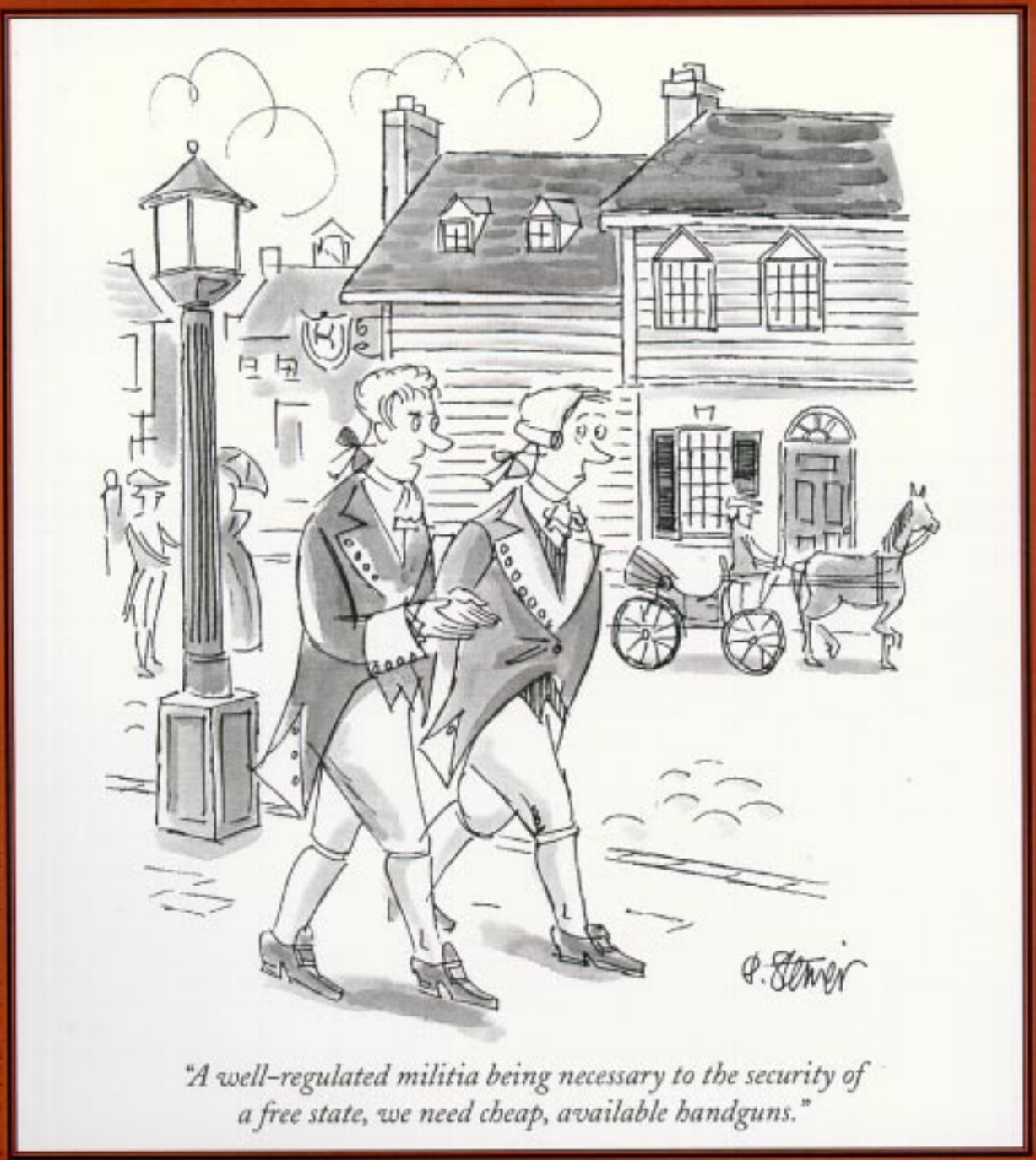
Shot Full of Holes

Deconstructing John Ashcroft's Second Amendment



"A well-regulated militia being necessary to the security of a free state, we need cheap, available handguns."

Violence Policy Center

The Violence Policy Center is a national non-profit educational organization that conducts research and public education on firearms violence and provides information and analysis to policymakers, journalists, grassroots advocates, and the general public. The Center examines the role of firearms in America, analyzes trends and patterns in firearms violence, and works to develop policies to reduce gun-related death and injury.

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INTRODUCTION

"What I am trying to clarify here is that I believe that there are constitutional inhibitions on the rights of citizens to keep and bear certain kinds of arms. And some of those I would think good judgment, some of those I'd think bad judgment. But as attorney general, it's not my judgment to make that kind of call my judgment. My responsibility is to uphold the acts of the legislative branch of this government in that arena, and I would do so and continue to do so in regard to the cases that now exist and further enactments of the Congress."

—John Ashcroft, at his confirmation hearing for attorney general, responding to a question from Senator Dianne Feinstein (D-CA).

"I will advise the president, to the best of my knowledge, on legal matters. They will not be result-oriented; they will be law-oriented advices."

—John Ashcroft, at his confirmation hearing for attorney general, responding to a question from Senator Charles Schumer (D-NY).

On May 17, 2001, Attorney General John Ashcroft shook the foundation of the U.S. Justice Department's enforcement of federal gun laws, writing to National Rifle Association (NRA) chief lobbyist James Jay Baker on official Department of Justice stationery to proclaim a 180-degree shift in the Department's position regarding the Second Amendment to the U.S. Constitution. The timing of Attorney General Ashcroft's letter coincided with the NRA's annual meeting of members, where Baker touted the letter as evidence that "[i]n John Ashcroft, we have an Attorney General who agrees with us."[1] In his letter [please see Appendix A], Attorney General Ashcroft detailed a position on the Second Amendment[2]—interpreting it to explicitly protect an *individual* right to privately possess firearms—that directly conflicts with longstanding legal precedent, historical evidence, and established policy of the Department of Justice. By seeking to elevate firearms ownership to the status of a fundamental constitutional right, Attorney General Ashcroft has placed his NRA membership before his responsibility as the nation's chief law enforcement officer, jeopardizing the Department's ability to vigorously enforce this nation's gun laws and

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[1] Transcript of remarks of James Jay Baker at the NRA annual meeting of members, May 19, 2001, at 6.

[2] The Second Amendment provides, in full, "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." U.S. CONST. AMEND. 2.

keep guns out of the hands of felons, fugitives, stalkers, and other prohibited persons.

The Violence Policy Center (VPC) was the first gun control organization to obtain a copy of the Ashcroft letter, which was made available at the NRA's annual meeting. The VPC publicly criticized Attorney General Ashcroft, an NRA Life Member, for pandering to a special interest group which donated substantial sums of money to his unsuccessful 2000 reelection campaign in Missouri for the U.S. Senate. The VPC also criticized Attorney General Ashcroft for abandoning the long-established position of the Justice Department and undermining ongoing litigation by the Department. Most significantly, the letter contradicted the position taken by the Justice Department in *United States v. Emerson*,[3] pending before the United States Court of Appeals in New Orleans. The Department's longstanding position on the Second Amendment was detailed in briefs filed with the court in New Orleans, as well as in an August 22, 2000, letter by former Solicitor General Seth P. Waxman, who affirmed the Department's position [please see Appendix B]. The irreconcilable conflict between the Department's established position and the letter has not gone unnoticed by the criminal defendant in the *Emerson* case. On July 18, 2001, Timothy Joe Emerson filed a motion to have the Ashcroft letter considered as supplemental authority by the court of appeals, "for it documents the government's position on a central issue in the case as explained by the Attorney General himself."[4]

Attorney General Ashcroft's letter to the NRA was immediately hailed by the gun lobby. The NRA cited it as proof of a shift in Department policy on the Second Amendment—a claim the Department has not disputed. According to NRA chief lobbyist James Jay Baker:

> [T]his dramatically reverses the "collective rights" theory held by the Clinton administration....It is a welcome change that reverses the opinion of the Clinton-Gore Solicitor General who claimed that the Second Amendment "precludes only federal attempts to disarm, abolish, or disable the ability to call up the organized militia."[5]

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[3] 46 F. Supp. 2d 598 (S.D. Tex. 1999), *appeal docketed*, No. 99-10331 (5th Cir. March 30, 1999).

[4] Appellee's motion to allow letter to be submitted under Fed. R. App. P. 28(j) in *United States v. Emerson*, No. 99-10331 (5th Cir.), July 18, 2001, at 1-2.

[5] James O.E. Norell, *In Step with the Founding Fathers*, AMERICA'S 1ST FREEDOM, July 2001, at 35.

Gun control supporters condemned the letter, charging that Attorney General Ashcroft had abandoned his Senate confirmation hearing pledge to defend federal gun laws from spurious and frivolous pro-gun legal challenges.

Although Attorney General Ashcroft's spokesperson freely admitted that the "the attorney general was expressing department policy in the letter to the NRA,"[6] the Department of Justice sought to downplay the significance of the letter. The Department claimed that the letter did not signal a change in the Department's commitment to enforce existing gun laws;[7] rather, it was asserted, the letter simply restored a view of the Second Amendment that existed before the anti-gun Clinton Administration.

Nothing could be further from the truth. By forcing what the NRA's Baker termed "a distinct shift"[8] inconsistent with Justice Department policy on the Second Amendment that can be traced back more than 65 years, to Republican and Democratic administrations alike, Attorney General Ashcroft has opened up every federal restriction on the acquisition and possession of firearms to a constitutional challenge. Armed career criminals who are serving time in federal prison today will be emboldened to file petitions for a *writ of habeas corpus*, alleging that their convictions violated this newfound constitutional right. Violent felons, charged with possession of assault weapons, will challenge their indictments on the grounds that the federal assault weapons ban is unconstitutional. Mandatory background checks under the Brady Handgun Violence Prevention Act will be attacked as an unconstitutional infringement of a citizen's newfound right to acquire handguns instantly.

The NRA and gun criminals will seek to have the Second Amendment incorporated against the states, so that more restrictive state and local gun control laws—such as municipal handgun bans—can be struck down as unconstitutional. Emboldened by this recent policy shift, the NRA already has indicated that it intends to bring test cases challenging the District of Columbia's ban on handguns. As NRA Executive Vice President Wayne LaPierre told *ABC News*: "I think it's a great test case for this. When we take a case to the Supreme Court, I think we're going to

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[6] Craig Gordon and Tom Brune, *Ashcroft Changes U.S. Gun Position/Says 2nd Amendment Applies to Individuals*, NEWSDAY, July 12, 2001, at A4.

[7] David S. Cloud, *Ashcroft Finding May Provoke Challenges to Federal Gun Laws*, THE WALL STREET JOURNAL, July 11, 2001, at A3.

[8] Naftali Bendavid, *Ashcroft Alters U.S. Gun Stance*, CHICAGO TRIBUNE, July 13, 2001, at 7.

win."[9]

Rather than continue a theoretical debate over which side's view of the Second Amendment is correct—the Ashcroft/NRA view or the longstanding position of the Justice Department—the Violence Policy Center has analyzed the Ashcroft letter to evaluate the accuracy and strength of the Attorney General's argument. The review was prompted by several factors. First, the VPC recognizes the highly irregular nature of this letter. For the sitting Attorney General to send official correspondence describing a view of a legal issue that is diametrically opposed to the position taken by the Justice Department in ongoing litigation is most unusual and, to the VPC's knowledge, unprecedented. Second, even the most cursory reading of the letter reveals that Attorney General Ashcroft, in citing Supreme Court cases that mention the Second Amendment, omits any reference to the one case in which the Court actually ruled on the amendment, holding that it decidedly does not secure an individual right to bear arms. Third, far from trying to dissuade critics that the letter signals a shift in policy, the Department of Justice is in the process of entrenching this policy shift by ordering the Department's Office of Legal Counsel (OLC) to prepare a formal opinion on the Second Amendment.[10] For OLC to prepare such an opinion at this time is highly irregular, as the Second Amendment is currently the subject of ongoing litigation in the *Emerson* case and the Department of Justice set forth its position regarding the Second Amendment at great length in the briefs filed in the court of appeals. This is precisely why OLC—in its traditional role—refrains from commenting on subjects under litigation by the Department, instead allowing the Department's litigators in individual cases to lay out its positions.[11] Fourth, the Department's aggressive attack on its own longstanding policy regarding the Second Amendment and on current law conflicts with assurances Attorney General Ashcroft provided to the Senate Judiciary Committee during his confirmation hearings. Answering queries as to whether his personal views on the Second Amendment would affect his ability to carry out the law enforcement programs of the Department of Justice, Ashcroft replied:

> What I am trying to clarify here is that I believe that there are constitutional inhibitions on the rights of citizens to keep and bear

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[9] *Attorney General Declares Individual Right to Bear Arms*, ABC NEWS/ REUTERS, JULY 12, 2001, at http://more.abcnews.go.com/sections/us/dailynews/guncontrol_010711.html.

[10] David S. Cloud, *Ashcroft Finding May Provoke Challenges to Federal Gun Laws*, THE WALL STREET JOURNAL, July 11, 2001, at A3.

[11] OLC has a longstanding (though occasionally broken) tradition of "disinterested" constitutional analysis. Although OLC may reconsider past court decisions from time to time, it does not do so for political reasons. Given the slapdash nature of the Ashcroft letter and the Attorney General's political motivations for reconsidering previous OLC Second Amendment opinions, it comes as no surprise that the Department freely admits that the letter to the NRA "would carry the same legal weight as a formal legal opinion in stating department policy." Craig Gordon and Tom Brune, *Ashcroft Changes U.S. Gun Position/Says 2nd Amendment Applies to Individuals*, NEWSDAY, July 12, 2001, at A4.

> certain kinds of arms. And some of those I would think good judgment, some of those I'd think bad judgment. But as attorney general, it's not my judgment to make that kind of call my judgment. My responsibility is to uphold the acts of the legislative branch of this government in that arena, and I would do so and continue to do so in regard to the cases that now exist and further enactments of the Congress.[12]

Finally, the VPC felt compelled to meet the challenge that the NRA posed to critics of the Ashcroft letter in a laudatory article that appeared as the cover story in one of the NRA's publications. Pro-gun lawyer Stephen Halbrook praised the letter, calling it "very well written" and noting that "the Attorney General's citations of original sources is critical to the strength of the letter."[13] He defied critics to rebut the letter's claims based on the authorities Ashcroft cites:

> By setting forth both the clear meaning and the citations, I don't know how the critics are going to be able to avoid confronting the actual evidence.[14]

The VPC has taken Halbrook at his word and confronted the "actual evidence" in the Ashcroft letter head-on. What the VPC has found is troubling—the Ashcroft letter collapses of its own weight under thorough analysis. The letter contains gross factual errors, takes historical material out of context, misquotes sources, and portrays as authoritative cases that have nothing at all to do with the Second Amendment. This deconstruction of the Ashcroft letter reviews each of the Attorney General's assertions and the documentation he provides in support. It reveals that the letter is an astonishingly inadequate piece of legal reasoning and an exemplar of wishful, and at times bizarre, revisionist history.

While the VPC holds clear views in the debate over the meaning of the Second Amendment,[15] Attorney General Ashcroft's letter was reviewed dispassionately and carefully, each assertion scrutinized to determine its factual and contextual accuracy. The following deconstruction follows the content and order of the Ashcroft letter.

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[12] Confirmation Hearing of the Honorable John Ashcroft (Day Two), January 17, 2001, available at www.washingtonpost.com/wp-srv/onpolitics/elections/ashcroft_hearing text011701.htm.

[13] James O.E. Norell, *In Step with the Founding Fathers*, AMERICA'S 1ST FREEDOM, July 2001, at 35-36. A portrait of the Attorney General adorns the cover of the magazine and a full-page photograph of Ashcroft appears at the beginning of the article.

[14] *Id.* at 36.

[15] See Josh Sugarmann and Kristen Rand, Violence Policy Center, CEASE FIRE: A COMPREHENSIVE STRATEGY TO REDUCE FIREARMS VIOLENCE 62 (1997).

Each section of the analysis leads off with a quotation from the relevant section of the letter being addressed. Each quotation is immediately followed by an analysis.

- **Attorney General Ashcroft:** *"While I cannot comment on any pending litigation…"*

- **Ashcroft Deconstructed:** This is easier said than done. It is an open secret that the unnamed litigation on the Second Amendment in question is *United States v. Emerson*, which now has been pending before the United States Circuit Court of Appeals for the Fifth Circuit in New Orleans for more than a year. In *Emerson*, a federal judge in Texas, Sam R. Cummings, flouted more than a century of Supreme Court precedent to find that the defendant, under an active domestic violence restraining order that prevented him from possessing firearms, had his Second Amendment rights violated. In a textbook example of judicial overreaching, Cummings held that the prohibition on possession of firearms by persons under domestic violence restraining orders violated the Second Amendment and the due process clause of the Fifth Amendment.[16]

Emerson squarely conflicts with established case law. In briefs filed in the *Emerson* appeal, the Department of Justice pointed out that every federal court of appeals has subscribed to the interpretation that the Second Amendment only protects firearm possession that is reasonably related to the maintenance of a militia.[17] The Justice Department's brief is unequivocal:

> Emerson's challenge to the longstanding interpretation of the Second Amendment wholly fails to counter the weight of Supreme Court precedent and historical facts. He fails to provide any coherent argument as to how the Second Amendment, with its introductory militia

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[16] *Id.* at 614.

[17] Brief of the United States in *United States v. Emerson,* No. 99-10331 (5th Cir.), at 16-28 (quoting *United States v. Friel*, 1 F.3d 1231 (1st Cir. 1993) (unpublished); *United States v. Toner*, 728 F.2d 115 (2nd Cir. 1984); *United States v. Rybar*, 103 F.3d 273 (3rd Cir. 1996), *cert. denied*, 522 U.S. 807 (1997); *Love v. Pepersack*, 47 F.3d 120 (4th Cir.), *cert. denied*, 516 U.S. 813 (1995); *United States v. Johnson*, 441 F.2d 1134 (5th Cir. 1971); *United States v. Warin*, 530 F.2d 103 (6th Cir.), *cert. denied*, 426 U.S. 948 (1976); *Quilici v. Village of Morton Grove*, 695 F.2d 261 (7th Cir. 1982), *cert. denied*, 464 U.S. 863 (1983); *United States v. Hale*, 978 F.2d 1016 (8th Cir. 1992), *cert. denied*, 507 U.S. 997 (1993); *Hickman v. Block*, 81 F.3d 98 (9th Cir.), *cert. denied*, 519 U.S. 912 (1996); *United States v. Oakes*, 564 F.2d 384 (10th Cir. 1977), *cert. denied*, 435 U.S. 926 (1978); *United States v. Wright*, 117 F.3d 1265 (11th Cir. 1997), *cert. denied*, 525 U.S. 896 (1997)); and Reply Brief of the United States in *United States v. Emerson,* No. 99-10331 (5th Cir.), at 6 (hereafter *Emerson* Reply Brief) (quoting *Fraternal Order of Police v. United States*, 173 F.3d 898 (D.C. Cir.), *cert. denied,* 528 U.S. 928 (1999)).

> clause, grants the right to bear arms completely untethered from militia service. He completely ignores the historical context against which the Amendment was drafted, which shows not only that the Amendment was aimed at protecting the states against the federal government, but that it grew out of a long history of gun control. And, most importantly, he fails to come to grips with *United States v. Miller*, 307 U.S. 174 (1939), the case now recognized by every circuit as providing the definitive interpretation of the Second Amendment.[18]

Furthermore, the very same court of appeals that is reviewing the *Emerson* decision rejected the claim that the Second Amendment secures an individual right to bear arms in *Kostmayer v. Department of Treasury*,[19] an unpublished decision issued more than a week after the trial judge's decision in *Emerson*. Other courts deciding cases since *Emerson* have been markedly critical of the trial judge's Second Amendment holding, and have refused to follow it.[20]

- **Attorney General Ashcroft:** *"[T]he text and the original intent of the Second Amendment clearly protect the right of individuals to keep and bear firearms."*

- **Ashcroft Deconstructed:** Not according to the United States Supreme Court which, for almost 200 years, has been recognized as having the last word as to what the Constitution means.[21] Despite the primacy of the Supreme Court's decisions on

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[18] *Emerson* Reply Brief at 24-25 (5th Cir.) (footnotes omitted).

[19] 178 F.3d 1291 (5th Cir.) (unpublished), *cert. denied,* 528 U.S. 928 (1999), See *Emerson* Reply Brief at 1-3.

[20] See *United States v. Spruill*, 61 F. Supp. 2d 587, 591 (W.D. Tex. 1999) (refusing to strike down the same federal law that was at issue in *Emerson*: "[T]he Court chooses to follow the majority path and here holds that the Second Amendment does not prohibit the federal government from imposing some restrictions on private gun ownership. The statute in question in this case is aimed at preventing the family violence that seems epidemic in this country."); *Olympic Arms v. Magaw*, 91 F. Supp. 2d 1061, 1071 (E.D. Mich. 2000) ("Nor, under the currently controlling authority in this circuit, is there an individual right to bear arms." (citations omitted)); *United States v. Henson*, 55 F. Supp. 2d 528, 529 (S.D. W.Va. 1999) (refusing to strike down the same law that was at issue in *Emerson*: "Defendant's reliance on *Emerson* is misplaced. Our Court of Appeals has held consistently that the Second Amendment confers a collective, rather than an individual right to keep and bear arms." (citations omitted)); and *Rupf v. Yan*, 85 Cal. App. 4th 411, 421 (Cal. App. 1st Dist. 2000) ("The Ninth Circuit is among the federal courts considering the issue that have held 'that the Second Amendment is a right held by the states, and does not protect the possession of a weapon by a private citizen.'" (citations omitted)).

[21] Chief Justice John Marshall laid down the principle of judicial review in *Marbury v. Madison,* 5 U.S. (1 Cranch) 137, 178 (1803) (emphasis added):

matters of constitutional interpretation, Attorney General Ashcroft neglects any mention of the Court's 1939 ruling in *United States v. Miller*[22] in his letter. This decision, which has never been reversed or narrowed, is the controlling legal authority on the Second Amendment. In upholding the constitutionality of the National Firearms Act of 1934—the most restrictive piece of federal gun control legislation ever enacted—the Court stated:

> The Constitution as originally adopted granted to the Congress power—"To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions; To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress." *With obvious purpose to assure the continuation and render possible the effectiveness of such forces the declaration and guarantee of the Second Amendment were made. It must be interpreted and applied with that end in view*.[23]

The Court's analysis tracks both clauses of the Second Amendment, which reads, "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." Thus, the right which the Second Amendment secures is the right to bear arms in connection with service in a state-regulated military organization. *Miller* holds that such a right is not legitimately transformed into a right of any individual to acquire and possess weapons.[24] The right on the part of the people to arm themselves in connection with organizing for the common defense, under State control, is a far cry from a right to deregulated firearm possession for personal defense or other use. In the days before the existence of a national standing army, local militias provided for the common defense of communities, and the Second Amendment guaranteed militias the right to organize and arm themselves to protect their individual states. The amendment was designed as a limitation on Congress' power over the militia as provided for by Article

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> So if a law be in opposition to the constitution; if both the law and the constitution apply to a particular case, so that the court must either decide that case conformably to the law, disregarding the constitution; or conformably to the constitution, disregarding the law; *the court* must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty.

[22] 307 U.S. 174 (1939).

[23] *Id*. at 178 (emphasis added).

[24] *Id.*

I, Section 8, of the Constitution. In the view of the Framers, Congress' power over the militia, if left unchecked, had the potential to emasculate the militia.

While the opinions of individuals not inside the court system—including the U.S. Attorney General—as to what may or may not be constitutional are often interesting, they are nonetheless purely academic. The Supreme Court alone has the final, official word on what the language of the Constitution actually means and how it should be applied. In *Miller*, the Supreme Court reconciled restrictive gun control legislation with the language and principles of the Constitution, and the decision remains in force. Thus, if the Supreme Court has declared that the Second Amendment is only to be interpreted in light of its purpose to maintain the militia, anyone applying that amendment, especially the Attorney General of the United States—who is an officer of the Court and the nation's chief law enforcement officer—must confine his interpretation of the constitutional text in his official capacity to one that is consistent with the Court's unambiguous reading of the provision.

Nor does the passage of time in any way diminish the continuing force of the *Miller* decision. On the contrary, the fact that the decision has not been weakened only makes it more unlikely that the Supreme Court would alter the understanding of the Second Amendment it describes in *Miller*. In *Planned Parenthood of Southeastern Pennsylvania v. Casey*,[25] the Court, invoking the writings of renowned jurist Justice Benjamin Cardozo, offered a comprehensive rationale for its unwillingness to overturn past decisions:

> The obligation to follow precedent begins with necessity, and a contrary necessity marks its outer limit. With Cardozo, we recognize that no judicial system could do society's work if it eyed each issue afresh in every case that raised it. See B. Cardozo, *The Nature of the Judicial Process* 149 (1921). Indeed, the very concept of the rule of law underlying our own Constitution requires such continuity over time that a respect for precedent is, by definition, indispensable.[26]

In order to provide continuity in the legal system, the Court will not overturn its past decisions unless the changing legal landscape renders them flatly unworkable. Since the opinion in *Miller* is entirely consistent with the language of the Second Amendment, and there are no Supreme Court opinions which undermine its holding, there is no legal justification for the Court to change its interpretation of the Second

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[25] 505 U.S. 833 (1992).

[26] *Id.* at 854 (citing Lewis Powell, *Stare Decisis and Judicial Restraint*, 1991 JOURNAL OF SUPREME COURT HISTORY 13, 16).

Amendment and no basis for Attorney General Ashcroft to conclude that the Second Amendment means something entirely different.

- **Attorney General Ashcroft:** *"While some have argued that the Second Amendment guarantees only a 'collective' right of the States to maintain militias..."*

- **Ashcroft Deconstructed:** The amorphous "some" cited by the Attorney General includes the Supreme Court of the United States and every federal appeals court, which have held uniformly that the Second Amendment does not confer an individual right to bear arms independent of the right to be armed as part of a well-regulated militia. In addition, "some" also includes Attorney General Ashcroft's own Justice Department lawyers in *Emerson*, the previous Solicitor General, some of the most eminent scholars in the country, including Pulitzer Prize-winning historians Jack Rakove and Garry Wills, and a host of constitutional law scholars and historians.[27] Most recently, 11 leading legal and historical scholars, including Professor Rakove, a preeminent constitutional historian at Stanford University, offered their views on the Second Amendment in a special symposium published in the *Chicago-Kent Law Review*.[28]

- **Attorney General Ashcroft:** *"Like the First and Fourth Amendments, the Second Amendment protects the rights of 'the people,' according to the Supreme Court's decision in United States v. Verdugo-Urquidez."*

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[27] E.g., Garry Wills, A NECESSARY EVIL: A HISTORY OF AMERICAN DISTRUST OF GOVERNMENT 252 (1999); Carl T. Bogus, *The Hidden History of the Second Amendment*, 31 U.C. DAVIS L. REV. 309 (1998); Saul Cornell, *Commonplace or Anachronism: The Standard Model, the Second Amendment, and the Problem of History in Contemporary Constitutional Theory*, 16 CONST. COMMENTARY 221 (1999); Jack N. Rakove, *The Second Amendment: The Highest Stage of Originalism*, 76 CHI.-KENT. L. REV. 103 (2000) (hereafter Rakove); and David Yassky, *The Second Amendment: Structure, History, and Constitutional Change,* 99 MICH. L. REV. 588 (2000).

[28] *Symposium on the Second Amendment: Fresh Looks,* 76 CHI.-KENT L. REV. 1 (Carl T. Bogus ed., 2000) (hereafter *Symposium*), including, Carl T. Bogus, *The History and Politics of Second Amendment Scholarship: A Primer*, *Symposium* at 3; Lois G. Schwoerer, *To Hold and Bear Arms: The English Perspective, Symposium* at 27; Michael A. Bellesiles, *The Second Amendment in Action, Symposium* at 61; Rakove, *Symposium* at 103; Daniel A. Farber, *Disarmed by Time: The Second Amendment and the Failure of Originalism, Symposium* at 167; Paul Finkelman, *"A Well Regulated Militia"—The Second Amendment in Historical Perspective, Symposium* at 195; Steven J. Heyman, *Natural Rights and the Second Amendment, Symposium* at 237; Michael C. Dorf, *What Does the Second Amendment Mean Today?, Symposium* at 291, Robert J. Spitzer, *Lost and Found: Researching the Second Amendment, Symposium* at 349; H. Richard Uviller & William G. Merkel, *The Second Amendment in Context: The Case of the Vanishing Predicate, Symposium* at 403.

• **Ashcroft Deconstructed:** *United States v. Verdugo-Urquidez*[29] does not turn on an interpretation of the Second Amendment. In fact, the decision barely mentions it. *Verdugo-Urquidez* dealt with non-U.S. citizens who claimed that the Fourth Amendment protected them from unreasonable search and seizure. The Supreme Court disagreed, holding that non-U.S. citizens were not "people" within the meaning of the Fourth Amendment. After identifying various places in the Constitution where the word "people" appears, including the Second Amendment, the Court concludes that "people" does not include non-citizens:

> While this textual exegesis is by no means conclusive, it suggests that "the people" protected by the Fourth Amendment, and by the First and Second Amendments, and to whom rights and powers are reserved in the Ninth and Tenth Amendments, refers to a class of persons who are part of a national community or who have otherwise developed sufficient connection with this country to be considered part of that community.[30]

Attorney General Ashcroft seeks to graft a more expansive interpretation onto this abbreviated discussion. He argues that because "people" appears in the First, Second, and Fourth Amendments, the word must operate the same way in each provision so as to confer an individual right of comparable dimension. However, this neglects the Court's reference to two other amendments that use the word people, the Ninth and Tenth Amendments, neither of which protects an expansive individual right. In the end, *Verdugo-Urquidez* answers the question, "who are the people?," not "what are the rights of the people?" To claim that *Verdugo-Urquidez* says anything about whether the Second Amendment protects either the right of the "people" to bear arms in military service under state regulation or an individual right of the "people" to bear arms independent of the militia completely misrepresents the limited scope of the Court's decision.

• **Attorney General Ashcroft:** *"This view of the text comports with the all but unanimous understanding of the Founding Fathers...."*

• **Ashcroft Deconstructed:** Attorney General Ashcroft identifies four sources as evidence of the "all but unanimous" position regarding the right to keep and bear arms that he ascribes to the Founding Fathers. However, this conclusion rests upon an extremely creative and liberal reading of the writings that he cites. Also, it is mystifying how Attorney General Ashcroft can claim that these statements, even if

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[29] 494 U.S. 259 (1990).

[30] *Id.* at 265 (citing *United States ex rel. Turner v. Williams*, 194 U.S. 279, 292 (1904)).

they did support his assertions in substance (which they do not), reflect the understanding of the Founders regarding the Second Amendment. *Not one* of the statements he cites was made in connection with the debates over the ratification of the Bill of Rights and the Second Amendment in 1791. Rather, every single statement was made at least two years earlier—and in one case at least 15 years earlier—in connection with either the ratification debate on the Federal Constitution or a state constitution.

Ashcroft cites *Federalist 46*, written by James Madison, which discusses the relative powers of the federal and state governments, not individual rights. It addresses the subject of an armed citizenry only in conjunction with the possible need to protect the political power of the states from the reach of the federal government. *Federalist 46* states:

> Let a regular army, fully equal to the resources of the country be formed; and let it be entirely at the devotion of the Federal Government; still it would not be going too far to say, that the State Governments with the people on their side would be able to repel the danger. The highest number to which, according to the best computation, a standing army can be carried in any country, does not exceed one hundredth part of the whole number of souls, or one twenty-fifth part of the number able to bear arms. This proportion would not yield in the United States an army of more than twenty-five or thirty thousand men. To these would be opposed a militia amounting to near half a million citizens with arms in their hands, officered by men chosen from among themselves, fighting for their common liberties, and united and conducted by governments possessing their affections and confidence. It may well be doubted whether a militia thus circumstanced could ever be conquered by such a proportion of regular troops. Those who are best acquainted with the late successful resistance of this country against the British arms will be most inclined to deny the possibility of it. Besides the advantage of being armed, which the Americans possess over the people of almost every other nation, the existence of subordinate governments to which the people are attached, and by which the militia officers are appointed, forms a barrier against enterprizes of ambition, more insurmountable than any which a simple government of any form can admit of.[31]

According to Madison, the people are to be armed so that they can form a state-regulated militia in order to defend the political powers enjoyed by the state. *Federalist 46* is completely silent on whether the people should have the right to own weapons for individual self-protection, whether they should be able to conceal

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[31] James Madison, *Federalist 46*, in THE FEDERALIST PAPERS 237, 241-242 (Garry Wills ed., 1982).

weapons on their person, or even whether they should be permitted to store them in their homes.

The essay continues, stating that the right to bear arms exists in relation to service in a militia that is formed to represent the will of local governments. According to *Federalist 46*:

> Notwithstanding the military establishments in the several kingdoms in Europe, which are carried as far as the public resources will bear, the governments are afraid to trust the people with arms. And it is not certain that with this aid alone, they would not be able to shake off their yokes. But were the people to possess the additional advantages of local governments chosen by themselves, who could collect the national will, and direct the national force; and of officers appointed out of the militia, it may be affirmed with the greatest assurance, that the throne of every tyranny in Europe would be speedily overturned, in spite of the legions which surround it.[32]

Arming and training the people to defend their government through a disciplined militia cannot be accomplished solely by a militia that is unconnected to any local government entity. Nowhere does this essay discuss arming people for individual self-defense: Madison limits his remarks to the discussion of arming people so that they may defend the governments of their respective states.

Attorney General Ashcroft also cites *Federalist 29*, which was penned by Alexander Hamilton. Like *Federalist 46*, this essay does not discuss the right to bear arms for individual self-protection. Instead, *Federalist 29* offers a justification for the existence and regulation of state militias, as provided for in the Constitution. *Federalist 29* is wholly an argument regarding the necessity and feasibility of disciplining the militia to become a useful military force. The general argument of *Federalist 29* is summarized by Hamilton:

> It requires no skill in the science of war to discern that uniformity in the organization and discipline of the militia would be attended with the most beneficial effects, whenever they were called into the service for the public defense. It would enable them to discharge the duties of the camp and of the field with mutual intelligence and concert; an advantage of peculiar moment in the operations of the army: And it would fit them much sooner to acquire the degree of proficiency in military functions, which would be essential to their usefulness. This desirable uniformity can only be accomplished by confiding the regulation of the militia to the

[32] *Id.* at 242.

> direction of the national authority. It is therefore with the most evident propriety that the plan of the Convention proposes to empower the union "to provide for organizing, arming and disciplining the militia, and for governing such part of them as may be employed in the service of the United States, *reserving to the states respectively the appointment of the officers and the authority of training the militia according to the discipline prescribed by Congress*."[33]

Thus, the right of a citizen to be part of the militia carries with it substantial responsibility. In order to bear arms in the militia, a citizen must submit to rigorous military training and discipline, as required by Congress. Hamilton does suggest in *Federalist 29* that the militia should be formed from the general population, which would extend his earlier reasoning to mean that large parts of the population should undergo strict training in military tactics. *Federalist 29*'s vision of the bearing of arms arose wholly within the context of militia membership, carrying with it responsibilities and restrictions. If anything, this essay highlights the importance of the first clause of the Second Amendment—which is often omitted by proponents of the individual-rights view—making it determinative in understanding the overall meaning and purpose of the provision. To cite *Federalist 29* as support for the proposition that the Founding Fathers endorsed an individual right to bear arms demonstrates a wholesale misinterpretation and distortion of the document.

After misrepresenting Madison and Hamilton, Attorney General Ashcroft proceeds to quote a line from Thomas Jefferson: "No freeman shall ever be debarred the use of arms."[34] Unlike *The Federalist Papers*, which were written following the drafting of the Constitution in 1787 to support the document's ratification, Jefferson's statement was written during consideration of the proposed constitution for the Commonwealth of Virginia. It was not written in connection with the U.S. Constitution and Bill of Rights. Moreover, Jefferson unveiled it as early as 1776, 15 years *before* the ratification of the Bill of Rights.[35]

Jefferson's seemingly broad statement suggests that the Framers knew how to describe the right to bear arms in more expansive terms if they had wanted to. They did not choose to. *The Federalist Papers* reinforce the view that the contemporaneous thinking around the Constitution envisioned a collective right to bear arms that was related exclusively to the maintenance of state militias as

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[33] Alexander Hamilton, *Federalist 29*, in THE FEDERALIST PAPERS 138, 138 (Garry Wills ed., 1982) (emphasis in original).

[34] THE PORTABLE THOMAS JEFFERSON 249 (Merrill D. Peterson ed., 1975).

[35] Attorney General Ashcroft's letter cites Jefferson's statement as having been made even earlier, in 1764. The VPC was unable to confirm this date, but if accurate, it then puts 24 years between Jefferson's statement and the ratification of the Bill of Rights.

permitted by Congress, and that the Second Amendment is the product of that thinking.

In Ashcroft's final reference to the supposed unanimity of the Founders, he quotes George Mason at Virginia's U.S. Constitution ratification convention in 1788 as stating:

> *I ask, sir, what is the militia? It is the whole people....To disarm the people is the best and most effectual way to enslave them.*[36]

This quote is misleading on many levels. First, while the quote appears to have been derived from comments that Mason made at the Virginia ratification convention, the words that Attorney General Ashcroft attributes to him do not in fact represent a direct quotation. Ashcroft misquotes Mason, presumably in order to make Mason's words more suited to the Attorney General's ends. Also, by employing ellipses to denote omitted text, Attorney General Ashcroft leads the reader to mistakenly believe that he is quoting the relevant parts of a single discussion. In fact, the quote is cobbled together from *two different days* of the Virginia convention's debate on the Federal Constitution. Even more misleading, the statement making up the second half of the quote ("to disarm the people...") was actually made two days *before* the statement making up the first half of the quote ("...what is the militia?...").

Moreover, as the Virginia debates appear in Jonathan Elliott's 1836 compendium, *The Debates in the Several State Conventions on the Adoption of the Federal Constitution*, the ellipses replace *more than 40 pages of debate!* To string these two disparate comments together with nothing more than ellipses, after having reversed the order in which they appeared, creates the impression that Mason was stating something completely different from what he actually said. In order to understand what Mason was actually saying, these two separate statements must be examined individually and in their respective places in the ratification debate.

The context of the first half of the quote Attorney General Ashcroft attributes to Mason at the Virginia ratification debates offers considerable insight into how Mason might have understood a guarantee like the one embodied in the Second Amendment. Mason made the statement in connection with the Virginia Convention's debate over the provision in the federal Constitution authorizing Congress to place limitations on state militias. Mason stated:

> I ask, Who are the militia? They consist now of the whole people, except a few public officers. But I cannot say who will be the militia of the future day. If that paper on the table gets no alteration, the militia

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[36] Ashcroft letter at 1.

> of the future day may not consist of all classes, high and low, and rich and poor; but they may be confined to the lower and middle classes of the people, granting exclusion to the higher classes of the people.[37]

Mason did identify the militia with the whole body of the people, but he saw that the ratification of the Constitution could change the composition of the militia. Though he does not explicitly mention at this point why he believes that the Constitution will have this effect, there can be little doubt that his cause for concern is the militia clauses in Article 1, Section 8, of the U.S. Constitution, which give Congress the power "to provide for organizing, arming and disciplining the militia." Mason apparently feared that the powers granted to Congress in Article 1, Section 8, would result in the transformation of the formerly universal militia into a body comprised of people from only certain segments of society. Despite his understanding of the militia as comprising all classes, Mason recognized that the Constitution gives Congress the ability to change the composition of that body, as established by Article I, Section 8. Nothing in Mason's statement suggests that he believed that the Second Amendment overrules Article I, Section 8. Moreover, Attorney General Ashcroft quotes from a discussion that has nothing to do with an individual right to bear arms, and the first half of the quote the Attorney General attributes to Mason simply reaffirms that the Constitution grants Congress the power to define the composition of the militia.

Attorney General Ashcroft derives the second half of the quote that he attributes to Mason from comments Mason made two days before he uttered the first half of the quote. Here, Mason approached the militia question from a slightly different perspective. Mason stated:

> An instance within the memory of some of this house will show us how our militia may be destroyed. Forty years ago, when the resolution of enslaving America was formed in Great Britain, the British Parliament was advised by an artful man, who was governor of Pennsylvania, *to disarm the people; that it was the best and most effectual way to enslave them;* but that they should not do it openly, but weaken them, and let them sink gradually, by totally disusing and neglecting the militia. [Here Mr. Mason quoted sundry passages to this effect.] This was a most iniquitous project. Why should we not provide against the danger of having our militia, our real and natural armed strength, destroyed? The general government ought, at the same time, to have some such power. But we need not give them power to abolish our militia. If they neglect to arm them, and prescribe proper discipline, they will be of no use....I wish that, in case the general government should neglect to arm

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[37] 3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 425-426 (3d ed., Jonathan Elliott ed., 1937).

> and discipline the militia, there should be an express declaration that the state governments might arm and discipline them.[38]

Again, Attorney General Ashcroft misquotes Mason. Mason was expressing a concern about the regulation of the militia, suggesting that if Congress abdicated its responsibility to arm and discipline the militia, states should be able to do so to ensure that the militia continues to exist. Instead of examining the militia from the vantage point of the people who comprise it, Mason here discussed the manner in which the militia should be provided with arms and disciplined. And, contrary to the manner in which Attorney General Ashcroft attempts to characterize this statement, Mason took the position that a national government should have the power to disarm the people, so long as that effort does not inhibit the ability of the people to effectively form up as the militia. He referred elsewhere in his statement to the unarmed populace that is not part of the militia,[39] which shows that he understood the general population will be unarmed, while the militia will be armed.

Thus, the actual texts that Attorney General Ashcroft cites fail to support his claim that the Founding Fathers had an "all but unanimous" view mirroring his own. In addition, there are other texts that further undermine his claim. For example, in contrast with documents cited by Ashcroft, Hamilton addressed private possession of arms in a report on how duties should be calculated for firearms:

> There appears to be an improvidence, in leaving these essential instruments of national defence to the casual speculations of individual adventure; a resource which can less be relied upon, in this case than in most others; the articles in question not being objects of ordinary and indispensable private consumption or use.[40]

Such language from Hamilton, downplaying the importance of privately held arms, fails to appear in Attorney General Ashcroft's letter. Instead, the Attorney General quotes language regarding armed militias out of context while declining to acknowledge statements by the Founding Fathers that would refute his views.

- **Attorney General Ashcroft:** *"In early decisions, the United States Supreme Court routinely indicated that the right protected by the Second Amendment applied to individuals."*

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[38] *Id.* at 380 (brackets in original) (emphasis added).

[39] *Id.*

[40] 10 THE PAPERS OF ALEXANDER HAMILTON 317 (Harold C. Syrett ed., 1966) (quoting Alexander Hamilton's Final Version of the *Report on the Subject of Manufactures*).

• **Ashcroft Deconstructed:** Not one of the cases cited by the Attorney General establishes that the Second Amendment protects an individual right of the kind he advocates—*i.e.*, the possession of guns absent any connection to a state militia.

The first case cited by Attorney General Ashcroft, *Logan v. United States*,[41] defines the scope of a federal prisoner's constitutional right to be protected from physical violence while in the custody of the United States Marshal. In fact, the page Attorney General Ashcroft cites is not actually a page from the Court's opinion. It is a page from the lengthy summary that appears before the beginning of the Court's opinion in *Logan*, and it contains no discussion of the Second Amendment. It is quite possible that the Attorney General intended to cite to text appearing 10 pages later, where the Court referred to a discussion of the first two amendments in an earlier case:

> 1st. It was held that the First Amendment of the Constitution, by which it was ordained that Congress should make no law abridging the right of the people peaceably to assemble and to petition the government for a redress of grievances, did not grant to the people the right peaceably to assemble for lawful purposes, but recognized that right as already existing, and did not guarantee its continuance except as against acts of Congress; and therefore the general right was not a right secured by the Constitution of the United States. But the court added: "The right of the people peaceably to assemble for the purposes of petitioning Congress for a redress of grievances, or for anything else connected with the powers or the duties of the national government, is an attribute of the national citizenship, and, as such, under the protection of, and guaranteed by, the United States. The very idea of a government, republican in form, implies a right on the part of its citizens to meet peaceably for consultation in respect to public affairs and to petition for a redress of grievances. If it had been alleged in these counts that the object of the defendants was to prevent a meeting for such a purpose, the case would have been within the statute, and within the scope of the sovereignty of the United States."
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> 2d. It was held that the Second Amendment of the Constitution, declaring that "the right of the people to keep and bear arms shall not be infringed," was equally limited in its scope.[42]

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[41] 144 U.S. 263, 276 (1892).

[42] *Id.* at 286-287 (citations omitted).

The extent of this case's treatment of the Second Amendment is limited to a restatement of the latter portion of that amendment's text, as part of a series of examples of cases interpreting various provisions in the Bill of Rights that constrain government action in some fashion. At the same time, however, the federal government does not have an affirmative obligation to enforce these constitutional provisions unless additional authority exists for it to do so. *Logan* notes that this limitation applies to the Second Amendment and does not otherwise define the scope of the amendment, other than to state that the right "was equally limited in its scope."[43]

The next case Attorney General Ashcroft cites, *Miller v. Texas*[44]—not to be confused with *United States v. Miller*—does address the Second Amendment, but not in a way that supports Ashcroft's view. In that case, the defendant unsuccessfully challenged a law that prohibited persons from carrying weapons. The Court rejected the Second Amendment challenge on the grounds that the provision does not apply against the states through the Fourteenth Amendment:

> Without, however, expressing a decided opinion upon the invalidity of the writ as it now stands, we think there is no Federal question properly presented by the record in this case, and that the writ of error must be dismissed upon that ground. The record exhibits nothing of what took place in the court of original jurisdiction, and begins with the assignment of errors in the Court of Criminal Appeals. In this assignment no claim was made of any ruling of the court below adverse to any constitutional right claimed by the defendant, nor does any such appear in the opinion of the court, which deals only with certain alleged errors relating to the impanelling of the jury, the denial of a continuance, the admission of certain testimony, and certain exceptions taken to the charge of the court. In his motion for a rehearing, however, defendant claimed that the law of the State of Texas forbidding the carrying of weapons and authorizing the arrest without warrant of any person violating such law, under which certain questions arose upon the trial of the case, was in conflict with the Second and Fourth Amendments to the Constitution of the United States, one of which provides that the right of the people to keep and bear arms shall not be infringed, and the other of which protects the people against unreasonable searches and seizures. *We*

[43] *Id.* at 287.

[44] 153 U.S. 535 (1894). In yet another example of the inaccuracy of the citations in Attorney General Ashcroft's letter, the date for this case is identified incorrectly as 1893.

> *have examined the record in vain, however, to find where the defendant was denied the benefit of any of these provisions....*[45]

The Court only discussed the language of the Second Amendment to show how it may be constitutionally limited and to demonstrate how a prohibition on firearm possession outside the home would be constitutional.

Attorney General Ashcroft also relies on *Robertson v. Baldwin,*[46] a decision which reaffirms *Miller v. Texas*. In *Robertson,* several sailors, having been convicted of a crime, were sent back to their ship and forced to work against their will. The sailors claimed their rights under the Fifth and Thirteenth Amendments were infringed. The opinion refers to the Second Amendment to make the point that there are limitations on the scope of the rights secured by the Bill of Rights:

> The law is perfectly well settled that the first ten amendments to the Constitution, commonly known as the Bill of Rights, were not intended to lay down any novel principles of government, but simply embody certain guarantees and immunities which we had inherited from our English ancestors, and which had from time immemorial been subject to certain well-recognized exceptions arising from the necessity of the case. In incorporating these principles into the fundamental law there was no intention of disregarding the exceptions, which continued to be recognized as if they had been formally expressed. *Thus...the right of the people to keep and bear arms (art. 2) is not infringed by laws prohibiting the carrying of concealed weapons*.[47]

As in *Logan*, the Court discusses the Second Amendment without specifying what the right actually is, beyond a recitation of a portion of the amendment's language. And as in *Miller v. Texas*, the Court points out how the right secured by the Second Amendment constitutionally may be limited. This case is useful primarily in the support that it lends to gun *control* legislation, and does not elucidate the nature of the actual right which the Second Amendment secures.

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[45] *Id.* at 537-538 (emphasis added).

[46] 165 U.S. 275 (1897).

[47] *Id.* at 281-282 (emphasis added).

The final case cited by Attorney General Ashcroft is *Maxwell v. Dow*.[48] As in *Miller v. Texas*, the Court refused to apply the Second Amendment against the states through the Fourteenth Amendment:

> In *Presser v. Illinois*, 116 U.S. 252 [1886], it was held that the Second Amendment to the Constitution, in regard to the right of the people to bear arms, is a limitation only on the power of Congress and the National Government, and not of the States. It was therein said, however, that as all citizens capable of bearing arms constitute the reserved military force of the National Government, the States could not prohibit the people from keeping and bearing arms, so as to deprive the United States of their rightful resource for maintaining the public security, and disable the people from performing their duty to the General Government.[49]

Maxwell, which dealt primarily with the right to a trial by jury, interpreted the right to bear arms with the end of maintaining an effective military. Since citizens have a duty to protect their government, the right to keep and bear arms should not be infringed so as to limit their ability to fulfill that duty. As in the other cases, *Maxwell* does not provide any support for Attorney General Ashcroft's claim that the Supreme Court recognized a private right to bear arms independent of service in a militia. The right which this opinion discusses as constitutionally protected is the same one which *United States v. Miller* and *The Federalist Papers* indicate, and nothing more—namely, the limited right to keep and bear arms in a militia in the service of the government.

• **Attorney General Ashcroft:** *"Justice Story embraced the same view in his influential Commentaries on the Constitution."*

• **Ashcroft Deconstructed:** Attorney General Ashcroft is correct to his detriment. Justice Story *did* embrace a view identical to the Supreme Court in the string of 19th century cases Ashcroft cites. However, as with the prior cases, it is not the view that the Attorney General credits to him. On the contrary, in his commentary on the Second Amendment, Justice Story interprets the right that the amendment protects as tied to militia service. Justice Story wrote:

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[48] 176 U.S. 581 (1900).

[49] *Id.* at 597.

> §1890. The importance of this article will scarcely be doubted by any persons, who have duly reflected upon the subject. The militia is the natural defense of a free country against sudden foreign invasions, domestic insurrections, and domestic usurpations of power by rulers. It is against sound policy for a free people to keep up large military establishments and standing armies in time of peace, both from the enormous expenses, with which they are attended, and the facile means, which they afford ambitious and unprincipled rulers, to subvert the government, or trample upon the rights of the people. The right of the citizens to keep and bear arms has justly been considered, as the palladium of the liberties of a republic; since it offers a strong moral check against the usurpation and arbitrary power of rulers; and will generally, even if these are successful in the first instance, enable the people to resist and triumph over them. And yet, though this truth would seem so clear, and the importance of a *well regulated militia* would seem so undeniable, it cannot be disguised, that among the American people there is a growing indifference to any system of militia discipline, and a strong disposition from a sense of burthens, to be rid of all regulations. How it is practicable to keep the people duly armed *without some organization*, it is difficult to see. There is certainly no small danger, that indifference may lead to disgust, and disgust to contempt; and thus gradually undermine all the protection intended by this clause of our national bill of rights.[50]

Echoing the discussions in the cases Attorney General Ashcroft cites, Story explained that the right to keep and bear arms exists in the context of militia service, and if the militia is to be effective, such service must entail discipline and training. To arm the people independent of any organization in the militia and without regard to maintaining discipline would, wrote Story, actually undermine the very protection that the Second Amendment affords. Story did not describe an individual right to keep and bear arms that is independent of military organizations, and to suggest otherwise reads far more into Story's commentary than its language can possibly support.

- **Attorney General Ashcroft:** *This view of the Second Amendment "was adopted by United States Attorney General Homer Cummings...."*

- **Ashcroft Deconstructed:** Even compared to other misleading components of the Ashcroft letter, this misrepresentation of the views of former Attorney General Homer Cummings stands out. Ashcroft cites Cummings' testimony before the House

[50] Joseph Story, COMMENTARIES ON THE CONSTITUTION § 1890 (1833) (emphasis added) (footnotes omitted).

of Representatives, claiming that he expressed a position in support of an expansive individual right to bear arms in testimony before Congress. Nothing could be further from the truth. Cummings never indicated his support for a broad view of the Second Amendment in his testimony. He appeared before the House Ways and Means Committee in 1934 in support of the National Firearms Act (NFA)—without question the most restrictive piece of federal gun control legislation ever passed. The NFA imposes severe restrictions on the possession of fully automatic machine guns—the then-freely available weapon of choice for gangsters such as Al Capone and John Dillinger. It imposed a significant tax on the acquisition of machine guns and other "gangster weapons" and established stringent sales and possession requirements, including registration, photographing, fingerprinting, and local police approval.[51] Not only that, Cummings testified in support of an earlier, more expansive version of the NFA—proposed by the Justice Department—that also swept handguns under its requirements. Recognizing the bill's severity, Cummings told the Committee: "Frankness compels me to say right at the outset that it is a drastic bill."[52] The NRA, over the objections of the Justice Department, succeeded in stripping handguns from the final version of the bill.[53]

When Attorney General Cummings testified in support of the NFA, he did answer questions about the constitutionality of the legislation. However, they were not the questions or answers that Attorney General Ashcroft apparently believes they were. With one exception, the constitutional questions that arose during the hearing did not concern the Second Amendment at all. Rather, the constitutional issue that Cummings and members of the Committee principally addressed was whether the legislation fell within Congress' power to regulate interstate commerce. Cummings' comments about gun ownership addressed the constitutional effect of a law that restricted the acquisition of firearms across state lines and one that also prohibited the possession of a firearm by someone who happened to cross state lines. In the latter case, such restrictions would, in Cummings' view, raise questions about the law's constitutionality under the commerce clauses. Early in the hearing Cummings stated:

> For instance, this bill does not touch in any way the owner, or possessor, or dealer in the ordinary shotgun or rifle. There would manifestly be a good deal of objection to any attempt to deal with weapons of that kind. The sportsman who desires to go out and shoot

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[51] *The National Firearms Act of 1934: Hearings on H.R. 9066 Before the House Committee on Ways and Means*, 73rd Cong. 24 (1934) (hereafter *National Firearms Act Hearing*).

[52] *Id.* at 5.

[53] Josh Sugarmann, NATIONAL RIFLE ASSOCIATION: MONEY, FIREPOWER & FEAR 31-32 (1992).

> ducks, or the marksman who desires to go out and practice, perhaps *wishing to pass from one State to another*, would not like to be embarrassed, or troubled, or delayed by too much detail. While there are arguments for including weapons of that kind, we do not advance that suggestion.[54]

This excerpt from Cummings' opening statement does not support Attorney General Ashcroft's contention that he was proffering a view of the Second Amendment. Rather, Cummings was addressing Congress' power to regulate commerce in firearms. While he made no mention whatsoever of the Second Amendment in his opening statement, Cummings did identify expressly the sources of constitutional authority for the bill:

> Now we proceed in this bill generally under two powers—one, the taxing power, and the other, the power to regulate interstate commerce.[55]

During a subsequent exchange, Cummings again addressed the interstate commerce question:

> MR. MCCLINTIC: What in your opinion would be the constitutionality of a provision added to this bill which would require registration, on the part of those who now own the type or class of weapons that are included in this bill?
>
> ATTORNEY GENERAL CUMMINGS: We were afraid of that sir.
>
> MR. MCCLINTIC: Afraid it would conflict with state laws?
>
> ATTORNEY GENERAL CUMMINGS: I am afraid it would be unconstitutional.[56]

Attorney General Ashcroft misreads this statement too, apparently thinking that Cummings was indicating that registration would be unconstitutional under the Second Amendment. Wrong again. Cummings was still discussing the commerce clause issue. He stated that a registration requirement for persons who currently possessed the weapons included in the bill might be unconstitutional, observing that possession alone might not satisfy the requirement that the weapon traveled in interstate commerce.

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[54] *National Firearms Act Hearing* at 5-6 (emphasis added).

[55] *Id.* at 6.

[56] *Id.* at 13.

And finally, in regard to the last point Ashcroft cites in Cummings' testimony, Cummings completely sidestepped the issue of Second Amendment interpretation.

> MR. LEWIS: Lawyer though I am, I have never quite understood how the laws of the various States have been reconciled with the provision in our Constitution denying the privilege to the legislature to take away the right to carry arms. Concealed-weapon laws, of course, are familiar in the various States; there is a legal theory upon which we prohibit the carrying of weapons—the smaller weapons.
>
> ATTORNEY GENERAL CUMMINGS: Of course we deal purely with concealable weapons. Machine guns, however, are not of that class. Do you have any doubt as to the power of the Government to deal with machine guns as they are transported in interstate commerce?
>
> MR. LEWIS: I hope the courts will find no doubt on a subject like this, General; but I was curious to know how we escaped that provision of the Constitution.
>
> ATTORNEY GENERAL CUMMINGS: Oh, we do not attempt to escape it. We are dealing with another power, namely, the power of taxation, and of regulation under the interstate commerce clause. You see, if we made a statute absolutely forbidding any human being to have a machine gun, you might say there is some constitutional question involved. But when you say "We will tax the machine gun" and when you say that "the absence of a license showing payment of the tax has been made indicates that a crime has been perpetrated," you are easily within the law.
>
> MR. LEWIS: In other words, it does not amount to prohibition, but allows of regulation.
>
> ATTORNEY GENERAL CUMMINGS: That is the idea. We have studied it very carefully.[57]

Here, Cummings responded to a question about the Second Amendment. However, he went only so far as to speculate that one "might say" that an absolute prohibition on the possession of a machine gun by anyone could result in a

[57] *Id.* at 19.

constitutional question being raised.[58] To read this statement as an affirmation by Cummings that there is an individual right to bear arms of the type that Attorney General Ashcroft posits, or that Cummings himself held such a view, grossly distorts Cummings' words. This point is further supported by the discussion immediately preceding the statement on which Attorney General Ashcroft appears to rely. The Congressman who asked Cummings about the Second Amendment did not even appear to believe that it protects an expansive right when he asked Cummings to comment on the strict controls that existed on machine guns in other western nations:

> MR. LEWIS: What I have in mind mostly, General, is this: The theory of individual rights that is involved. There is a disposition among certain persons to *overstate their rights*. There is a provision in the Constitution, for example, about the right to carry firearms, and it would be helpful to me in reaching a judgment in supporting this bill to find just what restrictions a law-abiding citizen of Great Britain and those other countries is willing to accept in the way of his duty to society.
>
> ATTORNEY GENERAL CUMMINGS: I will be very glad to supply all the information I can on that subject.[59]

If Cummings held the view of the Second Amendment that Attorney General Ashcroft ascribes to him, then Lewis' question provided the former Attorney General with the opportunity to express his disagreement with the notion that people "overstate their rights." Cummings did not do that; instead, he offered to "supply additional information" to Lewis rather than take a position on the Second Amendment at the hearing.

Not only does Attorney General Ashcroft completely misread and distort what Cummings said, Ashcroft wrongly suggests that his own view reflects longstanding Justice Department policy. On the contrary, Justice Department policy has consistently followed the same interpretation of the Second Amendment that the

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[58] In 1986, Congress enacted a ban on the transfer and possession of machine guns manufactured subsequent to May 19, 1986. This restriction has been upheld by numerous circuit courts of appeal. See *United States v. Franklyn*, 157 F.3d 90, 96, n.3 (2d Cir. 1998); *cert. denied*, 525 U.S. 1112 (1999); *United States v. Wright*, 117 F.3d 1265, 1270 (11th Cir.), *cert. denied*, 522 U.S. 1007 (1997); 133 F.3d 1412 (1998); *United States v. Knutson*, 113 F.3d 27, 30 (5th Cir. 1997); *United States v. Rybar*, 103 F.3d 273, 283 (3d Cir. 1996), *cert. denied*, 522 U.S. 807 (1997); *United States v. Kenney*, 91 F.3d 884, 890 (7th Cir. 1996); *United States v. Wilks*, 58 F.3d 1518, 1521 (10th Cir. 1995). The Firearms Owners' Protection Act has been upheld as a *Lopez* Category 1 regulation of the channels of interstate commerce by the Sixth and Ninth Circuits. See *United States v. Beuckelaere*, 91 F.3d 781, 783 (6th Cir. 1996); *United States v. Rambo*, 74 F.3d 948, 952 (9th Cir.), *cert. denied*, 519 U.S. 819 (1996).

[59] *National Firearms Act Hearing* at 18-19 (emphasis added).

Supreme Court laid down in *United States v. Miller* in 1939. The most recent reaffirmation of this long-held view was made on August 22, 2000, in a letter by then-Solicitor General Seth Waxman. Waxman wrote that "rather than holding that the Second Amendment protects individual firearms rights…courts have uniformly held that it precludes only federal attempts to disarm, abolish, or disable the ability to call up the organized state militia."[60] To support this assertion, Mr. Waxman cited a range of cases, including *United States v. Miller*, as well as a statement made by an official in the Office of Legal Counsel in the Department of Justice during the administration of President Richard Nixon:

> The language of the Second Amendment, when it was first presented to the Congress, makes it quite clear that it was the right of the States to maintain a militia that was being preserved, not the rights of an individual to own a gun…[and] [there is no indication that Congress altered its purpose to protect state militias, not individual gun ownership [upon consideration of the Amendment]….Courts…have viewed the Second Amendment as limited to the militia and have held that it does not create a personal right to own or use a gun.…In light of the constitutional history, it must be considered as settled that there is no personal constitutional right, under the Second Amendment, to own or to use a gun.[61]

One need not rely solely on Waxman's assertion regarding the Second Amendment positions of previous Administrations. The Justice Department's own briefs from cases filed in the U.S. Supreme Court during both the Reagan and George Herbert Walker Bush Administrations confirm that the Department's position—until now—has been consistent. In the Reagan administration, Solicitor General Charles Fried laid out the Department of Justice's position on the Second Amendment stating:

> Amicus CFREE's suggestion (Br. 32-50) that the right to acquire firearms must be considered fundamental for purposes of equal protection analysis is entirely without merit. In the context of a Fifth Amendment challenge to Title VII of the Gun Control Act of 1968,18 U.S.C. App. 1201 *et seq*., the Court has flatly held that "[t]hese legislative restrictions on the use of firearms * * * [do not] trench upon any constitutionally protected liberties." *Lewis v. United States*, 445 U.S. 55, 65 n.8 (1980). See id. at 65-66 n.8 (characterizing *United States v. Miller*, 307 U.S. 174, 178 (1939) as holding that "the Second Amendment guarantees no right to keep and bear a firearm that does

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[60] See Appendix B for the full text of the Waxman letter.

[61] Letter by former Solicitor General Seth P. Waxman, dated August 22, 2000, quoting Mary C. Lawton, Deputy Assistant Attorney General, Office of Legal Counsel, in a letter to George H. W. Bush, Chairman, Republican National Committee (July 19, 1973) (citing, *inter alia, Presser v. Illinois*, 116 U.S. 252 (1886), and *United States v. Miller*, 307 U.S. 174 (1939)).

not have 'some reasonable relationship to the preservation or efficiency of a well regulated militia'").[62]

Furthermore, in the administration of former President Bush, Solicitor General Kenneth Starr echoed the understanding of his predecessor when he stated:

> In *United States v. Miller*, 307 U.S. 174 (1939), the only decision by this Court construing the Second Amendment in this century, the Court rejected a challenge to provisions of the National Firearms Act prohibiting the interstate transportation of an unregistered firearm. The Court found no evidence that the firearm (a sawed-off shotgun) "has some reasonable relationship to the preservation or efficiency of a well regulated militia," and held that the possession of that firearm did not fall within the rights guaranteed by the Second Amendment. *Id.* at 178. Since *Miller*, the lower federal courts have concluded that the mere allegation that a firearm might be of value to a militia is insufficient to establish a right to possess that firearm under the Second Amendment. *See, e.g., Cases v. United States,* 131 F.2d 916, 922-923 (1st Cir. 1942), *cert. denied,* 319 U.S. 770 (1943); *Cody v. United States,* 460 F.2d, 34, 36-37 (8th Cir.), *cert. denied,* 409 U.S. 1010 (1972); *United States v. Johnson,* 497 F.2d 548, 550 (4th Cir. 1974); *United States v. Warin,* 530 F.2d 103 (6th Cir.), *cert. denied,* 426 U.S. 948 (1976).[63]

These briefs, like the Waxman letter, dispel any doubt that the view that the Second Amendment only protects the right to keep and bear arms in relation to militia service has been the Department of Justice's official interpretation for more than 65 years.

- **Attorney General Ashcroft:** *"As recently as 1986, the United States Congress and President Ronald Reagan explicitly adopted this view in the Firearms Owners' Protection Act. See Pub. L. No. 99-308, § 1(b) (1986)."*

- **Ashcroft Deconstructed:** Although the 1986 Firearms Owners' Protection Act, which was a wish list for the National Rifle Association, does include Congressional findings to the effect that the right guaranteed by the Second Amendment requires a relaxation of gun control legislation, those findings are simply wishful thinking and bind no one—not the courts, not the executive branch, nor any future Congress. These findings conflict with *United States v. Miller*, as well as other cases cited by Attorney General Ashcroft, such as *Miller v. Texas*, *Robertson v. Baldwin*, and

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[62] Brief of the United States in *Department of Treasury v. Galioto,* No. 84-1904, at 3 n.4 (1986).

[63] Brief of the United States in *Farmer v. Higgins,* No. 90-600, at 6 (1990).

Maxwell v. Dow, all of which endorse varying degrees of gun control. When Congressional findings regarding constitutional interpretation conflict with Supreme Court opinions, it is the Supreme Court, not Congress, that possesses the ultimate authority to decide what the Constitution actually means.[64]

• **Attorney General Ashcroft:** *"Significantly, the individual rights view is embraced by the preponderance of legal scholarship on the subject…."*

• **Ashcroft Deconstructed:** Attorney General Ashcroft's claim is misleading on numerous levels. First, contrary to the statement, there is a wide body of scholarship supporting the Supreme Court's interpretation of the Second Amendment. This fact was duly recognized by the Justice Department in its brief in the *Emerson* appeal:

> The case law and history ignored by Emerson are more than adequately set forth in the Government's opening brief and the amicus briefs of the Center to Prevent Handgun Violence *et al.* and the Ad Hoc Group of Law Professors and Historians, as well as by *countless* legal and historical researchers. See, e.g., Michael Bellesiles, *Suicide Pact: New Readings of the Second Amendment*, 16 Const. Commentary 247 (1999); Carl T. Bogus, *The Hidden History of the Second Amendment*, 31 U.C. Davis L. Rev. 309 (1998); Saul Cornell, *Commonplace or Anachronism*, 16 Const. Commentary 221 (1999); Dennis Henigan, *Arms, Anarchy and the Second Amendment*, 26 Val. U. L. Rev. 107 (1991); Don Higginbotham, *The Second Amendment in Historical Context*, 16 Const. Commentary 263 (1999); Garry Wills, *A Necessary Evil: A History of American Distrust of Government* (1999).[65]

Second, because legal scholarship is generally more interesting, controversial, and original when it is contrary to accepted legal doctrine or longstanding court decisions , many constitutional law scholars and historians have focused their energies elsewhere, viewing Second Amendment jurisprudence as well-settled law. As the friend-of-the-court brief filed in *Emerson* by the Ad Hoc Group of Law Professors and Historians states:

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[64] The only time that such a legislative attempt to take on the interpretive function of the judiciary is legitimate is when the legislative interpretation of a statute can be understood as an amendment of that statute. SUTHERLAND STATUTORY CONSTRUCTION § 45.03 (6th ed., 2000). Applying that same logic to a constitutional provision, since the procedure for amending the Constitution is far more rigorous than the process by which the Firearms Owners' Protection Act was passed, there is no way to understand this latter act as an amendment to the Constitution. Thus, the commentary that it makes on the Constitution is completely non-binding.

[65] *Emerson* Reply Brief at 25 (emphasis added).

> The individual rights theorists labeled their account of the Second Amendment the "Standard Model," *Slip Op.* at 5, which implies that it is espoused by the majority of constitutional law scholars. Amici deny that this is the case. Perhaps because the *Miller* view of the Second Amendment has been settled law for so long, few constitutional law scholars have published analyses of the Amendment.[66]

The 52 law and history professors who signed onto this brief[67] plainly do not think that the Second Amendment protects an individual right. For them, the Supreme Court's interpretation of the Second Amendment is both historically and legally sound.

Finally, as political scientist Robert Spitzer points out in a 2000 article discussing Second Amendment scholarship, of the 164 law review articles on the Second Amendment written from 1912 to 1999, 88 described a view roughly equivalent to the one Attorney General Ashcroft endorses in his letter.[68] The other 76 articles described a view closer to the position articulated by the Supreme Court in *United States v. Miller*.[69] Therefore, the material representing the scholarly debate over the Second Amendment presents an evenly divided field, with neither side able to lay claim to a "preponderance of legal scholarship." Even more interesting is the fact that 58 of these 88 law reviews backing Attorney General Ashcroft's interpretation of the Second Amendment were published between 1990 and 1999.[70] Thus, the publication of law review articles supporting the Supreme Court's interpretation of the Second Amendment outpaced the publication of articles supporting Attorney General Ashcroft's view, until this latter group made a surge in

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[66] Brief for an Ad Hoc Group of Law Professors and Historians as *Amici Curiae* in Support of Appellant in *United States v. Emerson,* No. 99-10331, at 2.

[67] The historians and legal scholars were Bruce Ackerman, Joyce Appleby, Jack M. Balkin, Michael Bellesiles, Adele Bernhard, Ruth Bloch, Carl T. Bogus, Frank Bowman, John Brooke, Chandos Michael Brown, Darryl Brown, Edwin G. Burrows, Andrew Cayton, Erwin Chermerinsky, Saul Cornell, Edward Countryman, John DiPippa, Michael Dorf, Norman Dorsen, David Dow, Susan R. Estrich, Heidi Li Feldman, Hendrik G. Hartog, Bruce Hay, Don Higginbotham, Peter Charles Hoffer, Nancy Isenberg, Sheri L. Johnson, Stanley N. Katz, Arthur LaFrance, Jan Lewis, Jill Lepore, Rory K. Little, Mari J. Matsuda, Andrew J. McClurg, Frank Michelman, Dawn Nunziato, Michael Perlin, Carl Prince, Norman L. Rosenberg, Malinda L. Seymore, Peter Shane, Billy G. Smith, Peter J. Strauss, Richard Uviller, Spencer Weber Waller, Eldon D. Wedlock, Jr., Leila Sadat Wexler, Welsh S. White, Steve Winter, David Yassky, and Michael Zuckerman.

[68] Robert J. Spitzer, *Symposium* at 384.

[69] *Id.*

[70] *Id*.

publication, largely in the last decade. Professor Carl T. Bogus suggests this explosion of publication on the Second Amendment supporting the individual rights reading was due in part to financial sponsorship from the National Rifle Association.[71]

- **Attorney General Ashcroft:** *"[T]he Constitution protects the private ownership of firearms for lawful purposes."*

- **Ashcroft Deconstructed:** This conclusion rests precariously on the house of cards that Attorney General Ashcroft has built. As a whole, the substantive legal and historical references that he presents in his letter to the National Rifle Association actually do articulate a coherent approach to the Second Amendment but, unfortunately for Attorney General Ashcroft, it is not the approach that he describes. The cases of the Supreme Court—informed by historical documents from the time of the framing of the Constitution and longstanding Justice Department policy—demonstrate a broad consensus that the Second Amendment guarantees a right to keep and bear arms only in relation to militia service in protection of the states. Attorney General Ashcroft's assertion "that the Constitution protects the private ownership of firearms for lawful purposes" is a bald expression of his policy preferences, not a conclusion reached by deliberate and careful consideration of any of the source materials identified in his letter. The governing Supreme Court case, *United States v. Miller,* correctly addresses the scope of the Second Amendment and expressly disavows such an expansive reading of the amendment.

- **Attorney General Ashcroft:** *"Of course, the individual rights view of the Second Amendment does not prohibit Congress from enacting laws restricting firearms ownership for compelling state interests...."*

- **Ashcroft Deconstructed:** In a footnote to the statement that the Second Amendment protects the private ownership of firearms for lawful purposes, Attorney General Ashcroft seeks to reassure the reader that his view of the Second Amendment would not foreclose Congress from enacting laws to regulate firearms. Yet, in what is arguably the most radical statement in the entire letter, Ashcroft then writes that Congress can restrict firearms ownership "for compelling state interests." The "compelling state interests" test is the strictest, most probing analysis of government action under constitutional law, and its application has been limited to a few cases—when government has made a classification based on race, religion, nationality, or citizenship status, or when a government action impacts on the rights of free speech and assembly. Even classifications based on gender do not have to

[71] Carl T. Bogus, *Symposium* at 14.

satisfy the "compelling state interests" test. Attorney General Ashcroft's statement would mean that a law restricting firearms ownership would be scrutinized more closely than one that disadvantages women, burdens a woman's reproductive right, restricts religious expression, or gives the police the right to conduct warrantless searches.

As a respected constitutional law scholar has noted, when a court strictly scrutinizes governmental actions or regulations, the review is "'strict' in theory and fatal in fact."[72] In other words, there is virtually no circumstance in which Congress can enunciate a "compelling state interest" that is sufficient to preserve the constitutionality of a law that is strictly scrutinized. The "compelling state interests" test would require the same type of showing by the government to justify a restriction on firearms that is required to justify a restriction on speech. There is absolutely no basis in constitutional law—or even the Ashcroft letter—for importing strict scrutiny to the Second Amendment.

- **Attorney General Ashcroft:** *"As Samuel Adams explained at the Massachusetts ratifying convention, the proposed Constitution should 'never [be] construed…to prevent the people of the United States who are peaceable citizens, from keeping their own arms.'"*

- **Ashcroft Deconstructed:** Dispelling any doubt about the real intentions behind his footnote—to advance an interpretation of the Second Amendment that would lead to the invalidation of existing laws that supposedly encroach upon the "fundamental" gun rights of "law-abiding" Americans—Ashcroft follows his statement about the "compelling state interests" test with this quote that he ascribes to Samuel Adams.

Though Samuel Adams might have been the source of this statement, this language does not appear on page 675—the cited page—or, to the authors' knowledge, on any other page of the Bernard Schwartz compendium that Attorney General Ashcroft cites.[73] Page 675 does refer to amendments to the Federal Constitution that Adams proposed at the Massachusetts ratification convention, of which one was reportedly a right to keep and bear arms, but these proposed amendments, which were not approved by the convention, are not discussed in any detail in the Schwartz book. To actually find the language that Attorney General Ashcroft attributes to Adams, one would have to look at the record of proceedings for the constitutional convention in Massachusetts.

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[72] Gerald Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972).

[73] 2 Bernard Schwartz, THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 675 (1971).

However, there is nothing recorded in those proceedings to suggest that the statement actually should be attributed to Samuel Adams. The quoted language appears in the entry of February 6, 1788, for the official journal of the convention and is presented in the passive voice without any mention of, or attribution to, Adams:

> A motion was made and seconded, that the report of the Committee made on Monday last, be amended, so far as to add the following to the first article therein mentioned, viz.: "And that the said Constitution be never construed to authorize Congress to infringe the just liberty of the press, or the rights of conscience; or to prevent the people of the United States, who are peaceable citizens, from keeping their own arms; or to raise standing armies, unless when necessary for the defense of the United States, or of some one or more of them; or to prevent the people from petitioning, in a peaceable and orderly manner, the federal legislature, for a redress of grievances; or to subject the people to unreasonable searches and seizures of their persons, papers, or possessions." And the question being put, was determined in the negative.[74]

There is no explicit indication as to who moved to have this article included, although it may well have been Adams. However, the journal does not indicate whether any particular amendments or statements in support of the amendments were made by any one convention participant. Even if the author was Adams, the convention participants still rejected the article. A discussion of this language does appear in the trial court's *Emerson* decision, citing to the work of historian Joyce Lee Malcolm, and she attributes this material to Samuel Adams.[75] However, Malcolm references only the page of the journal quoted above. If Attorney General Ashcroft wants to suggest that Samuel Adams believed in an individual right to bear arms free of government restrictions, then, once again, he is going to have to look deeper than a series of misquotes.

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[74] DEBATES AND PROCEEDINGS IN THE CONVENTION OF THE COMMONWEALTH OF MASSACHUSETTS, HELD IN THE YEAR 1788, at 86-87 (Bradford Pierce and Charles Hale, eds., 1856).

[75] *Emerson,* 46 F. Supp. 2d at 605-606 (quoting Joyce Lee Malcolm, TO KEEP AND BEAR ARMS: THE ORIGINS OF AN ANGLO-AMERICAN RIGHT 158 (1994)).

CONCLUSION

Not only has the source material in Attorney General Ashcroft's letter been manipulated and taken out of context, ironically, much of it appears to have been lifted wholesale from the historical discussion in the very *Emerson* decision that the Justice Department has appealed.[76] Most of the historical quotes that Ashcroft uses in his letter are identical to those that the judge in *Emerson* relied on to craft his expansive interpretation of the Second Amendment. The Attorney General of the United States is laying out what he describes as his own personal understanding of the Second Amendment, and he does this through an appeal to materials used in a court decision which rules against the Department of Justice's official position on the Second Amendment, and which the Department has appealed. In other words, Attorney General Ashcroft is presenting in an official letter his personal point of view, which directly conflicts with the duties of his official capacity as Attorney General, by borrowing liberally from a decision he is supposed to be working to have overturned. It says a great deal about both the trial court's decision in *Emerson* and the Ashcroft letter that *both* misrepresent the historical evidence and either omit or mischaracterize existing precedents. Such a situation is, at best, confusing and, at worst, destructive to the Department's litigating position. His letter has served as a rallying cry for the National Rifle Association and a warning sign for gun control advocates. In the meantime, the Justice Department's reputation is being tarnished. Most importantly, if brought to their natural conclusion, Attorney General Ashcroft's efforts to change the Department's position on the Second Amendment will have dangerous real-world implications that will be measured in increased death and injury from firearms.

[76] *Emerson*, 46 F. Supp. 2d at 601-608.

Appendix A:
Letter from Attorney General Ashcroft to James Jay Baker, dated May 17, 2001

Office of the Attorney General
Washington, D.C. 20530

May 17, 2001

Mr. James Jay Baker
Executive Director
National Rifle Association
Institute for Legislative Action
11250 Waples Mill Road
Fairfax, VA 22030

Dear Mr. Baker,

Thank you for your letter of April 10, 2001 regarding my views on the Second Amendment. While I cannot comment on any pending litigation, let me state unequivocally my view that the text and the original intent of the Second Amendment clearly protect the right of individuals to keep and bear firearms.

While some have argued that the Second Amendment guarantees only a "collective" right of the States to maintain militias, I believe the Amendment's plain meaning and original intent prove otherwise. Like the First and Fourth Amendments, the Second Amendment protects the rights of "the people," which the Supreme Court has noted is a term of art that should be interpreted consistently throughout the Bill of Rights. *United States v. Verdugo-Urquidez*, 494 U.S. 259, 265 (1990) (plurality opinion). Just as the First and Fourth Amendment secure individual rights of speech and security respectively, the Second Amendment protects an individual right to keep and bear arms. This view of the text comports with the all but unanimous understanding of the Founding Fathers. *See, e.g.*, Federalist No. 46 (Madison); Federalist No. 29 (Hamilton); *see also*, Thomas Jefferson, Proposed Virginia Constitution, 1764 ("No free man shall ever be debarred the use of arms."); George Mason at Virginia's U.S. Constitution ratification convention 1788 (" I ask, sir, what is the militia? It is the whole people . . . To disarm the people is the best and most effectual way to enslave them.").

This is not a novel position. In early decisions, the United States Supreme Court routinely indicated that the right protected by the Second Amendment applied to individuals. *See, e.g., Logan v. United States*, 144 U.S. 263, 276 (1892); *Miller v. Texas*, 153 U.S. 535, 538 (1893); *Robertson v. Baldwin*, 165 U.S. 275, 281-82 (1897); *Maxwell v. Dow*, 176 U.S. 581, 597 (1900). Justice Story embraced the same view in his influential *Commentaries* on the Constitution. *See* 3 J. Story, *Commentaries on the Constitution* § 1890, p. 746 (1833). It is the view that was adopted by United States Attorney General Homer Cummings before Congress in testifying about the constitutionality of the first federal gun control statute, the National Firearms Act of 1934. *See* The National Firearms Act of 1934: Hearings on H.R. 9066 Before the House Comm. on Ways and Means, 73rd Cong. 6, 13, 19 (1934). As recently as 1986, the United States Congress and President Ronald Reagan

explicitly adopted this view in the Firearms Owners' Protection Act. *See* Pub. L. No. 99-308, § 1(b) (1986). Significantly, the individual rights view is embraced by the preponderance of legal scholarship on the subject, which, I note, includes articles by academics on both ends of the political spectrum. *See, e.g.*, William Van Alstyne, *The Second Amendment and the Personal Right to Arms*, 43 Duke L.J. 1236 (1994); Akhil Reed Amar, *The Bill of Rights and the Fourteenth Amendment*, 101 Yale L.J. 1193 (1992); Sanford Levinson, *The Embarrassing Second Amendment*, 99 Yale L.J. 637 (1989); Don Kates, *Handgun Prohibition and the Original Meaning of the Second Amendment*, 82 Mich. L. Rev. 204 (1983).

In light of this vast body of evidence, I believe it is clear that the Constitution protects the private ownership of firearms for lawful purposes.[1] As I was reminded during my confirmation hearing, some hold a different view and would, in effect, read the Second Amendment out of the Constitution. I must respectfully disagree with this view, for when I was sworn as Attorney General of the United States, I took an oath to uphold and defend the Constitution. That responsibility applies to all parts of the Constitution, including the Second Amendment.

Thank you for your interest in this matter.

Sincerely,

John Ashcroft
Attorney General

[1]Of course, the individual rights view of the Second Amendment does not prohibit Congress from enacting laws restricting firearms ownership for compelling state interests, such as prohibiting firearms ownership by convicted felons, just as the First Amendment does not prohibit shouting "fire" in a crowded movie theater. As Samuel Adams explained at the Massachusetts ratifying convention, the proposed Constitution should "never [be] construed . . . to prevent the people of the United States *who are peaceable citizens*, from keeping their own arms." Reprinted in 2 B. Schwartz, *The Bill of Rights: A Documentary History* 675 (1971) (emphasis added).

Appendix B:
Text of Solicitor General Waxman's letter, dated August 22, 2000

U.S. Department of Justice
Office of the Solicitor General
Solicitor General
Washington, D.C. 20530
August 22, 2000

Dear Mr. (Name Deleted):

Thank you for your letter dated August 11, 2000, in which you question certain statements you understand to have been made by an attorney for the United States during oral argument before the Fifth Circuit in *United States v. Emerson*. Your letter states that the attorney indicated that the United States believes "that it could 'take guns away from the public,' and 'restrict ownership of rifles, pistols and shotguns from all people.'" You ask whether the response of the attorney for the United States accurately reflects the position of the Department of Justice and whether it is indeed the government's position "that the Second Amendment of the Constitution does not extend to the people as an individual right."

I was not present at the oral argument you reference, and I have been informed that the court of appeals will not make the transcript or tape of the argument available to the public (or to the Department of Justice). I am informed, however, that counsel for the United States in *United States v. Emerson*, Assistant United States Attorney William Mateja, did indeed take the position that the Second Amendment does not extend an individual right to keep and bear arms.

That position is consistent with the view of the Amendment taken both by the federal appellate courts and successive Administrations. More specifically, the Supreme Court and eight United States Courts of Appeals have considered the scope of the Second Amendment and have uniformly rejected arguments that it extends firearms rights to individuals independent of the collective need to ensure a well-regulated militia. See *United States v. Miller*, 307 U.S. 174 (1939) (the "obvious purpose" of the Second Amendment was to effectuate Congress's power to "call forth the Militia to execute the Laws of the Union," not to provide an individual right to bear arms contrary to federal law"); *Cases v. United States*, 131 F.2d 916, 921 (1st Cir. 1942) ("The right to keep and bear arms is not a right conferred upon the people by the federal constitution."); *Eckert v. City of Philadelphia*, 477 F.2d 610 (3rd Cir. 1973) ("It must be remembered that the right to keep and bear arms is not a right given by the United States Constitution."); *United States v. Johnson*, 497 F.2d 548, 550 (4th Cir. 1974); *United States v. Warin*, 530 F.2d 103, 106-07 (6th Cir. 1976) ("We conclude that the defendant has no private right to keep and bear arms under the Second

Amendment."); *Stevens v. United States*, 440 F.2d 144, 149 (6th Cir. 1971) ("There can be no serious claim to any express constitutional right of an individual to possess a firearm."); *Ouilici v. Village of Morton Grove*, 695 F.2d 261, 270 (7th Cir. 1982) ("The right to keep and bear handguns is not guaranteed by the second amendment."); *United States v. Hale*, 978 F.2d 1016, 1019 (8th Cir. 1992) ("The rule emerging from *Miller* is that, absent a showing that the possession of a certain weapon has some relationship to the preservation or efficiency of regulated militia, the Second Amendment does not guarantee the right to possess the weapon."); *United States v. Tomlin*, 454 F.2d 176 (9th Cir. 1972); *United States v. Swinton*, 521 F.2d 1255, 1259 (10th Cir. 1975) ("There is no absolute constitutional right of an individual to possess a firearm.").

Thus, rather than holding that the Second Amendment protects individual firearms rights, these courts have uniformly held that it precludes only federal attempts to disarm, abolish, or disable the ability to call up the organized state militia. Similarly, almost three decades ago, the Department of Justice's Office of Legal Counsel explained:

> The language of the Second Amendment, when it was first presented to the Congress, makes it quite clear that it was the right of the States to maintain a militia that was being preserved, not the rights of an individual to own a gun...[and] [there is no indication that Congress altered its purpose to protect state militias, not individual gun ownership [upon consideration of the Amendment] . . . . Courts...have viewed the Second Amendment as limited to the militia and have held that it does not create a personal right to own or use a gun . . . . In light of the constitutional history, it must be considered as settled that there is no personal constitutional right, under the Second Amendment, to own or to use a gun.

Letter from Mary C. Lawton, Deputy Assistant Attorney General, Office of Legal Counsel, to George Bush, Chairman, Republican National Committee (July 19, 1973) (citing, *inter alia, Presser v. Illinois*, 116 U.S. 252 (1886), and *United States v. Miller*, 307 U.S. 174 (1939)). See also, *e.g.*, Federal Firearms Act, Hearings before the Subcommittee to Investigate Juvenile Delinquency of the Committee on the Judiciary, United States Senate 41 (1965) (Statement of Attorney General Katzenbach) ("With respect to the second amendment, the Supreme Court of the United States long ago made it clear that the amendment did not guarantee to any individuals the right to bear arms.").

I hope this answers your question.

Thank you again for writing.

Yours sincerely,

Seth P. Waxman