

## MEMORANDUM

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**To:** D.C. Vote  
**From:** Patton Boggs LLP  
**Date:** March 26, 2009  
**Subject:** Concerns Regarding the Ensign Amendment to the D.C. Voting Rights Act

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Patton Boggs serves as pro bono legal counsel to D.C. Vote on voting rights matters in the District of Columbia. In that capacity and per your request, this memorandum provides a legal review of actions taken by D.C. in response to the *District of Columbia v. Heller* decision and the impact of the amendment to the D.C. House Voting Rights Act (S. 160) proposed by Senator John Ensign (R-NV) (the “**Ensign Amendment**”) on current DC law regulating gun safety. The Ensign Amendment was included in the D.C. House Voting Rights Act that was passed by the Senate on February 26, 2009.

Section One of this memorandum provides a brief history of the gun laws in the District of Columbia, including the outcome of the *District of Columbia v. Heller*, 554 U.S. \_\_\_ (2008), Supreme Court decision. Section Two provides an overview of the subsequent changes to D.C. laws, including a brief summary of the District of Columbia’s Inoperable Pistol Emergency Amendment Act of 2008 (the “**Inoperable Pistol Act**”) and the Firearms Registration Emergency Amendment Act of 2008 (the “**Firearm Registration Act**”). Each of these Acts were promulgated in response to the *Heller* decision and allow District residents to own firearms, subject to certain restrictions.

Section Three of this memo provides a comparative analysis of current D.C. laws and the proposed Ensign Amendment. Section Four provides closing remarks and notes that the Ensign Amendment is unnecessary as the District of Columbia has already taken measures to come into compliance with the *Heller* decision and allow for citizens to enjoy their Second Amendment rights. That said, should Congress address the issue this Session, it should not consider language as proposed in the Ensign Amendment for the reasons noted below.

### **I. DISTRICT OF COLUMBIA V. HELLER SUPREME COURT DECISION**

In 1976, the District of Columbia promulgated the Firearms Control Regulations Act of 1975 (“**Firearms Act of 1975**”) which banned residents from owning handguns and automatic firearms, and prohibited the possession of unregistered rifles and shotguns. Exceptions to the ban were

allowed for police officers and guns registered before 1976. The law also required that firearms kept in the home be “unloaded, disassembled, or bound by a trigger lock or similar device.”

In June 2008, the Supreme Court in *District of Columbia v. Heller* held that the Second Amendment of the United States Constitution provides an individual the right to possess a firearm for the protection of “hearth and home.” Therefore, it found that the following three provisions in the Firearms Act of 1975 violated D.C. residents’ Second Amendment rights: (i) the prohibition on registering handguns, (ii) the requirement that firearms in the home be kept nonfunctional, and (iii) the inability to move a firearm around the home without a license. The ruling left intact many other provisions in the 1975 Act including the District’s firearm registration laws.

## II. DISTRICT OF COLUMBIA COMPLIANCE

Within three weeks of the Supreme Court decision, the District of Columbia passed emergency legislation and regulations to comply with the ruling while at the same time beginning the process of drafting and enacting permanent legislation. On December 16, 2008, after a series of hearings, full debate and community and law enforcement input, the City Council passed permanent legislation.

In sum, these measures made it lawful for persons without a history of criminal activity or mental illness or a history of domestic violence or drug and alcohol abuse to obtain a firearm registration certificate and have a firearm to defend “hearth and home,” as required by the *Heller* decision.

On January 6, 2009, Mayor Adrian Fenty signed the following bills, which became immediately effective:

- The Inoperable Pistol Emergency Amendment Act of 2008
- The Firearms Registration Emergency Amendment Act of 2008

Each of these Acts is summarized below, along with an overview of the key changes to the D.C. laws implemented as a result of the Acts.

### **The Inoperable Pistol Act**

The Inoperable Pistol Act seeks to control the possession, sale, transfer and use of pistols and other dangerous weapons in the District by:

- Providing penalties, such as making discharging a weapon without a permit from the Chief of Police a misdemeanor offense and adding penalties for violations of the prohibition that are equivalent to those for unlawfully carrying a pistol;
- Prescribing rules of evidence;
- Changing the definitions for the terms firearm, machine gun, pistol, and sawed-off shotgun, and defining the terms “shotgun” and “place of business”;
- Providing that the District and private persons may prohibit or restrict the possession of firearms on their property;
- Prohibiting persons from carrying rifles and shotguns in the District except in limited circumstances and allowing for the transportation of firearms in limited circumstances and in a prescribed manner;

- Repealing the authority of the Chief of Police to issue licenses for the carrying of pistols;
- Changing the waiting period for delivery of a purchased pistol from two (2) to ten (10) days; and
- Providing a savings clause for actions, proceedings, and prosecutions commenced before the Act was enacted.

### **The Firearms Registration Act**

The Firearms Registration Act amends the Office of Administrative Hearings Establishment Act of 2001 and provides the Office of Administrative Hearings with jurisdiction to hear cases pertaining to firearm registration procedures and requirements.

The Act also amends the Firearms Control Regulations Act of 1975 by:

- Revising the definitions of the terms firearm, machine gun, pistol, and sawed-off shotgun and adding definitions for the terms assault weapon, intrafamily offense, magazine, and place of business;
- Providing a self-defense exemption for temporary possession of a firearm registered to another person within the registrant's home and providing for the registration of pistols for use in self-defense within the home;
- Prohibiting the registration of assault weapons and certain designated unsafe firearms; and
- Amending the Assault Weapon Manufacturing Strict Liability Act of 1990 to change the definition of the term assault weapon to conform it with the definition used in the Firearms Control Regulations Act of 1975.

The Act also repeals the Second Firearms Control Congressional Review Emergency Amendment Act of 2008.

Additionally, the Act makes certain persons ineligible from registering a firearm, including persons:

- Who have been convicted of an intrafamily offense within five (5) years of application;
- With multiple alcohol-related offenses within five (5) years of application; and
- Within five (5) years of application, have had a history of violence.

In addition, persons who have had civil protection or foreign protection orders entered against them will be ineligible to register a firearm for five (5) years.

The Act also adds a number of registration requirements and restrictions on the types of firearms that may be sold, including:

- Making clear that the Chief of Police may require an applicant for registration to receive training and pass tests on the use, handling, and storage of firearms;

- Requiring an applicant for registration to complete an hour of firing training and four (4) hours of classroom instruction;
- Establishing a registration limit of one pistol per registrant per thirty (30) days;
- Requiring a ballistics identification procedure as part of the registration process;
- Allowing the Chief of Police to assess a reasonable fee for the procedure;
- Prohibiting large capacity ammunition feeding devices;
- Requiring that semiautomatic pistols manufactured and sold in the District be microstamped;
- Prohibiting the sale, transfer, ownership, or possession of designated unsafe handguns; and
- Requiring firearms dealers to notify the Chief of the theft or loss of any firearms or ammunition from their inventory and providing that a dealer's license will be revoked if the dealer falls out of compliance with any of the duties or requirements.

In addition, the Act clarifies the process of revocation of a registration certificate and provides a process for the renewal of registration certificates. The Act also clarifies the firearms storage policy and establishes penalties for the reckless storage of a firearm accessible by a minor. Finally, the Act provides a savings clause for actions, proceedings, and prosecutions commenced before the Act.

The Mayor has rulemaking authority to implement the provisions of the Act.

### **Key Points under New D.C. Gun Laws**

There are several major provisions that stand out under the terms of the Inoperable Pistol Act and the Firearms Registration Act:

#### ***Lawful use of firearms for self-defense:***

Under Section 2 of the Firearms Registration Act, there is now a self-defense exception to allow residents with registered firearms to possess firearms lawfully in their homes. In addition, under Section 4a of the Inoperable Pistol Act, persons holding a valid registration may keep firearms in their homes and places of business.

#### ***Storing firearms in the home:***

Prior to *Heller*, D.C. required residents to keep firearms unloaded and either disassembled or bound by a trigger lock or similar device. The *Heller* decision determined that the storing requirement made firearms functionally inoperable for self-defense. Therefore, the Inoperable Pistol Act allows law abiding gun owners more discretion in how to legally store firearms in the home without requiring the gun to be kept bound by a trigger lock within the home.

However, in order to address the inherent dangers of possessing firearms in the home, Section 702 of the Firearms Registration Act requires that if a person knows or reasonably knows that a minor is likely to gain access to the firearm without the permission of the parent/guardian, the person must

either (i) keep the firearm in a securely locked box, secured container, or in a location which a reasonable person would believe secure; or (ii) keep the firearm on his or her person or within such close proximity that the person can readily retrieve and use it as if they carried it on his or her person.

***Use of firearms for lawful recreational purposes:***

Section 4a of the Inoperable Pistol Act also permits the use of registered firearms for lawful recreational purposes.

***Lawful transportation of firearms:***

Section 4b of the Inoperable Pistol Act provides for the lawful transportation to and from recreational shooting activities and training seminars. The Act permits residents to lawfully transport firearms by vehicle as long as the “firearm is unloaded, and neither the firearm nor any ammunition being transported [is] readily accessible or directly accessible from the passenger compartment,” or the firearm must be unloaded and “locked in a container other than glove compartment or console.” If the firearm is being transported other than by vehicle, it must be “unloaded, inside a locked container, and separate from any ammunition.”

***Residents have the right to possess registered semiautomatic firearms:***

Section 3 of the Firearms Registration Act law amends the definition of “machine gun” and permanently repeals D.C.’s ban on semiautomatic firearms. As a result, residents can now register semiautomatic pistols, in addition to revolvers, with the Metropolitan Police Department.

***D.C. has reasonable registration requirements:***

D.C. set up a simple handgun registration system in which at the time of applying for purchase of a pistol, the “purchaser shall sign a duplicate and deliver to the seller a statement containing his or her full name, address, occupation, color, place of birth, the date and hour of application,” the firearm’s information and a statement that the purchaser is not forbidden by law to possess a firearm. *D.C. Official Code* §22-4508. The application is to be submitted and approved by the Firearms Registration Section (“FRS”). The applicant is to bring the approved registration certificate to pick up the handgun and the unloaded gun back to FRS for a ballistics test that takes approximately one hour, after which the registration process will be complete.

The total cost for registering a handgun in D.C. is \$60 (\$13 for the application fee, \$35 for fingerprint processing, and \$12 for test-firing). Long guns can be registered for \$48.

The new D.C. law is not unique, and other states have similar laws. For instance, D.C. has a modern handgun registration system which is similar to that of New York, New Jersey, California, Massachusetts and Hawaii. The new law also includes provisions commonly found in other states, including a ban on assault weapons, handgun safety standards, child access prevention measures, a ban on large capacity magazines, comprehensive firearm dealer regulations, ballistic testing and a microstamping requirement that the firearm produce cartridges imprinted with a code that identifies the serial number of the gun. See [Addendum A](#) attached hereto which shows the other states that have these laws.

### III. COMPARATIVE ANALYSIS OF D.C. LAW AND ENSIGN AMENDMENT

As the House takes up the D.C. Voting Rights Act of 2009, it is important to note that the language in the Ensign Amendment, as adopted by the Senate, does not take into account the dramatic changes already made by the District to comply with the Supreme Court decision. The Ensign Amendment includes provisions which are no longer viable and which negate policies that are currently employed by other states.

Moreover, the Ensign Amendment repeals the Firearms Registration Act, but does not affect the Inoperable Pistol Act. The Inoperable Pistol Act then is left as a stand-alone when it was designed to work with the Firearms Registration Act, not the older pre-*Heller* law.

In addition, the Ensign Amendment fails in the following ways:

#### **The Proposed Ensign Amendment Prohibits D.C. from Enacting Firearm Laws**

If passed as is, the District would be barred from enacting any law that would “prohibit, constructively prohibit, or unduly burden” the firearm possession by anyone not otherwise prohibited by federal law. The bill goes so far as to bar the District from enacting any laws or regulations that may “discourage” private ownership or use of firearms in a person’s dwelling place or place of business, including regulations that would prevent the mentally ill, drug abusers or domestic violence perpetrators from obtaining and possessing firearms.

#### **The Proposed Ensign Amendment Repeals Registration Requirements for Firearms**

The Ensign Amendment would repeal even the most basic gun registration requirements. *See the Ensign Amendment, §X05*. In addition, the proposed Amendment repeals the requirement that licensed firearms dealers keep records of ammunition received into inventory and ammunition sold or transferred. With these proposed changes, police can no longer easily trace crime guns to the registered owner and would have no easy way of determining if a person with a gun encountered during a domestic violence call or a traffic stop could legally possess the weapon.

#### **The Proposed Ensign Amendment Effectively Requires a Firearm Owner to Physically Take the Firearm to a Gun Store to Purchase Ammunition**

The Ensign Amendment would leave in place the requirement that a person can only purchase ammunition of the same gauge or caliber as the weapon that they own. Currently, the registration certificate is produced at the gun store to prove that the purchaser is buying the appropriate ammunition for the weapon that they own. However, with the demise of registration there will no longer be registration certificates, so that those wishing to purchase ammunition will need to physically transport the firearm to the gun store to prove that they own a gun of the same caliber as the ammunition they purchase, thereby creating a huge inconvenience for gun owners and a regulatory scheme that will be difficult for law enforcement to monitor. The “I am on the way to purchase ammo” excuse will allow for exaggerated abuse of the limited transportation exemptions described in Section 4b of the Inoperable Pistol Act.

## **The Proposed Ensign Amendment Eliminates and Reduces Criminal Penalties**

Because the Ensign Amendment does not address the Inoperable Pistol Act, but does repeal the new registration law, it will leave in place inconsistent penalties for carrying a weapon outside the home.

## **The Proposed Ensign Amendment Does Not Include Age Limitations**

While current DC law provides for several public safety limitations for gun possession, language as proposed in S. 160 does not address these common sense restrictions, noted here. D.C. law limits ownership to those 21 yrs or older, or a minimum of 18 years of age, with parental/guardian written consent. *See the D.C. Official Code §7-2502.03.* These requirements are not included in the Ensign Amendment.

## **The Proposed Ensign Amendment Does Not Place Reasonable Prohibitions on Possession by Classes of Individuals Who Could Pose a Danger to Themselves and Others**

D.C. gun laws place gun ownership restrictions on the following persons:

- Persons with prior conviction(s) of a crime of violence, weapons offense, or previous violation of the D.C. gun laws.
- Persons under indictment for a crime of violence or weapons offense.
- Persons who, within the previous five (5) years, have been convicted for narcotics or dangerous drug offenses, a threat to do bodily harm, assault, acquitted of any criminal charge by reason of insanity, adjudicated a chronic alcoholic by any court, voluntarily or involuntarily committed to any mental hospital or institution.
- Persons who have been found negligent in any firearm mishap causing death or injury to someone.
- Who have been convicted of an intrafamily offense within five (5) years of application;
- With multiple alcohol-related offenses within five (5) years of application; and
- Within five (5) years of application, have had a history of violence.

The Ensign Amendment eliminates each of these restrictions, as well as the five (5) year wait period for persons who have had civil protection or foreign protection orders entered against them. *See Section 3 of the Firearms Registration Act, D.C. Official Code §7-2502.03.*

## **The Proposed Ensign Amendment Eliminates the Restrictions on Dangerous Weapons That Are Inappropriate for the Nation's Capital**

Assault weapons, including semi-automatic AK-47's, Uzi's and AR-15, as well as .50 sniper rifles, would be legal to purchase, possess and transport in the District.

## **The Proposed Ensign Amendment is Duplicative, Yet Inconsistent with the D.C. Law**

In addition, language as proposed in the Ensign Amendment is duplicative, yet inconsistent, with regards to gun ownership. For example, the Inoperable Pistol Act already makes unlawful the possession of machine guns, sawed-off shot-guns, or blackjacks. *See the D.C. Official Code §22-4509*. Therefore, this language in the Senate bill is not necessary.

Additionally, under D.C.'s Inoperable Pistol Act, a firearms dealer cannot release a firearm to a purchaser until 10 days after the initial application. *See Section 4b of the Inoperable Pistol Act, D.C. Official Code §22-4508*. The Ensign Amendment does not require a waiting period. Yet, because the Ensign Amendment does not address the Inoperable Pistol Act, inconsistencies would be created between congressional legislation and current D.C. Code.

Despite these inconsistencies, the Ensign Amendment prohibits the Government of the District of Columbia from making further laws related to gun ownership. Therefore, the U.S. Congress would again be required to address these inconsistencies in future legislation. Such actions are unnecessary and inefficient.

## **IV. CONCLUSION**

The District of Columbia has modified its statutes to fully comply with the *Heller* decision and to allow its citizens to enjoy their Second Amendment rights. Through the Ensign Amendment, the Senate amends the outdated Firearms Control Regulations Act of 1975, which has been recently replaced with a new registration law and the Inoperable Pistol Act, creating unnecessary duplication and legal inconsistencies. Moreover, language in the Ensign Amendment goes beyond clarifying that gun possession for self-defense in the home is protected by repealing a host of other important public safety provisions. Moving forward, it also denies the government of the District of Columbia the ability to regulate most aspects of gun possession and transfers in the City.

## Addendum A

<b>D.C. Gun Law Provision</b>	<b>States that Have Similar Provision</b>
High-Capacity Ammunition Magazine Ban	CA, HI, MD, MA, NJ, NY
Firearm Licensing and/or Registration System	CA, CT, HI, IA, IL, MA, MI, NJ, NY, NC, NV, RI
Child Access Prevention (CAP) Law	CA, CO, CT, DE, FL, GA, HI, IL, IN, IA, KT, MD, MA, MN, MS, MO, NV, NH, NJ, NC, OK, RI, TN, TX, UT, VA, WI
Microstamping	CA
Ballistics Testing	MD, NY
Design and Safety Standards for Handguns	CA, HI, IL, MD, MA, MN, NY, SC
Assault Weapon Ban	CA, CT, HI, MD, MA, NJ, NY
Purchase Prohibitions Beyond Federal Law	AK, AK, AL, AZ, CA, CT, DE, FL, HI, IL, IN, IA, KS, LA, MA, MD, ME, MI, MN, MS, NC, ND, NH, NJ, NV, NY, OH, OK, OR, PA, RI, SC, SD, TN, TX, UT, VA, WA, WI, WV
Misdemeanor Prohibitions Beyond Federal Law	CA, CT, DE, FL, HI, IL, IN, IA, LA, MA, MD, MN, NJ, NY, ND, OR, PA, SD, TN, TX, VA, WA, WV
Mental Illness Prohibitions Beyond Federal Law	AK, AZ, CA, CT, DE, FL, HI, IA, IL, IN, KS, MA, MD, ME, MI, MN, NC, ND, NJ, NV, NY, OH, OK, OR, PA, RI, SC, UT, VA, WA, WI, WV
Restraining Order Prohibitions Beyond Federal Law	CA, CT, DE, FL, HI, IL, IN, MA, MD, ME, MI, NC, NH, NJ, NY, PA, TX, VA, WI, WV
Drug Abuser Prohibitions Beyond Federal Law	AK, AL, CA, DE, FL, HI, IA, IL, IN, KS, MA, MD, MN, NC, NJ, NV, OH, OK, PA, RI, SC, SD, TN, TX, UT, VA, WA, WV
Alcohol Abuser Prohibitions Beyond Federal Law	AK, AL, DE, HI, IA, IN, MA, MD, MS, NJ, OH, OK, PA, RI, SC, TN, TX, WV
Waiting Periods for Firearm Purchases	CA, CT, FL, HI, IA, IL, MD, MN, NJ, RI, SD, WI
Training for Firearm Purchasers	CA, CT, HI, MA, MI, RI
One-Handgun-a-Month	CA, MD, VA
Dealer Regulation	AL, CA, CT, DE, GA, HI, IN, MA, MD, MN, NH, NJ, NY, PA, RI, SC, VA, WA, WI, WV