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July 8, 2002

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**VIA FACSIMILE (202) 307-6777
AND OVERNIGHT MAIL**

The Honorable John Ashcroft
Attorney General
United States Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, DC 20530-0001

Dear General Ashcroft:

We, the undersigned attorneys general of eighteen states, write regarding your recently announced position that "the text and the original intent of the Second Amendment clearly protect the right of individuals to keep and bear firearms." We agree that this is the proper reading of the Second Amendment, and that this policy best protects the fundamental interest of Americans in security and self-preservation. We have noted the criticism that has been leveled at you and the Department of Justice for taking this position, and wish to offer our wholehearted support for your efforts.

The Second Amendment has been the subject of substantial scholarly effort in recent years, almost all of which leads to the interpretation you have adopted.¹ In fact, one of the most remarkable attributes of current discussions of the Second Amendment is the extent to which scholars who are not personally disposed to the protection of private firearms ownership have come, however reluctantly, to the same conclusion about the Second Amendment that you have

¹ Many commentators have dated the revival of scholarly interest in the Second Amendment to the publication of Sanford Levinson, *The Embarrassing Second Amendment*, 99 Yale L. J. 637 (1989). "The following decade produced a flood of writing . . . almost unanimously rejecting the judicially dominant state's right interpretation." Nelson Lund, *Outsider Voices on Guns and the Constitution*, 17 Const. Comment. 701, 706 (2000). We note the following articles, in chronological order, as milestones in the development of the individual rights understanding of the Second Amendment: Nelson Lund, *The Second Amendment, Political Liberty, and the Right to Self-Preservation*, 39 Ala. L. Rev. 103 (1987); William Van Alstyne, *The Second Amendment and the Personal Right to Arms*, 43 Duke L. J. 1236 (1994); Glenn Harlan Reynolds, *A Critical Guide to the Second Amendment*, 62 Tenn. L. Rev. 461 (1995); Nelson Lund, *The Past and Future of the Individual's Right to Arms*, 31 Ga. L. Rev. (1996); Randy Barnett & Don B. Kates, *Under Fire: The New Consensus on the Second Amendment*, 45 Emory L. J. 1139 (1996); L. A. Powe, Jr., *Guns, Words and Constitutional Interpretation*, 38 Wm. & Mary L. Rev. 1311 (1997); Eugene Volokh, *The Commonplace Second Amendment*, 73 N.Y.U.L. Rev. 793 (1998); Sanford Levinson, *Is the Second Amendment Finally Becoming Recognized as Part of the Constitution? Voices from Courts*, 1998 BYU L. Rev. 127; Akhil Amar, *The Bill of Rights: Creation and Reconstruction* 46-59, 257-66 (1998).

reached. To take just one example, noted constitutional scholar Laurence Tribe recently wrote that the Second Amendment “achieves its central purpose by assuring that the federal government may not disarm individual citizens without some unusually strong justification consistent with the authority of the states to organize their own militias. That assurance in turn is provided through recognizing a right (admittedly of uncertain scope) on the part of individuals to possess and use firearms in the defense of themselves and their homes . . . a right that directly limits action by Congress or by the Executive Branch . . .” L. Tribe, 1 *American Constitutional Law* 902 n.221 (3d ed. 2000). The overwhelming historical evidence in support of this reading is ably marshaled in the recent opinion of the U.S. Court of Appeals for the Fifth Circuit in *United States v. Emerson*, 270 F.3d 203, 218-60 (5th Cir. 2001), *cert. denied*, 122 S.Ct. 2362 (2002).

Some have argued that a reading of the Second Amendment that protects an individual’s right to bear arms would make any regulation of firearms ownership impossible. These criticisms clearly miss the point. As the Fifth Circuit held in *Emerson*, that “the Second Amendment *does* protect individual rights . . . does not mean that those rights may never be made subject to any limited, narrowly tailored specific exceptions or restrictions that are reasonable and not inconsistent with the right of Americans generally to individually keep and bear their private arms as historically understood in this country.” *Emerson*, 270 F.3d at 261. Individual rights under the Second Amendment are no more absolute than are any of the other individual rights protected by the Bill of Rights, but neither should Second Amendment rights be any less protected. That is why the *Emerson* court upheld the constitutionality of a federal firearms law even though the *Emerson* court affirmed that the Second Amendment protects an individual right.

We are also unpersuaded by the claims that your position is contrary to Supreme Court precedent. The strongest case for the opponents’ view is the decision in *United States v. Miller*, 307 U.S. 174 (1939), but the *Emerson* opinion amply proves that “*Miller* . . . does not resolve the issue” of whether the Second Amendment guarantees an individual, as opposed to a collective, right. 270 F.3d at 227.

As the chief law enforcement officers of our respective states, we wish to make one final point that is outside the scope of constitutional analysis. Simply put, your position on the Second Amendment is a sound public policy decision. There is an increasing amount of data available to support the claim that private gun ownership deters crime. That evidence comes both from the United States (particularly as highlighted in the empirical research of John Lott²) and from abroad.³ To the extent that a society’s laws make it more difficult for law-abiding private citizens to buy and keep firearms, that society is more subject to the destructive behavior of those who do not follow any law. This fact is increasingly clear for those who will look at the evidence. It is, in a way, a twenty-first century vindication of the wisdom of our eighteenth century Founders in securing our right to bear arms.

² John R. Lott, *More Guns, Less Crime: Understanding Crime and Gun Control Laws* (1998).

³ John R. Lott, *Gun Control Misfires in Europe*, *Wall St. J. Europe*, Apr. 30, 2002; Paul Gallant, Joanne Eisen & Dave Kopel, *Fear in Britain*, *National Rev. Online*, July 18, 2000, <http://www.nationalreview.com/comment07199c.html>.

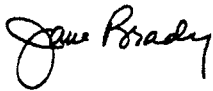
We salute you for your efforts to uphold all of the Constitution, including the Second Amendment, and we offer you whatever assistance we can provide on this important issue.

Sincerely,



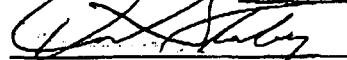
Bill Pryor
Attorney General

cc: Hon. Theodore B. Olson
Solicitor General



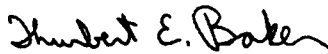
Jane Brady
Attorney General of Delaware

FOR THE STATE OF NEBRASKA

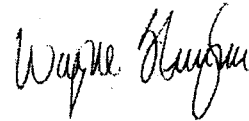


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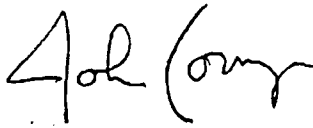
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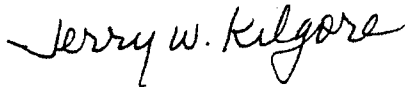
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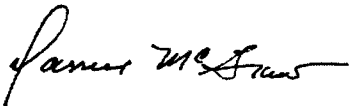
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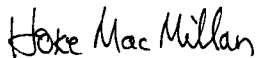
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