



July 3, 2001

The Honorable Glenn A. Fine, Inspector General
Office of the Inspector General
United States Department of Justice
950 Pennsylvania Avenue, N.W.
Suite 4706
Washington, D.C. 20530-0001

Joyce E. Peters, Bar Counsel
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Board on Professional Responsibility
District of Columbia Court of Appeals
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Dear Inspector General Fine and Ms. Peters:

Pursuant to 28 C.F.R. § 0.29c, 28 U.S.C. § 530B and 28 C.F.R. § 77.3, the Brady Center to Prevent Gun Violence and Common Cause hereby submit this complaint against United States Attorney General John Ashcroft.

On May 17, 2001, Attorney General Ashcroft wrote a letter to the National Rifle Association (NRA), on Department of Justice letterhead, explaining his interpretation of the legal meaning of the Second Amendment to the United States Constitution. His public expression of this position directly contradicts the United States' stated legal position in pending litigation. As explained below, we believe that Attorney General Ashcroft has violated numerous ethical guidelines that govern his conduct as an attorney toward his client, the United States of America. His actions merit review by your offices.

We have asked for and received an opinion letter from Professor Samuel Dash of Georgetown University Law Center regarding the ethical propriety of Attorney General Ashcroft's conduct. *See* Letter of Samuel Dash (June 29, 2001).¹ As referenced below, and as made clear in his letter, Professor Dash concluded that the Attorney General's conduct "has violated a number of the governing Rules of Professional Conduct" and that those violations were of an "egregious nature." *Id.* at 2, 4. Specifically, Mr. Ashcroft violated Rule 1.7(b) (requiring loyalty to clients' interests and prohibiting conflicts of interest) and Rule 3.6(a) (prohibiting extrajudicial statements substantially likely to materially prejudice a judicial proceeding). *Id.* at 3-4. Professor Dash found that Mr. Ashcroft's conduct was an "act of

¹ Appended hereto as Exhibit 1.

disloyalty to his client, the United States,” and “an impermissible conflict of interest.” *Id.* at 3. Professor Dash also found that, given the Attorney General’s position and influence, and the “egregious nature of his violations,” Rule 8.4(d) – which prohibits conduct that is “prejudicial to the administration of justice” – is also applicable. *Id.* at 4 (quoting Model Rule 8.4(a)).

Arguably, the Attorney General has broad discretion, as a political appointee, to advocate controversial legal positions. As an attorney, however, Mr. Ashcroft is bound by a higher ethical duty to his client that cannot be ignored. In his May 17 letter, Attorney General Ashcroft took the following public position on the meaning of the Second Amendment:

[L]et 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. . . . 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.²

Attorney General Ashcroft’s interpretation directly contradicts the stated position of his client, the United States of America, on the meaning of the Second Amendment. Specifically, in the case of *United States v. Emerson* (No. 99-10331 5th Cir.), now pending before the United States Court of Appeals for the Fifth Circuit, the Department of Justice filed a brief on behalf of the United States of America that argues:

In striking down Section 922(g)(8) as unconstitutional under the Second Amendment . . . the District Court broke with the long-standing rule of *stare decisis*. Every modern-day federal court charged with reviewing the constitutionality of a firearms statute against a direct Second Amendment challenge, including the Supreme Court in *United States v. Miller*, the Fifth Circuit, and nearly every federal court of appeals, has determined that possession of the firearm must be “reasonably related” to the preservation or efficiency of the militia before the Second Amendment will shield such possession.”³

While Attorney General Ashcroft states in his letter that he “cannot comment on any pending litigation,”⁴ the Fifth Circuit is currently considering the exact point of law, in the *Emerson* case, to

² See May 17, 2001, Letter of Attorney General John Ashcroft to NRA Executive Director James Jay Baker (appended hereto as Exhibit 2).

³ See Brief for Appellant The United States of America at 12 (appended hereto as Exhibit 3); see also Exhibit 4 (citing over five dozen federal court decisions that have accepted the militia view of the Second Amendment, as proffered by the United States in *Emerson*).

⁴ In fact, press reports suggest that Attorney General Ashcroft’s letter to the NRA was written in response to the NRA’s concerns about the United States’ position in the *Emerson* case. Reportedly, after the Fifth Circuit oral argument in the *Emerson* case, a Texas member of the NRA wrote to then-Attorney General Janet Reno, inquiring about the United States’ position on the Second Amendment as espoused by the United States’ attorney in the case. In response, Solicitor General Seth Waxman wrote a letter to the NRA member, confirming that the United States position on the Second Amendment was as stated in *Emerson*. The Waxman letter was widely publicized by the NRA through direct mail, in advertisements, and in an NRA magazine. After John Ashcroft became Attorney General, the NRA’s chief lobbyist, James J. Baker, wrote to him inquiring about the United States’ current position on the meaning of the Second Amendment and specifically referenced the

which the Attorney General's letter to the NRA speaks.⁵ It can hardly be doubted that the Attorney General's public expression of a view directly contrary to his client's legal position in *Emerson* poses a substantial risk of undercutting that position before the Court. This risk is heightened by the Attorney General's presentation, in the letter, of arguments and case law that he claims support his view and that are utterly inconsistent with the legal analysis advanced by the Department of Justice in the *Emerson* case.⁶

It also is highly relevant that the NRA has filed an *amicus curiae* brief⁷ in support of the criminal defendant and against the United States position in the *Emerson* case, and the Attorney General's interpretation of the Second Amendment espoused in his May 17 letter is identical to the position taken by the NRA in its *Emerson* brief. If the Attorney General had written a similar letter to the defendant's attorneys in the case, explaining that he agrees with Mr. Emerson's position on the Second Amendment, as opposed to the position of the United States, there would be no question as to the letter's impropriety. That the letter, rather, was sent to an *amicus* party supporting the defendant makes the Attorney General's statements no less objectionable.

It is axiomatic in the legal profession that "a lawyer may not represent a client if the representation would involve a conflict of interest. A conflict of interest is involved if there is a substantial risk that the lawyer's representation of the client would be materially and adversely affected by the lawyer's own interests" See Restatement (Third) of the Law: The Law Governing Lawyers § 121 (2000) [hereinafter "Restatement"]. Explaining the ethical limitations on an attorney's ability to take a public position adverse to a current client, comment e to Section 125 of the Restatement states that:

[A] lawyer's right to freedom of expression is modified by the lawyer's duties to clients. Thus, a lawyer may not publicly take a policy position that is adverse to the position of a

Waxman letter discussing the *Emerson* case. Attorney General Ashcroft's May 17 letter was written in response to James J. Baker's inquiry. See Terry Eastland, *John Ashcroft's Constitution*, The Wkly. Standard, June 25, 2001, available at http://www.weeklystandard.com/magazine/mag_6_39_01/eastland_art_6_39_01.asp (appended hereto as Exhibit 5).

⁵ In a letter from Senators Edward Kennedy, Charles Schumer, and Dianne Feinstein to Attorney General Ashcroft, the Senators raise their concern about this same issue. See Letter from Senator Edward Kennedy, Senator Charles Schumer, and Senator Dianne Feinstein to John Ashcroft, Attorney General of the United States (May 30, 2001) (appended hereto as Exhibit 6) ("[W]e also question the propriety of the manner in which you endorsed the NRA's view of the Second Amendment. Although you begin your letter by promising not to 'comment on any pending litigation,' you are certainly aware that the case of *United States v. Emerson* is now pending in the United States Court of Appeals for the Fifth Circuit. . . . Your NRA letter appears to support the defendant's position and actually contradicts the arguments made by the Justice Department in favor of the prosecution.").

⁶ Curiously, however, the Attorney General's citation of what he calls a "vast body" of evidence supporting the "individual rights" view of the Second Amendment omits any mention of *United States v. Miller*, 307 U.S. 174 (1939), the Supreme Court's only extensive discussion of the Amendment. In that opinion, the Supreme Court wrote that the "obvious purpose" of the Amendment was "to assure the continuation and render possible the effectiveness of" the state militia and that it "must be interpreted and applied with that end in view." *Miller*, 307 U.S. at 178. The Attorney General also neglected to mention that every federal court of appeals in the country has rejected his view of the Second Amendment, and that numerous federal district courts have done the same. See Exhibit 4.

⁷ Appended hereto as Exhibit 7.

client that the lawyer is currently representing if doing so would materially and adversely affect the lawyer's representation of the client in the matter.

See id. § 125, cmt. e. As this comment suggests, there is a substantial risk that an attorney's public articulation of a policy position contrary to his client's position will materially and adversely affect the lawyer's representation. Because Attorney General Ashcroft's letter takes a public position on a legal issue (as distinct from a policy issue) that is potentially dispositive in his client's pending case, the danger of a material and adverse impact on his representation is far greater than in the conflict contemplated in comment e. Having ascended to the position of Attorney General, thereby assuming the duties of representing the United States of America, Mr. Ashcroft is ethically bound to refrain from making statements that undermine the government's position in a pending case. As Professor Dash found, Mr. Ashcroft's "act of disloyalty to his client, the United States, constitutes an impermissible conflict of interest." Ex. 1 (Letter of Professor Dash) at 3.

Indeed, while his communication would have been improper were it made by any attorney representing the United States, Mr. Ashcroft's position as Attorney General exacerbates these improprieties, because of his influence, the publicity attendant to his remarks, and the fact that he can reasonably be perceived as stating the official legal position of the United States. *See* Ex. 1 (Letter of Professor Dash) at 4.

In addition to the specific ethical principles discussed above, Attorney General Ashcroft's conduct ran afoul of other ethical principles that guide all lawyers. *See* Model Rules of Prof'l Conduct R.1.7(b) ("A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's own interests. . . ."); District of Columbia Rule of Prof'l Conduct 1.7(b) (" [A] lawyer shall not represent a client with respect to a matter if . . . [t]he lawyer's professional judgment on behalf of the client will be or reasonably may be adversely affected by . . . the lawyer's own . . . personal interests."); Model Rules of Prof'l Conduct R. 3.6 ("A lawyer who is participating . . . in the . . . litigation of a matter shall not make an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication⁸ if the lawyer knows or reasonably should know

⁸ Attorney General Ashcroft sent his May 17 letter to the NRA in such a manner that he could expect that the NRA would disseminate the letter by means of mass public communication. First, there is no indication anywhere in the letter that it is confidential or that it should not be disseminated to the general public. Second, the letter was sent to the NRA the day before the NRA's annual convention and, according to press reports, portions of the letter were read aloud by James J. Baker at the convention. *See* Eastland, *supra* note 3; *see also* James Jay Baker, Speech at 2001 NRA Annual Meeting ("In John Ashcroft, we have an attorney general who agrees with us. In fact, this letter dated May 17, and delivered here to me yesterday, says it better than I could. And I quote: '[L]et 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.'"), available at <http://www.nraila.org>. The press further reported that "[a] Justice Department spokesman declined to say whether the timing [of the delivery of the letter] was simply coincidental." *See id.* The Ashcroft letter also is the subject of the cover story in the July 2001 issue of the NRA's magazine, *America's 1st Freedom*. *See* James O.E. Norell, *In Step With the Founding Fathers, America's 1st Freedom*, July 2001, at 35 (appended hereto as Exhibit 8). Attorney General Ashcroft's letter, in fact, has been widely disseminated and reported on in the national press. *See, e.g.*, Jerry Seper, *Ashcroft To Protect Private Ownership Of Firearms*, Wash. Times, May 23, 2001, at A1; Karen Gullo, *Ashcroft Assures NRA On Guns*, The News & Observer, May 23, 2001, at A10; *Gun Rights In Constitution, Ashcroft Says*, L.A. Times, May 23, 2001, at A23; *Ashcroft: Americans Have Right To Bear Arms*, Cincinnati Post, May 23, 2001, at 2A; Karen Gullo, *Gun Ownership An Individual Right, Ashcroft Writes NRA*, Chicago Tribune, May 23, 2001, at 13; *Ashcroft Reiterates Right To*

that it will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter. . . . No lawyer associated in a . . . government agency with a lawyer subject to paragraph (a) shall make a statement prohibited by paragraph (a).”); District of Columbia Rule of Professional Conduct 3.6 (“A lawyer engaged in a case being tried to a judge or jury shall not make an extrajudicial statement that a reasonable person would expect to be disseminated by means of mass public communication if the lawyer knows or reasonably should know that the statement will create a serious and imminent threat to the impartiality of the judge or jury.”). *See also* Ex. 1 (Letter of Professor Dash) at 3-4 (finding that the Attorney General violated Rules 1.7(b) and 3.6(a)).

When the Attorney General sat for his confirmation hearings in January, several members of the Senate Judiciary Committee raised concerns about whether then-nominee Ashcroft’s personal and political views would conflict with the Attorney General’s duty to defend the laws of the United States of America with which he personally disagrees.⁹ During vigorous questioning from several Senators over two days during his confirmation hearing, Attorney General Ashcroft addressed the concerns of the Senators, vowing to uphold the laws of the United States of America and put aside his personal beliefs. When asked specifically about how he would approach the *Emerson* case and other legal attacks on federal firearms laws and regulations, Attorney General Ashcroft responded: “I believe these are all enactments of the Congress signed by the president, laws of the United States that are under attack. I would expect to defend those vigorously.”¹⁰ *See* Jan. 17, 2001 Hearing on the Confirmation of Attorney General-Designate John Ashcroft Before the Senate Judiciary Comm., 107th Cong. (2001) (Statement of John Ashcroft). It is hardly a “vigorous defense” of the statute at issue in *Emerson*¹¹ to make public

Own Guns, Arizona Republic, May 23, 2001, at A9; Dan Eggen, *Ashcroft: Gun Ownership An Individual Right*, Wash. Post, May 24, 2001, at A13. As of 11:45 a.m. on Monday, July 2, 2001, the letter can be found on the internet at such sites as <http://www.nealknox.com> (stating that the letter was obtained from the NRA’s James J. Baker) and http://www.ournation.org/gun_news.htm.

⁹ *See, e.g.*, Jan. 16, 2001 Hearing on the Confirmation of Attorney General-Designate John Ashcroft Before the Senate Judiciary Comm., 107th Cong. (2001) (Statement of Senator Bond in support of Attorney General Ashcroft) (“[S]everal members of the committee have raised the reasonable question of whether John Ashcroft can be trusted to enforce laws with which he personally disagrees.”).

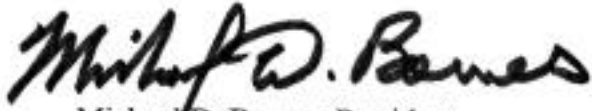
¹⁰ Attorney General Ashcroft made several similar pronouncements during his confirmation hearing: (1) “I understand that being Attorney General means enforcing the laws as they are written, not enforcing my own personal preference; it means advancing the national interest, not advocating my personal interest. . . . As a man of faith, I take my word and my integrity seriously. So when I swear to uphold the law, I will keep my oath, so help me God,” (2) “Well, there are lots of things that I disagree with that I believe it would be the responsibility of the attorney general to defend vigorously in court,” (3) “[I]f the Senate were to pass [gun licensing and registration laws], I would defend it in court and argue its constitutionality.” *See* Jan. 16, 2001 and Jan. 17, 2001 Hearings on the Confirmation of Attorney General-Designate John Ashcroft Before the Senate Judiciary Comm., 107th Cong. (2001) (Statements of John Ashcroft).


¹¹ The statute under attack in the *Emerson* case makes it illegal to possess a firearm while subject to a domestic violence restraining order. *See* 18 U.S.C. § 922(g)(8). Timothy Joe Emerson was indicted by a federal grand jury for possessing firearms in violation of this statute. *See* App. Br. at 8. Emerson’s wife testified at a divorce hearing that Emerson had threatened to kill a friend of hers and she asked the judge to impose a temporary restraining order (TRO) on Emerson to protect herself and their young daughter, which the judge granted. *See id.* at 5-6. Emerson testified at the hearing, but he did not contradict his wife’s allegations or offer any evidence that they were untrue. *See id.* at 6. On two occasions following the entry of the TRO, Emerson brandished or threatened to brandish his weapons at Mrs. Emerson or her friends. First, when his wife attempted to retrieve their daughter’s shoes from a back room in Emerson’s office space, he told her to leave his office and took a Beretta pistol out of his desk and allegedly pointed it at her and their daughter. *See id.* at 7. Second, when three of Mrs. Emerson’s friends attempted to remove some cars from Emerson’s office property, pursuant to a court order allowing

statements and advance legal arguments that undercut the arguments made by the Department of Justice in support of the constitutionality of the statute.

As this country's top attorney and supervisor of all litigation to which the United States is a party, *see* 28 U.S.C. § 519, Attorney General Ashcroft has engaged in ethical improprieties that have undermined and adversely affected the interests of the United States of America, his client. In consideration of the above, we respectfully request that your offices conduct investigations of the Attorney General's actions with respect to his May 17, 2001 letter to the National Rifle Association.

Sincerely,


Michael D. Barnes, President
Brady Center to Prevent Gun Violence


Scott Harshbarger, President
Common Cause

them to do so, Emerson called the police, told them people were wrongfully removing cars from his property, and also told them that if any of Mrs. Emerson's friend came on his property, they would be found dead. *See id.* at 8. Just over a week after the second incident, the federal grand jury issued its indictment of Emerson. *See id.* Emerson had collected over the years approximately 35 guns, including an AK-47 and other military weapons. *See* Ann LoLordo, *A Small-Town Doctor Caught In the Cross Fire*, *The Baltimore Sun*, May 30, 2000, at 1A.