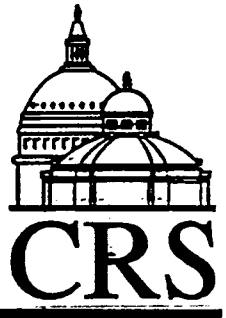
94-885 S

CRS Report for Congress

The Brady Handgun Control Act: Constitutional Issues

Dorothy Schrader
Senior Specialist
American Law Division

Updated July 23, 1997



Congressional Research Service · The Library of Congress

THE BRADY HANDGUN CONTROL ACT: CONSTITUTIONAL ISSUES

SUMMARY

In the Brady Handgun Violence Prevention Act of 1993 (the "Brady Act"), Congress sought to restrict access to handguns in an effort to reduce the opportunities for using a gun to commit violent crimes. The Act is intended to remedy a major problem with enforcement of federal gun control restrictions, which is the high cost of effective enforcement. Costs are high because the records maintained by federally-licensed gun dealers are decentralized. The Brady Act mandates creation by the Attorney General of a national instant criminal background check system by November 1998. As an interim measure, Congress established a five-day waiting period before a handgun sale can be finalized, in order to allow time for an ascertainment/ background check by the chief local law enforcement officer (CLEOs) of the legality of the sale.

The Supreme Court in *Printz v. United States* (June 27, 1997) held the "mandatory" background check by the CLEOs unconstitutional as a violation of the dual sovereignty structure of the constitution, as evidenced by the Tenth Amendment and the Court's precedents. District courts in Arizona, Mississippi, Montana, Vermont, and Louisiana earlier ruled the background check requirement violates the Tenth Amendment because the Act substantially commandeers state executive officers and indirectly commandeers the state legislatures to administer an unfunded federal program. Two other district courts in Texas and North Carolina upheld the constitutionality of the Brady Act's background check provisions before the Supreme Court reached its conclusion to the contrary.

By its decision, the Supreme Court reversed a divided panel of the Ninth Circuit, which had upheld the constitutionality of the background check provisions in September 1995. The Second Circuit had also upheld the constitutionality of the Brady Act. The Fifth Circuit held the background check requirements were unconstitutional.

Although the CLEO provisions have been held unconstitutional, the ruling may not seriously affect the Act's enforcement. The courts have not prohibited the CLEOs from voluntarily conducting ascertainment/background checks. State governments could direct the state officers to comply with the Brady Act. The Clinton Administration is encouraging CLEOs voluntarily to conduct the background checks.

This report reviews the background of federal gun control legislation, analyzes the *Printz* decision, and considers its implications for enforcement of the Brady Act.

TABLE OF CONTENTS

THE BRADY HANDGUN CONTROL ACT: CONSTITUTIONAL ISSUES

Congress enacted the Brady Handgun Violence Prevention Act (the "Brady Act")[1] in 1993, effective February 28, 1994, as an amendment to the Gun Control Act of 1968.[2] Generally, before a licensed dealer can transfer a handgun to a buyer, the dealer must generally see a valid photograph identification containing the buyer's name, address, and date of birth; obtain a signed statement from the buyer that he or she is a qualified purchaser; transmit a copy of the statement to the local chief law enforcement officer ("CLEO"); and wait for the earlier of five days or approval of the transfer by the CLEO. During the waiting period, the CLEO is directed to make a "reasonable effort" through a background check to determine if the sale is unlawful. If the CLEO finds no violation of any law, the CLEO must destroy the statement within 20 days. If a CLEO finds a violation and blocks a sale, the rejected purchaser can require reasons in writing within 20 days. Violations of the Brady Act are punishable by a fine of up to $1000 and/or imprisonment for up to one year. States may be exempt from the background check requirement if they establish alternative systems that meet specified conditions.

This report reviews the court decisions and the constitutional issues implicated by the Brady Act.

MOST RECENT DEVELOPMENTS

The Supreme Court in *Printz v. United States*[3] has held the "mandatory" background check by the CLEO unconstitutional as a violation of the dual sovereignty structure of the Constitution, as evidenced by the Tenth Amendment and Supreme Court precedents. The Federal Government may not compel the states to enact a federal regulatory program, or to administer such a program by commandeering state executive officers. State officials may voluntarily conduct background checks. The Court declined to decide whether federally licensed firearms dealers remain obligated to forward Brady forms to local law enforcement officials and to wait five days before completing a handgun sale since no dealer was a party to the lawsuits.

---

[1] Public Law 103-159, 107 Stat. 1536, Act of November 30, 1993, amending 18 U.S.C. 922(s)(the "Gun Control Act of 1968").

[2] Public Law 90-618, 82 Stat. 1213 (1968).

[3] ---S. Ct.---, 1997 WL 351180, 65 U.S.L.W. 4731 (June 27, 1997).

District courts in Arizona,[4] Montana,[5] Mississippi,[6] Vermont,[7] and Louisiana[8] had ruled the background check requirement violates the Tenth Amendment because the Act substantially commandeers state executive officers and indirectly commandeers the state legislatures to administer an unfunded federal program. District courts in the Western District of Texas[9] and the Middle District of North Carolina[10] had upheld the constitutionality of the Brady Act, before the Supreme Court decided the *Printz* case.

The appellate courts were also split on the constitutionality of the Brady Act, before the *Printz* decision settled the issue. A divided panel of the Ninth Circuit had upheld the constitutionality of the background check provisions in *Mack v. United States,*[11] on the grounds the background check requirements were a minimal burden that did not intrude on state sovereignty. The Second Circuit agreed in *Frank v. United States.*[12] The Fifth Circuit disagreed and held the Brady requirements unconstitutional in *Koog v. United States.*[13]

BACKGROUND

The Brady Act was passed after seven years of extensive public debate about federal restrictions on handgun possession. For gun control advocates, the Act is an important but modest step in the effort to reduce the opportunities for violent crime by controlling the transfer and possession of handguns. For those opposed to gun control restrictions, the five-day waiting period is

---

[4] *Mack v. United States*, 856 F. Supp.1372 (D. Ariz. 1994).

[5] *Printz v. United States*, 854 F. Supp. 1503 (D. Mont. 1994).

[6] *McGee v. United States*, 863 F. Supp. 321 (S.D. Miss. 1994), *aff'd*, 79 F.3d 452 (5th Cir. 1996).

[7] *Frank v. United States*, 860 F. Supp. 1030 (D. Vt. 1994).

[8] *Romero v. United States*, 883 F. Supp. 1076 (W.D. La. 1994).

[9] *Koog v. United States*, 852 F. Supp. 1376 (W.D. Tex. 1994), *rev'd*, 79 F. 3d 452 (5th Cir. 1996).

[10] *Frye v. United States*, 916 F. Supp. 546 (M.D. N.C. 1995).

[11] 66 F.3d 1025 (9th Cir. 1995), *rev'd*, *Printz v. United States, supra,* note 3.

[12] 78 F.3d 815 (2d Cir. 1996).

[13] 79 F.3d 452 (5th Cir. 1996).

considered an unnecessary and improvident burden on law-abiding citizens,[14] which can be easily circumvented by criminals (i.e., either by purchasing the gun on the secondary market or having an intermediary without a criminal record make the purchase for the criminal).

Federal efforts to enact and enforce gun control laws are of relatively recent vintage. National gun control laws engender intense public debate about federal authority, federal-state relations, the efficacy of this type of legislation in controlling crime, enforcement policies, the asserted intrusions in the rights of law-abiding citizens,[15] and the constitutional basis for the law.[16]

---

[14] Gun control opponents may also oppose background check provisions because they are seen as precursors to a national registration system or even to confiscation of handguns and because many states assess a fee on the gun purchaser to cover the costs of the background check. DeFrances and Smith, *Federal-State Relations in Gun Control: The 1993 Brady Handgun Violence Prevention Act,* 24 PUBLIUS 69, 77 (1994). In the case of the Brady Act, nearly 98% of the handgun purchases are approved. Bureau of Alcohol, Tobacco and Firearms Annual Report on the Brady Act, "Presale Firearm Checks" (February 1997). To the extent special fees are assessed, law-abiding citizens pay a kind of "tax" on gun purchases to maintain a system that disqualifies 2.3% of would-be purchasers.

[15] Opponents of gun control legislation generally assert there is a constitutional right to keep and bear arms under the Second Amendment to the Constitution. The courts have not been hospitable to this argument. In the only Second Amendment case decided by the Supreme Court following enactment of federal gun control legislation [*United States v. Miller*, 307 U.S. 174 (1939)], the Court ruled that the Second Amendment confers no right on a citizen to bear a sawed-off shotgun. The lower federal courts have been even more explicit in rejecting an individual right to keep and bear arms. *Stevens v. United States,* 440 F. 2d 144 (6th Cir. 1971)(Second Amendment applies only to the right of the State to maintain a militia and not to any individual right to bear arms.) Substantial support for an individual right to keep and bear arms for lawful purposes can be found, however, in recent academic writing. *See, e.g.,*Van Alstyne, *The Second Amendment and the Personal Right to Arms,* 43 DUKE L. JOUR. 1236 (1994). In the Brady Act cases reviewed in this report, the courts observed that the lawsuits do not implicate the Second Amendment. For further information about the Second Amendment issue, *see* Schrader, *Federal Gun Control Laws: The Second Amendment and Other Constitutional Issues,* CRS Report 95-220 S (1995).

[16] Federal gun control legislation has been challenged as beyond Congress' authority under the Commerce Clause [*United States v. Lopez*, 115 S. Ct. 1624 (1995)] or under the Tenth Amendment [*Koog v. United States*, 79 F.3d 452 (5th Cir. 1996)], and as a violation of the Due Process Clause of the Fifth Amendment [*Mack v. United States*, 856 F. Supp. 1372 (D.Ariz. 1994)].

The National Firearms Act of 1934 ("NFA")[17]-- the first major federal gun control law -- had a narrow focus: it required registration of a few, covered weapons (machine guns, short-barrelled shotguns and rifles, silencers, and some other relatively rare firearms) and imposed a transfer tax of $200 per transaction. Regulatory power was premised on the Taxation Clause. Since the tax was imposed on traffic in the covered weapons, federal jurisdiction was justified for intrastate as well as interstate transactions.[18] The NFA began federal licensing of firearms manufacturers and dealers.

The NFA was followed in four years by the Federal Firearms Act of 1938 ("FFA"),[19] which attempted broad control of interstate traffic in virtually all firearms but was subject to enforcement problems.[20] All manufacturers, importers, and dealers of guns shipped in interstate commerce were required to obtain federal licenses ($25 for a manufacturer or importer; $1 for a dealer). Licensees were prohibited from knowingly shipping a firearm in interstate commerce to disqualified buyers (felons; fugitives from justice; and persons under indictment). The disqualified persons were also forbidden to receive guns which had been shipped in interstate commerce. Dealers were required to maintain records of transactions. These records, which were maintained on a decentralized basis, could be checked by law enforcement officials to ascertain violations of the Act.

Until 1968, however, according to one source the scienter requirement meant that no dealers were prosecuted under the FFA.[21] The FFA required dealer knowledge of the disqualifying status of the buyer for the dealer to be liable, and yet imposed no obligation on the dealer to verify the status of the buyer -- even with respect to the basic name and address information.

Successful prosecutions did occur with respect to disqualified persons who obtained guns.[22]

---

[17] 48 Stat. 1236-1240, originally codified as 26 U.S.C. 1132; now codified, as amended, as chapter 53 of the Internal Revenue Code of 1986, 26 U.S.C. 5801-5872.

[18] Zimring, *Firearms and Federal Law: The Gun Control Act of 1968*, 4 J. LEGAL STUDIES 133, 138 (1975).

[19] 52 Stat. 1250, originally codified as former 15 U.S.C. 901-910, repealed by Public Law 90-351, Section 906, 82 Stat. 234 (1968), but which, as amended, has been carried forward to chapter 44 of title 18, 18 U.S.C. 921 *et seq.*

[20] Zimring, *supra,* note 18 at 140-142.

[21] *Id.* at 142, citing ROBERT SHERRILL, THE SATURDAY NIGHT SPECIAL (1973) at 66.

[22] *Jose Cases Velazquez v. United States*, 131 F. 2d 916 (1st Cir. 1942).

The FFA provided a thin layer of federal regulation over traffic in guns. Its main significance was that it provided an additional criminal offense with which to charge someone who was found in unlawful possession of a firearm when arrested for another crime.

Because the NFA was based on the taxing power, the Internal Revenue Service was assigned law enforcement responsibility for the NFA and later for the FFA.[23] In 1942, the IRS assigned firearms enforcement to the same division that collected alcohol and tobacco taxes. Firearms enforcement reportedly had a relatively low priority until the late 1960s.[24] There was no pressure on the IRS to expend more of its resources on firearms enforcement.[25] Then, in 1972 the Treasury reorganized the Alcohol, Tobacco, and Firearms division into a separate bureau ("BATF"), apparently in recognition of the greater significance Congress attributed to firearms enforcement compared to collection of alcohol and tobacco taxes.

In 1968, in the wake of rising gun homicides and the assassinations of Martin Luther King, Jr. and Robert Kennedy, Congress passed two statutes,[26] now known collectively as the Gun Control Act of 1968. The 1968 Act broadened the coverage of the National Firearms Act (and its transfer tax) to "destructive devices" (bombs, hand grenades, land mines, etc.); amended the registration provisions of the National Firearms Act to cure a constitutional fault noted by the Supreme Court earlier in 1968; mandated additional penalties for conviction of a federal crime while using a firearm; banned interstate shipment of guns to or from persons who do not possess a federal license either as a dealer, manufacturer, importer, or collector; expanded the classes of persons disqualified from access to guns; and banned importation of all military surplus firearms and all other guns, unless the gun was certified by the Secretary of the Treasury as "particularly suitable for . . . sporting purposes."[27]

The regulations implementing the 1968 Act imposed new requirements on federally licensed dealers. The dealers had to sign a form indicating the buyer had identification showing he or she was not a resident of another state. Although the scienter requirement remained the same as under the 1938 Act, the duty to obtain identification from the buyer meant that the dealer had to verify the name, address, and age. Dealers could now be prosecuted for willful

---

[23] This authority continued until 1972.

[24] Zimring, *supra,* note 18 at 157-158.

[25] *Id.* at 143.

[26] Titles IV and VII of the Omnibus Crime Control and Safe Streets Act, 82 Stat. 225, 236, and the act later passed in the same session, the Gun Control Act, 82 Stat. 1213, codified at 18 U.S.C. 921-928, app. sections 1201-03.

[27] Zimring, *supra,* note 18 at 163-165.

failure to obtain identification or for knowingly making a sale to someone whose ID disqualified him or her (e.g., a minor or nonresident). The illegal buyer was also at greater risk if the person used his or her legal name and lied about eligibility on the form required by the regulations.

The 1968 Act imposed broader coverage, tougher penalties, and stricter enforcement, but could be evaded by use of false IDs and other subterfuges. Also, it did not cover purchases on the secondary market. Stricter enforcement required a huge commitment of law enforcement personnel and resources since the dealer records were decentralized. The guns were not registered (except for those covered by the 1934 Act as amended), and there was no waiting period during which the buyer's eligibility could be checked. The ID presented to the licensed dealer could determine age and residency. If the buyer lied about the other eligibility criteria, he or she committed a crime by that lie but received the gun immediately. Unless the dealer had personal knowledge that the buyer was a felon or other disqualified person, the sale would be made.

The BATF, in the late 1970s, attempted to create a national database of firearms transactions by regulation.[28] The Bureau proposed to require manufacturers, importers, and wholesalers to report firearms transfers to Washington, D.C. headquarters. The BATF's proposal was stopped by riders attached to the Treasury Department appropriations bills prohibiting the use of appropriated funds to establish a centralized database.[29] During Senate hearings in 1979, the BATF was attacked for its enforcement policies; allegations were made that the BATF engaged in "serious abuses of enforcement powers."[30] One of the main charges was that the BATF sought prosecutions against ordinary citizens for technical violations of the Act (e.g., relatively minor paperwork mistakes) or targeted without cause persons who did not otherwise engage in criminal behavior.

In 1986, several technical adjustments were made to the 1968 law by passage of the Firearms Owners' Protection Act ("FOPA").[31] The 1986 Act redefined the phrase "engaged in business" as a gun dealer; allowed sale of an ordinary rifle or shotgun to nonresidents if the transaction was made in person and the sale complied with the law in both states; added a scienter requirement to certain offenses that had been accorded strict criminal liability; slightly tightened the conditions under which an inspection of the dealer's records would take place; and made other adjustments favorable to gun owners. The 1986 Act

---

[28] Hardy, *The Firearms Owners' Protection Act: A Historical and Legal Perspective,* 17 CUMB. L. REV. 585, 606 (1987).

[29] Public Law 95-429, 92 Stat. 1002 (1978); Public Law 96-74, 93 Stat. 560 (1979).

[30] Hardy, *supra,* note 28 at 605-606.

[31] Public Law 99-308.

also banned the private possession of machineguns, unless they were lawfully possessed before the date of enactment.

In the 1993 Brady Act, as an interim measure, Congress sought to restrict access to handguns by requiring that CLEOs make a reasonable effort to determine whether or not a prospective purchaser is disqualified from handgun possession. As the permanent solution, Congress mandated creation by the Attorney General of a national instant criminal background check system for all purchases of firearms from licensed dealers by November 1998. Information from federal and state criminal records will be used by law enforcement officials to help federally licensed dealers determine whether or not a prospective gun purchaser is disqualified from purchasing the gun. The sale may be made immediately if the system generates a unique identification number; if not, the sale may be made after three business days, unless the national system notifies the licensee that the receipt of the firearm violates the Gun Control Act of 1968, as amended, or applicable State law.

The interim provision for an ascertainment/background check by the local chief law enforcement officer ("CLEO") has now been held unconstitutional by the Supreme Court in the *Printz* case.

THE BRADY ACT IN THE LOWER COURTS

Montana-Arizona Cases

In the first decision testing the constitutionality of the Brady Act, *Printz v. United States,*[32] the district court for Montana held the background check provisions relating to CLEOs violated the Tenth Amendment.[33] The court also held that the criminal penalty provisions of the Act do not apply to CLEOs if they fail to carry out the duties imposed by Section 922(s)(2) of the Act.

Under *New York v. United States,*[34]the Supreme Court held unconstitutional a provision of a federal law that required the states to take title to low-level radioactive waste within their jurisdiction if they did not participate in the federal program for disposing of such waste. This provision violated the Tenth Amendment because it directly compelled the states alone to enact and enforce a federal regulatory program. Congress can regulate interstate commerce directly. It can influence the states, short of outright coercion, to adopt a legislative program consistent with federal requirements, and Congress can

---

[32] 854 F. Supp. 1503 (D. Mont. 1994).

[33] The Tenth Amendment reads as follows: "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."

[34] 505 U.S. 144 (1992).

attach conditions to the receipt of federal funds.[35] No matter how powerful the federal interest, however, Congress cannot simply require the states alone to regulate. Instead, Congress must regulate individuals and may pre-empt contrary state regulation.[36]

The Montana district court applied *New York* to find the Brady Act violates the Tenth Amendment: the Act substantially commandeers state executive officers and indirectly commandeers the legislative processes of the states to administer an unfunded federal program.

The court rejected the federal government's arguments that the CLEOs' duties are discretionary, that they require no more than what CLEOs did before enactment of Brady, and that the CLEOs have discretion to omit the background checks entirely under the right circumstances (e.g., where resources are insufficient). The duties are mandatory, the court ruled, even though the Bureau of Alcohol, Tobacco, and Firearms' open advisory letter said the CLEOs have discretion to establish enforcement standards based upon the local jurisdiction's resources. The duties are substantial and require activity not ordinarily engaged in by CLEOs, the court ruled, even though the BATF letter interpreted the duties as a minimal effort to check commonly available records, and even granted the discretion not to conduct any background check.

At bottom, the court decided that the Act required CLEOs to allocate scarce resources from other duties that might be more important to local constituents than the federally imposed gun control program. Without increased funding, the CLEOs would be held accountable for the decreased services. Many of the local officials are elected and could face popular ire for the failure to provide certain services because the federal Brady Act program conscripted scarce resources without providing any federal funding.[37] The court also noted that the CLEOs would be responsible to the public for any incorrect determinations they make in attempting to enforce the Brady Act. The Act, however, specifically exempts CLEOs from civil damages.

---

[35] 505 U.S. at 167.

[36] 505 U.S. at 178.

[37] Congress did authorize a $200 million grant program to provide funding for the collection, transmittal, and general improvement of state criminal history records. These funds can be spent only to improve criminal justice records for purposes of establishing the national instant check system, and cannot be applied to reimburse CLEOs for conducting background checks. No funds were appropriated until fiscal 1995. DeFrances & Smith, *Federal-State Relations in Gun Control: The 1993 Brady Handgun Violence Prevention Act,* 24 PUBLIUS 69, 77 (1995). As part of the the Violent Crime Control and Law Enforcement Act of 1994, Pub. L. 103-322, 108 Stat. 1976 (September 13, 1994), SEC. 210603, $100,000 was appropriated to upgrade the criminal history records.

In the Arizona case, *Mack v. United States,* [38] the district court also held the Brady Act violates the Tenth Amendment. It also found the CLEOs were subject to criminal prosecution for failure to enforce the Act and held the Act unconstitutionally vague under the Due Process Clause of the Fifth Amendment. The *Printz* district court had also considered the potential criminal liability of the CLEOs. However, it applied the principle that constitutional rulings should be avoided if the statute can be construed to avoid a conflict. The *Printz* district court found that Congress did not intend to impose criminal liability on the CLEOs for neglect of Brady Act duties and construed the Act not to impose such liability.

Ninth Circuit Decision

The Ninth Circuit reversed the Montana and Arizona district court decisions in *Mack v. United States,*[39] and held the Brady Act constitutional because it does not embody a mandate to the States in the sovereign sense discussed in *New York v. United States.*[40] The Brady Act is a regulatory program aimed at individuals, not the States, according to the majority of a divided Ninth Circuit panel.

In a 2-1 decision, the majority decided that the background check activities represent a minimal interference with state functions. To do computer checks and explain reasons for rejection, when requested, does not constitute the kind of interference with state functions that would raise Tenth Amendment concerns. The States are not commanded to legislate or regulate. They are not even asked to produce a new state policy. The CLEOs are merely directed to serve for a temporary period as law enforcement functionaries in carrying out a federal program. The only fixed requirement is a search in whatever state and national record systems are available.

The appellate court acknowledged that, at some point, a federal statute that enlists the aid of state employees could become so burdensome that it would violate the Tenth Amendment. The Brady Act, however, does not approach that point, according to the Ninth Circuit. The Brady Act duties are no more remarkable than the federally-imposed duties of state officers to report missing children or traffic fatalities.

The court also observed that, to some extent, the dispute over the magnitude of the burden is not ripe for resolution. On the records of the cases before it, there is no attempt to require the CLEOs to do anything more than check computer records.

---

[38] 856 F. Supp. 1372 (D. Ariz. 1994).

[39] 66 F.3d 1025 (9th Cir. 1995), *rev'd, Printz v. U. S., supra*, note 3.

[40] 505 U.S. 144 (1992).

With respect to the criminal liability of the CLEOs, the Ninth Circuit declined to reach the issue because it is not ripe and vacated the rulings of both lower courts on this point.

Finally, the court readily dismissed Sheriff Mack's claim of involuntary servitude in violation of the 13th Amendment by noting that he can always resign from his position.

The dissenting judge asserted that the Brady Act violates the Tenth Amendment because it treats state officials and workers as if they were mere federal employees. Every CLEO becomes part of the federal bureaucracy, directed by Washington. The states must bear the full cost of these tasks, even if the state does not want to regulate commerce in sales of handguns. The states cannot opt out of the federal program unless they adopt a local handgun permit system.

The Supreme Court reversed the Ninth Circuit in *Printz v. United States,* and agreed with the Arizona-Montana district courts and the dissenting judge that the Brady Act impermissibly intrudes on state sovereignty.

Louisiana, Mississippi, and Vermont Cases

District courts in Louisiana,[41] Mississippi,[42] and Vermont[43] held the Brady Act violates the Tenth Amendment for reasons similar to those originally expressed by the district courts in the *Mack* and *Printz* district court decisions.

In *Romero v. United States,* the Louisiana district court found that the Brady Act regulates state law enforcement methods and impacts an essential element of state sovereignty: the maintenance of public order. The specific provisions at issue do not apply to individuals. They apply only to state officials -- the CLEOs. The court rejected the federal government's argument that the background check provisions are permissive. The CLEO duties are clearly mandatory in nature, according to the *Romero* court.

The district court ruled that "the Tenth Amendment precludes Congress, under the auspices of the Commerce Clause, from issuing mandates which obstruct states' exercise of their ability to preserve public order, or from ordering the states' law enforcement officers to preserve public order in accordance with federally-defined procedures."[44]

---

[41] *Romero v. United States,* 883 F. Supp. 1076 (W.D. La. 1994).

[42] *McGee v. United States,* 863 F. Supp.321 (S.D. Miss. 1994).

[43] *Frank v. United States,* 860 F. Supp. 1030 (D. Vt. 1994).

[44] 883 F. Supp. at 1087.

In *McGee v. United States,*[45] the district court began by agreeing that gun control could be an appropriate area for "cooperative federalism," if Congress should so determine. State and federal authorities cooperate in many law enforcement programs. Applying *New York v. United States,* however, the court held the Congress cannot direct and compel local sheriffs to carry out the background check provisions of the Brady Act. Congress could elicit, but could not mandate, the cooperation of the CLEOs. It reached this conclusion even while acknowledging that the Brady Act responsibilities placed on CLEOs are not particularly onerous. The Act transgresses the proper division of authority between the federal government and the states and contravenes the Tenth Amendment.

In *Frank v. United States,*[46] the Vermont district court granted the sheriff standing to challenge the constitutionality of the Brady Act, even though the sheriff had rejected the offer of the Vermont State Police to discharge whatever duties the Act might have imposed on the sheriff. The court engaged in a very technical construction of the Act. It noted that the Brady Act duties must be carried out by a CLEO "or an equivalent officer," and it decided that a state police officer would not qualify because Congress intended the CLEO to be a local law enforcement official.[47]

Then, for reasons similar to those expressed in *McGee,* the court found the background check provisions unconstitutional under the Tenth Amendment. It analogized the Brady Act duties to the "take title" provisions held unconstitutional in *New York v. United States.* The Congress cannot compel the states to pass legislation requiring all local enforcement officials to conduct background checks. Neither can it directly compel state and local officials acting in their official capacity to undertake federally mandated duties.

Second Circuit Decision

In an appeal decided before the Supreme Court decision in the *Printz* case, the Second Circuit reversed the Vermont district court's decision and upheld the constitutionality of the Brady Act background check requirements.[48] In addition to finding that these requirements placed a minimal burden on state officials, the Second Circuit reasoned that its ruling serves the purposes of

---

[45] 863 F. Supp. 321 (S.D. Miss. 1994).

[46] 860 F. Supp. 1030 (D. Vt. 1994).

[47] A district court in the Western District of Kentucky reached a different conclusion pre-*Printz* about the eligibility of the Kentucky State Police to conduct Brady Act background checks. In *Roy v. Kentucky State Police*, 881 F. Supp. 290 (W.D.Ky. 1995), the court held that, although the State Police are not CLEOs, they can conduct background checks as "equivalent officers" since they have the same criminal law enforcement powers as sheriffs.

[48] *Frank v. United States,* 78 F.3d 815 (2d Cir. 1996).

federalism. If the Congress cannot act through state executive officers, it will expand the federal power. "[T]he perverse result would be a further concentration of authority in the federal government."[49]

Texas and North Carolina Cases

Before the Supreme Court decided the *Printz* case, a district court for West Texas upheld the constitutionality of the Brady Act in the face of the same arguments that led to contrary rulings in the other district courts. *Koog v. United States*.[50] The court made a thorough review of the less than consistent Supreme Court jurisprudence on application of the Tenth Amendment, and observed that the cases reflect shifting perspectives on the nature and breadth of the powers reserved to the States. Although *New York v. United States*[51] is the most recent Tenth Amendment case, the court found that it does not overrule several earlier decisions. It concluded that the Brady Act imposes only minimal duties on CLEOs. These duties more closely resemble the duties found constitutional in *Federal Energy Regulatory Commission v. Mississippi*,[52] (upholding federal regulation of retail sales of electric power and natural gas through state utility commissions) than the "take title of radioactive waste material" provision struck down in *New York*.

This court also emphasized that the Brady Act confers great discretion on the CLEO to determine what is a reasonable background search, that no search may be required if the circumstances dictate, and that the duties essentially end when the national database becomes operational in 1998. The court therefore held the Brady Act does not violate Tenth Amendment principles because the Act does not "commandeer state legislatures," and places only minimal duties on state executive officers.

In *Frye v. United States*,[53] the district court refused to grant an injunction against Brady Act enforcement. The local sheriff did not carry his burden of establishing irreparable harm. While the court did not decide the consitutional issue on this preliminary motion, it expressed doubt about the likelihood the sheriff could prevail on the merits in light of the decision of the Ninth Circuit upholding constitutionality pre-*Printz*.

---

[49] 78 F.3d at 829.

[50] 852 F. Supp. 1376 (W.D. Tex. 1994).

[51] 505 U.S. 144 (1992).

[52] 456 U.S. 742 (1982).

[53] 916 F. Supp. 546 (M.D. N.C. 1995).

Fifth Circuit Decision

Before the Supreme Court decided the *Printz* case, the Fifth Circuit held the Brady Act background check requirements unconstitutional in *Koog v. United States.*[54] The Fifth Circuit found the Brady Act requirements were more than a minimal burden on local law enforcement officials and, in any event, effectively amount to forced legislation, which is impermissible under the guiding principles of *New York v. United States,* 505 U.S. 144 (1992). Since the Brady requirements cross "the line separating encouragement from coercion and attempt[] to relegate the States to acting as subordinate agents of the federal government,"[55] the Fifth Circuit held these requirements unconstitutional in violation of the Tenth Amendment.

BRADY ACT BEFORE THE SUPREME COURT

When the Brady Act challenges reached the Supreme Court, by a 5-4 decision the Court held the interim background checks by CLEOs unconstitutional in *Printz v. United States.*[56] Although only the Ninth Circuit's decision was reviewed by the Supreme Court, the Court's decision embraced the rationale of the Fifth Circuit in *Koog v. United States* and rejected the reasoning of the Ninth Circuit.

Acknowledging that "there is no constitutional text speaking to th[e] precise question [of the constitutionality of the Congress compelling state officers to execute federal laws],"[57] the majority asserted that "the answer ... must be sought in historical understanding and practice, in the structure of the Constitution. and in the jurisprudence of this Court."[58]

Historical Practice

The Court reviewed the historical materials relating to interpretation of the Constitution, including early federal statutes and the Federalist Papers. It concluded that "the early laws establish, at most, that the Constitution was originally understood to permit imposition of an obligation on state *judges* to

---

[54] 79 F.3d 452 (5th Cir. 1996). The appellate court reviewed the district court decisions in *Koog v. United States* (Texas case) and *McGee v. United States* (Mississippi case), reversing the *Koog* case and affirming the *McGee* case.

[55] 79 F.3d at 462.

[56] ___ S.Ct. ___, 1997 WL 351180, 65 U.S.L.W. 4731 (June 27, 1997) (Future citations are to the "*Printz* Bench Opinion").

[57] --- S.Ct. at ---; *Printz* Bench Opinion at 4.

[58] *Ibid.*

enforce federal prescriptions...."[59] The Supremacy Clause and the Full Faith and Credit Clause require state judges to apply federal laws. Courts are distinct from the legislative and executive branches in that the courts traditionally have applied laws of other sovereigns. The only early federal law that imposed duties on state executive officers was the Extradition Act of 1793, which directly implemented the Extradition Clause of the Constitution.

Passages in the Federalist Papers that made reference to possible utilization of state executives to implement federal laws were interpreted by the *Printz* majority to "rest on the natural assumption that the States would consent to allowing their officials to assist the Federal Government,"[60] but do not justify any conclusion that this assistance could be compelled (absent an express mandate in the Constitution itself).

This "absence of executive-commandeering statutes in the early Congresses"[61] continued until very recent years. The Court observed that even under war-time conditions, President Wilson requested the assistance of State governors in calling upon State officers to implement the World War I selective draft law.

Dual Sovereignty Structure of the Constitution

The Constitution established a system of dual sovereignty of the Federal Government and the individual States. The States retained residual sovereignty, which was implicit in the conferral upon Congress of discrete, enumerated powers. This implication was made express by the Tenth Amendment, which reserved to the States or the people any powers not delegated to the Federal Government by the Constitution nor prohibited to the States by the Constitution. "The Framers explicitly chose a Constitution that confers upon Congress the power to regulate individuals, not States."[62]

This system of dual sovereignty, according to the majority, is one of the Constitution's structural protections of liberty. "The power of the Federal Government would be augmented immeasurably if it were able to impress into its service -- and at no cost to itself -- the police officers of the 50 States."[63]

---

[59] ___ S.Ct. at ___; *Printz* Bench Opinion at 6 (emphasis in original).

[60] --- S.Ct. at ___; *Printz* Bench Opinion at 11.

[61] ___S.Ct. at ___; *Printz* Bench Opinion at 16.

[62] Quoting *New York v. United States,* 505 U.S. 144, 166 (1992).

[63] ___ S.Ct. at ___; *Printz* Bench Opinion at 23.

Supreme Court Precedents

Finally, the Court turned to its own precedents on federal-state relations. The majority asserted that the Court's first experience with federal commandeering of state governments did not occur until the 1970's, in the context of auto emissions regulations issued by the Environmental Protection Agency. After the lower courts invalidated the regulations on statutory or constitutional grounds or both, the Government rescinded some of the regulations and conceded the invalidity of the remainder, which mooted the appeal to the Supreme Court.[64]

According to the majority, later opinions of the Supreme Court "made clear that the Federal Government may not compel the States to implement, by legislation or executive action, federal regulatory programs."[65] The constitutionality of the Surface Mining Control and Reclamation Act was upheld in *Hodel v. Virginia Surface Mining & Reclamation Assn., Inc.*[66] because the Act merely made compliance with federal standards a precondition to continued state regulation in an otherwise pre-empted field. Similarly, in *FERC v. Mississippi,*[67] the Act survived a constitutional challenge because it only required state agencies to consider federal regulations as a precondition to continued state regulation of an otherwise pre-empted field. Then, in *New York v. United States,*[68] the Court held unconstitutional the "take-title" provisions of the Low-Level Radioactive Waste Policy Amendments Act of 1985 under the Tenth Amendment: the Federal Government may not compel the States to enact or administer a federal regulatory program.

The Court rejected the Government's contentions that *New York* applies only where the federal statute has a policy-making component (which is absent in the Brady Act), and that the ministerial nature of the Brady Act requirements is a basis for distinguishing *New York* from the pending case. The Court refused to engage in an analysis that would balance the minimal nature of the Brady Act requirements and their burden on State officials with the public interest in controlling the proliferation of handguns. Since the Brady Act offends the very principle of separate state sovereignty, no comparative assessment of the various interests can overcome this fundamental defect.

Accordingly, the Court held the background check requirements of the Brady Act and the obligation to accept the Brady forms unconstitutional as a

---

[64] *EPA v. Brown*, 431 U.S. 99 (1977).

[65] ___ S.Ct. at ___; *Printz* Bench Opinion at 26.

[66] 456 U.S. 742 (1982).

[67] 456 U.S. 742 (1982).

[68] 505 U.S. 144 (1992).

violation of the dual sovereignty structure of the Constitution and of the Tenth Amendment.

The concurring opinion by Justice O'Connor emphasizes that CLEOs may voluntarily enforce the Brady Act. Congress could amend the interim background check provisions to provide for their continuance on a contractual basis with the States. Also, in the *Printz* decision, the Court refrains from deciding the constitutionality of other purely ministerial reporting requirements imposed by Congress on State and local officials pursuant to the Commerce Clause.[69]

IMPLICATIONS FOR BRADY ACT ENFORCEMENT

Federal gun control legislation typically must weather intense public controversy before enactment and must withstand concerted challenges to the constitutionality of the law. The Brady Act is no exception. In its short history, the law has been challenged many times in the courts by the very persons (local chief law enforcement officers) expected to enforce a key provision of the law -- the ascertainment/background check during the five-day waiting period to identify criminals, fugitives, and other persons disqualified from gun ownership by state or federal law.

Mandatory enforcement of the Brady Act's background check provisions by the CLEOs is unconstitutional. As the concurring opinion notes, CLEOs may voluntarily conduct background checks and otherwise comply with the Brady Act. Twenty-eight States already have their own alternative handgun control laws[70] that supersede Brady Act requirements. CLEOs in many of the remaining 22 States will voluntarily do background checks or be required to do so by the State Government.

What is the impact on the dealer's duties? The Supreme Court declined to rule on the validity of the requirements imposed on dealers since no dealer was a plaintiff in the case.

---

[69] The dissenting justices, led by Mr. Justice Stevens (who also dissented in *New York*), would have upheld the Brady Act requirements as a legitimate exercise of congressional power under the Commerce Clause and the Necessary and Proper Clause. Mr. Justice Souter, who had voted with the majority in *New York*, now joins the dissenters, but writes separately to emphasize that Congress must pay fair value for any administrative support it compels the States to provide. He would have remanded the case to develop a record about the CLEOs contentions that they have no budgetary authority to conduct the background checks and are liable for unauthorized expenditures.

[70] Examples of these alternative systems include a "point-of-sale check" in California, an "instant check" in Virginia, and a "permit" system in Missouri.

If the local CLEO notifies the gun dealers in his or her jurisdiction of an intent to enforce the law, must the dealer observe the five-day waiting period? Must the dealer observe the five-day wait even without confirmation that the local CLEO intends to enforce the law? Arguably, the dealer's duties and the five-day waiting period for completion of the sale are unaffected by the Supreme Court decision in *Printz*, at least in those cases where the CLEO voluntarily complies with Brady's background check provisions.

What is the impact of the *Printz* case on those CLEOs who want to enforce the background check provisions? The majority opinion by Mr. Justice Scalia leaves this question open, although the concurring opinion of Justice O'Connor asserts that CLEOs may voluntarily participate in the Brady regulatory scheme. In *New York v. United States,*[71] the Supreme Court found a violation of the Tenth Amendment even though New York State officials had at one time consented to the waste disposal plan enacted in the Low-Level Radioactive Waste Policy Act. "Where Congress exceeds its authority relative to the States, ... the departure from the constitutional plan cannot be ratified by the 'consent' of state officials."[72] The Court said ratification by consent is not possible because this would violate the rights of the people.

Notwithstanding this comment in *New York,* the district courts in Arizona, Montana, Louisiana, Mississippi, and Vermont clearly held only Section 922(s)(2) unconstitutional and specifically severed it from the remainder of the Act. The *Printz* district court said "elimination of subsection (s)(2) does not alter the substantive reach of the Act because the provisions affecting the targets of the Act, the transferor and transferees, would be left intact. In addition, the basic operation remains unchanged."[73] The court also remarked that "the process will be in place so that if CLEOs are required or permitted (and choose to do so) by state law to perform the ascertainment/background check function, they can do so." [74]

In the same vein, the *Mack* district court stated: "Irrefutably the balance of the interim provisions can function independent of the alleged invalid provision. Gun sales can be postponed for five days and sworn statements can be forwarded to CLEOs..."[75] Also, "[b]y invalidating the mandatory background check provision, the requirements of the other challenged provisions become optional."[76] The *Frank* district court opined: "Without the mandatory

---

[71] 505 U.S. 144 (1992).

[72] 505 U.S. at 182.

[73] *Printz v. United States*, 854 F. Supp. 1503, 1518 (D. Mont. 1994).

[74] *Ibid.*

[75] *Mack v. United States*, 856 F. Supp. 1372, 1383 (D.Ariz. 1994).

[76] *Ibid.*

background check, the Act can operate as intended by Congress with the exception that local law enforcement would then have the option, rather than the obligation, of conducting a background check during the five-day waiting period." [77] The *McGee* district court said even though Section 922(s)(2) is unconstitutional, "there is still a five-day waiting period, purchasers of handguns must still provide certain information to gun dealers, which in turn must be provided to the chief local law enforcement officer, who then will have the option 'to cooperate' or 'not cooperate' with federal officials in carrying out the provisions of Brady."[78] The *Romero* district court stated: "this Court believes that the primary goal of the Brady Handgun Control Act, a five-day waiting period for handgun dealers and local law enforcement officials, continues to be served even though this Court has invalidated the mandates to CLEOs. Further, although released from the mandate, CLEOs will maintain the option of acting on any given notice from a handgun dealer, at their option and in pursuit of their own law enforcement priorities and policies."[79]

Given this severence of the unconstitutional provisions by the district courts, which left the remainder of the Brady Act intact, it is arguable that the *Printz* case will not seriously affect enforcement of the Act. What the federal authorities maintained was discretionary anyway has become optional. There seems little difference, if any, between "broad discretion" and an "option" to enforce a law. The Supreme Court has not prohibited the CLEOs from conducting the ascertainment/background checks.

In its February 1997 annual report on Brady Act enforcement,[80] the Bureau of Alcohol, Tobacco, and Firearms estimates that 186,000 prospective handgun purchasers were denied legal sales in all states during the time the Brady Act was in effect. Over 70% of the rejected purchasers were convicted or indicted felons. In those states subject to the Brady Act, there were about 86,000 rejections from a total of about 4 million applications or inquiries. About 2.3 percent of handgun purchasers were denied legal sales in Brady States.

As a result of the *Printz* decision by the Supreme Court, Brady Act enforcement may be somewhat sporadic and less effective than that intended by the Congress in the 22 States that do not have alternative handgun check systems. Pending establishment of the national instant check system, the main concern would seem to be that a few non-complying counties or States may become havens for purchase of handguns by persons disqualified from handgun possession by federal law.

---

[77] *Frank v. United States*, 860 F. Supp. 1030, 1044 (D. Vt. 1994).

[78] *McGee v. United States*, 863 F. Supp. 321, 327 (S.D. Miss. 1994).

[79] *Romero v. United States*, 883 F. Supp. 1076, 1089 (W.D. La. 1994).

[80] BUREAU OF JUSTICE STATISTICS BULLETIN, DEPARTMENT OF JUSTICE, *A National Estimate [of] Presale Firearm Checks*, (Feb. 1997).

The effectiveness of the Brady Act may also have been affected by an amendment to 18 U.S.C. §922(s)(1) enacted as part of the Violent Crime Control and Law Enforcement Act of 1994.[81] When the Brady Act went into effect on February 28, 1994, federal gun restrictions applied to all pawnshop transactions. The Houston police, for example, reported that they blocked 199 gun sales within the first three weeks under the Brady Act, of which 177 (or nearly 90 percent) were pawnshop transactions.[82] Then, in September 1994, the Violent Crime Control Act removed from federal scrutiny anyone reclaiming his or her own gun as pawned merchandise.

Nationally, the number of handgun rejections declined during the second year of Brady Act enforcement, but may have increased during the third year. The estimates for the third year are incomplete since statistics are available only for the first-half of the year.[83]

CONCLUSION

Gun control legislation engenders strong emotional responses from its supporters and its opponents. Sincere people on both sides debate the efficacy of such controls to combat violent crime and the impact of the restrictions on law-abiding citizens who want to own a gun for self-defense, defense of their families, recreation, hunting, and other lawful purposes.

The Brady Act took seven legislative years to become law. Within its first years of operation, seven district courts, three appellate courts, and the Supreme Court have ruled on challenges to its constitutionality.

In *Printz v. United States*, the Supreme court held unconstitutional the Brady Act's mandatory background checks by CLEOs as a violation of the dual sovereignty structure of the Constitution, as evidenced by the Tenth Amendment and Supreme Court precedent such as *New York v. United States.*

The "mandatory" background check, which was always subject to local resources and the commitment of the CLEO, has legally become an option to

---

[81] SEC. 32097, Public Law No. 103-322, 108 Stat. 1976 (September 13, 1994).

[82] *Time* magazine, February 20, 1995, at 48.

[83] Rejections for the first nine-months in all states in 1994 numbered 92,000; in 1995 (a full year), rejections numbered 60,000; for the first half of 1996, rejections numbered 34,000. In Brady States, there were 42,000 rejections of handgun purchases in 1994, 28,000 rejections in 1995, and 16,000 rejections in the first half of 1996. The number of applications or inquiries has increased slightly. The February 1997 report of the Bureau of Justice Statistics does not comment on the one year decline. This CRS report does not attribute any reason for this decline.

conduct a background check. The CLEOs are not prohibited from conducting background checks by the *Printz* case. Justice O'Connor's concurring opinion emphasizes that voluntary enforcement may continue. The Clinton Administration encourages voluntary enforcement.

Enforcement may be sporadic and may fall short of the level intended by the Congress in those States that have not adopted alternative background check systems. The principal concern of gun control proponents about the *Printz* decision may be that a few non-background check counties or States will become havens for handgun sales to persons disqualified from gun possession by federal law.

Pending implementation of the national instant check system, if Members wish to legislate amendments to overcome the constitutional defects in the Brady Act, the following possible remedies could be considered. Adopting a "contractual" approach, Congress could condition distribution of crime-prevention money grants to the States on compliance with the background check requirements. Congress might alternatively impose additional requirements on federally-licensed gun dealers to check the qualifications of gun purchase applicants, and increase the authority and resources of the BATF to inspect dealer records and monitor compliance.