

A TRIBUTE TO JUDGE HAWKINS

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*Well, I'm a standing on a corner
in Winslow, Arizona
It's such a fine sight to see*

—*Take It Easy* by The Eagles¹

When Michael Daly Hawkins was asked at his confirmation hearing about where he grew up, he responded by asking if anyone had heard the song *Take it Easy* by The Eagles. It was a great way to showcase his pride in his home town, Winslow, Arizona. Popular songs about Bucharest don't come to mind so readily, but if pressed, I'd have to stick up for that Yiddish Borscht-belt classic, *Rumania, Rumania*.² By all accounts, Judge Hawkins has come a long way from that corner in Winslow, but he's always made it back to Arizona. I suppose most people would if they had a home as beautiful as his.³

I'm honored to introduce this tribute to Judge Hawkins, an extraordinary jurist, a life-long Arizonan, a wonderful friend and a real *Mensch*. I can only imagine his pride in being honored by his alma mater; don't all law students dream of one day being celebrated by the law journal that inducted them into the Way of Legal Citation? I am relieved that the *Arizona State Law Journal* didn't task me with cataloguing Judge Hawkins's contributions to the legal profession. I would have had to describe his service as a special courts-martial judge, his role as Special Prosecutor for the Navajo Nation, his private practice work and his bevy of decisions as a Ninth Circuit judge. It's fair to say that when the President appoints you United States Attorney at age 31, you haven't exactly been *Takin' It Easy*.

Judge Hawkins has penned some big deal decisions. Yes, in between watching Arizona Diamondbacks games, he's written opinions that have made quite a splash. For example, in *Li v. Ashcroft*, Judge Hawkins deemed eligible for asylum a Chinese woman who was subjected to a violent gynecological examination and threats of abortion and arrest for opposing

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1. THE EAGLES, *Take It Easy*, on EAGLES (Elektra Entertainment 1972).

2. Made famous by Joel Grey's father, Mickey Katz. If you think he isn't on par with The Eagles, you haven't been hanging around the right circles.

3. See Nancy Erdmann, *Urban Renewal: A Renovated Yard in Central Phoenix Is High on Style and Low on Maintenance*, PHX. HOME & GARDEN, July 2010, at 88.

China's one-child policy.⁴ He found that within the meaning of the asylum statute, she'd demonstrated past persecution and a clear fear of future persecution based on her resistance. *Li* is memorialized within a historical display at the James R. Browning U.S. Courthouse in San Francisco, as one of the most important cases of the decade.⁵

He also disposed of a rather fascinating set of legal claims by Ted Kaczynski, the Unabomber (no relation to yours truly). After Kaczynski pled guilty to several crimes involving three deaths and sixteen bombing attempts, the government seized his property and sought to sell it to pay the \$15,026,000 he owed to his victims in restitution. Judge Hawkins gave the government an opportunity to come up with "a commercially reasonable plan to dispose of the property at issue . . . to maximize monetary return to the victims and their families."⁶ You see, valuing Kaczynski's property was difficult because it only had value on account of his criminal notoriety. The plan needed to weigh the victims' need for restitution against allowing Kaczynski to profit from his heinous crimes. The government proposed to conduct a well-publicized internet sale of Kaczynski's property, including his books and own writings (with victims' names redacted). Kaczynski sued, claiming that this plan would violate his First Amendment rights, and that the government wasn't entitled to his writings and had no right to alter them. Judge Hawkins admirably disposed of this "murderabilia" case,⁷ upholding the restitution statute and deciding that Kaczynski would be able to express his ideas, since he'd receive copies of his papers before they were sold.⁸

Judge Hawkins is also a scholar. He had the stamina and humility to go back to law school *after* several years as a judge on the Ninth Circuit, and got himself a master's degree. So much for resting on his laurels. He wrote his master's thesis on the politics of slavery, and has since analyzed the role that John Quincy Adams played in legal cases dealing with the antebellum slave trade.⁹ He's explored the political pressures facing Adams and how they shaped his position on slavery, concluding that Adams "was himself a

4. 356 F.3d 1153 (9th Cir. 2004) (en banc).

5. On a lighter note, a Judge Hawkins opinion that made my musician son elated held that the part of a musician's apartment devoted exclusively to practice qualifies as a "principal place of business" for purposes of an income tax deduction. *Popov v. Comm'r*, 246 F.3d 1190, 1194 (9th Cir. 2001). Ne'er had he heard sweeter music.

6. *United States v. Kaczynski*, 416 F.3d 971, 977 (9th Cir. 2005).

7. Serge F. Kovaleski, *Unabomber Wages Legal Battle to Halt the Sale of Papers*, N.Y. TIMES (Jan. 22, 2007), <http://www.nytimes.com/2007/01/22/us/22unabomber.html>.

8. *United States v. Kaczynski*, 551 F.3d 1120, 1126–29 (9th Cir. 2009).

9. Michael Daly Hawkins, *John Quincy Adams and the Antebellum Maritime Slave Trade: The Politics of Slavery and the Slavery of Politics*, 25 OKLA. CITY U.L. REV. 1 (2000).

slave to political forces as long as he harbored ambitions for higher office.”¹⁰ The Ninth Circuit has been the beneficiary of Judge Hawkins’s extensive knowledge of all things Civil-War-related. Last year, we were treated to a lively and insightful skit, in which Judge Hawkins played the role of then-future-president General Ulysses S. Grant meeting with Abraham Lincoln (masterfully performed by Judge Stephen Trott) on the last day of Lincoln’s life. But you don’t need me to play the role of Roger Ebert—you can see for yourself Judge Hawkins’s historical imagination in action.¹¹

In his article on Adams, Judge Hawkins wrote that Article III judges “are reflective of their backgrounds and experiences.”¹² It’s clear from his academic writing that his experiences have stayed with him and have shaped his view of how law affects the world. For example, his service in the Marines likely motivated his thoughtful article encouraging jurisdictions to adopt veterans courts.¹³ His proposal explains why courts should specialize to address the unique concerns of war veterans returning home after “repeated and extended tours of duty, and the constant peril involved in conducting anti-insurgent warfare in strange and distant lands.”¹⁴ But his military service has done more than engender empathy for our soldiers: It’s made him acutely aware that our country’s military might must be exercised responsibly and that the courts are open to ensure that it is.¹⁵

His work as the United States Attorney for Arizona made him particularly sensitive to the effect that prosecutors can have on grand juries: “Prosecutors have nearly complete control over the type and kind of evidence presented to grand jurors, and they are under no obligation to

10. *Id.* at 56.

11. The United States Courts for the Ninth Circuit, *Scene: A Conversation Between General Ulysses S. Grant and President Abraham Lincoln Five Days After General Robert E. Lee’s Surrender to Grant’s Union Army at Appomattox Courthouse*, NINTH CIRCUIT CT. OF APPEALS, http://www.ce9.uscourts.gov/video/Lincoln_Grant_webedit.wmv (last visited Feb. 24, 2011).

12. Hawkins, *supra* note 9, at 56.

13. See Michael Daly Hawkins, *Coming Home: Accommodating the Special Needs of Military Veterans to the Criminal Justice System*, 7 OHIO ST. J. CRIM. L. 563 *passim* (2010).

14. *Id.* at 569 (internal quotation marks omitted).

15. See *Mohamed v. Jeppesen Dataplan, Inc.*, 614 F.3d 1070, 1093–95 (9th Cir. 2010) (en banc) (Hawkins, J., dissenting). Foreign nationals alleged that the CIA operated an extraordinary rendition program by secretly apprehending, transferring, detaining, and interrogating them. They sued a company that allegedly facilitated this rendition program. *Id.* at 1073–76 (majority opinion). The en banc majority dismissed the action pursuant to the state secrets privilege. *Id.* at 1093 (citing *United States v. Reynolds*, 345 U.S. 1 (1953)). Judge Hawkins filed an impassioned dissent arguing that the majority acted prematurely, and that plaintiffs should’ve been given an opportunity to prove their allegations without reliance on state secrets. *Id.* at 1101 (Hawkins, J., dissenting).

present evidence that suggests the person the prosecutor proposes to charge might be innocent or culpable of a less serious crime.”¹⁶ Contrary to what one might expect, his time as a prosecutor has made him *more* attuned to the plight of criminal defendants and the abuse that they suffer at the hands of overzealous police officers and government lawyers. He vigorously dissented from our court’s en banc decision upholding the model grand jury instructions, faulting the instructions for failing to apprise the grand jury of the tremendous power it possesses.¹⁷ On this issue, Judge Hawkins has called me a “happy warrior” who has joined him in his crusade.¹⁸ We were also happy warriors together in *United States v. Kincade*,¹⁹ where the en banc plurality held, over both of our dissents, and over Judge Reinhardt’s dissent, that it’s OK to take the DNA fingerprints of certain federal offenders on parole, probation, or supervised release, in the absence of any individualized suspicion they’d committed additional crimes.²⁰ I wear this title rather proudly, and expect that our happy warrior days are far from over.

I’ll admit I’m not quite sure where his scholarly fascination with John Quincy Adams comes from.²¹ Maybe it’s because Judge Hawkins shares a birthday with Louisa Adams, John Quincy’s wife (it’s February 12, for inquiring minds). I won’t rule out that there’s a deeper reason for his extensive scholarly attention to JQA. But, if Judge Hawkins is brainstorming topics for a new law review article about slavery, I offer that Abraham Lincoln shares that birthday as well.

Mining the text of Judge Hawkins’s opinions and academic publications can only tell you so much about who he really is. For example, it can’t tell you how he is always well-prepared and asks hard questions of both sides at oral argument—and he’s usually harder on the side that he thinks is right. He expects the lawyers to answer the questions and then listens to the answers. At conference, he states his reasons succinctly but clearly, and listens to contrary opinions with an open mind. Once in a while he is persuaded; most of the time he persuades you. And if you can’t come out on

16. See Michael Daly Hawkins, *The Federal Grand Jury: Fish, Fowl, or Fair-Weather Game?*, 33 OKLA. CITY U.L. REV. 823, 831 (2008).

17. *United States v. Navarro-Vargas (Navarro-Vargas II)*, 408 F.3d 1184, 1209–10 (9th Cir. 2005) (en banc) (Hawkins, J., dissenting).

18. Hawkins, *supra* note 16, at 833–34 (citing *United States v. Navarro-Vargas (Navarro-Vargas I)*, 367 F.3d 896, 899 (9th Cir. 2004) (Kozinski, J., dissenting)); see also *United States v. Marcucci*, 299 F.3d 1156, 1166 (9th Cir. 2002) (Hawkins, J., dissenting).

19. *United States v. Kincade*, 379 F.3d 813 (9th Cir. 2004) (en banc).

20. *Id.* at 816–17.

21. See generally Michael Daly Hawkins, *John Marshall Through the Eyes of An Admirer: John Quincy Adams*, 43 WM. & MARY L. REV. 1453 (2002); Hawkins, *supra* note 9.

the same side, there's no hard feelings, no matter how strongly he feels about the case. Did I already mention that he's a *Mensch*?

A case that stands out in my memory, *Idaho v. Horiuchi*,²² is one in which Judge Hawkins and I were on opposite ends of a high profile decision. It arose out of the tragic events at Ruby Ridge, where federal officers laid siege on Randy Weaver's family home in Boundary County, Idaho seeking to arrest him on weapons charges. An FBI sharp-shooter, Lon Horiuchi, opened fire, killing Mrs. Weaver. The DOJ Office of Professional Responsibility deemed the lethal shot not to have been objectively reasonable. Horiuchi was charged in Idaho state court for involuntary manslaughter. But perhaps of greater interest to legal junkies than the gory details is how the case provoked a major debate in our court over *vacatur*.

I was on the original three-judge panel that reviewed the district court decision granting Supremacy Clause immunity to Horiuchi.²³ The panel affirmed, and I dissented because I thought Horiuchi's actions were "wholly unreasonable," and that the majority was adopting a "007 standard for the use of deadly force" in granting him immunity.²⁴ I had the opportunity to vindicate my position when the case went en banc. I wrote the majority opinion, holding that Horiuchi could stand trial on manslaughter charges, from which Judge Hawkins vigorously dissented. He made very forceful and convincing arguments:

Every day in this country, federal agents place their lives in the line of fire to secure the liberties that we all hold dear. There will be times when those agents make mistakes, sudden judgment calls that turn out to be horribly wrong. We seriously delude ourselves if we think we serve the cause of liberty by throwing shackles on those agents and hauling them to the dock of a state criminal court when they make such mistakes Today's decision is a grave disservice to all these men and women, who knew until now that if they performed their duties within the bounds of reason and without malice that they would be protected from state prosecution by Supremacy Clause immunity and not subjected to endless judicial second-guessing.²⁵

The case was a challenging one for our court, as we pored through conflicting accounts to try and assess the reasonableness of a man's conduct in a highly charged environment. I will leave the reader and history to judge which one of us was right.

22. *Idaho v. Horiuchi (Horiuchi II)*, 253 F.3d 359 (9th Cir. 2001) (en banc).

23. *Idaho v. Horiuchi (Horiuchi I)*, 215 F.3d 986, 988 (9th Cir. 2000).

24. *Id.* at 1003, 1005 (Kozinski, J., dissenting).

25. *Horiuchi II*, 253 F.3d at 403 (Hawkins, J., dissenting).

But the twist came when we realized the entire case might be moot after a new County Prosecutor was elected for Boundary County, Idaho, and he decided to dismiss charges against Horiuchi. I was convinced the prosecutor's decision was calculated to manipulate our judicial process and wipe out a precedent that was unfavorable to police-officer defendants. But Judge Hawkins had the final triumph when he persuaded a majority of the en banc court that the weight of the law and common sense favored vacatur. Our circuit doesn't publicize the en banc votes or internal memos that we circulate. But I know Judge Hawkins wouldn't mind my saying how impressed I am that one of the major victories of his judicial career doesn't even have an opinion to show for it. He Houdini'd *Horiuchi*.

I've had many occasions to butt judicial heads with my learned colleague. I've won some, and I've lost some, but I've always been enlightened by the exchange. I'm sure others paying tribute to Judge Hawkins feel the same way. Judge Hawkins has left an indelible mark on the law and will continue to do so. He may have recently taken senior status, but I know he ain't *Takin' It Easy* anytime soon.