‘Strict Scrutiny’ Decision on Maryland Semi-Autos Still Leaves Dangerous ‘Common Use’ Threat Looming

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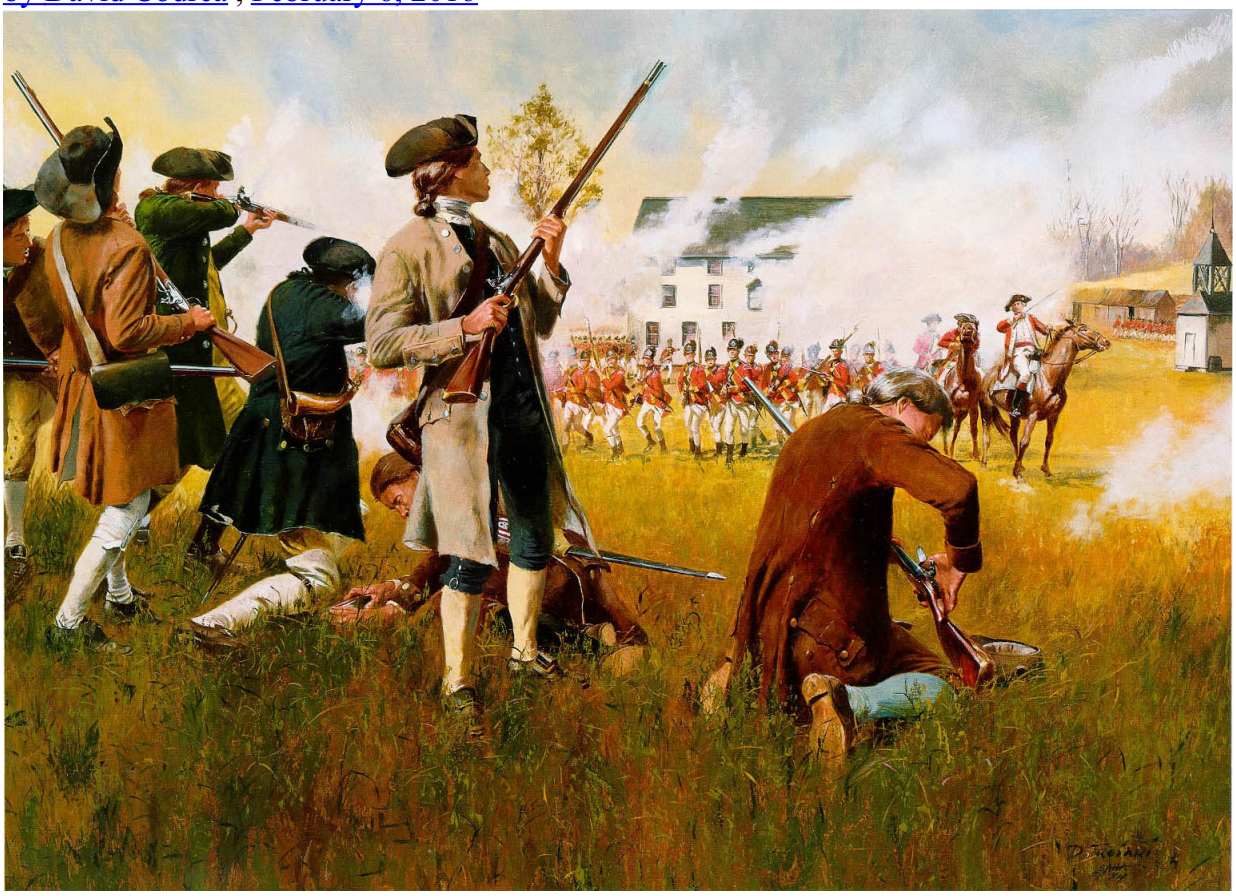
by David Codrea , February 6, 2016



Time was, even the Supreme Court acknowledged weapons “in common use at the time” were intended to be used by those defending their freedom against tyranny.

“[T]he United States Court of Appeals for 4th Circuit [applied] strict scrutiny to Maryland’s ‘Firearms Safety Act,’ in a two-to-one decision that could change the face of gun laws for Maryland (arguably one of the most anti-gun states in the nation), and perhaps portend similar relief for the beleaguered residents of New York, New Jersey, California, and the few other remaining anti-gun states,” Andrew Branca of Legal Insurrection reported Thursday. “Virtually all gun control laws will be found unconstitutional if subject to strict scrutiny.”

Maryland’s Orwellian-named edict banned many semi-automatic rifles and standard capacity magazines, naturally with a law enforcement exemption. If “intermediate scrutiny” were applied, the state claiming “public safety” would be enough to have its ban upheld. Under the higher “strict scrutiny” standard, “the law must advance not merely any governmental interest, but in particular a compelling governmental interest [and] must also be narrowly tailored to actually achieve that interest.” That’s been the assumed standard for rights EXCEPT those specified in the Second Amendment, mostly because that’s the way those in power have wanted it.

Whether the ruling will be upheld or overturned on appeal is anybody’s guess. Still, this goes far in validating those of us who were arguing years ago not to listen to useless mainstream Republican squishes — who were adamant that the intermediate benchmark was the highest goal we could hope to attain.

What this win-for-now does not do – and what gun owners had best get up to speed on and not ignore – is redirect the emphasis on the "in common use at the time" excuse for infringements. That was a phrase used by Justice Scalia in the Heller case, and has been a major concept the antis have been pinning their hopes, and their legal strategies on. And in many cases, "our side" is playing right into their hands by focusing exclusively on sporting purposes, and on self-defense against crimes by private actors .

"Judge Robert B. King, the dissenting vote in Thursday's ruling, wrote that the types of weapons banned by Maryland hardly constitute a Second Amendment violation," The Washington Times reported. "'Let's be real: The assault weapons banned by Maryland's [law] are exceptionally lethal weapons of war. I am far from convinced that the Second Amendment reaches the AR-15 and other assault weapons prohibited under Maryland law, given their military-style features, particular dangerousness, and questionable utility for self-defense.'"

It's evident that King (fitting name), a Clinton appointee backed at the time by Democrat Klansman Robert Byrd and Republican oligarch Jay Rockefeller, has no business being a court janitor, much less a judge. While self-defense is unquestionably a benefit, weapons of war are precisely what "We the People" are *entitled* to have. That's why the militia was deemed "necessary to the security of a free State" by the Founders.

Any honest reading of their intent and of prior precedent would have no alternative but to concede the "in common use at the time" qualifier in turn relied on U.S. v Miller, a case from 1939 that found a weapon must have "some reasonable relationship to the preservation or efficiency of a well regulated militia [or] that this weapon is any part of the ordinary military equipment, or that its use could contribute to the common defense."

That's the key point being ducked, and not just by the man who would be King.

The function of the militia, defined as "all males physically capable of acting in concert for the common defense [and] bearing arms supplied by themselves and of the kind in common use at the time," was — and is — to field citizen soldiers. And these citizens must bear arms that are suitable for that purpose, "ordinary military equipment" intended to be taken into "common defense" battles.

The militia in the War of the Rebellion did not assemble on the green bearing clubs and spears. They came with the intent to match and best the professional military threat of the most powerful empire of the time.

"Judge King said he sees no substantive difference between an automatic rifle, which is banned, and a semiautomatic rifle," the news account continued. "Both, he said, can fire dozens of rounds in mere seconds."

Knowing what you're talking about is evidently not a requirement for a government gig, at least if you have friends in high places. This contemptible King character's ignorance about firearms aside, any fair understanding of the Second Amendment would have to admit barriers against machine gun ownership are unconstitutional infringements.

If we let ourselves get sidetracked in the argument that Americans own *X* number of a certain model or type of gun, or so many million standard capacity magazines, we'll relegate our rights to what is essentially a popularity contest for sporting and personal defense arms. Standing armies will continue to deploy with weaponry denied the citizen militia under a "common use" misdirection that fails to acknowledge *what kind of use* was intended in the first place.

Using that rationale, it's conceivable the antis would be able to require "smart guns" and then outlaw them because not enough people own them. The argument is that stupid and absurd.

Just as the military no longer uses yesterday's technology, so too must that apply to the citizenry. When technology advances and the most effective "common use at the time" infantry weapon turns out to be a Star Trek-style "phaser rifle," it'll be the right of our Posterity to own one.

Otherwise, we might as well try to defend our freedom with spears.

Categories: 2nd_amendment, All
Tags: Constitutional Militia, Fourth Circuit, Second Amendment

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David Codrea blogs at The War on Guns: Notes from the Resistance (WarOnGuns.com), and is a field editor/columnist for GUNS Magazine. Named “Journalist of the Year” in 2011 by the Second Amendment Foundation for his groundbreaking work on the “Fast and Furious” ATF “gunwalking” scandal, he is a frequent event speaker and guest on national radio and television programs.