November 26, 2007

TO: Interested Parties

FROM: Jim Kessler, Vice President for Policy and Matt Bennett, Vice President for Public Affairs

RE: The DC Gun Ban Case – Rights and Responsibilities

Last week, the US Supreme Court agreed to hear a case from DC that for the first time squarely addresses the question of whether the Second Amendment is an individual right or a collective right that benefits only state militias. Lower courts have been split on this question, and advocates on both sides of the gun debate have waited in great anticipation for this high court showdown. They view this as a make or break moment for our nation's gun laws.

While the Supreme Court's decision will no doubt be interesting, the advocates are wrong to view this case as having real practical implications. Indeed, there would be almost no consequences for the nation's federal, state and local gun laws if the DC gun ban is declared unconstitutional. The reason is simple—there is simply no contradiction in believing that the Second Amendment is an individual right and in supporting reasonable firearms restrictions like almost all of the ones on the books today.

In this memo, we provide a brief analysis of the implications of this case and some talking points about the Supreme Court's review of the DC gun ban case.

Is the Second Amendment an individual right or collective right?

Our position on the Second Amendment is that it confers an individual right to own firearms, but like all constitutional rights, it allows for reasonable restrictions.

This is not just our position—we believe it is the de facto situation in America today, regardless of what the Supreme Court decides. Consider the numbers: there are roughly 280 million firearms in private hands in America, and somewhere between forty and fifty percent of households report a gun in the home. There are more than 80,000 federally licensed gun dealers in America, and in nearly all jurisdictions in America, any law-abiding adult is permitted to own a firearm. If this is not already an individual right, it certainly acts like one.

Can you be for the Second Amendment and for gun safety?

The choice between supporting this interpretation of the Second Amendment versus supporting reasonable gun safety laws is a false one. This dichotomy has been the mainstay of the interest groups on the left and the right—one side that believes

the Second Amendment offers no rights, and the other that believes it offers absolute rights.

We reject this either/or view, and our own research shows that nearly all Americans reject it as well. Among all likely voters[1]:

- 14% believe "there is an absolute Constitutional right to own guns which allows for no laws restricting gun ownership and sales. " (The NRA position)
- 8% believe "there is no Constitutional right to own guns so any law that restricts gun ownership and sales is allowed." (The traditional gun control groups' position)
- 74% believe "there is a Constitutional right to own guns but it allows for laws intended to keep guns out of the hands of criminals." (The American people's position)

Even among non-gun owners, we found overwhelming support for the Second Amendment as an individual right. In fact, only 11% of non-gun owners felt that the Second Amendment was a collective right.

Our research also revealed that 47% of likely voters had a gun in the home, including 42% of Democrats, 46% of Independents, and 54% of Republicans. We also found overwhelming support among gun owners and non-gun owners for measures like closing the gun show loophole and other reasonable gun laws. These gun owners did not see a conflict between good laws for the country and the individual right to own firearms.

Will this decision put federal statutes like the Brady Law or state and local laws in jeopardy?

A decision to overturn the DC gun ban would have little to no effect on any other gun law at the national, state or local level. The DC gun ban is the most restrictive gun law in the country. It is the only law that we are aware of that contains an outright firearms ban (Chicago has the next most restrictive law). Even the decision by the lower court striking down the DC gun ban on constitutional grounds notes that just about anything short of a complete ban would pass the Second Amendment test.[*]

Recommended Talking Points:

We caution progressives and other supporters of reasonable gun safety laws against overreacting to this case. We believe it to be limited in scope and with few practical implications. We caution against calling the Supreme Court "extreme" or "out of touch" or "in the pocket of the NRA." Instead, we suggest an approach that buttresses progressive support for both the Second Amendment (which was proclaimed in the 2004 Democratic Platform) as well as for reasonable gun laws.

- The 2nd Amendment confers an individual right to own firearms for protection, collection or sport.

- The Second Amendment does not extend to terrorists and criminals.
- The Second Amendment allows for reasonable restrictions that balance rights with responsibilities, such as closing the gun show loophole—something George Bush pledged to do when he ran in 2000.
- The DC gun ban is the most stringent gun law in the country, and it falls outside the Second Amendment because it is an outright ban on the ownership of the most commonly used firearms for self-protection. In deciding this case, the DC Circuit stated in its opinion that while the DC gun ban is unconstitutional, nearly all other gun safety laws short of an outright ban would be within the confines of the Second Amendment.
- This decision is likely to have no impact on any other gun safety statute at the national, state or local level.

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[1] Penn, Schoen, and Berland, national survey of 1,200 voters, October 1—6, 2003.

[*] "The protections of the Second Amendment are subject to the same sort of reasonable restrictions that have been recognized as limiting, for instance, the First Amendment.…We take these to be the sort of reasonable regulations contemplated by the drafters of the Second Amendment. For instance, it is presumably reasonable "to prohibit the carrying of weapons when under the influence of intoxicating drink, or to a church, polling place, or public assembly, or in a manner calculated to inspire terror . . . ." *State v. Kerner*, 107 S.E. 222, 225 (N.C. 1921). And as we have noted, the United States Supreme Court has observed that prohibiting the carrying of concealed weapons does not offend the Second Amendment. *Robertson*, 165 U.S. at 281-82.

Similarly, the Court also appears to have held that convicted felons may be deprived of their right to keep and bear arms. *See Lewis v. United States*, 445 U.S. 55, 65 n.8 (1980) (citing *Miller*, 307 U.S. at 178). These regulations promote the government's interest in public safety consistent with our common law tradition. Just as importantly, however, they do not impair the core conduct upon which the right was premised. Reasonable restrictions also might be thought consistent with a "well regulated Militia." The registration of firearms gives the government information as to how many people would be armed for militia service if called up. Reasonable firearm proficiency testing would both promote public safety and produce better candidates for military service. Personal characteristics, such as insanity or felonious conduct that make gun ownership dangerous to society also make someone unsuitable for service in the militia. *Cf.* D.C. Code § 49-401 (excluding "idiots, lunatics, common drunkards, vagabonds, paupers, and persons convicted of any infamous crime" from militia duty). On the other hand, it does not follow that a person who is unsuitable for militia service has no right to keep and bear arms.") *Parker v. DC*, slip op. pp. 54-55 (DC Cir. 2007).