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## Thomas Hardiman, possible Supreme Court nominee, seen as ‘Second Amendment extremist’

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In the wake of mass shootings that have divided the country on the issue of gun control, President Trump is considering nominating to the Supreme Court an appellate judge who has argued that Americans have a constitutional right not only to keep guns at home — as the high court has ruled — but also to carry them in public.

U.S. Circuit Judge Thomas M. Hardiman has also written that convicted criminals, including some felons, should be able to recover their right to own and carry guns, as long as their crimes were not violent.

Constitutional law scholars and advocates on both sides of the gun debate say that Hardiman, who sits on the Court of Appeals for the 3rd Circuit in Pittsburgh, holds a more expansive view of the Second Amendment than the Supreme Court has articulated to date. His nomination and confirmation would push the court to the right, they say, making it more likely that justices would agree to hear cases challenging gun laws — and perhaps to strike them down.

Adam Winkler, a law professor at the University of California at Los Angeles who has written extensively about gun laws, said that if Hardiman’s views were law, gun restrictions in states such as California, New York and New Jersey would be struck down, potentially leading to a vast expansion in legal gun ownership.

“He believes the government has very little leeway in regulating guns. He thinks the only types of gun-control laws that are constitutionally permissible are ones that existed at the founding,” said Winkler, author of [“Gunfight: The Battle Over the Right to Bear Arms in America.”](#) He described Hardiman as a “Second Amendment extremist.”

Hardiman has said he is fulfilling his duty as a federal judge to apply the Constitution, regardless of his own policy preferences or principles. “No matter how laudable the end, the Supreme Court has long made clear that the Constitution disables the government from employing certain means to prevent, deter or detect violent crime,” he wrote in a 2013 dissent.

Hardiman, 52, joined the federal bench after being nominated by George W. Bush in 2003. Three years later, he was confirmed to the appeals court. In 2017, he was one of two finalists to fill the

seat that had belonged to the late Justice Antonin Scalia. Trump ultimately chose Neil M. Gorsuch.

But now Hardiman — who, according to [Politico](#), has been endorsed by his colleague on the 3rd Circuit, the president’s sister Judge Maryanne Trump Barry — is said to again be among a handful of judges who have made Trump’s shortlist, a possibility that has alarmed gun-control advocates.

Since the Supreme Court issued a landmark decision striking down a D.C. handgun ban in 2008, and then extended that decision to the states in 2010, the justices have been largely silent on the gun debate, refusing to take up a slew of challenges to firearm restrictions from across the country.

Many court watchers believe that retiring Justice Anthony M. Kennedy’s presence on the court had something to do with that silence and that an avowed Second Amendment defender such as Hardiman — or Judge Brett Kavanaugh, who has also expressed an expansive view of gun rights and is reportedly among Trump’s top picks for the job — could have a profound effect on the court’s handling of gun-related cases.

Two other judges among Trump’s reported top picks — Amy Coney Barrett and Raymond Kethledge — have thinner records on the Second Amendment, making their positions more difficult to analyze. Conservative radio host Hugh Hewitt, writing in [The Washington Post](#), called Kethledge “exemplary” on gun rights, citing his concurrence with an opinion that described the right to bear arms as “fundamental.”

For the Supreme Court to hear a case, four justices must vote in favor of review. Three sitting justices — Clarence Thomas, Samuel Alito and Gorsuch — have made clear that they believe the high court should take up more Second Amendment cases. Experts say that Hardiman would almost certainly be the fourth vote in favor.

Experts also believe that Kennedy may have moderated the Supreme Court’s key decision on guns, *District of Columbia v. Heller*, in which the court struck down the District’s ban on handguns. Scalia, writing for the majority, wrote that Americans have a right to have guns at home and for self-defense but also that “long-standing” gun regulations, such as those prohibiting felons from owning guns, are constitutional.

Sanford Levinson, a constitutional law professor at the University of Texas, said that while it’s impossible to know for sure, he and court watchers from across the political spectrum believe that Scalia included explicit approval of some gun regulation in the opinion to persuade Kennedy, the perennial swing voter, to join the opinion.

Kennedy ultimately did, giving the conservatives a 5-4 majority in the case.

While others on Trump’s shortlist likely also have an expansive view of the Second Amendment, Hardiman has had the opportunity to express his in two key opinions over the past seven years.

In 2013, Hardiman was part of a three-judge appeals panel deciding the constitutionality of a New Jersey law that required citizens seeking a handgun permit to demonstrate a “justifiable

need” for such a weapon. The state defined “justifiable need” as an urgent need for self-protection because of “specific threats or recent attacks.”

Two judges voted to uphold the New Jersey law, finding it a constitutional way for the state to advance its goal of protecting public safety. Hardiman dissented, arguing that the law should be struck down.

Central to their disagreement was the *Heller* ruling, in which the Supreme Court did not directly weigh in on whether Americans also have a right to carry a gun in public but said that Second Amendment rights are not unlimited. In his dissent, Hardiman said that Americans do have a right to carry guns outside their homes and that forcing citizens to prove they have a “justifiable need” to exercise that right amounts to an unconstitutional “rationing system.”

Gun ownership poses risks, and “States have considerable latitude to regulate the exercise of the right in ways that will minimize that risk,” Hardiman wrote in his dissent in the case, known as Drake v. Filko. “But states may not seek to reduce the danger by curtailing the right itself.”

In 2016, the 3rd Circuit decided a case involving two men challenging a federal law that prevented them from owning guns because of their criminal convictions. One was a 41-year-old man convicted of misdemeanor “corruption of a minor” for having a sexual relationship with a 17-year-old employee, and the other had pleaded guilty to unlawfully carrying a handgun without a license, also a misdemeanor.

The court, in an 8-to-7 decision, said that the two men should be allowed to possess a gun because their offenses “were not serious enough to strip them of their Second Amendment rights.” Hardiman wrote a concurring opinion putting forth an even more expansive view of gun rights. He wrote that in cases involving people convicted of nonviolent crimes, the burden should not fall on citizens to prove that they deserve their Second Amendment rights but on the government to prove they do not, said Clark Neily of the Cato Institute.

Neily, one of the attorneys who represented Dick Heller in his namesake Supreme Court case, said that Hardiman has been more inclined to protect the Second Amendment than most of his colleagues on the federal bench.

“He does not see it as a second-class right,” Neily said. “His track record suggests a greater willingness than most judges to be involved in what some people see as part of the culture wars.”