

1 UNITED STATES DISTRICT COURT
2 EASTERN DISTRICT OF LOUISIANA
3 NATIONAL RIFLE ASSOCIATION
4 OF AMERICA, INC, ET AL CIVIL ACTION NO. 05-4234

5 NEW ORLEANS, LOUISIANA
6 VERSUS WEDNESDAY, AUGUST 16, 2006
7 C. RAY NAGIN, ET AL 9:30 A.M.

8 SECTION "J"

9 MOTIONS

10 BEFORE THE HONORABLE CARL J. BARBIER

11 UNITED STATES DISTRICT COURT JUDGE

12 APPEARANCES:

13 FOR THE PLAINTIFF, DANIEL D. HOLLIDAY,III
STEPHEN P. HALBROOK
14 LONG LAW FIRM
4041 Essen Lane
15 Suite 500
Baton Rouge, LA 70809
16 (225)922-5110

17 FOR THE DEFENDANT, JOSEPH VINCENT DIROSA, JR.
1300 Perdido Street
18 Room 5E01
New Orleans, LA 70112
19 (504)658-9800

20 REPORTED BY: WENDY C. RICARD, CCR, RPR
OFFICIAL COURT REPORTER
21 500 Poydras Street

22 Room HB-406
New Orleans, LA 70130
(504)589-7781

23 Proceedings recorded by mechanical stenography.

24 Transcript produced by computer-aided transcription.

25

2

1 P-R-O-C-E-E-D-I-N-G-S

2 THE COURT: Call the next matter.

3 THE DEPUTY CLERK: Civil action 05-4234, National

4 Rifle Association of America, Incorporated, et al, versus

5 Nagin, et al.

6 THE COURT: Mr. DiRosa, this must be the City of

7 New Orleans week here.

8 MR. DIROSA: Yes, it is.

9 THE COURT: Okay. Counsel, you can make your

10 appearances.

11 MR. HOLLIDAY: Good morning, Your Honor. Dan
12 Holliday here on behalf of the National Rifle Association
13 and the Second Amendment Foundation.

14 THE COURT: Good morning.

15 MR. HOLLIDAY: And this is my co-counsel, Steve
16 Halbrook. He'll be making the argument today.

17 MR. HALBROOK: Good morning, Your Honor.

18 THE COURT: Good morning.

19 MR. DIROSA: Joseph DiRosa on behalf of Mayor C. Ray
20 Nagin and Warren Riley, Superintendent of Police.

21 THE COURT: Okay. All right. This matter is before
22 the Court this morning on motion by defendants, Mayor Nagin
23 and Superintendent Riley, motions to dismiss 12.B(1) for
24 lack of subject matter jurisdiction and then the 12.B(6),
25 failure to state a claim.

3

1 Mr. DiRosa, it's your motion. Even if I agreed with

2 your view of this Second Amendment issue, how would that lead
3 to a total dismissal of this case? The plaintiffs allege
4 Fourth Amendment and Fourteenth Amendment claims, due process
5 and unreasonable search and seizures haven't they?

6 MR. DIROSA: Yes, they have.

7 THE COURT: Basically, they've alleged, as I
8 understand it, that some of them at least were in their homes
9 after the -- or on their property at some point after the
10 hurricane, and, with no probable cause, their weapons were
11 seized by the police department.

12 MR. DIROSA: Judge, there is no factual allegation
13 of any individual who had their weapons seized as a result of
14 any of the actions of either the mayor or the police chief at
15 the time. They have made references, but they have not
16 pointed to any individual who has had this actually occur to
17 them, and, more importantly, they haven't referred to any
18 individual who is a member of any of their organizations who
19 has had this occur to them. The only individual, the only
20 factual allegation, involves a man named Buell Teel was in St.
21 Tammany Parish at the time that the factual allegations
22 occurred, and his part of the case has been resolved.

23 THE COURT: All right. Well, let's talk about your

24 motions. You raise the issue of federal subject matter
25 jurisdiction. How can there not be federal subject matter

4

1 jurisdiction when the plaintiffs are alleging claims under the
2 Second Amendment, Fourth Amendment, Fourteenth Amendment? I
3 think what you're really arguing is failure to state a claim
4 and not subject matter jurisdiction. In other words,
5 if I find they don't have a claim under the Second Amendment,
6 that's different from lack of subject matter. I've got
7 jurisdiction it seems to me to decide that.

8 MR. DIROSA: Except that subject matter jurisdiction
9 can be mixed questions of law. In fact, the only fact you
10 need is that the City of New Orleans is a municipality. Once
11 you've recognized that fact, then, you can have no Second
12 Amendment claim against a municipality. That's a 125-plus
13 years of jurisprudence that says that cannot occur.

14 THE COURT: That what cannot occur?

15 MR. DIROSA: That you cannot have a Second Amendment

16 claim against a municipality. In fact, recently in the
17 Emerson case, the Fifth Circuit recognized exactly that, a
18 2001 case -- if I had my papers in line a little bit better,
19 I'd have that in front of me -- but the Fifth Circuit
20 recognized that saying the Second Amendment is the limitation
21 only upon the power of Congress and the national government
22 and not upon that of the state so that every other claim flows
23 from some allegation, something involving the Second
24 Amendment. But in order for --

25 THE COURT: But maybe so. Even if you're right on

5

1 that -- and I'm not sure I agree with you -- but even if you
2 are right, it doesn't give the state or the city the power to
3 enter someone's home with no probable cause, no cause
4 whatsoever, and start seizing weapons does it?

5 MR. DIROSA: Except that when -- in order for the
6 National Rifle Association or the Second Amendment Foundation
7 to bring that kind of action, it has to have standing. First

8 when it's -- the requirements are when its members would have
9 standing to sue in their own right, that would be present
10 under the seizure of the weapons; when the interest at stake
11 are germane to the organization's purpose and when neither of
12 the claim asserted or relief requested requires individual
13 participation in the lawsuit.

14 Well, in this -- again, in this instance, they have
15 alleged no factual allegation that any instance -- that they
16 can point to. They have made general allegations, but there's
17 no factual allegation that any instance occurred involving any
18 identifiable member of their organization who had his weapons
19 seized as a result of the actions of the city government.

20 And I think this was set once before, Your Honor.

21 THE COURT: Yeah. You all left this --

22 MR. DIROSA: And we just re-filed everything --

23 THE COURT: Telling me you were going to work this
24 out. So, obviously, you didn't work it out. What happened
25 with what you all were trying to do?

1 MR. DIROSA: Well, we -- that's the other thing.
2 We are ready to return any weapons. There is a procedure
3 setup for people to have weapons returned to them. We don't
4 want to keep the weapons. We weren't keeping them. It was a
5 reasonable time, place, and manner restriction given the
6 circumstances that occurred down here. Similar to if you are
7 boarding an airplane and you can't now bring hair lotion or
8 tonic and you forfeit those items. Those are reasonable time,
9 manner, and place restrictions based upon the circumstances.
10 That's what we did. Obviously, we're not seizing any weapons
11 anymore, and whatever weapons were taken are ready to be
12 returned.

13 You know if you look at a situation -- if what the
14 plaintiffs want to occur in this case, what happens during an
15 emergency when we are boarding thousands of people on buses
16 and are told that we cannot seize the weapons from any of the
17 people who are being evacuated on buses because there's a
18 prohibition against us seizing those weapons. So everybody
19 gets on the bus with whatever weapons they feel like they want
20 to carry on the bus, and we send them off to Houston or
21 Memphis or whatever armed to the teeth while the people who

22 filed the suit go sit in their bed, click on CNN, and say what
23 a horrible time we're having down here in New Orleans.

24 THE COURT: All right. Let me hear from -- who's
25 going to make the argument for the other side?

7

1 MR. DIROSA: I think Mr. Halbrook.

2 THE COURT: Mr. Halbrook.

3 MR. HALBROOK: Yes, Your Honor.

4 THE COURT: What exactly -- remind me again what
5 exactly are you asking me to do in this lawsuit -- asking the
6 Court to do in this lawsuit? My understanding is that the
7 policy -- if there ever was such a policy, it no longer
8 exists. It's been rescinded. And the city says they're
9 prepared to return whatever firearms might have been seized by
10 someone might still be in their custody and can be identified,
11 meaning the owner can be identified. So what is it that you
12 want the Court to do beyond that in this lawsuit?
13 MR. HALBROOK: Well, one thing, Your Honor, we'd

14 like to do is some discovery, and, to do the discovery, we've
15 got to get past the motion to dismiss so they can file an
16 answer, and we can get the case on a normal track, and then
17 we can determine to what extent -- if we want a permanent
18 injunction against any future confiscation and, also, we need
19 to have the firearms returned to their owners. We have been --

20 THE COURT: Well, isn't there even a new state law
21 that prohibits this from happening again?

22 MR. HALBROOK: Yes, Your Honor.

23 THE COURT: And I think Congressman Jindal is about
24 to pass a federal law doing the same thing, too.

25 MR. HALBROOK: Yes, Your Honor. There is federal

8

1 legislation pending, as well.

2 THE COURT: Why would you need a permanent
3 injunction? The city says we're not doing it. We're not
4 going to do it. There is a state law that is probably going
5 to be a federal law shortly. I'm just trying to figure why

6 would we even need to think about a permanent injunction.

7 MR. HALBROOK: Well, when the state law passed, the
8 superintendent of police made statements to the press that
9 they would be seizing firearms. That's outside the record,
10 but that's why we're before the Court wanting a permanent
11 injunction and also we might need the Court's assistance in
12 implementing the return policy. As you know, there's a
13 consent order now that they will return the firearms, but it
14 hasn't been implemented very well, and we want to do discovery
15 to find out what the problem is and to assist if we can.

16 THE COURT: Well, I thought it was setup, and they
17 made announcements that here's the weapons. Here come get
18 them. You've just got to prove that you own them.

19 MR. HALBROOK: That's getting into the details.
20 There's no real announcement made over the New Orleans
21 website. There's been no notice sent out to owners even when
22 they have the names and addresses. People have showed up to
23 get their firearms returned, and they even had serial numbers,
24 and they were turned away. So this is getting into the kind
25 of details, though, that we need to do discovery on and try to

1 also work with the city to try to move it forward, but, to do
2 that, that's not something we want to put before the Court
3 today, all these facts about why we need this relief when --

4 THE COURT: No. I understand it doesn't directly
5 pertain to the arguments here today. I was just curious as to
6 what was going on because I thought this had all been worked
7 out. Okay.

8 MR. HALBROOK: And we are continuing to --

9 THE COURT: Let's talk about the Second Amendment
10 and the jurisdiction of the Court now.

11 MR. HALBROOK: Yes, Your Honor. Under the Fifth
12 Circuit precedent of Williamson versus Tucker, the Court takes
13 jurisdiction, and the next -- if it's a plausible federal
14 claim and this is. It's the Second and Fourteenth Amendment,
15 just like our count four of the Fourth and Fourteenth
16 Amendment, and so, then, the issue gets into whether there's a
17 cause of action that's been alleged here, and that's never
18 been decided whether the Second Amendment is incorporated into
19 the Fourteenth Amendment has never been decided.

20 The Emerson case, the quotation that was referred to
21 by counsel a moment ago was from the Cruikshank case, and
22 Emerson, itself, said, however, that this issue has never been
23 resolved and that if the logic of the Supreme Court cases on
24 incorporation were to be followed that the Second Amendment
25 would be incorporated as well. When you look at the last

10

1 Supreme Court case on this matter, the issue was whether the
2 Second and Fourth Amendment directly apply to the states, and,
3 of course, the Supreme Court said, no. That was Miller versus
4 Texas, and the Court said that whether the Fourteenth
5 Amendment, privileges and immunity clause, incorporate the
6 Second and Fourteenth Amendment is something that we're not
7 deciding because it was not raised in the court below. Now,
8 that case came after Cruikshank and Presser which is the other
9 two other 19th Century cases on that point.

10 So we submit that Your Honor ought to decide that
11 issue in terms of whether there is a sufficient cause of

12 action stated when the Second and Fourteenth Amendment are
13 being alleged in this context. Although, we would add that
14 the Court has supplemental jurisdiction on the issue of the
15 right to bear arms because of Article I, Section 11 of the
16 Louisiana Constitution.

17 And, then, our other argument, we're just baffled by
18 the claim that counts two, three, and four have no basis
19 because count one supposedly does not, our due process, equal
20 protection, and Fourth Amendment claims clearly state -- well,
21 there's clearly federal jurisdiction, and they clearly state
22 causes of action.

23 THE COURT: Your complaint alleges -- I don't have
24 it right here in front of me. Your complaint alleges what
25 with respect to the Fourth and Fourteenth Amendment?

11

1 MR. HALBROOK: On the Fourth and Fourteenth
2 Amendment, it would be that law enforcement officers came up
3 to the citizens pointing guns at them and demanding that if

4 they had any guns that they had to turn them over. So they
5 temporarily seized their property.

6 THE COURT: On private property or in the street or
7 both or what?

8 MR. HALBROOK: In many contexts, Your Honor. It was
9 both in the context of houses. It was in the context of
10 automobiles where people were leaving, fleeing, and they had
11 their baggage in the trunks of their cars, and they were
12 taking -- they were stopped and asked if they had any
13 firearms, and, then, the firearms were seized from them
14 where they were unpacking them from their baggage. It was
15 not just in the context of people on the street wandering
16 around and looting or something. We're talking about people
17 who were obviously law-abiding citizens, and they were just
18 trying to either remain in their homes or trying to leave.
19 This happened in boats, also. People were either leaving in
20 boats or were in boats for other reasons.

21 The Fifth Circuit case of Augustine versus Doe is
22 right on point. In that case, law enforcement officers came
23 up to a man and pointed a shotgun at him and demanded his dog
24 and seized his dog, and Judge Wisdom's opinion says there is

25 claim for relief there. That same precedent, in fact, applies

12

1 to our due process claim because liberty was interfered with
2 and property was seized without due process of law, and, once
3 again, the Augustine precedent applied to that situation.

4 THE COURT: Okay.

5 MR. HALBROOK: Thank you, Your Honor.

6 THE COURT: Does anybody else want to say anything?

7 MR. DIROSA: In resetting this for hearing, I have
8 just printed out and refiled my original motion. The
9 plaintiffs have printed out and refiled their original
10 opposition --

11 THE COURT: Both of you just cluttered up the
12 record unnecessarily.

13 MR. DIROSA: Exactly. And I just wanted to point
14 out that we did address some of this in a reply memorandum
15 that was filed when this was originally set which, through my
16 own oversight, I failed to file a second time so that that

17 reply -- we would ask you to take the time to take a look at
18 that reply before you rule, but, also, again, from -- if you
19 read the complaint, there is not a single identifiable person
20 who is a member of any of these organizations that -- the
21 rights that we're talking be about --

22 THE COURT: But I didn't understand your motion to
23 be one directed to standing. It sounds like what you're
24 arguing now is that they lack standing; is that what you're
25 suggesting?

13

1 MR. DIROSA: Yes.

2 THE COURT: Was that the basis of your motion? I
3 don't recall that being the basis of your motion.

4 MR. DIROSA: It is briefed in our reply memorandum,
5 that these due process claims, these equal protection claims,
6 and these search and seizure claims -- there is not a single
7 factual allegation that these -- are specific that identifies
8 this as being associated with any of their members and that

9 the city was responsible for those particular actions. You've
10 got to remember there were many groups down here during that
11 time. But I think that the National Rifle Association has to
12 have interest -- their interest --

13 THE COURT: There were many groups down here at the
14 time, but it was my understanding that they were operating
15 under the mayor's emergency declaration and the orders of the
16 mayor and/or the chief of police in this respect weren't they?

17 MR. DIROSA: I guess we were probably, yes, the
18 center of authority at that time, but the fact is that they
19 cannot -- all of these claims that are left if you take out
20 the Second Amendment claim, which I think clearly does not
21 apply -- again, I go back to jurisdiction because the --

22 THE COURT: Why do you say it clearly does not
23 apply? The Supreme Court has never directly said that, right?

24 MR. DIROSA: It does not apply -- there is not a
25 single case that applies to a municipality.

1 THE COURT: Well, maybe not. There's not a
2 controlling case that says it doesn't apply either through the
3 Fourteenth Amendment. The old cases you cited, the
4 Cruikshank case and all didn't consider that issue, right?

5 MR. DIROSA: No.

6 THE COURT: There is a question of whether the
7 Second Amendment applied directly to the states, and,
8 obviously, it doesn't. It says what it says. It says
9 Congress shall not whatever, whatever.

10 MR. DIROSA: Uh-huh.

11 THE COURT: So the issue is -- which does seem to be
12 at least Supreme Court level an open question as to whether
13 the Second Amendment is incorporated in the Fourteenth
14 Amendment.
15 The Fifth Circuit did say in Emerson that -- and it certainly
16 seems to be at odds with some of the other circuit courts, at
17 least in the Fifth Circuit. My impression is that Emerson
18 says that the rights that flow under the Second Amendment are
19 individual rights as opposed to -- you know, there are several
20 different theories of what was meant by the Second Amendment
21 right to bear arms, whether it's a collective right, well-
22 armed militia and so forth or whether it gives you an

23 individual right, and Emerson said it's an individual right;
24 isn't that correct?

25 MR. DIROSA: Uh-huh. Correct.

15

1 THE COURT: Okay. That being the case, it seems at
2 least to me it's arguable that the Supreme Court now might --
3 this Supreme Court today -- if they agree with the Fifth
4 Circuit on that, they might well find it used the same logic
5 that incorporates the rest of the Bill of Rights into the
6 Fourteenth Amendment. I don't know that that's been
7 definitively decided one way or the other is what I am saying.

8 MR. DIROSA: Okay.

9 THE COURT: So I'm going to deny your motion. I
10 think the Court does have jurisdiction. I think that the
11 plaintiff has stated a claim, and so I'm going to deny these
12 motions. You all have engaged, I suspect, in some kind of
13 informal discovery is what it sounds like, but no formal
14 discovery; is that correct?

15 MR. DIROSA: That's correct, Judge.

16 MR. HALBROOK: That's correct because we're not to
17 the point where we're at issue. There's been no answer filed.

18 THE COURT: Oh, I see. You haven't filed your
19 answer yet.

20 MR. DIROSA: Correct.

21 THE COURT: Well, I think under our rules, now, you
22 have 10 or 20 days from the date of today. I forget what the
23 rules say. It's either 10 or 20 days from today to file your
24 answer, Mr. DiRosa, and, then, I guess we'll do a -- we
25 haven't done any kind of scheduling order in this case, right?

16

1 MR. DIROSA: No, sir.

2 MR. HALBROOK: No, sir.

3 THE COURT: The next step after you file your answer
4 will be you'll get a call from my case manager, Eileen, and
5 she'll do a phone conference and scheduling order. Okay.

6 MR. HALBROOK: Yes, Your Honor. Thank you, Your

7 Honor.

8 MR. DIROSA: Thank you, Judge.

9 THE COURT: Okay.

10 [END OF PROCEEDINGS]

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19

CERTIFICATE

I, Wendy C. Ricard, Official United States Court Reporter in and for the Eastern District of Louisiana, do hereby certify that the foregoing proceedings were taken down by me in shorthand at the time and place aforesaid, transcribed under my personal direction and supervision, and that the preceding pages represent a true and correct transcription, to the best of my ability and understanding.

Wendy C. Ricard, CCR, RPR
Official U.S. Court Reporter

20

21

22

23

24

25