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Judge Thomas Hardiman

Judge Thomas Hardiman serves on the U.S. Court of Appeals for the 3rd Circuit, to which he was appointed by President George W. Bush in 2007. Notably, Judge Maryanne Trump Barry, the President's sister, serves alongside Judge Hardiman on the 3rd Circuit. Prior to joining the Court of Appeals, Hardiman was a federal district judge in the western district of Pennsylvania.

Judge Hardiman began his career in private practice, first in Washington, D.C. (at Skadden, Arps, Slate, Meagher & Flom), and later in Pittsburgh. Judge Hardiman went to the University of Notre Dame (as the first of his family to attend college) and graduated from Georgetown University Law Center. He drove a taxi during law school to fund his education.

Judge Hardiman's record is largely conservative, with some outlying opinions.

In the criminal context, Judge Hardiman's opinions come out largely in favor of the government and law enforcement on constitutional issues. Judge Hardiman also tends to decide against inmates in death penalty cases, and has stressed that the Antiterrorism and Effective Death Penalty Act, which imposes limitations on an inmate's ability to obtain habeas corpus relief, establishes an extremely high bar for habeas petitioners. In *Dennis v. Pennsylvania*, No. 13-9003 (3rd Cir. August 23, 2016), the majority granted habeas relief, finding that several pieces of evidence suppressed in the lower court denied the petitioner a fair trial. Judge Hardiman disagreed, stating that he "would hold that when gaps or errors afflict a state court's habeas adjudication, federal courts may not reverse unless the *decision* itself is unreasonable." His dissent was critical of the federal courts' treatment of cases that fall under AEDPA, explaining:

> The inability of federal courts to follow AEDPA has reached epidemic proportions. As I pointed out in 2012, since 2000 the Supreme Court has granted certiorari in ninety-four cases arising under AEDPA, forty-six of which involved questions of federal court deference to decisions of state courts. Thirty-four of those cases (approximately seventy-four percent) have been reversed because the court of appeals failed to afford sufficient deference to state court. Remarkably, twenty-two of those cases – almost fifty percent – were reversed without dissent.

Judge Hardiman's record of constitutional cases includes several opinions that come out in favor of law enforcement. There are, however, outliers in which he finds for a constitutional claimant, indicating he is open to considering the merits of such claims. For example, *Kelly v. Borough of Carlisle*, 622 F.3d 248 (3rd Cir. 2010), considered whether an officer was entitled to qualified immunity with respect to First and Fourth Amendment claims brought by a defendant arrested for recording a police officer at a traffic stop. The officer alleged that he had consulted with an assistant district attorney with regard to whether the recording violated the Wiretap Act, and relied upon the ADA's advice in establishing probable cause for the arrest. Hardiman held that "a police officer who relies in good faith on a prosecutor's legal opinion that the arrest is warranted under the law is presumptively entitled to qualified immunity from Fourth

Amendment claims premised on a lack of probable cause," but that "a plaintiff may rebut this presumption by showing that, under all the factual and legal circumstances surrounding the arrest, a reasonable officer would not have relied on the prosecutor's advice." Considering the facts of this case – for example, whether the camera was in plain view or covered by the plaintiff's hands, and whether the officer called the ADA to seek legal advice or simply to get an approval number for an arrest – Hardiman held that the district court had not made sufficient factual findings and therefore vacated the district court's summary judgment order granting qualified immunity to the officer with respect to the Fourth Amendment claim, and remanded the case, stating that "the District Court did not consider the facts in the light most favorable to Kelly, did not evaluate the objective reasonableness of Officer Rogers's decision to rely on ADA Birbeck's advice in light of those facts, and did not evaluate sufficiently the state of Pennsylvania law at the relevant time."

Kelly is notable also for it's holding with respect to qualified immunity on the First Amendment claim, and particularly for its finding that there was not an established First Amendment right to record police. Citing cases that announce a broad right to videotape police, as well as those that "suggest a narrower right," Hardiman held in this case that "there was insufficient case law establishing a right to videotape police officers during a traffic stop to put a reasonably competent officer on 'fair notice' that seizing a camera or arresting an individual for videotaping police during the stop would violate the First Amendment." Thus, the officer was entitled to qualified immunity with respect to the alleged First Amendment claim.

Hardiman has a mixed record on other claims of First Amendment violations. In *Lodge No. 5 of the Fraternal Order of Police v. Philadelphia*, 763 F.3d 358 (3rd Cir. 2014), the court considered whether a restriction preventing members of the Philadelphia Police Department from making contributions to their union's political action committee violated the First Amendment. Hardiman held that it did. He acknowledged the prohibitions "aim to insulate the police from political influence," discussing the history of police corruption in Philadelphia, and agreed with the district court that the city of Philadelphia had "established real harms." However, he disagreed "with its conclusion that the . . . ban is an appropriately tailored means of addressing those concerns." Important to Hardiman in this case were the facts that other public employees did not face similar campaign contribution restrictions, and that police officers were expressly permitted to make public demonstrations of support, either through a union or on their own time, while prohibited only from making financial donations. Hardiman found it "hard to fathom how the latter is a more pernicious form of expression than the former." Thus, he struck down the ban based on "lack of fit," though there are hints in the case that, had the ban been broader, it in fact might have better fit Philadelphia's objectives.

In another widely-discussed First Amendment case, *B.H. ex rel. Hawk v. Easton Area School District*, 725 F.3d 293 (3rd Cir. 2013), the Third Circuit considered a First Amendment challenge brought by middle school students who wanted to participate in a breast cancer awareness campaign by wearing bracelets with the slogan "I [Heart] Boobies." The majority ruled in favor of the students, but Judge Hardiman dissented, calling the decision "inconsistent with the Supreme Court's First Amendment jurisprudence." He took issue with the fact that the speech

occurred in the middle school context and fell "into a gray area between speech that is plainly lewd and merely indecorous," believing it to be objectively reasonable to find the bracelets to be "inappropriate sexual double entendre" in this context.

In another school-related First Amendment case, *Busch v. Marple Newtown School District*, 567 F.3d 89 (3rd Cir. 2009), however, Hardiman would have allowed for the challenged speech at issue, while the majority found no First Amendment violation. In *Busch*, the plaintiffs were a mother and son who brought free speech, establishment, and equal protection claims against school officials and the school district after the son's school prevented his mother from reading aloud from Bible scripture to students in the kindergarten classroom as part of a family "All About Me" activity. The majority affirmed the district court's grant of summary judgment in favor of the school district, explaining that the age of the students was an important factor in the case (with older students but not kindergarteners being "mature enough and . . . likely to understand that a school does not endorse or support speech that it merely permits on a nondiscriminatory basis,"). In dissent, Hardiman argued that "the school went too far in this case in limiting participation in 'All About Me' week to nonreligious perspectives." While he acknowledged that "the constitutional rights of students in public school are not automatically coextensive with the rights of adults in other settings," citing *Bethel School District v. Fraser*, 478 U.S. 675, 682 (1986), he also maintained that "[i]t does not follow, however, that the state may regulate one's viewpoint merely because speech occurs in a schoolhouse – especially when the facts of the case demonstrate that the speech is personal to the student and/or his parent rather than the school's speech." He concluded:

> The majority's desire to protect young children from potentially influential speech in the classroom is understandable. But that goal, however admirable, does not allow the government to offer a student and his parents the opportunity to express something about themselves, except what is most important to them.

Hardiman again wrote on the First Amendment in *NAACP v. Philadelphia*, 834 F.3d 435 (3rd Cir. 2016), which considered the City of Philadelphia's written policy preventing private advertisers from displaying non-commercial content at the Philadelphia International Airport. Under the facts of this case, the NAACP had offered to pay the prevailing market rate for an advertisement at the airport which read: "Welcome to America, home to 5% of the world's people & 25% of the world's prisoners. Let's build a better America together." The City rejected the submission, and argued to the court that the policy helped to further its goals of "maximizing revenue" and "avoiding controversy." The majority found "substantial flaws in those justifications" to be revealed in the record, and held that the ban was not a reasonable use of governmental power and therefore that it violated the First Amendment, with Judge Hardiman dissenting. Judge Hardiman believed the restriction to be "a reasonable attempt to avoid controversy at the airport." In explaining his reasoning, he asked readers to "imagine that the monitors [at the airport] are rented by an organization seeking to abolish the death penalty," with "videos or photos of executions," and stated that if those advertisements were effective, "death penalty advocates or victims' rights groups would buy space showing similarly gruesome footage of the

victims of those who were executed." While he explained that "it would seem obvious that these images would be controversial and inappropriate for travelers heading to their gates," he did not necessarily elaborate on how the NAACP's proposed ad would elicit the same controversy or disruption of the peace at the airport.

On the Second Amendment, Judge Hardiman dissented from a majority opinion holding New Jersey's law conditioning the issuance of a permit to carry a handgun in public on a showing of "justifiable need" to be constitutional. *Drake v. Filko*, 724 F.3d 426 (3rd Cir. 2013). In his dissent, Judge Hardiman stated that he believed the law contravened the Second Amendment, and that "[a]though the majority declines to determine whether the Second Amendment extends outside the home . . . my view that the Second Amendment extends outside the home is hardly novel." Acknowledging that "[g]un violence is an intractable problem throughout the United States," and providing data that "in 2011 alone, 6,220 people were murdered by handguns," he explained that federal judges "must apply the Constitution and the precedents of the Supreme Court regardless of what each judge might believe as a matter of policy or principle," and "must enforce constitutional rights even when they have 'controversial public safety implications.'"

In *United States v. Barton*, 633 F.3d 168 (3rd Cir. 2011), Judge Hardiman did find some limitations on Second Amendment rights, however, holding that a restriction on a felon's right to bear arms was constitutional on its face, but remained open as to as-applied challenges (and was constitutional as applied in this particular case). Hardiman wrote that "felons forfeit other civil liberties, including fundamental constitutional rights such as the right to vote or to serve on a jury," and quoted the Ninth Circuit's decision in *United States v. Vongxay*, 594 F.3d 1111, 1115 (9th Cir. 2010), that "felons are categorically different from the individuals who have a fundamental right to bear arms."

Recently, however, Judge Hardiman agreed with complainants who argued that, as applied to them, a federal law under 18 U.S.C. section 922(g)(1), restricting firearm possession by certain categories of people who have committed certain categories of crimes, was constitutional as applied to them. The majority and Hardiman agreed that the law, as applied here, was unconstitutional, but disagreed on reasoning and viewpoints regarding the scope of Second Amendment review. In its opinion, the majority stated:

> Some judges – including Judge Hardiman and those colleagues who join his opinion concurring in the judgments – and commentators have interpreted *Heller* to mean that any law barring persons with Second Amendment rights from possessing lawful firearms in the home even for self-defense is *per se* unconstitutional; that is, no scrutiny is needed.

In his concurrence, Judge Hardiman agreed that the law was unconstitutional as applied to the two complainants, explaining that "[t]he most cogent principle that can be drawn from traditional limitations on the right to keep and bear arms is that dangerous persons likely to use firearms for illicit purposes were not understood to be protected by the Second Amendment." Hardiman believed that the complainants here had demonstrated that their crimes were

nonviolent and that "their personal circumstances are distinguishable from those of persons who do not enjoy Second Amendment rights because of their demonstrated proclivity for violence." Judge Hardiman agreed with the majority that the law was unconstitutional as applied to the complainants, but found "flaws" in the majority's opinion, including a misapprehension of "the traditional justifications underlying felon dispossession, substituting a vague 'virtue' requirement that is belied by the historical record."

Judge Hardiman has been somewhat sympathetic to plaintiffs in cases brought under Title VII of the Civil Rights Act of 1964. For example, in *Prowel v. Wise Business Forms, Inc.*, 579 F.3d 285 (3rd Cir. 2009), the court considered whether Prowel, an employee of Wise Business Forms, had marshaled sufficient evidence for his claims of "gender stereotyping" and religious discrimination to be submitted to the jury. The district court held that Prowel's suit was merely a claim for sexual orientation discrimination – not cognizable under Title VII – that he repackaged as gender stereotyping and religious discrimination claims. In reversing the district court on the "gender stereotyping" claim, Judge Hardiman found that the record, when viewed in the light most favorable to Prowel, contained sufficient facts from which a reasonable jury could conclude that he was harassed and/or retaliated against "because of sex," and that the claim should be submitted to a jury. He found that "the line between sexual orientation discrimination and discrimination 'because of sex' can be difficult to draw," and that in this case it is possible that Prowel was harassed either because of his sexual orientation or because of his failure to conform to gender stereotypes and that one "does not vitiate the possibility" of the other. Because the only fact Prowel offered to support his religious discrimination claim was "based entirely upon his status as a gay man," however, Judge Hardiman affirmed summary judgment for Wise on the religious discrimination claim.

In another case brought under Title VII, *NAACP v. North Hudson Regional Fire & Rescue*, 665 F.3d 464 (3rd Cir. 2011), Judge Hardiman considered the legality of a residency requirement for firefighter candidates imposed by North Hudson Regional Fire and Rescue, a fire department made up of five New Jersey municipalities. The district court had found the residency requirement to be invalid because it had a disparate impact on African-American applicants, and North Hudson and six Hispanic firefighter applicants appealed. In affirming, Judge Hardiman reviewed statistics such as the population breakdown of the municipalities and the percentage of protective services positions in total held by African Americans. Finding that the discrepancies between the actual and expected number of African American firefighters in North Hudson were so large, he stated that there was "virtually no probability" that they were "the result of chance." Judge Hardiman wrote:

> The NAACP Plaintiffs presented sufficient evidence to establish that North Hudson's residency requirement causes a disparate impact by excluding well-qualified African-Americans who would otherwise be eligible for available firefighter positions. North Hudson failed to present evidence to create any genuine dispute regarding this disparate impact or adduce a valid business necessity for the residency requirement.

Finally, in the immigration context, Judge Hardiman has signed on to several unpublished opinions that come out in favor of the government. Notably, however, early in his career, Hardiman worked with Ayuda, a legal organization representing immigrants, and during his Senate confirmation hearings he described this work, stating: "I volunteered at Ayuda, in the office, on a regular basis, and I did everything from fingerprinting and interviewing persons of Hispanic origin who entered the country without inspection and who were seeking work-authorization permits." He represented several immigrants who entered the United States without inspection, calling this work "one of the most important cases I have ever handled."

In *Valdiviezo-Galdamez v. Attorney General*, 663 F.3d 582 (3rd Cir. 2011), Judge Hardiman concurred in the majority opinion in favor of the asylum applicant who argued that he belonged to a "particular social group" of "Honduran youth who have been actively recruited by gangs but have refused to join because they oppose gangs," and that as such he came to the United States to avoid being targeted by Honduran gangs. The majority remanded the case to the Board of Immigration Appeals on the basis that the two requirements enunciated by the BIA in determining a "particular group" were inconsistent with the BIA's prior decisions, and therefore that the BIA erred in requiring the asylum seeker to show "particularity" and "social visibility" (the new requirements) to establish that he was a member. In his concurrence, Judge Hardiman indicated that he believed that "the BIA is free to adopt the additional requirements of particularity and social visibility," but that the problem with BIA's approach was that "the Board has failed to acknowledge a change in course and forthrightly address how that change affects the continued validity of conflicting precedent." He believed both the new requirements and the old precedent to be "reasonable," but maintained that the BIA needed to make a clear choice between them. Judge Hardiman explained that, "announcing a new interpretation while at the same time reaffirming seemingly irreconcilable precedents suggests that the BIA does not recognize, or is not being forthright about, the nature of the change its new interpretation effectuates. It also unfairly forces asylum applications to shoot at a moving target," and tasked the BIA with bringing "some stability to its interpretation of the law," so that the asylum seeker was allowed "the opportunity to present evidence with an eye towards the law under which his case is being decided."