Journal of Civil Rights and Economic Development

Volume 10, Fall 1994, Issue 1 Article 2

NRA and Law Enforcement Opposition to the Brady Act: From Congress to the District Courts

Richard E. Gardiner

Stephen P. Halbrook

Follow this and additional works at: https://scholarship.law.stjohns.edu/jcred

This Symposium is brought to you for free and open access by the Journals at St. John's Law Scholarship Repository. It has been accepted for inclusion in Journal of Civil Rights and Economic Development by an authorized editor of St. John's Law Scholarship Repository. For more information, please contact selbyc@stjohns.edu.

ARTICLES

NRA AND LAW ENFORCEMENT OPPOSITION TO THE BRADY ACT: FROM CONGRESS TO THE DISTRICT COURTS*

RICHARD E. GARDINER**
& STEPHEN P. HALBROOK, PH.D.***

* Part I of this article is derived from Mr. Gardiner's testimony before the House Judiciary Committee's Subcommittee on Crime and Criminal Justice. *Testimony of Richard Gardiner, Legislative Counsel Institute for Legislative Action, National Rifle Association of America, Before the Crime and Criminal Justice Subcommittee of the House Judiciary Committee: Waiting Period for Handgun Purchase*, Fed. Document Clearinghouse Cong. Testimony (FDC) (Sept. 30, 1993). Mr. Gardiner has added footnotes to his testimony to explain the actions taken in response to the concerns he raised. The testimony has been slightly abridged due to its original length.

** Mr. Gardiner is a private practitioner, emphasizing constitutional law, in Fairfax, Virginia. B.S.E.E., Union College, 1973; J.D., George Mason University School of Law, 1978.

*** Dr. Halbrook is engaged in private practice of civil and criminal law, emphasizing constitutional law, in Fairfax, Virginia. He was lead counsel in four challenges to the Brady Act. *See* McGee v. United States, 863 F. Supp. 321 (S.D. Miss. 1994); Mack v. United States, 856 F. Supp. 1372 (D. Ariz. 1994); Printz v. United States, 854 F. Supp. 1503 (D. Mont. 1994); Koog v. United States, 852 F. Supp. 1376 (W.D. Tex. 1994). Dr. Halbrook also authored *That Every Man Be Armed: The Evolution of a Constitutional Right* and *A Right to Bear Arms: State and Federal Bills of Rights and Constitutional Guarantees*. B.S., Florida State University, 1969; Ph.D. (philosophy), Florida State University, 1972; J.D., Georgetown University Law Center, 1978.

In September of 1993, Mr. Richard E. Gardiner was the Legislative Counsel for the National Rifle Association ("NRA"). In that capacity, he analyzed federal, state, and local legislation which affected the NRA's interests. His duties also included testifying before legislative bodies. One of the bills which Mr. Gardiner analyzed extensively and concerning which he testified was the Brady Bill ("H.R. 1025"), which was introduced by Representative Charles Schumer.[1] The Brady Handgun Violence Prevention Act ("Brady Act") primarily consists of two provisions. The first provision, section 102(a),[2] is an interim measure and establishes a waiting period for the purchase of a handgun from a federally licensed firearms dealer in those states which do not perform some other form of background check. The second provision, section 102(b),[3] is a permanent measure and provides that no later than sixty months after the effective date of the Brady Act, a national instantaneous point-of-purchase system must be established for firearms purchases from federally licensed firearms dealers.[4] Part One of this article discusses Mr. Gardiner's September 30, 1993 testimony before the House Judiciary Committee's Subcommittee on Crime, which was chaired by Representative Schumer.[5] Part Two sets forth the legal arguments being made in four of the lawsuits presently challenging the constitutionality of the interim provision of the Act. Part Two is co-authored by Dr. Stephen P. Halbrook, lead counsel for four sheriffs who are plaintiffs in these lawsuits.

[1] H.R. 975, 100th Cong., 1st Sess. (1985). The first version of the Brady Bill was introduced in the 100th Congress as H.R. 975. *Id.* It was defeated in the House of Representatives in 1988 when a substitute was adopted "requir[ing] the Attorney General to develop a national system for the identification of felons attempting to buy firearms." *See* HOUSE COMM. ON JUDICIARY, BRADY HANDGUN VIOLENCE PREVENTION ACT OF 1993, H.R. REP. No. 344, 103d Cong., 1st Sess. 13 (1993), *reprinted in* 1993 U.S.C.C.A.N. 1984, 1990 [hereinafter REPORT]. In the 101st Congress, the Brady Bill was introduced as H.R. 467 and, although hearings were held, the Bill was not reported out of Committee. *Id.* In the 102d Congress, the Bill was introduced as H.R. 7. The bill passed the House, but, after being combined with H.R. 3371, a comprehensive anti-crime bill, it died when the Senate did not vote on the final version of H.R. 3371. 1993 U.S.C.C.A.N. at 1991.

[2] 18 U.S.C. § 922(s)(1)(A)(ii)(I) (1994).

[3] 18 U.S.C. § 922(t)(1) (1994).

[4] *Id.* The other provisions of the Brady Act relate to the implementation of the national system, funding for states to improve their criminal history records, reporting of multiple handgun sales to state and local law enforcement, licensing fees, and prevention of firearms theft.

[5] *See Testimony of Richard Gardiner, Legislative Counsel Institute for Legislative Action, National Rifle Association of America, Before the Crime and Criminal Justice Subcommittee of the House Judiciary Committee: Waiting Period for Handgun Purchase*, Fed. Document Clearinghouse Cong. Testimony (FDC) (Sept. 30, 1993).

I. NRA's Testimony

As the members of the House Judiciary Committee's Subcommittee are undoubtedly aware, the NRA remains adamantly opposed to a federally imposed waiting period prior to the sale of a handgun. There is no evidence that a waiting period of any length, including a "five business day" wait as contained in the interim provision of H.R. 1025, serves a legitimate or constitutionally justifiable purpose.[6] Clearly, however, the NRA does not oppose an instantaneous point-of-purchase background check on a potential purchaser of a handgun prior to sale by a licensed firearms dealer. In fact, a point-of-purchase background check system is currently in use in five states[7] and conceptually embodied in the permanent provision of H.R. 1025.[8] Indeed, we are pleased that proponents of a waiting period, in supporting H.R. 1025, have moved toward the system that the NRA has been supporting since 1988.

Despite our preference for the concept embodied in the permanent provision of H.R. 1025, we remain opposed to H.R. 1025 for a multitude of reasons. While there are numerous drafting flaws throughout the bill, the following are the primary reasons we oppose H.R. 1025.

A. *The "Five Business Day" Waiting Period Imposes Burdens on Those Who Obey the Law*

The interim provision of H.R. 1025 imposes the duty to make "a reasonable effort to ascertain within five business days whether the transferee has a criminal record . . . ."[9] As Chairman Charles E. Schumer publicly stated on March 3, 1993 on *Crossfire*,[10] this

[6] *See* 139 Cong. Rec. H8649 (1993) (statement of Rep. Schiff); 139 Cong. Rec. H9088, 9092 (1993) (statement of Rep. Volkmer); 137 Cong. Rec. S9040, 9044 (1991) (statement of Sen. Symms noting that states with waiting period had increases in violent crimes more than states without); *see also* David B. Kopel, *Hold Your Fire: Gun Control Won't Stop Rising Violence*, Pol'y Rev., Jan. 1993, at 63 (stating that waiting period will not prevent crime, but may actually cost lives).

[7] The five states are: Virginia, Florida, Wisconsin, Delaware, and Illinois. Since the enactment of the Brady Act, Colorado, Utah, and Idaho have enacted "instant check" laws.

[8] 18 U.S.C. § 922(t)(1) (1994) (establishing national instant criminal background check system).

[9] This language was amended slightly in the final version of the Bill. As enacted, it requires the chief law enforcement officer to "make a reasonable effort to ascertain within 5 business days whether receipt or possession would be in violation of law . . . ." *See* 18 U.S.C. § 922(s)(2) (1994).

[10] *Crossfire: Gun Control Debate* (CNN television broadcast, Mar. 3, 1993).

language does not mandate a background check, making the interim provision primarily a mandated wait with an option to conduct a background check.[11] Such an interpretation of the interim provision of H.R. 1025 is, of course, required by the Tenth Amendment.[12] The Tenth Amendment forbids the federal government from compelling the states—and thus local law enforcement—to undertake any kind of action, including conducting background checks on handgun purchasers.[13] As the Supreme Court concluded in *New York v. United States*,[14] "even where Congress has the authority under the Constitution to pass laws requiring or prohibiting certain acts, it lacks the power directly to compel the States to require or prohibit those acts."[15] It is important to note that Attorney General Janet Reno, in her prior role as a Florida state attorney, asserted an interpretation of the Constitution consistent with the Court in *New York*.[16]

[11] *See* REPORT, *supra* note 1, at 2008. The full Committee made clear that the background check was mandatory when it defeated Representative Schiff's amendment to make it explicitly optional. *Id.* As Representative Schiff pointed out in his "Additional Dissenting Views to the Committee Report," the Committee rejected his amendments to place the burden of conducting checks on the FBI, or in the alternative, to require the federal government to reimburse the state or local agency for the costs of performing checks. *Id.* at 2007. Schiff added that he "would insert 'may,' and make it an option for state and local agencies with law enforcement resources to perform the background check. This amendment failed as well." *Id.* at 2010.

Representative Schumer opposed Schiff's proposal because localities or states "[would not] do the check . . . it makes it a much better bill . . . to say that they 'shall' have to do it." Transcript of Markup on H.R. 1025, House Judiciary Committee 131 (Nov. 4, 1993) (on file with author). Representative F. James Sensenbrenner, chief Republican sponsor, also opposed the amendment because "it makes the Brady bill optional . . . . We should make it mandatory." *Id.* at 134.

[12] U.S. CONST. amend. X. "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." *Id.*

[13] *See* Harvey Berkman, Printz v. United States: *An NRA Win in Montana*, NAT'L L.J., June 6, 1994, at A26 (discussing Brady Act and issues of federalism).

[14] 112 S. Ct. 2408 (1992).

[15] *Id.* at 2423. The Court in *New York* held unconstitutional a federal statute which required the states, unless they provided for radioactive waste according to Congress's directives, to take title to and possession of the waste and to be liable for damages. *Id.* The Court concluded:

> States are not mere political subdivisions of the United States. State governments are neither regional offices nor administrative agencies of the Federal Government. The positions occupied by state officials appear nowhere on the Federal Government's most detailed organizational chart. The Constitution instead 'leaves to the several States a residuary and inviolable sovereignty, The Federalist No. 39, . . . reserved explicitly to the States by the Tenth Amendment. . . . Whatever the outer limits of that sovereignty may be, one thing is clear: The Federal Government may not compel the States to enact or administer a federal regulatory program.

Id. at 2434-35.

[16] *See* Defendant's Answer at 2, Eugene Steele v. National Firearms Act Branch, No. 82-2013 (S.D. Fla. Oct 18, 1982). The Answer provides in relevant part:

The administrative costs inherent in conducting the checks, created by the interim provision of H.R. 1025, will be borne by already overextended local police agencies since no federal funds are provided by H.R. 1025 to local law enforcement.[17] This, of course, means that other important law enforcement functions will suffer.[18]

The "five business days" required by H.R. 1025 is an arbitrarily selected time period. All background check systems utilize the same record database. Therefore, any criminal record that is

> To the extent that 26 U.S.C. § 5812 and/or 27 C.F.R. 179.85 requires the Defendant to certify that possession of an automatic weapon is not contrary to State [or] Local law, 26 U.S.C. § 5812 and/or 27 C.F.R. 179.85 exceeds the authority vested in Congress and/or the Executive Branch by Articles I and II of the Constitution of the United States.

Id.

[17] For example, Sheriff McGee of Forrest County, Mississippi, who brought one of the five challenges to the constitutionality of the interim provision of the Brady Act informed the district court that he has forty-five deputies in his department and, at any given shift, six are on street patrol and five work inside the jail complex. The Sheriff is responsible for law enforcement for 68,314 persons in an area of 469 square miles (i.e., one deputy per 78 square miles). The Sheriff is also responsible for 205 inmates at the county jail and 75 at the county work center.

Sheriff McGee detailed the records required to be searched to ascertain the legality of receipt of a handgun under federal and state law. National Crime Information Center ("NCIC") records showing outstanding warrants are electronically retrievable. Determination of whether a person has a relief from disability would require long distance calls to the United States Treasury Department. County court criminal records must be hand searched to determine the nature of an offense and whether a restoration of civil rights had been granted. Forrest County records could be searched in Hattiesburg, but records from other counties would require driving there.

Mental commitments to the state hospital may not be available, but, if so, would require an hour and a half of driving time. Incompetency hearings are held weekly and would require a person to be present to learn the outcome. County court civil records would have to be searched to determine adjudications that a person is a mental defective or a danger to self or others. Records of unlawful drug use would include a wide variety of law enforcement and court records as well as medical and drug treatment records.

Depending on what is considered "reasonable," a background check could take anywhere from one hour to several days. The Sheriff's Department budget does not allocate any funding for these searches. No authority exits to charge for the searches.

There are 75 licensed firearm dealers in Forrest County. One of them made 755 handgun transactions in the past year, which would average 63 transactions requiring Brady checks each month. Another noted an average of 85 handgun transactions per month.

Sheriff McGee has been doing six to eight checks per day. The NCIC might render as many as 60 to 70 individuals with a common name. Sheriff McGee receives a computer printout listing every person with a certain name or alias and a certain (or similar) date of birth in the United States. One-third of the searches result in a detailed response. In some, it must be determined whether a conviction is a misdemeanor or felony. On occasion, the Sheriff has required individuals to come into the office to determine if they were persons identified in the NCIC check. At times the Sheriff's Department checks with the circuit clerk or the district attorney to determine if a person has been indicted. Once he determines that the transfer is lawful, Sheriff McGee destroys the records immediately.

[18] *See* Printz v. United States, 854 F. Supp. 1503, 1507 (D. Mont. 1994) (noting that Sheriff Printz believed that Brady Act imposed duties on already onerous position); *see also* 137 CONG. REC. S9040 (1991) (statement of Sen. Symms that waiting periods distract law enforcement officers from being on street and fighting crime).

available to local law enforcement within five days can be accessed immediately by automated means. In addition, since local law enforcement would conduct a background check utilizing the same criminal history record systems that an instant check system would query, the only real effect of the interim provision of H.R. 1025 is to create an unnecessary extra step in checking records. Why not simply cut out the middleman?

Waiting periods have not reduced violent crime.[19] Moreover, two-thirds of Americans are already living under some type of waiting period.[20] Twenty of the twenty-two states with waiting periods and/or "permit to purchase laws," as well as the District of Columbia, experienced *increases* in violent crime rates from 1987 to 1991.[21] In fact, most states that have imposed some type of waiting period on firearm purchases have experienced increases in violent crime or homicide rates greater than the national trend.[22]

B. Federal, State, and Local Government Officials Granted Absolute Immunity From Damages

It is particularly disturbing, from a civil liberties perspective, that H.R. 1025 so dramatically expands the potential for the government, including law enforcement, to abuse the rights of law-abiding citizens without any consequences for such abuse.[23] The proponents of a waiting period have long suggested that the purpose of such a wait is to allow time to scrutinize handgun purchasers and stop criminals from making purchases through retail outlets. Yet the language of H.R. 1025 is far more expansive, giving all levels of government, including local law enforcement, a virtually unchecked veto power over handgun sales, with no threat of penalty for even bad faith abuse of that power. Regardless of the reason for the denial—race, religion, sex, political party, or belief—individuals unlawfully denied their rights would have to

[19] *See* 138 CONG. REC. S9286 (1992) (statement of Sen. Smith noting that all jurisdictions which have enacted waiting periods have seen increases in violent crime).

[20] 139 CONG. REC. H9088, 9092 (1993) (statement of Rep. Volkmer that even though two-thirds of America are already living under some sort of waiting period, violent crime rates increased from 1987 to 1991).

[21] *Id.*

[22] *See* 137 CONG. REC. S9040 (1991) (statement of Sen. Symms comparing violent crime statistics of jurisdictions with waiting periods to statistics of those without).

[23] 139 CONG. REC. S16,304 (1993) (statement of Sen. Mitchell asserting that gun control's only effect is harassment of law-abiding citizens).

bring suit in federal court to win a judgment allowing them to purchase the firearm. This is wrong. Furthermore, it is not necessary to accomplish the bill's purported objective. One has to wonder if the objective of H.R. 1025 is truly that which is urged by its proponents.[24]

It is, of course, appropriate to shield government officials from the threat of damages in the event that they, in good faith, after a diligent effort to review records, prevent a lawful sale.

C. *No Specific Time Imposed for the Implementation of the National Instant Check System*

The proponents of H.R. 1025 have sought support for the bill by suggesting that the bill will lead eventually, when such a system is technologically feasible, to the implementation of a national instant check. We therefore applaud the admission that an instant point-of-sale screening system, which the NRA has been supporting since 1988, is the preferred alternative. We believe, however, that the time for dithering on this issue is long past. The date for the implementation of a federal point-of-sale screening system should be set, by law, and adhered to.

H.R. 1025 does not set a date on which the point-of-sale screening system would begin. Rather, it grants to the Attorney General virtually unfettered discretion to implement the instant check system after a period of not less than two and a half years.[25] Specifically, the bill grants to the Attorney General the exclusive discretion to certify that the national system is established.[26] Moreover, to be certified, the states must comply with timetables which are established by the Attorney General. These timetables relate to the times by which the states should be able to provide criminal records on "an on line capability basis" to the national system. Be-

[24] When Representative Schiff made a motion in the subcommittee to amend the bill removing immunity for local governments, Representative Schumer explained that the bill only provided immunity for the officials *personally*, not for the government entity by whom they were employed. Representative Schiff thus withdrew his amendment. Moreover, the committee amended the bill to establish a specific remedy for an erroneous denial. That remedy, as finally enacted, allows a person who was eligible to acquire a firearm to apply "for an order directing that the erroneous information be corrected or that the transfer be approved . . . ." 18 U.S.C. § 925A (1994). This provision also allows the court to award the prevailing party "a reasonable attorney's fee as part of the costs." *Id.*

[25] *See* 138 CONG. REC. S16,216, 16,220 (1992) (statement of Rep. Kohl that uniform five business day waiting period would remain in effect for at least two years).

[26] 18 U.S.C. § 922(t)(1) (1994).

cause it is solely up to the Attorney General to establish these timetables, he or she could well establish timetables that were not achievable for many years, and effectively delay the establishment of the national system for many years as well. Conceivably, the Attorney General would need only to establish an unattainable timetable for one state, and thereby prevent the national system from ever being certified.[27]

There is no good reason to delay indefinitely the implementation of a national instant check system. Currently, the states of Florida, Wisconsin, Virginia, Illinois, and Delaware successfully operate point-of-sale background check systems. All five states implemented these systems in less than one year, with the average implementation and startup costs being one-half of a million dollars for the first year.

The Department of Justice ("DOJ") compared the status of state criminal history records nationwide to the status of such records in the first two states to adopt instant check systems.[28] The DOJ noted that:

> 32 States claim disposition reporting rates as good or better than Florida's reported 47 percent rate for the past five years, while 29 States report a higher percentage of automated criminal histories than Virginia, which reported 56 percent of its files automated.[29]

Moreover, every state is currently in the process of upgrading its criminal history records. In fact, almost $50 million in federal grant money has gone to the states for that specific purpose over the last three years.[30] The 1988 DOJ initiatives were aimed at improving the quality and access to criminal records. In effectuating such goals, the DOJ began to automate criminal records in which there had been a record of activity within the last five years.[31] Today, the majority of those persons between the ages of

[27] *See* 139 CONG. REC. H9123 (daily ed. Nov. 10, 1993). This language was removed by an amendment offered on the House floor by Representative Gekas. *Id.* The proposed amendment also repeals the interim provision of the Brady Act when the national "instant check" system comes on line or in 60 months, whichever comes first. *Id.* at H9131.

[28] STEVEN D. DILLINGHAM, PH.D., BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, BJS INITIATIVES FOR CRIMINAL HISTORY RECORD IMPROVEMENT 14 (1992).

[29] *Id.* at 17.

[30] *See* H.R. REP. NO. 405, 102d Cong., 1st Sess. (1991) (statement by Mr. Jack Brooks authorizing $50,000,000 for fiscal year 1992).

[31] *See* REPORT, *supra* note 1, at 1988 (stating requirement of state timetable is 80% accuracy).

eighteen and twenty-seven who have committed a crime since 1988, or anyone who has a record of criminal activity in the same time period, can be identified by any national instant background check system.[32]

An effective background check system is not dependent on complete criminal histories. Rather, access to state master name indexes through the Interstate Identification Index ("III") of the National Criminal Information Center ("NCIC") is necessary.[33] This index lists those individuals who are, or have been, involved with the law. Last year's DOJ report noted:

> [T]he master name index in 44 States included 100 percent of record subjects and . . . the indexes in [39] States (representing over 80 percent of the records) were fully automated. Nationally, therefore, immediate identification through a name index of an individual as the subject of a criminal record is possible in a majority of cases even where full records are not automated.[34]

Since some ninety percent of firearms purchasers have no criminal record of any kind, a check of the master name index enables ninety percent of checks to be completed in seconds. Of the remaining ten percent of purchasers for whom some form of record exists, their records generally can be checked further in minutes. Based on anecdotal evidence, many of the one percent who are ultimately determined not to be qualified probably believe, for good reason, that they were qualified, but for some reason had been misinformed and were subsequently able to remove their disqualification. Thus, there is simply no compelling reason to have a five business day waiting period when more than ninety-eight percent of purchasers can be cleared in minutes with an automated system.

D. When National Instant Check System Goes On-Line, Purchasers of All Firearms Are Subject to the Check

It is an unnecessary requirement that purchasers of all firearms be subject to a check. Given the relatively minuscule use of long

[32] *Id.*

[33] *See* REPORT, *supra* note 1, at 2004 (citing Mr. Emett Rathbun, manager of division of FBI, who says that III is most accurate up-to-date nationwide information available).

[34] *See* DILLINGHAM, *supra* note 28, at 17.

guns in crime,[35] there is no conceivable justification to impose this burden on individuals, firearms dealers, law enforcement, or the federal government. It is an unnecessary expense.[36]

E. When Federal Point-Of-Purchase System is Implemented a Uniform National Standard Should Be Imposed

A uniform federal waiting period is meant to address a perceived laxness in the treatment of handgun purchases by various states. But, for the ninety-nine percent of people who purchase handguns from retail outlets who are not prohibited persons under federal or state law—proven with a criminal records background check—a wait is clearly an unnecessary and undue infringement.[37] Therefore, in the interest of uniformity and equal protection of the rights of all Americans, state laws requiring a wait following the verification of the eligibility of the purchaser should be preempted.[38]

A uniform national law will protect the rights of all law-abiding Americans, as provided for in section one of the Fourteenth Amendment to the United States Constitution: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law . . . ."[39] Section five of the Fourteenth Amendment grants Congress the power to enact legislation to enforce section one.[40] Once Congress enacts a uniform national point-of-purchase background check system, there is no reason for the states to violate the rights of law-abiding citizens by requiring waiting periods. Thus, Con-

[35] *See* U.S. DEP'T OF JUSTICE, FEDERAL BUREAU OF INVESTIGATION, UNIFORM CRIME REPORTS 18, 29, 32, 58 (1993) (asserting that long guns are used in well under 1% of all serious crime).

[36] *See* 139 CONG. REC. H9088, 9092 (1993) (statement by Rep. Volkmer arguing that long guns' small use in violent crimes make their inclusion in national instant check system unnecessary); *see also* 18 U.S.C. § 922(t) (1994) (codifying H.R. 1025).

[37] 139 CONG. REC. S16,304 (1993) (statement of Sen. Mitchell expressing that only thing handgun control measures do is harass law-abiding citizens).

[38] *See* 139 CONG. REC. H9131 (daily ed. Nov. 10, 1993). The House rejected an amendment to preempt state and local law. *Id.*

[39] U.S. CONST. amend. XIV, § 1.

[40] *See* U.S. CONST. amend. XIV, § 5. This provision of the Constitution states: "The Congress shall have power to enforce, by appropriate legislation, the provision of this article." *Id.*; *see also* Fullilove v. Klutznick, 448 U.S. 448, 472 (1979) (positing that Congress is charged with enforcing equal protection guarantees of Fourteenth Amendment).

gress should exercise its Fourteenth Amendment power to protect the rights guaranteed by the Second Amendment.

Recently, in *Planned Parenthood of Southeastern Pennsylvania v. Casey*,[41] the Supreme Court, analyzing the scope of the Fourteenth Amendment, quoted approvingly one of its earlier analyses. The Court concluded that:

> [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. This "liberty" is not a series of isolated points pricked out in terms of the taking of property; the freedom of speech, press, and religion; *the right to keep and bear arms*; the freedom from unreasonable searches and seizures; and so on.[42]

Therefore, the Supreme Court has recognized that the right to keep and bear arms is one of the rights that Congress has a duty to protect against state infringement.

F. Exemption from "Five Business Day Wait" Conditioned upon Existence of a "Threat"

Despite statements by supporters of H.R. 1025 that people who need a handgun for self-defense would be able to obtain a handgun without waiting five business days, the fact is that this exemption is only available to a purchaser who "requires" access to a handgun because of a "threat to the life" of that purchaser or a member of his household.[43] For several reasons, these are standards that few people could meet. First, the word "threat" connotes a specific communication by a particular person; thus, most law enforcement officials will undoubtedly require proof of the existence of such a specific communication. Second, since the bill requires a threat "to the life" of a person, a threat to do bodily harm would be insufficient. Finally, many law enforcement officials would not be willing to acknowledge—as they would by issuing a waiver—that anyone "required" a handgun for self-defense since law enforcement is present in the community.

[41] 112 S. Ct. 2791 (1992).

[42] *Id.* at 2805 (quoting Poe v. Ullman, 367 U.S. 497, 543 (1961) (Harlan, J., dissenting)).

[43] *See* H.R. REP. No. 1025, 103d Cong., 1st Sess. 9 (1993), *reprinted in* 1993 U.S.C.C.A.N. 1984, 1987 (creating ability to circumvent five-day waiting period).

G. *Firearms Purchaser's Exemption Unnecessarily Limited with Certain State Permits*

The exception in H.R. 1025 to both the interim waiting period and the instant check system for firearms purchasers who have certain state or local permits, is limited to purchasers who have a permit to *possess* which was issued within the last five years. However, there is no legitimate reason not to include within the exception persons with permits to *carry*, and persons with permits issued more than five years before the attempted purchase. This is logical, since the exception would continue to require that the permit be issued by a government official after a background check.[44]

Limiting the exception to permits issued within the last five years would effect primarily New York residents since that state issues lifetime licenses to possess handguns. As of the end of 1992, there were approximately one million pistol licenses issued in New York State, of which some ninety percent were issued more than five years earlier. Why should some 900,000 law-abiding New Yorkers who have waited as much as six months for a permit while having been subjected to a thorough background check be required to wait another five business days to allow another background check to be completed?

II. LITIGATION CHALLENGING THE CONSTITUTIONALITY OF THE INTERIM PROVISION OF THE BRADY ACT

Since February 28, 1994, the effective date of the Brady Act, five county sheriffs have filed suit in federal district courts challenging the constitutionality of the interim provision of the Brady Act.[45]

[44] *See* 139 CONG. REC. S16,505, S16,712 (1993) (adding permits to "acquire" handguns to alternative).

[45] *See* McGee v. United States, 863 F. Supp. 321 (S.D. Miss. 1994) (brought by Sheriff Bill McGee of Forrest County, Mississippi); Frank v. United States, 860 F. Supp. 1030 (D. Vt. 1994) (brought by Sheriff Sam Frank of Orange County, Vermont); Mack v. United States, 856 F. Supp. 1372 (D. Ariz. 1994) (brought by Sheriff Richard Mack of Graham County, Arizona); Printz v. United States, 854 F. Supp. 1503 (D. Mont. 1994) (brought by Sheriff Jay Printz of Ravalli County, Montana); Koog v. United States, 852 F. Supp. 1376 (W.D. Tex. 1994) (brought by Sheriff J.R. Koog of Val Verde County, Texas). The authors understand that the sixth and seventh cases have been filed. The sixth case was brought by Sheriff Errol Romero of Iberia Parish, Louisiana. The seventh case was brought in Alaska by a chief law enforcement officer. Except for the Romero case, all cases have been decided by the district courts in which they were filed.

A. *The Requirements of the Brady Act*

The Brady Act makes it unlawful for a federally licensed firearms dealer to transfer a handgun to a nonlicensee unless the dealer obtains a statement containing personal information from the transferee, provides notice of the contents, and transmits a copy of the statement to the chief law enforcement officer ("CLEO")[46] where the transferee resides.[47] The Brady Act then imposes various duties upon the CLEO which require spending time and resources examining the background of the potential purchaser.[48]

Numerous records must be researched to ascertain whether receipt or possession of a handgun would violate federal law.[49] To determine whether a person has been convicted of a crime punish-

[46] 18 U.S.C. § 922(s)(8) (1994) (defining term "chief law enforcement officer" as "the chief of police, the sheriff, or an equivalent officer or the designee of any such individual").

[47] 18 U.S.C. § 922(s)(1)(A)(i) (1994) (as created by § 102(a) of Pub.L.No. 103-159, 107 Stat. 1536 (1993) which amended Title 18 of U.S.C.); *see* 18 U.S.C. § 922 (s)(1)(B)-(E) (providing alternatives to compliance with subparagraph (A)); *see also* 59 Fed. Reg. 37,532 (1994) (noting that currently, twenty-four states have such alternatives).

[48] Specifically, section 922(s)(2) provides:

> A chief law enforcement officer to whom a transferor has provided notice . . . shall make a reasonable effort to ascertain within 5 business days whether receipt or possession would be in violation of the law, including research in whatever State and local record-keeping systems are available and in a national system designated by the Attorney General.

18 U.S.C. § 922(s)(2) (1994). Section 922(s)(6)(B) provides:

> Unless the chief law enforcement officer to whom a statement is transmitted . . . determines that a transaction would violate Federal, State, or local law—(i) the officer shall, within 20 business days after the date the transferee made the statement on the basis of which the notice was provided, destroy the statement, any record containing information derived from the statement, and any record created as a result of the notice required . . . .

18 U.S.C. § 922(s)(6)(B) (1994). Section 922(s)(6)(C) provides:

> If a chief law enforcement officer determines that an individual is ineligible to receive a handgun and the individual requests the officer to provide the reason for such determination, the officer shall provide the reasons to the individual in writing within 20 business days after receipt of the request.

18 U.S.C. § 922(s)(6)(C) (1994).

[49] *See* 18 U.S.C. § 922(g) (1994). Section 922(g) provides:

> It shall be unlawful for any person—(1) who has been convicted in any court of a crime punishable by imprisonment for a term exceeding one year; (2) who is a fugitive from justice; (3) who is an unlawful user of or addicted to any controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)); (4) who has been adjudicated as a mental defective or who has been committed to a mental institution; (5) who, being an alien, is illegally or unlawfully in the United States; (6) who has been discharged from the Armed Forces under dishonorable conditions; or (7) who, having been a citizen of the United States, has renounced his citizenship; to . . . possess in or affecting commerce, any firearm . . . ; or to receive any firearm . . . which has been shipped or transported in interstate or foreign commerce.

Id.; *see also* Violent Crime Control & Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796 (1994) (enacting category (8) to § 922(g), which includes person subject to court order which "restrains such person from harassing, stalking, or threatening an inti-

able by imprisonment for a term exceeding one year, a CLEO would have to search arrest, conviction, and appellate records as well as records concerning pardons, expungements, and restorations of civil rights.[50] The CLEO must also search medical, hospital, drug treatment, and police investigatory records to determine if a person is an unlawful user of or addicted to a controlled substance. Medical and judicial records must be searched to determine if a person has been adjudicated as a mental defective or committed to a mental institution. Records of fugitives, dishonorable discharges, and ex-citizens must be searched. Records of restraining orders involving intimate persons (e.g., in domestic relations cases) must be searched as well as various other records to determine whether the handgun to be purchased had ever been shipped or transported in interstate or foreign commerce or affected commerce, without which section 922(g) would not apply.

If the handgun transferee is in any of the several enumerated classes, the CLEO must then determine whether the person has received a relief from disabilities by the Secretary of the Treasury.[51] In the event of a denial of relief from disabilities, one may petition the United States District Court for review.[52] Accordingly, the CLEO must examine the *Federal Register* and the records of the United States District Courts to make the commanded determination.

In the event that the handgun is being purchased for use in the course of employment, the CLEO must search records not only of a prospective purchaser, but also of that person's employer.[53] Another provision of the Brady Act requires the CLEO to search records of indicted persons as well as records of whether a specific handgun has ever been shipped in interstate commerce.[54] Finally,

mate partner of such person or child of such intimate partner or person," where order makes findings that person is threat to physical safety of others).

[50] *See* 18 U.S.C. § 921(a)(20) (1994).

[51] *See* 18 U.S.C. § 925(c) (1994) (providing for publication of notice thereof in *Federal Register*).

[52] *Id.*

[53] *See id.* § 922(h) (1988). Section 922(h) provides:

> It shall be unlawful for any individual, who to that individual's knowledge and while being employed for any person described in any paragraph of subsection (g) of this section, in the course of such employment—(1) to receive, possess, or transport any firearm . . . in or affecting interstate or foreign commerce; or (2) to receive any firearm . . . which has been shipped or transported in interstate or foreign commerce.

Id.

[54] *Id.* § 922(n). This section provides: "It shall be unlawful for any person who is under indictment for a crime punishable by imprisonment for a term exceeding one year to . . .

various other provisions make the receipt or possession of certain handguns a violation.[55]

The three duties imposed on CLEOs by the Brady Act have been interpreted to be mandatory. For example, on February 9, 1994, at a national conference on the Brady Act, an official of the Bureau of Alcohol, Tobacco & Firearms ("BATF")—the federal agency charged with enforcing the Brady Act—was asked whether a CLEO who "refused to make a reasonable effort to ascertain whether a would-be gun buyer was qualified" is "subject to criminal prosecution."[56] In response, Robert J. Creighton, BATF Brady Law Coordinator, said that he did not expect CLEOs to defy the law.[57] He specifically stated that the criminal penalties could be applied to CLEOs because "it's in the law."[58] On February 14, 1994, the BATF published its view that the Brady Act "require[s]" the CLEO to carry out the three duties.[59] A letter from the BATF to the CLEOs stated that "the law clearly anticipates some minimal effort to check commonly available records" but that "it is difficult to prescribe precisely what must be done in every instance."[60] Additionally, a notice from the Attorney General interpreting the Brady Act states that the CLEO "must make a reasonable effort" to ascertain the legality of a handgun transaction.[61]

receive any firearm . . . which has been shipped or transported in interstate or foreign commerce." *Id.*

[55] *See, e.g., id.* § 922(j) (stolen firearm); *id.* § 922(k) (firearm with serial number removed); *id.* § 922(*l*) (unlawfully imported firearm); *id.* § 922(p) (undetectable firearm). Additionally, a person may be prohibited from receipt or possession of a handgun under state law. *See, e.g.*, KY. REV. STAT. ANN. § 527.040 (Michie/Bobbs-Merrill Supp. 1994); MD. ANN. CODE art. 27, § 364(d) (Supp. 1994); OHIO REV. CODE ANN. § 2923.21 (Anderson 1992).

[56] Affidavit of Paul H. Blackman, Ph.D. at Exhibit F, McGee v. United States, 863 F. Supp. 321 (S.D. Miss. 1994) (No. 2:94-CV-67PS).

[57] *Id.*

[58] *Id.*

[59] *See* Bureau of Alcohol, Tobacco & Firearms Regulations on Implementation of Pub. L. No. 103-159, 59 Fed. Reg. 7110, 7111 (1994) (codified at 27 C.F.R. § 178). The BATF form required for handgun purchases includes "Instructions to Chief Law Enforcement Officials" which [provides in relevant part: "you are required" to check state and local records and "the National Crime Information Center, to include a wanted person check and the Interstate Identification Index, . . . you shall" destroy the form, and "you must provide" reasons for denial. *Id.* at 7110.

[60] U.S. Dep't of Treasury, Bureau of Alcohol, Tobacco & Firearms, Open Letter to State and Local Law Enforcement Officials 9 (Jan. 21, 1994) (on file with authors).

[61] Attorney Gen. Order No. 1853-94, 59 Fed. Reg. 9498, 9498 (1994). In this order dated February 28, 1994, Attorney General Janet Reno stated:

> I hereby designate the National Crime Information Center ("NCIC") as the national system to be used by law enforcement for crime history record background checks under the interim provisions of the Brady Handgun Violence Prevention Act ("the

B. *The Duties Imposed by the Interim Provision of the Brady Act Are Unconstitutional*

As noted in the previous section, the Brady Act imposes duties on state and local officials. Recently, in *New York v. United States*,[62] the Supreme Court addressed the issue of the balance between the authorization of certain powers to Congress in Article I,[63] and the preservation of state sovereignty in the Tenth Amendment.[64] The Court concluded:

> In some cases the Court has inquired whether an Act of Congress is authorized by one of the powers delegated to Congress in Article I of the Constitution. . . . In other cases the Court has sought to determine whether an Act of Congress invades the province of state sovereignty reserved by the Tenth Amendment. . . . [T]he two inquiries are mirror images of each other. If a power is delegated to Congress in the Constitution, the Tenth Amendment expressly disclaims any reservation of that power to the States; if a power is an attribute of state sovereignty reserved by the Tenth Amendment, it is necessarily a power the Constitution has not conferred on Congress.[65]

Viewed either way, the statute at issue was unconstitutional.[66] Similarly, the duties imposed by section 922(s) of the Brady Act are also unconstitutional.

The *New York* Court began its analysis of the Tenth Amendment with a review of previous opinions concerning federal commands that states "enact *and* enforce" federal programs.[67] One of the cases reviewed in *New York* was *Hodel v. Virginia Surface*

Act"). The prescribed use of the NCIC under the Act will require two inquiries. One inquiry will be an NCIC Persons inquiry, which will furnish matching records on all fugitives listed in NCIC, including foreign fugitives, as well as those individuals listed in the Bureau of Alcohol, Tobacco, and Firearms Violent Felon File. The second inquiry will be to the Interstate Identification Index, which will furnish automated criminal history records available through NCIC.

Id.

[62] 112 S. Ct. 2408 (1992).

[63] U.S. CONST. art. I.

[64] U.S. CONST. amend. X.

[65] *New York*, 112 S. Ct. at 2417. *See generally* Wayne O. Hanewicz, New York v. United States: *The Court Sounds a Return to the Battle Scene*, 1993 WIS. L. REV. 1605 *passim* (arguing that Supreme Court holding that federal act in question violated Tenth Amendment is indicative of movement towards more judicial protection of state sovereignty).

[66] *New York*, 112 S. Ct. at 2429; *see also supra* note 15 (discussing statute dealt with in *New York*).

[67] New York v. United States, 112 S. Ct. 2408, 2420 (1992) (quoting Hodel v. Virginia Surface Mining & Reclamation Ass'n, 452 U.S. 264, 288 (1981)).

Mining & Reclamation Ass'n.[68] In *Hodel*, a federal statute was deemed constitutional because it did not violate the Tenth Amendment.[69] The statute in *Hodel* was constitutional for the same reason that the Brady Act duties are unconstitutional. The *Hodel* Court held that "the States are not compelled to enforce [federal] standards, to expend any state funds, or to participate in the federal regulatory program in any manner whatsoever."[70] This reasoning can be applied to the Brady Act to show that because the Act does, in fact, compel states to act, it is unconstitutional.

Another case reviewed in *New York* was *FERC v. Mississippi*.[71] However, the Court found *FERC* irrelevant because the statute in *FERC* "require[d] only consideration of federal standards. And if a State has no utilities commission, or simply stops regulating in the field, it need not even entertain the federal proposals."[72] Unlike the statute considered in *FERC*, the Brady Act compels the CLEO to carry out three federal commands routinely. Furthermore, the commission in *FERC* was part of the "state adjudicatory machinery"[73] (unlike the CLEOs who are state executive officers), and thus was subject to Article VI of the Constitution, under which state judges are bound by federal law.[74]

The Framers of the Constitution explicitly rejected a form of government in which state officers would be required to enforce federal laws. The Court in *New York* described this theory as follows:

> Under one preliminary draft of what would become the New Jersey Plan, state governments would occupy a position relative to Congress similar to that contemplated by the Act at issue in this case: "[T]he laws of the United States ought . . . to be carried into execution by the judiciary and executive of-

[68] 452 U.S. 264 (1981).
[69] *Id.* at 288.
[70] *Id.*
[71] 456 U.S. 742, 764 (1982).
[72] New York v. United States, 112 S. Ct. 2408, 2420-21 (1992) (stating that case "presents no occasion to apply or revisit the holdings of any of these cases, as this is not a case in which Congress has subjected a State to the same legislation applicable to private parties") (citing *FERC*, 456 U.S. at 758-59)). The *FERC* majority denounced the principles set forth in Justice O'Connor's dissent which would form the basis of O'Connor's majority opinion in *New York*. *See FERC*, 456 U.S. at 762 n.25, 767 n.30 (criticizing Justice O'Connor's dissent). *But see id.* at 775-97 (O'Connor, J., dissenting) (arguing for checks on congressional power to employ states in achieving national ends).
[73] *FERC*, 456 U.S. at 761-62.
[74] U.S. CONST. art. VI.

> ficers of the respective states, wherein the execution thereof is required." . . . In the end, the Convention opted for a Constitution in which Congress would exercise its authority directly over individuals rather than over States; for a variety of reasons, it rejected the New Jersey Plan in favor of the Virginia Plan.[75]

The Court concluded that the Constitution "confers upon Congress the power to regulate individuals, not States. . . . [E]ven where Congress has the authority under the Constitution to pass laws requiring or prohibiting certain acts, it lacks the power directly to compel the States to require or prohibit those acts."[76]

A direct federal command to a state official forces the state official to be perceived as the cause of harm. Under the Brady Act, the CLEO is the instrument of the unwanted federal mandate. If the CLEO does not perform a records search and render an opinion that a purchase is lawful, his constituents are harmed because they must wait the full five business days before receiving a handgun.[77] If the CLEO does not destroy the records, he offends his constituents whose privacy rights he violates. In *New York*, the Court addressed these types of harms and specifically recognized that it is the state official, not the federal government, who receives the brunt of public disapproval.[78]

The Court further noted the constitutionality of financial incentives which give states the option not to do anything.[79] The Brady Act, however, does not present the states with an option regarding compliance with the Act. The Court recognized that Congress

[75] *New York*, 112 S. Ct. at 2422.

[76] *Id.* at 2423 (citing *FERC*, 456 U.S. at 762-66; *Hodel*, 452 U.S. at 288-89; Lane County v. Oregon, 74 U.S. (7 Wall.) 71, 76 (1868)).

[77] *See* 18 U.S.C. § 922(s)(1)(A)(ii) (1994).

[78] *See* New York v. United States, 112 S. Ct. 2408, 2424 (1992). The Court stated:

> [W]here the Federal Government directs the States to regulate, it may be state officials who will bear the brunt of public disapproval, while the federal officials who devised the regulatory program may remain insulated from the electoral ramifications of their decision. Accountability is thus diminished when, due to federal coercion, elected state officials cannot regulate in accordance with the views of the local electorate in matters not pre-empted by federal regulation.

Id.

[79] *Id.* at 2423. "Congress may attach conditions on the receipt of federal funds." *Id.* However, "the residents of the State retain the ultimate decision as to whether or not the State will comply. If a State's citizens view federal policy as sufficiently contrary to local interests, they may elect to decline a federal grant." *Id.* at 2424; *see also* South Dakota v. Dole, 483 U.S. 203, 211-12 (1987) (holding federal statute may condition receipt of highway funds on minimum drinking age of 21). No such choice arises under the interim provision of the Brady Act.

may not force the states to act or to spend, such as by requiring a state to administer a federal program.[80]

New York characterizes the second unconstitutional "choice" in that case as involving only the administration of a federal program, not as requiring the states to legislate. The Court noted that "the take title provision" is "an alternative to regulating pursuant to Congress' direction."[81] The Court further acknowledged that "[t]he take title provision offers state governments a 'choice' of either accepting ownership of waste or regulating according to the instructions of Congress."[82] However, the Court stated:

> Either type of federal action would "commandeer" state governments into the service of federal regulatory purposes, and would for this reason be inconsistent with the Constitution's division of authority between federal and state governments. . . . Because an instruction to state governments to take title to waste, standing alone, would be beyond the authority of Congress, and because a direct order to regulate, standing alone, would also be beyond the authority of Congress, it follows that Congress lacks the power to offer the states a choice between the two.[83]

The *New York* Court rejected the Government's argument that Congress could compel the states if the federal interest is sufficiently strong.[84] The federal courts have authority to order state officials to comply with the duties imposed by the United States Constitution or a valid federal statute.[85] However, the Constitution "contains no analogous grant of authority to Congress."[86]

[80] *New York*, 112 S. Ct. at 2427. The Court stated:
A State whose citizens do not wish it to attain the Act's milestones may devote its attention and its resources to issues its citizens deem more worthy; the choice remains at all times with the residents of the State, not with Congress. The State need not expend any funds, or participate in any federal program, if local residents do not view such expenditures or participation as worthwhile.
Id.

[81] *Id.*

[82] *Id.* at 2427-28.

[83] New York v. United States, 112 S. Ct. 2408, 2428 (1992).

[84] *Id.* at 2429. "Where a federal interest is sufficiently strong to cause Congress to legislate, it must do so directly; it may not conscript state governments as its agents." *Id.*

[85] *Id.* at 2430 (citing Puerto Rico v. Branstad, 483 U.S. 219, 228 (1987)). The *Branstad* case involved a federal extradition statute passed pursuant to Article IV, section 2 of the United States Constitution, which provides that a fugitive from justice "shall on demand of the executive authority of the state from which he fled, be delivered up." *Branstad*, 483 U.S. at 228.

[86] *New York*, 112 S. Ct. at 2430. Nothing in the text of § 922(s) nor anything in its legislative history suggests any enumerated power in Article I, § 8 of the Constitution which

The Brady Act is not like the minimum wage law which was previously upheld by the Supreme Court in *Garcia v. San Antonio Metropolitan Transit Authority*[87] because the wage law applied equally to both the public and private sectors.[88] In comparison, the Brady Act does not command every person in the United States to check records, destroy records, or explain denials—it directs those commands solely to the CLEOs.[89]

The principle of *Testa v. Katt*,[90] that Congress may order a state to implement a federal directive if it is the same type of activity in which the state ordinarily engages, is not applicable to the interim provision of the Brady Act. *Testa* held that a valid federal statute is enforceable in the state courts because Article VI, section two of the Constitution makes federal law the supreme law of the land and makes the judges in every state bound thereby.[91] The Brady

justifies imposition of the three duties here. While Congress may regulate interstate commerce in firearms, no court has ever held that Congress may draft state-created law enforcement officers to enforce federal interstate commerce regulations. In *New York*, the Court concluded that "[t]he allocation of power contained in the Commerce Clause . . . authorizes Congress to regulate interstate commerce directly; it does not authorize Congress to regulate state governments' regulation of interstate commerce." *Id.* at 2423; *see also* Brown v. EPA, 521 F.2d 827, 838 (9th Cir. 1975). The *Brown* court emphasized that no Supreme Court precedent even "suggests that a state's exercise of its police power with respect to an economic activity which affects interstate commerce is itself an economic activity . . . subject to regulation by Congress." *Id.* The *Brown* court further noted that "[a] Commerce Power so expanded would reduce the states to puppets of a ventriloquist Congress." *Id.* at 839; *see also* United States v. Lopez, 2 F.3d 1342, 1347 (5th Cir. 1993). The *Lopez* court held that a portion of the Gun Control Act was unconstitutional for exceeding power granted by the Commerce Clause. *Id.* The *Lopez* court stated that "[t]he Tenth Amendment, though it does not purport to define the limits of the commerce power, obviously proceeds on the assumption that the reach of that power is not unlimited, or else there would be nothing on which the Tenth Amendment could operate." *Id.* at 1347.

87 469 U.S. 528 (1985).

88 *Id.* at 554 (upholding minimum wage laws under Commerce Clause since they applied to private and public sectors alike).

89 *New York* presents no occasion to apply or revisit the holdings of any of these cases (such as *Garcia*), as this is not a case in which Congress has subjected a state to the same legislation applicable to private parties. *See New York*, 112 S. Ct. at 2420. The decision in *Garcia* was also premised on the notion that state sovereignty is secured only by representation in Congress. *See Garcia*, 469 U.S. at 549. Representation in Congress did not, however, preclude the Court in *New York* from declaring the statute unconstitutional, a result *Garcia* did not reject when it stated: "These cases do not require us to identify or define what affirmative limits the constitutional structure might impose on Federal action affecting the States under the Commerce Clause." *Id.* at 556. Moreover, according to the dissent in *New York*, the "process" test of *Garcia* may no longer be viable. *See New York*, 112 S. Ct. at 2444 (White, J., dissenting). "The Court rejects this process-based argument by resorting to generalities and platitudes about the purpose of federalism being to protect individual rights." *Id.* Indeed, the Court in *New York* reversed the Second Circuit Court of Appeals, which relied on the "process" argument. *See* New York v. United States, 942 F.2d 114, 119 (2d Cir. 1991), *rev'd*, 112 S. Ct. 2408 (1992).

90 330 U.S. 386 (1947).

91 *Id.* at 389-90, 394.

Act duties, however, are not the type of activity in which the states ordinarily engage.[92]

Finally, *New York* provides no de minimis exception to the doctrine that Congress cannot " 'commandeer' state governments into the service of federal regulatory purposes . . . ."[93] Even if it did, the Brady Act commands are hardly de minimis. There are scores of firearms dealers in the jurisdictions of the sheriffs here dealing with numerous transactions each day.

Section 922(s)(2) requires research and a legal opinion stating whether each purchaser is a convicted felon, fugitive, drug user or addict, mental defective, unlawful alien, dishonorably discharged ex-soldier, citizenship renouncer, indicted for a felony, person under a restraining order, or employee of a felon.[94] In addition, the officer must determine whether the firearm had ever been transported in interstate commerce, and whether a prohibited person has had the disability removed or received a pardon, restoration of civil rights, or expungement.[95]

The same is true with the commands to destroy records and to explain denials. Every notice of a purchase and every request for an explanation must be calendared to ensure that the applicable twenty business day deadlines are not missed. Failure to destroy the records will expose the sheriff to lawsuits from handgun purchasers who value their privacy rights.[96] Even if the sheriff fails to perform record searches, the duty to destroy records does not become "optional."[97] The dealer is required to send the records. The sheriff, therefore, receives them involuntarily, and has no option but to destroy them.

Failure to provide an explanation for a denial would expose the sheriff to lawsuits from persons entitled to know the reasons. The sheriff is compelled to write a legal opinion enumerating the reason for denial.[98] Since this opinion may potentially have to withstand judicial scrutiny, the sheriff may need to consult with coun-

[92] The *New York* Court found *Testa* irrelevant because "[n]o comparable constitutional provision authorizes Congress to command State legislatures to legislate." *New York*, 112 S. Ct. at 2429-30.

[93] *Id.* at 2428.

[94] 18 U.S.C. § 922(s)(3)(B) (1993).

[95] *Id.*

[96] *Id.* § 922(s)(7).

[97] *Id.* § 922(s)(6)(B).

[98] *Id.* § 922(s)(6)(C) (mandating that ineligible purchasers are entitled to written explanations as to their denial from CLEO, upon request).

sel to draft this opinion. Moreover, this duty is not truly "optional." Even if the sheriff has no duty to conduct a record check in the first place, he may conduct searches voluntarily as a service to his constituents who otherwise *must* wait five business days to receive a handgun. By undertaking the first duty voluntarily, the sheriff becomes subject to the third unconstitutional command involuntarily.

C. *The Unconstitutional Duties of the Brady Act Are Not Severable*

The issue of severability—whether one unconstitutional provision voids the entire act—was considered by the Supreme Court in *New York*. The Court determined that an invalid provision can be dropped, leaving the remaining parts of the Low-Level Radioactive Waste Act still valid, unless the legislature would not have enacted the provision separately.[99]

The Brady Act contains no severability clause. The court in *Board of Natural Resources v. Brown*[100] posed the issue as follows:

> Two questions must be answered to satisfy the severability test. First, we inquire whether the Act which remains after the unconstitutional provisions are excised is "fully operative." . . . Second, . . . we then inquire whether Congress would have enacted the constitutional provisions of the Act independently of the unconstitutional provisions. . . . In making this determination, the "relevant inquiry . . . is whether the statute will function in a *manner* consistent with the intent of Congress."[101]

The court held that the provisions under consideration were "inextricably intertwined" and were therefore not severable.[102] That is exactly the case with section 922(s). Without the three uncon-

[99] The Supreme Court in *New York* stated:

> The standard for determining the severability of an unconstitutional provision is well established: Unless it is evident that the Legislature would not have enacted those provisions which are within its power, independently of that which is not, *the invalid part may be dropped if what is left is fully operative as a law.*

New York v. United States, 112 S. Ct. 2408, 2434 (1992) (emphasis added).

[100] 992 F.2d 937 (9th Cir. 1993) (noting that absence of severability clause "does suggest an intent to have all components operate together or not at all").

[101] *Id.* at 948.

[102] *Id.* at 949. "[I]n the absence of state regulations implementing the bans, it is possible that the bans would be ineffectual." *Id.*

stitutional impositions, the remainder of section 922(s) is ineffectual and indeed contrary to the scheme Congress sought to create.

It is plain from the face of the statute that the *only* purpose of the five-day waiting period[103] is to allow the CLEO to fulfill his duty to check records pursuant to the interim provision.[104] The waiting period is a *maximum*, not a mandatory, time period, and is an alternative to earlier approval by the CLEO.[105] A transfer can be conducted as soon as the transferor is notified by the CLEO that the transfer is lawful.[106] Finally, the waiting period provision expires in sixty months or when the national instant criminal background check system is established, whichever comes first.[107] Thus, striking the mandatory background check destroys the entire purpose of the interim provision.

Even without a duty to do so, CLEOs still have the option of checking records. Yet, notice to the CLEO of the transferee's statement without a *duty* to check would not meet the statutory purpose. The Brady Bill was defeated in Congress for several years when it was drafted to mandate a waiting period and to make the record check optional. It passed *only* when it was revised to *mandate* a record check and to allow avoidance of a waiting period. By severing the duty to check records,[108] and leaving the waiting period, the law is transformed into a *mandatory*, not a maximum, five-day waiting period. This is exactly what proponents said it would not be.[109] Likewise, striking the provision which unconstitutionally commands the CLEO to destroy the

[103] 18 U.S.C. § 922(s)(1)(A)(ii)(I) (1993).

[104] *Id.* § 922(s)(2).

[105] *Id.* § 922(s)(1)(A)(ii)(II).

[106] *Id.* Moreover, subparagraphs (B), (C), (D), and (E) of § 922(s)(1) are exceptions to § 922(s)(1)(A). For example, under subparagraph (D), handgun purchases in states with an instant check or permit system are effectively exempt from the waiting period. 18 U.S.C. § 922(s)(2)(D) (1993). The BATF has determined that there are twenty-four such states. *See* 59 Fed. Reg. 37,534 (1994). Those states encompass approximately 58% of the U.S. population.

[107] 18 U.S.C. § 922(s)(1), (t)(1) (1993).

[108] *See* 18 U.S.C. § 922(s)(2) (1993) (establishing duty to check records).

[109] *See* Transcript of Mark-up of H.R. 1025, House Judiciary Comm. 101 (Nov. 4, 1993) (on file with authors). Representative Schumer stated during the mark-up of the bill that "[t]he Brady bill . . . is not supposed to be a national cooling off period." *Id.*; *see also* 139 CONG. REC. H9107-08 (daily ed. Nov. 10, 1993). During the floor debate, Congressman Zimmer explained:

> Two years ago I voted against an earlier version of the Brady bill, which required a 7-day waiting period for handgun purchases with only an optional background check. I voted instead for affirmative legislation that provided for an instant, mandatory background check . . . . The legislation we are voting on today addresses my principal objections to the 1991 Brady bill. The background check is no longer optional and the

statement made by the lawful handgun purchaser and any records derived therefrom within twenty business days,[110] without also striking the provision which requires the dealer to provide notice of and to transmit a copy of the handgun transferee's statement to the CLEO,[111] effectively rewrites the Brady Act into a form which Congress would not have enacted.

The requirement to destroy documents was intended to protect the privacy rights of law-abiding firearms owners in the same manner as they were protected by the Firearms Owners' Protection Act of 1986 ("FOPA"),[112] which amended section 926(a) to restrict the power of the Secretary to prescribe regulations. FOPA states:

> No such rule or regulation . . . may require that records required to be maintained under this chapter or any portion of the contents of such records, be recorded at or transferred to a facility owned, managed, or controlled by the United States or any State or any political subdivision thereof, nor that any system of registration of firearms, firearms owners, or firearms transactions or dispositions be established.[113]

An almost identical provision will become effective when the permanent national instant check system[114] replaces the interim provision of the Brady Act. In addition to the FOPA regulation, section 103(i) of Public Law 103-159 provides:

> [N]o department, agency, officer, or employee of the United States may—(1) require that any record or portion thereof generated by the system established under this section be recorded at or transferred to a facility owned, managed, or controlled by the United States or any State or political subdivision thereof; or (2) use the system established under this section to establish any system for the registration of firearms, firearm owners, or firearm transactions . . . .[115]

waiting period will be eliminated as soon as a national instant check system can be implemented.

Id.

110 18 U.S.C. § 922(s)(6)(B) (1993).

111 *Id.* § 922(s)(1)(A)(i).

112 *Id.* § 926(a).

113 *Id.*

114 18 U.S.C. § 922(t) (1993).

115 *See* Pub. L. No. 103-159, § 103(i), 107 Stat. 1536 (1993).

The destruction provision was included in the Act to protect the privacy of lawful firearm owners. It has the same goal as the above two provisions—prevention of a system for registration of lawful firearm owners.[116] It is evident, therefore, that without the protection of this provision, which was seen as indispensable, Congress would not have enacted the CLEO provision.[117] Thus, the provisions are not severable.

Finally, the interim provision would not have been enacted without section 922(s)(6)(C). This provision violates the Tenth Amendment by commanding the CLEO, at the request of any person whom the CLEO finds to be ineligible to receive a handgun, to provide the reason for the determination within twenty business days.[118] Without this provision, a CLEO could arbitrarily veto any or *all* handgun transfers, even for eligible transferees, and then refuse to offer any explanation. Moreover, section 925A provides that a person, who has been denied a firearm due to erroneous information, may bring an action against the state or political subdivision to correct the error.[119] This remedy is not viable without the CLEO's written explanation stating the reason for the denial.

Even if the duty to check records and ascertain the lawfulness of a handgun transaction is unconstitutional, and thus optional, the duty to explain a denial does not become moot. A CLEO might still carry out the function as a service to their constituents, who *must* otherwise wait five days and who may thereby hold the CLEO politically accountable. However, if the CLEO provides this service to his constituents, they are then subject to the unconstitutional command to write a legal opinion letter if they deem a purchaser ineligible.[120]

For these reasons, the requirements that a dealer must provide notice of the handgun transfer to the CLEO and that the dealer may not transfer the gun if the CLEO notifies the dealer that transfer of the handgun would be unlawful,[121] are not severable from the unconstitutional duty of a CLEO to explain why the receipt would be unlawful. A House committee report[122] clarifies

116 18 U.S.C. § 922(s)(6)(B) (1993).
117 *Id.* § 922(s)(1)(A)(i).
118 *Id.* § 922(s)(6)(c).
119 *Id.* § 925A (denoting remedy for one who has been erroneously denied firearm).
120 *Id.* § 922(s)(6)(C).
121 18 U.S.C. § 922(s)(1)(A)(i) (1993).
122 REPORT, *supra* note 1, at 1984.

the mandatory character of the duty to determine legality and thus the nonseverability of this duty from the waiting period.[123] The report provided: "Local law enforcement officials are required to use the waiting period to determine whether a prospective handgun purchaser has a felony conviction or is otherwise prohibited by law from buying a gun."[124] Without the duty to destroy records, Congress would not have required a licensee to furnish the purchaser's statement to law enforcement. Representative Donald A. Manzullo explained: "To help protect the privacy of legal purchasers, [the bill] requires that a copy of the statement and other records of the transaction be destroyed within 20 days."[125]

The House amended the bill, by an overwhelming vote of 431 to 2,[126] requiring that the CLEO provide the reason for a denial. As Representative Edolphus Towns noted during the debate on the amendment, "the bill opens the door to corrupting influences where local officials could deny any individual the right to purchase a firearm or decide to ban firearms within the whole community for virtually any reason."[127] Representative Peter Hoekstra also supported the Brady Bill, as amended, to require written explanation of denial.[128] Given the virtual unanimity of

[123] *Id.* at 1984-85 (noting summary and purpose of Brady Act).

[124] *Id.* at 1984. The report noted that "[t]here would be additional costs to local law enforcement authorities for background checks . . . ." *Id.* at 2000. It further recognized that "[t]he chief law enforcement officer is required to destroy within 20 days any record generated by the background check system . . . ." *Id.* at 1988; *see also id.* at 1994 (noting responsibilities of CLEO in proposed bill).

[125] 139 CONG. REC. H9117 (daily ed. Nov. 10, 1993).

[126] 139 CONG. REC. H9122 (daily ed. Nov. 10, 1993).

[127] *Id.*

[128] 139 CONG. REC. H9111 (daily ed. Nov. 10, 1993) (statement of Rep. Hoekstra). Representative Hoekstra stated:

> I support the Brady Bill, with the Ramstad amendment that will guarantee the Second Amendment rights of citizens by requiring law enforcement officials to provide written documentation for any denials that might be rendered. Such a guarantee is essential so that individuals who are denied permission to purchase a gun might be given a written explanation which they may use in the event that they appeal the decision in Federal Court.

Id.; *see also id.* at H9122. Judiciary Committee Chairman Jack Brooks, stressing why it is imperative that CLEOs be required to explain denials, posited:

> Each person in this country has a right to due process of law. Yet, as this bill is written, a person can be denied the right to make a lawful handgun purchase—without any cause, and without any explanation.
>
> What could be more fundamental to due process than to require the Government to tell you why you cannot exercise a right that is being exercised by others every day?
>
> . . .

the vote, it is evident that the duty to explain a denial is not severable from the power to deny a handgun purchase.

Senate debate was consistent with the House debate. For example, Senator Carol Moseley-Braun stated that "[t]he bill . . . requires local law enforcement officials to conduct background checks on handgun purchasers."[129] In addition, Senator Larry E. Craig averred that the mandatory duties would violate the Tenth Amendment.[130] Craig added: "[t]he Brady bill . . . creates a mandate but does not put any money with it. It says to the States, 'You do it.' . . . It says you pull law enforcement officers off the streets and send them to their desks."[131] Senator James M. Jeffords also stated that without required background checks, the bill should not pass.[132]

Another illustration of nonseverability is the fact that the requirement that handgun transactions be reported would not have been passed without the duty of CLEOs to destroy the records. Proponents of the Brady Bill, long before, had promised that the destruction provision would prevent firearm registration. Yet, as Senator Howard M. Metzenbaum argued, the Brady Bill "does not call for gun registration. The police, under this legislation, must destroy the firearms form within 30 days."[133] The almost identical provision requires the reporting of multiple handgun sales to state and local police, and the destruction of those records within twenty days.[134] This, Senator Robert J. Dole explained, "eliminates the concern that this would be back door gun registration."[135]

The severability clause of the Gun Control Act[136] does not save the remainder of section 922(s). As passed in 1968, section 928 of

This amendment is a small—but absolutely necessary—effort to uphold the tradition of this House in defending our constitutional right of due process.

Id.

129 139 CONG. REC. S16,415 (daily ed. Nov. 19, 1993).

130 *Id.* at S16,307.

131 *Id.* at S16,308.

132 *Id.* at S16,416 (quoting Sen. Jeffords). He stated: "I do not believe that Brady bill waiting periods should be established prior to hand gun purchases unless accurate background checks can be made. Thus, I am not here supporting waiting periods without background checks." *Id.*

133 *See The Brady Handgun Violence Prevention Act, 1989: Hearings on S1236 Before The Subcomm. on the Constitution*, 101st Cong., 1st Sess. 12 (1991) (statement of Sen. Metzenbaum).

134 *See* 18 U.S.C. § 923(g)(3) (1993).

135 139 CONG. REC. S16,311 (daily ed. Nov. 19, 1993).

136 18 U.S.C. § 928 (1968).

Title 18 provides, in part, "[i]f any provision of this chapter . . . is held invalid, the remainder of the chapter . . . shall not be affected thereby."[137] However, a severability clause "is an aid merely; not an inexorable command."[138]

In *Alaska Airlines, Inc. v. Brock*,[139] the United States Supreme Court evidences that the three duties imposed by section 922(s) are nonseverable, despite section 928. As with the Brady Act, the Airline Deregulation Act of 1978, the act at issue in *Alaska Airlines*, contained no severability clause.[140] However, like the Gun Control Act of 1968, to which the Brady Act was added, the Federal Aviation Act of 1958, to which the Airline Deregulation Act of 1978 was added, "does contain such a clause."[141] Despite the severability clause within the Federal Aviation Act, the Supreme Court concluded that the original severability clause did not apply to the later enacted provision because that provision established a new program rather than amending an old one.[142]

Similarly, section 922(s) did not "amend" the Gun Control Act in this sense because, like section 43 of the Airline Deregulation Act, it did not remove or insert new words within any existing sentences or paragraphs. Instead, like the enactment of section 43, section 922(s) added "a new program." Thus, the applicability of the severability clause of the Gun Control Act to the Brady Act is in doubt.[143]

[137] *Id.*

[138] Dorchy v. Kansas, 264 U.S. 286, 290 (1924).

[139] 480 U.S. 678 (1987).

[140] *Id.* at 686 n.8.

[141] *Id.* at 686 n.8. The severability clause of the Federal Aviation Act of 1958 states: "If any provision of this Act . . . is held invalid, the remainder of the Act . . . shall not be affected thereby." The Federal Aviation Act of 1958, Pub. L. No. 85-726, § 1504, 49 Stat. 1301, *reprinted in* 1958 U.S.C.C.A.N. 946.

[142] *Alaska Airlines*, 480 U.S. at 686. "[T]he applicability of [the severability] clause to § 43 [of the Airline Deregulation Act of 1978], is in doubt, however, because, unlike many sections of the Deregulation Act, . . . [§ 43] does not *amend* provisions of the Aviation Act or any other pre-existing statute, but instead establishes a new program." *Id.* (emphasis added). The Court used the word "amend" to refer to the insertion of new wording in existing provisions, in contrast to "a new program" which adds something major to the statute that did not exist before. *Id.* Section 43 did not remove or insert any new words within existing sentences or paragraphs, but instead created a wholly new section within Title 49 U.S.C. App. Section 43 "established a new program" rather than merely "amend[ing]" existing sentences or paragraphs. *Id.*

[143] *Compare* Federal Aviation Act § 1504 *with* Gun Control Act § 928. With the exception of references to "this Act," as distinguished from "this chapter," the pertinent part of the severability clause of the Federal Aviation Act is identical to the severability clause of the Gun Control Act. This is a distinction without a difference since the Federal Aviation Act was, like the Gun Control Act, codified as a chapter of a title (Chapter 20 of Title 49).

Even if the severability clause applies to the Brady Act, one cannot read too much into it, for it states only that, if a provision of "this chapter" is invalid, "the remainder of the chapter" is not affected.[144] The "chapter" referred to is Chapter 44 of Title 18, beginning with section 921 and ending with section 930. By using the word "chapter," as distinguished from "subsection" or "section"—words used throughout Chapter 44—Congress sought to preclude the invalidation of a subsection, or even an entire section, within Chapter 44 leading to the entire *chapter* being invalidated. This does not suggest that, if a paragraph of a subsection within Chapter 44 is invalid, that the remainder of that *subsection* is automatically to be preserved.

CONCLUSION

The *McGee* and *Koog* cases were, at the time of this writing, on appeal to the United States Court of Appeals for the Fifth Circuit; the *Mack* and *Printz* cases are certain to be appealed to the Ninth Circuit and the *Frank* case to the First Circuit. If one of the circuits holds the interim provision of the Brady Act unconstitutional, it is likely that the issue will reach the United States Supreme Court. Given the extraordinary reach of section 922(s), it is an issue that the Supreme Court needs to resolve.

[144] 18 U.S.C. § 928 (1968).