

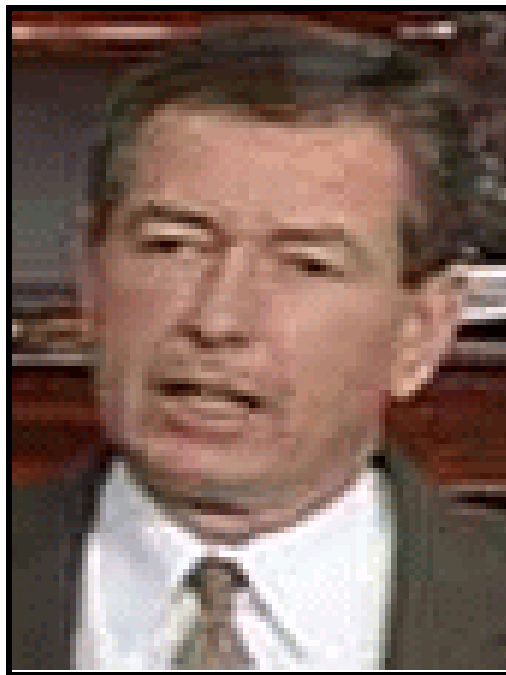


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Violence Policy Center
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The Violence Policy Center is a national non-profit educational organization that conducts research and public education on firearms violence and provides information and analysis to policymakers, journalists, grassroots advocates, and the general public. The Center examines the role of firearms in America, analyzes trends and patterns in firearms violence, and works to develop policies to reduce gun-related death and injury.

This report was authored by VPC Litigation Director and Legislative Counsel Mathew Nosanchuk.

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- *“A .22 for Christmas”—How the Gun Industry Designs and Markets Firearms for Children and Youth* (December 2001)
- *Kids in the Line of Fire: Children, Handguns, and Homicide* (November 2001)
- *Firearms Training for Jihad in America* (November 2001)
- *Unintended Consequences: Pro-Handgun Experts Prove That Handguns Are a Dangerous Choice For Self-Defense* (November 2001)
- *When Men Murder Women: An Analysis of 1999 Homicide Data* (October 2001)
- *Voting from the Rooftops: How the Gun Industry Armed Osama bin Laden, Other Foreign and Domestic Terrorists, and Common Criminals with 50 Caliber Sniper Rifles* (October 2001)
- *Shot Full of Holes: Deconstructing John Ashcroft’s Second Amendment* (July 2001)
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- *Cashing in on the New Millennium: How the Firearms Industry Exploits Y2K Fears to Sell More Guns* (December 1999)
- *One Shot, One Kill: Civilian Sales of Military Sniper Rifles* (May 1999)
- *Making a Killing: The Business of Guns in America* (January 1999)
- *Joe Camel with Feathers: How the NRA with Gun and Tobacco Industry Dollars Uses Its Eddie Eagle Program to Market Guns to Kids* (November 1997)
- *Cease Fire: A Comprehensive Strategy to Reduce Firearms Violence* (Revised, October 1997)

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Introduction

On February 1, 2001, John Ashcroft assumed the office of Attorney General of the United States. Members of the gun lobby—from national organizations like the National Rifle Association of America (NRA) to grassroots pro-gun advocates—hailed the appointment of ‘one of their own’ as America’s chief law enforcement officer. Gun control advocates warned that the Ashcroft appointment would be the first step toward dismantling the nation’s gun laws.

In January 2001, the Violence Policy Center (VPC) released *John Ashcroft: The Wrong Choice To Enforce America’s Gun Laws*. The report documented the former Missouri senator’s consistent record of support for the agenda of the NRA, which counts Ashcroft as a life member. Among the issues cited by the VPC in the report were:

- ! The NRA spent a combined total of \$374,137 on behalf of Ashcroft in his failed 2000 Senate reelection bid, which he lost to deceased Missouri Governor Mel Carnahan.
- ! As a U.S. senator, Ashcroft supported NRA efforts to require immediate destruction of essential records maintained under the Brady law's National Instant Criminal Background Check System (NICS). Retention of the records is necessary to detect fraud and abuse of the system. On July 21, 1998, he voted for legislation offered by Senator Robert Smith (R-NH) that would have required the FBI to destroy immediately any records relating to an approved firearm transfer.
- ! As recently as last Congress, Ashcroft voted to weaken the Brady law. During the May 1999 Senate vote on whether to expand the current Brady background check to all sales at gun shows, Ashcroft voted in favor of legislation sponsored by Senate Judiciary Chair Orrin Hatch (R-UT) and Senator/NRA Board Member Larry Craig (R-ID) that would have weakened our nation's gun laws by reducing the time allowed to conduct background checks on all gun show sales—including those by licensed dealers—from three business days to 24 hours.
- ! Ashcroft has made clear his own view of the Second Amendment: That guarantees an expansive individual right to keep and bear arms. Such an interpretation could shape the Justice Department’s actions not only in its policy and enforcement activities, but in litigation.

Soon after Attorney General Ashcroft took office, the VPC established ashcroftgunwatch.org, a web site which supplies ongoing information on the firearm policies of the Ashcroft Justice Department. The strong concerns voiced by the VPC

in its original report, in press statements, and on its web site, have not only been confirmed, but surpassed by the pro-gun, anti-public safety actions of the Attorney General. In the space of a year, the Ashcroft Justice Department has compiled a breathtaking record of embracing the special interests of the gun lobby.

The Justice Department's approach to crime is supposed to be driven by a dedication to enforcing existing laws and protecting public safety—an approach the Attorney General endorsed during his confirmation hearings in January 2001. Since then, however, the Ashcroft Justice Department has repeatedly demonstrated that its commitment to law enforcement ends where the interests of the gun lobby begin. Almost without exception, the result has been an agenda and decisionmaking process designed to appease the gun lobby while minimizing public debate and evading congressional oversight. Equally troubling, many of the decisions by the Ashcroft Justice Department appear to have been made without the knowledge of career Department attorneys and law enforcement officials by circumventing established channels and shutting out these personnel from having any meaningful input into important, far-reaching decisions.

This report details key, publicly reported aspects of the Ashcroft Justice Department's pro-gun agenda.

The Gun Lobby Exception to the War on Terror

In December 2001 it was revealed that the Justice Department was refusing to allow the FBI access to the audit log of the National Instant Criminal Background Check System (NICS)—the federal system overseen by the Federal Bureau of Investigation (FBI) which is utilized by gun dealers to conduct background checks under the Brady law—to determine whether suspected terrorists had purchased guns. Attorney General Ashcroft's decision to disallow the use of the NICS audit log for this purpose represents a 180-degree policy shift by the Justice Department. Most disturbing was the fact that this shift occurred post-September 11, after the Attorney General had proclaimed repeatedly that every tool at his disposal would be employed to combat terrorism.

The VPC worked with the *New York Times* to reveal this policy shift in a front-page story that appeared on December 6, 2001.¹ The article became the focus of the Attorney General's appearance that day before the Senate Judiciary Committee to discuss the Bush Administration's anti-terror efforts. Committee members asked the Attorney General to explain why the Department believed it lacked the authority to use the audit log to determine whether suspected terrorists had bought guns. The Attorney General claimed that such a use of NICS was barred both by statute and regulation protecting the privacy of gun purchasers. However, when given the opportunity to support proposed legislation to clarify the Department's authority to check whether suspected terrorists had purchased guns, Attorney General Ashcroft demurred, stating that he could not answer a "hypothetical" question. Typical of the dialogue between the Attorney General and the Committee is the following:

SENATOR KENNEDY: The report in today's *New York Times* that officials at the Department of Justice refused to let the FBI examine its background checklist to determine whether any of the 1,200 people detained following the September 11th attacks recently bought guns. Why is the department handcuffing the FBI in its efforts to investigate gun purchases by suspected terrorists?

ATTORNEY GENERAL ASHCROFT: Thank you, Mr. Senator, for that inquiry. The answer is simple: The law which provided for the development of the NIC, the National Instant Check system, indicates that the only permissible use for the National Instant Check system is to audit the maintenance of that system. And the Department of Justice is committed to following the law in that respect. And when—

SENATOR KENNEDY: Do you think it ought to be changed?

ATTORNEY GENERAL ASHCROFT: When the request first came, obviously the instinct of the FBI was to use the information to see. When they were advised

by those who monitor whether or not we are following the congressional direction, we stopped. And I believe we did the right thing in observing what the law of the United States compels us to observe. The list—

SENATOR KENNEDY: Do you think it ought to be changed in that provision? The FBI obviously wants that power in order to try to deal with the problems of terrorism. Do you support it?

ATTORNEY GENERAL ASHCROFT: I won't comment on specific legislation in the hypothetical.

SENATOR KENNEDY: But would you submit legislation to do what the FBI wants to have done? Would you work with the FBI and submit legislation to deal with this?

ATTORNEY GENERAL ASHCROFT: I will be happy to consider any legislation that you would propose.²

Despite claims by Attorney General Ashcroft and other Department officials that this use of NICS was prohibited by law, it was widely reported that FBI officials disagreed with the Department's decision. As one FBI official stated, "This is a sticky one for us. The Justice Department sees things differently than we do."³

The press and public, like Senators on the Judiciary Committee, reacted to news of the Justice Department's gun lobby exception to the war on terror with disbelief and outrage. A wave of newspaper editorials and columns resoundingly condemned the Department's refusal to use NICS records in the war on terror, calling it "insane,"⁴ "baffling,"⁵ "absurd,"⁶ "unconscionable,"⁷ "illogical,"⁸ "testimony to his fealty to the loony paranoia of the gun lobby,"⁹ "gun-coddling fanaticism that adds hypocrisy to the mix,"¹⁰ "transparently ideological,"¹¹ "self-destructive,"¹² and "a case of ideology trumping security."¹³ The criticism spanned the political spectrum. Much of the commentary focused on the Attorney General's decision to protect the privacy of gun-buying terrorists while acting to limit civil rights and curtail civil liberties in the war on terror.

The day after the hearing, the *Washington Post* revealed that, in contrast to the claims by Attorney General Ashcroft in his testimony and other officials in the press that the Department lacked legal authority to check whether persons under investigation for firearms violations had bought guns, there is authority for the Department to allow precisely this use of information in the NICS audit log. The *Post* reported that a 1996 policy advisory by the Department's Office of Legal Counsel, which has responsibility to advise the executive branch on legal matters, concluded that this use of NICS was entirely permissible.¹⁴

Undermining the Effectiveness of the National Instant Criminal Background Check System (NICS)

Attorney General Ashcroft's unwillingness to allow law enforcement to check whether suspected terrorists had purchased firearms followed on the heels of the Department's other major effort to undermine the ability of law enforcement to find out whether felons, fugitives, spousal abusers, illegal aliens, and other prohibited purchasers had been evading detection by NICS. Just after taking office, Attorney General Ashcroft unlawfully suspended a Clinton Administration rule that would have permitted the FBI to keep records of approved gun sales for 90 days so that the system could be audited to uncover fraudulent gun purchases and abuses of the system. In suspending the rule, the Justice Department cited concerns that any retention of records of approved gun sales—even for a brief period of time—would violate the privacy rights of gun purchasers. The Department raised these concerns even though the FBI recommended keeping an audit log of information on approved gun purchasers for 90 days, and the federal court of appeals for the District of Columbia had ruled that the retention of records was lawful.¹⁵

In response to Attorney General Ashcroft's unlawful suspension of the rule for a second time, the Violence Policy Center filed suit in federal court on June 4, 2001, warning that the suspension was a prelude to an effort to gut the record retention rule entirely.¹⁶ These suspicions were quickly proven correct. On June 25, 2001, the Supreme Court announced that it would not review the NRA's challenge to the limited retention of records. Within days the Attorney General handed the NRA the victory it could not achieve in the courts. He proposed a new rule which required the virtually immediate destruction of records of approved gun purchases, depriving law enforcement of any ability to find out whether suspected terrorists or other prohibited purchasers had slipped through the system.^a That rule is still pending. And despite

^a The Supreme Court actually denied review at the urging of the Ashcroft Justice Department's Office of the Solicitor General, which filed a brief that defended the legality of the NICS audit log. However, the Ashcroft Justice Department negated the benefit of the Supreme Court's ruling and its own brief by giving the gun lobby the victory it could not win. Recently, the Office of the Solicitor General has again taken the correct position in an important case involving enforcement of the gun laws. In *United States v. Bean*, the Solicitor General successfully petitioned the Supreme Court to review a case in which a federal appeals court found that a gun felon could petition to have his firearms privileges restored to him by a federal judge, even though the federal "relief from disability" program has been defunded by Congress since 1992. *Bean v. BATF*, 253 F.3d 234 (5th Cir.), *rehearing and rehearing en banc denied*, 2001 U.S. App. LEXIS 20565 (5th Cir., Aug. 21, 2001), *writ of certiorari granted*, *United States v. Bean*, 2002 U.S. LEXIS 511 (January 22, 2002) (No. 01-704). (The defunding of the program was the result of research conducted by the VPC. For more information, please see the 1992 VPC study *Putting Guns Back Into Criminals' Hands: 100 Case Studies of Felons Granted Relief From Disability Under Federal Firearms Laws* and the 2000 VPC study *Guns for Felons: How the NRA Works to Rearm Criminals*.) The VPC intends

the recent firestorm over the Attorney General's refusal to allow the audit logs to be used in connection with the war on terror, the Department has given no indication that the pending rule will not be finalized.

And while the Justice Department has indicated that it was reviewing its decision regarding the availability of gun purchase information in connection with the terrorism investigation,¹⁷ it has yet to acknowledge that this question becomes academic if the Department proceeds to finalize a rule that would require immediate destruction of NICS information. Moreover, the Department continues to purge information in the NICS audit log despite a request from members of Congress to preserve the records so that they can be used in terrorism investigations.¹⁸

Undercutting Enforcement of Gun Laws by Misinterpreting the Constitution

Although its effects may not be felt for some time, the most far-reaching policy shift imposed by the Ashcroft Justice Department concerns the Second Amendment to the U.S. Constitution.^b Flatly contradicting Supreme Court precedent, more than 65 years of Justice Department policy as expressed in countless cases and numerous opinions by the Office of Legal Counsel, and the position of Department prosecutors in ongoing litigation, Attorney General Ashcroft has imposed his personal view of the Second Amendment onto the Department. In an official letter written last May to the National Rifle Association's chief lobbyist just days before the NRA's annual meeting, Attorney General Ashcroft embraced the view that the Second Amendment protects the private ownership of firearms.

The Ashcroft letter is a highly irregular pronouncement of Department policy. A July 2001 VPC study on the content of the letter, *Shot Full of Holes: Deconstructing John Ashcroft's Second Amendment*, demonstrated that the letter was inadequately researched, contained numerous errors of fact and citation, and included glaring examples of bias and omission of facts. Ultimately, the VPC study concluded, the letter was little more than a predetermined conclusion in search of supporting documentation. Yet, the letter, by the Department's own admission,

to file a friend-of-the-court brief in the U.S. Supreme Court, and it remains to be seen whether Attorney General Ashcroft would undermine a victory in the *Bean* case by supporting a subsequent change in legal policy that would keep the federal guns-for-felons program alive.

^b The Second Amendment to the U.S. Constitution 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."

represents the agency's definitive policy statement on the Second Amendment—one which actually complicates and undercuts the position of the Department in gun prosecutions.

In particular, the letter contradicted the position taken by the Department in *United States v. Emerson*, a case recently decided by the federal court of appeals in New Orleans.¹⁹ The *Emerson* case is a prosecution that was brought by the Justice Department against Timothy Joe Emerson, charging him with violating a federal law that prohibited him from possessing firearms because he was subject to a domestic violence protective order.²⁰ While under the protective order, Emerson possessed numerous firearms and had threatened his wife and child with a handgun. Emerson argued that his case should be dismissed because he had a fundamental right—akin to free speech or freedom of religion—to possess guns under the Second Amendment. While the Justice Department attorneys argued unequivocally that the Second Amendment protects only the collective right of states to arm their militia and does not protect an individual right to keep and bear arms, Attorney General Ashcroft's letter to the NRA actually supported Emerson's position. This fact was not lost on Emerson's lawyers, who submitted the Attorney General's letter to the court of appeals in support of Emerson's position.

Although Emerson lost his case in the court of appeals, two of the three judges appear to have followed Attorney General Ashcroft's lead and embraced the view that the Second Amendment protects an individual right. Their lengthy digression on the Second Amendment was purely advisory and non-binding, because the ultimate decision in the case was that Emerson had no Second Amendment right and could stand trial. However, this did not prevent Attorney General Ashcroft from issuing a memorandum to all 93 U.S. Attorney's offices in which he stated that the Department would adopt the view of two judges in the Emerson case that the Second Amendment protects an individual right. The memo required that every case raising Second Amendment issues be sent to the Criminal Division at Justice Department headquarters in Washington, DC, for review.²¹

The memo, an attempt to nationalize the impact of a decision that was not even binding in the federal circuit where it was decided, can only complicate and weaken the U.S. government's position in gun prosecutions.

Conclusion

In its report *John Ashcroft: The Wrong Choice To Enforce America's Gun Laws*, the VPC warned what an Ashcroft Justice Department could mean for enforcement of our nation's gun laws and reductions in gun violence. The report warned:

During the 2000 elections, the National Rifle Association claimed that if George Bush won the presidency, the NRA would be working out of his office. With John Ashcroft as Attorney General, the NRA will be firmly entrenched in the Department of Justice.²²

At his confirmation hearing, Attorney General Ashcroft told the Senate Judiciary Committee that he would not let his personal views on gun rights stand in the way of carrying out the responsibilities of his position. Many Senators took him at his word. Now we know that the exact opposite is true: Attorney General Ashcroft will not allow the responsibilities of his position to interfere with his efforts to advance the special interests of the gun lobby.

Endnotes

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17. "FBI Access To Gun Sale Records Under Review," *Newsday*, December 8, 2001, sec. A, p. 25.
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19. *United States v. Emerson*, 270 F.3d 203 (5th Cir. 2001), *rehearing and rehearing en banc denied*, 2001 U.S. App. LEXIS 27683 (November 30, 2001).
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