# *Speech*

**THE HONORABLE JAMES LOUIS ROBART***

## Commencement Remarks—
## Reflections on Being a Lawyer[1]

I was surprised to learn that you invited me in recognition of my recent, groundbreaking opinion concerning application of copyright law to photographs of houses for sale on real estate listing sites.[2] I am confident that you find it significantly more interesting than the *Washington v. Trump* litigation concerning President Trump's first Executive Order on immigration.[3] The revised Executive Order on

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* Judge Robart became a United States District Judge for the Western District of Washington in June 2004. Prior to his appointment, he was with Lane Powell in Seattle for thirty-two years where he served as Chair of the Litigation Department and Managing Partner. He graduated from Whitman College (B.A. 1969) and Georgetown University Law Center (J.D. 1973).

Judge Robart has presided over several notable civil and criminal cases. His opinion in *Simmonds v. Credit Suisse*, construing the statute of limitations for Section 16(b) of the Securities and Exchange Act of 1934, was reversed by the Ninth Circuit, but adopted by the United States Supreme Court in an 8-0 opinion. He is the judge in *United States v. City of Seattle*, overseeing a consent decree involving an overhaul of Seattle Police Department practices and procedures. He also authored *Microsoft Corp. v. Motorola, Inc.*, which is the first court opinion in the United States setting reasonable and nondiscriminatory ("RAND") rates for standard essential patents.

Judge Robart served on the Organizing Committee and the Board of Governors for the Federal Circuit Bar Association and is a Fellow of the American College of Trial Lawyers.

1 Judge Robart was invited to provide the commencement remarks for the University of Oregon School of Law Class of 2017. The commencement address was given on Saturday, May 20, 2017, at the Matthew Knight Arena in Eugene, Oregon.

2 *See* VHT, Inc. v. Zillow Grp., Inc., No. C15-1096JLR, 2016 WL 7077235 (W.D. Wash. Sept. 8, 2016).

3 *See* Washington v. Trump, No. C17-0141JLR, 2017 WL 462040 (W.D. Wash. Feb. 3, 2017), *appeal dismissed*, No. 17-35105, 2017 WL 3774041 (9th Cir. Mar. 8, 2017).

immigration remains pending before me so excuse my inability to comment on the merits of the case—particularly with regard to the revised Executive Order.

It is May—but you probably knew that. What you might not know is that during this month some seven million students in the United States, and lots of parents, grandparents, spouses, partners, brothers, and sisters will have to sit through a commencement speech.

So you are freely granted permission to forget who delivered your law school commencement speech, but I hope you will consider in your careers three observations that I would like to make.

## FIRST: JUDGES TRY TO FOLLOW THE LAW

A young Japanese American college student recently asked me if I thought it was a coincidence that federal trial court judges in Washington State and Hawai‘i entered injunctive relief in the Immigration Executive Order cases. I pointed out that judges in many other states also issued opinions on those Executive Orders, but I understand her implicit point: Were two judges from states with recent historical experience concerning the treatment of citizens and immigrants more sensitive to the issues raised in the litigation?

The nomination hearings for Justice Gorsuch directed renewed attention to the impact of a judge's life experiences and beliefs on his or her decisions. Judicial nominees have used various terms in the course of their confirmation proceedings. Chief Justice Roberts famously said: "[I]t's my job to call balls and strikes and not to pitch or bat."[4] Opponents to judicial nominees often describe the nominee as an "activist judge," meaning the nominee will promote policies that he or she individually favors. Or as one person critical of my Executive Order ruling wrote: "I can tell you're an activist judge 'cause I disagree with you."

The late Chief Justice Earl Warren once said: "In civilized life, law floats in a sea of ethics."[5] I have often contemplated the Chief Justice's statement. In most cases, a judge's job is to decide the case based on the applicable law, prior decisions, or authoritative legal principle rather than a judge's personal sense of right or wrong. Yet,

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[4] *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to be Chief Justice of the United States: Hearing Before the Comm. on the Judiciary*, 109-158 Cong. 56 (2005) (statement of John G. Roberts, Jr., J.).

[5] Earl Warren, Chief Justice of the United States, Speech at the Louise Marshall Award Dinner of the Jewish Theological Seminary (Nov. 11, 1962).

sooner or later, every judge is obligated to make a decision he or she regards as unjust or unfair but mandated by the law—mandatory minimums in criminal cases come to mind. But there are many cases where a judge's views or moral convictions will influence his or her decision. Undoubtedly, judges rely on broadly held moral principles of society—the "sea of ethics"—in shaping their decisions.

For example, when judges empanel a death penalty jury, they are required to exclude potential jurors who believe society should never impose the death penalty ("thou shalt not kill") and those who believe the death penalty is always appropriate for anyone convicted of murder ("an eye for an eye"). The Supreme Court has never adopted either view but has recognized that the death penalty involves moral decisions that must be considered in order to pass constitutional muster.

Judges strive to follow the law and apply it impartially. In fact, we see ourselves as essential to efforts to enforce the rule of law and ensure that no one is above the law. But there are cases where the proper application of the law to specific facts is unclear. And in my fourteen years on the bench, I have often been surprised by the number of times I have been asked to decide legal questions of first impression.

So in cases where a judge has discretion to go either way or is forging new legal ground, I'm sure his or her beliefs and convictions influence the outcome. I am mindful that not all law school graduates become judges. Instead, they follow a panoply of career paths. Nevertheless, in each career there is room for discretion and in that sense we are all buoyed in a "sea of ethics" that challenges us to follow both our legal obligations and our moral values. Please remember in your legal career that lawyers don't merely call "balls and strikes," but they also can help shape the law while remaining true to their duty to represent their client, uphold the Constitution, and follow the law.

## SECOND: THE DOCTRINE OF UNINTENDED CONSEQUENCES

The first question we needed to address in the *Washington v. Trump* litigation was subject matter jurisdiction—and in particular—whether the plaintiff-states, which initially included both Washington and Minnesota, had standing to sue.[6]

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[6] *See Trump*, 2017 WL 462040, at *1.

As all lawyers know, to establish Article III standing, plaintiffs must demonstrate that they have suffered a concrete and particularized injury that is either actual or imminent, that the injury is fairly traceable to the defendant, and that it is likely that a favorable decision will redress that injury.[7]

To establish standing in the pending litigation, the States argued, among other things, that the first Executive Order on immigration caused concrete and particularized injuries to their public universities.[8] Certain state officials had great success in persuading judges to block or complicate efforts to expand healthcare, shield certain immigrants from deportation, and protect the rights of transgender students. Now other state officials are using those same rulings to try to block or frustrate some of the current administration's initiatives.

During the prior administration, the State of Texas sued the federal government at least forty-eight times—a point of pride with some of Texas's leaders.[9] Former Texas Attorney General and now Governor Greg Abbott filed thirty-one of those lawsuits, and his successor, Ken Paxton, has filed seventeen more.[10]

Of special note was the case of *Texas v. United States*, which involved an Executive Order that would have provided relief from deportation and work permits to estimated millions of people.[11] A U.S. District Court in Texas found that the State of Texas had standing to challenge the Executive Order, and the Fifth Circuit agreed.[12] On June 23, 2016, the Supreme Court deadlocked 4-4 in the appeal of the Fifth Circuit ruling, leaving the Fifth Circuit decision as the controlling decision in that Circuit.[13]

I will leave it to the Supreme Court, the Courts of Appeals, and legal scholars to debate whether the Fifth Circuit holding on standing was ultimately right. But I will venture the observation that the ruling clarified or modified whether a state has Article III standing and a justiciable cause of action regarding federal government actions. I can

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[7] *See* U.S. CONST. art. III, § 2.

[8] *Trump*, 2017 WL 462040, at *2.

[9] Neena Satija et al., *Texas vs. the Feds—A Look at the Lawsuits*, TEX. TRIB. (Jan. 17, 2017, 12:00 AM), https://www.texastribune.org/2017/01/17/texas-federal-government-lawsuits/.

[10] *Id.*

[11] Texas v. United States, 809 F.3d 134, 146-48 (5th Cir. 2015).

[12] *Id.* at 146.

[13] United States v. Texas, 136 S. Ct. 2271, 2272 (2016) (per curiam).

also say, without question, that certain political partisans celebrated the decision.

After *Washington v. Trump* was filed, the United States vigorously argued that the plaintiff-states had no standing to attack the Immigration Executive Order.[14] Applying the most recent authority from Texas, I found they did.[15] The Ninth Circuit agreed.[16] Further, relying on that same authority, I issued a TRO enjoining the Executive Order not just in the Western District of Washington, but on a nationwide basis—believing that the failure to do so "would undermine the constitutional imperative" to enforce immigration laws uniformly nationwide.[17]

As my mother used to say, "Be careful what you ask for." I urge you to consider the doctrine of unintended consequences. The precedent Texas created by resisting immigration policies it didn't like was utilized by other states to challenge the current Executive Orders.[18] I'm willing to venture that Texas didn't expect to be key in court decisions challenging the current administration's immigration policies.

In our current time of divided government, we should give special care to unintended consequences. In December 2013, the Senate changed the rules regarding filibusters of presidential nominees to lower court and government positions.[19] But it left untouched the higher number of votes needed to stop filibusters of U.S. Supreme Court nominees. In April of this year, a newly formed Senate voted to allow simple majority votes on Supreme Court nominees as well.[20] Who can predict what the consequence of this vote will be on the composition of the U.S. Supreme Court?

In another example, it was popular with certain partisans when a 2012 Supreme Court decision, *National Federation of Independent Business v. Sebelius*, allowed states to opt out of the Affordable Care

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[14] Brief for Petitioner at 9–12, Washington v. Trump, No. C17-0141JLR, 2017 WL 462040 (W.D. Wash. Feb. 3, 2017), *appeal dismissed*, No. 17-35105, 2017 WL 3774041 (9th Cir. Mar. 8, 2017).

[15] *Trump*, 2017 WL 462040, at *2.

[16] Washington v. Trump, 847 F.3d 1151, 1161 (9th Cir. 2017), *reconsideration en banc denied*, 858 F.3d 1168 (9th Cir. 2017), *cert denied sub nom.* Golden v. Washington, – S. Ct. –, No. 17-5424, 2017 WL 3224674 (Nov. 13, 2017).

[17] *Trump*, 2017 WL 462040, at *2.

[18] *See, e.g.*, Hawai'i v. Trump, 241 F. Supp. 3d 1119, 1131 (D. Haw. 2017).

[19] *See* 159 CONG. REC. S8418 (daily ed. Nov. 21, 2013); 159 CONG. REC. S8584 (daily ed. Dec. 10, 2013).

[20] *See* 163 CONG. REC. S2190 (daily ed. Apr. 4, 2017).

Act's expansion of Medicaid.[21] Recently, however, Judge William Orrick relied on a holding in that case to block the current administration's efforts to withhold federal money from localities—"Sanctuary Cities"—that refuse to aid efforts to deport undocumented immigrants.[22] Further, although only two California counties had challenged the sanctuary cities order, Judge Orrick issued a nationwide injunction temporarily blocking it.[23] Partisans who had cheered the nationwide injunction blocking the prior administration's immigration and transgender rights executive orders expressed concern about a single district court judge issuing a nationwide ruling on the sanctuary cities executive order. Contrary to what some partisans may think, legal precedent has no political affiliation. It simply becomes part of the law and is applied neutrally by judges doing their jobs in deciding cases based on the facts and the law that is before them.

In your careers, when analyzing questions and recommending answers, try to foresee collateral consequences and then argue for the best policy, keeping in mind the doctrine of unintended consequences.

## THIRD: DEMOCRATIC CITIZENSHIP

It is undeniable that the courts owe substantial deference to the immigration and national security determinations of the political branches. As the Ninth Circuit said, this is "an uncontroversial principle that is well-grounded in our jurisprudence."[24] In the litigation over the first Executive Order on immigration, however, the government took the position that executive orders about immigration policy, particularly when motivated by national security concerns, are unreviewable, even if those actions potentially contravene constitutional rights and protections.[25]

I raise this matter not to debate the merits of rival arguments, but as a springboard to reflect on democratic citizenship (and I stress that democratic is spelled with a lower case "d").

The American philosopher John Dewey believed that support for free inquiry, tolerance of alternative viewpoints, and preparation for

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21 Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519 (2012).

22 Cty. of Santa Clara v. Trump, 250 F. Supp. 3d 497, 532 (N.D. Cal. 2017).

23 *Id.* at 539.

24 Washington v. Trump, 847 F.3d 1151, 1161 (9th Cir. 2017), *reconsideration en banc denied*, 858 F.3d 1168 (9th Cir. 2017), *cert denied sub nom.* Golden v. Washington, – S. Ct. –, No. 17-5424, 2017 WL 3224674 (Nov. 13, 2017).

25 *Id.*

participation as citizens were all fundamental to democratic citizenship.[26] In my last few minutes I would like to share with you some impressions I have gained during the last three-and-a-half months tested against John Dewey's principles.

Depending on what you count, my chambers, my wife, and I received over 35,000 communications from the public about my ruling on the first Executive Order on immigration. After speculation about my parents not being married when I was conceived, perhaps the most common statement in letters opposing my ruling was "You're not going to be re-elected!" Holding a position with lifetime tenure, I am not troubled by this threat. But it is a sad commentary on the state of civics education in America and our preparation for participation in our communities.

The claim of unreviewability of presidential decisions is also troubling. The saga of the first Executive Order on immigration is concluded—the President rescinded the Order. I am pleased that the final word was written by the Ninth Circuit. The panel stated unequivocally: "There is no precedent to support this claimed unreviewability, which runs count[er] to the fundamental structure of our constitutional democracy."[27] Since 1803, we have honored a system of "checks and balances" in which the Supreme Court can review the actions of the President and Congress against the provisions of the Constitution. Yet many of those who comment on the ruling often say that the courts should "bug out." In your careers, please remember *Marbury v. Madison*[28] and continue to breathe fresh oxygen into its aged lungs.

Lastly, let me speak to tolerance. Typical of the some of the letters I received was one from a woman who wrote: "Surely you can see that there has to be something done to ease the burden on the American taxpayer[s], as they cannot go on paying for these unskilled, inept people that are incapable of assimilation into the United States. I am referring to Muslim people." She then went on to describe me (I don't think we have ever met) as "un-American, weak-minded, and without moral values." This is not John Dewey's "tolerance of alternative viewpoints."[29]

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[26] *See generally* JOHN DEWEY, DEMOCRACY AND EDUCATION: AN INTRODUCTION TO THE PHILOSOPHY OF EDUCATION (Paul Monroe ed., 1922).

[27] *Trump*, 847 F.3d at 1161.

[28] 5 U.S. 137 (1803).

[29] DEWEY, *supra* note 26.

Our country is divided on many issues at the moment. But we can disagree with one another without condemnation. As fellow participants in our great democracy, we will certainly always have disagreements with one another, but we owe one another tolerance, mutual respect, and civil discourse. Our courts and judicial system, grounded in centuries of history and experience, have evolved to ensure that all citizens have a neutral forum where they can come together to resolve disputes in precisely that way—with mutual respect and utilizing civil discourse. The courts must remain a place where all the participants—litigants, their supporters, court personnel, jurors, attorneys, and judges, each of whom plays their own unique role in conflict resolution—are treated fairly and can expect to be treated with respect. Indeed, our judicial system can serve as a model and remind us that as Americans we can discuss problems, disagree, and peaceably resolve disputes without rejecting or condemning each other because we disagree.

## CONCLUSION

You have honored me by allowing me to speak with you today. Congratulations, and regardless of the path you follow, may you go in peace.

Thank you.