**U. S. Department of Justice**

Office of the Solicitor General

*Solicitor General*

*Washington, D.C. 20530*

August 22, 2000

[redacted]

Dear [redacted]

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.").

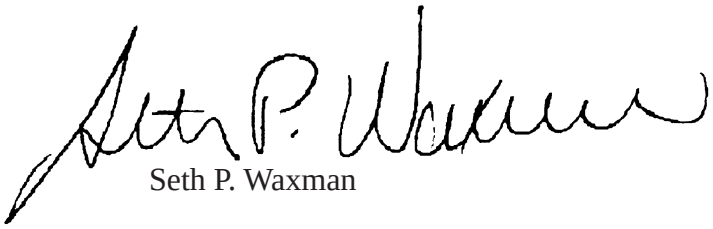
Thus, rather than holding that the Second Amendment protects individual firearms rights, these courts have uniformly held that it precludes only federal attempts to disarm, abolish, or disable the ability to call up the organized state militia. Similarly, almost three decades ago, the Department of Justice's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