

## ***Bateman v. Perdue: Implications for Gun Restrictions During a State of Emergency***

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On March 29, 2012, Senior U.S. District Judge Malcolm Howard ruled on the constitutional challenges brought against restrictions on dangerous weapons that can be imposed during a declared state of emergency under North Carolina law. The statutes at issue in the case, [\*Bateman v. Perdue\*](#)<sup>1</sup> make it a Class 1 misdemeanor for a person to “transport or possess off his own premises any dangerous weapon or substance in any area in which a declared state of emergency exists or within the immediate vicinity of which a riot is occurring;”<sup>2</sup> and authorize the governor and city and county officials to impose restrictions on the “possession, transportation, sale, purchase, storage, and use of dangerous weapons and substances, and gasoline” during a declared state of emergency.<sup>3</sup>

The plaintiffs asserted that restrictions imposed under these statutes during declared states of emergency denied them of their 2<sup>nd</sup> Amendment right to keep and bear arms for lawful purposes, including self-defense and hunting. The Court declared these statutes unconstitutional as applied to the plaintiffs, but did not go so far as to declare the statutes facially (meaning “on their face”) unconstitutional. The state chose not to appeal the decision, so Judge Howard’s ruling is now the final word in North Carolina.

By declaring the statutes unconstitutional only as applied, Judge Howard left the door open for restrictions on dangerous weapons – including guns – to be imposed during a state of emergency so long as those restrictions are not inconsistent with 2<sup>nd</sup> Amendment rights. State and local governments may face extreme conditions during a disaster when reasonable restrictions on weapons must be imposed to maintain public safety and prevent injury, loss of life, and damage to property, such as looting after a major hurricane or public rioting. However, because of the *Bateman* decision, these restrictions cannot be imposed as broadly as in the past. So, what restrictions on weapons can local governments still impose during a disaster?

The U.S. Supreme Court has held that that the 2<sup>nd</sup> Amendment confers individual rights, including “even more importantly [than preventing elimination of militia], self-

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<sup>1</sup> *Bateman v. Perdue*, No. 5:10-CV-265-H (E.D.N.C. filed Mar. 29, 2012).

<sup>2</sup> G.S. 14-288.7.

<sup>3</sup> G.S. 14-288.12(b), 14-288.13(b), 14-288.14(a), and G.S. 14-288.15(d). A “dangerous weapon or substance” is defined as “any deadly weapon, ammunition, explosive, incendiary device, radioactive material or device, as defined in G.S. 14-288.8(c)(5), or any instrument or substance designed for a use that carries a threat of serious bodily injury or destruction of property; or any instrument or substance that is capable of being used to inflict serious bodily injury, when the circumstances indicate a probability that such instrument or substance will be so used; or any part or ingredient in any instrument or substance included above, when the circumstances indicate a probability that such part or ingredient will be so used.” G.S. 14-288.1(2).

protection and hunting.”<sup>4</sup> In fact, the right of self-defense has been held to be fundamental and the central component of the 2<sup>nd</sup> Amendment,<sup>5</sup> and extends to individual protection against both public and private violence.<sup>6</sup>

Rights under the 2<sup>nd</sup> Amendment are not unlimited, however, just as rights under the 1st Amendment are not unlimited.<sup>7</sup> The courts have upheld a number of restrictions on the right to possess and bear arms.<sup>8</sup> Whether governmental restrictions on 2<sup>nd</sup> Amendment rights will be upheld in the face of a legal challenge appears to turn on whether the restriction is regulatory as opposed to prohibitive (such as an outright ban), and whether the restriction applies within or beyond an individual’s home. While the courts have found a clearly defined fundamental right to possess firearms for self-defense within the home, the extent of 2<sup>nd</sup> Amendment rights beyond the home (other than for self-defense) is less clear.<sup>9</sup>

When considering 2<sup>nd</sup> Amendment challenges to the constitutionality of governmental regulations, the level of scrutiny applied by the courts will vary depending on the nature of the 2<sup>nd</sup> Amendment interest presented, the extent to which those interests are burdened by governmental regulation, and the strength of the government’s justification of the regulation (for example, mere regulation is generally viewed less strictly than outright prohibitions).<sup>10</sup> In *Bateman*, Judge Howard applied the most stringent level of judicial review, strict scrutiny, because the statutes at issue authorized broad restrictions – even prohibitions – on core 2<sup>nd</sup> Amendment rights, including self-defense by law-abiding citizens.

In light of the *Bateman* decision, future governmental restrictions on dangerous weapons, including guns, should be viewed under the strict scrutiny level of judicial review.<sup>11</sup> The strict scrutiny analysis requires the statute to be “narrowly tailored to achieve a compelling government interest.”<sup>12</sup> There is little doubt that the government has a compelling interest in protecting public safety, ensuring order, and general crime

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<sup>4</sup> *District of Columbia v. Heller*, 128 S. Ct. 2783, 2801 (2008).

<sup>5</sup> *Id.*; *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3036 (2010).

<sup>6</sup> *Heller* at 2799.

<sup>7</sup> *Id.*; *McDonald* at 3047.

<sup>8</sup> *U.S. v. Chester*, 628 F.3d 673 (4th Cir. 2010), (upholding federal prohibition against possession of firearm by person convicted of domestic violence); *U.S. v. Marzzarella*, 614 F.3d 85 (3d Cir. 2010), (upholding federal prohibition against possession of firearm with obliterated serial number); *U.S. v. Masciandro*, 638 F.3d 458, 467; cert. denied, 132 S. Ct. 756 (4th Cir. 2011), (upholding federal prohibition against carrying concealed weapons in federal parks); *Heller* at 2186-17 (noting previous opinions upholding restrictions on possession of firearms by felons and mentally ill, forbidding carrying of weapons in “sensitive places” such as schools and government buildings, and conditions and qualifications on commercial sale of arms).

<sup>9</sup> *U.S. v. Masciandro*, 638 F.3d 458, 467 (4th Cir. 2011); cert. denied, 132 S. Ct. 756 (2011).

<sup>10</sup> *Id.* at 470.

<sup>11</sup> While some courts have upheld government regulation of firearms under the intermediate scrutiny standard of judicial review (see cases cited in n. 8), Judge Howard’s use of strict scrutiny compels analysis under this standard.

<sup>12</sup> *Citizens United v. Federal Election Commission*, 130 S. Ct. 876 (2010).

prevention.<sup>13</sup> However, restrictions imposed on weapons to achieve this interest, even during a declared state of emergency, should be narrowly tailored.

While Judge Howard does not outline specific instructions for balancing the government's compelling interest in protecting public safety with individuals' core 2<sup>nd</sup> Amendment rights, aspects of the statutes that Judge Howard found troubling provide guidance for what restrictions might be constitutionally acceptable. In particular, Judge Howard noted that the statutes:

- Applied equally to all individuals, even law-abiding citizens (as opposed to targeting dangerous individuals or dangerous conduct);
- Were not limited to a certain manner of carrying weapons;
- Were not limited to certain times of the day (such as during curfews);
- Prohibited law-abiding citizens from purchasing and transporting to their homes firearms and ammunition needed for self-defense;
- Did not impose reasonable time, place, and manner restrictions by, for example, imposing a curfew to allow the exercise of 2<sup>nd</sup> Amendment rights during circumscribed times.<sup>14</sup>

Although Judge Howard found the statutes unconstitutional as applied to the plaintiffs in the case, he did not strike down the statutes entirely. This still leaves local governments with the legal authority to impose restrictions on dangerous weapons during a state of emergency, but these restrictions must be more narrowly prescribed. Drawing on Judge Howard's concerns and applicable case law, future restrictions on weapons during a declared state of emergency should:

- Be limited to situations and geographic areas where the restriction is necessary to preserve the public peace in the face of an imminent risk of damage, injury, or loss of life or property; and
- Not prohibit the possession, storage, or use of dangerous weapons in an individual's home for self-defense or other lawful purposes.

Within these parameters, examples of restrictions on weapons during a state of emergency that presumably would not be inconsistent with Judge Howard's ruling might include:

- Off-premises possession, transportation, and use of dangerous weapons during curfew periods (thus still allowing transportation and use of weapons during the times of the day when the curfew is not in effect).
- Off-premises possession and transportation of dangerous weapons in the immediate vicinity of a riot or within a geographic area severely damaged by a disaster.

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<sup>13</sup> Schenck v. Pro-Choice Network of Western New York, 519 U.S. 357 (1997); U.S. v. Carter, 669 F.3d 411 (2012).

<sup>14</sup> Bateman at pp. 14-15.

- Off-premises possession and transportation of dangerous weapons within a geographic area covered under a state of emergency declaration by individuals not lawfully authorized to be in that area (such as during limited reentry of an evacuated area when only certain authorized individuals are allowed into the restricted area).
- Possession and use of only certain kinds of dangerous weapons (for example, exempting from the restriction lawfully licensed handguns and hunting rifles).

The General Assembly might consider amending the challenged statutes during the upcoming legislative session which reconvenes on May 16<sup>th</sup>. Absent clarification from the General Assembly (and, even with it), local governments should proceed with caution if they impose restrictions on dangerous weapons during a state of emergency.<sup>15</sup>

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