

Ashcroft takes steps to make his stance on Second Amendment official policy

By RICK MONTGOMERY - *The Kansas City Star*

Date: 07/20/01 22:15

As a senator and member of the National Rifle Association, John Ashcroft made clear his take on the Second Amendment of the Bill of Rights. He argued that it granted individuals the right to own guns just as the First Amendment granted individuals the right to speak freely.

His view exceeded what federal courts and most presidential administrations had insisted for decades -- that the Second Amendment only guarantees the "collective right" of citizen militias to keep and bear arms.

Now Attorney General Ashcroft is taking steps to make his interpretation the Justice Department's official policy, broadening the federal government's traditional backing of the "collective right" view.

Ashcroft has long stressed that some gun restrictions are necessary. But legal experts say the Justice Department's shifting stance toward "individual rights" could dramatically affect how federal prosecutors defend gun-control laws in court.

Gun-control proponents fear that Ashcroft's broader interpretation may encourage legal challenges, on constitutional grounds, of federal laws denying certain types of guns to certain types of people. Existing laws restrict gun ownership by felons, the mentally incompetent and people convicted of domestic violence, among others.

"In the past, constitutional challenges to gun laws have fallen flat," said political science professor Robert Spitzer of State University of New York. "This may be seen as a green light to judges and anyone else who may be sympathetic to Ashcroft's view."

The new policy, reportedly being prepared by the Justice Department's Office of Legal Counsel, "is a page directly from how the NRA would like the Second Amendment to be viewed," said Spitzer, who wrote *The Politics of Gun Control*.

Interpretations

The Second Amendment reads: "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed."

Through most of the 20th century, federal judges willing to interpret that sentence focused on "a well regulated Militia," ruling the amendment merely gives states the right to maintain armed militias, or national guards.

By dismissing the argument for individual rights, the government could draft and enforce restrictions on gun ownership without running afoul of the Constitution. And the Justice Department successfully defended those laws when legal challenges arose.

For gun-rights advocates, Ashcroft's broader interpretation "is a major victory," said Kevin Jamison, attorney for the Western Missouri Shooters Alliance.

"But it doesn't mean the courts will change their way of thinking," he said. "Judges could say, 'It's just a lawyer's view, and sometimes lawyers are wrong.'"

The individual-rights view once was widely rejected in legal circles. Under the Nixon administration, the Office of Legal Counsel concluded, "It must be considered as settled that there is no personal right, under the Second Amendment, to own or to use a gun."

In the last decade, however, even some liberal scholars have questioned that interpretation. Laurence H. Tribe of the Harvard Law School wrote in 1999 that federal authorities "may not disarm individual citizens without some unusually strong justification."

The gun lobby and some historians argue that the Constitution's framers clearly intended to grant law-abiding citizens the right to take up arms and defend themselves from federal tyranny.

At least two conservatives on the U.S. Supreme Court, Justices Clarence Thomas and Antonin Scalia, have suggested a willingness to expand the high court's interpretation.

Ashcroft reiterated his own views in letter to chief NRA lobbyist James Jay Baker on May 17, a day before the NRA opened its annual convention in Kansas City.

"While some have argued that the Second Amendment guarantees only a 'collective' right of the states to maintain militias," the attorney general wrote, "I believe the Amendment's plain meaning and original intent prove otherwise."

At least one federal judge agreed in 1999.

Ruling on a Texas case, U.S. District Judge Sam Cummings invoked the individual-rights argument to void federal charges against physician Timothy Joe Emerson, who had brandished a handgun in front of his estranged wife and daughter. Emerson had been charged under a 1994 law that prohibits anyone under a federal restraining order from possessing firearms.

The Justice Department under Attorney General Janet Reno appealed Cummings' decision, which was thought to be the first in recent memory to strike at a federal law on grounds it violated the Second Amendment.

The appeal hasn't been decided.

A Justice Department spokeswoman, Susan Dryden, said the government would not reverse its position on the closely watched case, which may yet wind up in the U.S. Supreme Court.

New U.S. attorney

Still, Assistant U.S. Attorney Bill Mateja, who argued that Emerson had no individual right to own a gun, was passed over in his bid to be the new U.S. attorney for the northern region of Texas.

Three finalists for the position -- all assistant U.S. attorneys in Texas -- were interviewed this week by the state's U.S. senators. A nominee is expected to be named soon.

"Bill Mateja was the most qualified of any candidate I'd seen," said former U.S. Attorney Paul Coggins, who was appointed by President Bill Clinton. "When I left, in the back of my mind I thought the Emerson case was one the Bush administration might just bag."

Northeastern University law professor Richard Daynard said Ashcroft and other Justice Department appointees remained "obligated to defend the law of the land, whether or not they personally agree with it."

"In any event, if the United States is a party to a case involving gun rights, it's going to be represented by someone who ultimately answers to John Ashcroft," Daynard said.

That will no doubt raise questions about the vigor of the government's defense of gun laws challenged in court, he said.

Of the thousands of firearms statutes across the nation, relatively few are federal laws. Courts have held that Second Amendment protections do not automatically carry over to state and local actions, although judges may accept briefs from interested parties -- including federal prosecutors -- when local laws raise constitutional concerns.

Ashcroft's view of the Second Amendment "is a plausible interpretation," Daynard allowed. "He's not arguing it's a right that can't be regulated or that you can keep and bear any weapon you please."

Ashcroft said as much at his confirmation hearing: "I don't believe the Second Amendment to be one that forbids any regulations of guns." He also testified he would "move forward" with President Bush's support for extending the federal ban on assault weapons -- a measure Ashcroft opposed in the Senate.

Gun-control advocates say they'll wait and see.

"The NRA is certainly getting their money's worth from the last election," said Amy Stilwell of the Brady Campaign to Prevent Gun Violence. "We hope the courts will uphold gun laws as they've been doing for years. But a lot is going to depend on the vigor of the prosecution."

The Star's wire services contributed to this report.

To reach Rick Montgomery, national correspondent, call **(816) 234-4410** or send e-mail to **rmontgomery@kcstar.com**.

