The Right of the People of Maryland To Keep and Bear Arms:
A Refutation of a 1994 Opinion of the Maryland Attorney General

by

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February 2007

Published by:

MARYLAND SHALL ISSUE, INC.
P.O. Box 314
Libertytown, Maryland 21768

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INTRODUCTION:

The 1994 Opinion of the Maryland Attorney General

For over a decade, the office of the former Maryland Attorney General has fueled a state-wide radical anti-gun campaign to disarm Maryland's law-abiding citizenry under the guise of getting guns out of the hands of criminals. In 1994 the Maryland Attorney General issued an Opinion[1] that neither the U.S. Constitution nor the Maryland State Constitution secures the right of the people to keep and bear arms in defense of their homes and their families.

Since that date, the Attorney General's Opinion has gone unchallenged, even though study after study shows that laws confiscating firearms in private hands leaves the law-abiding community at great risk of loss of life and property, totally dependent upon the State for their protection, and increasingly vulnerable to the lawless element of society.[2] Yet, the 1994 Opinion has never been rescinded or modified and, at this time, it remains the last word of a former Attorney General of Maryland whose constitutional views were clearly compromised by a strongly-held political bias against the right of ordinary Marylanders to own and possess firearms.[3]

This analysis has been undertaken in order to set the record straight: Any effort by the State legislature to disarm Marylanders would unconstitutionally take away one of their most fundamental rights, secured to the people by the Second and Fourteenth Amendments to the United States Constitution, as well as by Article 28 of the Maryland Declaration of Rights — the right of the individual to keep and bear arms for the defense of his life, home and property.

The Maryland Attorney General's Assertions

According to the Attorney General's 1994 Opinion, the Maryland legislature may regulate individual gun ownership, possession and use in the state — indeed, even ban the private ownership, possession and use of any firearm — without any constitutional restraint.

1. The Second Amendment is Irrelevant

With respect to the United States Constitution, the Attorney General has stated emphatically, and without reservation, that the **Second Amendment** guarantee of the people's right to keep and bear arms "**is irrelevant**" to state law measures controlling the private ownership, possession and use of guns. 79 Op. Atty. Gen. at 207 (emphasis added).

2. Article 28 of the Maryland Declaration of Rights is Irrelevant

Even though Article 28 of the **Maryland Declaration of Rights** appears in the state constitution in a long list of **individual rights** secured against the State, the Attorney General has concluded that Article 28 is irrelevant, being "nothing more than a directive to the General Assembly to provide for a **militia**." 79 Op. Atty. Gen. at 209 (emphasis added).

The Maryland Attorney General's Erroneous Assumptions

The Attorney General's opinion is based upon two erroneous assumptions.

1. No Individual Right to Keep and Bear Arms.

First, the Attorney General would have the people of Maryland believe that neither the United States Constitution nor the Maryland Constitution secures an **individual** right to keep and bear arms, but only the right of the State of Maryland to raise and support an armed militia.

2. No Constitutional Guarantee of the Right to Keep and Bear Arms.

Second, the Attorney General would have the people of Maryland believe that the explicit guarantee of the right of the people to keep and bear arms in the Second Amendment to the United States Constitution only applies to restrictive gun laws enacted by **Congress** and not by the Maryland General Assembly.

This is in error. The **Second Amendment does apply** to the Maryland General Assembly; and both **the Second Amendment and Article 28 do protect the important individual right** to keep and bear arms, as opposed to merely securing the power of the Maryland General Assembly to raise and support a militia.

I. AS PROVIDED BY THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION, THE SECOND AMENDMENT APPLIES TO THE STATES.

A. The Attorney General Opinion that the Second Amendment Does Not Apply to the States Rests on Outdated Supreme Court Opinions.

According to the Attorney General's 1994 Opinion, in 1876, the Supreme Court established for the first time "that the Second Amendment itself is applicable only to the federal government, not to the states…" *See* 79 Op. Atty. Gen. at 207 (emphasis added). Such was not the case, as was clearly shown in Miller v. Texas, 153 U.S. 535 (1894) — a case also cited by the Attorney General in support of his faulty claim that the **Second Amendment** was specially treated as inapplicable to the states — wherein the Court ruled that neither the Second Amendment right to keep and bear arms nor the **Fourth Amendment** right against unreasonable searches and seizures applied to the states. *See id.*, 153 U.S. at 536.

Indeed, in 1833 in the famous case of Barron v. Baltimore, 32 U.S. (7 Pet.) 243 (1833), Chief Justice John Marshall for a unanimous court ruled that **none** of the restrictions on rights secured by the first 10 amendments to the United States Constitution applied to the states. Thus, the **First Amendment** freedoms of religion, speech, press, assembly and petition, the **Second Amendment** right to keep and bear arms, the **Third Amendment** right against the quartering of soldiers in homes in times of peace, the **Fourth Amendment** right to be free from unreasonable searches and seizures — and so on through the first 10 amendments — did not restrict the powers of state governments, but only those of the then-newly established federal government.

Thus, when — in 1876, just 43 years later — the Supreme Court announced that the Second Amendment, standing alone, "means no more than that it shall not be infringed by Congress," the Court was not pronouncing a new doctrine; rather, it was reaffirming the well-established rule that the Second Amendment was **no different** from any "one of the [first 10] amendments that has no other effect than to restrict the powers of the national government…." United States v. Cruikshank, 92 U.S. 542, 553 (1876). *See also* Presser v. Illinois, 116 U.S. 252, 264 (1886).

Beginning in the early 20th century and continuing to the present day, however, the Supreme Court has changed its mind, ruling that the Fourteenth Amendment's Due Process Clause has made applicable to the States most of the individual rights contained in the United States Constitution's Bill of Rights. *See* Duncan v. Louisiana, 391 U.S. 145 (1968). In light of this

seismic change in the Supreme Court's jurisprudence since the 19th Century Cruikshank, Presser, and Miller cases, the "threshold question" is **not** "whether the Second Amendment … is applicable to the states" — as the Maryland Attorney General put it in his February 1994 Opinion.

Rather, the question is whether the Fourteenth Amendment makes the Second Amendment applicable to gun control legislation before the Maryland General Assembly. Stated properly, then, the issue whether the Second Amendment applies to the States depends upon whether the right to keep and bear arms is either a "privilege or immunity of United States citizenship" that may not be "abridged" by any State or is protected as a fundamental right that cannot be denied by a State without depriving a person of his liberty or property without due process of law.

B. As a Privilege and Immunity of American Citizenship, Maryland May Not Abridge the Right to Keep and Bear Arms.

As Justice Anthony Kennedy recently observed, American citizens "have two political capacities, one **state** and one **federal**, each protected from incursion by the other." U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 838 (1995).

As a citizen of the United States, a resident and citizen of Maryland is entitled to certain "privileges or immunities" that, according to the Fourteenth Amendment, may not be abridged by the state of Maryland. One of these privileges and immunities is the right to keep and bear arms as guaranteed by the Second Amendment.

As Harvard Law professor Lawrence Tribe has written:

> [T]he core meaning of the Second Amendment is a populist/republican/ federalism one: Its central object is to arm "we the People" so that ordinary citizens can participate in the collective defense of their community and their state. [L. Tribe, American Constitutional Law (3d ed. 2000).]

And as the United States Court of Appeals for the Fifth Circuit observed, "If the people [of the United States] were disarmed there could be no militia (well-regulated or otherwise) as it was … understood" by our Founders. United States v. Emerson, 270 F.3d 203, 235 (5th Cir. 2001).

This right to keep and bear arms vis-a-vis the national government is "an attribute of national citizenship, and, as such, under the protection of, and guaranteed by, the United States," in the same manner as "the right of the people peaceably to assemble for the purpose of petitioning Congress for redress of grievances." *See* United States v. Cruikshank, 92 U.S. 542 at 552 (1876). *See also* Slaughter-House Cases, 83 U.S. (16 Wall.) 36 (1873).

Anytime a Maryland state legislature or other state governing body considers gun control legislation, a Maryland citizen's national citizenship privilege and immunity to keep and bear arms is put at risk. Thus, any gun control measure put forth at either the state or local level must be scrutinized to ensure that the measure does not unconstitutionally "abridge" that privilege and immunity of United States citizenship.

According to the United States Supreme Court, any gun control measure deprives an American citizen of the use, possession, and ownership of any weapon that "is any part of the ordinary military equipment or that its use could contribute to the common defense." *See* United States v. Miller, 307 U.S. 174, 178 (1939). Among the cases cited by the Miller Court in support of this constitutional standard were several late nineteenth century opinions handed down by various state courts, including Fife v. State, 31 Ark. 455 (1876), where the Arkansas Supreme Court stated:

> [T]he arms which … American citizens [have] the right to keep and to bear, are such as are needful to, and ordinarily used by a well regulated militia, and such as are necessary and suitable to a free people, to enable them to resist oppression, prevent usurpation, repel invasion, etc., etc. [*Id.*, 31 Ark. at 458.]

In sum, the Second Amendment was designed to secure the right of each and every American to keep and bear arms, preserving thereby the practical arms and legs to ensure the people's liberties should a tyrannical and unconstitutional government rise up against them, or should those liberties be threatened by foreign invaders or terrorists. The 1994 Maryland Attorney General Opinion, however, **would erase the constitutional right of the people** to defend their families and communities, which was considered by America's founders to be "the true palladium of liberty, the right of self-defense [being] the first law of nature."[4]

C. Being a Fundamental Right, the Right to Keep and Bear Arms May Not Be Denied By a State as a Matter of Due Process of Law.

While the Attorney General's 1994 Opinion correctly points out that the United States Supreme Court has not made the Second Amendment applicable to the states "through incorporation into the 'liberty' component of the Fourteenth Amendment," it has failed to acknowledge that the Supreme Court has **not** ruled to the contrary. 79 Op. Atty. Gen. at 208. Instead, the Attorney General's Opinion creates the false impression that the Court has already decided that the Second Amendment is **not** incorporated by the due process clause of the Fourteenth Amendment, having claimed that, unless the Cruikshank and Presser cases are "'overturned,'" those cases are "controlling." 79 Op. Atty. Gen. at 208. Not only is the Attorney General's Opinion mistaken, but the cases upon which it relied are mistaken.[5]

Neither the Cruikshank court nor the Presser court considered the question whether the Fourteenth Amendment makes the Second Amendment applicable to the states. Rather, the Court in both cases decided only that the Second Amendment — standing alone, like all of the other nine amendments in the federal Bill of Rights — did not apply to the states. As the United States Court of Appeals for the Fifth Circuit observed in 2001, these two cases, as well as Miller v. Texas, "all came well before the Supreme Court began the process of incorporating certain provisions of the first eight amendments into the Due Process Clause of the Fourteenth Amendment…." United States v. Emerson, 270 F.3d 203, 222, n.13 (5th Cir. 2001). Thus, neither Cruikshank nor Presser need be "overturned" before a lower federal or state court could hold that the Second Amendment applies to the states as a matter of due process of law.

If there were justification to "incorporate" any of the first eight amendments into the Fourteenth Amendment,[6] the case for incorporation of the Second Amendment is perhaps the strongest. As Justice Hugo Black pointed out in his concurring opinion in one of the Supreme Court's leading incorporation cases, Senator Jacob Howard of Ohio — one of the Fourteenth Amendment's principal sponsors — stated that the **privileges and immunities clause** of that amendment embraced:

> the **personal rights** … secured by the **first eight** amendments of the Constitution; **such as** the freedom of speech and of the press; the right of the people peaceably to assemble and petition the Government for a redress of grievances …; the **right to keep and to bear arms**; the right to be exempted from the quartering of soldiers in a house without the consent of the owner; the right to be exempt from unreasonable searches and seizures, [etc.][7]

With the modern Supreme Court having incorporated all of the First Amendment rights as "implicit in the concept of ordered liberty,"[8] it

appears that the burden should be on those who argue that the Second Amendment should not likewise be incorporated — for the First and Second Amendments "ultimately rest on a rationale equally applicable to [both],"[9] namely the "absolute" civil sovereignty of the American people.[10] As James Madison put it in *Federalist No. 46:*

> [T]he advantage of being armed, which the Americans possess over the people of almost every other nation, the existence of subordinate governments, to which the people are attached, and by which the militia officers are appointed, forms a barrier against the enterprises of ambition, more insurmountable than any which a simple government of any form can admit of.

At the time that Madison penned these words, the Constitution did not guarantee that the American people, then armed, would remain so in the future. Concerned that the new Constitution endangered the right of the people to keep and bear arms, opponents of the Constitution urged its defeat, or at least, adoption of a federal bill of rights. *See* United States v. Emerson, 270 F.3d at 237-40. Thus, he observed:

> No clause in the Constitution could by any rule of construction be conceived to give to congress a power to disarm the people. Such a flagitious attempt could only be made under some general pretence by a state legislature. But if in any blind pursuit of inordinate power, either should attempt it, [the Second Amendment] may be appealed to as a restraint on both.[11]

II. THE RIGHT TO KEEP AND BEAR ARMS IS AN INDIVIDUAL RIGHT.

In five brief and conclusory paragraphs, the 1994 Maryland Attorney General Opinion dismisses outright any claim that either the Second Amendment or Article 28 of the Maryland Declaration of Rights secures an individual right to keep and bear arms. Rather, the Opinion contends, Article 28 is "nothing more that a directive to the General Assembly to provide for a militia," and the Second Amendment merely "'protect[s] state militias, rather than individual rights.'" *See* 79 Op. Atty. Gen. at 209. The Attorney General Opinion's "collectivist" view of the nature of the right — as stated in the state and federal constitutions — is both erroneous and outdated.

A. The Second Amendment Secures the Individual Right to Keep and Bear Arms.

Since the Attorney General's Opinion was issued in 1994, the United States Court of Appeals for the Fifth Circuit had occasion to examine carefully and thoroughly the text and history of the Second Amendment, following which it concluded positively that the Second Amendment secures the individual right to keep and bear arms, not the state's right to constitute and maintain a militia. *See* Emerson v. United States, 270 F.3d 203 (5th Cir. 2001).

But the shortcomings of the 1994 Opinion go beyond its obsolescence. First, it is based upon a serious misreading of the Supreme Court's decision in United States v. Miller, 307 U.S. 174, 178 (1939), asserting that the "purpose of the Second Amendment was to 'assure the continuation and render possible the effectiveness of [state militia] forces....'" *See* 79 Op. Atty. Gen. at 209. Clearly, as the Emerson court points out, the Miller Court coupled that quoted statement of purpose with a description of the kind of militia contemplated by the Second Amendment, namely, one comprised of all males of suitable age acting in concert for the common defense **"bearing arms supplied by themselves and of the kind in common use at the time."** *Id.,* 307 U.S. at 179 (emphasis added). In other words, the reference to "a well regulated militia" in the Second Amendment is to the one(s) that actually existed in American revolutionary times, composed of

volunteers who brought their own weapons into service of the commonweal.

This historic meaning of militia is also reflected in the text of the Second Amendment, which states explicitly that "the right of the people to keep and bear Arms shall not be infringed," lest there be no "well regulated militia [so] necessary to the security of a free State." As the Emerson court notes, the word "**people**" also appears in both the First and the Fourth Amendments, each of which has always been construed as securing **individual rights**, not the rights of the state. *See* Emerson, 270 F.3d at 227-28. Indeed, as the Supreme Court itself asserted four years prior to the 1994 Attorney General Opinion:

> "**[T]he people**" seems to have been a term of art employed in select parts of the Constitution. The Preamble declares that the Constitution is ordained and established by "the People of the United States." **The Second Amendment protects "the right of the people to keep and bear Arms,"** and the Ninth and Tenth amendments provide that certain rights and powers are retained by and reserved to "the people." … While this textual exegesis is by no means conclusive, it suggests that "the people" protected by the Fourth Amendment, and by the First and Second Amendments, and to whom rights and powers are reserved in the Ninth and Tenth Amendments, refers to a class of persons who are part of a national community or who have otherwise developed sufficient connection with this country to be considered part of that community. [United States v. Verdugo-Urquidez, 494 U.S. 259, at 266 (1990) (emphasis added).]

Unquestionably, as the Emerson court concluded, "[i]t appears clear that 'the people,' as used in the Constitution, including the Second Amendment, refers to individual Americans." Emerson, 270 F.3d at 229. On this point, then, the 1994 Maryland Attorney General Opinion that the Second Amendment secures only the right of a state government to constitute and maintain a militia is in error.

B. Article 28 of the Maryland Constitution Also Secures the Individual Marylander's Right to Keep and Bear Arms.

Unlike the Second Amendment, Article 28 of the Maryland Constitution does not expressly secure the right of the people to keep and bear arms. Rather, as the 1994 Attorney General Opinion points out, Article 28 simply states "[t]hat a well regulated militia is the proper and natural defense of a free Government." *See* 79 Op. Atty. Gen. at 208-09. Even though the Attorney General Opinion stated that, because of this textual difference, the Article 28 guarantee "would likely be construed by the courts more narrowly, as nothing more than a directive to the General Assembly to provide for a militia," the Opinion, "[f]or purposes of this analysis … assum[ed] that Article 28 has a scope equal to that of the Second Amendment." *Id.*, at 209. And for good reason. The two guarantees, notwithstanding their textual differences, secure the individual right to keep and bear arms.

Article 28 first appeared as Article XXV of the Declaration of Rights in the November 3, 1776 Maryland Constitution. *See* Constitution of Maryland reprinted in Sources of Our Liberties 348 (American Bar Foundation: revised ed. 1978). Although renumbered as Article 28, its text remains exactly the same as the original.[12] So the "well regulated militia" contemplated by today's Article 28 is the same as the one reflected not only in the Second Amendment, which was ratified in 1791, but in the other state constitutions contemporaneous with the 1776 Maryland Constitution, including those of Virginia, Delaware and New Hampshire.[13]

The original state constitutional militia provisions, like the one in Maryland, appeared in

the "individual rights" sections of their respective documents. Thus, the "well regulated militia" as a "proper and natural defense of a free Government" must be understood in the context of a bill of rights that affirmed the right of the people to constitute and to reconstitute their government in whatever manner that the people decided, including by the taking up of arms in time of need to defend the liberties of their countrymen against a tyrannical foe. *See* Articles 1 and 5 of the Maryland Declaration of Rights.[14] *See also* Emerson, 270 F.3d at 227-36.

To be sure, other original state constitutions did not express this right in terms of a "well regulated militia," but more directly by express language securing the right of "the people … to bear arms for the defence of themselves and the state."[15] By embracing both expressions, the Second Amendment indicated that the two reflected the same guarantee, as one leading constitutional expert of the nineteenth century apparently believed when he wrote that "[t]he federal and State constitutions … provide that the right of the people to bear arms shall not be infringed," in recognition of the fact that a "'well regulated militia' … cannot exist unless the people are trained to bearing arms." *See* T. Cooley, A Treatise on Constitutional Limitations, p. 429 (Little, Brown: 5th ed 1883). *See also* Emerson, 270 F.3d at 255-59. Indeed, as this same constitutional expert further explained:

> It might be supposed from the phraseology of this provision that the right to keep and bear arms was only guaranteed to the militia; but this would be an interpretation not warranted by the intent…. The meaning of the provision undoubtedly is, that the people, from whom the militia must be taken, shall have the right to keep and bear arms; and they need no permission or regulation of law for that purpose. But this enables the government to have a well-regulated militia; for to bear arms implies something more than the mere keeping; it implies the learning to handle and use them in a way that makes those who keep them ready for their efficient use; in other words, it implies the right to meet for voluntary discipline in arms, observing in so doing the laws of public order.[16]

Finally, the very language of Article IX, Section 1 of the Maryland Constitution, which directs the General Assembly to provide for a militia, weakens any argument that Article 28 is "nothing more than a directive to the General Assembly to provide for a militia." *See* 79 Op. Atty. Gen. at 209. If Article 28 were merely a directive to provide for a militia, it would be redundant and unnecessary in light of the language of Article IX. Thus, the Attorney General's Opinion fails to comply with the well-settled rule of constitutional construction that "every word must have its due force and appropriate meaning; for it is evident from the whole instrument that no word was unnecessarily used or needlessly added." *See* Holmes v. Jennison, 39 U.S.(14 Peters) 540, 570-71 (1840).

C. The 1994 Maryland Attorney General's "Collectivist" Views of the Second Amendment and Article 28 Are Misplaced.

The 1994 Maryland Attorney General Opinion relied primarily, if not exclusively, upon certain court opinions to substantiate its views that the Second Amendment and Article 28 do not secure the individual right to keep and bear arms. The Opinion's **over-reliance upon those judicial opinions** is misplaced.

First, in the American constitutional system of separated powers, the judiciary has neither the exclusive right nor the final say concerning the meaning of any constitutional provision. Rather, as Stanford Law School Dean, Larry S. Kramer, has written, **the people themselves are the ultimate authority** of the scope and meaning of the written document that embodies the legal and political limits that they have placed upon those

who govern them. *See* L. Kramer, The People Themselves (Oxford: 2004). According to the Constitution, the preamble of which begins with "We the People," judges are not the only ones elected or appointed to office whose duty is to conform to the constitutional limits placed upon them by the people. And this includes the Second Amendment specifically, as well as the right to keep and bear arms generally.

If the question of whether the Second Amendment or Article 28 secured the individual right to keep and bear arms, rather than the right of the state to constitute and maintain a militia, turned on the number of court opinions finding there to be no such individual right, then aspects of the 1994 Maryland Attorney General's Opinion would be considered correct. Thankfully, the people's constitutional rights are not determined by majority vote, even where it is a majority vote of judges. Rather, rights such as the right to keep and bear arms are determined by a dynamic legal and political process that involves not just the judiciary, but the executive and legislative departments as well, as overseen by the people who have the ultimate power through the elective franchise.

While the Emerson case upholding the individual rights view of the Second Amendment has not been widely accepted among judges,[17] the **United States Department of Justice** has endorsed the Emerson view, concluding — after conducting an independent, exhaustive study — that "[t]he Second Amendment secures a right of individuals generally, not a right of States or a right restricted to persons serving in militia":

> [O]ur examination of the original meaning of the Amendment provides extensive reasons to conclude that the Second Amendment secures an individual right, and **no persuasive basis for either the collective-right** or **quasi-collective-rights views.** [T]he broader history of the Anglo-American right of individuals to have and use arms, from England's Revolution of 1688-89 to the ratification of the Second Amendment, and especially the commentaries and case law in the pre-Civil War period closest to the Amendment's ratification, confirm what the text and history of the Second Amendment require.[18]

Such an opinion coming from the executive department of the federal government responsible for enforcing existing firearms law in court is significant indeed.

Equally significant is the fact that, in the enactment of the **Firearms Owner's Protection Act of 1986**, the **United States Congress** recognized "the rights of citizens … to keep and bear arms under the second amendment." *See* United States v. Lopez, 2 F.3d 1342 (5th Cir.), 1364, n.46, judgment affirmed, 514 U.S. 549 (1995).

Moreover, in reality, there is no conflict between the so-called collectivist militia view and the individual rights view, for "the people" and "the militia" were — and still are — interchangeable terms. As one early American patriot, George Mason, stated emphatically in the debates over the ratification of the Constitution: "I ask, Who are the militia? They consist now of the whole people, except a few public officers." 3 J. Elliot, The Debates in the Several State Conventions on the Adoption of the Federal Constitution, pp. 425-26.

In light of these expressions favoring the individual rights view, and of developments in the understanding of the constitutional nature of the people's right to keep and bear arms, it should be incumbent upon Maryland's Attorney General to take a fresh look at the Second Amendment and Article 28. If this were done in an objective and comprehensive way, the Attorney General should come to the conclusion that the Second Amendment and Article 28 secure the individual right to keep and bear arms, and the Attorney General should instruct the Maryland General Assembly that any gun control bill should be reviewed to ensure that

it would not, if enacted, infringe upon that most fundamental right.

CONCLUSION

For the reasons stated above, the 1994 Opinion of the Attorney General of Maryland is outdated, is based on flawed legal reasoning, contains serious constitutional errors and, consequently, should not be relied upon by the Maryland General Assembly.

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ENDNOTES

1. "Firearms: Constitutional Law — Second Amendment Does Not Apply to State Legislation — Article 28 of Declaration of Rights Does Not Bar Gun Control Legislation," 79 Op. Atty. Gen. 206 (February 25, 1994).

2. *See, e.g.,* John R. Lott, Jr., More Guns, Less Crime: Understanding Crime and Gun Control (Univ. of Chicago Press, 2000).

3. The same attorney general cited this opinion authoritatively in "A Farewell to Arms: The Solution to Gun Violence in America," Maryland Attorney General's Special Report, J. Joseph Curran, Jr., Attorney General, October 20, 1999, p. 38. Former Attorney General Curran's political bias is shared by numerous elected officials. *See* John R. Lott, Jr., The Bias Against Guns (Regnery Publishing, Inc. 2003).

4. St. George Tucker, View of the Constitution of the United States with Selected Writings, p. 238 (Liberty Fund, Indianapolis, 1999).

5. In each of those cases, the courts have made the same assumption — that it is settled law that the Second Amendment does not apply to the States until the United States Supreme Court overrules Cruikshank and Presser. *See* Fresno Rifle and Pistol Club, Inc. v. Van de Kamp, 965 F.2d 723, 731 (9th Cir. 1992) ("Until such time as *Cruikshank* and *Presser* are overturned, the Second Amendment limits only federal action …."); Quilici v. Village of Morton Grove, 695 F.2d 261, 269 (7th Cir. 1982), *cert. denied*, 464 U.S. 863 (1983) ("[T]he parties agree that *Presser* is controlling …."); State v. Goodno, 511 A.2d 456, 457 (Me. 1986); State v. Friel, 508 A.2d 123, 125 (Me. 1986), *cert. denied*, 479 U.S. 843 (1986); City of East Cleveland v. Scales, 10 Ohio App.3d 25, 460 N.E.2d 1126, 1131 (1983) ("[T]he Second Amendment does not apply to state action. For it has never been incorporated into the Due Process Clause of the Fourteenth Amendment. Therefore, it governs only federal action. *Presser … Cruikshank*."); Onderdonk v. Handgun Permit Review Bd., 44 Md. App. 132, 407 A.2d 763, 764 (1979) ("A plethora of cases hold that a statute, such as Maryland's, which reasonably regulates the 'right to bear arms' does not violate the Second Amendment's … limitation on the federal government. *Miller … Presser … Cruikshank* ….").

6. While the "incorporation" doctrine has been severely criticized by many scholars, it is a well-entrenched doctrine reflecting the prevailing view of the United States Supreme Court for nearly 40 years.

7. Duncan v. Louisiana, 391 U.S. at 166-167 (emphasis added).

8. *See* Palko v. Connecticut, 302 U.S. 319, 325 (1937).

9. *See* United States v. Emerson, 270 F.3d at 221, n.13.

10. *See* J. Madison, "Report on the Virginia Resolutions," reprinted in Sources of Our Liberties, pp. 425-26 (Perry, ed., ABA Foundation: 1972).

11. W. Rawle, A View of the Constitution of the United States, pp. 125-26 (2d ed. 1829).

12. Indeed, a committee of the Maryland convention ratifying the U.S. Constitution wanted to include an amendment to the Constitution which read, "That the militia shall not be subject to martial law, except in time of war, invasion, or rebellion." The committee's explanation of this proposed amendment reflected its understanding that the general militia consisted of the adult freemen of Maryland. *See* C. Cramer, For the Defense of Themselves and the State: The Original Intent and Judicial Interpretation of the Right to Keep and Bear Arms (Praeger Publishers, 1994) (citing Jonathan

Elliot, The Debates in the Several State Conventions on the Adoption of the Federal Constitution (Burt Franklin, 1888)).

13. *See* Constitution of Virginia, Bill of Rights, Section 13 (June 12, 1776), Delaware Declaration of Rights, Section 18 (Sept. 11, 1776), and Constitution of New Hampshire, Bill of Rights, Article XXIV (June 2, 1784) reprinted in Sources of Our Liberties ("Sources") at pp. 311, 339 and 385 respectively.

14. *See also* Constitution of Virginia, Bill of Rights, Sections 1 through 3, Constitution of New Hampshire, Bill of Rights, Article VIII and X, reprinted in Sources, pp. 310, 383.

15. *See, e.g.,* Constitution of Pennsylvania, Declaration of Rights, Article XIII, Constitution of North Carolina, Declaration of Rights, XVII, Constitution of Vermont, Declaration of Rights, Article XV, and Constitution of Massachusetts, Declaration of Rights, Article XVII, reprinted in Sources, pp. 330, 356, 366, and 376.

16. T. Cooley, General Principles of Constitutional Law, p. 271 (1st ed. 1880).

17. *See, e.g.,* Seegars v. Ashcroft, 297 F. Supp. 2d 201 (D.D.C. 2004).

18. *See* Memorandum for the Attorney General, "Whether the Second Amendment Secures an Individual Right," http://www.usdoj.gov/olc/secondamendment2.pdf (August 24, 2004).