March 9, 2007

TO: Interested Parties

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

RE: Responding to the Court Decision Striking Down the DC Gun Ban

The DC Court of Appeals today struck down the District of Columbia's ban on the private possession of handguns on grounds that the ban violates the 2nd Amendment (*Parker v.* DC, slip op. No. 03cv00213 (D.C. Cir. 2007)).

This is the second federal circuit court to find that the Second Amendment confers an individual right to own guns (the other was the 5th Circuit). Some in Congress, particularly those who care deeply about gun safety, may be asked to comment on this decision. This memo offers guidance for a response.

First, there are some basic facts to consider:

1. ***In America, law-abiding adults have the right to own a gun:*** There are over 200 million firearms in private hands, and more than 40% of the general population has a gun in the home. Thus, the question of whether the 2nd Amendment confers an individual or a collective right (based on the militia concept), while generating fierce scholarly debate, is in practice largely irrelevant. Those 200 million guns are not going away.
2. ***Most Americans like it that way:*** The vast majority of Americans believe the 2nd Amendment confers an individual right to own a firearm. In our polling, 16% of likely voters believe the 2nd Amendment confers an individual right that does not allow for restrictions, 9% believe it is a collective right that allows for any restrictions, and 70% believe it is an individual right that allows for reasonable restrictions. Therefore, this decision should not be characterized as "extreme" or "out of step" with the views of most Americans.
3. ***The problem is interstate trafficking of crime guns:*** Every gun used in a DC crime was trafficked across state lines. The District has an extremely high murder and violent crime rate, not because of or in spite of the gun ban, but because America has a gun trafficking problem. This problem is exacerbated by a patchwork of gun laws that fuel illegal trafficking.
4. ***The Bush Administration is weak on enforcement:*** Twenty of the twenty-two major federal gun laws are enforced so rarely that they might as well not exist. Laws that deal with interstate gun trafficking, buying, selling, and possessing stolen firearms and firearms with obliterated serial numbers, cracking down on dirty gun dealers, and selling to straw buyers are rarely prosecuted.
5. ***This is a both a win and a loss for the NRA:*** At first blush, this decision looks like a victory for gun rights organizations, but some of the wording in this decision is a significant loss for them as well. The decision clearly states that restrictions far beyond anything the gun rights groups would support are permissible

under the 2nd Amendment. Pasted below is a section from the Court decision that allows for effective gun safety laws and restrictions under the Second Amendment

Here's the messaging we recommend:

> *Most Americans can agree that law-abiding citizens have the right to possess firearms, but the Second Amendment does not apply to terrorists, gang members, and criminals. That was underscored in today's decision – the Court makes clear that nearly every gun law already in effect in this country is constitutional under the 2nd Amendment.*
>
> *But our laws are only as effective as the people who enforce them. Under the Bush Administration, our federal gun laws are almost never enforced. It is part of the reason that the crime rate – especially assaults and murder with firearms – is now soaring.*

Here's the relevant excerpt from the decision (*Parker v. DC*, p. 54-55):

That is not to suggest that the government is absolutely barred from regulating the use and ownership of pistols. 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. *See Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) ("[G]overnment may impose reasonable restrictions on the time, place, or manner of protected speech . . . ."). Indeed, the right to keep and bear arms—which we have explained pre-existed, and therefore was preserved by, the Second Amendment—was subject to restrictions at common law. 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.