Case Number: 2009-1305-F

FOIA MARKER

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

Folder Title:
Brady Act: Brady Act - Litigation

Staff Office-Individual:
Counsel's Office-Neuwirth, Stephen

Original OA/ID Number:
CF 383

Row:	Section:	Shelf:	Position:	Stack:
20	3	10	3	V

File - Brady Act
Litigation

To: SN
Suzy [illegible]

DRAFT

Nos. 94-50562 and 94-60518 (Consolidated)

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

SHERIFF J.R. KOOG, Val Verde County, Texas,
Plaintiff-Appellant,

v.

UNITED STATES OF AMERICA,
Defendant-Appellee.

DRAFT

SHERIFF BILL MCGEE AND FORREST COUNTY, Mississippi,
Plaintiffs-Appellants/Cross-Appellees

v.

UNITED STATES OF AMERICA,
Defendant-Appellee/Cross-Appellant

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS

BRIEF FOR APPELLEE

WALTER DELLINGER
Assistant Attorney General

H. JEFFERSON POWELL
RICHARD L. SHIFFRIN
Deputy Assistant Attorneys General

STUART M. BENJAMIN
Attorney-Advisor
Office of Legal Counsel

FRANK W. HUNGER
Assistant Attorney General

JAMES H. DeATLEY
GEORGE L. PHILLIPS
United States Attorneys

MARK B. STERN
(202) 514-5089
SEAN A. LEV
(202) 514-1278
STEPHANIE R. MARCUS
(202) 514-1633
Attorneys, Appellate Staff
Civil Division, Room 7124
Department of Justice
Washington, D.C. 20530-0001

STATEMENT REGARDING ORAL ARGUMENT

Because these consolidated appeals challenge the constitutionality of the Brady Handgun Violence Prevention Act, an enactment of great public concern, the United States respectfully requests oral argument.

STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

Plaintiff in Koog v. United States invoked the jurisdiction of the district court pursuant to 28 U.S.C. § 1331. KR 2.[1] The district court entered final judgment for the United States on June 1, 1994. KR 327. Plaintiff filed a motion to alter or amend judgment pursuant to Fed.R.Civ.P. 59(e) on June 8, 1994. KR 358. The district court denied that motion on June 27, 1994. KR 391. Plaintiff filed a timely notice of appeal on August 16, 1994. KR 392.

Plaintiff in McGee v. United States invoked the jurisdiction of the district court pursuant to 28 U.S.C. § 1331. MR 2. The district court entered final judgment on June 3, 1994. MR 143. Plaintiff filed a timely notice of appeal on July 29, 1994. MR 158. The United States filed a timely notice of appeal on August 1, 1994. MR 160.

This Court has jurisdiction over both appeals pursuant to 28 U.S.C. § 1291. On the joint motion of all parties, the Court consolidated the appeals for briefing and argument.

STATEMENT OF ISSUES

1. Whether provisions of the Brady Handgun Violence Prevention Act contravene the Tenth Amendment because they require limited interim involvement by local officers in implementing federal law.

2. Whether plaintiffs present a justiciable challenge to the Brady Act's criminal penalties provision, when the Department

---

[1] "KR" and "KT" designate record and transcript references in Koog v. United States. "MR" and "MT" designate record and transcript references in McGee v. United States.

of Justice has formally opined that the provision does not apply to the conduct of local officials in implementing the Act, and, as both courts below concluded, the provision does not in fact apply to persons such as plaintiffs.

3. Whether, assuming that the Court accepts any part of plaintiffs' constitutional argument, the remaining provisions of the Brady Act are severable.

STATEMENT OF THE CASE

A. Course of Proceedings and Disposition in the Court Below.

Sheriff J.R. Koog and Sheriff Bill McGee brought separate actions to challenge the constitutionality of the Brady Handgun Violence Prevention Act, Pub. L. 103-159, 107 Stat. 1536 (1993) ("Brady Act"). The interim provisions of the Act establish a five-day waiting period for the sale of handguns and require firearms dealers to refer proposed purchases to the Chief Law Enforcement Officer ("CLEO") of their district. The CLEO, a state or local official, is required to make a "reasonable effort" during the waiting period to determine if the sale would be barred by law.

Plaintiffs argued that the "reasonable effort" requirement and related provisions of the Act constituted an impermissible encroachment on state sovereignty and thus violated the Tenth Amendment. They also contended that the Act would impose criminal penalties on local officials who failed to undertake a "reasonable effort" and that this stricture was unconstitutionally vague.

After an evidentiary hearing, the district court in Koog held that the requirements imposed on local officials by the Act were temporary and minimal and did not constitute an unconstitutional affront to state sovereignty. The court further found plaintiff's challenge to the criminal penalties provision nonjusticiable because that section has no applicability to the conduct of CLEOs under the Act.

The district court in McGee also found that the requirements placed on local officials were not onerous. Nevertheless, the court held that the "reasonable effort" requirement violated the Tenth Amendment. The court held, however, that this provision was severable from the other requirements of the Act, including the statute's five-day waiting period for handgun sales. The court also found that plaintiff's Fifth Amendment challenge to the criminal penalties section was nonjusticiable, holding that the provision does not apply to local officials and that Sheriff McGee faced no realistic threat of criminal prosecution.

Plaintiff appealed from the district court's order in Koog. Both parties appealed in McGee.

B. The Brady Act.

The Gun Control Act of 1968, 18 U.S.C. § 921 et seq., establishes a comprehensive federal regulatory scheme governing the manufacture and distribution of firearms in interstate commerce. Among other requirements, the Gun Control Act prohibits the sale or transfer of firearms to certain classes of persons, including those who have been charged with or convicted of serious crimes.

In the face of mounting handgun violence, Congress enacted the Brady Act to enhance enforcement of these prohibitions on gun transfers. See H.R. Rep. No. 103-344, 103d Cong., 1st Sess. 7 (1993). The Act requires the federal government to establish a national instant criminal background check system by February 1999. When the system is in place, firearms dealers will be required to refer proposed firearm transfers to the system to determine whether any legal impediment exists to the sale. 18 U.S.C. § 922(t)(1)-(2); Brady Act § 103(b), 107 Stat. 1541.

Pending establishment of the national instant criminal background check system, Congress enacted interim provisions to deal with the national "epidemic of handgun violence." H.R. Rep. No. 344, 103d Cong., 1st Sess. 8 (1993). The interim scheme requires a prospective gun purchaser to provide a firearms dealer with a statement that includes specified information, such as name, address, and date of birth. 18 U.S.C. § 922(s)(3)(A)-(B). The firearms dealer must notify the "chief law enforcement officer" of the contents of the statement and provide the official with a copy of the statement. Id. § 922(s)(1)(A)(i)(III)-(IV).[2]

The Act establishes a five-day waiting period before the purchaser may receive the gun. Id. § 922(s)(1)(A)(ii)(I). It

[2] The statute defines a "chief law enforcement officer" as "the chief of police, the sheriff, or an equivalent officer or the designee of any such individual." 18 U.S.C. § 922(s)(8).

also provides that, during that time, the CLEO "shall make a reasonable effort" to determine whether a legal impediment exists to the proposed sale:

> 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 [of the handgun] would be in violation of the law, including research in whatever State and local recordkeeping systems are available and a national system designated by the Attorney General.

Id. § 922(s)(2).[3]

The Act also imposes two other duties incident to the "reasonable effort" requirement. If the CLEO finds no impediment to the proposed handgun sale, he or she must destroy records related to the referral. Id. § 922(s)(6)(B). If the CLEO determines that the sale is barred by law, the prospective purchaser may request that the CLEO provide written reasons for the determination within 20 business days. Id. § 922(s)(6)(C). The Act insulates CLEOs from damage claims for failing to prevent an unlawful handgun sale or for erroneously concluding that a transfer would be contrary to law. Id. § 922(s)(7).

The Bureau of Alcohol, Tobacco and Firearms ("ATF"), which is charged with the interpretation and implementation of the Act, issued interpretive guidance on January 21, 1994 in an open letter to state and local law enforcement officials. KR 152.

---

[3] If the CLEO finds no bar to a sale and reports his findings to a firearms dealer, the sale may proceed before the expiration of the waiting period. Id. § 922(s)(1)(A)(ii)(II).

ATF explained that the Brady Act "anticipates some minimal effort to check commonly available records," but that CLEOs are not obliged to check "every conceivable record system that may contain information relating to categories of prohibited persons." Id. at 9, KR 159. Moreover, the ATF letter stated that because the "vast majority of persons who are prohibited from possessing a handgun are prohibited by virtue of some criminal background," a CLEO's reasonable effort should focus on criminal history records. Id. Other records need only be searched where they are readily "accessible." Id. at 10, KR 160. The letter further notes that in some circumstances, as when the CLEO has personal knowledge of a gun purchaser, no research may be required. Id.[4]

C. Statement of Facts and Proceedings Below.

1. Koog v. United States

Plaintiff Koog is the Sheriff of Val Verde County, Texas, and is the county's "chief law enforcement officer." Complaint, ¶ 2, KR 1. He filed this action on March 9, 1994 in the United States District Court for the Western District of Texas seeking declaratory and injunctive relief. Id. Plaintiff moved for a preliminary injunction, and the district court conducted an evidentiary hearing that was converted into a hearing on the merits with the assent of the parties. Order of June 1, 1994 at 2, KR at 328.

---

[4] The Brady Act exempts handgun transactions that occur in states that have their own background check or permit requirements. See 18 U.S.C. § 922(s)(1)(C)-(D).

The hearing focused on the impact of the Brady Act on Sheriff Koog's activities. Sheriff Koog testified that his office has direct computer access to the data bases of the Texas Crime Information Center ("TCIC") and the National Crime Information Center ("NCIC"), and that he processed Brady Act referrals by checking the TCIC or NCIC records. KT 26, 28. Sheriff Koog testified it took "a minute or two" to enter a data request and receive a return. KT 40.

On June 1, 1994, the district court issued its opinion and order rejecting plaintiff's challenges. KR 327, 852 F. Supp. 1376. The court first concluded that Sheriff Koog was authorized by law to bring his Tenth Amendment challenge and therefore had standing to bring suit. Order at 8-9, KR 334-35. Turning to the merits of plaintiff's claim, the court found that the responsibilities placed on Sheriff Koog by the Brady Act were "temporary" and "minimal." Order at 28, KR 354. The court noted that plaintiff's fundamental position was "that the federal government may <u>never</u> mandate <u>any</u> action by state officials." Order at 27, KR 353 (emphasis in original). The court found this position to be without merit.

Undertaking a comprehensive analysis of the Supreme Court's Tenth Amendment jurisprudence, the district court concluded that "no single decision controls the entire spectrum of Tenth Amendment analysis" (Order at 26, KR 352), and rejected plaintiff's "intimat[ion]" that the Court's decision in <u>New York v. United States</u>, 112 S. Ct. 2408 (1992), had implicitly overruled prior Tenth Amendment jurisprudence. Order at 27, KR 353. The court observed that the federal government was plainly barred from "commandeering state legislatures," as was the case in New York. However, New York did not bar the federal government from imposing minimal burdens on state executive officers, such as those required by the Brady Act. Ibid.

The court held that plaintiff's Fifth Amendment challenge to the criminal penalties section of the Brady Act was not justiciable. It concluded that the criminal penalties provision did not apply to a CLEO's exercise of statutory responsibilities and that Sheriff Koog therefore lacked standing to file a Fifth Amendment claim. Order at 28, KR 354.

2. McGee v. United States.

Plaintiff Bill McGee is the sheriff of Forrest County, Mississippi and that county's "chief law enforcement officer." Complaint ¶¶ 2, 6. MR 1, 2. He filed this suit on March 1, 1994 in the United States District Court for the Southern District of Mississippi. MR 1.

Sheriff McGee sought a preliminary injunction, and the district court conducted a hearing on April 19, 1994 to take evidence on the impact of the Brady Act on plaintiff's office. Sheriff McGee, like Sheriff Koog, testified that his office uses the NCIC data base to process Brady Act referrals. MT 17. Sheriff McGee stated that he makes additional inquiries in cases where he has personal knowledge of the prospective purchaser and believes further investigation may be appropriate. Id. Sheriff

McGee testified that his office routinely performs many types of background checks on the NCIC system, explaining that the system is used to "check suspicious individuals, individuals who are stopped on routine patrol who give us reason to believe that further evaluation should be made * * *. Yes, we use that computer day in and day out." MT 47.

On June 3, 1994, the district court issued its final judgment. MR 155. The court concluded as a preliminary matter that Sheriff McGee was authorized to file suit under Mississippi law and thus had standing to assert his Tenth Amendment claim.[5] Op. at 5-6, MR 147-48. The court then concluded that the "reasonable effort" requirement of § 922(s)(2) contravened the Tenth Amendment. Op. at 9, MR 151. Although the court acknowledged that "the responsibilities placed upon local sheriffs by Brady [are not] particularly onerous," it concluded that they were "more than de minimis." Id.[6] The court found

---

[5] On appeal the United States does not challenge plaintiffs' standing to raise their Tenth Amendment claim. Plaintiffs argue that the court erred in denying Sheriff McGee's motion to amend his complaint to add Forrest County as a plaintiff. See McGee Op. at 2, MR 144. Because we no longer contest Sheriff McGee's standing to assert his Tenth Amendment claim, the district court's ruling on this issue does not appear to have any substantive effect.

[6] In contrast, the court found that "simply requiring a CLEO to destroy forms provided to the CLEO by a gun dealer as to handgun purchases (18 U.S.C. § 922(s)(6)(B)) . . . is clearly de minimis." Op. at 9 & n.5, MR 151. Additionally, the court found that "18 U.S.C. § 922(s)(6)(C) which requires a CLEO to give a reason why a gun purchase is turned down will not become mandatory on any CLEO unless he has first voluntarily decided to cooperate and comply with 18 U.S.C. § 922(s)(2)." Op. at 9, MR 151.

that under New York v. United States, "Congress cannot direct and compel local sheriffs to carry out the provisions of the Brady Bill as is done in 18 U.S.C. § 922(s)(2)." Id.

The court then found that § 922(s)(2) was severable from the remainder of the Brady Act and thus rejected plaintiff's claim that the statute should be held unconstitutional in its entirety. Op. at 10-11, MR 152-53. The court further held that Sheriff McGee's Fifth Amendment challenge to the statute's criminal penalty provision was not justiciable. It noted that the Department of Justice had officially interpreted the provision to have no applicability to CLEOs and that Sheriff McGee therefore faced no realistic threat of prosecution. Op. at 3, MR 145.

STANDARD OF REVIEW

The constitutionality of a statute is an issue reviewed de novo by this Court. United States v. Guajardo, 950 F.2d 203, 206 (5th Cir. 1991), cert. denied, 112 S.Ct. 1773 (1992).

SUMMARY OF ARGUMENT

1. The Brady Act responds to a national epidemic of handgun violence. It does so by regulating firearms dealers to enhance enforcement of existing restrictions on handgun transfers. To this end, the Act mandates establishment of a national instant background check system by 1999 and requires firearms dealers to refer proposed sales to the national system. In substance and implementation, the Act is a congressional solution to a national problem.

The interim provisions challenged here by plaintiffs do not alter the fundamentally federal character of the statute. Local officials are involved in a temporary and ministerial capacity. And, as both district courts below recognized, their responsibilities are not onerous. CLEOs are required only to make a "reasonable effort" to determine whether the proposed sale is barred by law. ATF, which is charged with implementing the statute, has emphasized that CLEOs may determine what is reasonable in light of their own resources and that CLEOs may, consistent with the Act, limit their efforts to consulting readily accessible records for evidence of criminal convictions.

Indeed, both plaintiffs testified that they meet their statutory responsibilities by conducting brief computer checks from their office, and neither district court found this practice burdensome. The requirement that CLEOs destroy the records pertaining to the proposed sale is even more obviously minimal, as is the requirement that a CLEO explain, on request, why the sale is barred by law.

Congress's decision to require this type of short-term ministerial assistance in responding to a national emergency is well within the scope of its constitutional authority. The Framers contemplated that the national government would make use of state officers to carry out some federal duties, and a variety of statutes have imposed such duties from the time of the earliest Congresses to the present day.

The Supreme Court's jurisprudence reflects that settled principle. The Court has never held that Congress is barred from placing any requirements on state officials. Indeed, in FERC v. Mississippi, 456 U.S. 742 (1981), the Court upheld a federal statute that parallels the Brady Act in key respects, requiring state authorities to implement federal regulations by resolving disputes arising under federal law. The statute sustained in FERC is distinguishable from the Brady Act only in that the FERC statute imposed a more significant burden on local officials.

New York v. United States, 112 S. Ct. 2408 (1992), on which plaintiffs rely, did not purport to overrule prior decisions and well-established principles. The Court in that case confronted a statute of a different type than those at issue in this case, FERC, and other decisions upholding federal mandates on state officials. In New York, unlike the present case, Congress identified a national problem -- the disposal of radioactive waste -- but did not respond by enacting a federal regulatory scheme. Instead, Congress required that the individual states legislate their own solutions to the problem of radioactive waste. Alternatively, the states could take title to the waste, incur substantial penalties, and then determine its proper disposition. Unlike the Brady Act, the New York statute did not require state help in implementing federal requirements on private conduct. Instead, as the Court stressed, the statute "'commandeered the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program.'" Id. at 2428.

The teaching of New York is clear. Congress may not identify a national problem and require the states to devise solutions. Such directives intrude on fundamental attributes of state sovereignty and undermine the principles of political accountability protected by the Tenth Amendment. By the same token, New York did not signal a departure from the well-established tenet that the federal government may require state help in implementing federal law, particularly where the burden placed on the states is insignificant and temporary.

2. Plaintiffs argue that the criminal penalties provision of the Brady Act applies to the conduct of local officials in implementing the Act. Since the Act requires only that CLEOs undertake a "reasonable effort" -- a term that leaves vast discretion to the local officials -- plaintiffs argue that the criminal penalties section is unconstitutionally vague.

Plaintiffs seek to manufacture a constitutional problem where none exists and thus fail to state a justiciable claim. The Department of Justice, through its Office of Legal Counsel, has officially explained that the criminal penalties section does not apply to local officials. Since the Department of Justice has sole authority to authorize federal prosecutions, plaintiffs face no realistic prospect of criminal prosecution and their challenge is not properly before the Court.

Moreover, as both district courts below concluded, the Department's interpretation is correct: the criminal penalties section does not apply to officials who implement the Act; it applies to the parties whom the statute regulates. Accordingly, as the courts below concluded, plaintiffs lack standing to challenge the provision.

3. Assuming that the Court were to accept any part of plaintiffs' constitutional argument, the challenged provisions are plainly severable. It is axiomatic that a court must refrain from invalidating more of a statute than absolutely necessary and that constitutionally defective provisions should be severed unless it is evident that Congress would not have enacted the remaining sections. Congress plainly believed that the statute as enacted was best calculated to stem the tide of handgun violence. However, it is also clear that the statute is operational and furthers congressional purposes even if the mandatory "reasonable effort" requirement is severed from the Act. Even without such a requirement, local officials would be informed of pending handgun transfers, and those officials who wished to conduct background checks could do so. Indeed, the history of the Act makes clear that vast numbers of local enforcement officials supported the Act and welcomed the ability to conduct background checks. Moreover, where no check is conducted, sales would be subject to the five-day "cooling off" period that many members of Congress saw as a key benefit of the Act. In sum, as the court in McGee correctly concluded (Op. at

10-11, MR 152-53), it is hardly evident that Congress would have spurned these benefits if its chosen structure was made unavailable.

ARGUMENT

I. THE BRADY ACT'S REQUIREMENT THAT LOCAL OFFICIALS UNDERTAKE REASONABLE EFFORTS TO DETERMINE THE LEGALITY OF PROPOSED HANDGUN TRANSFERS IS FULLY CONSISTENT WITH THE TENTH AMENDMENT.

A. The Tenth Amendment Does Not Bar Federal Requirements That State Executive Officials Provide Limited, Ministerial Assistance In Implementing Federal Law.

The Brady Act establishes federal restrictions on the sale of handguns. Pending the creation of a national instant criminal background check system, the Act requires limited assistance by local officials in conducting background checks during the statutory five-day waiting period.

Below, we discuss the particulars of the Act and demonstrate that it survives scrutiny under all criteria conceivably relevant to Tenth Amendment analysis. In particular, as both district courts below recognized, the temporary requirements placed on local officials by the Act are not onerous. Plaintiffs' effort to derive a daunting burden from the "reasonable effort" requirement is at odds with the language and history of the statute and with ATF's explicit authoritative guidance.

At the outset, however, it is plain that the fundamental legal premise of plaintiffs' argument is incorrect. As the district court in Koog observed, plaintiffs' position, at bottom, does not turn on the specific provisions of the Brady Act or the extent of the burden they create. Instead, plaintiffs' basic contention is "that the federal government may never mandate any action by state officials." Koog Order at 27, KR 353 (emphasis in original). Indeed, plaintiffs begin their argument to this Court by sounding this absolute theme: "Congress cannot issue commands to state officials." Pl. Br. 23.

Plaintiffs are wrong. As we now show, the Supreme Court's jurisprudence -- up to and including New York v. United States -- establishes no such absolute bar.

1a. "[T]he Framers chose to rely on a federal system in which special restraints on federal power over the states inhered principally in the workings of the National Government itself, rather than in discrete limitations on the objects of federal authority." Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 552 (1984). Thus, the Constitution "has left primarily to the political process the protection of the States against intrusive exercises of Congress' Commerce Clause powers." Gregory v. Ashcroft, 501 U.S. 452, 464 (1991).

In keeping with this principle and with the supremacy of federal law, the Supreme Court has repeatedly made clear that the federal government may require state assistance in the implementation of federal law. Where the federal government devises a legislative solution that regulates private conduct and merely calls upon state officers for ministerial aid in implementing that solution, no constitutional problem is presented.

A different situation exists where Congress chooses not to enact a federal solution and, instead, directs the states to devise or administer their own regulatory schemes. In that circumstance, Congress intrudes into the heart of state sovereignty and blurs lines of political accountability. Such problems are presented in quintessential form when the federal government directs the states to legislate.

This distinction is explicit in FERC v. Mississippi, 456 U.S. 742 (1981), where the Court observed that, although it "never has sanctioned explicitly a federal command to the States to promulgate and enforce laws and regulations," it has "upheld federal statutory structures that," like the Brady Act, "in effect direct[] state decisionmakers to take or refrain from taking certain actions." Id. at 762 (emphasis added) (citing Fry v. United States, 421 U.S. 542 (1975); Washington v. Washington State Commercial Passenger Fishing Assn., 456 U.S. 763 (1982); Testa v. Katt, 330 U.S. 386 (1947)).

In FERC, the Court upheld a directive similar in key respects to the provisions at issue here. There, the Court considered a challenge to a statute requiring states to "implement" FERC rules that were designed to encourage power production at small plants. 456 U.S. at 759. In practice, the statutory mandate meant that state executive branch officials were required to assist in federal regulation of private parties by deciding private disputes arising under the FERC rules.[7] See id. at 759-60.

The Court found that compelling state executive officers to undertake these additional duties was consistent with the "preeminent position held by federal law throughout the Nation." Id. at 761. The FERC Court also upheld aspects of the same federal statute that required state authorities to "consider" enacting certain energy standards if they desired to continue regulating in this field. Id. at 761-69. As the Court stressed, when a state regulates private conduct, the state's "legislative and judicial decisionmakers must give preclusive effect to federal enactments * * * no matter what the strength of the competing local interests." Id. at 766.

As the court in Koog observed, FERC makes clear that "the Tenth Amendment does not prevent the federal government from imposing minimal duties on state executive officers." Koog Order at 27, KR 353. Nor is the FERC decision a Tenth Amendment anomaly. The Supreme Court has upheld a variety of federal laws that impose requirements on states that engage in administrative action. See FERC, 456 U.S. at 762 (collecting cases). For example, in South Carolina v. Baker, 485 U.S. 505, 511-15 (1988), the Court upheld against a Tenth Amendment challenge a statute

[7] Plaintiffs suggest that this aspect of FERC is not relevant here because the state officials who would hear these claims were part of the "state adjudicatory machinery." Pl. Br. 25. In fact, the affected state officials were executive authorities who were required to apply federal law governing private parties to concrete factual circumstances. The requirements thus directly parallel those of the Brady Act.

that effectively required registration of state bonds. See id. at 514 (allegation that states had to "devote substantial effort to determine how best to implement" the federal requirement not constitutionally significant); see also Garcia, 469 U.S. at 555-57 (upholding Fair Labor Standards Act requirement that state entities abide by federal minimum wage and overtime standards).

Moreover, at least where the federal government does not require the states to devise their own solution to a national problem, Tenth Amendment concerns are minimized where the federal requirements at issue are insignificant. Thus, Chief Justice Rehnquist concurred in Baker because the requirements at issue had no "substantive effect" on significant state functions. Baker, supra, at 529 (Rehnquist, C.J., concurring in the judgment).[8] And, as this Court observed in Texas v. United States, 730 F.2d 339 (5th Cir. 1984), requiring state agencies to assist in the implementation of federal law does not "violate constitutional rights of state sovereignty if the acts are minimally intrusive." Id. at 356 & n.29.

---

[8] In analogous areas, the Court has also repeatedly emphasized that insignificant intrusions do not raise issues of constitutional magnitude. See Morrison v. Olson, 487 U.S. 654, 691 (1988) (upholding limitation on President's power to remove special prosecutor because it does not "unduly trammel[] on executive authority"); Helvering v. Gerhardt, 304 U.S. 405, 421 (1938) (state claiming tax immunity must show that it "clearly appear[s] that the burden upon the state function is actual and substantial, not conjectural"); Department of Taxation v. Milhelm Attea & Bros., Inc., 114 S. Ct. 2028, 2036 (1994) (general rule that state may not regulate Indian traders does not apply to state law that imposes "minimal burdens" on reservation retailers).

b. The Court's contemporary understanding that no constitutional problem is raised by laws requiring state executive officials to take ministerial action is firmly rooted in constitutional tradition. Both the proponents and opponents of the Constitution understood that, under that charter, the federal government could lawfully call upon state officials to provide assistance in implementing federal controls. Thus, The Federalist refers to "the probability" that "the United States * * * will make use of State officers and State regulations, for collecting the additional imposition" of taxes required to run the Federal Government. The Federalist, No. 36 at 227 (Hamilton); see also The Federalist, No. 45 at 313 (Madison) ("Indeed it is extremely probable that in other instances, particularly in the organization of the judicial power, the officers of the States will be cloathed with the correspondent authority of the Union.").

Similarly, Patrick Henry specifically anticipated that sheriffs would be required to assist in federal regulation: "The sheriff comes to-day as a state collector. Next day he is federal." 3 Debates In The Several State Conventions On The Adoption Of The Federal Constitution 168 (J. Elliot ed. 1987). And, only a few years after the Constitution was ratified, Elbridge Gerry declared that "nothing could be plainer" than that "the General Government had a right to require the assistance of the officers of the several State Governments, for they have severally taken an oath to support the Constitution of the United States." 2nd Cong., 1st Sess. 579 (Apr. 25, 1792).[9]

Consistent with the Framers' intent, the earliest Congresses enacted statutes requiring local officials to participate in the implementation of federal law regarding naturalization.[10] The First Congress directed that the clerk of "any common law court of record, in any one of the states * * * shall record" the application of a person seeking citizenship. Act of Mar. 26, 1790, c. 3, § 1, 1 Stat. 103 (1790). Similarly, in 1798, the Fifth Congress passed another law on naturalization, requiring clerks of courts -- including state courts -- who had received declarations of intent by aliens seeking to become citizens,[11]

---

[9] Similarly, during debates on a bill regulating pilots, Rep. Smith of Maryland noted that state "officers might be directed to grant licenses to these pilots on the same ground that the Judges and Justices of States are directed to do the business of the United States." 4th Cong., 2d Sess. 1983 (Jan. 24, 1797).

[10] The Supreme Court has frequently noted that legislation enacted by these Congresses provides an important guide to understanding the Framers' constitutional plan. E.g., Myers v. United States, 272 U.S. 52, 175 (1926) ("This Court has repeatedly laid down the principle that contemporaneous legislative exposition of the Constitution when the founders of our Government and framers of our Constitution were actively participating in public affairs, acquiesced in for a long term of years, fixes the construction to be given its provisions"); Burrow-Giles Lithographic Co. v. Sarony, 111 U.S. 53, 57 (1884) ("The construction placed upon the Constitution by the first act of 1790, and the act of 1802, by the men who were contemporary with its formation, many of whom were members of the convention which framed it, is of itself entitled to very great weight * * *."); see also Mistretta v. United States, 488 U.S. 361, 398-401 (1989); Marsh v. Chambers, 463 U.S. 783, 786-792 (1983).

[11] Prior laws on naturalization made it clear that the clerks receiving such declarations included state court clerks.
(continued...)

"to certify and transmit * * * an abstract of such declaration" to the United States Secretary of State. The law provided that clerks would receive $2 for each abstract and would be penalized $10 for failing to comply. Act of June 18, 1798, c. 54, § 2, 1 Stat. 567 (1798). The Act also provided that the ten dollar penalty could be recovered in court by private citizens. Section 7 of Act of June 18, 1798, ch. 54, 1 Stat. 569 (1798). Finally, in 1802, the Seventh Congress passed another law on naturalization that directed court clerks to participate in the creation of a national registry of aliens and required the clerks to issue certificates to aliens seeking naturalization. Section 2 of Act of April 14, 1802, ch. 28, 2 Stat. 154-55 (1802).[12]

Nor are such statutes limited to the Framers' era. Consistent with fundamental constitutional principles, a host of

---

[11](...continued)
See Third Congress, Section 1 of Act of January 29, 1795, ch. 20, 1 Stat. 414 (1795) (requires that alien declare "an oath or affirmation, before the supreme, superior, district or circuit court of some one of the states, or of the territories northwest or south of the river Ohio, or a circuit or district court of the United States * * *." (emphasis added)). A subsequent law passed by the Seventh Congress also reflects this understanding. See Seventh Congress, Section 1 of Act of April 14, 1802, ch. 28, 2 Stat. 153 (1802) (alien "shall have declared an oath or affirmation, before the supreme, superior, district or circuit court of some one of the states, or of the territorial districts of the United States, or a circuit or district court of the United States * * *. " (emphasis added)).

[12] These laws were not unique. See Section 1, Act of Feb. 12, 1793, ch. 7, 1 Stat. 302 (1793) (mandating that the "executive authority" of a state or territory take action to return fugitive slaves).

contemporary statutes require participation by state and local officials in implementing federal regulatory schemes.[13]

2. Plaintiffs argue that the decision in New York v. United States, 112 S. Ct. 2408 (1992), deprives the Court's earlier jurisprudence of vitality and bars the federal government from imposing any mandate upon the states, however insubstantial, ministerial or temporary. There is no warrant for reading New York in this fashion.

The law at issue in New York presented states with two options. The states could (1) provide for the disposal of all low-level radioactive waste generated within the state by 1996 or (2) take title to that waste at that time. See 112 S. Ct. at 2427-29. The first option, the Court emphasized, was a "command to state government to enact state regulation." Id. at 2429 (emphasis in original). The directive thus clashed with the constitutional rule that Congress itself must "legislate" where there is a sufficiently powerful federal interest and thus may not "conscript" states to legislate for it. Ibid.; see id. at 2430 (statute was not a "congressional regulation of

---

[13] E.g., 42 U.S.C. § 5779(a) (requires state law enforcement agencies to report cases of missing children); 23 U.S.C. § 402(a) (requires state law enforcement agencies to report traffic fatalities); 42 U.S.C. §§ 11001, 11003 (requires comprehensive data collection and reporting, as well as the creation of state emergency response commissions); 15 U.S.C. § 2645, 20 U.S.C. § 4011 (requires governors to conduct certain reporting and approval activities with respect to local educational agencies); 20 U.S.C. § 4011 (requires governors to submit plans for asbestos abatement and follow certain reporting procedures); 42 U.S.C. § 6933 (requires states to inventory state hazardous waste sites); 42 U.S.C. § 6991(a) (requires governors to inventory underground storage tanks).

individuals," but rather a "congressional requirement[] that States regulate"). The Court further noted that the second statutory option, actually taking title, was improper as a "congressionally compelled subsidy from state governments to radioactive waste producers." Id. at 2428. In short, the statute was unconstitutional because it "'commandeer[ed] the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program.'" Id. at 2428 (internal quotation omitted); see also Thompson v. Oklahoma, 487 U.S. 815, 877 (1988) (Scalia, J., dissenting) (states' legislative processes are the "heart of their sovereignty"); In re Duncan, 139 U.S. 449, 461 (1891) (key feature of a republican form of government is "right of the people to * * * pass their own laws in virtue of the legislative power reposed in representative bodies").

Throughout New York, the Court emphasized the constitutional problems generated when Congress declines to enact a federal legislative solution and instead commands action by the state legislatures. This kind of buck-passing, the Court emphasized, violates the Framers' constitutional design because it allows federal officials to avoid responsibility for difficult decisions. "Accountability is * * * diminished when, due to federal coercion, elected state officials cannot regulate in accordance with the view of the local electorate in matters not pre-empted by federal regulation." 112 S. Ct. at 2424; see also Texas, 730 F.2d at 354 (political accountability is a primary

Tenth Amendment concern). New York makes clear that the federal government may not diminish accountability in this way by "commandeering" the states' political processes, no matter how strong the federal interest or how much latitude states are given. 112 S. Ct. at 2428, 2429.

As plaintiffs point out (Pl. Br. 24, 27), New York refers not only to a constitutional bar on federal government intrusion into the state legislative process, but also to a prohibition on requiring states to "administer" a federal program. See 112 S.Ct. at 2435 ("federal government may not require the states to enact or administer a federal regulatory program"). Plaintiffs read this language to refer to the administration required by states that declined to legislate and were, instead, required to take title to radioactive waste under the second option of the New York statute. Pl. Br. 24.

As we discuss below in greater detail, this kind of "administration" is readily distinguishable from the provisions of the Brady Act. States that declined to legislate a solution to the radioactive waste program would confront the same problems administratively when they took title to the waste. Thus, in the end, states would be required to devise their own administrative solutions to the national problem. Moreover, as the New York Court emphasized, the administrative requirements of the take title provision were impermissible because they were flat penalties, compelled subsidies of private parties by the states. See 112 S. Ct. at 2428; see also Zych v. Unidentified, Wrecked, And Abandoned Vessel Believed To Be The SB Seabird, 811 F. Supp. 1300, 1319 (N.D. Ill. 1992) (take title provision in New York "coerce[d] states to accept title to something that is undesirable"), aff'd, 19 F.3d 1136 (7th Cir. 1994).

Alternatively, the Court may have used the word "administer" to encompass the package of regulatory policy judgments required of the states under the first New York option.[14] As we have already discussed, the Court's analysis on this score does not translate into the absolute bar posited by plaintiffs, and the Court did not overrule its prior recognition that the federal government may "direct[] state decisionmakers to take or refrain from taking certain actions." FERC, 456 U.S. at 762.

Finally, as the court in Koog recognized, the limited scope of the New York rule is confirmed by the fact that the Supreme Court did not purport to overrule prior decisions establishing that various mandates to state officials pass constitutional muster. See Koog Order at 10, 26, KR 336, 352 (New York must be reconciled with the Court's other Tenth Amendment decisions); see also New York, 112 S. Ct. at 2441 (White, J., concurring in part and dissenting in part) (noting that majority had signalled that

[14] While commands to legislate present the quintessential problem of accountability, similar problems may be raised if state executives are required to administer the scheme fashioned on command by the legislature, or if the state executive apparatus is commanded to devise a regulatory scheme itself. This latter situation obtained in Board of Natural Resources v. Brown, 992 F.2d 937 (9th Cir. 1993) (discussed at Pl. Br. 28-29), where the federal government required state agencies to enact wide-ranging regulations necessary to effectuate a federal timber export law. See 992 F.2d at 947.

it did not "intend to cut a wide swath through [the Court's] recent Tenth Amendment precedents"); Zych, 811 F. Supp at 1319 (New York did not bar particular challenged federal mandate on state officials). Moreover, if the Court were, in fact, erecting an absolute bar of the type posited by plaintiffs, its searching analysis of the problems presented by the statute at issue would have been superfluous. After announcing its new rule, the Court could have disposed of the case in a terse paragraph.

B. The Brady Act Is A Federal Response To A National Crisis That Requires Only Interim And Ministerial Assistance From Local Officials.

1. The provisions struck down in New York stand in stark contrast to those at issue here. As noted, the law invalidated in New York was a "command to state government to enact *state* regulation" to deal with the problems of radioactive waste. New York, 112 S. Ct. at 2430 (emphasis in original). There, Congress identified a problem, but required the states to devise a solution, intruding on fundamental prerogatives of state sovereignty and raising important issues of accountability.

In distinction to the statute at issue in New York, the Brady Act represents a congressional solution to the problems posed by handgun violence. It imposes federal restraints on handgun sales in legislation crafted after six years of highly publicized debate. The Act does not require the states to legislate or otherwise devise a solution to handgun violence. It requires only that local officials make a "reasonable effort" to ascertain the validity of handgun transfers, a ministerial requirement which, in plaintiffs' practice, translates into a brief computer check from the office computer. (See infra at pp. __.)

Plaintiffs fail to come to grips with these basic differences between the New York statute and the Brady Act. The features that were fatal to the New York scheme have no counterpart here.[15] To the contrary, the Brady Act's interim requirements are of precisely the type that the Framers contemplated could be imposed on state entities and that early Congresses in fact imposed on state officials. See supra pp. 19-21. Indeed, the Brady Act's interim provisions closely parallel those sustained in FERC, where state executive branch officials were required to "implement" federal regulations by deciding private disputes arising under FERC rules. FERC, 456 U.S. at 759. Like the statute in FERC, the Brady Act is not an impermissible command to the states to promulgate laws or regulations, but a permissible directive to "state decisionmakers to take" certain actions. Id. at 762. Indeed, as the discussion below demonstrates, the temporary burden imposed under the Brady Act is more ministerial and less onerous than that issue in FERC.

---

[15] The "accountability" concerns identified in plaintiffs' brief are not of the type discussed in New York. The critical question under New York is whether the federal government has legislated a federal solution for which it accepts responsibility and will be held accountable. That is clearly the case with the Brady Act. Plaintiffs' suggestion that sheriffs may be unpopular if they fail to take the ministerial actions required by the Act misses the point. See Pl. Br. at 26.

Plaintiffs point to no other principle of Tenth Amendment, other than the inapplicable rationale of New York, that would support invalidation of the Brady Act. Their argument hinges, as the district court in Koog observed, on their untenable interpretation of New York as an absolute bar to all federal directives to state officials.

Moreover, under any other conceivably relevant criteria, the Act easily passes muster. Contrary to plaintiffs' protestations, the Act does not require exhaustive research and it does not require CLEOs to insure the legality of handgun transaction. As both courts below recognized, the CLEOs interim responsibilities are not onerous. And these temporary requirements should be viewed in the context of the massive federal assistance Congress has provided to the states in this area.

2a. The CLEO's primary responsibility under the Brady Act is to make a "reasonable effort" to ascertain, by consulting "available" records, whether a legal impediment exists to a proposed handgun sale. Id. § 922(s)(2). Where no impediment exists, the CLEO is required to destroy any records regarding the proposed sale within twenty days. Id. § 922(s)(6)(B)(i). If the CLEO finds a legal bar to a handgun transfer, the prospective purchaser may request that the CLEO provide reasons in writing within 20 days. Id. § 922(s)(6)(C).

Congress required this limited assistance only as a short-term measure to deal with a national "epidemic of handgun violence," H.R. Rep. No. 103-344 at 8.[16] To regulate firearms transfers on a permanent basis, the Act requires establishment of a national instant criminal background check system no later than 1999. 18 U.S.C. § 922(t). Under the permanent scheme, firearms dealers will refer proposed firearms purchases directly to the national system -- not to local officials -- to determine whether the proposed sale would be barred by law.

Congress looked to local officials for interim help because their access to relevant records and personal knowledge of their communities allows them to provide uniquely effective assistance. E.g., H.R. Rep. No. 101-691, 101st Cong., 2nd Sess. 10-11 (1990) (knowledge of local officials is a "central" benefit).[17]

---

[16] The epidemic identified by Congress is plainly of crisis proportions. As Congress observed, 12,489 Americans were murdered with handguns in 1992; gun murders increased by 41% between 1988 and 1992; 530,000 Americans were robbed or assaulted by gun-wielding criminals in 1991; armed rapists attacked 15,000 women in 1992; and firearms injuries cost our economy $19 billion dollars annually. H.R. Rep. No. 103-344 at 8; see Fry v. United States, 421 U.S. 542, 548 (1975) (federal government accorded great latitude in placing burden on states in enacting "emergency measure" to deal with significant national problem of monetary inflation).

[17] Accord Statement of Rep. Schumer, Brady Handgun Violence Prevention Act: Hearing Before the Subcommittee on Crime and Criminal Justice of the Committee on the Judiciary on H.R. 1025, 103d Cong., 1st Sess. 90 (Sept. 30, 1993) (stressing advantages of CLEOs' personal knowledge); Statement of Rep. Sangmeister, Brady Handgun Violence Prevention Act: Hearing Before the Subcommittee on Crime and Criminal Justice of the Committee on Judiciary on H.R. 7, 102d Cong., 1st Sess. 15 (March 21, 1991) (same); Hearings Before the Subcommittee on Crime of the Committee on Judiciary on H.R. 975 and H.R. 155, 100th Cong. 1st and 2nd Sess. 219 (Feb. 24, 1988) (test. of Superintendent of New Jersey State Police) ("In the smaller communities especially, as the person comes in to make application, he is probably told right then and there, why are you here? We know your background--and it's settled without ever putting pen to paper * * *.").

Indeed, the decision to call on local officials for interim assistance accords with the long-standing recognition that a national police force is repugnant to principles of federalism. See Garcia v. United States, 469 U.S. 70, 89 (1984) (Stevens, J., dissenting).[18]

b. In their brief, plaintiffs argue at length that the Brady Act's interim provisions require laborious, time-consuming research into every conceivable source of relevant information. Pl. Br. 12-16, 33-34. Plaintiffs attempt to read the term "reasonable" out of the "reasonable effort" requirement. Their argument is at odds with the language of the statute, its history, ATF's authoritative interpretation, and plaintiffs' own practice.

To be sure, the Brady Act's interim scheme imposes a mandatory duty on CLEOs. See 18 U.S.C. § 922(s)(2) (CLEOs "shall make a reasonable effort"). But Congress did not, as plaintiffs suggest, require CLEOs to insure the legality of the handgun transfer. Instead, Congress required only that CLEOs make a "reasonable effort" to determine whether a purchase would be illegal.

As ATF explained in providing guidance to law enforcement officials, this statutory formulation vests considerable

---

[18] See also LeFlore v. Robinson, 434 F.2d 933, 956 (5th Cir. 1970) (Gewin, J., concurring in part and dissenting in part), vacated and remanded on other grounds, 446 F.2d 715 (5th Cir. 1971) ("Under our system of federalism we have declined to establish a national police force [and] have chosen to rely * * * upon state and municipal governments * * *.").

discretion in the local official to determine what measures are "reasonable" in any given instance. ATF Letter at 10, KR 160. ATF noted that "[e]ach * * * CLEO will have to set its own standards based on its own circumstances, i.e., the availability of records, access to records, and taking into account the law enforcement priorities of the jurisdiction." Id.[19] Thus, the statute requires only a "minimal effort to check commonly available records," not research into "every conceivable record system that may contain information relating to categories of prohibited persons." ATF Letter at 9, KR 159. ATF also stated in its letter that the "vast majority of persons who are prohibited from possessing a handgun are prohibited by virtue of some criminal background." Id. Therefore, ATF noted that a CLEO's reasonable effort should focus on those records, which may indicate not only whether a purchaser is disqualified because of a criminal record, but also whether that purchaser is disqualified because of drug use or mental health problems. Id. Other types of records may also be searched where they are readily "accessible." Id. at 10, KR 160.

ATF's interpretation of the statute reflects congressional intent. As noted, the Act contemplates that it will generally be "reasonable" simply to consult "available" criminal records that are accessible directly from the CLEO's office. 18 U.S.C.

---

[19] ATF is charged with implementation of the Gun Control Act, including the Brady Act and its interpretation of the Act is entitled to substantial deference. See Gun South, Inc. v. Brady, 877 F.2d 858, 864 (11th Cir. 1989).

§ 922(s)(2). Legislators consciously crafted this statutory language so as to avoid onerous burdens. See 139 Cong. Rec. S2001 (daily ed. Feb. 24, 1993) (statement of Sen. Kohl) (CLEOs would "use available resources"); 139 Cong. Rec. H9118 (daily ed. Nov. 10, 1993) (statement of Rep. Nadler) (checks would occur "within the constraints of existing information systems"); see also Hearings Before the Subcommittee on Crime of the Committee on Judiciary on H.R. 975 and H.R. 155, 100th Cong., 1st and 2nd Sess. 357 (Feb. 24, 1988) (test. of exec. director of International Association of Chiefs of Police) (background checks "should not be a burden on most police agencies"); Hearing Before the Subcommittee on Crime and Criminal Justice of the Committee on the Judiciary on H.R. 1025, 103d Cong., 1st Sess. 253 (Sept. 30, 1993) (test. of exec. director of Police Executive Research Forum) (bill allows "[t]he law enforcement executive * * * discretion to choose what procedure best suits his or her agency").

Indeed, as ATF has concluded, in some circumstances a CLEO may properly determine that it is reasonable not to engage in any research at all, as when purchasers are personally known to local officials. ATF Letter at 10, KR 160. More generally, in some emergency situations, the "availability of resources * * * [and] law enforcement priorities of the jurisdiction," may make diversion of resources unreasonable.[20]

[20] The court in McGee read the language of § 922(s)(2) to require checks of available records in every instance. McGee Op. (continued...)

In fact, although plaintiffs' brief outlines the allegedly daunting burdens placed on them by the "reasonable effort" requirement, both plaintiffs have testified that they meet their Brady Act responsibilities by conducting quick computer checks of criminal history records from their offices.

Sheriff Koog explained that his office has direct computer access to the data bases of the Texas Crime Information Center ("TCIC") and the National Crime Information Center ("NCIC"), and that he processed Brady Act referrals by checking the TCIC or NCIC records. KT 26, 28. Sheriff Koog testified that it was a matter of "a minute or two" to enter a data request and receive a return. KT 40. Sheriff Koog further explained that by limiting his researches in this way (which is entirely consistent with the Brady Act's requirements) he was able to meet other pressing problems in his jurisdiction. KT 28; Pl. Br. 9.

Sheriff McGee likewise testified that he routinely performs all types of criminal background checks on the NCIC system directly from his office, "using that computer * * * day in and day out." MT 47. His office uses the same NCIC data base to process Brady Act referrals. Id. Sheriff McGee makes additional inquiries in cases where he has personal knowledge of the

---

[20](...continued) at 7, MR 149. As the court concluded, even under this reading of the statute, the duties it imposes are not onerous. Id. at 9, MR 151. As ATF has explained, however, a check is not invariably required. Indeed, the Act itself contemplates instances in which a gun dealer has not received notification from a CLEO within five days and requires the dealer to complete the transaction in that event. 18 U.S.C. § 922(s)(1)(a)(ii).

prospective purchaser and believes further investigation may be appropriate. Id.[21]

While the plaintiffs are free to do more than rely on these computer checks, their discretionary decisions to do only these checks clearly satisfy the Act's requirements.

c. The two additional burdens incident to the "reasonable effort" requirement are even less weighty. As the court in McGee observed, the requirement that a CLEO destroy the records pertaining to a background check (18 U.S.C. § 922(s)(6)(B)) is clearly "de minimis" and without constitutional significance. McGee Op. at 9 & n.5, MR 151. Similarly, neither Sheriff Koog nor Sheriff McGee testified as to any burden associated with the requirement that a CLEO, on request, identify the legal impediment to a handgun transfer. 18 U.S.C. § 922(s)(6)(C). This provision only requires the CLEO to note the legal bar to sale by stating, for example, that records indicate that a prospective purchaser is a convicted felon.

In sum, the district courts below correctly concluded that the burdens placed on local officials are "not particularly

---

[21] Plaintiffs argue that their Brady Act computer checks are not the type of activity in which they normally engage because they would not otherwise perform checks with regard to handgun transfers. Pl. Br. 32. They miss the point. The minimally intrusive nature of the Brady Act's requirements is illustrated not only by the brevity of plaintiffs' background checks but by the fact that the Act does not require plaintiffs to undertake activities of a different type than those in which they customarily engage. Similarly, the Framers envisioned that the state tax collector might also collect federal revenues, and in FERC, state officials were required by federal law to hear new and different claims in order to implement federal regulations.

onerous," McGee Op. at 9, MR 151, and "minimal." Koog Order at 28, KR 354.

d. Finally, the minimal and temporary burdens imposed by the Brady Act arise in a field in which the federal government provides substantial financial assistance to the states.

First, the federal government has made a "huge" fiscal commitment to assisting the states with implementation of the Brady Act. Hearing Before the Subcommittee on Crime and Criminal Justice of the Committee on the Judiciary on H.R. 1025, 103d Cong., 1st Sess. 104 (Sept. 30, 1993) (test. of Assistant Attorney General Acheson); see also H.R. Rep. No. 103-344, at 22 (reprinting Congressional Budget Office statement) (Brady Act's financial "impact on any given jurisdiction is likely to be small"); Garcia, 469 U.S. at 555 (noting, in upholding federal law, that "Congress has not simply placed a financial burden on the shoulders of States and localities * * * but has provided substantial countervailing financial assistance as well"). The Brady Act authorizes $200 million in funds for grants to "each State" for the "creation of a computerized history record system or improvement of an existing system," improvement of their "access[] to the national instant background check system," and, once the national system is in place, "assisting the State[s] in the transmittal of records" to it. Brady Act § 106(b), 107 Stat. 1544 (1993). Congress has already appropriated $100 million of these funds for disbursement to states in fiscal 1995. Pub. L. No. 103-317, 108 Stat. 1724, 1777 (1994). The interim statutory requirements are thus emphatically "not an unfunded mandate." 139 Cong. Rec. S16304 (Nov. 19, 1993) (Statement of Sen. Mitchell).

Second, the funding attached to the Brady Act only augments the significant pre-existing federal commitment in the area of criminal history records. Under the formula grant program established by the Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, the United States provided nearly $850 million to states in fiscal 1992 and 1993. KR 237, 239. Five percent of that money -- over $40 million -- must be used for improving state criminal history records. Id. Texas has received over $51 million under this program in just those two fiscal years, and Mississippi has received over $9 million during that period. Id.

In sum, the Brady Act is a congressional response to a national problem. Congress is accountable for its highly publicized legislative action, and has appropriated significant funding for its implementation. The temporary requirements placed on local officials to deal with the epidemic of handgun violence do not contravene the Tenth Amendment.[22]

---

[22] Plaintiffs appear to argue in passing that, Tenth Amendment concerns aside, Congress lacked affirmative power under the Commerce Clause to impose duties on local officials. Pl. Br. 30-31. If so, they are wrong. It is hornbook law that Congress has affirmative power to use any legitimate means to an authorized end. See McCulloch v. Maryland, 17 U.S. 316, 421 (1819). The only question is whether Tenth Amendment considerations limit that power in this case. The Court made this point explicit in New York. 112 S. Ct. at 2417. Plaintiffs do not and cannot argue that federal statutes regulating purchase and sale of firearms are outside Congress's Commerce Clause power. This Court has squarely held that Congress has such (continued...)

II. THE COURTS BELOW PROPERLY REJECTED CLAIMS THAT THE CRIMINAL PENALTY PROVISIONS OF THE BRADY ACT ARE UNCONSTITUTIONALLY VAGUE.

Plaintiffs challenge the Brady Act's criminal penalties provision on Fifth Amendment grounds. Both courts below properly rejected this claim. First, plaintiffs' claim is not justiciable because they face no realistic threat of prosecution. To the contrary, the Department of Justice has formally taken the position that the criminal penalties section has no applicability to the conduct of CLEOs. Second, the Justice Department's interpretation is correct: the Act imposes penalties on the persons whom it regulates, not the persons who assist in its implementation. Because the provision does not apply to plaintiffs, they lack standing to pursue their claim and, for the same reason, their claim is meritless.

1. The criminal penalties section of the Brady Act, 18 U.S.C. § 924(a)(5), provides: "Whoever knowingly violates subsection (s) or (t) of section 922 shall be fined not more than $1000.00, imprisoned for not more than a year, or both * * *."

---

[22](...continued) authority. See United States v. Nelson, 458 F.2d 556, 559 (5th Cir. 1972) ("We believe that the acquisition of firearms by convicted felons and persons under indictment for felonies * * * imposes a sufficient burden on interstate commerce to be a proper subject of federal regulation."); see also United States v. Laisure, 460 F.2d 709 (5th Cir. 1972); United States v. Lebman, 464 F.2d 68 (5th Cir.), cert. denied, 409 U.S. 950 (1972); United States v. Lopez, 2 F.3d 1342, 1348 (5th Cir. 1993) (distinguishing between laws, like the Brady Act, that regulate gun transactions and statutes that govern "mere simple possession"), cert. granted, 114 S. Ct. 1536 (1994).

Subsection (s) and (t) of section 922 are the principal Brady Act provisions regulating sale of handguns by firearms dealers.

Because the duties of local officials are described in subsection (s) (see 18 U.S.C. § 922(s)(2)), plaintiffs argue that a CLEO's failure to carry out his or her responsibilities would be a "violation" of the Act subject to criminal penalties. Pl. Br. 35. Plaintiffs then reason that because the "reasonable effort" requirement places vast discretion in the CLEO, this application of the criminal penalties section would be unconstitutionally vague. Pl. Br. 35-37.

As the court in McGee concluded, this claim is not justiciable because plaintiffs are in no danger of being subject to criminal penalties. McGee Op. at 3-4, MR 145-46; accord Frank v. United States, 860 F. Supp. 1030, 1036 (D. Vt. 1994). To maintain an anticipatory challenge to the constitutionality of a criminal statute, a plaintiff must show that there is a "credible threat" that he or she will be prosecuted thereunder. Renne v. Geary, 111 S. Ct. 2331, 2339 (1991); Babbitt v. United Farm Workers Nat'l Union, 442 U.S. 289, 298 (1979); Ellis v. Dyson, 421 U.S. 426, 434 (1975); see also Younger v. Harris, 401 U.S. 37, 42 (1971) ("persons having no fears of state prosecution except those that are imaginary or speculative are not to be accepted as appropriate plaintiffs"); Poe v. Ullman, 367 U.S. 497, 501-09 (1961) (plurality opinion) ("[i]f the prosecutor agrees not to prosecute, a suit against him for declaratory and injunctive relief is not such an adversary case as will be reviewed here").[23]

There is no credible threat of prosecution here. The Department of Justice, through its Office of Legal Counsel, has formally opined that the Brady Act's criminal penalties provision does not apply to CLEOs. KR 259-61. Because the Department has sole authority to authorize federal criminal prosecutions, plaintiffs are thus "not under any danger of criminal prosecution," and their challenge to the criminal penalties provision is not justiciable. McGee Op. at 3-4, MR 145-46; see Renne, 111 S. Ct. at 2339; cf. Babbitt, 442 U.S. at 302, 303.

2. In any event, as both district courts below concluded, the criminal provisions of the statute in fact have no applicability to local officials. McGee Op. at 4 n.3, MR 146; Koog Order at 28-29, KR 354-55; see also Printz v. United States, 854 F. Supp. 1503, 1509-10 (D. Mont. 1994). Plaintiffs thus lack standing (see Koog Order at 28, KR 354), and, for the same reason, their claim is meritless.

Subsections (s) and (t), the interim and permanent provisions of the Brady Act, regulate firearms transactions between licensed dealers and other private parties. Chief law enforcement officers assist in the implementation of subsection

---

[23] This justiciability issue has been discussed as both a ripeness question (Renne, 111 S Ct. at 2339), and as a question of whether the plaintiff is threatened with sufficient injury to establish standing. Babbitt, 442 U.S. at 298 (citing O'Shea v. Littleton, 414 U.S. 488, 494 (1974)). Under either of these related rubrics, however, the lack of a credible threat of prosecution deprives federal courts of jurisdiction.

(s); they are not themselves the subject of the regulatory scheme. Plaintiffs grasp at straws when they seek to designate failures in the implementation of a statute as "violations" triggering criminal penalties. But cf. Mack v. United States, 856 F. Supp. 1372, 1376 (D. Ariz. 1994) (court fails to address meaning of "violates").

The legislative history underscores this point. The criminal penalties provision was part of the Brady Bill before Congress even added the requirement that chief law enforcement officers make a "reasonable effort" to ascertain whether the handgun transfer would violate the law. See H.R. 7, 102d Cong., 1st Sess. 5, 8 (1991). There is no indication that Congress intended to alter the scope of the criminal sanctions provision when it added the "reasonable effort" requirement of § 922(s)((2). Indeed, it would have been anomalous for Congress expressly to exempt CLEOs from all civil liability (see 18 U.S.C. § 922(s)(7)) and simultaneously subject them to criminal sanctions. Finally, Congress's decision to adopt a flexible "reasonable effort" requirement -- the source of plaintiffs' purported vagueness claim -- further negates plaintiffs' reading of the statute. Congress vested broad discretion in CLEOs and was not concerned with problems of "vagueness" because it had no intention of subjecting them to penalties or damages of any kind, criminal or civil.

As the district courts below recognized, two canons of statutory interpretation also militate against plaintiffs' proposed reading. First, the Supreme Court established in Gregory v. Ashcroft, 501 U.S. at 460-61, that statutes should not be construed so as to impose burdens on the states -- much less a criminal penalty on state officials -- unless Congress has spoken with unmistakable clarity. See Koog Order at 28-29, KR 354-55. Second, as the court in McGee observed, it is axiomatic that a court should interpret a statute so as to avoid raising significant constitutional concerns. McGee Op. at 4 n.3, MR 146 (citing DeBartolo v. Florida Gulf Coast Building & Constr. Trades Council. 485 U.S. 568, 575 (1985)).

In short, the courts below properly declined plaintiffs' invitation to read the statute so as to create a constitutional issue where none exists.

III. EVEN ASSUMING A CONSTITUTIONAL DEFECT, THE CHALLENGED PROVISIONS ARE SEVERABLE.

Assuming that the Court were to accept any part of plaintiffs' constitutional argument, the provisions of the Act challenged here are plainly severable from the balance of the statute.

1. Plaintiffs bear a heavy burden in arguing that this Court should strike down the interim Brady Act in its entirety. Federal courts must "refrain from invalidating more of a statute than is necessary." Regan v. Time, Inc., 468 U.S. 641, 652 (1984) (plurality opinion). Thus, as the Supreme Court stressed in New York, "[u]nless it is evident that" Congress would not have enacted a statute's constitutional provisions independently of the unconstitutional ones, "the invalid part may be dropped if what is left is fully operative as law." New York, 112 S.Ct at 2434 (quoting Alaska Airlines, Inc. v. Brock, 480 U.S. 678, 684 (1987)); see EEOC v. Hernando Bank, Inc., 724 F.2d 1188, 1192 (5th Cir. 1984) ("mere uncertainty about the legislature's intent is insufficient" to show that an unconstitutional provision is not severable). Moreover, plaintiffs' burden is especially heavy here because the Gun Control Act, of which the Brady Act is a part, contains an express severability clause, 18 U.S.C. § 928. See Alaska Airlines, 480 U.S. at 686 (such clauses create presumption of severability); accord McGee Op. at 10, MR 152.[24]

As the McGee court found -- in accord with every other court to address this question -- plaintiffs have not discharged their heavy burden here. McGee Op. at 10, MR 152; Printz v. United States, 854 F. Supp. 1503, 1518-19 (D. Mont. 1994); Mack v. United States, 856 F. Supp. 1372, 1382-83 (D. Ariz. 1994); Frank v. United States, 860 F. Supp. 1030, 1044 (D. Vt. 1994).

2. Assuming that the Court were to accept plaintiffs' argument that the "reasonable effort" requirement of section 922(s)(2) cannot survive Tenth Amendment review, that provision can and should be severed from the remainder of the Act.

[24] Plaintiffs strain to show that the Gun Control Act's express severability provision is not relevant here. They assert that the Brady Act does not "amend" the Gun Control Act and instead creates a new "program," so that this Court should ignore the plain meaning of the severability clause. See Pl. Br. 48-49 (citing Alaska Airlines, 480 U.S. at 868 n.8). Plaintiffs are wrong. The Brady Act amends provisions of the Gun Control Act to provide new mechanisms for enforcing the Gun Control Act's preexisting prohibitions on handgun transfers. It is, in other words, a quintessential statutory amendment. See Mack, 856 F. Supp. at 1383; Printz, 854 F. Supp. at 1519.

Without that provision, the remainder of the interim scheme would be "fully operative as a law." New York, supra. Gun dealers would still be required to inform CLEOs of potential gun transfers (18 U.S.C. § 922(s)(1)(A)(III)-(IV)), and CLEOs who so desired could still conduct background checks on an optional basis. If a CLEO chose not to do the checks, the dealer would be allowed to transfer the weapon after 5 business days had passed. Id. § 922(s)(1)(a)(ii)(I). Under such a system, a CLEO would have to provide written reasons for rejecting a handgun transfer only if he first voluntarily chose to conduct a background check. Id. § 992(s)(6)(C).

This regime would plainly further Congress's purposes. Most importantly, CLEOs would be able to perform background checks, and it is clear that many CLEOs will seize the opportunity to prevent unlawful transfers. See H.R. Rep. No. 103-344, at 13, 14 (noting support of the Fraternal Order of Police, the International Association of Chiefs of Police, and other law enforcement groups for the Brady Act); see also Frank, 860 F. Supp. at 1044 & n.16. Thus, even without the severed provisions, the statute would enhance the ability of law enforcement authorities to halt unlawful handgun sales to felons and others. See H.R. Rep. No. 103-344 at 7 (emphasizing this purpose); New York, 112 S. Ct. at 2434 (take title provision severable since, even without its draconian penalties, states would be encouraged to take steps toward congressional goal).

Additionally, even if a particular CLEO chooses not to do a check, the law would further Congress's purpose of providing a cooling off period before a handgun was transferred. Brady Act supporters repeatedly emphasized the importance of this purpose. E.g., H.R. Rep. No. 103-344 at 14-15; 139 Cong. Rec. S16304 (Nov. 19, 1993) (Sen. Mitchell); id. S16303 (Sen. Metzenbaum); id. S16332 (Sen. Kohl); id. H9093 (Nov. 10, 1993) (Rep. Sensenbrenner); id. H9106 (Rep. Roukema).

Finally, Congress recognized that even in the absence of a background check, a valuable purpose would be served by requiring firearm dealers to share information regarding handgun transfers with law enforcement officials. See 139 Cong. Rec. H9092 (Nov. 10, 1993) (Rep. Dreier) (by enacting the Brady bill, Congress was "trying to increase the availability of information on people with this 5-day waiting period").

Against this evidence establishing that § 922(s)(2) can and should be severed, plaintiffs rely primarily on the self-evident fact that Congress preferred a mandatory background check to an optional check. Pl. Br. 40-44, 45. But, the question here is not whether Congress wanted the mandatory check that it enacted into law. Instead, the issue is whether it is clear that Congress would have preferred no bill at all to a voluntary mechanism and five-day waiting period. See New York, 112 S. Ct. at 2434; Alaska Airlines, 480 U.S. at 684. Plaintiffs have not shown that it is "evident" that Congress, deeply concerned about the national "epidemic of handgun violence," would have spurned the option of a waiting period and voluntary background check to stem the tide of violence.

Plaintiffs note that earlier Congresses considered, and did not enact, a version of the Brady bill that did not contain a mandatory check provision. Pl. Br. 38. The failure of a different Congress to enact different legislation cannot overcome the presumption that the Congress that actually passed the Brady Act would have wished to preserve those parts of the statute that clearly effectuate its purpose. Cf. Consumer Product Safety Comm'n v. GTE Sylvania, 447 U.S. 102, 117 (1980) ("[W]e begin with the oft-repeated warning that 'the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one.'") (quoting United States v. Price, 361 U.S. 304, 313 (1960)).[25] This is especially true where, as here, the prior legislation was never rejected in a vote by the full Congress. See H.R. Rep. No. 103-344 at 12-14 (summarizing legislative history of prior versions of Brady Act); Schneiderwind v. ANR Pipeline Co., 485 U.S. 293, 306 (1988) ("[t]his court generally is reluctant to draw inferences from Congress' failure to act"); Red Lion Broadcasting Co. v. FCC, 395

[25] Plaintiffs seek to draw additional support for their argument from the fact that a handful of legislators stated that the mandatory check was decisive in their support of the bill. Pl. Br. 38, 44. This Court, however, has specifically rejected this type of argument in the past. See Hernando Bank, 724 F.2d at 1191-92 (act severable even though a legislator opined both that unconstitutional provision was "integral" to the act and that the act's lack of severability clause was intentional); see also Printz, 854 F. Supp. at 1519.

U.S. 367, 382 n.11 (1969) ("unsuccessful attmpts at legislation are not the best guides to legislative intent").

In short, by any reckoning, plaintiffs have failed to demonstrate that it is "evident" that Congress would not have enacted the interim scheme if it could not require participation by state officials.

3. Plaintiffs also argue that the Brady Act's incidental requirements on CLEOs, i.e., the requirements to destroy records and give written reasons for a denial, cannot be severed from the Act as a whole. Pl. Br. 38-40, 44-45. This argument fares no better.

Initially, contrary to plaintiffs' claims (Pl. Br. 40, 43-45), there is no need to reach the severability question as to the requirement that CLEOs provide reasons on request when permission for a handgun transfer is denied. As noted above, if the Court were to strike the mandatory background check from the statute, CLEOs would only be required to provide reasons if they freely choose to do a background check. Thus, by severing § 922(s)(2), the Court would also effectively sever the mandatory explanation requirement. See Mack, 856 F. Supp. at 1383. Contrary to plaintiffs' arguments (Pl. Br. 40), severing the background check requirement therefore does "moot[]" the question of the severability of the requirement that CLEOs provide reasons for rejecting a prospective purchaser.

Plaintiffs offer no plausible basis for their assertion that the section 922(s)(6)(B) record destruction requirement cannot be severed. Pl. Br. 39-40, 46. It is in no way evident that Congress would have declined to enact the entire Brady Act absent a record-destruction requirement. The statements from individual legislators quoted by plaintiffs noting that this peripheral requirement is beneficial do not suggest otherwise and clearly do not satisfy plaintiffs' heavy burden. See Hernando Bank, 724 F.2d at 1191-92. There is still less reason to conclude that Congress would have deemed the record-destruction requirement essential to voluntary checks performed by local officials.

CONCLUSION

For the foregoing reasons, the judgment of the district court in Koog should be affirmed and the judgment of the district court in McGee should be reversed.

Respectfully submitted,

WALTER DELLINGER
Assistant Attorney General

H. JEFFERSON POWELL
RICHARD L. SHIFFRIN
Deputy Assistant Attorneys General

STUART M. BENJAMIN
Attorney-Advisor
Office of Legal Counsel

FRANK W. HUNGER
Assistant Attorney General

JAMES H. DeATLEY
GEORGE L. PHILLIPS
United States Attorneys

MARK B. STERN
(202) 514-5089
SEAN A. LEV
(202) 514-1278
STEPHANIE R. MARCUS
(202) 514-1633
Attorneys, Appellate Staff
Civil Division, Room 7124
Department of Justice
Washington, D.C. 20530-0001

DECEMBER 1994

THE WHITE HOUSE

WASHINGTON

August 8, 1994

TO: Lloyd Cutler

FROM: Steve Neuwirth

Attached for your information.
(Dictated but not read)

ROUTING AND TRANSMITTAL SLIP

Date: AUGUST 5, 1994

TO: (Name, office symbol, room number, building, Agency/Post)	Initials	Date
1. STEVE NEUWIRTH		
2.		
3.		
4.		
5.		

	Action		File		Note and Return
	Approval		For Clearance		Per Conversation
	As Requested		For Correction		Prepare Reply
	Circulate		For Your Information		See Me
	Comment		Investigate		Signature
	Coordination		Justify		

REMARKS

Attached is a copy of the Solicitor General's memorandum authorizing appeal in McGEE v. United States. I draw your attention to Ed Kneedler's comments.

DO NOT use this form as a RECORD of approvals, concurrences, disposals, clearances, and similar actions

FROM: (Name, org. symbol, Agency/Post)	Room No.—Bldg.
Mark B. Stern	7410-A MAIN
	Phone No. (202)514-5089

5041-102

☆U.S. G.P.O. 1991 281-781/40013

OPTIONAL FORM 41 (Rev. 7-76)
Prescribed by GSA
FPMR (41 CFR) 101-11.206

U.S. Department of Justice

Office of the Solicitor General

August 1 ~~JULY~~, 1994

RE: McGEE v. UNITED STATES, No. 2:94-CV-67PS (S.D. Miss.)

APPEAL

69

Drew S. Days III

DREW S. DAYS, III
Solicitor General

Mr. Kneedler
Mr. Wolfson

BRADY ACT

Memorandum

Subject	Date
McGee v. United States, No. 2:94-CV-67PS (S.D. Miss.)	July 7, 1994

To	From
The Solicitor General	Paul R.Q. Wolfson

TIME

The district court entered its judgment on June 2, 1994. A notice of appeal would be due on August 1, 1994.

RECOMMENDATIONS

The Department of the Treasury (Alcohol, Tobacco, and Firearms) recommends appeal. The Office of Legal Counsel recommends appeal. The Civil Division recommends appeal.

I recommend APPEAL. I have also attached a tentative appeal recommendation prepared for Printz v. United States, No. 94-35-M-CCL (D. Mont.), another case raising the same issues. That case is still before the district court on a motion to alter or amend judgment, but because the district court's analysis in that case was much more extensive, the opinion there gives a better idea of the nature of the issues that we must face on appeal.

I recommend APPEAL.

The district court has held unconstitutional the provision in the Brady Act that requires the chief law enforcement officer (CLEO) in every locality to ~~conduct~~ make a "reasonable effort" to determine, within five business days, whether a person's purchase of a handgun would violate federal or state law. In my view, the Tenth Amendment argument against the constitutionality of the provision is substantial, after the New York case. I am not all that persuaded by efforts to distinguish a federal law that requires a State to enact legislation ~~and~~ from a federal law that bypasses the state legislature and imposes duties directly on state or county officials, and in New York, the "take-title" alternative to state regulation would apparently not have depended upon enactment of a state law in any event. Nor am I all that persuaded by the argument that the political accountability argument does not apply in this setting, since the federal government has assigned a duty that is controversial and politically unpopular in some jurisdictions on local officers who ordinarily are accountable to local voters, not Congress. Although the task of performing background checks may seem minor,

QUESTIONS PRESENTED

1. Whether 18 U.S.C. 922(s)(2), the portion of the Brady Handgun Violence Prevention Act that requires state and local chief law enforcement officers (CLEOs) to make a "reasonable effort" to determine, within five business days, whether a person's purchase of a handgun would violate federal or state law, exceeds Congress's legislative authority under Article I or the Tenth Amendment.

2. Whether this constitutional challenge brought by a CLEO to the Brady Act is justiciable.

STATEMENT

1. Background on the Brady Act. The Brady Act imposes a waiting period before any handgun may be sold. Under the Act, a gun dealer, manufacturer, or importer who intends to transfer a handgun must first furnish the local CLEO with information, obtained from the transferee, about the transferee's name, address, date of birth, and eligibility to possess handguns (e.g., whether the transferee is under indictment, has been convicted of a crime, is a fugitive from justice, etc.). 18 U.S.C. 922(s)(1)(A)(i). The transfer may not go forward until (a) five business have elapsed after the transferor provides this information to the CLEO, or (b) the CLEO informs the transferor that he has no reason to believe that possession of the handgun by the transferee would violate federal, state, or local law. 18 U.S.C. 922(s)(1)(A)(ii).

This case does not involve a challenge to the obligations imposed on the transferors, but rather a challenge to the obligations imposed on the CLEOs. Under the Act, a CLEO who receives notice from a transferor about a proposed transfer "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 recordkeeping systems are available and in a national system designated by the Attorney General." 18 U.S.C. 922(s)(2) (emphasis added). Plaintiff challenges the constitutional authority of Congress to require him, a CLEO, to ascertain whether the transferee's possession of a handgun would violate the law.

As the definition of "reasonable effort" is crucial to this case, it is worth noting that the Bureau of Alcohol, Tobacco, and Firearms (ATF), which is responsible for overseeing the Brady Act, has issued an "open letter" (parts attached) to state and local law enforcement officials interpreting this phrase. According to ATF,

the cumulative burden may be substantial. And, more significantly in my view, Congress has imposed a duty that, however minor in practical terms, is directly contrary to the public policy of a number of State and local governments. For that reason, the interference with State sovereignty may seem substantial.

Nevertheless, I agree with Civil, Treasury and Mr Wilson that the arguments in support of the provision are sufficiently meritorious to warrant the performance of our usual responsibility to defend the constitutionality of an Act of Congress. A district court in the

"the law clearly anticipates some minimal effort to check commonly available records." Open Letter, at 9. Thus, since the vast majority of persons who are ineligible to possess handguns are disqualified because of a criminal record, "a reasonable effort should be made to determine whether the buyer has a criminal record." Ibid. On the other hand, ATF recognized that "[t]he level of research may justifiably vary among law enforcement agencies," and "[e]ach law enforcement agency serving as the CLEO will have to set it[s] own standards based on its own circumstances, i.e., the availability of resources, access to records, and taking into account the law enforcement priorities of the jurisdiction" (id. at 10).

According to ATF, the Brady Act does not require the CLEO to tell the gun dealer that the transferee may be ineligible to possess the gun. Thus, if the CLEO determines that the transferee has a criminal record, it may let the purchase go through, while setting up surveillance to arrest the transferee when he returns to pick up the gun. ATF notes that "[t]hese options, and variations of these options, are virtually limitless and will ultimately be determined by [the] particular circumstances." Open Letter, at 10. However, if the CLEO informs the gun dealer that transfer of the handgun would violate the law and the gun dealer than refuses to sell the gun (as he should), the would-be transferee can request that the CLEO justify his conclusions. If such a request is made, the CLEO must provide the transferee with his reasons in writing within 20 business days. 18 U.S.C. 922(s)(6)(C).

A crucial point is that the Brady Act apparently imposes no civil or criminal sanction for a CLEO's failure to make the required ascertainment of eligibility to receive a handgun. The Act specifically exempts CLEOs from civil liability for the failure to prevent a sale or transfer of a handgun. 18 U.S.C. 922(s)(7). Presumably, this eliminates the possibility that CLEOs could be liable under, for example, 42 U.S.C. 1983 for depriving someone of the "right" not to be shot by someone who should not have been transferred a handgun.

The Act does provide for criminal penalties against "[w]hoever knowingly violates" section 922(s) (see 18 U.S.C. 924(a)), but the Office of Legal Counsel (OLC) has taken the position that CLEOs are not covered by this criminal provision. OLC reasons: (a) the criminal penalty was part of an earlier version of the Brady Bill, before the ascertainment obligation imposed on CLEOs was written into the law, yet no member of Congress suggested that CLEOs would be covered by the criminal sanction; (b) imposing criminal

Koog case in Texas has sustained the provision. Our best defense, I think, is the one identified in the memos -- that New York does not announce a per se test in the context of this case, that the intrusion is relatively minor and allows the CLEO considerable latitude in deciding what a "reasonable effort" would be, and that, by analogy to Testa v. Katt and FERC v. Mississippi, Congress has imposed an adjudicatory-type duty on local officials who already perform numerous background checks as part of their regular duties. As we proceed with a defense in this and other cases, however, it would liability on CLEOs for violating the ascertainment obligation would markedly alter the federal-state balance, and Congress "must make its intention to do so unmistakably clear in the language of the statute" before a court will conclude that Congress has altered this balance, see Gregory v. Ashcroft, 111 S. Ct. 2395 (1991); and (c) prosecution of a CLEO for violating a statute that requires CLEOs to make a "reasonable effort" could be subject to a Fifth Amendment due process challenge, since the Act does not clearly define a punishable act.

2. District Court Proceedings. This is one of several virtually identical cases brought to challenge the Brady Act on Fifth and Tenth Amendment grounds. Copies of other district court opinions in this area are attached.

This challenge was brought by the sheriff of Forrest County, Mississippi, who asserts that he is the CLEO obligated under the Brady Act to ascertain whether transferees are eligible to possess handguns. The plaintiff alleges that enforcement of the Act forces him to reallocate already limited resources. Specifically, sheriff McGee estimates that carrying out background checks would require one and one-half hours each day by his office. Dist. Ct. Op. at 8-9. The plaintiff also alleged that application of the criminal penalties section, 18 U.S.C 924(a), to him would violate the Fifth Amendment because the penalty section is unconstitutionally vague.

The district court first concluded that the plaintiff did not have standing to challenge the penalty provision, but did have standing to challenge the requirement that he make a background check. As to the penalty provision, the court observed that, as the Justice Department has construed the penalty provision not to apply to CLEOs, plaintiff was under no danger of criminal prosecution, whether or not he makes the background check.

As to the background check provision, the court rejected the government's contention that only the county, not the sheriff, was the proper party to bring the lawsuit. The court observed that the Brady Act makes the CLEO, not the county or the state attorney general, squarely responsible for implementation of the Act. The court also cited approvingly to Board of Education v. Allen, 392 U.S. 236 (1968), in which the Supreme Court held that several members of local boards of education had standing to challenge a New York statute requiring the loan of textbooks to private and parochial schools. The district court also suggested that if the CLEO refused to implement the Brady Act, he could face civil

be prudent, in my view, to explore whether a provision might be adopted by Congress or the Attorney General that would condition the availability of federal funds or access to the NCIC on the local CLEO's agreement to perform the Brady Act investigation, rather than imposing a direct duty.

With respect to the nature of the duty imposed on CLEOs, I agree with Mr. Wolfson that ATF's guidance (excerpts of which are in the file) tends more to interpretation one, rather than two. The discussion of a CLEO in a rural area does not really suggest that injunctive relief for failure to make a background check. Dist. Ct. Op. at 6.

On the merits, the court first concluded that the Act imposed a mandatory duty on CLEOs to engage in the ascertainment/background check. The court rejected the government's contention (made in all the litigation on this subject) that the ascertainment/background check provision requires only that the CLEO determine whether or not conducting a check would be a reasonable diversion of the sheriff's resources. The court relied on legislative history of the Brady Act, noting that Congress rejected an amendment that would have changed "shall" to "may" in the ascertainment requirement. It thus concluded that "at a bare minimum a CLEO must check 'whatever' records 'are available.'" Dist. Ct. Op. at 7.

Having concluded that the Act requires CLEOs to engage in a background check, the court considered whether this mandate was constitutional. The court concluded that, under New York v. United States, 112 S. Ct. 2408 (1992), the mandate violated Article I and the Tenth Amendment. The analysis is very sketchy on this point (unlike the lengthy analysis set forth in other district court opinions on the subject, especially Printz v. United States (D. Mont., attached)) But the crucial point to the court was clearly that the Constitution does not permit Congress to "directly compel[] [the States] to enact and enforce a federal regulatory program," and that in this case, "Congress has crossed the line from encouragement to coercion" of local governments. "When a federal interest is sufficiently strong to cause Congress to legislate, it must do so directly; it cannot conscript state governments as its agents." Dist. Ct. Op. at 8 (quoting New York v. United States).

The District Court also held the background check mandate to be severable from the rest of the Act. The waiting-period requirement thus remains in force, and if CLEOs choose to engage in the ascertainment (or are required to do so by state law), they can do so. Dist. Ct. Op. at 11.

DISCUSSION

1. Justiciability. The justiciability problem in this case seems to be, not standing, but ripeness. Even if it is true that the Act imposes a "mandatory duty" on CLEOs to make the ascertainment of eligibility to possess a handgun, there is no sanction if they fail to do so. They cannot be held civilly

the CLEO ~~[illegible]~~ can omit making any effort at all if he is too busy or does not have sufficient resources; the point, rather, is that such a CLEO might personally know the individual and therefore would not have to do a record check. In other words, the CLEO's invocation of his personal knowledge constitutes a "reasonable effort"; it does not excuse the CLEO from making such an effort. That is not to say that I would rule out the possibility that a CLEO ~~[illegible]~~ might be regarded as in substantial compliance with the Act even though, in a particular instance, circumstances might prevent liable, and OLC has taken the position (well reasoned, in my view) that they cannot be held criminally liable either. Even if they can be held criminally liable, OLC's memorandum suggests that DOJ has essentially disclaimed any intention of proceeding against them.

In these circumstances, it is hard to understand how there is a "credible threat" that any provision of the Brady Act will be enforced against CLEOs. In Renne v. Geary, 111 S. Ct. 2331 (1991), the Court held that a First Amendment challenge to a state prohibition against political party endorsements for nonpartisan offices could not go forward, even when the plaintiffs' actions flatly violated the plain language of the provision under challenge. One reason given by the Court was that the provision under challenge "carries no criminal penalties, and may only be enforced by injunction[, but n]othing in the record suggests that [the defendants] have threatened to seek an injunction] to prevent violations of the provision." Id. at 2339. See also Wisconsin's Environmental Decade v. State Bar, 747 F.2d 407 (7th Cir. 1984) (First Amendment challenge to rules prohibiting unauthorized practice of law held unripe, even after state bar recommended taking legal action against plaintiff and referred plaintiff's activities to attorney general for prosecution), cert. denied, 471 U.S. 1100 (1985); Field v. Brown, 610 F.2d 981 (D.C. Cir. 1979), cert. denied, 446 U.S. 939 (1980).

Plaintiff argues, however, that as a public official, he is compelled, by his oath to uphold the law and Constitution, to adhere to the Brady Act, even if enforcement of the Act against him is not probable. Adherence to this oath would compel him to set aside programs and plans that he would otherwise pursue. This, I think, is what the district court was getting at in its reliance on Board of Education v. Allen. In that case, the school officials challenged a textbook-loan program, contending that implementing the program would force them to violate somebody else's First Amendment rights, and thus to violate their oath to uphold the Constitution. While this case is not really the same (implementing the Brady Act would not force the sheriff to violate the Tenth Amendment), it could be argued that the sheriff has standing and that the case is ripe because refusal to implement the Brady Act would force him to violate his oath to uphold the law, while implementation of the Act would interfere with local plans and projects by requiring him to set aside one and one-half hours a day or seeking greater resources. On full consideration, I agree with the Civil Division that the case is justiciable, and I recommend against raising standing/ripeness questions on appeal.

the performance of any investigation -- e.g., because of a law enforcement emergency in the locality. We should resist a broad expansion of that "exception," however, both because it could invite nullification of the federal statute and because it would undermine our credibility and suggest a lack of confidence in our basic position.

I agree with Mr. [illegible] that we should not make the justiciability argument on appeal.

S.S.L.
7/25/94

2. Merits. While the district court's opinion has a substantial basis, it is vulnerable to challenge on appeal. Even assuming that New York v. United States remains the Supreme Court's view of the contours of federalism, it should be possible to distinguish that case. First, the "accountability" theory underlying New York concerns situations where Congress forces the states to regulate, not where state officials are compelled to make purely or nearly ministerial actions in the implementation of a federal program. In New York, the Court was concerned that the state and federal governments were essentially trying to palm off unpopular political decisions (where to site nuclear waste) onto each other. "Accountability is thus diminished when, due to federal coercion, elected state officials cannot regulate in accordance with the view of the local electorate in matters not pre-empted by federal regulation." 112 S. Ct. at 2424. But the same can hardly be said here, where the difficult choice (whether to have a background-check provision) has been made, in full view, by the federal government. State involvement amounts to implementation of the details of the program, and no threat to the structure of federalism is presented. The reasoning behind New York is concerned with coercion of state legislation, not state administrative processes, and it is ironical to apply New York here, where Congress involved state governments out of respect for federalism concerns (but, of course, the same could have been said about the statute in New York, see id. at 2438 (White, J., dissenting)).

There is language in New York suggesting a broader view of federalism, that Congress generally cannot coerce state sovereign entities ("[T]he Constitution has never been understood to confer upon Congress to require the States to govern according to Congress' instructions," id. at 2421). Assuming this broader view prevails, the question is whether the Brady Act "coerces" the states at all. This, in turn, begs the question of what the Act's "reasonable effort" requirement entails.

There are three possible interpretations: First, CLEOs must make some effort, in every case, to ascertain whether a transferee may possess a handgun, but the effort that they make is essentially left to their discretion. Second, CLEOs should make such an effort in every case, but if it would not be reasonable for them to do so in a particular case (because of resource constraints or other pressing matters), they need not do so. Third, the ascertainment provision is essentially discretionary; CLEOs may determine for themselves whether, and under what circumstances, it would be reasonable for them to adhere to the Brady Act.

The first interpretation, in my view, is essentially ATF's interpretation of the Act (though others may disagree). It is also the only interpretation that poses any constitutional problems. The second and third interpretations basically allow CLEOs to opt out of the Brady Act, either at a particular point or on an ongoing basis, if they find they do not have the resources to make the background checks. The second and third interpretations thus avoid constitutional problems because they permit CLEOs not to be "coerced" if the coercion is inconvenient.

As I understand it, the second interpretation is what DOJ has been arguing. Under that view, the ascertainment provision is notionally mandatory, but occasional lapses are permitted. The problem with this argument is that it easily slides into the third view. What is to prevent a CLEO from deciding, every time a transfer takes place, that it just isn't reasonable to make a background check at that particular time? (The government has argued that, if a CLEO evaded the Brady Act in that way, the government could seek to compel adherence to the mandate by a writ of mandamus.) Another problem with the second argument is that ATF's assumption appears to be otherwise, i.e., that a CLEO must do something, if only something minimal, in every case (such as checking out criminal records). The district court adopted this interpretation, and we may be stuck with it since it is ATF's interpretation, and since the Supreme Court currently believes that a plausible agency interpretation of a statute must be chosen over an equally plausible interpretation that would avoid constitutional questions. See Rust v. Sullivan, 500 U.S. 173 (1991).

Even so, it is hard to believe that statute that requires local government to do only something reasonable -- and also says that what is "reasonable" is up to them -- is a serious intrusion on state sovereignty. This case bears some resemblance to FERC v. Mississippi, 456 U.S. 742 (1982), upholding Congress' requirement that state utility regulatory agencies "implement" a federal rule requiring traditional utilities to deal with nontraditional facilities, "consider" imposing federal standards for conservation of energy, and "follow" notice and comment procedures allowing public participation in the consideration of conservation standards. There, the Supreme Court held that the federal statute only required states to do the kind of the thing that they ordinarily did anyway, although it did expand their jurisdiction and workload. Here, it could be argued that determining whether someone is entitled to possess a firearm is one of the ongoing functions of local law enforcement agencies (which is why Congress gave the task to them), even though they may not do it in the same way, or to the same extent, as mandated under the Brady Act.[1]

More troubling is the Brady Act's requirement that CLEOs provide rejected transferees with a written statement of reasons, upon request, if the background check turns up evidence that the transferee may be ineligible to possess handguns. This is surely a more burdensome activity than one traditionally engaged in by CLEOs. However, the plaintiff has not made this specific contention, and CLEOs arguably can opt out of it, because the statement of reasons requirement comes into operation only if the CLEO reports back to the handgun dealer that the transfer should not go forward. As ATF has pointed out, nothing in the Brady Act requires CLEOs to report to the handgun dealer. So, a CLEO that took serious objection to providing a written statement of reasons could avoid it by deciding to make the background check, but not to inform the gun dealer of the result.

---

[1] Under New York v. United States, the state government's immunity from direct federal regulation cannot be overcome by a compelling federal interest. 112 S. Ct. at 2429. New York is stricter in this regard than the older National League of Cities view, which held that a compelling federal interest could justify regulating the "States as States." EEOC v. Wyoming, 460 U.S. 226, 242 n.17 (1983).