

## HOUSE OF REPRESENTATIVES STAFF ANALYSIS

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

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REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1) Domestic Security Committee	8 Y, 0 N	Newton	Newton
2) Judiciary Committee	9 Y, 0 N	Hogge	Hogge
3) State Administration Council	8 Y, 0 N	Newton	Bussey
4) _____	_____	_____	_____
5) _____	_____	_____	_____

### SUMMARY ANALYSIS

In New Orleans, following Hurricane Katrina, a number of legally owned weapons were reportedly confiscated by law enforcement agencies. This practice was subsequently halted.

This bill amends s. 252.36, F.S., to provide that nothing in the Florida Emergency Management Act and the Florida Emergency Planning and Community Right to Know Act shall be construed as authorizing the "seizure, taking, or confiscation" of lawfully possessed weapons. Currently, under the Florida Emergency Management Act, the Governor has broad authority to act during a declared state of emergency. The Governor may "issue executive orders, proclamations, and rules" which "shall have the force and effect of law." Specifically, within that act, the Governor may, "in addition to any other powers conferred upon the Governor," suspend or limit the sale, dispensing, or transportation of alcoholic beverages, firearms, explosives, and combustibles during a state of emergency. That same section of current law does not, however, expressly authorize the Governor to order the confiscation of lawfully possessed weapons.

This bill also amends s. 870.044, F.S., to provide that nothing in Chapter 870, F.S., relating to "Affrays; Riots; Routs; Unlawful Assemblies," shall be construed as authorizing the "seizure, taking, or confiscation" of lawfully possessed firearms. Currently, under s. 870.041, F.S., local officers are empowered to declare a state of emergency, generally for a period of 72 hours. Within that Chapter, s. 870.044, F.S., prohibits the sale and intentional display of ammunition and guns or other firearms during a locally declared state of emergency. That section further permits only authorized law enforcement officials or persons in military service acting in the official performance of their duties to display or have firearms in their possession.

Finally, this bill reenacts s. 377.703(3)(a), 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.

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 limited government:** The bill prohibits a construction of certain existing sections of law as permitting government confiscation of firearms during a state of emergency.

**Safeguards individual liberty:** The bill prohibits a construction of certain existing sections of law as permitting government confiscation of firearms during a state of emergency, thereby enabling individuals to retain their firearms in these circumstances.

**Maintain public security:** The bill may adversely affect 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:

The Constitution of the United States and the Florida Constitution 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 on this right exist in regard to convicted felons and the sale and ownership of certain prohibited weapons. Currently, there are no express statutory provisions prohibiting public officials from confiscating legally owned firearms from law-abiding citizens. However, there are several statutory provisions related to the sale, display, or possession of firearms during a state of emergency.

In New Orleans, following Hurricane Katrina, a number of legally owned weapons were reportedly confiscated by law enforcement agencies. This practice was subsequently halted when concerns were voiced over these actions and a lawsuit was filed by the National Rifle Association.<sup>1</sup> The *New York Times* quoted the superintendent of police as stating that “only law enforcement (is) allowed to have weapons.”<sup>2</sup> Legislation has since been introduced in eight states, including Louisiana, to address this issue.<sup>3</sup>

#### Effects of the Bill

The bill amends s. 252.36, F.S., to provide that nothing in the Florida Emergency Management Act<sup>4</sup> and the Florida Emergency Planning and Community Right to Know Act<sup>5</sup> shall be construed as authorizing the “seizure, taking, or confiscation” of lawfully possessed weapons.

[Currently, under the Florida Emergency Management Act, the Governor has broad authority to act during a declared state of emergency. A state of emergency generally is limited to 60 days, but may be extended or terminated before 60 days. The Governor may “issue executive orders, proclamations, and rules” which “shall have the force and effect of law.”<sup>6</sup> Specifically, within that act, the Governor may, “in addition to any other powers conferred upon the Governor,” suspend or limit the sale, dispensing, or transportation of alcoholic beverages, firearms, explosives, and combustibles during a state of

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

<sup>2</sup> *New York Times*, September 8, 2005, “New Orleans Begins Confiscating Firearms as Water Recedes.”

<sup>3</sup> Alaska: HB 400; Kentucky: HB 290; Mississippi: HB 1141; New Hampshire: HB 1639; Oklahoma: HB 2696; Virginia: HB 1265; also Idaho and Louisiana (unknown).

<sup>4</sup> Sections 252.31-252.60, F.S.

<sup>5</sup> Sections 252.81-252.90, F.S.

<sup>6</sup> Section 252.36(1)(b), F.S.

emergency.<sup>7</sup> That same section of current law does not, however, expressly authorize the Governor to order the confiscation of lawfully possessed weapons.]

The bill also amends s. 870.044, F.S., to provide that nothing in Chapter 870, F.S., relating to “Affrays; Riots; Routs; Unlawful Assemblies,” shall be construed as authorizing the “seizure, taking, or confiscation” of lawfully possessed firearms.

[Currently, under s. 870.041, F.S., local officers are empowered to declare a state of emergency, generally for a period of 72 hours. Elsewhere within that Chapter, s. 870.044, F.S., prohibits the sale and intentional display of ammunition and guns or other firearms during a locally declared state of emergency. That section further permits only authorized law enforcement officials or persons in military service acting in the official performance of their duties to display or have firearms in their possession.]

Finally, the bill reenacts s. 377.703(3)(a), 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.

#### C. SECTION DIRECTORY:

**Section 1.** Amends s. 252.36, F.S., to provide that certain sections shall not be construed as authorizing lawfully possessed firearms to be seized, taken, or confiscated.

**Section 2.** Amends s. 870.044, F.S., to provide that certain sections shall not be construed as authorizing lawfully possessed firearms to be seized, taken, or confiscated.

**Section 3.** Re-enacts s. 377.703(3)(a), 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.

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

## II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

### A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

None.

### B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

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<sup>7</sup> S. 252.36(5)(h), F.S.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

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:

Not applicable because this joint resolution does not appear to require counties or cities to: spend funds or take action requiring the expenditure of funds; reduce the authority of counties or cities to raises revenues in the aggregate; or reduce the percentage of a state tax shared with counties or cities.

2. Other:

The bill implicates constitutional considerations under both the United States and Florida Constitutions, including the interplay between the right to keep and bear arms and the emergency powers of the State and local governments. The constitutionality of confiscating 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 choose.

It has been argued in the courts that the right to keep and bear arms is a collective rather than an individual right. In United States v. Miller,<sup>8</sup> the court implied that 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, the courts held that the right to bear arms is not absolute and the state, through the legislative process, may enact valid police regulations to promote the safety of the general public.<sup>9</sup>

In two recent federal cases, courts have applied 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, 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, Fourth and Ninth Amendments.<sup>10</sup> Although this case was a Fourth Amendment case, it has applicability to this issue. In Gilbert Equipment Co., Inc. v. Higgins, the court held that the right to keep and bear arms was guaranteed to all Americans.<sup>11</sup>

The Governor has the express statutory authority to issue executive orders, proclamations, and rules and may amend or rescind them as necessary. These executive orders, proclamations, and rules have the force and effect of law during the declared emergency.<sup>12</sup> To the extent this authority, in the context of a state of emergency, emanates from the Governor’s “supreme executive power” in Article IV, s. 1 of the Florida Constitution, attempts to statutorily limit the emergency power of the Governor to temporarily suspend rights as granted under the Constitution, one constitutional authority bumps up against another.

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<sup>8</sup> 307 U.S. 174 (1939).

<sup>9</sup> *State of Florida v. Astore, Fla.*, 258 So.2d 33 (Fla. 2d 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).

<sup>10</sup> 110 S.Ct. 3039 (1990).

<sup>11</sup> 709 F. Supp. 1071 (S.D. Ala. 1989), aff’d, 894 F.2d 412 (11th Cir. 1990).

<sup>12</sup> Section 252.36(1)(a) and (5)(a), F.S.

The bill also 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 during a state of emergency. 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:**

Although the bill indicates that nothing in Chapter 870, F.S., which includes provisions limiting the sale, display, or possession of lawfully possessed firearms, shall be construed to authorize the confiscation of firearms that are lawfully possessed, it does not necessarily mean, as drafted, that it necessarily prohibits restrictions on possession. "Possession" and "confiscation" are different actions. If the intent of the sponsor is to also prohibit restrictions on possession, then the sponsor may consider revising the proposal.

Additionally, the bill states that nothing in this "Chapter" shall be construed in a certain manner, and includes this statement in a specific "section."

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

None.