STATE OF INDIANA
MARION COUNTY SUPERIOR COURT
CIVIL DIVISION

JONATHAN C. HOUGHTON, Plaintiff, vs. THE CITY OF INDIANAPOLIS, MARION COUNTY, THE INDIANAPOLIS POLICE DEPARTMENT, THE MARION COUNTY SHERIFF'S DEPARTMENT, THE INDIANAPOLIS METROPOLITAN POLICE DEPARTMENT, MICHAEL T. SPEARS, and FRANK ANDERSON, Defendants.	CAUSE NO.: 49D12-0603-PL-008381

RESPONSE TO MOTION TO DISMISS

Motions to Dismiss are generally disfavored, because these Motions undermine the public policy of deciding causes of action on their merits. *Bienz v. Bloom*, App.1996, 674 N.E.2d 998. In considering such a Motion, all of Complainant's allegations are to be taken as true, and all reasonable inferences are to be drawn in favor of Plaintiff. *Kitterman v. Pierson*, App.1996, 661 N.E.2d 1255. Only where it appears that under no set of facts can Plaintiffs be granted relief is dismissal of complaint appropriate. *Brenner v. Powers,* App. 3 Dist.1992, 584 N.E.2d 569.

A Complainant is only required to plead a "short and plain statement of the claim showing the that the pleader is entitled to relief..." T.R. 8(A)(1). A Motion to Dismiss is proper under T.R. 12(B)(6) if the Complaint alleges no claims upon which relief can be granted. A trial court should consider as true all allegations of the Complaint, and should view a Motion to Dismiss in the light most favorable to the nonmoving party. *William S. Deckelbaum Co. v. Equitable Life Assur. Coc. of U.S.*, App. 1 Dist.1981, 419 N.E.2d 228, modified 422 N.E.2d 301.

A Complaint is subject to dismissal only when it appears to a certainty that Plaintiff would not be entitled to relief under any sets of facts. *Pactor v. Pactor*, App.2 Dist.1979, 391 N.E.2d 1148. In the *Complaint,* Plaintiff has made an ample showing of his claims and the relief sought. If

all allegations made in the *Complaint* are taken as true, Plaintiff has brought a justiciable case showing civil rights violations and tort claims. Relief can be granted on these claims either at law or in equity.

The Government has filed its *Motion to Dismiss* which contains arguments under four headings. These arguments will be addressed as presented. In the end, these arguments will be shown to have no weight in logic or law, and the Government's *Motion* ought be given no moment.

IPD Need Not Seek Approval from the Indiana General Assembly for its Procedures

Under this heading, the Government unconscionably misstates Plaintiff's claim to suggest that the Indianapolis Police Department ("IPD") must have its procedures approved by the Legislature to be valid. Plaintiff has made no such claim. *Complaint* at 32. In discussions with Mark Mertz, City Attorney, regarding IPD General Order 30.03, in which Attorney Sweeney told Mertz the Government's firearm procedure was afoul of Indiana Law, Mertz responded by saying that the procedure is justified by Home Rule. Ind. Code 36-1-3, *et seq.* According to statute, Home Rule protections are not triggered until an act is passed by ordinance. Ind. Code § 36-1-3-6. Plaintiff has reviewed the Code of Indianapolis and has found no ordinance passed containing the IPD procedure at issue.

While it is dishonest to read the Complaint to contain an argument that each and every police procedure must be approved by the Legislature, Indiana law does expressly state that "If there is a constitutional or statutory provision requiring a specific manner for exercising a power, a unit wanting to exercise the power must do so in that manner." *Id*.

The present heading of discussion "IPD Need Not Seek Approval from the Indiana General Assembly for its Procedures" bespeaks the haughtiness and indifference of Indianapolis Government to the power and authority of the Legislature. With this heading as a marching order, the Government advances an arrogant attack on the Indiana Constitution when it says that "IPD is not a unit." *Motion to Dismiss* at 6.

It is essential that governments of any size divide their responsibilities into departments, lest the chain of command be so chaotic that the city becomes apoplectic. This necessity to divide functions among departments was recognized by the Legislature when they passed the following statutes bringing IPD under the ambit of Indianapolis' authority as a unit:

IC 36-3-2-2
Consolidated city; home rule and taxation powers; annexation of territory
Sec. 2. (a) The consolidated city has home rule powers under IC 36-1-3, including all the powers that a first class city has according to law.

IC 36-3-1-6
Special service districts; special taxing districts
Sec. 6. (a) When a first class city becomes a consolidated city, the following special service districts of the consolidated city are created:
(1) Fire special service district.
(2) Police special service district.

IC 36-3-2-3
Powers and duties of special service districts; administration of special service and special taxing districts; expansion of solid waste collection district
Sec. 3. (a) A special service district of the consolidated city:
(1) may sue and be sued;

IC 36-3-3-5
Supervision of work of departments, special service districts, and special taxing districts
Sec. 5. As the chief officer of the executive branch of the consolidated city government as provided by IC 36-4-4, the executive shall supervise the work of the departments of the consolidated city, its special service districts, and its special taxing districts.

According to the above passages, Indianapolis has acquired the status of a consolidated city, giving it Home Rule authority. Ind. Code § 36-3-2-2(a). Consolidated cities, upon creation, are endowed with a police special service district. Ind. Code § 36-3-1-6(a)(1). Special service districts may be sued. Ind. Code § 36-3-2-3(a)(1). The chief executive of the consolidated city (the Mayor) is responsible for supervising the police special service district. Ind. Code § 36-3-3-5. The Chief of Police is appointed by the Director of Public Safety who is installed by nomination of the Mayor and approval of the City-County Council. Indianapolis Revised Code § 251-211 and § 253-103.

To put a fine point on the question, the Indianapolis Code contains this language:

253-102. Jurisdiction, duties and powers of the Indianapolis police department.

(b) The Indianapolis police department shall have the following duties:

(13) To enforce and prevent the violation of all laws in force in the city.

The Government seems to argue that if it created enough departments, it could completely inoculate itself against suit. That IPD is an instrumentality of a unit, and thus part of the unit, appears to be settled by Indiana statute and Indianapolis' own Code. That this unit can be sued is also settled. Moreover, the City of Indianapolis, unquestionably a unit, is named as a Defendant. The Government's argument that IPD is not a unit is of little consequence, except to evidence the

Government's haughtiness. That these statutes, directly on point, were not cited in the Government's *Motion* is no small cause for concern.

Indeed, if IPD is not a unit, and Ms. Hasanadka works for the City of Indianapolis, a unit, then how can she represent all Defendants when there are, by her own argument, non units as Defendants? Has she executed a separate fee agreement with these non units? What conflicts of interest exist between the units and non units she represents? Do these non units receive any taxpayer funding?

The Government's argument that IPD is not a unit is noxious to all concepts of state federalism and is indicative of the haughtiness the City of Indianapolis holds regarding the state in which it resides. Despite Indianapolis' desire to create governmental divisions that are answerable to none but the City of Indianapolis, Indianapolis and all of its subdivisions are not above Indiana Law nor are they outside of Indiana Law. This suit is brought, in significant measure, because Indianapolis must be reminded that it is a creation of the State.

Arguments aside, it was Mark Mertz, Government's counsel, who initiated the subject of Home Rule in discussions with Attorney Sweeney, arguing that the City's conduct is protected by Home Rule. If the Government is now willing to admit it is not protected by Home Rule, Plaintiff would welcome the chance to entertain the admission, but Plaintiff does wish the Government would confine its position to one side of the argument. Plaintiff is presently tasked to research both sides of the question, as the Government perpetually changes its mind.

Keep and Bear Arms

In this passage, we again find the Government misstating the clear language of Plaintiff's claim. The Government claims that "Defendants have never denied or attempted to deny Plaintiff the right to keep or bear arms, and Plaintiff does not make this allegation." This sentence is a gross misstatement that contradicts clear language in the *Complaint* at 35. Plaintiff expressly, loudly and clearly alleges that the Government has denied him the right to keep and bear arms, and he redoubles that point in this *Response.*

It is basic in our Constitutional Law that when the government denies a person the right to speak at a place that such governmental conduct is a cause for judicial inquiry. So also open the courthouse doors if a person is denied access to a house of worship. It is not a successful Motion

to Dismiss for the Government to argue that the person could simply speak at another place at another time or attend another church.

Rights exist at the moment of peoples' desire to exercise them. If rights are denied, they are also denied at this moment. Subsequent moments are irrelevant. That Mr. Houghton could have kept and borne another arm does not refute the fact that Indianapolis and its instrumentalities denied him the right to keep and bear the arm they have in their possession. Arms are not inexpensive, and a person may not be able to afford another arm, or, in any case, should not have to purchase another arm because the Government has denied him the right to keep and bear an arm already purchased.

On this point, Plaintiffs have pled a live and justiciable Constitutional cause of action that merits redress.

Applicability of § 35-47-3-2(b)

The Government further claims that Mr. Houghton has sought relief under a statute that does not apply to him or his firearm.

Indiana Code 35-47-3 creates firearm return procedures for two classes of firearms, those required to be registered under the National Firearms Registration and Transfer Record ("NFRTR") (§ 35-47-3-3) and those that are not (§ 35-47-3-2(b)). The Government contends that Mr. Houghton's handgun is required to be so registered on the NFRTR, so Plaintiff has improperly pled under § 35-47-3-2(b). *Motion* at 16.

In support of its argument, the Government cites the following passage from the U.S. Code:

> The Secretary shall maintain a central registry of all firearms in the United States which are not in the possession or under the control of the United States. This registry shall be known as the National Firearms Registration and Transfer Record. 26 U.S.C. § 5841

The Government contends that since Mr. Houghton has a firearm, and "all firearms" are so mentioned in the U.S. statute, then Mr. Houghton's firearm is required to be registered, and the instant case is improperly pled. What, then, of the two classes of firearms noted in the Indiana Code?

Unfortunately, the Government has violated its duty of honesty and candor to the Court and has presented a fictitious argument to the Court. In citing the passage from the U.S. Code, the word "firearm" is very much at issue, as it is relevant to both the U.S. and Indiana statutes. It is essential, then, that the meaning of "firearm" be fixed, if possible.

Mere paragraphs down the page from the cite employed by the Government are the definitions for the statute.

> For the purpose of this chapter—
> (a) Firearm
> The term “firearm” means
> (1) a shotgun having a barrel or barrels of less than 18 inches in length;
> (2) a weapon made from a shotgun if such weapon as modified has an overall length of less than 26 inches or a barrel or barrels of less than 18 inches in length;
> (3) a rifle having a barrel or barrels of less than 16 inches in length;
> (4) a weapon made from a rifle if such weapon as modified has an overall length of less than 26 inches or a barrel or barrels of less than 16 inches in length;
> (5) any other weapon, as defined in subsection (e);
> (6) a machinegun;
> (7) any silencer (as defined in section 921 of title 18, United States Code); and
> (8) a destructive device. The term “firearm” shall not include an antique firearm or any device (other than a machinegun or destructive device) which, although designed as a weapon, the Secretary finds by reason of the date of its manufacture, value, design, and other characteristics is primarily a collector’s item and is not likely to be used as a weapon.
> (b) Machinegun
> The term “machinegun” means any weapon which shoots, is designed to shoot, or can be readily restored to shoot, automatically more than one shot, without manual reloading, by a single function of the trigger. The term shall also include the frame or receiver of any such weapon, any part designed and intended solely and exclusively, or combination of parts designed and intended, for use in converting a weapon into a machinegun, and any combination of parts from which a machinegun can be assembled if such parts are in the possession or under the control of a person.
> (c) Rifle
> The term “rifle” means a weapon designed or redesigned, made or remade, and intended to be fired from the shoulder and designed or redesigned and made or remade to use the energy of the explosive in a fixed cartridge to fire only a single projectile through a rifled bore for each single pull of the trigger, and shall include any such weapon which may be readily restored to fire a fixed cartridge.
> (d) Shotgun
> The term “shotgun” means a weapon designed or redesigned, made or remade, and intended to be fired from the shoulder and designed or redesigned and made or remade to use the energy of the explosive in a fixed shotgun shell to fire through a smooth bore either a number of projectiles (ball shot) or a single projectile for each pull of the trigger, and shall include any such weapon which may be readily restored to fire a fixed shotgun shell.
> (e) Any other weapon
> The term “any other weapon” means any weapon or device capable of being concealed on the person from which a shot can be discharged through the energy of an explosive, a pistol or revolver having a barrel with a smooth bore designed or redesigned to fire a fixed shotgun shell, weapons with combination shotgun and rifle barrels 12 inches or more, less than 18 inches in length, from which only a single discharge can be made from either barrel without manual reloading, and shall include any such weapon which may be readily restored to fire. Such term shall not include a pistol or a revolver having a rifled bore, or rifled bores, or weapons designed, made, or intended to be fired from the shoulder and not capable of firing fixed ammunition.
> (f) Destructive device [Passage continues] 26 U.S.C. 5845

Indeed, the very chapter cited by the Government has the title “CHAPTER 53—MACHINE GUNS, DESTRUCTIVE DEVICES, AND CERTAIN OTHER FIREARMS.”

Mr. Houghton's firearm is far from the reach of this U.S. Code chapter. Welcome is the knowledge that the Indiana Legislature was not misinformed and did not create an empty category of firearms when it crafted return procedures for firearms required to be registered and firearms not required to be registered.

As a short background, registered firearms were the result of the National Firearms Act ("NFA") which was passed in 1934 as a reaction to the Prohibition tactics of gangsters wielding Thompson submachine guns and sawed-off shotguns. The NFA created a registration list for certain exceptional firearms, noted above. Indeed, in order to purchase a NFA firearm, the U.S. Government imposes a $200 "transfer tax" for registry updating. The NFA, and thus the NFRTR, was never intended to cover, and does not now cover, the ordinary arms of private citizens.

According to the logic in the Government's *Motion*, the "all firearms" language in the U.S. Code means that every single firearm in the country is to be NFA registered. Anyone who has purchased a shotgun or handgun in Indiana knows that Federal background paperwork is processed at the time of purchase, but no registrations of ordinary private arms are kept.

Perhaps most frustrating is that firearms both required to be registered and not to be registered are to be returned at once. *There is no distinction in the manner of return for the two classes of firearms!* Ind. Code § 35-47-3-2 and § 35-47-3-3. The two statutes reside next to one another in the Indiana Code. If issue is to be made with one class of firearm, it is demanded of an advocate to compare the change in course required by the competing statute. According to professional rules, a lawyer shall not controvert an issue of a claim unless there is a good faith basis for doing so. Rules of Professional Conduct 3.1.

Given that among the first tasks in which a law student receives training is to verify the definitions of the terms being employed, it is impossible that the U.S. Code could have been innocently misstated. Further, a lawyer shall not "knowingly (1) make a false statement of material law or fact." Rules of Professional Conduct 3.3(a)(1). This Court and this attorney are owed an apology, and perhaps more, for the Government's inexcusable misstatement of the law and waste of the Court's time.

Ripeness of Plaintiff's case

Under this heading, the Government advances the strained argument that Plaintiff's cause is

not yet ripe. The Government argues that it has not refused to return the firearm. It just will return the firearm after its procedures are followed. Apart from the "begging the question" fallacy contained in this logic, we recall a sad time in which Blacks were not disallowed the vote; they were just required to pass tests prior to voting.

Again, the Government has intentionally misstated Plaintiff's *Complaint.* Plaintiff has expressly, loudly and clearly alleged that the Government has refused to return his firearm. *Complaint* at 15. Mr. Houghton made his initial demand for immediate return of his firearm (*Exhibit 1*) on October 26, 2005, and as of this writing, April 26, 2006, five months later, the firearm has not been returned. Plaintiff is flummoxed by the Government's attempt to claim that the firearm hasn't been returned "*at all*." Return is a binary state: it either happens, or it does not. Five months following Mr. Houghton's clear demand, there has been no return of Mr. Houghton's firearm. The October demand letter contained no ambiguous language, and the Government retains Mr. Houghton's firearm under a superior claim of title and at a violation of Mr. Houghton's rights.

The validity of a governmental procedure restricting civil rights is a justiciable case, the regular stuff of civil rights cases. According to the Government's logic, it is impossible to challenge the police procedure, as challenging the procedure prior to firearm return would make the case unripe, while challenging it after return would subject the citizen to the very unconstitutional practices for which the suit provides relief and would remove the judicial requirement for an active case or controversy. The Government cannot have it both ways.

If the Government is going to demand that its procedures be followed, it is obligated to defend its procedures. The Government has failed to follow Indiana law, and Plaintiff has brought a justiciable case that seeks protection under Indiana law from local illegal conduct.

Conclusion

In sum, the Government would have the Court believe that the Indiana Legislature has passed a law that Indianapolis is not required to follow. The Government's *Motion* is incoherently constructed and built atop dishonest arguments. Plaintiff has presented a civil rights and tort case that is deserving of relief and addresses essential questions of government construction and state federalism. Plaintiff has brought a meaningful case that will require vigorous examination of Indiana Constitutional law to settle the most foundational governmental questions.

Most importantly, if all allegations in the Complaint are taken as true, the Government has violated Mr. Houghton's state and federal right to keep and bear arms and has asserted dominion over his chattels under superior claim of title. These are claims upon which relief can be granted.

Accordingly, the Government's *Motion* ought be given no moment.

Respectfully submitted,

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CERTIFICATE OF SERVICE

Brian P. Sweeney, counsel for the Plaintiff, delivered a copy of the Response to Motion to Dismiss to Lakshmi Hasanadka, attorney for all Defendants, at the following adores by depositing a copy of this Response in the United States Postal Service First Class Mails s on April 26, 2006:

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