

# Legislative Analysis

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## **FIREARMS: DEFINE "BRANDISH"**

**House Bill 5091 (Substitute H-1)**  
**Sponsor: Rep. Joel Johnson**

**House Bill 5092 (Substitute H-1)**  
**Sponsor: Rep. Brandon Dillon**

**Committee: Judiciary**  
**First Analysis (3-12-14)**

**BRIEF SUMMARY:** House Bill 5091 would revise the prohibition on brandishing a weapon in public. House Bill 5092 would define the term "brandish."

The bills are tie-barred to each other, meaning that neither could take effect unless both are enacted into law.

**FISCAL IMPACT:** The bills would not have fiscal implications for state or local units of government.

### ***THE APPARENT PROBLEM:***

According to a Legal Update by Michigan State Police, Michigan statute does not specifically permit the open carrying of firearms in public, but it doesn't clearly prohibit it either. (There are limits on the premises where firearms can be carried and on the kind of weapons.) The Legal Update also states that "it is legal for a person to carry a firearm in public as long as the person is carrying the firearm with lawful intent and the firearm is not concealed." Legislation enacted in 1990 prohibited "brandishing" a firearm in public, but did not define the term "brandishing." An analysis prepared by the former House Legislative Analysis Section (subsequently merged with the House Fiscal Agency) indicates that the legislation was part of a package to strengthen gun control while at the same time taking away the authority of local units of government to enact local gun control ordinances.

In 2002, an Attorney General Opinion stated that a reserve police officer "when carrying a handgun in a holster in plain view is not waving or displaying the firearm in a threatening manner. Thus, such conduct does not constitute brandishing a firearm in violation of Section 234e of the Michigan Penal Code." Several years later, a Michigan State Police Legal Update cited the AG Opinion as guidance and applied it to any person carrying a handgun in a holster (No. 86, October 26, 2010) and said, as noted above, that a person can carry a firearm in public as long as it is carried with lawful intent and not concealed.

Some believe that the law needs further clarification to protect gun owners who want to openly carry firearms in public from undue prosecution.

## ***THE CONTENT OF THE BILLS:***

Currently, the Michigan Penal Code prohibits a person from knowingly brandishing a firearm in public, but does not define the term "brandish."

House Bill 5092 would amend the code (MCL 750.222) to define the term "brandish" to mean intentionally point, wave about, or display in a threatening manner that would induce fear in a reasonable person.

House Bill 5091 would amend the code (MCL 750.234e) to revise the prohibition on brandishing a firearm to prohibit a person from *wilfully* and knowingly brandishing a firearm in public.

There is currently an exception from the brandishing prohibition for a peace officer lawfully performing duties as a peace officer and also for a person *lawfully engaged* in hunting; target practice; or the sale, purchase, repair, or transfer of that firearm. The bill would:

- Retain the exemption for a peace officer.
- Eliminate the exemptions for a person lawfully engaged in hunting; target practice; or the sale, purchase, repair, or transfer of that firearm.
- Add an exemption for a person lawfully acting in self-defense or defense of another under the Self-Defense Act (MCL 780.971-780.974)

A violation of the brandishing prohibition is a misdemeanor punishable by imprisonment for not more than 90 days and/or a fine of not more than \$100.

## ***ARGUMENTS:***

### ***For:***

For the first time, the term "brandishing" would be defined in law in a manner consistent with dictionary definitions, federal court opinions, and a state AG opinion. In addition, House Bill 5091 would clearly authorize a person to point a firearm when acting in self-defense or when defending another from imminent harm. House Bill 5092 uses the "reasonable person standard," a standard well established in case law, as a threshold for when conduct by a person carrying a firearm crosses the line and becomes menacing. Together, the bills should provide the clarity currently lacking in law and prevent harassment by law enforcement officers or prosecutors when law abiding citizens are carrying firearms in a lawful and non-threatening manner.

### ***Against:***

The bills appear to be in direct contradiction to the original intent of the prohibition on brandishing a firearm in public. Prior to legislation enacted in 1990, local governments had the authority to adopt and enforce gun control ordinances. The brandishing prohibition was part of a measure enacted at the same time to strengthen gun control statewide. The only lawful carrying of firearms in public (non-brandishing) was when a

person was hunting; target practicing; or actively engaged in the sale, repair, or purchase of a firearm.

Further, the bills are still problematic. The definition of "brandishing" in House Bill 5092 does not appear to require that a firearm be enclosed in a holster or secured in any way, just that a person doesn't "wilfully" point it, wave it about, or display it in a manner that a reasonable person would experience fear. Does this mean that a person could walk around with a long gun in one hand as long as it was pointed at the ground or the sky? And how is a "reasonable person" not going to be fearful when it only takes a second to go from that stance to brandishing to firing the weapon?

Moreover, it is not clear if the bills will resolve the current confusion exhibited by gun owners, the general public, and law enforcement as to the lawful carrying of firearms, or make things worse. At the very least, the penalty for a violation should be increased to a maximum penalty of 93 days imprisonment. That way, if law enforcement is called by a citizen who felt threatened, there would be a way for the officers to ascertain if the person had any prior criminal convictions that would make possessing a firearm unlawful or that the person had no unlawful intent. It also would enable law enforcement agencies to track repeat offenders. (Offenses with a maximum penalty of less than 92 days imprisonment do not trigger a check of the national fingerprint databases, nor is a conviction permanently stored in LEIN.)

***Response:***

It should be noted, however, that public attitudes, legal interpretations, and the political climate regarding the issue of guns has changed considerably since 1990, and so the "original intent" of legislation from that era may not be relevant to definitions of "brandishing" or the carrying of firearms in general. This bill will represent the intent of the law and legislature as it stands today.

***POSITIONS:***

A representative of Michigan Open Carry testified in support of the bills. (2-27-13)

The Michigan State Police indicated a neutral position on the bills. (2-27-13)

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■ This analysis was prepared by nonpartisan House staff for use by House members in their deliberations, and does not constitute an official statement of legislative intent.