

FOIA MARKER

This is not a textual record. This is used as an administrative marker by the William J. Clinton Presidential Library Staff.

Collection/Record Group: Clinton Presidential Records

Subgroup/Office of Origin: Domestic Policy Council

Series/Staff Member: Leanne Shimabukuro

Subseries:

OA/ID Number: 23164

FolderID:

Folder Title:

Crime: Brady Legislation

Stack:

S

Row:

98

Section:

4

Shelf:

11

Position:

2



Crime-Brady law ~~Exemption~~
U.S. Department of Justice *Legislation*
Office of Intergovernmental Affairs

Office of the Director

Washington, D.C. 20530

July 10, 1997

MEMORANDUM

TO: Elena Kagan
FROM: Nick Gess
SUBJECT: Brady Act / Halbrook Letter

Elena -- Attached is my draft response to the Halbrook / NRA letter on the Brady Act. I've given it to Beth Nolan & Eldie Acheson. Basically, I want to stay away from being drawn into a battle of each of the 19 states' laws. Rather, I want to cast Brady as a law enforcement investigative method, one which is no different than a wide variety of other law enforcement activities which aren't graven in any statutes.

Enclosures

File Crime
Brady / Legislation

Toni/Leanne --
I assume
Nick sent this to
you, but just in case...
Elena

Stephen P. Halbrook, Esquire
10560 Main Street, Suite 404
Fairfax, Virginia 22030

Dear Mr. Halbrook:

Thank you for your recent letter to the President and the Attorney General concerning law enforcement efforts in support of enforcement of the Brady Handgun Control Act. Your letter suggests a rather novel view of the law, one which bodes ill for law enforcement's ability to protect the American public.

In our criminal justice system, Federal, state and local laws generally authorize law enforcement agencies to enforce the law. With the exception of certain particularly intrusive methods of investigation, Federal and state laws do not generally authorize specific investigative methods. Your analysis seems to suggest that unless there is a state law expressly authorizing law enforcement to conduct interviews or surveillance in support of an investigation, that law enforcement cannot conduct interviews or surveillance in that state. This is, of course, not the case and, if it were, would deal a body blow to the public's safety.

The Brady Handgun Control Act is one of a panoply of authorities which exist in our society to prevent crimes from occurring in the first place. Just as law enforcement heavily patrols highways and streets with significant incidents of drunk driving fatalities in an effort to prevent further such crimes from occurring, the Brady Handgun Control Act is designed to permit law enforcement to assure that an individual may lawfully possess a handgun before the handgun transfer takes place.

Just as there are no statutes which specifically authorize enhanced drunk driving patrols, yet law enforcement may, within the limits of the law, conduct such patrols, we find it inconceivable that for law enforcement to conduct pre-sale background checks, that it must have a specific authorization to do so. Of course, those provisions of the Act which create a five-day delay to permit the check to take place, remain in full force and effect.

Ultimately, we view our request to law enforcement to continue doing what it has done as exactly the sort of good cooperative law enforcement which the public needs to be safe and secure. We do not intend to change our advice because to do so would be legally incorrect and would put the citizens whom we serve at significant risk.

END

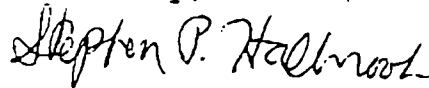
the states governing the duties of law enforcement do not encompass voluntary execution of federal law, and law enforcement departments are not authorized to expend funds on volunteer activities not sanctioned by State law. See, e.g., Mont. Code §7-32-2121 (duties of sheriff under State law), §§7-4-2110, 7-4-2203 (board of county commissioners supervise officials charged with the disbursement of public revenues and prosecute delinquencies). All of the other States also define law enforcement duties and prohibit use of funds for purposes unauthorized by State law.

The above limitations apply as much to departments of State police and Attorneys General as to local sheriffs and police chiefs. State officials are not authorized to expend funds for activities not sanctioned by State law any more than are local officials.

Certainly the Supreme Court's decision does not create a problem so urgent as would justify encouraging local law enforcement officials to violate the laws of their own States. In 1994, federal district courts in Montana, Mississippi, Arizona, Vermont, and Louisiana declared the Brady Act unconstitutional. The Brady Act has been inoperative in Texas, Mississippi, and Louisiana since March 1996, when it was declared unconstitutional in *Koog v. United States*, 79 F.3d 452 (5th Cir. 1996). Yet no one has suggested since then that a crisis was forthcoming in those States such as warranted acting outside of and in conflict with State law.

The above points to the necessity of putting on line the permanent provision of the Brady Act, the federal instant check. This task should be accomplished with all deliberate speed. Meanwhile, in urging CLEOs to execute the Brady law voluntarily, we urge you to inform them that you do not warrant that they may lawfully do so under the laws of their respective States, and that you warn them that expenditure of funds for unauthorized execution of federal law may be contrary to State law.

Sincerely,



Stephen P. Halbrook

cc: Honorable Walter Dellinger
Acting Solicitor General
Department of Justice
10th St. and Constitution Ave., N.W.
Washington, D.C. 20530

STEPHEN P. HALBROOK, PH.D.

ATTORNEY AT LAW

SUITE 404

10560 MAIN STREET

FAIRFAX, VIRGINIA 22030

TELEPHONE (703) 352-7276

FAX (703) 359-0938

JUL 8 1997

June 30, 1997

President Bill Clinton
The White House
Washington, D.C. 20500

Attorney General Janet Reno
U.S. Department of Justice
10th & Constitution Ave., N.W.
Washington, D.C. 20530

Re: "Voluntary" Background Checks Under Brady Act

Dear President Clinton and Attorney General Reno:

I am writing as counsel for Sheriff Jay Printz. As you know, on June 27, 1997, the Supreme Court in *Printz v. United States* declared the Brady Act's required background checks by chief law enforcement officers (CLEOs) unconstitutional. President Clinton responded in the news media that he would urge all law enforcement departments in the States where the Brady Act applied to do the background checks voluntarily.

I would respectfully draw your attention to the fact that, under the laws of most if not all of these States, CLEO involvement in firearms transactions is contrary to law or not authorized by law. As stated in *Printz*, Slip Opinion at 36 n. 18:

Both CLEOs before us here assert that they are prohibited from taking on these federal responsibilities under state law. That assertion is clearly correct with regard to Montana law, which expressly enjoins any "county . . . or other local government unit" from "prohibit[ing] . . . or regulat[ing] the purchase, sale or other transfer (including delay in purchase, sale, or other transfer), ownership, [or] possession . . . of any . . . handgun," Mont. Code §45-8-351(1) (1995).

The Court added that "it is arguably correct with regard to Arizona law as well," citing Ariz. Rev. Stat. §13-3108(B) (1989). Similar preemption laws exist in most of the other States where the Brady Act applied. (See attached addendum.)

In addition to the preemption statutes, the general laws of

ADDENDUM

State	Statute
Alabama	Ala. Code § 11-45-1.1
Arizona	Ariz. Rev. Stat. Ann. § 13-3108(B)
Arkansas	Ark. Code Ann. § 14-54-1410
Kentucky	Ky. Rev. Stat. Ann. § 65.870
Maine	Me. Rev. Stat. Ann., tit. 25, Chap. 252-A, § 2011
Mississippi	Miss. Code Ann. § 45-9-51
Montana	Mont. Code Ann. § 45-8-351(1)
Nevada	Nev. Rev. Stat., Chaps. 244, 268, 269
New Mexico	Const. of N.M. Art. II, § 6
North Dakota	N.D. Cent. Code § 62.1-01-03
Oklahoma	Okla. Stat., tit. 21, § 1289.24
Pennsylvania	18 Pa. Cons. Stat. § 6120
Rhode Island	R.I. Gen. Laws § 11-47-58
South Carolina	S.C. Code Ann. § 23-31-510
South Dakota	S.D. Codified Laws Ann. § 7-18A-36; § 8-5-13; § 9-19-20
Texas	Local Gov't Code § 215.001
Vermont	Vt. Stat. Ann. tit. ____, § 2295
West Virginia	W.Va. Code § 8-12-5a
Wyoming	Wyo. Stat. § 6-8-401