No. 07-290

IN THE
Supreme Court of the United States

DISTRICT OF COLUMBIA AND ADRIAN M. FENTY, MAYOR OF THE DISTRICT OF COLUMBIA,
Petitioners,

v.

DICK ANTHONY HELLER,
Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR FORMER DEPARTMENT OF JUSTICE OFFICIALS AS AMICI CURIAE SUPPORTING PETITIONERS

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INTEREST OF AMICI CURIAE

Amici curiae are former officials of the United States Department of Justice.[1] In their official capacities, amici curiae were responsible for enforcing the laws of the United States, including federal laws that regulate the possession, use, ownership, and sale of firearms. They submit this brief to express their view that federal, state, and local gun control legislation is a vitally important law enforcement tool used to combat violent crime and protect public safety. Amici disagree with the current position of the United States Department of Justice that the Second Amendment protects an individual right to keep and bear arms for purposes unrelated to a State's operation of a well-regulated militia. That position, which was adopted in the fall of 2001, reversed the Department's longstanding position that the Second Amendment is not implicated by firearms regulations that are designed to protect public safety and do not interfere with participation in a well-regulated militia. The

[1] A list of the amici who are filing this brief is set forth in the Appendix. Pursuant to Rule 37.6, amici affirm that no person other than amici or their counsel made a monetary contribution to the preparation or submission of this brief, and that no counsel for a party authored this brief in whole or in part, except as follows: On January 3, 2008, after the drafting of this brief was substantially completed, Petitioners, through their counsel, asked Robert Long and the law firm of Covington & Burling to provide them with additional legal counsel and advice in connection with the drafting of Petitioners' reply brief and preparation for oral argument. On January 4, Covington & Burling agreed to provide additional legal counsel to Petitioners. The parties' letters consenting to the filing of amicus briefs have been filed with the Clerk.

Department's current position runs against the great weight of federal appellate authority, which has rejected the view that the Second Amendment protects a right to keep and bear arms for private purposes. Amici believe that the Department's original position reflects the correct interpretation of the Second Amendment and that the current position, if adopted by this Court, will place vitally important gun-control legislation at risk of invalidation, to the detriment of effective law enforcement and public safety.

SUMMARY OF ARGUMENT

Gun violence continues to exact a devastating toll on communities throughout the United States. Every year thousands of homicides are committed with firearms, as are hundreds of thousands of non-lethal crimes, including rapes, robberies, and assaults. Crimes involving firearms have a long history in America. The first significant federal legislative response to such crimes was the enactment of the National Firearms Act of 1934 (NFA), which imposed a prohibitive tax on the transfer of firearms considered desirable to criminals.

Congress built on the NFA in subsequent legislation. The Federal Firearms Act of 1938 imposed licensing requirements on gun manufacturers and dealers and prohibited licensees from shipping firearms to certain classes of persons. The Gun Control Act of 1968 (GCA) strengthened licensing requirements and expanded the categories of persons prohibited from possessing firearms. The Brady Handgun Violence Prevention Act of 1993 requires federal firearms licensees to conduct a

background check on prospective gun buyers before making a sale.

Enforcement of those gun-control laws is a critical component of the mission of the Department of Justice. The Department prosecutes thousands of defendants for firearms violations every year. In opposing Second Amendment challenges to those prosecutions, the government contended for more than 60 years that the Second Amendment did not protect an individual right to keep and bear arms for purposes unrelated to participation in a well-regulated militia. The government set out that position in its brief in *United States v. Miller*, 307 U.S. 174 (1939), the only prior case in which this Court has squarely addressed a Second Amendment challenge to federal firearms legislation. In rejecting the defendants' Second Amendment challenge to the NFA, which rendered unlawful their transport of an unregistered sawed-off shotgun across state lines, the Court agreed with the government that the "possession or use" of a firearm must "ha[ve] some reasonable relationship to the preservation or efficiency of a well regulated militia" to fall within the scope of the Second Amendment. *Id.* at 178. The government continued to press that position successfully in the federal courts of appeals for the rest of the Twentieth Century. In evaluating the constitutionality of proposed firearms legislation over the same time period, the Department, through the Office of Legal Counsel, repeatedly expressed the same view.

In May 2001, despite the longstanding position of the Department of Justice and uniform body of favorable federal appellate precedent,

Attorney General John Ashcroft wrote a letter to the National Rifle Association expressing the view that the Second Amendment "protects the private ownership of firearms for lawful purposes." May 17, 2001 Letter from John Ashcroft, Attorney General, to James Jay Baker, Executive Director, National Rifle Association Institute for Legislative Action (Ashcroft Letter), http://www.nraila.org/images/Ashcroft.pdf. The Attorney General's statement contradicted the longstanding position of the United States, which government lawyers had advanced in pending cases, including a case in the Fifth Circuit involving a Second Amendment challenge to a federal law prohibiting the possession of firearms by persons subject to a domestic violence restraining order. Although the Fifth Circuit ultimately rejected the defendant's claim, the court recognized a Second Amendment right of individuals "to privately possess and bear their own firearms, . . . that are suitable as personal, individual weapons." *United States v. Emerson* 270 F.3d 203, 260 (5th Cir. 2001), *cert. denied*, 536 U.S. 907 (2002).

Emerson was the first federal appellate decision to adopt the view that the Second Amendment protects an individual right to keep and bear arms for purposes unrelated to the effective functioning of the militia. After the decision was issued, the Attorney General adopted it as the position of the United States.

As the briefs filed by the petitioners and their amici in this case explain, the original, longstanding position of the Department of Justice, embraced by this Court in *Miller* and by all the federal courts of appeals until the *Emerson* decision and the decision

below, is firmly rooted in the text of the Second Amendment, its drafting history, and the historical context in which it was enacted. Given the strength of the Department's original position and its acceptance by the courts, the decision to abandon it in 2001 was unjustified.

The decision was also unwise. Recognition of an expansive individual right to keep and bear arms for private purposes will make it more difficult for the government to defend present and future firearms laws. With gun violence continuing to plague the United States, this Court should adhere to the position it staked out nearly 70 years ago in *Miller* and construe the Second Amendment to protect a right to keep and bear arms only to the extent the exercise of such a right is related to the "preservation or efficiency of a well regulated militia." 307 U.S. at 178.

ARGUMENT

The Second Amendment Does Not Protect Firearms Possession or Use That Is Unrelated To Participation In A Well-Regulated Militia.

Gun violence in the United States is an extremely serious problem. Every year firearms are used in thousands of homicides and hundreds of thousands of non-lethal crimes such as rape, robbery, and assault. *See* William J. Krouse, CRS Report for Congress, *Gun Legislation in the 109th Congress* (updated May 15, 2006), at 4-5. The deadly toll that firearms exact on the American people has been punctuated in recent years by especially horrific crimes involving firearms, including the Virginia

Tech and Columbine school shootings and the sniper attacks in the Washington Metropolitan Area.

The question presented in this case is whether the Second Amendment prevents the District of Columbia from enacting public safety measures such as the handgun law at issue here that are designed to combat the violence that firearms enable a criminal to perpetrate against the District's citizens. Amici submit that the answer is no. Properly understood, the Second Amendment does not prohibit a legislature from enacting a law that has neither the purpose nor the effect of interfering with a State's operation of its militia in accordance with state and federal law. That was the position the United States Department of Justice maintained throughout the Twentieth Century in successfully defending federal firearms laws against Second Amendment challenge and in evaluating the constitutionality of proposed firearms legislation.

In 2001, the Department of Justice abandoned its longstanding position, adopting the view that the Second Amendment protects firearms possession and use for purposes unrelated to participation in a well-regulated militia. Because the Department's original position is amply supported by the Second Amendment's text, drafting history, and historical context, the abrupt change in the Department's position was unwarranted. The Department's new interpretation of the Second Amendment, if adopted by this Court, threatens to obstruct legislative efforts to combat gun-related violence, even when the clear purpose of the statute is to protect public safety, not to dismantle the militia, and even when the statute will have no effect on the operation of the militia.

A. Congress Has Enacted A Series Of Statutes Regulating Firearms Possession And Use.

Having determined that "there are more people in the underworld today armed with deadly weapons, in fact, twice as many, as there are in the Army and the Navy of the United States combined," National Firearms Act: Hearings on H.R. 9066 before the H. Comm. on Ways and Means, 73d Cong., 2d Sess., at 4 (1934), Attorney General Homer Cummings in the early 1930s presented a Department of Justice proposal to combat the "armed underworld," *id*. at 5, by taxing commerce in certain firearms and imposing registration requirements. Congress responded by enacting the National Firearms Act of 1934 (NFA), ch. 757, 48 Stat. 1236 (1934) (codified as amended at 26 U.S.C. § 5801 *et seq*.), the first major piece of federal legislation addressing gun violence in America. The NFA sought to discourage commerce in firearms favored by criminals—including machine guns, sawed-off shotguns, and silencers—by imposing a prohibitive tax on their transfer.

Congress returned to the regulation of firearms in 1938, enacting the Federal Firearms Act (FFA), ch. 850, 52 Stat. 1250 (1938). The FFA imposed licensing requirements on gun manufacturers, importers, and dealers operating in interstate commerce and prohibited the knowing transfer of firearms to certain categories of persons, including felons and fugitives. 52 Stat. at 1250-1251.

The next significant federal legislative response to the persistent problem of gun violence in the United States came in 1968, towards the end of a

decade that saw the fatal shootings of President John F. Kennedy, Robert F. Kennedy, and Martin Luther King, Jr. The Gun Control Act of 1968 (GCA), Pub. L. No. 90-618, 82 Stat. 1213 (codified as amended at 18 U.S.C. § 921 *et seq*.), amended the NFA to tax firearms that constitute "destructive devices" and superseded the FFA by imposing more comprehensive licensing requirements and adding to the categories of persons prohibited from possessing firearms, including drug users and the mentally ill. 82 Stat. at 1214-1220. The GCA also established minimum age requirements for handgun and long gun purchases, prohibited the sale of handguns to out-of-state residents, limited the importation of firearms, and imposed significant criminal penalties for using or carrying a firearm in committing a federal felony. 82 Stat. at 1216-1224.

In 1993, Congress enacted the Brady Handgun Violence Prevention Act, Pub. L. No. 103-159, 107 Stat. 1536, which amended the GCA to require the completion of a background check before a licensed firearms manufacturer, importer, or dealer may sell or transfer a firearm to a nonlicensed person. Pursuant to that law, the Federal Bureau of Investigation established the National Instant Criminal Background Check System (NICS) to facilitate the conduct of the background checks.[2]

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[2] Responding to the Virginia Tech shootings, Congress recently enacted the NICS Improvement Amendments Act of 2007, Pub. L. No. 110-180, 121 Stat. 2559, which is designed to enhance state reporting to NICS of mental health information about prospective gun purchasers. Currently pending in Congress are a variety of measures designed to make it more difficult for (...continued)

B. For Decades The Department of Justice Maintained The Position That The Second Amendment Only Prohibits Those Laws That Interfere With The Operation Of A Well-Regulated Militia.

Enforcing the federal firearms laws is a top priority of the Department of Justice. In 2006, the Department prosecuted 10,425 federal firearms cases against 12,479 defendants. *See* Sept. 17, 2007 Department of Justice Fact Sheet, Project Safe Neighborhoods: America's Network Against Gun Violence, at 1, http://www.psn.gov/Training/Atlanta_conf07/07sep17-factsheet.html. In opposing defendants' claims that such prosecutions violate the Second Amendment, the Department for many decades took the position that the Second Amendment is not implicated by laws that do not interfere with the maintenance of a well-regulated militia. The Department successfully defended federal firearms laws on that theory until 2001, when Attorney General John Ashcroft directed that the position be changed to reflect the view that the

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known or suspected terrorists to obtain firearms in the United States. Spurred by a GAO report finding that, in a five-month period in 2004, 35 individuals designated as known or suspected terrorists were permitted to purchase firearms, *see* GAO Report 05-127, *Gun Control and Terrorism, FBI Could Better Manage Firearm-Related Background Checks Involving Terrorist Watch List Records*, at 11 (Jan. 2005), one such measure would authorize the Attorney General to block the sale of a firearm when the background check reveals that the prospective purchaser is a known or suspected terrorist. *See* Denying Firearms and Explosives to Dangerous Terrorists Act of 2007, S. 1237, 110th Cong. (introduced Apr. 26, 2007).

Second Amendment protects a right to keep and bear arms independent of the State's need to maintain a well-regulated militia.

1. The Government's Brief in *United States v. Miller*

In the first and only Second Amendment challenge to federal firearms legislation resolved by this Court, *United States v. Miller*, 307 U.S. 174 (1939), the government sought reversal of a district court decision invalidating under the Second Amendment a provision of the NFA making it a crime to transport an unregistered firearm (defined in the Act to include a sawed-off shotgun) across state lines. In its brief filed in this Court, the government argued that Section 11 of the NFA did not violate the Second Amendment because

> the right secured by that Amendment to the people to keep and bear arms is not one which may be utilized for private purposes but only one which exists where the arms are borne in the militia or some other military organization provided for by law and intended for the protection of the state.

Brief for the United States, *United States v. Miller*, No. 696, 1939 WL 48353, at *15 (1939) (*Miller* Brief).

In support of that proposition, the government pointed to "the very declaration in the Second Amendment that 'a well-regulated militia, being necessary to the security of a free State'" as limiting the scope of the right recognized in the Second Amendment to the public purpose of maintaining a militia for the common defense. *Miller* Brief, at *15.

The government also discussed the historical experience in England, where the recognition of a right to keep and bear arms was the product of "oppression by rulers who disarmed their political opponents and who organized large standing armies which were obnoxious and burdensome to the people." *Id*. at *12. Quoting the Tennessee Supreme Court's discussion in *Aymette v. State*, 2 Humphr. (Tenn.) 154, 156-157 (1840), of "the origin of the right in England to bear arms, particularly as assured by the Bill of Rights of 1688," the government concluded that the right recognized in England "gave sanction only to the arming of the people as a body to defend their rights against tyrannical and unprincipled rulers. It did not permit the keeping of arms for purposes of private defense." *Miller* Brief, at *12.[3]

The government acknowledged that some courts had recognized a right to keep and bear arms for private defense, *Miller* Brief, at *18 (citing *People v. Brown*, 253 Mich. 537 (1931); *State v. Duke*, 42 Tex. 455 (1874)), but explained that "the cases are unanimous in holding that the term 'arms' as used in constitutional provisions refers only to those weapons which are ordinarily used for military or public defense purposes and does not relate to those weapons which are commonly used by criminals,"

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[3] The government also cited decisions of two other state supreme courts, both of which construed the Second Amendment as protecting the right to keep and bear arms only to the extent the exercise of that right is related to participation in a well-regulated militia. *Miller* Brief, at *15-18 (quoting *Salina v. Blaksley*, 72 Kan. 230, 232-33 (1905), and *State v. Buzzard*, 4 Ark. 18, 24-25 (1842)).

id.[4] The government argued that "[s]awed-off shotguns, sawed-off rifles and machine guns are clearly weapons which can have no legitimate use in the hands of private individuals." *Id*. at *20. The government concluded by observing that "[t]he Constitution does not grant the privilege to racketeers and desperadoes to carry weapons of the character dealt with in the act. It refers to the militia, a protective force of government; to the collective body and not individual rights." *Id*. at *21 (quoting *United States v. Adams*, 11 F. Supp. 216, 218-219 (S.D. Fla. 1935)).

2. This Court's *Miller* Decision

In upholding Section 11 of the NFA, this Court agreed with the government that the scope of the Second Amendment right to keep and bear arms is limited to furthering the operation of a well-regulated militia. *Miller*, 307 U.S. at 178. The Court held that the Second Amendment was not implicated because the "possession or use" of a sawed-off shotgun did not have a "reasonable relationship to the preservation or efficiency of a well regulated militia." *Id*. The Court reinforced that point by discussing the Militia Clauses of the Constitution, which grant Congress the power "To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions" and "To provide for organizing, arming, and

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[4] *Brown* and *Duke* construed state constitutional provisions that, in contrast to the Second Amendment, conferred a right to bear arms for self-defense. *See Brown*, 253 Mich. at 538; *Duke*, 42 Tex. at 458-59.

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." *Id.* (quoting art. I, § 8, cls. 15-16). The Court then observed that "[w]ith obvious purpose to assure the continuation and render possible the effectiveness of such [militia] forces the declaration and guarantee of the Second Amendment were made." *Id.* The Court concluded that "[the Second Amendment] must be interpreted and applied with that end in view." *Id.*[5]

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[5] The court of appeals in this case, while acknowledging that "the *Miller* Court linked the Second Amendment's language to the Constitution's militia clause[s]," Pet. App. 43, concluded that neither that linkage nor the language of the Second Amendment's introductory clause imposes a purpose-related limitation on the exercise of the right beyond excluding from protection those weapons that are not "Arms" within the meaning of the Second Amendment, *id.* at 44. The court of appeals held instead that the Second Amendment was not in fact designed to serve only the "civic purpose of helping to preserve the citizen militia." *Id.* at 46. Rather, it "was premised on the private use of arms for activities such as hunting and self-defense," *id.*, a proposition that finds no support in the text of the Second Amendment, its drafting history, the relevant debates surrounding its enactment, or in *Miller*. *See* Jack N. Rakove, *The Second Amendment, The Highest Stage of Originalism*, 76 Chi.-Kent. L. Rev. 103, 161 (2000) ("[T] he records from the Constitutional Convention, the ensuing ratification campaign, and the debates in the First Congress of 1789 all demonstrate [that] the issue under discussion was always the militia, and that issue was posed primarily as a matter of defining the respective powers of two levels of government.").

3. Post-*Miller* Developments

Having successfully defended the NFA before this Court on the theory that the scope of the Second Amendment does not extend further than protecting the operation of a well-regulated militia, the Department of Justice adhered to that position for more than 60 years in defending federal firearms prosecutions against Second Amendment challenges. The Department was successful, as every federal appellate court held that the scope of the Second Amendment is limited.

In *United States v. Tot*, 131 F.2d 261 (3d Cir. 1942), *rev'd on other grounds*, 319 U.S. 463 (1943), the Third Circuit rejected a Second Amendment challenge to a provision of the FFA that prohibited a person who had been convicted of a crime of violence from receiving a firearm in interstate commerce. The court of appeals observed that the Second Amendment "was not adopted with individual rights in mind, but as a protection for the States in the maintenance of their militia organizations against possible encroachments by the federal power." *Id.* at 266. The court explained that the defendant's challenge could "be denied without more under the authority of [*Miller*]," given that he had failed to show a relationship between his possession of a pistol and maintenance of a well-regulated militia. *Id.* The court further observed that it would not invalidate laws such as the FFA that are "in the nature of police regulations, but which do not go so far as substantially to interfere with the public interest protected by" the Second Amendment. *Id.* The First Circuit rejected a similar challenge to the FFA in *Cases v. United States*, 131 F.2d 916, 923 (1st

Cir. 1942), *cert. denied*, 319 U.S. 770 (1943), holding that the defendant's use of a revolver was not entitled to any Second Amendment protection because he used the firearm "on a frolic of his own and without any thought or intention of contributing to the efficiency of the well regulated militia."

Federal courts of appeals addressing more recent Second Amendment challenges similarly construed the protection it affords as limited to restricting the federal government from passing laws that interfere with a State's capacity to maintain a well-regulated militia. *See*, *e.g.*, *Gillespie v. City of Indianapolis*, 185 F.3d 693, 711 (7th Cir. 1999) (upholding 18 U.S.C. § 922(g)(9), which bars persons convicted of domestic violence offenses from possessing firearms, because "the viability and efficacy of state militias will [not] be undermined by" the prohibition), *cert. denied*, 528 U.S. 1116 (2000); *United States v. Wright*, 117 F.3d 1265, 1273 (11th Cir.) (holding that the Second Amendment "protect[s] only the use or possession of weapons that is reasonably related to a militia actively maintained and trained by the states"), *cert. denied*, 522 U.S. 1007 (1997); *United States v. Rybar*, 103 F.3d 273, 286 (3d Cir. 1996) (upholding federal machine gun ban in absence of evidence that the defendant's possession of machine guns "had any connection with militia-related activity"), *cert. denied*, 522 U.S. 807 (1997); *United States v. Hale*, 978 F.2d 1016, 1020 (8th Cir. 1992) ("The purpose of the Second Amendment is to restrain the federal government from regulating the possession of arms where such regulation would interfere with the preservation or efficiency of the militia."), *cert. denied*, 507 U.S. 997

(1993); *United States v. Warin*, 530 F.2d 103, 106-07 (6th Cir. 1976) (possession of submachine gun does not bear reasonable relationship to preservation of well-regulated militia); *United States v. Johnson*, 497 F.2d 548, 550 (4th Cir. 1974) (per curiam) (upholding felon-in-possession statute in the absence of evidence that it "in any way affects the maintenance of a well regulated militia").

When review of this uniform body of precedent was sought in this Court, the Department of Justice opposed such review on the ground, among others, that the decisions adopted the correct interpretation of the Second Amendment. For example, in *Gillespie v. City of Indianapolis*, in which the court of appeals had rejected a Second Amendment challenge to 18 U.S.C. § 922(g)(9), the government defended the decision on the ground that "[u]nder [*Miller*], the Second Amendment does not apply in the absence of 'some reasonable relationship' between the regulation at issue and 'the preservation or efficiency of a well regulated militia.'" Brief for the United States in Opposition, *Gillespie v. City of Indianapolis*, No. 99-626, 1999 WL 33632892, at *10 (1999) (quoting *Miller*, 307 U.S. at 178). The government made the same argument in its opposition brief in *Fraternal Order of Police v. United States*, No. 99-106, 1999 WL 33640087, at *10 (1999). *See also* Brief for the Respondent in Opposition, *Farmer v. Higgins*, No. 90-600, at 11-12 (1990) ("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.").

This Court relied on *Miller* in *Lewis v. United States*, 445 U.S. 55 (1980), to reject an equal protection challenge to the federal law prohibiting convicted felons from possessing firearms. The Court held that the firearm prohibition was lawful provided that there was a "rational basis" for it because "[t]hese legislative restrictions on the use of firearms are neither based upon constitutionally suspect criteria, nor do they trench upon any constitutionally protected liberties." *Id*. at 65 n.8. The Court cited *Miller* as support for that proposition, i*d*. at 65-66 n.8, and further observed that "a legislature constitutionally may prohibit a convicted felon from engaging in activities far more fundamental than the possession of a firearm," *id*. at 66.

The Department of Justice addressed a similar equal protection and due process challenge premised in part on the Second Amendment in a brief filed in *United States Department of the Treasury v. Galioto*, 477 U.S. 556 (1986). There, the government argued that a provision prohibiting persons who have been committed to mental institutions from possessing firearms should be subject to deferential rational-basis review because "the opportunity to acquire a firearm has not been held to fall within th[e] category" of cases "bearing on the exercise of fundamental rights." Brief for the Appellant, *United States Dep't of the Treasury v. Galioto*, No. 84-1904, 1986 WL 728208, at *28 n.24 (1986). The government made the point again in its reply brief, characterizing as "entirely without merit" the suggestion of an amicus that "the right to acquire firearms must be considered fundamental" because

this Court had "flatly held that '[t]hese legislative restrictions on the use of firearms . . . [do not] trench upon any constitutionally protected liberties.'" Reply Brief for the Appellant, *Galioto,* 1986 WL 728209, at *4 n.4 (quoting *Lewis*, 445 U.S. at 65 n.8) (alterations in government's brief).[6]

C. The Office of Legal Counsel Repeatedly Took The Position That The Second Amendment Does Not Protect A Right To Keep And Bear Arms For Private Purposes.

In addressing the constitutionality of proposed gun-control legislation, the Department of Justice through the Office of Legal Counsel (OLC) repeatedly expressed the view that the Second Amendment does not protect a right to keep and bear arms for purposes unrelated to a State's operation of the militia. In 1954, in response to an inquiry from the Joint Committee on Atomic Energy, OLC opined in a memorandum that proposed amendments to the Atomic Energy Act that would authorize prohibitions on individual ownership or possession of fissionable materials that could be used for a bomb or grenade would not violate the Second Amendment. Unsigned Memorandum on Whether Reasonable Regulation By AEC Under Proposed Amendments To Atomic Energy Act For Peacetime Use Of Fissionable Materials Would Violate The Second Amendment To

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[6] The Supreme Court did not address the merits of the challenge, however, because it determined that an amendment to the law while the case was pending rendered the challenge moot. *Galioto*, 477 U.S. at 559-60.

The Constitution, at 1 (attached to Feb. 11, 1954 Letter from J. Lee Rankin, Assistant Attorney General, OLC, to George Norris, Jr., Esq., Joint Committee on Atomic Energy, United States Senate). The memorandum relied on the analysis of the Second Amendment set out in *Cases* and *Tot*, *supra*, and concluded that, even assuming a State would "be so remiss in its duty . . . as to permit in the future any member of a militia to possess a hand-throwing bomb containing fissionable material," the Second Amendment would not preclude federal regulation given "the destructive consequences that would attend irresponsible use of these powerful weapons." *Id*. at 12-13.

In 1965, when Congress was considering proposed firearms legislation, OLC, then headed by Assistant Attorney General Norbert A. Schlei, wrote a memorandum addressing the scope of the Second Amendment. The Origin of the Second Amendment, attached to May 3, 1965 Letter from Norbert A. Schlei, Assistant Attorney General, OLC, to Myrl E. Alexander, Director, Bureau of Prisons, Re: Attorney General's Testimony Regarding the Application of the Second Amendment to S. 1592—Federal Firearms Act Amendments. The memorandum discussed the "original proposal of what is now the Second Amendment" submitted by James Madison and the proposal reported by the Select Committee, both of which contained a conscientious objector clause barring any "person religiously scrupulous" from being compelled to bear arms. *Id*. The memorandum observed that the conscientious objector clause contained a reference to "person" whereas the clause recognizing a right to bear arms

referred collectively to "the people." *Id.* The memorandum concluded that "[t]he contrast in terminology supports the view that the right to bear arms was intended as a collective right while the protection of religious scruples was a personal benefit." *Id.*

The memorandum found additional support for its conclusion in the reported congressional debates on the Second Amendment, which discussed the need for a militia to counter the threat posed by a standing army, but not an individual right to possess or use arms. *Id.* at 2. The memorandum also found support in State constitutions. The memorandum observed that "Five States had Constitutions specifically providing for the organization and maintenance of a militia but making no reference to bearing arms." *Id.* at 3. Three States "expressly recognized the 'right of the people to bear arms'" but only "*for the defense of the State*." *Id.* (emphasis in memorandum). The memorandum found that "it is reasonable to conclude" that the two States whose constitutions recognized a right of "'the people'" to "'defence of themselves'" "referred only to collective defense and did not include individual self-defense" in light of those States' concerns about a standing army and the need for civilian control of the militia. *Id.* at 4. OLC concluded from its review of the historical materials that, at the time the Second Amendment was adopted, "[b]oth the States and the Congress were preoccupied with the distrust of standing armies and the importance of preserving State militias. It was in this context that the Second Amendment was written and it is in this context that it has been interpreted by the courts." *Id.* at 5.

The view that the Second Amendment protects a right to keep and bear arms only in connection with service in a well-regulated militia was also reflected in the testimony of Attorney General Nicholas deB. Katzenbach before the Judiciary Committee. Katzenbach stated that this Court had "made it clear that the [Second] [A]mendment did not guarantee to any individuals the right to bear arms." Federal Firearms Act, Hearings Before the Subcomm. To Investigate Juvenile Delinquency of the S. Comm. on the Judiciary, 89th Cong., 1st Sess., 41 (1965). Attorney General Katzenbach submitted a memorandum that "documents the opinion that the right to bear arms protected by the [S]econd [A]mendment relates only to the maintenance of the militia." *Id.* The memorandum made several points.

First, it observed that the Second Amendment was not an obstacle to the enactment of the NFA and was not even mentioned in connection with the enactment of the FFA. *Id.* at 42. Second, it explained that the decisions in *Miller, Tot*, and *Cases* "demonstrate[d] that the proposed amendments to the FFA are in no way invalidated by the [S]econd [A]mendment." *Id.* Third, the memorandum discussed the laws relating to the establishment of a well-regulated militia, observing that "for nearly a century and a half Congress has provided for the arming of the enrolled, organized militia, . . . and that for at least the past half century no member of the organized militia has been required or permitted to supply his own arms." *Id.* at 44. The memorandum identified the National Guard and the Naval Militia as "the 'well-regulated' militia' of the present day," *id.,* and explained that, because the

proposed legislation "exempt[s] from [its] application activities by Federal and State authorities," it was clear that the Second Amendment was not implicated, *id*. at 45.[7]

Finally, the memorandum addressed the question whether the Second Amendment recognizes an individual or collective right. The memorandum observed that

> [i]nasmuch as "arms" is traditionally a military term and the statement of the right in the Federal and several State constitutions is connected with the necessity for a well-regulated militia, it has been concluded that, if such a right is personal in nature, it is at least restricted to members of a well regulated, or, synonymously, organized State militia.

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[7] This Court discussed the changes to the laws governing the militia in *Perpich v. Department of Defense*, 496 U.S. 334 (1990). The Court observed that a 1792 law directing that "every able-bodied male citizen between the ages of 18 and 45 be enrolled [in the Uniform Militia] and equip himself with appropriate weaponry" was "virtually ignored for more than a century, during which time the militia proved to be a decidedly unreliable fighting force." *Id*. at 341. Congress responded by repealing the law in 1901 and enacting a new law in 1903 that began "[t]he process of transforming 'the National Guard of the several States' into an effective fighting force." *Id*. at 341-42. *See* H. Richard Uviller & William G. Merkel, *The Second Amendment in Context: The Case of the Vanishing Predicate*, 76 Chi.-Kent L. Rev. 403, 511-47 (2000) (discussing the transformation of the militia since the enactment of the Second Amendment and concluding that "the militia world contemplated by the Second Amendment no longer exists, and no plausible analogy to that nexus can be reconstructed").

Id. *See, e.g.,* Jack N. Rakove, *The Second Amendment, The Highest Stage of Originalism*, 76 Chi.-Kent. L. Rev. 103, 132 (2000) ("[T]he framers, clearly reasoning on the basis of hard-earned experience, saw the militia as an institution that would henceforth be regulated through a combination of national and state legislation firmly anchored in the text of the Constitution, rather than some preexisting, preconstitutional understanding."). The memorandum further observed that "respectable authority supports the view that the [S]econd [A]mendment merely affirms the right of the States to organize and maintain militia," *id.* at 45-46, and that, even assuming an individual right was protected, the Second Amendment would still pose no obstacle to federal firearms legislation unless a law "in fact prevent[ed] an eligible citizen from functioning as a State militiaman," *id.* at 45.

In 1968, OLC opined on the constitutionality of a Johnson Administration proposal to "[r]equire the registration of every firearm in the United States" and to "[p]rovide a Federal system for licensing possession of firearms." June 25, 1968 Unsigned Memorandum On Constitutional Basis For Administration Gun Registration And Licensing Bill, at 1. The memorandum concluded that the Second Amendment "does not create a personal right in individuals to be free of reasonable legislative regulation of their possession of firearms" and that "Congressional action in enacting earlier Federal firearms legislation, and judicial rulings sustaining this legislation, confirm this understanding." *Id.* at 11. The memorandum thus opined that the Second

Amendment "does not affect regulation of individual possession as proposed in this bill." *Id.* at 12.

The following year, after a change in Administration, the same issue resurfaced. In responding to a request from Deputy Attorney General Richard G. Kleindienst for OLC's views on the registration provision, which had been omitted from the GCA but had been resubmitted to Congress, then-Assistant Attorney General William H. Rehnquist, while objecting to the proposed legislation on policy grounds, stated that the Office "d[id] not believe that constitutional objections based on the Second Amendment's guarantee of 'the right of the people to keep and bear arms' present any serious legal obstacle to this legislation." February 13, 1969 Memorandum from William H. Rehnquist, Assistant Attorney General, OLC, to Richard G. Kleindienst, Deputy Attorney General, Re: Proposed Federal Gun Registration and Licensing Act of 1969, at 4 (citing *Miller* and *Tot*).

In 1973, OLC responded to an inquiry from the Republican National Committee respecting whether "individual citizens have the constitutional right to own guns," by observing that "[t]he 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." July 19, 1973 Letter from Mary C. Lawton, Deputy Assistant Attorney General, OLC, to George Bush, Chairman, Republic National Committee, at 1.

In 1981, OLC expressed its views on a bill that would "narrow the scope of permissible firearms

regulation under the [GCA]." May 27, 1981 Memorandum for D. Lowell Jensen, Assistant Attorney General, Criminal Division, from Theodore B. Olson, Assistant Attorney General, OLC, Re: Proposed Legislation Relating to Firearms and to Mandatory Sentencing, at 2. Observing that "the 'findings' portion of [the bill] . . . purports to rest the bill, in part, on a legislative determination that the current scheme for federal firearms regulation violates a range of constitutional rights," OLC "perceive[d] no basis for suggesting that the [GCA] so interferes with the powers of the States to raise militias as to transgress the Second Amendment." *Id*.

To amicis' knowledge, the only pre-2001 statements from OLC that could be read to reflect a more expansive view of the Second Amendment's scope came in connection with proposed legislation respecting the custody and disposition by the United States of missiles, rockets, earth satellites, and similar devices. In a April 5, 1959 Memorandum to Deputy Attorney General Lawrence E. Walsh, Paul A. Sweeney, the Acting Assistant Attorney General, stated that "serious constitutional problems would arise under the Second Amendment" if the proposed statute defined "missile" in a way that would "prohibit private individuals from acquiring, possessing, or receiving any standard ammunition for firearms." *Id*. at 2. The Memorandum contains no legal analysis, however. Then-Assistant Attorney General Nicholas deB. Katzenbach repeated the same concern (also without providing a legal analysis) two years later with respect to a similarly worded bill, observing that "[t]he definition of

'missile' in the bill is so loose it would seem to include an ordinary revolver bullet, so as to raise constitutional problems under the Second Amendment." May 8, 1961 Memorandum from Nicholas deB. Katzenbach, Assistant Attorney General, OLC, to Byron R. White, Deputy Attorney General. As noted above, p. 21, *supra*, Katzenbach subsequently adopted the view that the Second Amendment's scope is limited to protecting the functioning of a well-regulated militia.

D. The Department Of Justice Changes Its Position.

In May 2001, despite the Department's longstanding position, and despite the federal appellate decisions uniformly rejecting a more expansive construction of the Second Amendment, Attorney General Ashcroft wrote a letter to the National Rifle Association (NRA) expressing the view that "the Constitution protects the private ownership of firearms for lawful purposes." Ashcroft Letter, *supra*, at 2.

At the time Attorney General Ashcroft wrote the letter, the government was a party in federal firearms cases in the courts of appeals, including a government appeal to the Fifth Circuit of a district court decision dismissing on Second Amendment grounds an indictment charging the defendant with violating 18 U.S.C. § 922(g)(8), which prohibits persons subject to a domestic violence restraining order from possessing firearms. *United States v. Emerson*, 46 F. Supp. 2d 598 (N.D. Tex. 1999). In its appellate brief, the government adhered to its longstanding position 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." Brief for Appellant, *United States v. Emerson*, No. 99-10331, at 11 (Aug. 27, 1999), http://www.saf.org/EmersonAppealGovtl.html; *see* Reply Brief for Appellant, *Emerson*, 2000 WL 33978355, at *24-34 (Jan. 31, 2000) (same).[8]

Departing from the uniform precedent in the courts of appeals, the Fifth Circuit concluded that the Second Amendment "protects the right of individuals, including those not then actually a member of any militia or engaged in active military service or training, to privately possess and bear their own firearms, such as the pistol involved here, that are suitable as personal, individual weapons." *Emerson*, 270 F.3d at 260. The court elaborated that

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[8] In response to an inquiry concerning the position the Department had taken at oral argument in the *Emerson* case, former Solicitor General Seth P. Waxman wrote that "the position that the Second Amendment does not extend an individual right to keep and bear arms" was "consistent with the view of the Amendment taken both by the federal appellate courts and successive Administrations." Aug. 22, 2000 Letter from Seth P. Waxman, Solicitor General, at 1, http://www.vpc.org/ashapb.htm. For other statements of the government's position in the federal courts, *see*, *e.g.*, Brief for the United States, *United States v. Witherspoon*, No. 99-51110, 1999 WL 33728315, at *12 (5th Cir. 1999) ("The *Miller* Court instructs that the necessity of maintaining effective state militias is, by the language itself, the only concern of the Second Amendment."); Brief for the United States, *United States v. Rybar*, No. 95-3185, 1995 WL 17197798, at *38 (3d Cir. 1995) (fact that firearm might be useful to a militia "is insufficient to establish that the defendant's possession of [it] as charged was reasonably related to the preservation of a well-regulated militia").

recognition of such individual rights "does not mean that those rights may never be made subject to any limited, narrowly tailored specific exceptions or restrictions for particular cases that are reasonable and not inconsistent with the right of Americans generally to individually keep and bear their private arms." *Id*. at 261. After examining the standards applicable to obtaining a domestic violence restraining order in Texas, the court concluded that Section 922(g)(8), as applied to the defendant, did not violate his Second Amendment rights. *Id*. at 261-65.

On November 9, 2001, less than one month after *Emerson* was decided, Attorney General Ashcroft issued a Memorandum To All United States' Attorneys in which he observed that the *Emerson* decision was "noteworthy" for having held that the Second Amendment protects an individual right to keep and bear arms unrelated to militia service and stated that "the *Emerson* opinion, and the balance it strikes, generally reflect the correct understanding of the Second Amendment." Nov. 9, 2001 Ashcroft Memorandum, http://www.usdoj.gov/osg/briefs/2001/0responses/2001-8272.resp.pdf.

In May 2002, the Office of the Solicitor General confirmed that Attorney General Ashcroft's view on the scope of the Second Amendment was now the litigating position of the United States. In its brief opposing the petition for a writ of certiorari filed in the *Emerson* case, the government stated:

> In its brief to the court of appeals, the government argued that the Second Amendment protects only such acts of firearm possession as are reasonably related to the preservation or efficiency

> of the militia. The current position of the United States, however, is that the Second Amendment more broadly protects the rights of individuals, including persons who are not members of any militia or engaged in active military service or training, to possess and bear their own firearms, subject to reasonable restrictions designed to prevent possession by unfit persons or to restrict the possession of types of firearms that are particularly suited to criminal misuse.

Brief for the United States in Opposition, *Emerson v. United States*, No. 01-8780, at 19-20 n.3 (May 6, 2002) (citation omitted). On the same day, the government filed an opposition to another petition raising a Second Amendment claim in which it noted that it "agree[d] with petitioner that the Fifth Circuit's decision in *Emerson* reflects a sounder understanding of the scope and purpose of the Second Amendment than does the [Tenth Circuit's] decision," which, like "other courts of appeals," held that "the Amendment protects the possession of firearms only in connection with state militia activity." Brief for the United States in Opposition, *Haney v. United States,* No. 01-8272, at 4-5 (May 2002), http://www.usdoj/osg/briefs/2001/0responses/2001-8272.resp.pdf.

E. The Department's Change In Position Was Unjustified And Unwise.

The abrupt turnabout by the Department of Justice on the scope of the Second Amendment is

remarkable. At the time Attorney General Ashcroft wrote to the NRA, a federal district court had invalidated a federal firearms provision on the very theory of the Second Amendment that the Attorney General endorsed. At the same time, the federal courts of appeals had uniformly rejected Second Amendment challenges to federal firearms prosecutions, adopting a more modest, militia-based view of the Amendment's scope the government had long advocated. That view was also adopted by this Court in *Miller*, which held that the Second Amendment does not protect the "possession or use" of a firearm unless such possession or use "has some reasonable relationship to the preservation or efficiency of a well regulated militia." 307 U.S. at 178.

In his letter to the NRA, Attorney General Ashcroft did not cite *Miller* or the substantial body of other cases rejecting the view that the Second Amendment protects a right to keep and bear arms for private purposes. Moreover, the sources the Letter does cite do not support the proposition that the Second Amendment protects an individual right independent of the State's operation of a well-regulated militia. *See generally* Mathew S. Nosanchuk, *The Embarrassing Interpretation of the Second Amendment*, 29 N. Ky. L. Rev. 705, 713-36 (2002) (addressing each source cited and concluding that the Attorney General's reliance on them was misplaced).[9] While the letter correctly refers to a

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[9] Attorney General Ashcroft also cited the testimony of Attorney General Cummings at the 1934 hearings on the NFA. That testimony cannot fairly be read to support the position (...continued)

body of scholarship endorsing a more expansive interpretation of the Second Amendment right, there is also a body of scholarship that supports the Department's original, longstanding position. *See* Aug. 24, 2004 Memorandum Opinion for the Attorney General, *Whether The Second Amendment Secures An Individual Right*, from Steven G. Bradbury, Principal Deputy Assistant Attorney General, OLC, Howard C. Nielson, Jr., Deputy Assistant Attorney General, OLC, and C. Kevin Marshall, Acting Deputy Assistant Attorney General, OLC (2004 OLC Mem. Op.), at 9 (concluding from review of modern scholarship that there are "many adherents" of the view that the Second Amendment does not protect an individual right to keep and bear arms for private purposes) (collecting citations); Nosanchuk, *supra*, at 768-72 & n.377 (discussing scholarship on both sides of the debate).

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taken in the Ashcroft Letter. At the hearings, when a Congressman broached the subject of the relationship between the Second Amendment and firearms restrictions and how the two could be reconciled (Hearings on H.R. 9066, *supra*, at 18-19), Attorney General Cummings explained that the proposed legislation "easily" fell within Congress' Article I powers. Cummings did suggest that, had Congress flatly prohibited the possession of machine guns, there "might" have been "some constitutional question" respecting Congress's power to enact such a ban, but Cummings framed that concern as an Article I authority issue, not as a view on the scope of the Second Amendment. The other excerpts of testimony on which the Ashcroft Letter relies similarly involve Cummings' expression of views on Congress' Article I powers, not the Second Amendment. *See id*. at 6-8, 13; *see also* Nosanchuk, *supra*, at 746-50.

As the analysis in the OLC memoranda discussed in Part C above and the briefs filed by petitioners and their other supporting amici illustrate, the text of the Second Amendment, its drafting history, and the historical context in which it was enacted support the conclusion that the constitutional right to keep and bears arms is limited to the possession or use of firearms that is reasonably related to a State's operation of a militia regulated by state and federal law.[10]

Given the strength of the legal arguments supporting the Department's original, longstanding position, and the substantial body of case law adopting it, Attorney General Ashcroft's decision to abandon that position in favor of an individual rights theory that accords constitutional protection to the possession and use of firearms for private purposes was, in our view, unjustified. It was also unwise. While the Attorney General pledged to "continue to

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[10] In 2004, OLC wrote that "the Second Amendment secures to individuals a personal right to keep and to bear arms, whether or not they are members of any militia or engaged in military service or training." 2004 OLC Mem. Op., at 1. While the 2004 OLC memorandum is lengthy and cites more sources than the Ashcroft Letter, the most relevant sources—the text of the Second Amendment, its drafting history, and the views expressed by those involved in its enactment—refute the memorandum's contention that the introductory clause of the Amendment identifies the militia as merely "*a* justification" for recognizing the right to keep and bear arms (*id*. at 19 (emphasis added)) and the related suggestion that the Amendment protects a "right of self-defense" (*id*. at 33-35). *See* Rakove, *supra*, at 161 ("Had the framers and ratifiers of the Constitution really perceived the problem in terms of a private right detached from service in the public institution of the militia, we would know it.").

defend vigorously the constitutionality, under the Second Amendment, of all existing federal firearms laws," Ashcroft Memorandum, *supra*, the change in position has made the Department's task more difficult. None of the federal firearms laws in place today could reasonably be described as having as their aim or effect interfering with a State's operation of its militia. If the Second Amendment protects a person's right to keep and bear arms for self-defense, recreation, or other purposes unanchored to the operation of the militia, however, the analysis that courts must undertake becomes less straightforward and the risk that a firearms regulation or prohibition enacted to protect public safety will be invalidated is increased.[11]

In conceptualizing the appropriate analytical framework, Attorney General Ashcroft has adverted to standards such as requiring a showing of "compelling state interests" that are affiliated with the application of strict scrutiny. Ashcroft Letter, *supra*, at 2 n.1. *See also* Ashcroft Memorandum, *supra* (endorsing the *Emerson* decision, which permits only "limited, narrowly tailored specific exceptions or restrictions for particular cases that are reasonable and not inconsistent with the right of Americans generally to individually keep and bear

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[11] The *Emerson* case itself offers an example. Applying an expansive individual rights theory, the district court invalidated the federal law prohibiting persons subject to a domestic violence restraining order from possessing firearms. While the Fifth Circuit reversed, it observed that "the nexus between firearm possession by the party so enjoined and the threat of lawless violence" was "barely" sufficient "to support the [firearms] deprivation." 270 F.3d at 264-65.

their private arms"). Under such an exacting standard, present and future firearms regulations and prohibitions designed to combat gun violence and having no practical effect on the functioning of the militia would face the prospect of invalidation to the detriment of law enforcement and public safety.

At a time when the Nation continues to feel the terrible effects of gun violence, this Court should adhere to its view in *Miller* that the scope of the Second Amendment is limited to furthering the institution of the well-regulated militia and in all events should adopt a standard that gives legislatures flexibility to enact firearms laws designed to protect their citizens.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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APPENDIX

Amici Curiae in Support of Petitioners

Janet Reno served as Attorney General of the United States from 1993 to 2001.

Nicholas deB. Katzenbach served as Attorney General of the United States from 1965 to 1966. He also served as Deputy Attorney General of the United States from 1962 to 1965 and as Assistant Attorney General for the Office of Legal Counsel from 1961 to 1962.

Eric H. Holder, Jr. served as Deputy Attorney General of the United States from 1997 to 2001, and Acting Attorney General in 2001. He also served as the United States Attorney for the District of Columbia from 1993 to 1997.

Jamie S. Gorelick served as Deputy Attorney General of the United States from 1994 to 1997.

Philip B. Heymann served as Deputy Attorney General of the United States from 1993 to 1994.

Warren M. Christopher served as Deputy Attorney General of the United States from 1967 to 1969. He also served as Secretary of State from 1993 to 1997 and Deputy Secretary of State from 1977 to 1981.

Seth P. Waxman served as Solicitor General of the United States from 1997 to 2001. Before serving as Solicitor General, he served as Acting Deputy Attorney General, Acting Solicitor General, Principal Deputy Solicitor General, and Associate Deputy Attorney General.

Drew S. Days III served as Solicitor General of the United States from 1993 to 1996. He also served as Assistant Attorney General in charge of the Civil Rights Division from 1977 to 1980.

James K. Robinson served as Assistant Attorney General in charge of the Criminal Division of the Department of Justice from 1998 to 2001. He also served as United States Attorney for the Eastern District of Michigan from 1977 to 1980.

Jo Ann Harris served as Assistant Attorney General in charge of the Criminal Division of the Department of Justice from 1993 to 1995. She also served as Chief of the Fraud Section of the Criminal Division from 1979 to 1981 and as an Assistant United States Attorney in the Southern District of New York from 1981 to 1983 and 1974 to 1979.

Roscoe C. Howard, Jr. served as United States Attorney for the District of Columbia from 2001 to 2004.

Earl J. Silbert served as United States Attorney for the District of Columbia from 1974 to 1979.

David Schertler served as Chief of the Homicide Section of the United States Attorney's Office for the District of Columbia from 1992 to 1996 and was an Assistant United States Attorney in that Office from 1984 to 1996.