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THE EMPIRE STRIKES BACK: THE DISTRICT OF COLUMBIA'S POST-HELLER FIREARM REGISTRATION SYSTEM

Stephen P. Halbrook

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THE EMPIRE STRIKES BACK: THE DISTRICT OF COLUMBIA'S POST-*HELLER* FIREARM REGISTRATION SYSTEM

STEPHEN P. HALBROOK*

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The author is lead counsel for the plaintiffs in what has come to be known as "*Heller II*," which is the subject of this article. Thanks go to Richard Gardiner, Dan Peterson, and John Frazer for their contributions to the case and this topic, but any deficiencies herein are those of this author alone.

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INTRODUCTION

In *District of Columbia v. Heller*, the Supreme Court held the District of Columbia's handgun ban to violate the Second Amendment,¹ which provides that "the right of the people to keep and bear -arms, shall not be infringed." Prior District law required the registration of long guns (i.e., rifles and shotguns). The District responded to *Heller* by making registration of all firearms more restrictive than ever before.

Shortly thereafter, and continuing through the present, the District's firearm registration laws have been subject to an ongoing challenge. The first named plaintiff was the same Dick Heller as in the Supreme Court case; he was joined by Absalom Jordan (a plaintiff in prior challenges)² and others. The District Court rendered summary judgment in favor of the District,³ and the plaintiffs appealed.

In 2011, the D.C. Circuit's 2–1 opinion in *Heller v. District of Columbia (Heller II)* upheld basic registration requirements, but

1. 554 U.S. 570, 636 (2008).

2. *Jordan v. District of Columbia*, 362 A.2d 114, 115, 119 (D.C. 1976) (upholding denial of license to carry concealed pistol); *Seegars v. Gonzales*, 396 F.3d 1248, 1250, 1256 (D.C. Cir. 2005) (affirming dismissal of Second Amendment challenge to handgun ban), *reh'g denied*, 413 F.3d 1 (D.C. Cir. 2005), *cert. denied*, 546 U.S. 1157 (2006).

3. *Heller v. District of Columbia*, 698 F. Supp. 2d 179, 197 (D.D.C. 2010).

“only as applied to handguns. With respect to long guns they are novel, not historic.”⁴ Those provisions as applied to long guns were remanded for further proceedings.⁵

The appellate court further found that the following provisions were not longstanding and remanded them for further proceedings: a ballistics-identification requirement for handguns; a prohibition on registering more than one pistol per thirty days; the requirements that applicants appear in person to register, and that they re-register each firearm every three years; and the requirements that an applicant demonstrate knowledge about firearms, be fingerprinted and photographed, take a firearms training or safety course, meet a vision requirement, and submit to a background check every six years.⁶

The court stated that all of the above requirements and all requirements as applied to long guns “also affect the Second Amendment right because they are not *de minimis* [and] make it considerably more difficult for a person lawfully to acquire and keep a firearm,” and thus “impinge upon that right.”⁷ The case was remanded to allow the District another chance to prove its case.

Dissenting, Judge Kavanaugh would have held the registration requirements void under the Second Amendment.⁸ He would have decided the case based on text, history, and tradition, or alternatively on the basis of strict scrutiny, rather than what he considered the balancing test of intermediate scrutiny adopted by the majority.⁹

After the case was remanded, the District passed further amendments, resulting in the 2012 Firearms Amendment Act. At the time of this writing, cross motions for summary judgment are pending before the district court on the Act’s validity under the Second Amendment. Since it is reasonable to assume that litigation through the appellate level will continue for some time, and that a definitive resolution of the issues is not in the cards for the near future, it is appropriate now to articulate and analyze, based on the

4. *Heller v. District of Columbia (Heller II)*, 670 F.3d 1244, 1254–55 (D.C. Cir. 2011).

5. *Id.* at 1260.

6. *Id.* at 1255, 1260.

7. *Id.* at 1255 (noting as an example “the mandatory five hours of firearm training and instruction”).

8. *Id.* at 1291–96 (Kavanaugh, J., dissenting). Judge Kavanaugh would also have held the District of Columbia’s “assault weapon” ban void under the Second Amendment, which the majority upheld. *Id.* at 1285–91.

9. *Id.* at 1276, 1284.

Heller II majority's ruling, the Second Amendment issues arising from the District's firearm registration system.

Before launching into the issues of *Heller II*, a word about the subject of firearm registration is in order. As detailed in this author's article in the 1995 Second Amendment Symposium issue of the *Tennessee Law Review*, Congress has historically rejected legislation to register common firearms.¹⁰ Besides rejecting bills to register handguns in the National Firearms Act of 1934¹¹ and the Gun Control Act of 1968,¹² Congress explicitly prohibited registration in the Property Requisition Act of 1941,¹³ the Firearms Owners' Protection Act of 1986,¹⁴ and the Brady Act of 1993.¹⁵ It is no secret that, while not inevitable, registration facilitates confiscation,¹⁶ and that it has occurred in some of the darkest pages of history.¹⁷

A committee report in support of the legislation at issue states, "Hawaii and the District are the only states [*sic*] that require all firearms to be registered."¹⁸ While the committee's inclusion of the District as a "state" was perhaps wishful thinking, this statement demonstrates the unusual nature of universal firearm registration at the state level.¹⁹

10. See generally Stephen P. Halbrook, *Congress Interprets the Second Amendment: Declarations by a Co-Equal Branch on the Individual Right to Keep and Bear Arms*, 62 TENN. L. REV. 597 (1995).

11. See National Firearms Act of 1934, Pub. L. No. 474, 48 Stat. 1236; H.R. REP. NO. 73-1780, at 1-2 (1934).

12. 114 CONG. REC. 27422-56 (daily ed. Sept. 18, 1968).

13. Property Requisition Act of 1941, Pub. L. No. 274, 55 Stat. 742.

14. Firearm Owners' Protection Act of 1986, Pub. L. No. 99-308, § 106(4), 100 Stat. 449 (codified as amended, at 18 U.S.C. § 926(a)).

15. Brady Handgun Violence Prevention Act, Pub. L. No. 103-159, § 103(i)(2), 107 Stat. 1536, 1542 (1993).

16. For instance, New York City required registration of long guns in the 1960s, and in 1991 declared many types of them to be prohibited "assault weapons"; police knocked on doors of persons who failed to report that they got rid of such firearms. See Stephen P. Halbrook, "A Crime to Possess a Firearm": *Does the Second Amendment Apply in New York?* 14 GOV'T L. & POL'Y J. 51, 53 (2012).

17. See generally STEPHEN P. HALBROOK, GUN CONTROL IN THE THIRD REICH: DISARMING THE JEWS AND "ENEMIES OF THE STATE" (2013); Stephen P. Halbrook, *Why Can't We Be Like France? How the Right To Bear Arms Got Left Out of the Declaration of Rights and How Gun Registration Was Decried Just in Time for the Nazi Occupation*, 39 FORDHAM URB. L.J., No. 5, 1637 (2012).

18. COUNCIL OF D. C., COMM. ON PUB. SAFETY AND THE JUDICIARY, REPORT ON BILL NO. 17-843, FIREARMS REGISTRATION AMENDMENT ACT OF 2008, at 3 (2008) [hereinafter 2008 COMMITTEE REPORT].

19. But see Stephen P. Halbrook, *Defense of Self and Community: A Response to Professor Johnson*, 45 CONN. L. REV. 1653, 1658-59 (2013) (explaining that in

I. THE BURDEN TO SHOW A NARROWLY-TAILORED, TIGHT FIT
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The Decision of the Court of Appeals

The D.C. Circuit applied intermediate scrutiny, under which “the District must establish a tight ‘fit’ between the registration requirements and an important or substantial governmental interest, a fit ‘that employs not necessarily the least restrictive means but . . . a means narrowly tailored to achieve the desired objective.’”²⁰ The Supreme Court has formulated that test as follows: “The requirement of narrow tailoring is satisfied so long as the regulation promotes a substantial governmental interest that would be achieved less effectively absent the regulation, and the means chosen are not substantially broader than necessary to achieve that interest.”²¹

The District advanced two government interests for registration—“to protect police officers and to aid in crime control.”²² For instance, the 2008 Committee Report claimed that registration “is critical” because it “allows officers to determine in advance whether individuals involved in a call may have firearms.”²³ The circuit court placed the burden on the District “to explain in greater detail how these governmental interests are served by the novel registration requirements.”²⁴

The Committee also claimed other benefits of registration; for example, it “permits officers to charge individuals with a crime if an individual is in possession of an unregistered firearm,”²⁵ but the

Virginia, registration of and an annual tax on pistols were advocated to disarm African Americans; enacted in 1926 with penalties including high fines and sentences to work on the convict road force, three-fourths of which were blacks; declared unconstitutional in 1928; and formally repealed in 1936).

20. *Heller v. District of Columbia (Heller II)*, 670 F.3d 1244, 1258 (D.C. Cir. 2011) (quoting *Bd. of Trs. of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 480 (1989)).

21. *Ward v. Rock Against Racism*, 491 U.S. 781, 782–83 (1989). *Ward* involved speech exercised in a public forum with public impact (where reasonable time, place, or manner restrictions applied), and even then the restrictions had to be “narrowly tailored to serve a significant governmental interest . . .” *Id.* at 791. By contrast, *Heller II* involves mere possession of a firearm in one’s home.

22. *Heller II*, 670 F.3d at 1258.

23. *Id.* (quoting 2008 COMMITTEE REPORT, *supra* note 18, at 3).

24. *Id.* at 1258 n.*. “[S]ince the State bears the burden of justifying its restrictions, it must affirmatively establish the reasonable fit we require.” *Fox*, 492 U.S. at 480.

25. 2008 COMMITTEE REPORT, *supra* note 18, at 4. As in other instances, the

Court categorized those rationales as “circular” and found that they “do not on their own establish either an important interest of the Government or a substantial relationship between the registration of firearms and an important interest.”²⁶ Undeterred, the 2012 Committee Report that seeks to justify the post-remand amendments repeated the same reason: “Registrations fulfills a number of needs important to the District’s interest in public safety: distinguishing criminals from law-abiding citizens, enabling police to arrest criminals immediately”²⁷ Such persons are “criminals” only because they possess unregistered firearms, the very rationale the Court found to be circular.

Heller II held that, under the record before it, “the novel registration requirements —or any registration requirement as applied to long guns” failed intermediate scrutiny “because the District ha[d] not demonstrated a close fit between those requirements and its governmental interests.”²⁸ The court stated that the 2008 Committee Report, testimony, and written statements did not show the registration requirements to be narrowly tailored.²⁹ Although the 2008 Committee Report made references to what “studies show,” it “neither identifie[d] the studies relied upon nor claim[ed] those studies showed the laws achieved their purpose.”³⁰ The court noted “cursory rationales” in which the District failed “to present any data or other evidence to substantiate its claim that these requirements can reasonably be expected to promote either of the important governmental interests it has invoked.”³¹

The court concluded that “the District needs to present some meaningful evidence, not mere assertions, to justify its predictive judgments.”³² First, it had not shown “a substantial relationship between any of the novel registration requirements and an

drafters of the Committee Report copied this rationale for registration almost verbatim from a hearing witness: “Permit law enforcement to charge an individual with a crime if he or she is in possession of an unregistered gun” LEGAL CMTY. AGAINST VIOLENCE, TESTIMONY OF JULIET A. LEFTWICH 2 (2008).

26. *Heller II*, 670 F.3d at 1258 (quoting 2008 COMMITTEE REPORT, *supra* note 18, at 4).

27. COUNCIL OF D.C., COMM. ON THE JUDICIARY, REPORT ON BILL 19-614, FIREARMS AMENDMENT ACT OF 2012, at 8 (2012) [hereinafter 2012 COMMITTEE REPORT].

28. *Heller II*, 670 F.3d at 1258.

29. *Id.*

30. *Id.* at 1258–59 (quoting 2008 COMMITTEE REPORT, *supra* note 18, at 10 regarding multiple handgun sales).

31. *Id.* at 1259. These two interests were safety training and demonstrating knowledge of gun laws. *Id.*

32. *Id.*

important governmental interest.”³³ Second, the 2008 Committee Report did not include “even a single reference to the need for registration of rifles or shotguns,” and thus the law’s provisions “that deal specifically with registration of long guns might have been written in invisible ink.”³⁴ As such, the court stated, “those registration requirements will be deemed constitutional only if the District shows they serve its undoubtedly important governmental interests in preventing crimes and protecting police officers.”³⁵

The D.C. Circuit reiterated the Supreme Court’s rejection of Justice Breyer’s “interest-balancing” inquiry, which “would have had [the court] weigh this governmental interest against ‘the extent to which the District’s law burdens the interests that the Second Amendment seeks to protect.’”³⁶ Instead of asking “whether the Government is promoting an important interest by way of a narrowly tailored means,” that approach would ask whether a statute “imposes burdens that, when viewed in light of the statute’s legitimate objectives, are disproportionate.”³⁷

The “judge-empowering ‘interest-balancing inquiry’” that must be avoided, according to *Heller*, would allow “arguments for and against gun control” and the upholding of a handgun ban “because handgun violence is a problem.”³⁸ Justice Breyer would have relied on the District’s 1976 Committee Report³⁹ and empirical studies about the alleged role of handguns in crime, injuries, and death, rejecting contrary studies questioning the effectiveness of the ban and focusing on lawful uses of handguns.⁴⁰ Similarly, the Supreme Court’s decision in *McDonald v. City of Chicago*, which held the Second Amendment to apply to the states through the Fourteenth Amendment and invalidated Chicago’s handgun ban, barely mentioned Chicago’s legislative finding and accorded it no deference or even discussion.⁴¹

As in *Heller*, in *Heller II* the District relied on the 2008 Committee Report, which the Court of Appeals held insufficient.

33. *Id.*

34. *Id.*

35. *Id.* at 1267.

36. *Id.* at 1264–65 (Breyer, J., dissenting) (quoting *District of Columbia v. Heller*, 554 U.S. 570, 706 (2008)).

37. *Id.* at 1264 (quoting *Heller*, 554 U.S. at 706).

38. 554 U.S. at 634.

39. *Id.* at 693–96 (Breyer, J., dissenting).

40. *Id.* at 696–702.

41. *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3026 (2010) (quoting CITY COUNCIL OF THE CITY OF CHI., JOURNAL OF PROCEEDINGS OF THE CITY COUNCIL OF THE CITY OF CHICAGO, ILLINOIS, at 10049 (1982)).

Preceding its latest amendments, the District produced yet another Committee Report, that of 2012. Rather than deference to legislative judgments, however, *Heller II* requires “meaningful evidence.”⁴² Even where relaxed scrutiny applies, the Supreme Court has held that a municipality cannot “get away with shoddy data or reasoning.”⁴³

Since *Heller II* involves mere possession of firearms in the home by law-abiding citizens, the standard of review should not derive from cases involving persons convicted of crimes punishable by more than one year’s imprisonment⁴⁴ or handgun possession outside the home.⁴⁵ Given that the Second Amendment “elevates above all other interests the right of law-abiding, responsible citizens to use arms in defense of hearth and home,”⁴⁶ restrictions on that right are subject to the most rigorous narrow-tailoring analysis.

II. THE DISTRICT’S FIREARM REGISTRATION REQUIREMENTS VIOLATE THE SECOND AMENDMENT

The District requires that a person register to exercise Second Amendment rights: “no person or organization in the District shall possess or control any firearm, unless the person or organization holds a valid registration certificate for the firearm.”⁴⁷ Possession of an unregistered firearm is punishable by imprisonment for one year and a \$1,000 fine, and by imprisonment for five years and a \$5,000 fine for a second offense.⁴⁸

After the Supreme Court decided *Heller*, the District made it much more difficult to register any firearm, including long guns. Judge Kavanaugh wrote: “After *Heller*, . . . D.C. seemed not to heed the Supreme Court’s message. Instead, D.C. appeared to push the envelope again, with . . . its broad gun registration requirement.”⁴⁹

42. *Heller v. District of Columbia (Heller II)*, 670 F.3d 1244, 1259 (D.C. Cir. 2011); see *Landmark Commc’ns v. Virginia*, 435 U.S. 829, 843 (1978) (“Deference to a legislative finding cannot limit judicial inquiry when First Amendment rights are at stake.”).

43. *Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 438 (2002) (upholding the city’s ban on adult bookstores).

44. *E.g.*, *Schrader v. Holder*, 704 F.3d 980, 990 (D.C. Cir. 2013).

45. *E.g.*, *Kachalsky v. County of Westchester*, 701 F.3d 81, 97 (2d Cir. 2012). The circuits differ on the extent of the right to bear arms outside the home. See *Moore v. Madigan*, 702 F.3d 933 (7th Cir. 2012) (invalidating prohibition).

46. *District of Columbia v. Heller*, 554 U.S. 570, 635 (2008).

47. D.C. CODE § 7-2502.01(a) (2001).

48. *Id.* § 7-2507.06.

49. *Heller v. District of Columbia (Heller II)*, 670 F.3d 1244, 1271 (D.C. Cir.

The *Heller II* majority held as much when it reversed in part and remanded.

The D.C. Council asserted in its 1976 Report that it was necessary to require registration of all firearms.⁵⁰ But the 1976 Report focused on handguns;⁵¹ it provided no reason at all that registering long guns was necessary.

The District's 1976 Report included no findings purporting to justify registration in light of the Second Amendment. Some courts at the time held that the Amendment only protected a "collective" state power to maintain militias. But the text of the Second Amendment mandates that "the right of the people to keep and bear Arms, shall not be infringed." The Supreme Court has observed that "broad constitutional requirements [may be] 'made specific' by the text."⁵² The D.C. Circuit had never held that, contrary to ordinary language, "the people" did not mean the people and that "arms" did not include long guns or handguns.⁵³

The 2008 Committee Report decries the lack of a federal firearm registration system and the prohibition on use of the National Instant Criminal Background Check System (NICS) to register firearms and firearm owners.⁵⁴ Indeed, gun registration is explicitly prohibited by the federal Gun Control Act,⁵⁵ including in the provisions of the Brady Act creating the NICS.⁵⁶ That is the norm nationwide: once a person passes the background check, no governmental interest remains in retaining the person's identity in a

2011) (Kavanaugh, J., dissenting).

50. COUNCIL OF D.C., REP. ON BILL NO. 1-164, FIREARMS CONTROL ACT OF 1976 (April 21, 1976), at 1–2.

51. *Id.* at 3–5.

52. *United States v. Lanier*, 520 U.S. 259, 267 (1997) (quoting *Screws v. United States*, 325 U.S. 91, 105 (1945)).

53. See *Fraternal Order of Police v. United States*, 173 F.3d 898, 905–06 (D.C. Cir. 1999). The Third Circuit suggested that the New Jersey legislature could not have foreseen that its restrictions on carrying handguns "could run afoul of a Second Amendment that had not yet been held to protect an *individual* right to bear arms." *Drake v. Filko*, 724 F.3d 426, 437–38 (3d Cir. 2013). Perhaps the legislature could have done so by reading the text, which "suggests that 'the people' protected by the Fourth Amendment, and by the First and Second Amendments" are one and the same. *United States v. Verdugo-Urquidez*, 494 U.S. 259, 265 (1990); see *Drake*, 724 F.3d at 454 (Hardiman, J., dissenting) ("Our role is to evaluate the State's proffered evidence, not to accept reflexively its litigation position.").

54. 2008 COMMITTEE REPORT, *supra* note 18, at 3–4.

55. 18 U.S.C. § 926(a) (2012).

56. Pub. L. No. 103-159, § 103(i)(2), 107 Stat. 1536, 1542 (1993) (prohibiting "any system for the registration of firearms, firearm owners, or firearm transactions").

central database or in making it difficult for law-abiding citizens to keep firearms to protect their families and homes.

The failure of the District's registration system is suggested by comparative data about other jurisdictions. The District has stated, "The District's age-adjusted rate of firearms deaths (intentional and unintentional) for 2010 was 14.62 per 100,000, considerably higher than the national rate (10.07) and the rate in neighboring jurisdictions (9.26 for Maryland, and 10.69 for Virginia)."⁵⁷ Perhaps making it easier for law-abiding citizens to possess guns would help reduce this senseless violence to a level closer to that in the neighboring jurisdictions such as Maryland and Virginia, which have no comparable gun registration requirements.

A. The District's Foremost Purported Reason for Registration—To Allow Police to Determine if Firearms are Present when Responding to a Call—Turns Out to Be False

As it stated in the 2008 Committee Report, the first and foremost reason the District claimed that registration "is critical" was because it "allows officers to determine in advance whether individuals involved in a call may have firearms."⁵⁸ The Council hearing record includes no testimony by a law enforcement official stating this. Rather, the drafters of the 2008 Committee Report lifted this claim—without attribution—from the testimony of a witness for the Legal Community Against Violence, a lobbying organization. This testimony stated that registration is "critical" in part based on the following: "Protect law enforcement officers responding to calls for assistance . . . by allowing the officers to determine, in advance, whether the individuals involved possess firearms."⁵⁹

The Court of Appeals in *Heller II* used the Committee's statement to highlight this justification in explaining how the District claimed to advance the government interests "to protect police officers and to aid in crime control."⁶⁰ Judge Kavanaugh was skeptical:

57. Defendants' Memorandum of Points and Authorities in Support of Their Motion for Summary Judgment at 22, *Heller v. District of Columbia*, No. 1:08-cv-01289 (JEB) (D.D.C. Nov. 5, 2013) [hereinafter Defendants' Memorandum].

58. *Heller v. District of Columbia (Heller II)*, 670 F.3d 1244, 1258 (D.C. Cir. 2011) (quoting 2008 COMMITTEE REPORT, *supra* note 18, at 3).

59. LEGAL CMTY. AGAINST VIOLENCE, *supra* note 25, at 1.

60. *Heller II*, 670 F.3d at 1258 (quoting 2008 COMMITTEE REPORT, *supra* note 18, at 3). On appeal, the District argued that registration is justified because it "allows officers to determine in advance whether individuals involved in a call may have firearms." Appellees' Brief at 8, 57, *Heller v. District of Columbia*, No. 10-7036

D.C.'s articulated basis for the registration requirement is that police officers, when approaching a house to execute a search or arrest warrant or take other investigative steps, will know whether the residents have guns. But that is at best a Swiss-cheese rationale because police officers obviously will assume the occupants might be armed regardless of what some central registration list might say. So this asserted rationale leaves far too many false negatives to satisfy strict or intermediate scrutiny with respect to burdens on a fundamental individual constitutional right.⁶¹

After the case was remanded, the 2012 Committee Report was published to justify the District's policies. This time, the Report's drafters disclosed the source of the justification and reasserted:

Each of these findings [of the 1975 Committee Report] remains true today. Indeed, in its written statement regarding Bill 19-614, the Legal Community Against Violence wrote: . . .

Registration laws are an essential component of responsible gun policy because they: . . . 3) protect police officers responding to an incident by providing them with information about whether firearms may be present at the scene⁶²

But it turns out that the Metropolitan Police Department (MPD) officers, in responding to calls, *do not* check registration records to determine if a firearm is present. In discovery after the remand, the District flatly admitted: "MPD officers that are responding to a call for service are not informed in advance if there is a registered firearm at the location."⁶³ Neither MPD dispatchers nor officers being dispatched on calls for service have direct access to the firearms registry database.⁶⁴ The database "can only be accessed by authorized personnel from terminals within the Firearms Registration Section" and "is not accessible through the MPD's intranet or the Internet."⁶⁵ In addition, "[p]olice department squad

(D.C. Cir. Sept. 3, 2010).

61. *Heller II*, 670 F.3d at 1294–95 (Kavanaugh, J., dissenting).

62. 2012 COMMITTEE REPORT, *supra* note 27, at 6.

63. Memorandum in Support of Plaintiffs' Motion for Summary Judgment and Opposition to Defendants' Motion for Summary Judgment, No. 1:08-cv-01289 (JEB) (D.D.C. Dec. 10, 2013) at 14 (quoting D.C.'s Responses to Plaintiffs' First Set of Interrogatories, Pl. Ex. 2 (Resp. No. 6)) (internal quotation marks omitted).

64. *Id.* (citing Pl. Ex. 1 (Lt. Jon Shelton Deposition) 66–68). Lt. Shelton was branch commander of the D.C. Firearms Registration Section.

65. *Id.* (citing Pl. Ex. 1 (Shelton Declaration) ¶ 13; Def. Ex. J at 1–2).

cars or vehicles are not equipped with a computer that can access the firearms registry.”⁶⁶

Further, “[o]ther jurisdictions do not routinely check registrations when dispatching officers,”⁶⁷ and “[n]or do MPD officers investigating an individual routinely check whether the individual has firearms registered to him.”⁶⁸ Rather, “police officers responding to calls are trained to treat potentially violent situations as always having the potential for presence of weapons.”⁶⁹

Accordingly, the assertion that registration allows police to check on whether a firearm is present on a call was suggested by a lobbyist in favor of the legislation, copied by the drafters of a committee report as if it were reality, urged by the District in litigation, relied on by the Court of Appeals in its decision, and even reasserted by the District after the remand. It turns out to be utterly false.

*B. Requiring Registration of Long Guns Is Not a
Narrowly-Tailored Means to Achieve the Goals of Protection of
Police Officers and Crime Control*

After over thirty years of banning handguns and using a milder registration system for long guns, in 2008 the District reversed course and decided that handguns and long guns should be equally subject to the same, more onerous registration requirements. Although rifles and shotguns are rarely used in crime, the District banned the rifles and shotguns it considered to be overly dangerous “assault weapons.”⁷⁰ Long guns are not a threat to public safety at all in the *right* hands (i.e., law-abiding citizens), regardless of whether they are registered.

Seeking to justify registration of long guns, the 2012 Committee Report cited three incidents. Long guns were used by Oscar Ortega-Hernandez, who shot at the White House in November 2011, and by James Von Brunn, who shot and killed a man at the Holocaust

66. *Id.* (citing Pl. Ex. 1 (Shelton Dep.) 66–67; Pl. Ex. 3 (D.C. Police Chief Cathy Lanier Dep.) 66).

67. *Id.* (citing Pl. Ex. 1 (Shelton Dep.) 68–69; Pl. Ex. 6 (Mark Jones Dep.) 69).

68. *Id.* (citing Pl. Ex. 3 (Lanier Dep.) 67; Pl. Ex. 1 (Shelton Dep.) 64; Pl. Ex. 9; Pl. Ex. 10).

69. *Id.* (citing Pl. Ex. 1 (Shelton Dep.) 71; Pl. Ex. 6 (Jones Dep.) 68).

70. The District bans mostly large numbers of rifles as “assault weapons,” which are defined to include firearms of some seventy-five specified makes and models, or having certain generic features. D.C. CODE § 7-2501.01(3A)(A) (Supp. 2012). The Chief of Police may ban any other firearm she deems similarly dangerous. *Id.* § 7-2501.01(3A)(A)(iii); *see id.* § 7-2502.02(a)(6) (stating that assault weapons are not registerable).

Museum in June 2009.⁷¹ Neither shooter was a District resident to whom the registration laws would apply, and in any event the subject of registration had no nexus with their crimes.⁷² The murder of three in March 2010 did involve use of long guns by District residents, but again the relevance of these crimes to registration is nonexistent.⁷³

Police Chief Cathy Lanier referred to how “long guns are typically used in more rural areas, such as for hunting or recreational target shooting.”⁷⁴ Indeed, District residents use rifles and shotguns to hunt deer in the woods and ducks on the flyways of Virginia, Maryland, and other states. Subjecting such hunters to incarceration for not having their long guns registered does not protect police officers or control crime.

Hypothetically, long guns could be used in political assassinations in the District, but no such instance has occurred.⁷⁵ The type of person that would register a gun is also the type of person that would not commit assassinations, even if there were no registration requirement. And assassins are not dissuaded by gun registration laws. That said, in the District’s experience handguns are favored by actual or potential assassins, as instances from Abraham Lincoln to Ronald Reagan illustrate.⁷⁶

“With respect to long guns,” *Heller II* noted, registration laws “are novel, not historic.”⁷⁷ In the ongoing litigation, the District sought to re-litigate that holding in claiming that “[t]he historic record contains numerous references to registration laws applying to long guns,” citing three purported instances. The oldest was an 1866 Georgia law imposing a tax of \$1 for every firearm owned over the

71. 2012 COMMITTEE REPORT, *supra* note 27, at 19.

72. That is also the case with the Navy Yard murders committed on September 16, 2013, which were carried out by a non-resident with a sawed-off shotgun and a handgun taken from a murdered security guard. See Michael Isikoff et al., *Chilling Navy Surveillance Video Shows Shooter Stalking Hallways*, NBC NEWS (Sept. 25, 2013), http://usnews.nbcnews.com/_news/2013/09/25/20694290-chilling-navy-yard-surveillance-video-shows-shooter-stalking-hallways. It goes without saying that the killer was not dissuaded by the District’s registration laws.

73. 2012 COMMITTEE REPORT, *supra* note 27, at 20.

74. *Id.*

75. *Id.* The District “hosts a large presence of government and diplomatic officials. The Committee is cognizant of its duty to give law enforcement every tool to protect all citizens from violence, but also to protect these officials from assassination.” 2008 COMMITTEE REPORT, *supra* note 18, at 3.

76. 2012 COMMITTEE REPORT, *supra* note 27, at 4.

77. *Heller v. District of Columbia (Heller II)*, 670 F.3d 1244, 1255 (D.C. Cir. 2011).

number of three.⁷⁸ But that illustrated one method in which, as *Heller* noted, “[b]lack[s] were routinely disarmed by Southern States after the Civil War.”⁷⁹ Most former slaves would not have been able to afford such a tax.

The District also relied on an 1893 Florida statute empowering officials to grant a license to carry a pistol or repeating rifle.⁸⁰ However, that law was construed not to require a license to possess such firearms.⁸¹ As one judge said in a concurring opinion, “[T]he Act was passed for the purpose of disarming the negro laborers The statute was never intended to be applied to the white population”⁸²

The District further cited an 1896 law of the Republic of Hawaii requiring a license to possess a firearm.⁸³ The U.S. Bill of Rights had no application to that independent country, which was not a model of democratic rule.⁸⁴ When Hawaii became a U.S. territory in 1900, specified penal laws concerning “firearms,” possibly including this one, were repealed.⁸⁵ Hawaii did not become a state until 1959.

The District also suggested that a federal registration law reduced the use of certain long guns in crime.⁸⁶ But the only pertinent federal law has no application to long rifles and shotguns; it applies only to “sawed-off” rifles or shotguns. The National Firearms Act (NFA) requires registration of rifles with barrels under sixteen inches, shotguns with barrels under eighteen inches, or a weapon made from either with overall length of less than twenty-six inches.⁸⁷ The NFA in no way requires the registration of “long guns” as that term is commonly used.

78. Defendants’ Memorandum, *supra* note 57, at 27 n.23 (citing 1866 Ga. Laws 27–28).

79. *District of Columbia v. Heller*, 554 U.S. 570, 614 (2008).

80. Defendants’ Memorandum, *supra* note 57, at 25–26 (citing 1893 FLA. LAWS. 71–72).

81. *Watson v. Stone*, 4 So. 2d 700, 703 (Fla. 1941).

82. *Id.* (Buford, J., concurring).

83. Defendants’ Memorandum, *supra* note 57, at 25 (citing Act 64, Laws of 1896).

84. See NOENOE K. SILVA, *ALOHA BETRAYED: NATIVE HAWAIIAN RESISTANCE TO AMERICAN COLONIALISM* (2004).

85. Act To Provide a Government for the Territory of Hawaii, ch. 339, § 7, 31 Stat. 141, 142–43 (1900).

86. Defendants’ Memorandum, *supra* note 57, at 27.

87. 26 U.S.C. § 5841 (2006) (regarding registration); *id.* § 5845(a)(1)–(4). These firearms are banned in the District. D.C. CODE § 7-2501.01(15), (17) (2001); *id.* § 7-2502.02(a)(1), (3).

But the Supreme Court's holdings on the NFA—originally passed in 1934—⁸⁸ demonstrate that registration of constitutionally protected firearms violates the Second Amendment. In *United States v. Miller*, the Supreme Court considered whether requiring the registration of a short-barreled shotgun was consistent with the Second Amendment; the firearms at issue were not banned outright.⁸⁹

Based on “the absence of any evidence” of whether the weapon was “ordinary military equipment,” *Miller* held, “we cannot say that the Second Amendment guarantees the right to keep and bear such an instrument.”⁹⁰ *Heller* commented, “Had the Court believed that the Second Amendment protects only those serving in the militia, it would have been odd to examine the character of the weapon”⁹¹ Similarly, had the *Miller* Court believed that the Second Amendment is consistent with registration, it would have been odd to examine the character of the weapon rather than simply note that registration does not violate the Second Amendment.

Heller continued, “We therefore read *Miller* to say only that the Second Amendment does not protect those weapons not typically possessed by law-abiding citizens for lawful purposes, such as short-barreled shotguns.”⁹² Protect such weapons from what? Registration, as required by the NFA.⁹³ The premise, again, is that registration of common firearms would violate the Second Amendment.⁹⁴

While *Heller II* held that handguns were historically subject to certain basic registration requirements, the appropriate standard of review as applied to long guns—whether categorical, intermediate scrutiny, or strict scrutiny—should take seriously, as *Heller* held, that “the Second Amendment, like the First and Fourth Amendments, codified a *pre-existing* right.”⁹⁵ And as the Supreme

88. National Firearms Act of 1934, Pub. L. No. 474, 48 Stat. 1236.

89. *United States v. Miller*, 307 U.S. 174, 175 (1939). The NFA registration included the registrant's name, address, place of storage, and place of business; the required transfer order included identification of the transferee, fingerprints, photograph, and the identification mark of the firearm. *Id.* at 176 n.1.

90. *Id.* at 178.

91. *District of Columbia v. Heller*, 554 U.S. 570, 622 (2008).

92. *Id.* at 625.

93. 26 U.S.C. § 5841(a) (2006).

94. “After all, if registration could be required for all guns, the Court could have just said so and ended its analysis.” *Heller v. District of Columbia (Heller II)*, 670 F.3d 1244, 1294 (D.C. Cir. 2011) (Kavanaugh, J., dissenting). The opinion of the majority in *Heller II* precludes that argument only as applied to basic handgun registration.

95. *Heller*, 554 U.S. at 625.

Court elsewhere held, “If the exercise of the rights of free speech and free assembly cannot be made a crime, we do not think this can be accomplished by the device of requiring previous registration as a condition for exercising them”⁹⁶ Similarly, requiring law-abiding citizens to register firearms does not prevent criminals from committing crimes with firearms.

No state requires registration of all firearms, with the exception of Hawaii.⁹⁷ The District is an outlier jurisdiction, contrasting with forty-nine states that have deemed registration of long guns not to have any nexus to protection of police officers or crime control. As *Heller II* stated, the 2008 Committee Report did not include “even a single reference to the need for registration of rifles or shotguns,” the justification for which “might have been written in invisible ink.”⁹⁸

Finally, the District asserted that “[i]f registration is good enough for American soldiers, it should be good enough for District residents.”⁹⁹ Yet soldiers sacrifice many Bill of Rights freedoms that are guaranteed to civilians. As the Supreme Court noted, “The essence of military service is the subordination of the desires and interests of the individual to the needs of the service.”¹⁰⁰ It further held that “demonstrations, picketing, sit-ins, protest marches, political speeches and similar activities” may be constitutionally banned at military bases.¹⁰¹ A commissioned officer who uses “contemptuous words against the President” is subject to court-martial.¹⁰² Non-judicial punishment, including incarceration and reduced rations, may be imposed for minor offenses.¹⁰³ District residents would likely reject mandatory fitness testing, grooming standards, or a host of other limitations that apply to military personnel.

96. *Thomas v. Collins*, 323 U.S. 516, 540 (1945); see *Watchtower Bible & Tract Soc’y of N.Y., Inc. v. Vill. of Stratton*, 536 U.S. 150, 169 (2002) (finding it “unlikely that the absence of a permit would preclude criminals” from violating the law and invalidating a canvassing registration requirement); *Near v. Minnesota*, 283 U.S. 697, 722 (1931) (rejecting argument for prior restraint based on the possibility that unlicensed speech could “provoke assaults and the commission of crime.”).

97. “Hawaii and the District are the only states [sic] that require all firearms to be registered.” 2008 COMMITTEE REPORT, *supra* note 18, at 3; see HAW. REV. STAT. § 134-2 (2012).

98. *Heller II*, 670 F.3d at 1259.

99. Defendants’ Memorandum, *supra* note 57, at 27 n.24 (citing selected military base regulations).

100. *Goldman v. Weinberger*, 475 U.S. 503, 507 (1986) (citation omitted) (internal quotation marks omitted) (upholding Air Force ban on religious headgear).

101. *Greer v. Spock*, 424 U.S. 828, 831 (1976).

102. 10 U.S.C. § 888 (2012).

103. *Id.* § 815.

C. *The Registration Requirements Significantly Burden Second Amendment Rights*

The District's registration requirements are anything but *de minimis*. As well documented by *Washington Times* senior editor (and crime victim) Emily Miller in a series of editorials that morphed into a book, it takes many hours and plenty of effort and expense, not to mention dogged determination, to register a firearm in the District.¹⁰⁴ For instance, *Heller II* included "the mandatory five hours of firearm training and instruction" as among the requirements that "affect the Second Amendment right because they are not *de minimis*," "make it considerably more difficult for a person lawfully to acquire and keep a firearm," and thus "impinge upon that right."¹⁰⁵

In contrast, a decision upheld a prohibition on possession of a firearm with an obliterated serial number; because the provision did not ban any type of firearm or impose any other restriction, it was "arguably *de minimis*."¹⁰⁶ The law in that case was narrowly tailored based on the following: "While the intent of the District of Columbia's ban was to prevent the possession of handguns, [18 U.S.C.] § 922(k) permits possession of all otherwise lawful firearms."¹⁰⁷ But the effect, if not the intent, of the District's registration requirements is to discourage the possession of lawful firearms.

104. See generally EMILY MILLER, *EMILY GETS HER GUN* (2013). If a major portion of a book can be written on how hard it is to acquire a gun legally, it seems probable that countless citizens who are otherwise law-abiding possess unregistered firearms in D.C. Many who are poor and live in crime-ridden neighborhoods simply may not have the resources, time, or know-how to register a gun. For them, the dilemma regarding whether to have an unregistered gun reduces to whom they fear more—the thugs on their street who might rob, rape, or murder them, or the police who don't come around much but might arrest them for an unregistered gun?

105. *Heller v. District of Columbia (Heller II)*, 670 F.3d 1244, 1255–56 (D.C. Cir. 2011).

106. *United States v. Marzzarella*, 614 F.3d 85, 94 (3rd Cir. 2010).

107. *Id.* at 97.

D. The Requirements of In-Person Appearance, Fingerprinting, Bringing the Firearm to the MPD, and Re-Registration Are Unnecessary to Verify an Applicant's Eligibility to Possess Firearms

1. The National Instant Criminal Background Check System (NICS)

The nationwide standard to determine eligibility to purchase a firearm was established in 1998 by the National Instant Criminal Background Check System (NICS),¹⁰⁸ rendering local background checks obsolete. All persons who purchase a firearm from a federally licensed dealer are screened by the NICS,¹⁰⁹ which authorizes transfer of a firearm only if it would not violate federal¹¹⁰ or state law,¹¹¹ which is defined to include the District.¹¹² Established by the Attorney General, the NICS is contacted by dealers to ensure that prospective firearm purchasers are eligible under federal and state law.¹¹³ The NICS does not retain a record of the identity of the purchaser, and any system of registration of firearms or firearms owners is prohibited.¹¹⁴

The NICS accesses records maintained in the National Crime Information Center (NCIC), which is the nationwide computerized information system of criminal justice data established by the FBI as a service to local, state, and federal criminal justice agencies; the NICS also accesses records maintained in the Interstate Identification Index (III), which includes arrest records.¹¹⁵ While the NICS includes records related to all legal disabilities, the NICS Improvement Amendments Act focuses on improving the database on mental commitments.

108. 18 U.S.C. § 922(t) (2012).

109. District residents may lawfully obtain firearms only from federally licensed dealers. *See id.* § 922(a)(3) (prohibiting out-of-state transfer); *id.* § 922(b)(3) (providing that receipt of long guns from another state must be from a dealer).

110. Federal law prohibits receipt of firearms by convicted felons, domestic-violence misdemeanants, fugitives from justice, drug addicts, persons committed to mental institutions, illegal aliens, persons subject to domestic restraining orders, persons under indictment, and others. *Id.* § 922(g), (n).

111. *Id.* § 922(t)(2).

112. *Id.* § 921(a)(2).

113. Brady Handgun Violence Prevention Act, Pub. L. No. 103-159, § 103(b), 107 Stat. 1536, 1541 (1993); *see also* NICS Improvement Amendments Act, Pub. L. No. 110-180, 121 Stat. 2559 (2008).

114. Brady Handgun Violence Prevention Act § 103(i).

115. 28 C.F.R. §§ 25.2, 25.4 (2012).

The identity of a firearm transferee, who appears in person, is established for NICS checks in part by presenting a government-issued photo identification card.¹¹⁶ The NICS conducts the check based on name, sex, race, date of birth, state of residence, identifiers such as social security number and military number, and physical description.¹¹⁷ The FBI conducts NICS checks without charging a fee.¹¹⁸ The NICS renders the District's background checks for firearm acquisition redundant.

Even if the District wishes to conduct its own background checks, that does not require the permanent registration of the gun buyer, nor does it require recordation of the firearm. While it is not necessary to subject persons who passed the background check already to perpetual background checks in the future, even that could be done without any record of the specific firearms the person purchased. In short, the NICS exemplifies narrow tailoring compared to the District's broad registration scheme.

2. In-Person Appearance, Fingerprinting, and Bringing the Firearm

As provided by federal law, in-person appearance and positive identification at the premises of the federally licensed firearm dealer, together with the NICS check, screens out ineligible persons. When a person receives a firearm from a District dealer (of which there is only one), checking additional databases may be required. An in-person appearance, fingerprinting, and photographing by the MPD are not narrowly tailored. No such requirements exist under the laws of any state but Hawaii.

To register a firearm, the District requires an applicant to appear in person and be fingerprinted and photographed.¹¹⁹ This treats persons who exercise Second Amendment rights like gun offenders and sex offenders. "Gun offenders"—persons convicted of various crimes involving firearms¹²⁰—must register, but only for a period of two years.¹²¹ They must appear in person and give personal information, including fingerprints.¹²²

116. 18 U.S.C. § 922(t)(1)(C).

117. 28 C.F.R. § 25.7.

118. NICS Improvement Amendments Act § 103(f).

119. D.C. CODE § 7-2502.04(a), (b) (Supp. 2012).

120. *Id.* § 7-2508.01.

121. *Id.* §§ 7-2508.02(a), 7-2508.03.

122. *Id.* § 7-2508.02(a)(2).

Sex offenders—for whom registration may endure for various periods¹²³—include persons convicted of rape, child sex abuse, and murder while engaging in a sexual act, as well as sexual psychopaths.¹²⁴ A sex offender must register, provide personal information, be photographed and fingerprinted, and periodically verify information.¹²⁵ Knowing violation subjects an offender to a \$1,000 fine and imprisonment for 180 days,¹²⁶ which is only half the incarceration period for possession of an unregistered firearm.¹²⁷

Along with the in-person appearance, a person “may be required to bring with him the firearm for which a registration certificate is sought, which shall be transported in accordance with § 22-4504.02.”¹²⁸ Requiring the gun to be taken to the MPD creates the risk that the person may be arrested under the laws of the District, Maryland, or another state, or even confronted by a police officer who sees a “man with gun” (or a gun case).

3. Expiration and Re-registration

“Registration certificates shall expire 3 years after the date of issuance unless renewed in accordance with this section for subsequent 3-year periods.”¹²⁹ To renew a registration, the applicant must submit a statement attesting to the registrant’s possession of the registered firearm, address, and “continued compliance with all registration requirements set forth in § 7-2502.03(a).”¹³⁰ This information duplicates information already in the original registration and in any notice of changed information.¹³¹ Possession of an unregistered firearm is punishable by imprisonment for one year and a \$1,000 fine.¹³²

123. *Id.* § 22-4002.

124. *Id.* § 22-4001.

125. *Id.* § 22-4014; *see* *Gunderson v. Hvass*, 339 F.3d 639, 644–45 (8th Cir. 2003) (finding photograph and fingerprints requirements to be a minimal burden for a registered sex offender under the rational-relation test).

126. D.C. CODE § 22-4015.

127. *Id.* § 7-2507.06.

128. *Id.* § 7-2502.04(c). If transported by vehicle, the firearm may not be readily or directly accessible, or must be in a locked container. *Id.* § 22-4504.02(b). If not in a vehicle, it must be in a locked container. *Id.* § 22-4504.02(c). A locked container would always be required, even in the case of vehicle transport, for the firearm must be carried from a parking area to the MPD building.

129. *Id.* § 7-2502.07a(a).

130. *Id.* § 7-2502.07a(c).

131. *See id.* § 7-2502.08(a).

132. *Id.* § 7-2507.06.

It is unclear why this provision suddenly became compelling after the *Heller* decision in 2008, given that the District had required registration for decades without requiring re-registration. Hawaii, the only state that requires the registration of all firearms, does not provide that registrations expire and must be renewed.¹³³ Not even the National Firearms Act, which mandates registration of machineguns, requires re-registration.¹³⁴

The District could conduct new background checks at any time without causing the registrations to expire. The chance that a person who passed the NICS check has become ineligible to own a firearm is too remote to justify this burden on all lawful firearm owners.

The 2008 Committee Report promised that “re-registration may be relatively easy. The attestation of address and firearms in possession could be done by mail or on-line.”¹³⁵ The 2012 Committee Report repeated that “the re-registration process is simple — the Chief of Police will provide a form for renewal, and submission can occur either online via MPD’s website, by mail, or in person. The renewal form need not be notarized . . .”¹³⁶ It further stated that “fingerprinting is a mandatory, one-time requirement,” and that “additional fingerprinting” would not be required.¹³⁷

These commitments were broken. For re-registration, which began on January 1, 2014, the District is requiring that, besides paying more fees, the person must appear in person at MPD headquarters; submit fingerprints yet again; and confirm possession of the registered firearm, home address, and continued compliance with the registration requirements.¹³⁸ This overkill can only dissuade persons from re-registering or, indeed, from registering in the first place.

E. The Requirements to Demonstrate Knowledge of Firearm Laws and Complete a Safety and Training Course Do Not Protect Police Officers or Control Crime

Registration of a firearm requires an applicant “to demonstrate satisfactorily, in accordance with a test prescribed by the Chief, a knowledge of the laws of the District of Columbia pertaining to

133. HAW. REV. STAT. § 134-3 (2007).

134. 26 U.S.C. § 5841 (2006).

135. 2008 COMMITTEE REPORT, *supra* note 18, at 4.

136. 2012 COMMITTEE REPORT, *supra* note 27, at 11.

137. *Id.* at 8.

138. METRO. POLICE DEPT, NOTICE OF PROPOSED RULEMAKING, RENEWAL OF FIREARM REGISTRATION 14–15 (2013), available at <http://dcregs.dc.gov/Gateway/RuleHome.aspx?RuleID=1258495>.

firearms and, in particular, the requirements of this act, the responsibilities regarding storage, and the requirements for transport.”¹³⁹ Further, the Chief must determine that the applicant has “completed a firearms training and safety class” offered by the Chief, or has submitted evidence of training from the U.S. military, another state, or otherwise by an instructor.¹⁴⁰

No state requires training or a written test for the mere possession of a firearm. Some states require training or an exam for issuance of a permit to carry a concealed handgun, or even to purchase a handgun. But people exercise the right to “keep arms” for other reasons, *e.g.*, for home defense, hunting, sale, or as an inheritance.¹⁴¹ It is not evident that firearms training or testing protect police officers or control crime, nor is it evident that such requirements are any more permissible than hypothetical training and tests to exercise the right to vote.¹⁴²

F. Failure to Display a Registration Certificate Does Not Indicate that a Person Is Not Law-Abiding

Each registrant must “have in the registrant’s possession, whenever in possession of a firearm, the registration certificate, or exact photocopy thereof, for such firearm, and exhibit the same upon the demand of a member of the Metropolitan Police Department, or other law enforcement officer.”¹⁴³ Registrants may be penalized and may lose their Second Amendment rights altogether for failing to exhibit a registration certificate upon the demand of a law enforcement officer.¹⁴⁴

139. D.C. CODE § 7-2502.03(a)(10) (Supp. 2012); *see Firearms Safety Training Course*, METRO. POLICE DEPT, <https://dcfst.mpdconline.com/> (last visited Mar. 25, 2014).

140. D.C. CODE § 7-2502.03(a)(13). Training is required even for a person who wishes merely to possess a firearm—as an inheritance or collector’s item, to preserve it for descendants, or to accomplish some other lawful purpose—and not for discharge or other actual use.

141. *District of Columbia v. Heller*, 554 U.S. 570, 583, n.7 (2008).

142. *See Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 189 (2008) (stating that “even rational restrictions on the right to vote are invidious if they are unrelated to voter qualifications”); *City of Mobile v. Bolden*, 446 U.S. 55, 83 (1980) (Stevens, J., concurring) (arguing that “practices such as poll taxes or literacy tests . . . deny individuals access to the ballot”).

143. D.C. CODE § 7-2502.08(c).

144. Besides being arrested on the spot, a registrant is subject to “(1) a civil fine of \$100 for the first violation or omission of the duties and requirements imposed by this section”; (2) for the second violation or omission, a civil fine of \$500, revocation of the registration, and prohibition of possessing or registering a firearm for five years;

Persons who register firearms are not likely to use them in crime—nor are the overwhelming number of American gun owners whose state laws do not subject them to registration requirements. Does a registration certificate enable a police officer to distinguish between a registered owner who is legally transporting a firearm and someone who is transporting an illegal firearm? Given that generally an “illegal firearm” just means an unregistered firearm, this is just a variation of the District’s circular rationale that making unregistered guns illegal allows police to arrest persons for illegal guns.¹⁴⁵

G. Reporting Requirements Are Not Substantially Related to Protection of Police Officers and Crime Control

A registrant is required to notify the Chief in writing immediately of the loss, theft, or destruction of a firearm; of any change in name or address; and of the sale, transfer or other disposition of the firearm within two business days.¹⁴⁶ Failure to do so subjects the registrant to the same penalties as not having the registration certificate in one’s possession.¹⁴⁷ Thus, one may be deprived of Second Amendment rights for failure to notify the Chief of a change in the registrant’s name or address.

Do the notification requirements prevent the diversion of firearms to prohibited persons? The types of persons who register firearms would not divert them to prohibited persons without regard to any notification requirement.

H. The District’s Prohibition on Registering More than One Pistol in Thirty Days Does Nothing to Prevent Illegal Trafficking

“The Chief shall register no more than one pistol per registrant during any 30-day period,” with an exception for new residents.¹⁴⁸ The 2012 Committee Report asserts that “laws restricting the number of firearms purchased prevent gun traffickers from purchasing guns in bulk sales to in turn sell those guns to prohibited

and (3) for the third violation or omission, a civil fine of \$1,000, revocation of the registration, and a permanent prohibition on possessing or registering any firearm. *Id.* § 7-2502.08(e).

145. *Heller v. District of Columbia (Heller II)*, 670 F.3d 1244, 1258 n* (D.C. Cir. 2011).

146. D.C. CODE § 7-2502.08(a).

147. *Id.* § 7-2502.08(e).

148. *Id.* § 7-2502.03(e).

purchasers.”¹⁴⁹ Similarly, the 2008 Committee Report avers, “Jurisdictions with weaker firearms laws may attract gun traffickers who make multiple purchases and resell the guns in jurisdictions with stronger firearms laws.”¹⁵⁰ An obvious question remains unanswered: Why would a person bring in a firearm from another state, register it, and then “traffic” it, instead of just bringing it in and “trafficking” it directly?

I. *The Financial Burdens of Registration Are Significant*

The financial burden to register and re-register firearms is significant, particularly to the poor. The District charges \$48 to register a firearm, which includes a registration fee of \$13 and a fingerprinting/FBI background check fee of \$35.¹⁵¹ Re-registration requires payment of the very same fees all over again.¹⁵² The expenses include not only the formal fees to register, be fingerprinted, and to meet other requirements, but also transportation costs of repeated trips to the MPD, the opportunity costs stemming from time off work, and the like.

To be sure, the Second Circuit upheld New York City’s \$340 fee for a three-year residential handgun license as not violative of the Second Amendment.¹⁵³ In doing so, it purported to rely on the Supreme Court’s decision in *Cox v. New Hampshire*, which held that fees could be required for a parade permit for the “public expense of policing the spectacle” and “the maintenance of public order.”¹⁵⁴ However, the *Cox* Court reiterated the Court’s previous decision in *Lovell v. Griffin*—that a law prohibiting the distribution of literature “at any time, at any place, and in any manner without a permit” would “stri[k]e at the very foundation of the freedom of the press by subjecting it to license.”¹⁵⁵ Similarly, the District prohibits possession of a firearm at any time, at any place, and in any manner without registration.

The Supreme Court has held that “[a] state may not impose a charge for the enjoyment of a right granted by the federal

149. 2012 COMMITTEE REPORT, *supra* note 27, at 14.

150. 2008 COMMITTEE REPORT, *supra* note 18, at 10.

151. METRO. POLICE DEPT, DISTRICT OF COLUMBIA FIREARMS REGISTRATION: GENERAL REQUIREMENTS GUIDE 8 (2013), available at http://mpdc.dc.gov/sites/default/files/dc/sites/mpdc/publication/attachments/firearms_reg_req.pdf.

152. METRO. POLICE DEPT, FIREARMS REGISTRATION RENEWAL: COMPLETE RENEWAL PROCEDURES, available at <http://mpdc.dc.gov/node/750552>.

153. *Kwong v. Bloomberg*, 723 F.3d 160, 165–69 (2d Cir. 2013).

154. *Cox v. New Hampshire*, 312 U.S. 569, 576–77 (1941).

155. *Id.* at 577 (citing *Lovell v. Griffin*, 303 U.S. 444, 451 (1937)).

constitution.”¹⁵⁶ And it commented about a poll tax that “wealth or fee paying has . . . no relation to voting qualifications; the right to vote is too precious, too fundamental to be so burdened or conditioned.”¹⁵⁷ The same applies to exercise of the right to keep arms.¹⁵⁸

It goes without saying that the District’s fees are for “services” that are wholly unnecessary. Persons who purchase firearms after background checks by NICS, which charges no fee, are capable of quietly keeping their firearms in their homes without any expense to the public. The District may not condition exercise of a fundamental constitutional right in one’s home on a burdensome registration regime and then justify imposing “administrative costs” to pay for it.

J. The Vision Requirement

To register a firearm, an applicant must show that she “[i]s not blind.”¹⁵⁹ In “remanding other registration requirements to the district court,” the appellate court referred in part to the “vision standard” and added that “we see no reason to foreclose these particular plaintiffs from fleshing out their arguments as well as supplementing the record.”¹⁶⁰ Because of age and other factors, anyone may face blindness and need to plan accordingly for the uncertainties that condition may entail.

The 2012 Committee Report asserted a “correlation between not being blind and being able to handle a firearm safely, especially for defense in the home.”¹⁶¹ But registration is required for mere possession, not handling, of a firearm, and a blind person is entitled to possess a firearm, even if it is just locked in a safe to keep for a grandchild. The District is not entitled to confiscate private property

156. *Murdock v. Pennsylvania*, 319 U.S. 105, 113 (1943).

157. *Harper v. Va. State Bd. of Elections*, 383 U.S. 663, 670 (1966).

158. While invidious voting restrictions were historically based on race, so too were firearms restrictions. *See* Code of Laws for the District of Columbia: Prepared Under the Authority of the Act of Congress of the 29th of April 1816, at 290–91 (Wash., D.C., Davis & Force 1819) (providing that “no slave shall . . . keep nor carry away any gun”); *id.* at 300 (applying the gun prohibition to any “negro or mulatto”); *see also* LETITIA W. BROWN, *FREE NEGROES IN THE DISTRICT OF COLUMBIA, 1790–1846* 140 (1972) (explaining that free blacks were “prohibited from voting . . . and from bearing arms”).

159. D.C. CODE § 7-2502.03(a)(11) (Supp. 2012).

160. *Heller v. District of Columbia (Heller II)*, 670 F.3d 1244, 1256 n.* (D.C. Cir. 2011).

161. 2012 COMMITTEE REPORT, *supra* note 27, at 17.

because a person turns blind, whether that private property is a car stored in a garage or a firearm stored in a safe.

CONCLUSION

In sum, the District cannot show that registration of long guns protects police officers or controls crime. Even if a simple registration requirement for handguns passes constitutional muster, as *Heller II* held, the District's complex procedures do not. No state imposes requirements as onerous as the District's. These burdensome requirements appear calculated to discourage persons from registering firearms at all and, for those who do so, to snare them with expiration and re-registration deadlines that, if missed, would turn them into criminals.

As is obvious, this Article sets forth the plaintiffs' perspective in what the eventual outcome of this litigation should be, but does not predict what the outcome will be. Both the majority and dissenting opinions by the D.C. Circuit in *Heller II* are the most thorough analyses of any court on whether firearm registration is consistent with the Second Amendment, and the post-remand litigation has put the registration system under a microscope as never before. Pending subsequent decisions, hopefully this Article will provoke further analysis and scholarship on the extent to which the registration of firearm owners is consistent with the Second Amendment.