"ONLY LAW ENFORCEMENT WILL BE ALLOWED TO HAVE GUNS": HURRICANE KATRINA AND THE NEW ORLEANS FIREARM CONFISCATIONS

*by Stephen P. Halbrook**

INTRODUCTION

When Hurricane Katrina hit New Orleans in 2005, the police declared that only law enforcement would be allowed to have guns and that lawfully-possessed firearms would be confiscated from civilians. Police proceeded to seize firearms at gunpoint from persons in their motor vehicles, boats, houses, and business premises. Citizens were left without protection in a city besieged by looters and criminals.

The National Rifle Association (NRA) filed suit in federal court against New Orleans Mayor Ray Nagin and obtained a preliminary injunction against any further confiscations and an order that firearms be returned to their rightful owners. The Sheriff of St. Tammany Parish, a co-defendant, returned confiscated guns and agreed to a permanent injunction, leading to a voluntary dismissal as to that party. New Orleans initially denied having any confiscated arms, but after a motion for contempt was filed, took NRA counsel to view some 1,100 seized firearms.

NRA's causes of action include infringement of the right to keep and bear arms, deprivation of liberty and property without due process, violation of equal protection, and unreasonable search and seizure. New Orleans moved to dismiss, arguing that a State or locality may confiscate firearms without violating the Second Amendment.

---

* Stephen P. Halbrook (with co-counsel Daniel Holliday) represents the plaintiffs in *NRA v. Nagin*. He received his Ph.D. in Philosophy from Florida State University and J.D. from Georgetown University Law Center. In addition to arguing *Printz v. United States*, 521 U.S. 898 (1997), and other cases in the Supreme Court, he is author of FIREARMS LAW DESKBOOK (2007); FREEDMEN, THE FOURTEENTH AMENDMENT, & THE RIGHT TO BEAR ARMS (1998); THAT EVERY MAN BE ARMED (1984, 2000); A RIGHT TO BEAR ARMS (1989); THE SWISS AND THE NAZIS (2006); and TARGET SWITZERLAND (in five languages) (1998). *See also* www.stephenhalbrook.com.

The trial court denied the motion, ruling that the Second Amendment guarantees individual rights and that this right is incorporated into the Fourteenth Amendment so as to apply to State and local action. The court also upheld the NRA's other claims.

The litigation continues at the time of this writing. The case is doubly significant in that it stemmed from a historically unprecedented police action against American citizens and that the ruling may be the first by a federal district court to recognize incorporation of the right to have arms into the Fourteenth Amendment.

I. SEIZURE OF LEGALLY-OWNED FIREARMS IN NEW ORLEANS

A. *Facts*

In the wake of Hurricane Katrina, New Orleans authorities announced that only police would be allowed to possess firearms and proceeded to seize lawfully-possessed firearms from citizens at gunpoint.[1] Suit was filed alleging that the confiscations violated the right to keep and bear arms under the Federal and Louisiana constitutions, deprived citizens of liberty and property without due process, violated equal protection, and constituted unlawful searches and seizures.[2] The United States District Court for the Eastern District of Louisiana enjoined New Orleans's mayor and police superintendent from making further seizures and ordered the return of confiscated firearms.[3] This Article describes the claims and proceedings in the case.

Images of flooding, death, looting, and devastation flashed across television screens after Hurricane Katrina deluged New Orleans. Two news clips are of particular interest here. One was the footage of Patricia Konie, a fifty-eight year old petite woman at her home with an old revolver for protection. Several burly policemen slammed her to the ground, fracturing her shoulder, and took her into custody. The other featured Police Superintendent Eddie Compass announcing on

[1] Erin McClam, *In the First Sweep, Authorities in New Orleans Find Far Fewer Bodies than Feared*, ASSOCIATED PRESS, Sept. 9, 2005. *See also* Susan Jones, *New Orleans Now Admits it Seized Firearms from Citizens*, CYBERCAST NEWS SERVICE, March 16, 2006, http://www.cnsnews.com/ViewCulture.asp?Page=%5CCulture%5Carchive%5C200603%5CCUL20060316b.html.

[2] NRA v. Nagin, Civil No. 05-4234, 2005 WL 2428840 (E.D. La. 2005).

[3] *Id.* Warren Riley replaced Compass as Superintendent of Police and thus was substituted for Compass as the second-named defendant.

September 8, 2005: "No one will be able to be armed. Guns will be taken. Only law enforcement will be allowed to have guns."[4]

B. *The Complaint and Consent Order Enjoining Confiscations*

The National Rifle Association ("NRA"), Second Amendment Foundation ("SAF"), and an individual plaintiff filed a complaint and a motion for preliminary injunction against the gun seizures.[5] These filings were made in the United States District Court for the Eastern District of Louisiana, which had moved to Baton Rouge due to the flooding.[6] The Complaint alleged that, in the devastation and breakdown of law and order that followed Katrina, law-abiding citizens were left on their own without police protection to defend their families, persons, and property from looters, rapists, and other criminals.[7] According to the Complaint, police officers who stayed on the job to do their duty were overwhelmed and the defendants responded to this crisis, in part, by ordering that the law-abiding citizens be disarmed, leaving them at the mercy of roving gangs, home invaders, and other criminals.[8]

The Complaint alleges that during the same period, New Orleans Mayor Nagin ordered the New Orleans Police and other law enforcement entities under his authority to evict persons from their homes and to confiscate their firearms.[9] Police went from house to house and confiscated numerous firearms from citizens at gunpoint. While decreeing that ordinary citizens may not possess firearms, Defendants followed a policy of allowing certain businesses and wealthy persons to hire armed security guards.[10]

On September 23, 2005, Judge Jay C. Zainey entered a Consent Order in which the New Orleans defendants "den[ied] that seizures of lawfully possessed firearms from law-abiding citizens has occurred"

[4] Both of the above video clips and accounts of gun seizures from citizens may be viewed at http://www.youtube.com/watch?v=-taU9d26wT4 (last visited Sept. 28, 2007). *See also* Konie v. State, No. 2:05-cv-06310-MLCF-DEK (E.D. La. filed Nov. 30, 2005).

[5] Complaint for Declaratory and Injunctive Relief, NRA v. Nagin, Civil No. 05-4234, 2005 WL 3162097 (E.D. La. 2005), *available at* http://stephenhalbrook.com/lawsuits/complaint.motion.tro.inj.pdf.

[6] *Federal Courts Regrouping After Hurricane Katrina*, Sept. 8, 2005, http://www.uscourts.gov/newsroom/hurricane090805.html.

[7] Complaint, *supra* note 5, at ¶ 12.

[8] *Id.* at ¶ 12-13.

[9] *Id.* at ¶ 14-15.

[10] *Id.* at ¶ 14-15, 18. *See also* McClam, *supra* note 1.

and further denied "that any such weapons are presently in the possession of the City of New Orleans."[11] Nonetheless, the order enjoined the defendants "from confiscating lawfully-possessed firearms from citizens," and ordered them "to return any and all firearms which may have been confiscated from . . . all . . . persons who lawfully possessed them, upon presentation of identification and execution of a receipt therefor."[12]

In addition to the New Orleans defendants, the Complaint named the sheriff of St. Tammany Parish and John Doe deputies as defendants, based on a similar gun confiscation policy being carried out in that parish. In an instance alleged in the Complaint, sheriff's deputies came alongside plaintiff Buell O. Teel's boat on Lake Pontchartrain in St. Tammany Parish,pointed their assault rifles at him, and demanded any firearms that he might have.[13] He surrendered two encased hunting rifles which he kept for his protection.[14] Numerous other citizens in the parish also had firearms seized. The plaintiffs reached an early settlement with the St. Tammany defendants providing for a return of the seized firearms and the entry of a permanent injunction against further confiscations.[15]

C. *Failure to Return Seized Firearms*

By contrast, no settlement with New Orleans was reached, and plaintiffs filed a motion to hold the New Orleans defendants in contempt for not implementing a plan to return confiscated firearms.[16] New Orleans Counsel Joseph DiRosa appeared before court began and offered to allow plaintiffs' counsel to inspect firearms being held by the police and to enter into negotiations to establish a procedure for owners to re-claim their guns.[17] Plaintiffs' counsel thereupon continued the motion pending negotiations. This author's contemporaneous notes reflect:

> We went to the police facility where the guns are stored in a double wide trailer and a moving truck. Some are evidence guns (for criminal cases) but most are property guns (confiscated from citizens not accused of any crime). In both the trailer and the truck, there are piles of rifles and shotguns stacked on the floor (mostly hunting type, some military style), and large plastic buckets of handguns. The majority are rusted, some unsalvageable, others in good condition. . . .
>
> The guns in good condition were apparently those seized from persons at their homes or in vehicles. Those in the worst condition may have originated from flooded homes when police conducted house searches for dead bodies and guns. . . .
>
> The guns are tagged. Many tags have no names but only an address, or only the address of the block. . . .
>
> The figure of 1,100 guns at the premises was given, including both evidence and property guns.

Thereafter the NRA and SAF publicized the address and telephone number of the police facility so that owners could retrieve their firearms.[18] While a number of owners went to the facility, most were turned away empty handed,[19] after police officials requested original bills of sale, which flood victims did not have, or otherwise told claimants that they could not locate the firearms requested.[20]

II. THE MOTION TO DISMISS

Meanwhile, New Orleans filed a motion to dismiss the complaint for lack of subject matter jurisdiction and for failure to state a viable claim. The motion asserted that "the states, and by extension their political subdivisions, are free to proscribe the possession of firearms, not only because the Second Amendment does not prohibit it but also pursuant to the emergency powers granted to the State and municipal-

11 Consent Order at 2-3, NRA v. Nagin, Civil No. 05-4234, 2005 WL 2428840 (E.D. La. 2005), *available at* http://www.stephenhalbrook.com/lawsuits/nagin-order.pdf.

12 *Id.* at 4.

13 Complaint, *supra* note 5, at ¶ 18-20.

14 *Id.* at ¶ 18.

15 Order Granting Motion for Permanent Injunction, NRA v. Nagin, Civil No. 05-4234, 2005 WL 2428840 (E.D. La. Sept. 23, 2005).

16 Motion to Hold Defendants C. Ray Nagin and Warren Riley in Contempt for Violation of the Consent Order, NRA v. Nagin, Civil No. 05-4234, 2005 WL 2428840 (E.D. La. Sept. 23, 2005).

17 NRA Online, NRA and New Orleans Reach Agreement on Return of Firearms Confiscated During Katrina, http://www.nraila.org/CurrentLegislation/Read.aspx?ID=2057 (last visited Oct. 26, 2007).

18 *Id.*

19 Mary Foster, *NOPD Begins to Return Confiscated Guns*, Apr. 17, 2006, http://www.wwltv.com/local/stories/wwl041706khconfiscated.44851e00.html.

20 *Id.*

ity during a state of emergency."[21] Defendants also argued that the plaintiffs' claim under the Second and Fourteenth Amendments was defective, and that "although plaintiffs also assert due-process, equal-protection, and search-and-seizure claims arising under the U.S. Constitution, none of these other claims stands without their Second Amendment claims."[22] The following sections summarize the plaintiffs' response and the court's ruling.

A. *Violation of the Right to Keep and Bear Arms: The Second and Fourteenth Amendments*

Count One of the Complaint alleged that the confiscations abridged and infringed on the right of citizens to keep and bear arms, in violation of the Second and Fourteenth Amendments of the United States Constitution, and Article I, Section 11 of the Louisiana Constitution.[23] The federal constitutional claim gave rise to federal subject matter jurisdiction, and the state constitutional claim invoked ancillary jurisdiction.[24] Violation of each provision stated claims on which relief may be granted.

The Supreme Court has long held that Bill of Rights guarantees do not apply *directly* to the States.[25] The Court has, however, "incorporated" most Bill of Rights provisions into the Fourteenth Amendment so as to be applicable to State action.[26] Nonetheless, neither the Fifth Circuit Court of Appeals nor the United States Supreme Court has decided whether the Second Amendment applies to the States through the Fourteenth Amendment.

Contrary to defendants' claim that the right to keep and bear arms is not an individual right, *United States v. Emerson*[27] rejected the "collective rights" view of the Second Amendment and held that:

> [C]onsistent with [*United States v. Miller*, 307 U.S. 174 (1939)], [the Second Amendment] protects the right of individuals, including those not then actually a member of any militia or engaged in active military service or training, to privately possess and bear their own firearms, such as the pistol involved here, that are suitable as personal, individual weapons . . . .[28]

As far as applying the Second Amendment to the States, in a trio of nineteenth century cases, the United States Supreme Court held that the First, Second, and Fourth Amendments apply only to Congress.[29] In two of these decisions, the Court specifically held that the Amendments do not apply *directly* to the States.[30] However, these cases did not consider whether these rights were incorporated against the States through the Fourteenth Amendment. "[T]hese holdings all came well before the Supreme Court began the process of incorporating certain provisions of the first eight amendments into the Due Process Clause of the Fourteenth Amendment," and "they ultimately rest on a rationale equally applicable to all those amendments."[31]

Senator Jacob Howard, introducing the Fourteenth Amendment in 1866, explained that its purpose was to protect "personal rights" such as "the right to keep and bear arms."[32] The Freedmen's Bureau Act, passed by over two-thirds of the same Congress which proposed the Fourteenth Amendment, recognized the right to "full and equal benefit of all laws and proceedings concerning personal liberty, personal security, and . . . estate, real and personal, including the constitutional right to bear arms."[33] The Amendment protects from State infringement the "indefeasible right of personal security, personal liberty and private property,"[34] the very rights the Freedmen's Bureau Act declared to include the right to bear arms.

A decade after passage of the Fourteenth Amendment, the Supreme Court decided *United States v. Cruikshank*.[35] This case did

---

21 Memorandum in Support of Defendants' Rule 12(b)(1) and 12(b)(6) Motion to Dismiss for Lack of Subject Matter Jurisdiction and for Failure to State a Claim at 5, NRA v. Nagin, Civil No. 05-4234, 2005 WL 2428840 (E.D. La. Sept. 23, 2005).

22 *Id.* at 2.

23 Complaint, *supra* note 5, at 5-6.

24 *See* Williamson v. Tucker, 645 F.2d 404, 416 (5th Cir. 1981) ("[A] claim cannot be dismissed for lack of subject matter jurisdiction because of the absence of a federal cause of action.").

25 *See e.g.*, Miller v. Texas, 153 U.S. 535, 538 (1894) (Second and Fourth Amendments).

26 *See, e.g.*, Gitlow v. New York, 268 U.S. 652, 666 (1925) (free speech and press under the First Amendment); Wolf v. Colorado, 338 U.S. 25, 27-28 (1949) (Fourth Amendment).

27 270 F.3d 203 (5th Cir. 2001).

28 United States v. Emerson, 270 F.3d 203, 260 (5th Cir. 2001).

29 *Miller*, 153 U.S. at 538; *Presser*, 116 U.S. at 265, 267; United States v. Cruikshank, 92 U.S. 542, 551-53 (1876).

30 *Miller*, 153 U.S. at 538; *Presser*, 116 U.S. at 265; *Cruikshank*, 92 U.S. at 542.

31 *Emerson*, 270 F.3d at 221 n.13.

32 Cong. Globe, 39th Cong., 1st Sess., 2765 (1866). *See also* STEPHEN P. HALBROOK, FREEDMEN, THE FOURTEENTH AMENDMENT, & THE RIGHT TO BEAR ARMS, 1866-1876 (1998).

33 14 Stat. 176, § 14 (1866).

34 Griswold v. Connecticut, 381 U.S. 479, 484-85 n.* (1965).

35 92 U.S. 542 (1876).

not involve State action, but alleged private criminal violations of First and Second Amendment rights of black freedmen under the federal Enforcement Act.[36] Supreme Court Justice Bradley, sitting as a Circuit Judge, stated that the Fourteenth Amendment "now prevents the states from interfering with the right to assemble," but that the indictment counts on that issue and on the "conspiracy to interfere with certain citizens in their right to bear arms" failed to include "any averment that the state had, by its laws interfered with any of the rights referred to."[37]

Since no State action was involved, the Supreme Court in *Cruikshank* never considered whether the Fourteenth Amendment protected First and Second Amendment freedoms. It noted that the rights "peaceably to assemble" and "of bearing arms for a lawful purpose" long antedated the Constitution.[38] The Court went on to note that the First and Second Amendments protected those rights from "encroachment" or from "be[ing] infringed by Congress," not by private individuals.[39] For protection of these and other rights from private violence, citizens must rely on the States. *Cruikshank* did not refer to encroachment or infringement by the States, as that was not involved in the case.

Thus, *Cruikshank*'s only mention of the Fourteenth Amendment was the rejection of a due process right against false imprisonment and murder by private citizens, for the Amendment's due process clause "adds nothing to the rights of one citizen as against another. It simply furnishes an additional guaranty against any encroachment by the State upon the fundamental rights which belong to every citizen as a member of society."[40]

The United States Supreme Court subsequently held, in *Presser v. Illinois*,[41] that requiring a permit for an armed march in a city did not violate the rights to associate or to bear arms.[42] The Court also held that the First and Second Amendments did not apply to the States.[43] However, the *Presser* Court did not consider whether the

[36] United States v. Cruikshank, 92 U.S. 542 (1876).
[37] United States v. Cruikshank, 25 F. Cas. 707, 714-15 (C.C.D. La. 1874).
[38] *Cruikshank*, 92 U.S. at 542.
[39] *Id.* at 552-53.
[40] *Id.* at 554.
[41] 116 U.S. 252 (1886).
[42] Presser v. Illinois, 116 U.S. 252, 264-65 (1886).
[43] *Id.* at 265-68. *See id.* at 265 ("[T]he amendment is a limitation only upon the power of Congress and the National government, and not upon that of the States.").

Fourteenth Amendment protects those rights by incorporating them against the States.

Finally, in *Miller v. Texas*,[44] the United States Supreme Court again rejected direct application of the Second and Fourth Amendments to the States, while at the same time refusing to consider whether those Amendments were incorporated into the Fourteenth Amendment:

> And if the fourteenth amendment limited the power of the states as to such rights, as pertaining to citizens of the United States, we think it was fatal to this claim that it was not set up in the trial court. . . . A privilege or immunity under the constitution of the United States cannot be set up here . . . when suggested for the first time in a petition for rehearing after judgment.[45]

Had the issue of incorporation been decided previously, the Court could have so stated, rather than refusing to consider it because it had not been raised below. This is because *Cruikshank* decided only that Bill of Rights guarantees do not provide protection from private violation, and *Presser* and *Miller* decided only that such guarantees do not apply directly to the States. None of these decisions considered whether the Fourteenth Amendment protects the rights set forth in these guarantees.

The United States Supreme Court has never asserted that some of the substantive guarantees of the Bill of Rights are more fundamental than others. In *Robertson v. Baldwin*,[46] the Court stated of "the freedom of speech and of the press" and "[t]he right of the people to keep and bear arms" that "the law is perfectly well settled that the first 10 Amendments to the constitution, commonly known as the 'Bill of Rights,' were not intended to lay down any novel principles of government, but simply to embody certain guaranties and immunities which we had inherited from our English ancestors."[47] More recently, the Court, in *United States v. Verdugo-Urquidez*,[48] explained:

[44] 153 U.S. 535 (1984).
[45] Miller v. Texas, 153 U.S. 535, 538-39 (1894).
[46] 165 U.S. 275 (1897).
[47] Robertson v. Baldwin, 165 U.S. 275, 281-82 (1897).
[48] 494 U.S. 259 (1990).

> "[T]he people" seems to have been a term of art employed in select parts of the Constitution. . . . The Second Amendment protects "the right of the people to keep and bear Arms," . . . . See also U.S. Const., Amdt. I ("Congress shall make no law . . . abridging . . . the *right of the people* peaceably to assemble") . . . . While this textual exegesis is by no means conclusive, it suggests that "the people" protected by the Fourth Amendment, and by the First and Second Amendments, . . . refers to a class of persons who are part of a national community . . . .[49]

The right to arms is fundamental because it is an individual liberty explicitly guaranteed in the Bill of Rights.[50] No constitutional right is "less 'fundamental' than" others, and "we know of no principled basis on which to create a hierarchy of constitutional values."[51]

In *Planned Parenthood of Southeastern Pennsylvania v. Casey*,[52] the Court found that "all fundamental rights comprised within the term liberty are protected by the Federal Constitution from invasion by the States."[53] The Court added that:

> Neither the Bill of Rights nor the specific practices of States at the time of the adoption of the Fourteenth Amendment marks the outer limits of the substantive sphere of liberty which the Fourteenth Amendment protects. . . . As the second Justice Harlan recognized:
>
> "[T]he full scope of the liberty guaranteed by the Due Process Clause cannot be found in or limited by the precise terms of the specific guarantees elsewhere provided in the Constitution . . . [such as] the freedom of speech, press, and religion; the right to keep and bear arms . . . . It is a rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints . . . ."[54]

[49] United States v. Verdugo-Urquidez, 494 U.S. 259, 265 (1990).

[50] "The key to discovering whether [a right] is 'fundamental'" is whether it is "explicitly or implicitly guaranteed by the Constitution." San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 33 (1973).

[51] Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc., 454 U.S. 464, 484 (1982).

[52] 505 U.S. 833 (1992).

[53] Planned Parenthood of SE. Pa. v. Casey, 505 U.S. 833, 847 (1992).

[54] *Id.* at 848 (citation omitted).

Based on the foregoing Fifth Circuit and United States Supreme Court precedents, plaintiffs argued that Count One of the Complaint stated a claim on which relief may be granted. It is likely that these courts, if faced squarely with the issue, would decide that the Second Amendment right to keep and bear arms is protected from State infringement through incorporation in the Fourteenth Amendment.

B. *Violation of the Right to Keep and Bear Arms: The Louisiana Guarantee*

In addition to the above, the Complaint alleged a violation of Article I, Section 11, of the Louisiana Constitution, which provides that "[t]he right of each citizen to keep and bear arms shall not be abridged, but this provision shall not prevent the passage of laws to prohibit the carrying of weapons concealed on the person."[55] The federal court had supplemental jurisdiction over this state law claim.[56]

Under the Louisiana Constitution, Defendants had no authority to abridge the right of law-abiding citizens to keep and bear non-concealed arms. "The Constitutions of the United States and Louisiana give us the right to keep and bear arms. It follows, logically, that to keep and bear arms give us the right to use the arms for the intended purpose for which they were manufactured."[57]

At the Constitutional Convention of 1973, where the current version of Article I, Section 11, was framed, Delegate John L. Avant, sponsor of the guarantee, noted its purpose to protect "the right to carry a firearm in your automobile, in your boat, or keep one in your place of business."[58] Delegate Avant pointed out that criminals are deterred knowing "that that store owner, or that homeowner, or that citizen, is in all probability armed and prepared to defend himself."[59] Similarly, Delegate Hayes noted the folly of "disarming everybody so the criminals could just have a heyday knowing that you have nothing to protect yourself with."[60] These concerns were realized in New

[55] LA. CONST. art. I, § 11.

[56] 28 U.S.C. § 1367(a), (c)(3).

[57] McKellar v. Mason, 159 So. 2d 700, 702 (La. Ct. App. 1964) (upholding right to defend home), *aff'd*, 162 So. 2d 571 (La. 1964).

[58] 7 RECORDS OF THE LOUISIANA CONSTITUTIONAL CONVENTION OF 1973 1211 (1977).

[59] *Id.* Delegate Tapper supported the guarantee to preclude restrictions on "the possession of firearms and weapons for the defense of the innocent people so that a man cannot have a weapon in his business place to protect himself, so that you cannot have a weapon in your home to protect yourself . . . ." 7 *id.* at 1213.

[60] 7 *id.* at 1216.

Orleans as a result of the policies of Defendants, who chose to suspend constitutional rights.[61]

Under the Louisiana Constitution, the state may regulate "the carrying of weapons concealed on the person," or require the registration of certain narrowly-defined arms.[62] However, a total ban on and confiscation of all firearms in all places, including the home, is plainly unconstitutional.

Defendants also argued that "the states, and by extension their political subdivisions, are free to proscribe the possession of firearms" under their emergency powers.[63] No such emergency powers exist or were invoked here. Under Louisiana law, designated officials may only "[s]uspend or limit the sale, dispensing, or transportation of . . . firearms,"[64] not prohibit possession thereof. Moreover, Louisiana statutes specifically state that "[n]othing in this Chapter shall be interpreted to diminish the rights guaranteed to all persons under the Declaration of Rights of the Louisiana Constitution or the Bill of Rights of the United States Constitution."[65]

The governor's declaration of an emergency may authorize chief law enforcement officers to promulgate orders "[r]egulating and controlling the possession, storage, display, sale, transport and use of firearms."[66] These orders can only be effective for five days.[67] This does not authorize an absolute prohibition on firearms possession,[68] and may not be interpreted to violate constitutional guarantees.

To clarify, on June 8, 2006, Louisiana passed a law declaring that the above emergency powers shall not "authorize the seizure or confiscation of any firearm . . . from any individual who is lawfully carrying or possessing the firearm . . . ."[69] An exception exists for a peace officer to "disarm an individual if the officer reasonably believes it is immediately necessary for the protection of the officer or another individual." The officer must "return the firearm to the individual before discharging that individual unless the officer arrests that individual for engaging in criminal activity, or seizes the firearm as evidence pursuant to an investigation for the commission of a crime."[70]

In sum, in addition to stating a federal claim under the Second and Fourteenth Amendments, Count One states a claim on which relief may be granted under Article I, Section 11, of the Louisiana Constitution over which the court has supplemental jurisdiction.

C. *Deprivation of Liberty and Property Without Due Process*

The Fourteenth Amendment to the United States Constitution provides that no State shall "deprive any person of life, liberty, or property without due process of law."[71] Count Two of the Complaint alleged that the firearms confiscated by Defendants constituted private property that was lawfully possessed by Plaintiffs pursuant to State and Federal law.[72] Moreover, the manner in which Plaintiffs kept, bore, and possessed such property constituted liberty interests recognized by State and Federal law.[73]

The liberty and property interests at issue here are recognized by Louisiana's constitutional right to keep and bear arms[74] as well as the statute providing for a permit which "shall grant authority to a citizen to carry a concealed handgun on his person," which may be revoked only according to specified procedures.[75] These interests are also recognized by Louisiana law allowing the possession and open carrying of firearms and by the prohibition on local regulation "more restrictive than state law" of firearms possession and transportation.[76] Loui-

[61] "[I]t is reasonable . . . to regulate the possession of firearms for a limited period of time by citizens who have committed certain specified serious felonies." State v. Amos, 343 So. 2d 166, 168 (La. 1977). That is not the case regarding law-abiding citizens. *See* State v. Williams, 735 So. 2d 62, 70 (La. Ct. App. 1999) (denying that narcotics trafficker "has the equal right to possess or bear arms *as does the law-abiding citizen*.") (emphasis added).

[62] State v. Hamlin, 497 So. 2d 1369, 1370-71 (La. 1986).

[63] Defendant's Motion to Dismiss at X, NRA v. Nagin, Civil No. 05-4234, 2005 WL 2428840 (E.D. La. Sept. 23, 2005).

[64] LA. REV. STAT. ANN. § 29:724.D(8) (1993) (current version at § 29:724.D(6) (2006)), :737(B)(7) (2001).

[65] *Id.* § 29:736(D); HOME RULE CHARTER OF THE CITY OF NEW ORLEANS, art. II, § 4-206(3)(d) (1996) (authorizing the mayor to declare an emergency but not to confiscate firearms).

[66] LA. REV. STAT. ANN. § 14:329.6.A(6) (1990).

[67] LA. REV. STAT. ANN. § 14:329.6.B (1969).

[68] *See* LA. REV. STAT ANN. § 14:329.6.A(4) (1990) (contrasting "*regulating* and *controlling*" firearms with "*[p]rohibiting* the sale and distribution of alcoholic beverages") (emphasis added).

[69] 2006 LA. ACTS 275.

[70] *Id.*

[71] U.S. CONST. amend. XIV, § 1.

[72] Complaint, *supra* note 5, at 6-7.

[73] *Id.*

[74] LA. CONST., art. I, § 11.

[75] LA. REV. STAT. ANN. § 40:1379.3(B) (1996).

[76] LA. REV. STAT. ANN. § 40:1796(A) (2007).

siana law also generally respects personal freedom and private property.[77]

Moreover, federal law provides that "notwithstanding . . . any rule or regulation of a State or any political subdivision thereof," any person in lawful possession thereof "shall be entitled to transport a firearm for any lawful purpose from any place where he may lawfully possess and carry such firearm to any other place where he may lawfully possess and carry such firearm . . . ."[78]

"State-created liberty and property interests, including the right to bear arms for defense and security, are protected by the Due Process Clause."[79] Like liberty interests, property interests recognized by State law are also protected by the Due Process clause.[80] "[M]unicipalities or supervisors may face liability under section 1983 where they breach duties imposed by state or local law."[81]

Accordingly, by confiscating firearms from their lawful possessors in their homes, businesses, automobiles, boats, and otherwise, Defendants deprived them of liberty and property without due process of law. Therefore, Count Two of the Complaint adequately alleged federal jurisdiction and stated a valid claim.

D. Denial of Equal Protection of the Laws

The Fourteenth Amendment to the United States Constitution provides that no State shall "deny to any person within its jurisdiction the equal protection of the laws."[82] Count Three of the Complaint alleged that at the same time that Defendants instituted and executed their policy of confiscating firearms from Plaintiffs and other law-abiding citizens, Defendants allowed selected wealthy persons to keep

[77] "Every person has the right to acquire, own, control, use, enjoy, protect, and dispose of private property." LA. CONST. art. I, § 4(A). "Personal effects, other than contraband, shall never be taken." *Id.* § 4(C).

[78] 18 U.S.C. § 926A (1986) (requiring only that the firearm be unloaded and inaccessible from the passenger compartment of a transporting vehicle).

[79] Peoples Rights Org. v. City of Columbus, 925 F. Supp. 1254, 1269 (S.D. Ohio 1996) (citing Olim v. Wakinekona, 461 U.S. 238, 249 (1983); Hewitt v. Helms, 459 U. S. 460, 466 (1983); Mills v. Rogers, 457 U.S. 291, 300 (1982)), *aff'd in part, rev'd in part on other grounds sub nom.* Peoples Rights Org., Inc. v. City of Columbus, 152 F.3d 522 (6th Cir. 1998).

[80] Schaper v. City of Huntsville, 813 F.2d 709, 713-14 (5th Cir. 1987) (citing Bd. of Regents v. Roth, 408 U.S. 564, 577 (1972)).

[81] O'Quinn v. Manuel, 773 F.2d 605, 608 (5th Cir. 1985). *See also* Augustine v. Doe, 740 F.2d 322, 327 (5th Cir. 1984) (complaint adequately alleged that detention of person deprived him of liberty, and seizure of his dog deprived him of property, both without due process).

[82] U.S. CONST. amend. XIV, § 1.

their firearms.[83] The wealthy could also afford to retain armed private security personnel to protect their more expensive homes and properties.[84] Thus, one's ability to exercise one's rights and to protect life and property depended on whether one had the economic means to retain armed private security personnel.

Discrimination based on wealth or type of housing as to who may possess firearms (whether personally or through surrogate armed guards) violates equal protection. In *Hetherton v. Sears, Roebuck & Co.*,[85] the Third Circuit Court of Appeals invalidated a requirement that two freeholders must identify a firearm purchaser, because a state cannot "arbitrarily establish categories of persons who can or cannot buy the weapons."[86] The court found that:

> To limit the options of prospective purchasers for guns to a requirement that only people who own real estate can identify the purchasers is not more constitutionally permissible than a requirement that only Catholics or Blacks or Indians can identify purchasers of handguns.[87]

A poor person who cannot afford a private security service is not more likely to misuse a firearm than a wealthy person or a private security guard.[88] Accordingly, the court had jurisdiction over Count Three, which stated a valid claim on which relief may be granted.

E. The Right to Be Secure from Unreasonable Searches and Seizures

The Fourth Amendment to the United States Constitution, which applies to the States through the Fourteenth Amendment,[89] provides in part that "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated."[90] Count Four of the Complaint alleges

[83] Complaint, *supra* note 5, at ¶ 33.

[84] *Id.*

[85] 652 F.2d 1152 (3d Cir. 1981).

[86] Hetherton v. Sears, Roebuck & Co., 652 F.2d 1152, 1157-58 (3d Cir. 1981).

[87] *Id.* at 1160.

[88] *See* Peoples Rights Org., Inc. v. City of Columbus, 152 F.3d 522, 531-32 (6th Cir. 1998) (invalidating law which allowed some to register and possess certain firearms and prohibited similarly-situated persons from doing so and stating that the equal protection clause "keeps governmental decision makers from treating differently persons who are in all relevant respects alike" (quoting Nordlinger v. Hahn, 505 U.S. 1, 10 (1992))).

[89] Mapp v. Ohio, 367 U.S. 643, 655 (1961).

[90] U.S. CONST. amend. IV.

that Defendants issued or executed orders that persons (including Plaintiffs) be accosted at gunpoint by law enforcement officers and that their persons, homes, boats, and other properties be searched and temporarily seized, and that their firearms be seized and kept for an indefinite period of time.[91] The Complaint goes on to allege that Plaintiffs committed no unlawful acts, did not threaten any law enforcement officers, or engage in any other activity that would justify such searches and seizures.[92] Defendants thus violated the right of Plaintiffs and other citizens to be secure in their persons and houses against unreasonable searches and seizures.[93]

The mere presence of a firearm does not justify a search of or seizure from its apparent lawful possessor. "[O]wning a gun is usually licit and blameless conduct. Roughly 50 percent of American homes contain at least one firearm of some sort."[94] "Common sense tells us that millions of Americans possess these [firearms] with perfect innocence."[95]

"[P]olice officers may stop and briefly detain an individual for investigative purposes if they have reasonable suspicion that criminal activity is afoot."[96] However, apparent lawful possession of a firearm, by itself, does not give rise to reasonable suspicion.

Likewise, "[a]n officer seizes a person when he, 'by means of physical force *or* show of authority, has in some way restrained the liberty of a citizen.'"[97] A seizure of the person may take place even though it is temporary and does not result in an arrest. Defendants, by their orders or their actions, violated the security of the persons and property of Plaintiffs by restraining their liberty and seizing their firearms.

91 Complaint, *supra* note 5, at ¶ 37.

92 *Id.*

93 *See* Augustine v. Doe, 740 F.2d 322, 324-25 (5th Cir. 1984) (holding that deputy sheriffs wielding a sawed-off shotgun, and seizing the person of plaintiff in order to seize his dog without a warrant established a clear violation of the Fourth Amendment); *see also* Castellano v. Fragozo, 352 F.3d 939, 953-54 (5th Cir. 2003) (en banc) (referring to "events that run afoul of explicit constitutional protection - the Fourth Amendment if the accused is seized and arrested, for example . . . . Such claims of lost constitutional rights are for violation of rights locatable in constitutional text . . . .").

94 Staples v. United States, 511 U.S. 600, 613-14 (1994).

95 United States v. Anderson, 885 F.2d 1248, 1254 (5th Cir. 1989) (en banc).

96 Goodson v. City of Corpus Christi, 202 F.3d 730, 736 (5th Cir. 2000) (citing Terry v. Ohio, 392 U.S. 1, 30 (1968)).

97 Flores v. City of Palacios, 381 F.3d 391, 396 (5th Cir. 2004) (quoting Terry v. Ohio, 392 U.S. 1, 19 n.16 (1968) (emphasis added)).

Defendants violated the Fourth Amendment by searching the persons, homes, businesses, and motor vehicles of Plaintiffs and seizing their firearms. Thus, Count Four of the Complaint adequately stated federal jurisdiction and a cause of action.

III. THE DISTRICT COURT UPHOLDS JURISDICTION AND CAUSE OF ACTION

Argument on the motion to dismiss was held on August 16, 2006, before Judge Carl J. Barbier. The district court found that federal jurisdiction existed and that the complaint stated a valid cause of action, and thus denied the motion to dismiss. Although no memorandum opinion was issued, the judge made clear his reasoning from the bench.

On the jurisdictional issue, the judge asked: "How can there not be federal subject matter jurisdiction when the plaintiffs are alleging claims under the Second Amendment, Fourth Amendment, [and] Fourteenth Amendment?"[98] Regarding the argument that all of the claims failed if the Second Amendment claim was defective, he asked "[e]ven if you are right, it doesn't give the state or the city the power [to] enter someone's home with no probable cause, no cause whatsoever, and start seizing weapons does it?"[99] In response to the defense argument that proof was lacking that New Orleans police (instead of some outside police force) confiscated firearms, the following exchange took place:

> The Court: There were many groups down here at the time, but it was my understanding that they were operating under the mayor's emergency declaration and the orders of the mayor and/or the chief of police in this respect weren't they?
>
> Mr. DiRosa: I guess we were probably, yes, the center of authority at that time.[100]

98 Transcript of Hearing on Motion to Dismiss at 4-5, NRA v. Nagin, Civil No. 05-4234, 2005 WL 3162097 (E.D. La. 2005), *available at* www.stephenhalbrook.com/lawsuits/nagin.argument.ruling.doc.

99 *Id.* at 5-6.

100 *Id.* at 14. While this was a significant factual admission, it was unnecessary in that, for a motion to dismiss, a trial court "must accept all well-pleaded averments as true and resolve all factual disputes in favor of the plaintiff." O'Quinn v. Manuel, 773 F.2d 605, 608 (5th Cir. 1985).

Regarding the Second Amendment incorporation issue, Judge Barbier made the following comments from the bench:

> The Court: There's not a controlling case that says it doesn't apply either through the Fourteenth Amendment. The old cases you cited, the *Cruikshank* case and all didn't consider that issue, right?
>
> Mr. DiRosa: No.
>
> The Court: There is a question of whether the Second Amendment applied directly to the states, and obviously, it doesn't. . . . So the issue is—which does seem to be at least Supreme Court level an open question as to whether the Second Amendment is incorporated in the Fourteenth Amendment.
>
> . . . *Emerson* says that the rights that flow under the Second Amendment are individual rights
>
> . . . .
>
> That being the case, it seems at least to me it's arguable that the Supreme Court now might—this Supreme Court today—if they agree with the Fifth Circuit on that, they might well find it used the same logic that incorporates the rest of the Bill of Rights into the Fourteenth Amendment.[101]

The above comments were perceptive, in that it is a common error to assume that the Supreme Court has ruled against incorporation of the Second Amendment, when actually it has only ruled that the Second Amendment (like the First and Fourth) does not apply directly to the States.[102] As the judge noted above, if the Supreme Court agrees with *Emerson*'s individual rights interpretation, the Second Amendment may be incorporated under the same standards as other Bill of Rights provisions. Accordingly, the court denied the motion to dismiss in its entirety.

LITIGATION CONTINUES

After the district court made the above ruling, plaintiffs sought to pursue discovery from defendants. Failure of defendants to respond led to the filing of a motion to compel and to hold defendants in contempt.[103] The district court granted the motion, censuring defense counsel and ordering him to pay attorney's fees to plaintiffs.[104]

In April 2007, plaintiffs were given access to the police property facility to begin an inventory of the firearms and to record such information about the owners as is on the tags affixed thereon. Plaintiffs' objectives include giving notice to the owners that their firearms are in the possession of the New Orleans police—to date New Orleans has not done so—and to obtain information about the circumstances of the seizures.

A trial date of February 19, 2008, has been set. Plaintiffs' litigation goals remain the same as at the beginning of the case–the return of seized firearms to their rightful owners and a permanent injunction against any future unlawful confiscations. The case is constitutionally significant because of the district court's holding that an action alleging infringement on the right to keep and bear arms by local authorities under the Second and Fourteenth Amendments states a valid federal claim.

[101] *See supra* note 98, at 14-15.

[102] *See supra* notes 25-29 and accompanying text.

[103] *See* Motion to Hold Defendants C. Ray Nagin and Warren Riley in Contempt for Failure to Provide Initial Disclosures and to Compel Answers to Discovery, NRA v. Nagin, Civil No. 05-4234, 2005 WL 3162097 (E.D. La. 2005), *available at* saf.org/new.orleans.lawsuit/motion.to.compel.for.contempt.pdf.

[104] Order Granting in Part and Denying in Part Plaintiff's Motion to Hold Defendants C. Ray Nagin and Warren Riley in Contempt, NRA v. Nagin, Civil No. 05-4234, 2005 WL 3162097 (E.D. La. 2005) ("Here, defense counsel failed to timely answer discovery requests or provide initial disclosures. Defense counsel also ignored the repeated requests of Plaintiffs' counsel to discuss the matter. . . . Defense counsel has caused time and money to be wasted by Plaintiffs' counsel and further admits that he has 'no good reason' to explain his behavior. This type of conduct is wholly unprofessional and shall not be condoned.").