

## HOUSE OF REPRESENTATIVES STAFF ANALYSIS

**BILL #:** HB 285    Emergency Management  
**SPONSOR(S):** Needelman and others  
**TIED BILLS:**    **IDEN./SIM. BILLS:** SB 568, SB 590

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REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1) <u>Domestic Security Committee</u>	<u>8 Y, 0 N</u>	<u>Newton</u>	<u>Newton</u>
2) <u>Judiciary Committee</u>	<u></u>	<u></u>	<u></u>
3) <u>State Administration Council</u>	<u></u>	<u></u>	<u></u>
4) <u></u>	<u></u>	<u></u>	<u></u>
5) <u></u>	<u></u>	<u></u>	<u></u>

### SUMMARY ANALYSIS

The bill amends s. 252.36, F.S., to provide that lawfully possessed weapons cannot be confiscated in a state of emergency. Section 252.36(5)(h), F.S., suspends or limits the sale, dispensing, or transportation of alcoholic beverages, firearms, explosives, and combustibles during a state of emergency, but does not provide for the confiscation of lawfully possessed weapons.

The bill amends s. 870.044, F.S., to provide that firearms that are lawfully possessed may not be confiscated by public officials from law-abiding citizens in a state of emergency. Section 870.44, F.S., provides that when a state of emergency is declared that weapons and ammunition shall not be sold or displayed. The section further provides that only authorized law enforcement officials or persons in military service acting in the official performance of their duties may display or have firearms in their possession.

This bill does not appear to have a fiscal impact on state and local governments.

The bill takes effect July 1, 2006.

## FULL ANALYSIS

### I. SUBSTANTIVE ANALYSIS

#### A. HOUSE PRINCIPLES ANALYSIS:

Provides for Limited Government: - The bill maintains the right of Floridians to legally keep and bear arms under Article I Section 8 of the Florida Constitution. No expanded restrictions or limitations are implied under the bill.

Safeguards Individual liberty - The purpose of this bill is to amend s. 252.36, F.S., and s. 870.044, F.S., to state that firearms that are lawfully possessed may not be confiscated in times of declared emergency reaffirming Florida citizen's right to legally bear arms.

Maintain Public Security - The bill may adversely impact on the ability of law enforcement agencies to protect public safety and security. By limiting the ability of law enforcement to be flexible in their responses to emergency conditions, the safety and security of the public may be degraded under certain conditions.

#### B. EFFECT OF PROPOSED CHANGES:

##### Current Situation

The Constitution of the United States and Florida both guarantee citizens the right to keep and bear arms. This right has been reaffirmed by the decisions of the courts to varying degrees over the course of history. However, some limitations to this right exist in regard to convicted felons and limits placed on the sale and ownership of certain prohibited weapons. Currently, there are no prohibitions delineated in statute that prohibit the taking of legally owned weapons.

In New Orleans, following Hurricane Katrina a number of legally owned weapons were confiscated by law enforcement agencies. This practice was halted when concerns were voiced over these actions and a lawsuit was filed by the National Rifle Association.<sup>1</sup> Eight states including Louisiana have since filed legislation to address this issue in detail.

##### Effects of the Bill

The bill amends s. 252.36 (5)(h), F.S., and s. 870.44, F.S., detailing emergency powers of the Governor and public officials by prohibiting the seizure, taking or confiscation of legally owned firearms. The amended language does not affect the current prohibition on sales and display of firearms in a declared state of emergency, nor does it effect the carrying of firearms by on duty law enforcement or military personnel in performance of their duties.

#### SECTION DIRECTORY:

**Section 1.** Amends s. 252.36, F.S., to provide that lawfully possessed weapons may not be seized or confiscated.

**Section 2.** Amends s. 870.044, F.S., to provide that lawfully possessed firearms may not be seized or confiscated.

**Section 3.** Re-enacts s. 870.44, F.S., which outlines the authority of the governor to impose energy restrictions when energy shortages are anticipated and to carry out the state's energy emergency contingency plan.

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<sup>1</sup> <http://www.nraila.org>

**Section 4.** Provides an effective date of July 1, 2006.

## II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

### A. FISCAL IMPACT ON STATE GOVERNMENT:

This bill does not appear to have a fiscal impact on state or local governments.

1. Revenues: N.A.

2. Expenditures: N.A.

### B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues: N.A.

2. Expenditures: N.A.

### C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR: N.A.

### D. FISCAL COMMENTS:

This bill does not appear to have a fiscal impact.

## III. COMMENTS

### A. CONSTITUTIONAL ISSUES:

#### 1. Applicability of Municipality/County Mandates Provision:

See Below.

#### 2 Other:

The bill raises constitutional concerns under both the United States and Florida Constitutions. A number of questions regarding the right to keep arms and the emergency powers of the State and local governments remain. The ability to remove legally owned firearms from private citizens for the protection of the common good is open to argument. The State Constitution prohibits any infringement on the right to keep and bear arms while providing for its regulation in the manner by which the State shall chose. A tension is drawn under the structure of this bill regarding the right to keep arms and that of the State to regulate the keeping of firearms. An argument has been advanced in the Courts that the right to keep and bear arms is a collective rather than an individual right. In United States v. Miller 307 US 174 (1939), the court has implied the rights contained in the Second Amendment of the United States Constitution are only limits on the powers of the federal government and not on the powers of the states. In four Florida cases; State of Florida v. Astore,

Fla., 258 So.2d 33 (Fla. 2<sup>nd</sup> DCA 1972), Nelson v. State, 195 So.2d 853 (Fla.1967), Davis v. State, 146 So.2d 892 (Fla.1962) and Carlton v. State, 63 Fla. 1, 58 So. 486 (Fla.1912), the courts held that the right to bear arms is not an absolute and the state through a legislative process may enact valid police regulations to promote the safety of the general public. Applying the above reasoning, the bill would have applicability to the execution of emergency powers and may create a potential conflict with Article IV Section 1, Florida Constitution and the emergency powers of the Governor contained in Florida statutes.

The Governor may issue executive orders, proclamations, and rules and may amend or rescind them as necessary. These executive orders, proclamations have the same force and effect of law during the declared emergency.<sup>2</sup> This then brings into question the emergency power of the Governor to temporarily suspend rights as granted under the Constitution. Precedent exists for such an action in that the declaring of martial law has been upheld for the limiting of personal liberties in times of emergency.<sup>3</sup> Although the Courts tend to see the declaration of martial law as a last resort, they have upheld a Governor's power as granted by the State Constitution in Article 4, section 1(d).

Two recent cases have applied the opposite precedent, that the right to keep and bear arms is an individual right rather than a collective right. In United States v. Verdugo-Urquidez, 110 S. Ct. 3039 (1990), the court held that the term "the people" in the Second Amendment of the United States Constitution had the same meaning as in the Preamble, First, Four and Ninth Amendments. Although this case was a Fourth Amendment case it has applicability to this issue. In Gilbert Equipment Co., Inc. v. Higgins, 709 F. Supp. 1071 (S.D. Ala. 1989), aff'd, 894 F.2d 412 (11<sup>th</sup> Cir. 1990), the court held that the right to keep and bear arms was guaranteed to all Americans.<sup>4</sup>

The bill highlights the question of the rights of the individual verses that of the State to exercise limitations on such rights in protecting the welfare and security of the public at large. It should be anticipated, if the bill is enacted, that it could be subject to legal scrutiny well beyond the depth of this analysis.

**B. RULE-MAKING AUTHORITY:**

No additional grant of rulemaking authority is required to implement the provisions of this bill.

**C. DRAFTING ISSUES OR OTHER COMMENTS:**

None

**IV. AMENDMENTS/COMMITTEE SUBSTITUTE & COMBINED BILL CHANGES**

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<sup>2</sup> S. 252.36 (1)(a) and (5)(a) F.S.

<sup>3</sup> <http://www.answers.com>

<sup>4</sup> <http://www.firearmsandliberty.com>