5</sup> and the Ninth Circuit handed down a twenty-nine page

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<sup>1</sup> No. C17-0141, 2017 WL 462040 (W.D. Wash. Feb. 3, 2017), *motion for stay pending appeal denied*, 847 F.3d 1151 (9th Cir. 2017).

<sup>2</sup> Exec. Order No. 13,769, 82 Fed. Reg. 8977, 8977-79 (Jan. 27, 2017).

<sup>3</sup> See Scott Malone & Dan Levine, *Challenges to Trump’s Immigration Orders Spread to More U.S. States*, REUTERS (Feb. 1, 2017), <http://www.reuters.com/article/us-usa-trump-immigration-sanfrancisco-idUSKBN15F2B1> [<https://perma.cc/3J6Q-X56K>] (detailing the states that had challenged President Trump’s Immigration Order as of February 1st, 2017).

<sup>4</sup> *Washington v. Trump*, No. C17-0141, 2017 WL 462040 (W.D. Wash. Feb. 3, 2017) [hereinafter Judge Robart’s Order].

<sup>5</sup> Emergency Motion Under Circuit Rule 27-3 for Administrative Stay and Motion for Stay Pending Appeal at 8, *Washington v. Trump*, 847 F.3d 1151 (9th Cir. 2017) (No. 17-35105) [hereinafter Government Appeal Brief].

precedential opinion refusing to grant a stay.<sup>6</sup> This breakneck pace has generated significant commentary on the underlying legal disputes and, to a lesser extent, of the States' standing to sue.<sup>7</sup>

In our view, an interesting aspect of the case is flying largely under the radar: appellate jurisdiction. We find this issue notable for two, interrelated reasons. First, the parties and the Ninth Circuit devoted almost no attention to the matter, despite the question being a close one doctrinally. This presages our second point of intrigue, one of judicial policy and craftsmanship: Why bother exercising jurisdiction at all?

Recall the procedural posture of the case. The Government sought an emergency stay of the TRO, arguing that it was actually a preliminary injunction ("PI").<sup>8</sup> A PI—unlike a TRO—is appealable.<sup>9</sup> But instead of concluding that the order was a TRO, and thus not subject to appeal, the Ninth Circuit construed the order as a PI, reached the merits, and denied the Government's motion for an emergency stay, leaving the district court order in place.<sup>10</sup> The Ninth Circuit could have achieved functionally the same result—leaving the district court's order in place—by concluding, as one reasonably could, that the district court order was in fact a TRO and the Ninth Circuit lacked appellate jurisdiction altogether.<sup>11</sup> The preceding discussion thus begs the question: Why did the Ninth Circuit reach the merits of the case when it had narrower grounds to achieve the same ends?

We surmise that the Ninth Circuit's decision to exercise jurisdiction and reach the merits was an act of judicial self-defense. *Washington v. Trump*, by

<sup>6</sup> *Washington v. Trump*, 847 F.3d 1151 (9th Cir. 2017) [hereinafter Appellate Opinion].

<sup>7</sup> See, e.g., Jonathan Hafetz, *Why Courts Appear Willing to Reject Trump's Travel Ban Order*, JUST SECURITY (Feb. 6, 2017, 10:41 AM), <https://www.justsecurity.org/37388/courts-reject-trumps-travel-ban-order/> [<https://perma.cc/9UVJ-W8QU>] (one paragraph of analysis on States' standing, five on the merits); Emma Kohse, *Washington v. Trump: Summary of Ninth Circuit Decision Upholding TRO in Trump Travel Ban Case*, LAWFARE (Feb. 9, 2017, 8:52 PM), <https://www.lawfareblog.com/washington-v-trump-summary-ninth-circuit-decision-upholding-tro-trump-travel-ban-case> [<https://perma.cc/5LJN-XRDL>] (containing two sentences on standing in 1,000-plus word summary of opinion); Marty Lederman, *Getting a Handle on the Litigation Challenging the Seven-Nation "Travel Ban"*, JUST SECURITY (Feb. 6, 2017, 6:00 PM), <https://www.justsecurity.org/37315/getting-handle-litigation-challenging-seven-nation-travel-ban/> [<https://perma.cc/9LSX-GAEB>] (mentioning standing only in passing and observing it "is very difficult to keep track, in anything approaching real time, of the various arguments by all parties and the government"); Michael McConnell, *A Flawed Restraining of a Flawed Order*, HOOVER INST. (Feb. 10, 2017), <http://www.hoover.org/research/flawed-restraining-flawed-order> [<https://perma.cc/SY6S-D9XA>] (providing modest analysis of standing).

<sup>8</sup> Government Appeal Brief, *supra* note 5, at 8.

<sup>9</sup> See *infra* note 15 and accompanying text.

<sup>10</sup> See *infra* note 18–19 and accompanying text.

<sup>11</sup> By "functionally the same result" we mean that the Immigration Order would have remained enjoined regardless. Had the court declined to exercise jurisdiction, the TRO would have continued in place until a PI decision was made, at which point the Government could have appealed if a PI was granted.

the Ninth Circuit’s own admission, presents “extraordinary” and “unusual” circumstances.<sup>12</sup> Those circumstances include a pattern of extrajudicial statements by the President questioning not only the reasoning, but also the legitimacy, of judicial decisions and the judges who issue them.<sup>13</sup> By reaching the merits and preliminarily upholding the district court’s ruling—rather than finding that it lacked jurisdiction—the Ninth Circuit chose to send a clear (and unanimous) signal that it stands behind Judge Robart’s (and all judges) authority in our constitutional scheme.

## I. TROS, PIS, AND LIMITS ON APPELLATE JURISDICTION

### A. *Appellate Jurisdiction over TROs and PIs, Generally*

The United States Code establishes that “the courts of appeals shall have jurisdiction of appeals from . . . [i]nterlocutory orders of the district courts of the United States . . . granting, continuing, modifying, refusing or dissolving injunctions.”<sup>14</sup> It is well established that this grant of jurisdiction excludes TROs.<sup>15</sup> Nevertheless, a district court cannot simply “shield its orders from appellate review merely by designating them as temporary restraining orders.”<sup>16</sup> Appellate courts will look to “the essence of the order, not its moniker,” to determine whether they have jurisdiction.<sup>17</sup>

In *Washington v. Trump*, the Ninth Circuit panel did precisely that, concluding in two brief paragraphs that it had jurisdiction.<sup>18</sup> While acknowledging that TROs are not usually appealable, the panel reasoned that the instant TRO “possess[ed] the qualities” of a PI because the parties “vigorously contested the legal basis for the TRO in written briefs and oral arguments,” the TRO had no expiration date, and no PI hearing had been scheduled at that time.<sup>19</sup>

We posit that several factors—the accelerated timeline of the case, the minimal oral argument before the district judge, the sparse reasoning of the district court order, and the district court’s scheduling order—reveal that this

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<sup>12</sup> Appellate Decision, 847 F.3d at 1158.

<sup>13</sup> See *infra* Sections II.A–B.

<sup>14</sup> 28 U.S.C. § 1292(a) (2012).

<sup>15</sup> See, e.g., *Bennett v. Medtronic, Inc.*, 285 F.3d 801, 804 (9th Cir. 2002) (“Ordinarily, temporary restraining orders, in contrast to preliminary injunctions, are not appealable . . . .”); see also *Sampson v. Murray*, 415 U.S. 61, 86–88 (1974) (recognizing that a TRO typically falls outside appellate review, but concluding that “where an adversary hearing has been held, and the court’s basis for issuing the order strongly challenged, classification of the potentially unlimited order as a temporary restraining order seems particularly unjustified”).

<sup>16</sup> *Sampson*, 415 U.S. at 87.

<sup>17</sup> *Bennett*, 285 F.3d at 804.

<sup>18</sup> Appellate Opinion, 847 F.3d at 1158.

<sup>19</sup> *Id.*

jurisdictional question was much closer than the panel (or the parties) averred.<sup>20</sup> Given these factors and the broad latitude appellate courts possess when deciding whether district court orders are TROs or PIs, the Ninth Circuit panel easily could have concluded that Judge Robart’s order was a TRO and thus beyond its jurisdiction. While we do not contend the panel’s decision was necessarily incorrect,<sup>21</sup> the panel did reject a colorable and narrower alternative ground for decision that would have yielded functionally the same result.

### B. *Appellate Jurisdiction in Washington v. Trump*

To better understand the distinction between TROs and PIs, one must briefly consider the nature of TROs. Professors Wright and Miller explain that TROs are “designed to preserve the status quo until there is an opportunity to hold a hearing on the application for a preliminary injunction and may be issued with or without notice to the adverse party.”<sup>22</sup> Unlike PIs, which typically remain in effect during the pendency of a case,<sup>23</sup> TROs are limited in scope, lasting a maximum of fourteen days unless extended for good cause or by consent of the adverse party.<sup>24</sup> TROs must possess the same basic contents of PIs.<sup>25</sup> Moreover, when considering motions seeking TROs, courts use the same factors as for PIs,<sup>26</sup> though their analysis is typically

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<sup>20</sup> Although the issue of jurisdiction was raised by the States in their brief, they devoted a mere two paragraphs to the issue. States’ Response to Emergency Motion Under Circuit Rule 27-3 for Administrative Stay and Motion for Stay Pending Appeal at 5-6, *Washington v. Trump*, 847 F.3d 1151 (9th Cir. 2017) (No. 17-35105) [hereinafter States’ Response Brief]. The discussion was in response to the Government’s initial brief, which contained just one paragraph on the subject. Government Appeal Brief, *supra* note 5, at 8. The Government did not even mention jurisdiction in their reply brief. Reply in Support of Emergency Motion for Stay Pending Appeal, *Washington v. Trump*, 847 F.3d 1151 (9th Cir. 2017) (No. 17-35105). Similarly, neither party has addressed appellate jurisdiction during the subsequent briefing over whether to rehear the case *en banc*. See States’ Brief Regarding Rehearing En Banc, *Washington v. Trump*, No. 17-35105 (9th Cir. Feb. 16, 2017); Supplemental Brief on *En Banc* Consideration, *Washington v. Trump*, No. 17-35105 (9th Cir. Feb 16, 2017).

<sup>21</sup> But see Josh Blackman, *The Ninth Circuit’s Contrived Comedy of Errors in Washington v. Trump: Part I*, LAWFARE (Feb. 13, 2017, 4:18 PM), <https://www.lawfareblog.com/ninth-circuits-contrived-comedy-errors-washington-v-trump-part-i> [<https://perma.cc/FC9E-CNCR?type=image>] (arguing that the Ninth Circuit obviously lacked appellate jurisdiction).

<sup>22</sup> 11A CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 2951 (3d ed. 2017) [hereinafter WRIGHT & MILLER].

<sup>23</sup> See *id.* § 2947 (“[T]he purpose [of a PI] is not to determine any controverted right, but to prevent a threatened wrong or any further perpetration of injury, or the doing of any act pending the final determination of the action . . . .” (quoting *Benson Hotel Corp. v. Woods*, 168 F.2d 694, 696 (8th Cir. 1948))).

<sup>24</sup> FED. R. CIV. P. 65(b)(2) (2009).

<sup>25</sup> FED. R. CIV. P. 65(d).

<sup>26</sup> See, e.g., Judge Robart’s Order, 2017 WL 462040, at \*1 (“The standard for issuing a TRO is the same as the standard for issuing a preliminary injunction.” (citing *New Motor Vehicle Bd. v. Orrin W. Fox Co.*, 434 U.S. 1345, 1347 n.2 (1977))).

condensed due to the time-sensitive nature of TRO requests.<sup>27</sup> This captures the essence of why TROs are not appealable: They are temporary orders that endure only long enough for a proper preliminary injunction motion to be considered and decided.

Despite the general principle that TROs are not appealable, courts of appeals sometimes construe TROs as PIs and thus exercise appellate jurisdiction over them. Although “[t]here is no precise test for determining whether an order will be deemed a preliminary injunction for purposes of appeal,”<sup>28</sup> courts weigh factors such as: (1) whether the TRO exceeds the time limits in Rule 65(b)(2);<sup>29</sup> (2) whether a subsequent PI hearing has been scheduled;<sup>30</sup> and (3) whether the opposing party had sufficient notice, along with an opportunity to be heard and present evidence in a hearing seeking a TRO.<sup>31</sup> In essence, courts consider whether a given order functions more like a PI than a TRO, irrespective of its label.<sup>32</sup>

A brief review of Judge Robart’s order reveals that, in most respects, it possessed the qualities of a standard TRO. First, Judge Robart reached his decision and published his order with remarkable speed. Washington filed its complaint on January 30, 2017,<sup>33</sup> and subsequently amended it on February 1, 2017, to add Minnesota.<sup>34</sup> The Government appeared and filed a brief opposing the States’ request for a TRO on February 2, 2017,<sup>35</sup> and Judge Robart held a one-hour hearing on February 3, 2017—at which no evidence

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<sup>27</sup> See, e.g., *Providence Health & Servs. v. McLaughlin*, No. C17-24, 2017 WL 68426, at \*2 (W.D. Wash. Jan. 6, 2017) (providing four short paragraphs on TRO analysis); *Does v. Univ. of Wash.*, No. C16-1212, 2016 WL 4147307, at \*2 (W.D. Wash. Aug. 3, 2016) (Robart, J.) (analyzing the TRO factors in one paragraph).

<sup>28</sup> *WRIGHT & MILLER* § 2962.

<sup>29</sup> *Sampson v. Murray*, 415 U.S. 61, 86 (1974); *Serv. Emps. Int’l Union v. Nat’l Union of Healthcare Workers*, 598 F.3d 1061, 1067 (9th Cir. 2010); *Chi. United Indus., Ltd. v. City of Chicago*, 445 F.3d 940, 943 (7th Cir. 2006); *Bennett v. Medtronic, Inc.*, 285 F.3d 801, 804 (9th Cir. 2002). *But see Grant v. United States*, 282 F.2d 165, 168-70 (2d Cir. 1960) (Friendly, J.) (refusing to accept jurisdiction over a TRO that had extended four days beyond the time limit).

<sup>30</sup> *Fernandez-Roque v. Smith*, 671 F.2d 426, 430 (11th Cir. 1982); see also *Serv. Emps.*, 598 F.3d at 1066 (noting that a PI—which requires a hearing—had been requested and issued).

<sup>31</sup> *Serv. Emps.*, 598 F.3d at 1067; *Bennett*, 285 F.3d at 804; *Dilworth v. Riner*, 343 F.2d 226, 229 (5th Cir. 1965). *But see Bailey v. Transp.-Comm’n Emps. Union*, 45 F.R.D. 444, 445 (N.D. Miss. 1968) (finding that defendant’s presence at an initial hearing was insufficient to convert a TRO to a PI because two days of notice was insufficient).

<sup>32</sup> See *Bennett*, 285 F.3d at 804 (“It is the essence of the order, not its moniker, that determines our jurisdiction.”).

<sup>33</sup> Complaint for Declaratory and Injunctive Relief, *Washington v. Trump*, No. C17-0141 (W.D. Wash. Jan. 30, 2017).

<sup>34</sup> First Amended Complaint for Declaratory and Injunctive Relief, *Washington v. Trump*, No. C17-0141 (W.D. Wash. Feb. 1, 2017).

<sup>35</sup> Defendants’ Opposition to Plaintiff State of Washington’s Motion for TRO, *Washington v. Trump*, No. C17-0141 (W.D. Wash. Feb. 2, 2017).

was presented.<sup>36</sup> Judge Robart then issued an oral order from the bench,<sup>37</sup> and a written order was entered that same day.<sup>38</sup> This expedited timeline is more characteristic of a TRO than a PI.<sup>39</sup>

Second, although Judge Robart's order did not contain an explicit expiration date, he ordered the parties to propose a PI briefing schedule by the next business day, February 6, 2017.<sup>40</sup> This implies that Judge Robart viewed his order as a temporary measure to maintain the status quo until a PI hearing could be held. As discussed, this is precisely the purpose of TROs.<sup>41</sup>

Third, Judge Robart's order contains only two paragraphs analyzing the legal standards for injunctive relief, the brevity one would expect in a TRO. For instance, Judge Robart writes summarily,

The States have satisfied the *Winter* test because they have shown that they are likely to succeed on the merits of the claims that would entitle them to relief; the States are likely to suffer irreparable harm in the absence of preliminary relief; the balance of the equities favor the States; and a TRO is in the public interest.<sup>42</sup>

The order provides no analysis of how the States satisfied that burden. Such conclusory language is common for TROs,<sup>43</sup> but it would be considered unacceptable for a PI.<sup>44</sup>

These factors, when viewed together, demonstrate that not only did Judge Robart believe his order was a TRO, but also that the Ninth Circuit could have reasonably reached the same conclusion. Instead, the Ninth Circuit panel construed the order as a PI. As justification for this decision, the panel noted that (1) the parties "vigorously contested" the TRO, and (2) the order had no expiration date or hearing scheduled.<sup>45</sup>

But to say that the TRO was "vigorously contested" is something of a misnomer: While the parties vehemently disagreed as to the legality of the Immigration Order, among other issues, the opportunity to fully develop

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<sup>36</sup> Oral Argument, *Washington v. Trump*, No. C17-0141 (W.D. Wash. Feb. 3, 2017), <http://www.uscourts.gov/cameras-courts/state-washington-vs-donald-j-trump-et-al> [<https://perma.cc/S7EL-EACN>].

<sup>37</sup> *Id.* at 56:00.

<sup>38</sup> Judge Robart's Order, No. C17-0141, 2017 WL 462040 (W.D. Wash. Feb. 3, 2017).

<sup>39</sup> Compare *WRIGHT & MILLER* § 2951 (discussing the purpose and usual characteristics of a TRO), *with id.* § 2947 (describing the purpose and characteristics of a PI).

<sup>40</sup> 2017 WL 462040, at \*3.

<sup>41</sup> See *supra* note 22 and accompanying text.

<sup>42</sup> 2017 WL 462040, at \*2.

<sup>43</sup> See *supra* note 27.

<sup>44</sup> See, e.g., *Am. Passage Media Corp. v. Cass Commc'ns, Inc.*, 750 F.2d 1470, 1472-73 (9th Cir. 1985) (reversing a district court's PI for insufficient findings of fact).

<sup>45</sup> Appellate Opinion, 847 F.3d 1151, 1158 (9th Cir. 2017).

their positions was quite constrained. Judge Robart granted the TRO a mere four days after the initial complaint was filed and only two days after it was amended.<sup>46</sup> Due to the short timeframe, each side submitted just one brief to Judge Robart,<sup>47</sup> and no evidence was entered into the record during oral argument.<sup>48</sup> In contrast, the parties in both *Bennett* and *Service Employees*—the cases cited by the Ninth Circuit panel to support its conclusion that the order should be construed as a PI—had filed “extensive written materials,” and in *Service Employees*, a two-day evidentiary hearing had been held.<sup>49</sup> In other words, bare notice and a hearing alone are not always sufficient to construe a TRO as a PI.<sup>50</sup> In fact, holding an adversarial hearing before issuing a TRO is encouraged.<sup>51</sup>

Similarly, the absence of an expiration date in Judge Robart’s order did not necessarily render it appealable. The TRO asked the parties to propose a schedule for briefing the PI, and a subsequent scheduling order (entered before the Ninth Circuit issued its opinion) adopted the parties’ briefing schedule.<sup>52</sup> The scheduling order required the final PI briefs to be filed by February 17, 2017, exactly fourteen days from the issuance of the TRO.<sup>53</sup> This meant that the TRO would extend briefly beyond the time limit set out in Rule 65(b)(2).<sup>54</sup> Nevertheless, the rule allows a TRO to be extended if “the adverse party consents,”<sup>55</sup> and courts have recognized that consent to a briefing schedule qualifies as consent to a TRO extension.<sup>56</sup> By contrast, the cases cited by the Ninth Circuit panel involved TROs that unambiguously violated the timing rules of Rule 65(b)(2). In *Bennett*, the TRO deadline was three times longer

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<sup>46</sup> See *supra* notes 33, 34, and 37.

<sup>47</sup> See *supra* notes 34–35.

<sup>48</sup> In fact, the Government’s attorney spoke for a grand total of twenty-six minutes at the hearing. Oral Argument, *supra* note 36, at 25:00.

<sup>49</sup> *Serv. Emps. Int’l Union v. Nat’l Union of Healthcare Workers*, 598 F.3d 1061, 1067 (9th Cir. 2010); *Bennett v. Medtronic, Inc.*, 285 F.3d 801, 804 (9th Cir. 2002); see also *Dilworth v. Riner*, 343 F.2d 226, 229 (5th Cir. 1965) (construing a TRO as a PI after a full evidentiary hearing was held with witnesses).

<sup>50</sup> See, e.g., *Woods v. Wright*, 334 F.2d 369, 373–74 (5th Cir. 1964) (finding that notice and a brief hearing on a TRO did not affect its appealability because parties did not view the order as a PI).

<sup>51</sup> FED. R. CIV. P. 65 advisory committee’s note to 1966 amendment (instructing that “opposition should be heard, if feasible,” before a TRO is granted).

<sup>52</sup> Order on Briefing Schedule for Plaintiffs’ Motion for a Preliminary Injunction, *Washington v. Trump*, No. C17-0141 (W.D. Wash. filed Feb. 7, 2017).

<sup>53</sup> *Id.*

<sup>54</sup> *Cf. Grant v. United States*, 282 F.2d 165, 168 (2d Cir. 1960) (Friendly, J.) (refusing to construe a TRO as a PI when it extended four days beyond the time limit).

<sup>55</sup> FED. R. CIV. P. 65(b)(2); see also *Ross v. Evans*, 325 F.2d 160, 160–61 (5th Cir. 1963) (per curiam) (finding that a TRO extended by consent cannot be appealed).

<sup>56</sup> See, e.g., *Fernandez-Roque v. Smith*, 671 F.2d 426, 430 (11th Cir. 1982) (declining appellate jurisdiction where the government impliedly consented to an extension of a TRO).

than permitted by Rule 65(b)(2),<sup>57</sup> and in *Service Employees*, the TRO required compliance pending the resolution of a PI motion, which had not been filed.<sup>58</sup>

Therefore, despite the parties' and the panel's terse discussion of appellate jurisdiction in *Washington v. Trump*, the issue was a close one. Considering the rapid timeline, minimal oral argument in the district court, limited analysis in the Judge Robart's order, and existence of a scheduling order, the Ninth Circuit panel could have reasonably held that Judge Robart's order was in fact a TRO and could not be appealed. Because such a finding would have yielded the same outcome in the case—leaving Judge Robart's order in place and the Immigration Order enjoined—a claim that the judges were simply seeking a particular *outcome* does not explain the decision to exercise jurisdiction. If the panel was simply determined to block the Immigration Order, a question remains: Why did it choose the merits path over the jurisdictional one if the destination was the same?

## II. JUDICIAL SELF-DEFENSE

The Ninth Circuit panel's decision to exercise jurisdiction is particularly puzzling because it required the panel to wade into a high-profile case challenging the authority of a newly elected President in an area of traditionally robust executive power. In so doing, the panel eschewed “passive virtues”<sup>59</sup> and the “time-honored tradition of avoiding constitutional questions where narrower grounds are available.”<sup>60</sup>

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<sup>57</sup> *Bennett v. Medtronic, Inc.*, 285 F.3d 801, 804 (9th Cir. 2002).

<sup>58</sup> *Serv. Emps. Int'l Union v. Nat'l Union of Healthcare Workers*, 598 F.3d 1061, 1066 (9th Cir. 2010).

<sup>59</sup> See generally Alexander M. Bickel, *The Supreme Court 1960 Term—Foreword: The Passive Virtues*, 75 HARV. L. REV. 40 (1961) (arguing that the Supreme Court should proceed incrementally and, in certain circumstances, decide cases on narrower grounds rather than on the merits); see also Jonathan T. Molot, *Principled Minimalism: Restriking the Balance Between Judicial Minimalism and Neutral Principles*, 90 VA. L. REV. 1753, 1755, 1771-72 (2004) (discussing modern scholars who have built on Professor Bickel's work and arguing that “[b]y embracing the ‘passive virtues’—employing prudential justiciability doctrines, the discretionary certiorari power, and other tools to postpone or avoid resolving disputes that are not ready for resolution—the Supreme Court could avoid displacing political decisionmaking and instead exert a valuable influence over democratic deliberation and debate”); Adrian Vermeule, *Second Opinions and Institutional Design*, 97 VA. L. REV. 1435, 1440 (2011) (“By construing statutes narrowly to avoid constitutional questions, by invalidating statutes on procedural rather than substantive grounds, and through other exercises of ‘the passive virtues,’ Bickel thought that courts could encourage or force legislatures to squarely face and deliberate on constitutional objections to their enactments.” (footnote omitted)).

<sup>60</sup> *Mattel Inc. v. Walking Mountain Prods.*, 353 F.3d 792, 808 n.14 (9th Cir. 2003); see also *Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288, 346-48 (1936) (Brandeis, J., concurring) (detailing situations in which the Court should avoid passing upon constitutional questions and instead decide cases on narrower grounds); *Sosa v. DIRECTV, Inc.*, 437 F.3d 923, 931 n.5 (9th Cir. 2006) (discussing the “canon of constitutional avoidance, which requires a statute to be construed so as to avoid serious doubts as to the constitutionality of an alternate construction”); *Env'tl. Def. Ctr., Inc. v. U.S. EPA*, 344 F.3d 832, 843 (9th Cir. 2003) (“[W]e avoid considering constitutionality if an issue may be resolved on narrower grounds . . .”).



We infer that the Ninth Circuit panel saw that maneuver not as a defect, but as a central feature of its opinion. Apart from doctrinaire legal analysis, the panel's decision to reach the merits is an expression of institutional self-defense against efforts to erode the judiciary's legitimacy. By choosing the path it did, the panel signaled its support for not only Judge Robart's conclusions, but also for his (and theirs, and other judges') authority and willingness to serve as a check on the Executive. The panel's decision is perhaps best explained by Justice Holmes's maxim that "a page of history is worth a volume of logic."<sup>61</sup>

A. *Comments About U.S. District Judge Curiel During the 2016 Presidential Campaign*

During the 2016 presidential race, then-candidate Trump injected the impartiality and competence of judges into the campaign. He opined that U.S. District Judge Gonzalo Curiel, who was presiding over fraud lawsuits against the defunct Trump University, could not objectively decide the cases. Specifically, Trump stated that Judge Curiel's "Mexican heritage" presented an "absolute" and "inherent conflict of interest" due to Trump's campaign promise to build a wall on the Mexican–American border.<sup>62</sup> He labeled Judge Curiel "a total disgrace" and "a hater," suggested authorities "ought to look into" the judge, and claimed the courts were "a rigged system."<sup>63</sup> On Twitter, Trump called Judge Curiel "very biased and unfair."<sup>64</sup>

Legal experts and commentators decried Trump's comments as inappropriate, overt attacks on judicial independence, which could lessen courts' ability to check Executive power.<sup>65</sup> In a subsequent order, even Judge

<sup>61</sup> N.Y. Tr. Co. v. Eisner, 256 U.S. 345, 349 (1921).

<sup>62</sup> Brent Kendall, *Trump Says Judge's Mexican Heritage Presents "Absolute Conflict"*, WALL ST. J. (June 3, 2016), <https://www.wsj.com/articles/donald-trump-keeps-up-attacks-on-judge-gonzalo-curiel-1464911442> [<https://perma.cc/337P-3G2K>].

<sup>63</sup> Peter Beinart, *Trump Takes Aim at the Independent Judiciary*, ATLANTIC (June 1, 2016), <https://www.theatlantic.com/politics/archive/2016/06/the-gop-front-runner-takes-aim-at-the-independent-judiciary/485087/> [<https://perma.cc/UJ2Y-5ZME>]; Kendall, *supra* note 62; Adam Liptak, *Donald Trump Could Threaten U.S. Rule of Law, Scholars Say*, N.Y. TIMES (June 3, 2016), [https://www.nytimes.com/2016/06/04/us/politics/donald-trump-constitution-power.html?\\_r=0](https://www.nytimes.com/2016/06/04/us/politics/donald-trump-constitution-power.html?_r=0) [<https://perma.cc/A483-T2AK>].

<sup>64</sup> Donald J. Trump (@realDonaldTrump), TWITTER (June 2, 2016, 9:54 AM), <https://twitter.com/realdonaldtrump/status/738413456118841345> [<https://perma.cc/6G82-QR4R>]; accord Donald J. Trump (@realDonaldTrump), TWITTER (May 30, 2016, 2:45 PM), <https://twitter.com/realdonaldtrump/status/737399475509985280?lang=en> [<https://perma.cc/NA6C-5T68>] ("I have a judge in the Trump University civil case, Gonzalo Curiel (San Diego), who is very unfair. An Obama pick. Totally biased—hates Trump[.]").

<sup>65</sup> Beinart, *supra* note 63; Kendall, *supra* note 62; Liptak, *supra* note 63; Shushannah Walshe & Meghan Keneally, *Legal Experts Worry After Trump Attacks Judge for Alleged Bias, Judge's Brother Calls Trump a "Blowhard"*, ABC NEWS (June 3, 2016), <http://abcnews.go.com/Politics/legal-experts-worry-trump-attacks-judge-alleged-bias/story?id=39589590> [<https://perma.cc/5HPH-BY6Y>].

Curiel acknowledged the effects of the comments, observing that Trump had “placed the integrity of these court proceedings at issue.”<sup>66</sup>

### B. *Comments About Judge Robart and the Washington v. Trump Litigation*

Appointed by President George W. Bush and unanimously confirmed by the Senate, Judge Robart is a widely respected judge.<sup>67</sup> Attorneys and politicians describe him as a “judge’s judge” with “exceptional qualifications” who is “smart, thoughtful,” “even-tempered,” and “believes in the rule of law” and the “independence of the judiciary.”<sup>68</sup> Nevertheless, his TRO in *Washington v. Trump* elicited a reaction from the President reminiscent of his remarks about Judge Curiel during the campaign.

Hours after the TRO was issued, President Trump labeled Judge Robart a “so-called judge” and his order as “ridiculous” and “terrible.”<sup>69</sup> He stated that Judge Robart had “open[ed] up our country to potential terrorists,”<sup>70</sup> theorizing that, because of the ruling, “many very bad and dangerous people may be pouring into our country.”<sup>71</sup>

Days later, President Trump opined that Judge Robart had “put our country in . . . peril” and encouraged Americans to “blame him [*i.e.*, Judge

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<sup>66</sup> Cohen v. Trump, No. 13-CV-2519, 2016 WL 3036302, at \*6 (S.D. Cal. May 27, 2016).

<sup>67</sup> See Jim Brunner, *Trump’s “So-Called Judge” Is a Highly Regarded GOP Appointee*, SEATTLE TIMES (Feb. 4, 2017), <http://www.seattletimes.com/seattle-news/politics/judge-who-stalled-travel-ban-is-a-highly-regarded-gop-appointee/> [https://perma.cc/9FQW-CRZM] (“The federal judge who ordered a halt to the Trump administration’s controversial travel ban—derided as a ‘so-called judge’ by a bitter President Trump—is a Republican appointee whose vast legal credentials and volunteer work for poor children and refugees prompted unanimous Senate confirmation more than a decade ago.”).

<sup>68</sup> Thomas Fuller, *“So-Called” Judge Criticized by Trump Is Known as a Mainstream Republican*, N.Y. TIMES (Feb. 4, 2017), [https://www.nytimes.com/2017/02/04/us/james-robart-judge-trump-ban-seattle.html?\\_r=0](https://www.nytimes.com/2017/02/04/us/james-robart-judge-trump-ban-seattle.html?_r=0) [https://perma.cc/83YW-Z2J6].

<sup>69</sup> Donald J. Trump (@realDonaldTrump), TWITTER (Feb. 4, 2017, 5:12 AM), <https://twitter.com/realdonaldtrump/status/827867311054974976?lang=en> [https://perma.cc/966L-4QM7]; Donald J. Trump (@realDonaldTrump), TWITTER (Feb. 4, 2017, 1:44 PM), [https://twitter.com/realdonaldtrump/status/827996357252243456?ref\\_src=twsrc%5Etfw](https://twitter.com/realdonaldtrump/status/827996357252243456?ref_src=twsrc%5Etfw) [https://perma.cc/9LWW-NN2D].

<sup>70</sup> Donald J. Trump (@realDonaldTrump), TWITTER (Feb. 4, 2017, 4:48 PM), [https://twitter.com/realdonaldtrump/status/828042506851934209?ref\\_src=twsrc%5Etfw](https://twitter.com/realdonaldtrump/status/828042506851934209?ref_src=twsrc%5Etfw) [https://perma.cc/P7W-FXBU].

<sup>71</sup> Donald J. Trump (@realDonaldTrump), TWITTER (Feb. 4, 2017, 1:44 PM), [https://twitter.com/realdonaldtrump/status/827996357252243456?ref\\_src=twsrc%5Etfw](https://twitter.com/realdonaldtrump/status/827996357252243456?ref_src=twsrc%5Etfw) [https://perma.cc/PX55-YGFE].

Robart] and [the] court system” if “something happens.”<sup>72</sup> “The courts,” said the President, “are making the job” of protecting the country “very difficult!”<sup>73</sup>

The critiques did not subside once the case moved to the Ninth Circuit. During a speech the day after appellate arguments in the case, President Trump bemoaned that the “courts seem to be so political.”<sup>74</sup> He later proclaimed on Twitter that, if the Government did not prevail in the litigation, “we can never have the security and safety to which we are entitled.”<sup>75</sup>

Lawyers, legal commentators, law scholars, and bar associations criticized the President’s comments as an assault on the judiciary.<sup>76</sup> Other judges even joined the fray,<sup>77</sup> including President Trump’s own Supreme Court nominee, Judge Neil Gorsuch of the Tenth Circuit, who characterized Trump’s remarks as “disheartening” and “demoralizing.”<sup>78</sup>

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<sup>72</sup> Donald J. Trump (@realDonaldTrump), TWITTER (Feb. 5, 2017, 12:39 PM), <https://twitter.com/realdonaldtrump/status/828342202174668800?lang=en> [<https://perma.cc/82LM-83U8>].

<sup>73</sup> Donald J. Trump (@realDonaldTrump), TWITTER (Feb. 5, 2017, 12:42 PM), [https://twitter.com/realdonaldtrump/status/828343072840900610?ref\\_src=twsrc%5Etfw](https://twitter.com/realdonaldtrump/status/828343072840900610?ref_src=twsrc%5Etfw) [<https://perma.cc/RJ3M-D7QW>].

<sup>74</sup> Reena Flores, *Trump Defends Travel Ban, Blasts “Political” Courts in Speech to Law Enforcement*, CBS NEWS (Feb. 8, 2017), <http://www.cbsnews.com/news/trump-defends-travel-ban-blasts-political-courts/> [<https://perma.cc/R596-NX2Z>].

<sup>75</sup> Donald J. Trump (@realDonaldTrump), TWITTER (Feb. 8, 2017, 4:03 AM), <https://twitter.com/realdonaldtrump/status/829299566344359936> [<https://perma.cc/XT86-E5SP>].

<sup>76</sup> See, e.g., Aebra Coe, *Law Schools, Bar Group Denounce Trump Attacks on Judges*, LAW360 (Feb. 14, 2017), [https://www.law360.com/sports/articles/891797/law-schools-bar-group-denounce-trump-attacks-on-judges?nl\\_pk=6ecef533-d128-4094-8a10-3c69f7609106&utm\\_source=newsletter&utm\\_medium=email&utm\\_campaign=sports](https://www.law360.com/sports/articles/891797/law-schools-bar-group-denounce-trump-attacks-on-judges?nl_pk=6ecef533-d128-4094-8a10-3c69f7609106&utm_source=newsletter&utm_medium=email&utm_campaign=sports) [<https://perma.cc/GE6T-P3NG>] (noting that the International Bar Association had “called for a halt to Trump’s ‘undermining the U.S. judiciary’”); Martha Minow & Robert Post, *Standing Up for “So-Called” Law*, BOS. GLOBE (Feb. 10, 2017), <https://www.bostonglobe.com/opinion/2017/02/10/standing-for-called-law/VLbDYmrwpdJcN8qs5FPJaK/story.html> [<https://perma.cc/9V7R-3GUY>] (describing how the Deans of Harvard and Yale Law Schools asserting “[i]t is time for all who care about this nation to worry when the nation’s most powerful office is used to intimidate the institutions of law that have maintained American stability and prosperity since the founding of the Republic”); Corky Siemaszko, *Experts: Trump Undermines Judiciary with Twitter Attack on Judge Robart*, NBC NEWS (Feb. 7, 2017), <http://www.nbcnews.com/news/us-news/experts-trump-undermines-judiciary-twitter-attack-judge-robart-n717626> [<https://perma.cc/X627-9XAY>] (quoting various law professors who were concerned by President Trump’s remarks).

<sup>77</sup> See Joe Palazzolo, *Judges React to Trump’s Attacks on the Judiciary*, WALL ST. J. (Feb. 13, 2017), <http://blogs.wsj.com/law/2017/02/13/judges-react-to-trumps-attacks-on-the-judiciary/> [<https://perma.cc/4UYD-JTMJ>] (quoting various federal judges).

<sup>78</sup> Abby Phillip, Robert Barnes & Ed O’Keefe, *Supreme Court Nominee Gorsuch Says Trump’s Attacks on Judiciary Are “Demoralizing”*, WASH. POST (Feb. 9, 2017), [https://www.washingtonpost.com/politics/supreme-court-nominee-gorsuch-says-trumps-attacks-on-judiciary-are-demoralizing/2017/02/08/64e03fe2-ee3f-11e6-9662-6eedf1627882\\_story.html?utm\\_term=.415d878c4464](https://www.washingtonpost.com/politics/supreme-court-nominee-gorsuch-says-trumps-attacks-on-judiciary-are-demoralizing/2017/02/08/64e03fe2-ee3f-11e6-9662-6eedf1627882_story.html?utm_term=.415d878c4464) [<https://perma.cc/H764-H2AA>].

### C. *The Institutional Significance of the Choice to Exercise Jurisdiction*

It seems unlikely that the Ninth Circuit panel that decided *Washington v. Trump* was impervious to these events, given their high-profile nature.<sup>79</sup> The Ninth Circuit itself relied, at least in part, on the “extraordinary circumstances of this case” to justify its exercise of jurisdiction.<sup>80</sup> Simply put, judicial decisions are not made in a vacuum. As one law professor recently hypothesized, the President’s “attacks on the integrity of federal judges” have “transformed [*Washington v. Trump*] into an early—and critical—showdown over the independence of the judiciary.”<sup>81</sup> Viewed through this lens, the Ninth Circuit panel’s choice to reach the merits of the case is itself a demonstration of judicial authority, bolstered in at least three ways.

First, the opinion comes from a higher court. This obvious feature ordinarily would be unremarkable. Here, however, a decision rejecting (even preliminarily) the Immigration Order on the merits carries special weight, given news reports that the Government had not fully complied with prior TROs issued by other district judges.<sup>82</sup> It is easier to credibly criticize (or less credibly, disregard) a short order of a single, local district judge as idiosyncratic, unsound, or politically motivated than a precedential opinion from a three-judge appellate panel that hears cases from nine states covering twenty percent of the U.S. population.<sup>83</sup>

Second, the Ninth Circuit panel’s decision was unanimous, reached by three judges appointed by the bipartisan coterie of Presidents Jimmy Carter, George W. Bush, and Barack Obama.<sup>84</sup> Unanimity, of course, is often

<sup>79</sup> Threats against judges involved in the case have required an increased security presence. Evan Perez, Shimon Prokupecz & Ariane de Vogue, *Threats Against Judges in Immigration Ban Cases Leads to Increased Security*, CNN (Feb. 9, 2017), <http://www.cnn.com/2017/02/09/politics/judges-threatened-immigration-order/> [<https://perma.cc/QS93-T8W4>].

<sup>80</sup> Appellate Decision, 847 F.3d 1151, 1158 (9th Cir. 2017).

<sup>81</sup> Jonathan Hafetz, *Why the Ninth Circuit’s Ruling on Trump’s Travel Ban EO Is So Important*, BALKINIZATION (Feb. 10, 2017), <https://balkin.blogspot.com/2017/02/why-ninth-circuits-ruling-on-trumps.html> [<https://perma.cc/4QZV-X3NZ>].

<sup>82</sup> See Isaac Arnsdorf, *Trump Officials Slow-Walked Court Orders on Travel Ban*, POLITICO (Feb. 3, 2017), <http://www.politico.com/story/2017/02/trump-officials-travel-ban-234633> [<https://perma.cc/FLG2-K2US>] (“A little over 24 hours after Trump ordered the ban, federal judges in New York, Massachusetts and Virginia issued emergency rulings blocking parts of it. But at Dulles and other airports, customs officers refused to change their procedures until their superiors conveyed instructions from agency lawyers reviewing the court decisions, according to three lawyers familiar with the situation and a congressional staff member investigating the matter.”).

<sup>83</sup> See Carol J. Williams, *U.S. Supreme Court Again Rejects Most Decisions by the U.S. 9th Circuit Court of Appeals*, L.A. TIMES (July 18, 2011), <http://articles.latimes.com/2011/jul/18/local/la-me-ninth-circuit-scorecard-20110718> [<https://perma.cc/XYC9-VAMC>] (noting that roughly 20% of the American population resides within the Ninth Circuit).

<sup>84</sup> Sudhin Thanawala & Gene Johnson, *A Look at Judges Who Refused to Reinstate Trump’s Travel Ban*, U.S. NEWS (Feb. 9, 2017), <https://www.usnews.com/news/politics/articles/2017-02-09/spotlight-on-3-judges-ruling-on-president-trumps-travel-ban> [<https://perma.cc/M7NX-LB77>].

regarded as a desirable, legitimizing trait of judicial decisions, particularly in controversial cases.<sup>85</sup> Indeed, the panel's unanimity may be both in response to and caused by the President's statements. Some scholars believe that attempting to "browbeat" or "intimidate" the courts is "counterproductive," because it motivates judges to "circle the wagons" and fight against the perception that they are "cav[ing] to executive pressure" with an accommodating ruling.<sup>86</sup>

Third, the panel issued its ruling anonymously, an option not available to district judges. Writing *per curiam* somewhat insulates individual appellate judges from direct, personal attacks on their integrity like those leveled at Judge Curiel and Judge Robart, both district court judges sitting alone. By not attributing authorship to one particular judge, the panel hindered an interlocutor's ability to target that judge as illegitimate or biased. And aside from this inoculating effect, anonymity frames the debate in institutional terms (turf on which courts are more familiar and comfortable) rather than personal ones, as is more common for disputes within and between the political branches.<sup>87</sup>

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<sup>85</sup> Perhaps the most famous example is *Brown v. Board of Education*, 347 U.S. 483 (1954). See also Neil S. Siegel, *Reciprocal Legitimation in the Federal Courts System*, 70 VAND. L. REV. (forthcoming 2017) ("Proceeding incrementally and finding strength in numbers is one good way for judges to rebut the President's repeated charges to his millions of Twitter followers that the federal courts are illegitimate because all of the judicial decisions going against him are political."); Cass R. Sunstein, *Unanimity and Disagreement on the Supreme Court*, 100 CORNELL L. REV. 769, 770 (2015) (quoting Chief Justice Roberts as stating that "[u]nanimous, or nearly unanimous, decisions are hard to overturn and contribute to the stability of the law and the continuity of the Court"); Mark Sherman, *Roberts Touts Unanimity on Supreme Court*, WASH. POST (Nov. 17, 2006), <http://www.washingtonpost.com/wp-dyn/content/article/2006/11/17/AR2006111700999.html> [<https://perma.cc/93SA-JGWV>] (quoting Chief Justice Roberts as stating that "[t]he more cautious approach, the approach that can get the most justices to sign onto it, is the preferred approach . . . . It also contributes, I think, to stability in the law.").

<sup>86</sup> Jack Goldsmith, *Does Trump Want to Lose the EO Battle in Court? Or is Donald McGahn Simply Ineffectual (or Worse)?*, LAWFARE (Feb. 6, 2017, 8:22 AM), <https://lawfareblog.com/does-trump-want-lose-EO-battle-court-or-donald-mcgahn-simply-ineffectual-or-worse> [<https://perma.cc/223L-YCXZ>]; Siemaszko, *supra* note 76 (quoting Professor Ron Allen).

<sup>87</sup> As an example of how writing *per curiam* framed the debate in institutional terms, shortly after the Ninth Circuit's decision, President Trump proclaimed "SEE YOU IN COURT." Donald J. Trump (@realDonaldTrump), TWITTER (Feb. 9, 2017, 3:35 PM), <https://twitter.com/realDonaldTrump/status/829836231802515457> [<https://perma.cc/ASJ9-SKDY>]. However, his previous attacks on judicial decisions had largely focused on individual judges, as discussed. See Kat Greene, *Trump Slams 9th Circ. as Court in "Chaos," "Turmoil"*, LAW360 (Feb. 16, 2017), [https://www.law360.com/appellate/articles/893204/trump-slams-9th-circ-as-court-in-chaos-turmoil-?nl\\_pk=f90418ad-8c65-4126-acc7-9e38c5012dd1&utm\\_source=newsletter&utm\\_medium=email&utm\\_campaign=appellate](https://www.law360.com/appellate/articles/893204/trump-slams-9th-circ-as-court-in-chaos-turmoil-?nl_pk=f90418ad-8c65-4126-acc7-9e38c5012dd1&utm_source=newsletter&utm_medium=email&utm_campaign=appellate) [<https://perma.cc/ZG4V-LLS3>] (reporting President's statements about Ninth Circuit's reversal rate before Supreme Court); Donald J. Trump (@realDonaldTrump), TWITTER (Feb. 6, 2017, 6:49 PM), <https://twitter.com/realDonaldTrump/status/828797801630937089> [<https://perma.cc/5993-JYBS>] (urging, the day before Ninth Circuit oral argument, that the "[c]ourts must act fast").

## CONCLUSION

The Ninth Circuit panel's method of resolving the emergency motion for a stay pending appeal in *Washington v. Trump* reflects what was likely a conscious choice to venture into the merits of a highly publicized (and politicized) case when a jurisdictional avenue would have done the trick. In fact, President Trump's statements may have galvanized the court toward that approach. No one, of course, can know with certainty why the panel decided to reach the merits, except for the judges themselves. Nevertheless, there is circumstantial evidence that the Ninth Circuit's choice to exercise jurisdiction may have been intended as an institutional display against presidential challenges to judicial legitimacy. If these concerns did in fact motivate the panel, then the decision to exercise jurisdiction is a symbol of judicial self-defense, buttressed by the opinion's unanimity and anonymity.<sup>88</sup>

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<sup>88</sup> Indeed, as this Essay goes to press, other Ninth Circuit judges have demonstrated in forceful terms their willingness to engaged in judicial self-defense. After the President issued an amended Immigration Order on March 6, 2017, which mooted the Government's appeal, a judge of the Ninth Circuit called for a vote on whether to grant en banc rehearing to vacate the panel's decision. *Washington v. Trump*, 2017 WL 992527, at \*1 (Mar. 15, 2017); Exec. Order No. 13,780, 82 Fed. Reg. 13,209 (Mar. 6, 2017). A majority of the Ninth Circuit voted against rehearing. 2017 WL 992527, at \*1. Judge Stephen Reinhardt concurred in a short opinion, noting that he was "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." *Id.* (Reinhardt, J., concurring in the denial of rehearing en banc).

Although disagreeing with the denial of rehearing, Judge Jay Bybee (joined by Judges Kozinski, Callahan, Bea, and Ikuta) went even further. Judge Bybee observed that the panel's decision was issued "under the worst conditions imaginable, including" compressed timelines "and the most intense public scrutiny of our court that [he could] remember." *Id.* at \*10 (Bybee, J., dissenting from denial of rehearing en banc). He continued:

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.

*Id.* If the panel's opinion in *Washington v. Trump* and the atmospherics surrounding the case created an inference that judicial self-defense was in play, Judge Reinhardt and Judge Bybee's opinions strengthen that theory.