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U.S. DEPARTMENT OF JUSTICE
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WASHINGTON, D.C. 20530

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REMARKS:

U. S. Department of Justice

Office of Legal Counsel

Office of the
Assistant Attorney General

Washington, D.C. 20530

April 15, 1997

MEMORANDUM FOR CHARLES F.C. RUFF
COUNSEL TO THE PRESIDENT

From: Dawn E. Johnsen
Acting Assistant Attorney General

Re: Constitutionality of Potential Legislative Responses in the Event of an Adverse Supreme Court Decision in Pending Brady Act Litigation

This memorandum sets forth the preliminary views of the Office of Legal Counsel on various legislative initiatives that have been outlined by your office as potential responses to an adverse Supreme Court decision in pending litigation involving the Brady Handgun Violence Prevention Act, Pub. L. No. 103-159, Tit. I, § 102, 107 Stat. 1536, 1536-1541 (1993) ("Brady Act").

As we did in our summary memorandum on this subject, we caution that our advice is necessarily preliminary due to the limited time we have had to prepare this memorandum, and, more significantly, due to the fact that the Supreme Court has yet to decide what is likely to prove to be a significant precedent in this area of the law. Any Supreme Court decision invalidating the Brady Act is likely to provide critical guidance regarding the constitutionality of legislation responding to that decision. We urge that the Administration not make any decision regarding possible legislative responses until there has been time to analyze the Supreme Court's decision. Finally, we stress that we are simply providing legal analysis relating to the options that you have outlined for us. We take no position regarding the policy merits or feasibility of any of these options.

Introduction

The Brady Act currently provides that within five business days of a firearms dealer's proposal to transfer a handgun the "chief law enforcement officer" (CLEO) of the transferee's residence shall make a "reasonable effort" to determine whether the transferee's receipt or possession of the handgun would be illegal. 18 U.S.C. § 922(s)(2). If the CLEO determines that receipt or possession by the transferee would be legal, the CLEO is instructed to destroy the records relating to the transfer. 18 U.S.C. § 922(s)(6)(B)(i). If the CLEO determines that receipt or possession would be illegal, the CLEO is instructed, upon request by the transferee, to provide in writing the reason for that determination. 18 U.S.C. § 922(s)(6)(C).

These instructions to CLEOs form part of the Brady Act's interim mechanism for improving enforcement of federal restrictions on handgun possession.[1] CLEOs' obligations to make reasonable efforts to determine the legality of proposed handgun transfers will end with the initiation of a national instant criminal background check system, which is due to begin operations no later than November 30, 1998. 18 U.S.C. § 922 note. Once that system is in place, firearms dealers generally will be required to use it to determine whether any legal impediment exists to the sale of a firearm. 18 U.S.C. § 922(t)(1)(A).

A handful of CLEOs have challenged the Brady Act's interim background check provisions, arguing that Congress, in imposing background check responsibilities on CLEOs, exceeded its power under the Commerce Clause or contravened constitutional principles of federalism embodied in the Tenth Amendment. We are awaiting a decision from the Supreme Court in one of these cases. See Mack v. United States, 66 F.3d 1025 (9th Cir. 1995), cert. granted sub nom. Printz v. United States, 116 S. Ct. 2521 (1996) (Nos. 95-1478, 95-1503 1996 Term).

This memorandum provides a preliminary assessment of the constitutionality of three legislative initiatives that your office has identified as possible responses to an adverse decision in Printz. They are (1) replacing the Brady Act's current directive to CLEOs with financial incentives, by conditioning federal crime-prevention grants on the relevant CLEOs' performance of background checks; (2) imposing preemptive federal regulation of handgun sales in noncomplying jurisdictions, such as providing a federal alternative to background checks by CLEOs until the instant check system becomes operational;[2] and (3) prohibiting handgun transfers by gun sellers who cannot obtain a background check from the CLEO with jurisdiction over the seller's place of business or the prospective purchaser's residence. Our analysis begins with a summary of current Tenth Amendment jurisprudence, focusing primarily on the Supreme Court's treatment of various statutory incentives for state action in New York v. United States, 505 U.S. 144 (1992). That summary is followed by a brief application of these principles to the current proposals for legislation to address a possible adverse holding in Printz.

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[1] The Brady Act is intended to improve enforcement of the Gun Control Act's ("GCA") prohibition against the receipt or possession of firearms in or affecting interstate commerce by certain persons, such as convicted felons. 18 U.S.C. § 922(g). The GCA regulates the conduct of transferors as well as transferees. It proscribes transfers to persons known to be covered by one of these prohibitions. 18 U.S.C. § 922(d). In addition, it prohibits federally licensed firearms dealers from transferring firearms to anyone who is younger than eighteen, who does not reside in the dealer's state, or who is prohibited by state or local law from purchasing or possessing a firearm. 18 U.S.C. §§ 922(b)(1)-(3).

[2] A variant on this option, discussed infra at note 11, would simply require a longer waiting period in noncomplying jurisdictions.

Constitutional Limits on Congress's Power to Induce State Action in the Service of Federally Defined Objectives

The CLEOs who have challenged the Brady Act's interim background check provisions seek to extend the anti-commandeering principle articulated in New York v. United States to prohibit federal directives requiring ministerial acts by state and local officials. New York considered a Tenth Amendment challenge to various provisions of the Low Level Radioactive Waste Policy Act ("LLRWPA"), 42 U.S.C. §§ 2021b-2021j, which calls upon states to provide for the disposal of low-level radioactive wastes generated within their borders. New York and two of its counties challenged Congress's effort to secure state cooperation through three different mechanisms: (1) provisions requiring states that failed to provide for disposal of waste generated within their borders by a date certain to take title to that waste; (2) conditions placed on federal payments to the states; and (3) commerce power legislation detrimental to the residents of noncomplying states.

Of these inducements for state action, New York invalidated only the "take-title" provision. That provision was found to command states to follow one of two courses. A state could either take action by 1996 to provide for the disposal of low-level radioactive waste generated within its borders, or take title to that waste at that time. See 505 U.S. at 153-54. The first alternative, the Court found, represented a "command [to] state government to enact state regulation," which violated the constitutional rule that Congress itself must "legislate" where there is a sufficiently powerful federal interest and may not "conscript" states to legislate for it. Id. at 178. The second alternative -- taking title to the waste -- was equally flawed. That alternative too, as the Court appeared to recognize, would ultimately require the state to devise and implement a regulatory solution to a federally identified problem. See id. at 176. New York invalidated the take-title provision on grounds that both choices "'commandeer[ed] the legislative processes of the states by directly compelling them to enact and enforce a federal regulatory program.'" Id. at 176 (quoting Hodel v. Virginia Surface Mining & Reclamation Ass'n, 452 U.S. 264, 288 (1981)).

At the same time, New York upheld, subject to certain limitations, spending power legislation establishing conditions that states must meet to receive federal funding. The Court reviewed its past analyses of conditional spending power legislation and identified four relevant limitations: (1) the grant program itself must serve the general welfare; and conditions on states that accept the grants must be (2) "unambiguous," (3) "reasonably related to the purpose of the expenditure," and (4) compliant with "independent constitutional prohibition[s]." Id. at 171-72.[3] In addition, although the Supreme Court mentioned the issue only briefly in New York, its preceding spending power decision, South Dakota v. Dole, 483 U.S. 203 (1987), suggested a separate prohibition on unduly coercive grant conditions. There, the Court observed that conditional federal expenditures "might be so coercive as to pass the point at which 'pressure

[3] A violation of an independent constitutional prohibition, clearly absent in any of the proposals at issue here, would exist, for example, if "a grant of federal funds [were] conditioned on invidiously discriminatory state action or the infliction of cruel and unusual punishment." South Dakota v. Dole, 483 U.S. 203, 210-11 (1987).

turns into compulsion,'" 483 U.S. at 211 (quoting Steward Machine Co. v. Davis, 301 U.S. 548, 590 (1937)). Since the other criteria are easily satisfied, we focus here on New York's requirement that grant conditions be reasonably related to the purposes of affected grant programs and on Dole's suggestion that conditions on federal grants could, in extreme circumstances, exert such intense pressure on states as to amount to unconstitutional compulsion.

The reasonable relationship test, as elaborated in New York, requires that conditions on federal grants to the states "bear some relationship to the purpose of the federal spending." Id. at 167 (emphasis added); see id. at 172 (upholding specific funding condition that was found to be "reasonably related to the purposes of the expenditure"). This formulation, which appears to accord Congress broad leeway in establishing appropriate conditions on federal grants to the states, comports with a long line of Supreme Court decisions that have upheld such conditions without identifying any direct relationship between the purposes of those conditions and the purposes of the funding programs.[4] Current jurisprudence, in short, requires only that the limitation be "germane[]" to the grant. See Dole, 483 U.S. at 208 & n.3.

As for the question of coercion, Dole acknowledged the difficulty of any such constitutional standard:

> [T]o hold that motive or temptation is equivalent to coercion is to plunge the law in endless difficulties. The outcome of such a doctrine is the acceptance of a philosophical determinism by which choice becomes impossible.

Dole, 483 U.S. at 211 (quoting Steward Machine Co., 301 U.S. at 589-90). Neither Dole nor any subsequent Supreme Court decision has attempted to confront this difficulty or articulate a clear constitutional limit on permissible economic coercion.

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[4] See, e.g., South Dakota v. Dole, 483 U.S. at 208-209 & n.3 (upholding requirement that states establish twenty-one as the minimum drinking age in order to receive their full allocation of federal highway funds); Fullilove v. Klutznick, 448 U.S. 448, 474-75, 478-80 (1980) (upholding minority set-aside requirements as conditions on federal public works grants); Lau v. Nichols, 414 U.S. 563, 566-69 (1974) (upholding conditions imposed under the Civil Rights Act of 1964 on states that accept federal education funds); Oklahoma v. United States Civil Service Comm'n, 330 U.S. 127, 143-44 (1947) (upholding Hatch Act requirement that states restrict the political activities of officials administering federal grants); see also Ivanhoe Irrigation Dist. v. McCracken, 357 U.S. 275, 295 (1958) ("the Federal Government may establish and impose reasonable conditions relevant to federal interest in [a federally financed irrigation] project and to the over-all objectives thereof"); Oklahoma v. Schweiker, 655 F.2d 401, 406-07 (D.C. Cir. 1981) (restrictions on federal grants have never been subject to a "rigid nexus" test requiring that those conditions be "precisely related to the purpose of the federal funds whose receipt is conditioned") (discussing cases).

Justice O'Connor, dissenting in Dole, referred to a "direct relationship" requirement. See id. at 216-17. But this formulation received no mention in Justice O'Connor's subsequent opinion for the Court in New York. Moreover, even Justice O'Connor's dissent in Dole appeared to accept that restrictions on "how federal monies [are] to be expended" need not be rooted in the specific purposes of affected funding programs. Id. at 217 (discussing Oklahoma v. United States Civil Service Commission's approval of Hatch Act restrictions on political activities of state highway officials).

We are unaware of any case in which a federal court has invoked the coercion limit on the spending power to invalidate a condition that Congress has placed on federal grants to the states. In Nevada v. Skinner, 884 F.2d 445 (9th Cir. 1989), cert. denied, 493 U.S. 1070 (1990), the Ninth Circuit reviewed Dole and other Supreme Court cases and questioned the existence of any definable "coercion" test for conditions on federal grants. The court questioned the appropriateness of judicial inquiry into the intensity of the temptation that federal grants present to state officials, observing that "[t]he difficulty if not the impropriety of making judicial judgments regarding a state's financial capabilities renders the coercion theory highly suspect as a method for resolving disputes between federal and state governments." 884 F.2d at 448. Other courts have expressed similar skepticism concerning the notion that conditions on federal grants to the states could be struck down as unconstitutionally coercive.[5]

Six judges of the Fourth Circuit, however, recently signalled their inclination to invalidate one particular piece of conditional spending power legislation on coercion grounds. See Virginia Dep't of Educ. v. Riley, 106 F.3d 559, 569-72 (4th Cir. Feb. 5, 1997) (en banc) (Luttig, J., speaking for six of thirteen judges) (dictum). There, Virginia challenged a Department of Education ruling that the state, in order to receive federal grants for special education, was required to provide educational services to all disabled students, including students who had been expelled from public schools for reasons unrelated to their disabilities. The Department's ruling was overturned on the grounds that this funding condition was not clearly expressed in the underlying statute. Six judges, however, expressed the view that a "Tenth Amendment claim of the highest order" would be presented if Congress actually had authorized the Department of Education to withhold the state's entire grant ($60 million per year) for failure to provide educational services to 126 expelled students. Apart from this minority dictum, however, current case law provides no guidance as to the point at which permissible financial pressure becomes impermissible compulsion.

In addition to federal legislation commanding states to regulate or encouraging state action through conditions on federal grants, New York also considered legislation relying on the conditional exercise of the commerce power to encourage state action in the service of federal goals. With respect to the latter, the Court stated:

Where federal regulation of private activity is within the scope of the Commerce

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[5] See, e.g., Schweiker, 655 F.2d at 413-14 (courts "not suited" to determining whether states are faced with "an offer they cannot refuse or merely a hard choice"); South Dakota v. Adams, 506 F. Supp. 50, 57 (D. S.D. 1980) ("There is a vast difference between requiring a state to adopt certain regulations and denying funding to a state that refuses to adopt them."), aff'd sub nom. South Dakota v. Goldschmidt, 635 F.2d 698 (8th Cir. 1980), cert. denied sub nom. South Dakota v. Lewis, 451 U.S. 984 (1981); see also Virginia v. Browner, 80 F.3d 869, 881-82 (4th Cir. 1996) (states not coerced by Clean Air Act provisions that restrict permissible use of federal highway funds in states that decline to establish permitting programs for air emissions), cert. denied, 117 U.S. 764 (1997). But cf. United States v. Butler, 297 U.S. 1, 74-78 (1936) (holding that Congress, which under then-prevailing Commerce Clause doctrine lacked power to limit the production of agricultural commodities by direct regulation, also lacked authority to induce farmers to reduce production through financial incentives implemented under the taxing and spending powers).

> Clause, we have recognized the ability of Congress to offer States the choice of regulating that activity according to federal standards or having state law preempted by federal regulation.

505 U.S. at 173-74 (citing Hodel, 452 U.S. at 288, and FERC v. Mississippi, 456 U.S. 742, 764-65 (1982)).[6] It is true that New York suggested, without deciding, that Congress's power to offer such choices to the states might violate the Constitution if the threat of federal regulation resulted in pressure on states that was tantamount to "outright coercion." See id. at 166. Nonetheless, in practice the Supreme Court has upheld, both in New York and in FERC, provisions that appear to have established strong inducements for states to take actions that Congress could not have compelled directly.

New York upheld an incentive under which a state that declines to "regulate the disposal of radioactive waste in accordance with federal standards by attaining local or regional self-sufficiency [in waste disposal capacity]" must accept that its "residents who produce radioactive waste will be subject to federal regulation authorizing sited States and regions to deny access to their disposal sites." 505 U.S. at 174; see id. at 153. The Court approved this "conditional exercise of Congress' commerce power" as a constitutionally permissible means of encouraging states to assume responsibility for waste generated within their borders, notwithstanding that lost access to licensed disposal sites would undoubtedly cause great hardship to a wide range of radioactive waste generators including nuclear power plants and hospitals. See id. at 174, 176.[7] So, too, in FERC v. Mississippi, the Court rejected a Tenth Amendment challenge to provisions of an act directing state regulatory commissions to consider adopting federally prescribed rate structures and regulatory standards. The Court found that these provisions, properly viewed, merely imposed conditions on continued state operation in a field that Congress had the power to preempt. In other words, since states were free to withdraw from regulating utilities altogether (and despite the high cost of dismantling longstanding state programs to regulate natural monopoly markets for utility services), the provision was found not to infringe upon constitutionally protected attributes of state sovereignty. See id. at 764-66.[8]

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[6] See also Browner, 80 F.3d at 882 (Congress may constitutionally require states to participate in the Clean Air Act's preferred, federal-state scheme for controlling air emissions if they want the benefit of federal forbearance from federally imposed reductions).

[7] Indeed, it was the "crisis" brought on by earlier threats of state-ordered access restrictions that prompted Congress to enact the LLRWPA. See New York, 505 U.S. at 190 (White, J., dissenting in part).

[8] The FERC majority specifically rejected the dissent's objection that Congress's power to place conditions on the exercise of Commerce Clause powers "compels state agencies either to function as bureaucratic puppets of the Federal Government or to abandon regulation of an entire field traditionally reserved to state authority." Id. at 783 (O'Connor, J., dissenting in part). Congress's power to offer this choice to the states in the majority's view, was fully supported by its established authority to "condition the validity of state enactments in a preemptible area on their conformity with federal law," even where such conditioning could be characterized as an "attempt to 'coerce' the states into enacting nationally desirable legislation." Id. at 767-68 n. 30. See also Hodel, 452 U.S. at 288-89 (rejecting a claim that statute impermissibly "coerce[d] the states" by threatening "federal usurpation" of the states' traditional regulatory role if they declined to enforce certain minimum federal standards); Ponca Tribe of Oklahoma

As these cases make clear, conditional exercises of the commerce power, relied upon by Congress as incentives for desired state action, need not be burden-free or innocuous to pass constitutional muster.

Consideration of Specific Legislative Responses

You have asked us to assess the constitutionality of three potential legislative responses to an adverse decision in Printz. Our preliminary views, informed by the principles summarized above, follow.

1. Conditions on the Receipt of Federal Funds

We understand this potential response to require new legislation that would withhold future federal grants from noncomplying jurisdictions. Under current law, we believe that such legislation could be drafted in a constitutional manner, although it would present certain litigation risks that should be weighed in any evaluation of possible responses to an adverse decision in Printz.

Properly drafted legislation to cut federal grants to jurisdictions whose CLEOs decline to perform background checks would not raise significant difficulties under the four limitations on conditional spending power legislation that New York expressly addresses. The contemplated conditions would unquestionably be in pursuit of the general welfare and could easily be drafted to provide clear notice to the participating jurisdictions. Moreover, as long as the affected federal grant programs lent support to state and local violent crime prevention and law enforcement, the conditions would also seem to be sufficiently related to the purpose of the grants. Congress could reasonably conclude that inadequate enforcement of GCA restrictions on gun ownership[9] reduces the effectiveness of crime control efforts in general and decide, on this basis, to reduce federal funding of crime control programs in states and localities that decline to take reasonable efforts to enforce the GCA.[10] Finally, the contemplated condition would not violate any "independent constitutional prohibition[s]," New York, 505 U.S. at 171-72, since background checks on prospective handgun purchasers, performed by state and local CLEOs, do not, in themselves, violate the Constitution.

v. Oklahoma, 37 F.3d 1422, 1433-34 (10th Cir. 1994) (relying on FERC as authority for rejecting Tenth Amendment challenge to Congress's instructions to the states in the Indian Gaming Regulatory Act), overruled on other grounds, Seminole Tribe of Florida v. Florida, 116 S. Ct. 1114 (1996).

[9] See supra note 1.

[10] Even where federal funds are earmarked for assisting state and local law enforcement efforts directed at preventing trade in illegal drugs without mentioning violent crime in particular, a reduction in funds for failure to enforce the GCA restrictions would seem reasonable since drugs and guns have been held to be intimately associated. See, e.g., United States v. Clark, 24 F.3d 299, 304 (D.C. Cir. 1994) (investigative stop not converted into arrest because it was reasonable to require drug suspect to exit car at gunpoint and kneel on ground in light of fact that "it was not uncommon for guns and drugs to be associated").

Dole's suggestion that conditional spending power legislation could "pass the point at which 'pressure turns into compulsion,'" 483 U.S. at 211 (quoting Steward Machine, 301 U.S. at 590), is more problematic. The effort to obtain state and local cooperation in a national background-check program through the imposition of conditions on federal grants might be attacked as unconstitutionally coercive. Dole rejected a similar challenge to a requerement that states adopt a minimum drinking age of at least twenty-one in order to receive their full allocation of federal highway funds. 483 U.S. at 208-209 & n.3. Indeed, the Court has never struck down a conditional exercise of Congress's Spending Clause power on the ground that it amounted to coercion, and some lower courts have questioned whether "a sovereign state which is always free to increase its tax revenues [can] ever be coerced by the withholding of federal funds." Skinner, 884 F.2d at 448; accord California v. United States, 104 F.3d 1086, 1092 (9th Cir. 1997). However, as noted above, six judges of the Fourth Circuit have recently expressed the view that such unconstitutional "coercion" can occur in the funding context and have suggested that the relationship between the severity of the funding reduction and the magnitude of the federal interest involved is critical to the coercion inquiry. See Riley, 106 F.3d at 569-72 (Luttig, J., speaking for six of thirteen judges) (dictum).

Although we believe, in light of this authority, that legislation conditioning federal anti-crime grants on the performance of Brady background checks could be drafted in a constitutionally acceptable manner, we caution that such legislation, enacted in the wake of an adverse decision by the Supreme Court in Printz, might present an attractive target for the first invocation of the anti-compulsion doctrine to strike down a federal law. To provide an effective replacement for the challenged provisions, conditional spending power legislation would need to make the financial stakes for states and localities high enough to persuade most, if not all, to direct their CLEOs to perform background checks. While the boundary between encouragement and coercion is indistinct, litigation risks undoubtedly increase with the strength of the financial threat. The timing of the contemplated legislation would heighten the risk. Congress would quite clearly be attempting to accomplish indirectly what the Court would have just held that it could not accomplish directly. Opponents of the Brady Act might well be able to find some judges who would be prepared to rule that an effective spending power fix was simply too coercive.

2. Federal Background Checks in Noncomplying Jurisdictions

We understand this proposal as providing for federal background checks in jurisdictions where the relevant CLEO declines to perform that function. Where the CLEO conducts the checks, potential purchasers would have to wait no more than five days for such clearance. Where the federal government must step in, we understand that logistical problems might require a longer waiting period. We believe that this approach would be constitutional under current law.

"Where federal regulation of private activity is within the scope of the Commerce Clause," the Supreme Court has said, "Congress [may] . . . offer States the choice of regulating that activity according to federal standards or having state law preempted by federal regulation."

New York, 505 U.S. at 173-74; see also Hodel, 452 U.S. at 288; FERC, 456 U.S. at 764-65. Legislation calling for substantively equivalent, though somewhat slower, federal background checks in noncooperating jurisdictions would place the burden of state and local noncooperation on private individuals rather than on state and local governments. It would also allow "state residents [who] would prefer their government to devote its attention and resources to problems other than those deemed important by Congress, [to] . . . choose to have the Federal Government rather than the State bear the expense of a federally mandated regulatory program, and [to] . . . continue to supplement that program to the extent state law is not preempted." New York, 505 U.S. at 168. The failure of any CLEO to perform checks would result only in longer waiting periods for firearms dealers and purchasers because the federal government is required to act. If the state is unwilling to incur the expense of conducting checks, the federal government would stand ready to provide a similar service.

Even if the conditional exercise of the Commerce Clause power is subject to a "coercion" limit -- a possibility suggested by New York (see id. at 166) -- we believe that, under current law, the federal government can clearly impose genuine federal regulation in jurisdictions that fail to perform background checks. A risk of invalidation would arise only if contingent federal controls, to be imposed in lieu of acceptable state efforts, were seen to function not as alternative regulations but as threats against regulated parties, designed to force states into assuming the responsibilities that Congress has assigned them. Therefore, a system resulting in substantially longer waiting periods in jurisdictions where state officers have declined to perform checks could face claims of coercion if courts became persuaded that the longer waiting period served solely or primarily to induce state compliance.[11] Absent unjustified delay, however, a requirement that federal background checks precede handgun sales in jurisdictions that decline to conduct such checks themselves would be constitutional under current law and unlikely to face any serious federalism-based constitutional challenge.

3. Handgun Sales Allowed Only Where a Relevant CLEO Participates

We understand that this potential response would prohibit the sale of handguns in jurisdictions where all relevant CLEO refuse to conduct background checks. This proposal would allow sales as long as a backgrsound check was conducted by a CLEO whose jurisdiction included either the purchaser's residence or the seller's place of business. We believe this proposal would be constitutional under current law. It would also, however, present litigation risks similar to those that arise in the conditional spending context.

[11] Such a concern could thus be heightened if, in jurisdictions where the relevant CLEOs decline to perform background checks, the federal government did not perform background checks itself, but instead simply imposed a very long waiting period. Such a waiting period in noncomplying jurisdictions might be justified as serving a "cooling off" function, but might be characterized by gun control opponents as a means of coercing state compliance with federal goals. Although we believe that a constitutional "cooling-off" period could be crafted under current law, this proposal would raise some of the litigation risks discussed in connection with the conditional ban on handgun sales, discussed below.

Analyzed under New York, this proposal would be constitutional. If Congress can constitutionally ban handgun sales altogether, it is presumptively empowered to impose such a ban selectively where states and localities refrain from performing background checks. Like the second incentive for state action that the Supreme Court upheld in New York, which provided that a state decision not to participate in the federal scheme would result in a federally imposed burden on state residents instead of upon the state itself, a federal ban on handgun sales in noncomplying jurisdictions would allow states to choose between regulating in accordance with federal standards or stepping aside to allow alternative federal regulation. The burden of a decision not to cooperate would fall on handgun sellers and purchasers, not on the state itself.[12] Although a court, as noted above, might conclude that certain extraordinary conditional Commerce Clause legislation has the effect of unconstitutionally coercing states to act in a certain manner,[13] we believe that this proposal, if properly crafted, would be constitutional under current law. Certainly where federal controls are a reasonable effort to ensure that, in the face of state officers' decisions not to perform background checks, prohibited persons are prevented from purchasing handguns, and not an effort simply to punish citizens of noncooperating state jurisdictions as a means of effecting state compliance, such legislation would be constitutional.

Nonetheless, concerns regarding the potential for litigation exist, as they do with the conditional spending proposal. This legislative solution could also present an attractive opportunity for those who wish to extend federalism-based limits on Congress's powers under the Commerce Clause, including limits based on coercion.[14] Although we would take issue with any such characterization, challengers would undoubtedly allege that any contingent ban on the sale of handguns functioned less as federal regulation in lieu of effective state action than

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12 The burden on residents of noncomplying jurisdictions under the proposal we are considering here differs from the burden created by the conditional commerce power provisions that the Supreme Court upheld in New York. Under the scheme that New York upheld, residents of states that failed to cooperate with the federal program only lost guaranteed access to out-of-state waste facilities. They were free to negotiate access or to attempt to develop their own, in-state capacity. The contemplated background check provisions, in contrast, would result in a legal ban on handgun purchases where the relevant CLEOs declined to perform background checks. For example, a firearms dealer in a jurisdiction where the CLEO declined to perform background checks would be prohibited from selling to local residents. That dealer's only lawful customers would come from other in-state jurisdictions where the CLEO was willing to perform checks on its residents. Conversely, the purchaser who resides in a noncomplying jurisdiction would be required to travel to another in-state jurisdiction where the CLEO was willing to perform a background check on non-local purchasers. Thus, while many desired transactions might be proscribed, a dealer would be completely prohibited from selling, and a customer would be completely prohibited from purchasing, handguns only in the unlikely event that no CLEO in the state was willing to perform the required background checks. See 18 U.S.C. § 922(b)(3) (prohibition on out-of-state sales).

13 See New York, 505 U.S. at 166 (Congress's power under both the Spending and Commerce Clauses permits providing incentives to states that are "short of outright coercion").

14 One might reasonably argue, however, that a provision that does not operate upon the state as a sovereign, but rather upon individuals who may then bring pressure to bear upon the state, could only in the most extraordinary circumstances be deemed unduly coercive.

as a bare attempt to coerce states into performing a federally assigned role.

Send Copy to
Bill Marshall

Memorandum

Subject
S. 1219, the Senate Campaign Finance Reform Act of 1996

Date
June 24, 1996

To
Andrew Fois
Assistant Attorney General

From
Randolph D. Moss
Deputy Assistant
Attorney General

The following are the comments of the Office of Legal Counsel on the amendments to S. 1219, the Senate Campaign Finance Reform Act of 1996, reported at Congressional Record S6616 (June 20, 1996).[1] Although we believe that the fundamental thrust of the bill is constitutional, we suggest below how the bill might be strengthened against potential constitutional attack.

Contributions by advisers and employees: A prior version of the bill would have treated any expenditure for express advocacy made by a person who had advised a candidate or a candidate's agents on any aspect of the campaign, including whether or not to run, as a contribution and therefore subject to a $1,000 limit. Because this provision would have covered expenditures that are truly independent, it raised serious constitutional concerns. See Buckley, 424 U.S. at 39-59. The current, amended version represents a substantial improvement in that it only applies to expenditures by individuals who have provided "significant" advice. S. 1219, § 241. We believe that any remaining constitutional concerns can be avoided by further clarifying that the provision applies only where it is valid to presume that an expenditure is coordinated with a campaign.

Soft money other than from political parties: Persons (broadly defined) who are not political party committees would be required to file a report for disbursements aggregating to $10,000 and an additional report for every additional aggregation of $10,000. This requirement covers disbursements that "might affect the outcome of a federal election" but does not cover "independent expenditures" (express advocacy regarding a specific candidate). S. 1219, § 221. In Buckley, the Court applied strict scrutiny to a disclosure requirement because it recognized that requiring individuals and groups to identify themselves could chill protected speech and association. Although the Court upheld a requirement

[1] This comment supersedes our comment on S. 1219 signed and delivered on June 23, 1996.

that individuals and groups file reports disclosing their independent expenditures, it indicated that the governmental interest in disclosure would not be sufficient where the expenditure was not made expressly to advocate a specific result in an election. Id. at 76-82. The expenditures covered by this provision of the bill, by definition, do not include express advocacy regarding the result of a specific election. We believe that the concern the Court expressed would be alleviated if the bill were amended to make clear that no portion of the report that identifies the person who made the disbursement may be made public.

In addition, the phrase "[disbursements that] might affect the outcome of a federal election" may be attacked on vagueness grounds. See Buckley, 424 U.S. at 39-44. We therefore suggest that this phrase be given a specific definition that provides clear notice to anyone who falls within its coverage.

Compelled advertisement identification: Existing law requires that every "general public political advertis[ement]" that includes either express advocacy of the election or defeat of a candidate or solicitation of a contribution must also identify the candidate or other person or entity who paid for the advertisement and, if the advertisement is authorized by a candidate, must disclose the authorization. 2 U.S.C. § 441d(a). S. 1219 would further define the form of this self-identification. S. 1219, § 302.

As applied to express advocacy, we recognize, as did the court in FEC v. Survival Education Fund, 65 F.3d 285, 295-98 (2d Cir. 1995), that substantial arguments might be made that the existing law does not survive McIntyre v. Ohio Elections Comm'n, 115 S. Ct. 1511 (1995).[2] The validity or invalidity of the amendments proposed in S. 1219 that further define the form of the identification follows a fortiori from the validity or invalidity of the existing statute.

In addition to S. 1219's amendments to the form of the self-

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2 In McIntyre, an individual distributed handbills expressing opposition to a local referendum to increase the school tax. The handbills did not disclose the identity of their author as required by Ohio law. The Supreme Court held that the Ohio law placed a substantial burden on speech that lies at the core of the First Amendment's protection and that the state's interest in avoiding fraud and libel was not sufficient to sustain the self-identification requirement. The Court, however, noted that the case involved only the distribution of handbills in a local issue-based election and expressly declined to reach the question of whether, and to what extent, its holding would apply in the context of advocacy expressed through mass media regarding a federal, candidate election. See id. at 1514-15 n.3; id. at 1524 (Ginsburg, J., concurring).

identification requirement, S. 1219 would enact additional requirements. The bill would require that (1) printed communications financed by independent expenditures include the permanent street address of the person or organization that paid for the communication, (2) broadcast or cablecast communications that are paid for or authorized by a candidate include an audio self-identification that is read by the candidate, and (3) any televised broadcast or cablecast that is paid for by a candidate include, next to the written self-identification, "a clearly identifiable photographic or similar image of the candidate." S. 1219, § 302.

Assuming the validity of the existing statutory self-identification requirement and the amendments to their form proposed in S. 1219 discussed previously, the additional requirements raise constitutional concerns. By requiring those making independent expenditures to publicize their permanent street address and forcing candidates literally to speak[3] or to make an appearance, each of these requirements places a burden on speech at the core of the First Amendment's protection.[4] If these requirements place a substantial burden on protected speech and do not materially advance a governmental interest, the provision would fail to pass constitutional scrutiny.[5] Congress should ensure that this standard is met, either by advancing a constitutionally legitimate and sufficiently strong governmental interest or alleviating the burden on protected speech.

Out-of-state contributions: The bill applies a limit on out-

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3 We do not doubt that, if self-identification requirements are valid, a requirement that the self-identification on a televised ad be read as well as written on the screen is also permissible. Such a requirement would serve the purpose of conveying the identification to someone who does not happen to be looking at the television screen during the four seconds that the identification is required to appear. The distinct constitutional issue arises where a specific individual, here the candidate, is required personally to read the identification.

4 See, e.g., Riley v. National Fed'n of the Blind, 487 U.S. 781 (1988); Wooley v. Maynard, 430 U.S. 705 (1977).

5 See McIntyre, 115 S. Ct. at 1522-24; Buckley, 424 U.S. at 39-59. A court might, if Congress fails to advance a sufficient interest, be inclined to credit the inevitable argument that the bill is an attempt to prevent candidates from broadcasting "negative" ads. Congress may not enact regulations that are aimed at the suppression of speech the content of which Congress deems distasteful. See, e.g., Rosenberger v. Rector & Visitors of the University of Virginia, 115 S. Ct. 2510, 2519 (1995); Speiser v. Randall, 357 U.S. 513 (1958).

of-state contributions to candidates who elect to participate in the public funding system. The bill defines allowable contributions as not including "contributions from individuals residing outside the candidate's State to the extent such contributions exceed 40 percent of the aggregate allowable contributions" received during the approximately two years preceding the Senate election. S. 1219, § 501.

The bill would discriminate against out-of-state contributors. While Buckley held that there is little speech content in the size of a contribution, the Court did hold that inherent in every contribution is a statement of support that is protected by the First Amendment. In discriminating against out-of-state contributions, the bill would place burdens on the speech of citizens who do not reside in the same state as the candidate. As such, the bill would trigger some level of scrutiny under the First Amendment, for "[i]n the realm of private speech or expression, government regulation may not favor one speaker over another."[6]

Speaker-based restrictions demand strict scrutiny only where the speaker-based discrimination is based on "the communicative impact of the regulated speech," Turner Broadcasting Sys., Inc. v. FCC, 114 S. Ct. 2445, 2467 (1994); that is, where the regulation "'arises in some measure because the communication . . . is itself thought to be harmful.'" Buckley v. Valeo, 424 U.S. 1, 17 (1976) (quoting United States v. O'Brien, 391 U.S. 367, 382 (1968)). Thus, strict scrutiny is required where the prohibition or limitation on speech is based "on the identity of interests that spokesmen may represent in public debate over controversial issues." First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 784 (1978); accord Pacific Gas & Elec. Co. v. Public Utilities Comm'n, 475 U.S. 1, 15 (1986) (plurality opinion); Austin v. Michigan Chamber of Commerce, 494 U.S. 652, 657 (1990). In contrast, strict scrutiny is not required where a discriminatory regulation is based on something other than the communicative impact of the disadvantaged speech, as where a speaker-based restriction is imposed because of a speaker's unique ability to communicate using particular physical means, see Turner Broadcasting, 114 S. Ct. at 2460-61, 2467, or because of things the speaker has done in the past unrelated to their speech, see Regan v. Taxation with Representation, 461 U.S. 540, 548-51 (1983).

We believe that there are valid reasons unrelated to the communicative impact of out-of-state contributions that could sustain the provision. In particular, we believe that the government has a legitimate interest in seeking to foster strong

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6 Rosenberger, 115 S. Ct. at 2516; see Lakewood v. Plain Dealer Publishing Co., 486 U.S. 750, 763 (1986) ("A law or policy permitting communication in a certain manner for some but not for others raises the specter of content and viewpoint censorship.").

ties between a Senator and the constituency he or she is constitutionally committed to represent. In upholding the individual contribution limit in Buckley, the Court noted its effect was merely "to require candidates and political committees to raise funds from a greater number of persons and to compel people who would otherwise contribute amounts greater than the statutory limits to expend such funds on direct political expression." 424 U.S. at 22. We believe that the out-of-state contribution limit would have essentially the same effect. It would merely require candidates to build stronger ties with the constituents whom they are elected to represent. We also note that because candidates may return to each out-of-state contributor a pro rata share of the excess of the 40% limitation, the law does not necessarily require that a candidate ever refuse to receive, which is to say associate with, a given out-of-state contributor.

Jurisdiction over Challenges to Broadcast Media Rates and Free Broadcast Time: S. 1219 would provide that "[t]he United States Court of Federal Claims shall have exclusive jurisdiction over any action challenging the constitutionality of the broadcast media rates and free broadcast time required to be offered to political candidates. . . ." S. 1219, § 102(b). Because the Court of Federal Claims is not an Article III court, this provision raises serious constitutional questions under Article III of the United States Constitution.

The bill would vest exclusive power to adjudicate any challenge to the bill's broadcast rates and free time provisions if the challenge is based on the Constitution, regardless of which component of the Constitution the amended bill is asserted to violate. The validity of any provision that purports entirely to withhold jurisdiction to review the constitutionality of a law from both an Article III court and from state courts is seriously in doubt. See, e.g., Webster v. Doe, 486 U.S. 592 (1988); Weinberger v. Salfi, 422 U.S. 749 (1975); Johnson v. Robison, 415 U.S. 361, 373-74 (1974). Moreover, even if § 102(b) can be read to preserve review in the Federal Circuit or any other Article III appellate court, the provision would establish that "the exclusive remedy in an action" brought under it is "[m]oney damages," raising the question whether any court would have authority to enjoin application of a provision that the court concludes, for example, violates the First Amendment. Accordingly, we suggest that the bill be revised to specify that Article III "review of constitutional error is preserved," see Thomas v. Union Carbide Agricultural Prods., 473 U.S. 568, 592 (1985), and that the Article III courts retain authority to grant all appropriate relief.

Effect of Ineligible Senate Candidate Overspending the Voluntary Limit: Existing law imposes a $1,000 limit on the amount an individual may contribute to a specific candidate. This is a general limit that applies to contributions to all candidates, whether they participate in the voluntary public financing scheme or not. 2 U.S.C. § 441a(a)(1)(A); see Buckley, 424 U.S. at 23-35. Under the amended bill, the limit would be increased to $2,000 for a candidate who participates in the voluntary public financing system if that candidate's opponent exceeds the spending limits of the voluntary system. S. 1219, § 105. The general $1,000 limit would continue to apply in races in which all candidates comply with the voluntary limits or in which no candidates comply.

This provision might well be subject to constitutional challenge. In Buckley, the Court held that "[t]he First Amendment denies government the power to determine that spending to promote one's political views is . . . excessive." 424 U.S. at 57. Moreover, the Court stressed that "equalizing" resources is not a permissible basis for imposing restrictions or benefits in the context of federal elections. Id. at 48-51. The bill arguably would run afoul of these principles and effectuate a speaker-based distinction that is based on the communicative impact of speech and that forces a candidate to choose between not speaking in excess of voluntary limits or triggering a higher contribution limit for his or her opponent.[7] If it does so, as discussed above, it would be subject to strict scrutiny and would need to be narrowly tailored to serve a compelling governmental interest. § 105 also might call into question the validity of the S. 1219's public financing system. In Buckley, the Court struck down mandatory spending limits, but held that such limits could be made a condition of participation in a voluntary public financing system. By imposing a stricter legal impediment on candidates who do not participate, a court may hold that participation in the public financing system is not voluntary, in which case it would be unconstitutional. See Buckley, 424 U.S. at 54-59. We would be happy to work with Congress in reviewing any proposed findings of purpose or substantive revisions that might address these issues.

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7 See Pacific Gas & Electric v. Public Utils. Comm'n, 475 U.S. 1 (1986) (plurality); Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974).

Document No.__________

WHITE HOUSE STAFFING MEMORANDUM

DATE: 4-12   ACTION/CONCURRENCE/COMMENT DUE BY: 4-14 COB

SUBJECT: Proposed Response to Brady Decision

	ACTION	FYI		ACTION	FYI
VICE PRESIDENT	☑	☐	McCURRY	☐	☐
BOWLES	☑	☐	McGINTY	☐	☐
McLARTY	☐	☐	NASH	☐	☐
PODESTA	☑	☐	RUFF	☑	☐
MATHEWS	☑	☐	SMITH	☐	☐
RAINES	☐	☐	REED	☐	☐
BAER	☐	☐	SOSNIK	☑	☐
ECHAVESTE	☐	☐	LEWIS	☐	☐
EMANUEL	☐	☐	YELLEN	☐	☐
GIBBONS	☐	☐	STREETT	☐	☐
HALE	☐	☐	SPERLING	☐	☐
HERMAN	☐	☐	HAWLEY	☐	☐
HIGGINS	☐	☐	WILLIAMS	☐	☐
HILLEY	☑	☐	RADD	☑	☐
KLAIN	☑	☐		☐	☐
BERGER	☐	☐		☐	☐
LINDSEY	☐	☐		☐	☐

REMARKS: Any comment?

RESPONSE:

NO Comment

Staff Secretary
Ext. 6-2702

THE WHITE HOUSE

WASHINGTON

'97 APR 10 PM 7:04

MEMORANDUM FOR THE PRESIDENT

FROM: RAHM EMANUEL
BRUCE REED

SUBJECT: STRATEGY IN RESPONSE TO BRADY LAW SUPREME COURT DECISION

The Supreme Court will decide the Brady Law case within the next few months. Most experts believe that the Court will find the law unconstitutional and hold that the Federal Government cannot "require" state and local law enforcement officials to conduct criminal background checks.

The Counsel's Office is providing you a memo with their views on legislative fix options. Here are recommended actions that we think we should take in response to such a ruling.

<u>If Court Rules Brady Law Unconstitutional</u>

Three elements of the law would most likely still be in effect --- 1) Brady's 5-day waiting period; 2) Requirement that gun dealers obtain a statement from purchasers concerning the proposed handgun sale; and 3) Transfer by gun dealers of the statement to state or local law enforcement officers. In addition, the decision would apply only to 24 Brady states, and not to the Brady "alternative" states (where state legislatures have established an alternative system that meets federal standards).

Law enforcement officials would be able to continue to conduct criminal record checks of handgun purchasers -- but only on a <u>voluntary</u> basis. And most law enforcement officials believe that the vast majority of local chief law enforcement officers would continue to perform background checks.

<u>Actions To Take In Response</u>

We have been working with the Justice and Treasury Departments to develop a multi-pronged strategy to respond to such a decision. It is critical that we move quickly to respond to an adverse ruling by the Court. These options will permit us to stand with the Bradys and law enforcement in a united front and challenge Congress and the gun lobby to support reinstating the Brady Law.

The communications message from this strategy would be straightforward -- the majority of the Brady Law is still intact, but criminals should have no safe haven. The law should be clear: no background check, no gun sale.

Day of Supreme Court Ruling

- Presidential Statement. You would make a statement at the White House with the Bradys condemning the decision and directing the Attorney General and the Secretary of Treasury to review the decision and within a week present you with legislative options.

Law Enforcement/Bradys Event

At an event, within a short period of the ruling, you would stand with the Attorney General, Secretary Rubin, numerous law enforcement chiefs and sheriffs, Members of Congress, and the Bradys to announce the following:

- Legislation. Announce legislation addressing the Court decision and challenge Congress to pass it quickly (in addition, Treasury is currently reviewing whether any actions could be taken by Executive Order in conjunction with or instead of legislation);

  A more definitive recommendation will depend upon an analysis of the Court's opinion. However, here are at least some preliminary options being considered by the Justice and Treasury Departments:

  1. Condition federal crime program funding upon states and localities agreeing to abide by background check requirements. This option would provoke some resistance in the law enforcement community.

  2. Federal Operation --- turn over background check operations to the FBI and ATF.

  3. Regulate Firearms Dealers -- prohibit federally licensed firearms dealers from selling handguns unless a law enforcement official certifies that a background check will be conducted.

  4. No Legislative Response -- Brady is currently scheduled to sunset in 1998 and be replaced with a instant background check system. Any legislation will probably not pass this Congress.

We recommend option #3. We think it is important that you respond to the decision with legislation and challenge Congress to move. It will then have to explain any inaction to law enforcement and the American public. Under option #3, most chief law enforcement officers will conduct background checks; any who refuse will have to take responsibility for halting all handgun sales in their area. This approach sticks to a simple overall message -- no background check, no gun sale. Handgun Control supports this approach.

- Law Enforcement Pledge. Release a pledge signed by chiefs and sheriffs from across the nation vowing to continue to enforce the Brady Law.

- Reno/Rubin Letter. Release letter from Reno and Rubin to every police chief and sheriff in the country urging them to continue their public safety duty to conduct background checks on handgun purchasers. The letter would be sent electronically by Treasury to all state and local law enforcement organizations, and also sent to state attorneys general.

- ATF Letter. Release ATF Director Magaw letter to all Federal Firearms Licensees notifying them of the Court decision and informing them that their obligations under Brady remain unaffected.

U.S. DEPARTMENT OF JUSTICE
OFFICE OF LEGAL COUNSEL
WASHINGTON, D.C. 20530

FACSIMILE TRANSMISSION SHEET

DATE: 4/15/97

FROM: Daniel Halberstam

OFFICE PHONE: (202) 514-4409

TO: Bill Marshall

OFFICE PHONE: (202) 456-7900

NUMBER OF PAGES: 11 **(NOT INCLUDING COVER SHEET)**

FACSIMILE NUMBER: (202) 456-1647

REMARKS:

ANY QUESTIONS, PLEASE CONTACT OUR ADMINISTRATIVE OFFICE ON 514-2067
OFFICE OF LEGAL COUNSEL FACSIMILE MACHINE NUMBER - 514-0563 (FTS - 368-0563)

U. S. Department of Justice

Office of Legal Counsel

Office of the
Assistant Attorney General

Washington, D.C. 20530

April 15, 1997

MEMORANDUM FOR CHARLES F.C. RUFF
COUNSEL TO THE PRESIDENT

From: Dawn E. Johnsen
Acting Assistant Attorney General

Re: Constitutionality of Potential Legislative Responses in the Event of an Adverse Supreme Court Decision in Pending Brady Act Litigation

This memorandum sets forth the preliminary views of the Office of Legal Counsel on various legislative initiatives that have been outlined by your office as potential responses to an adverse Supreme Court decision in pending litigation involving the Brady Handgun Violence Prevention Act, Pub. L. No. 103-159, Tit. I, § 102, 107 Stat. 1536, 1536-1541 (1993) ("Brady Act").

As we did in our summary memorandum on this subject, we caution that our advice is necessarily preliminary due to the limited time we have had to prepare this memorandum, and, more significantly, due to the fact that the Supreme Court has yet to decide what is likely to prove to be a significant precedent in this area of the law. Any Supreme Court decision invalidating the Brady Act is likely to provide critical guidance regarding the constitutionality of legislation responding to that decision. We urge that the Administration not make any decision regarding possible legislative responses until there has been time to analyze the Supreme Court's decision. Finally, we stress that we are simply providing legal analysis relating to the options that you have outlined for us. We take no position regarding the policy merits or feasibility of any of these options.

Introduction

The Brady Act currently provides that within five business days of a firearms dealer's proposal to transfer a handgun the "chief law enforcement officer" (CLEO) of the transferee's residence shall make a "reasonable effort" to determine whether the transferee's receipt or possession of the handgun would be illegal. 18 U.S.C. § 922(s)(2). If the CLEO determines that receipt or possession by the transferee would be legal, the CLEO is instructed to destroy the records relating to the transfer. 18 U.S.C. § 922(s)(6)(B)(i). If the CLEO determines that receipt or possession would be illegal, the CLEO is instructed, upon request by the transferee, to provide in writing the reason for that determination. 18 U.S.C. § 922(s)(6)(C).

These instructions to CLEOs form part of the Brady Act's interim mechanism for improving enforcement of federal restrictions on handgun possession.[1] CLEOs' obligations to make reasonable efforts to determine the legality of proposed handgun transfers will end with the initiation of a national instant criminal background check system, which is due to begin operations no later than November 30, 1998. 18 U.S.C. § 922 note. Once that system is in place, firearms dealers generally will be required to use it to determine whether any legal impediment exists to the sale of a firearm. 18 U.S.C. § 922(t)(1)(A).

A handful of CLEOs have challenged the Brady Act's interim background check provisions, arguing that Congress, in imposing background check responsibilities on CLEOs, exceeded its power under the Commerce Clause or contravened constitutional principles of federalism embodied in the Tenth Amendment. We are awaiting a decision from the Supreme Court in one of these cases. See Mack v. United States, 66 F.3d 1025 (9th Cir. 1995), cert. granted sub nom. Printz v. United States, 116 S. Ct. 2521 (1996) (Nos. 95-1478, 95-1503 1996 Term).

This memorandum provides a preliminary assessment of the constitutionality of three legislative initiatives that your office has identified as possible responses to an adverse decision in Printz. They are (1) replacing the Brady Act's current directive to CLEOs with financial incentives, by conditioning federal crime-prevention grants on the relevant CLEOs' performance of background checks; (2) imposing preemptive federal regulation of handgun sales in noncomplying jurisdictions, such as providing a federal alternative to background checks by CLEOs until the instant check system becomes operational;[2] and (3) prohibiting handgun transfers by gun sellers who cannot obtain a background check from the CLEO with jurisdiction over the seller's place of business or the prospective purchaser's residence. Our analysis begins with a summary of current Tenth Amendment jurisprudence, focusing primarily on the Supreme Court's treatment of various statutory incentives for state action in New York v. United States, 505 U.S. 144 (1992). That summary is followed by a brief application of these principles to the current proposals for legislation to address a possible adverse holding in Printz.

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[1] The Brady Act is intended to improve enforcement of the Gun Control Act's ("GCA") prohibition against the receipt or possession of firearms in or affecting interstate commerce by certain persons, such as convicted felons. 18 U.S.C. § 922(g). The GCA regulates the conduct of transferors as well as transferees. It proscribes transfers to persons known to be covered by one of these prohibitions. 18 U.S.C. § 922(d). In addition, it prohibits federally licensed firearms dealers from transferring firearms to anyone who is younger than eighteen, who does not reside in the dealer's state, or who is prohibited by state or local law from purchasing or possessing a firearm. 18 U.S.C. §§ 922(b)(1)-(3).

[2] A variant on this option, discussed infra at note 11, would simply require a longer waiting period in noncomplying jurisdictions.

Constitutional Limits on Congress's Power to Induce State Action in the Service of Federally Defined Objectives

The CLEOs who have challenged the Brady Act's interim background check provisions seek to extend the anti-commandeering principle articulated in New York v. United States to prohibit federal directives requiring ministerial acts by state and local officials. New York considered a Tenth Amendment challenge to various provisions of the Low Level Radioactive Waste Policy Act ("LLRWPA"), 42 U.S.C. §§ 2021b-2021j, which calls upon states to provide for the disposal of low-level radioactive wastes generated within their borders. New York and two of its counties challenged Congress's effort to secure state cooperation through three different mechanisms: (1) provisions requiring states that failed to provide for disposal of waste generated within their borders by a date certain to take title to that waste; (2) conditions placed on federal payments to the states; and (3) commerce power legislation detrimental to the residents of noncomplying states.

Of these inducements for state action, New York invalidated only the "take-title" provision. That provision was found to command states to follow one of two courses. A state could either take action by 1996 to provide for the disposal of low-level radioactive waste generated within its borders, or take title to that waste at that time. See 505 U.S. at 153-54. The first alternative, the Court found, represented a "command [to] state government to enact state regulation," which violated the constitutional rule that Congress itself must "legislate" where there is a sufficiently powerful federal interest and may not "conscript" states to legislate for it. Id. at 178. The second alternative -- taking title to the waste -- was equally flawed. That alternative too, as the Court appeared to recognize, would ultimately require the state to devise and implement a regulatory solution to a federally identified problem. See id. at 176. New York invalidated the take-title provision on grounds that both choices "'commandeer[ed] the legislative processes of the states by directly compelling them to enact and enforce a federal regulatory program.'" Id. at 176 (quoting Hodel v. Virginia Surface Mining & Reclamation Ass'n, 452 U.S. 264, 288 (1981)).

At the same time, New York upheld, subject to certain limitations, spending power legislation establishing conditions that states must meet to receive federal funding. The Court reviewed its past analyses of conditional spending power legislation and identified four relevant limitations: (1) the grant program itself must serve the general welfare; and conditions on states that accept the grants must be (2) "unambiguous," (3) "reasonably related to the purpose of the expenditure," and (4) compliant with "independent constitutional prohibition[s]." Id. at 171-72.[3] In addition, although the Supreme Court mentioned the issue only briefly in New York, its preceding spending power decision, South Dakota v. Dole, 483 U.S. 203 (1987), suggested a separate prohibition on unduly coercive grant conditions. There, the Court observed that conditional federal expenditures "might be so coercive as to pass the point at which 'pressure

[3] A violation of an independent constitutional prohibition, clearly absent in any of the proposals at issue here, would exist, for example, if "a grant of federal funds [were] conditioned on invidiously discriminatory state action or the infliction of cruel and unusual punishment." South Dakota v. Dole, 483 U.S. 203, 210-11 (1987).

turns into compulsion,'" 483 U.S. at 211 (quoting Steward Machine Co. v. Davis, 301 U.S. 548, 590 (1937)). Since the other criteria are easily satisfied, we focus here on New York's requirement that grant conditions be reasonably related to the purposes of affected grant programs and on Dole's suggestion that conditions on federal grants could, in extreme circumstances, exert such intense pressure on states as to amount to unconstitutional compulsion.

The reasonable relationship test, as elaborated in New York, requires that conditions on federal grants to the states "bear some relationship to the purpose of the federal spending." Id. at 167 (emphasis added); see id. at 172 (upholding specific funding condition that was found to be "reasonably related to the purposes of the expenditure"). This formulation, which appears to accord Congress broad leeway in establishing appropriate conditions on federal grants to the states, comports with a long line of Supreme Court decisions that have upheld such conditions without identifying any direct relationship between the purposes of those conditions and the purposes of the funding programs.[4] Current jurisprudence, in short, requires only that the limitation be "germane[]" to the grant. See Dole, 483 U.S. at 208 & n.3.

As for the question of coercion, Dole acknowledged the difficulty of any such constitutional standard:

> [T]o hold that motive or temptation is equivalent to coercion is to plunge the law in endless difficulties. The outcome of such a doctrine is the acceptance of a philosophical determinism by which choice becomes impossible.

Dole, 483 U.S. at 211 (quoting Steward Machine Co., 301 U.S. at 589-90). Neither Dole nor any subsequent Supreme Court decision has attempted to confront this difficulty or articulate a clear constitutional limit on permissible economic coercion.

[4] See, e.g., South Dakota v. Dole, 483 U.S. at 208-209 & n.3 (upholding requirement that states establish twenty-one as the minimum drinking age in order to receive their full allocation of federal highway funds); Fullilove v. Klutznick, 448 U.S. 448, 474-75, 478-80 (1980) (upholding minority set-aside requirements as conditions on federal public works grants); Lau v. Nichols, 414 U.S. 563, 566-69 (1974) (upholding conditions imposed under the Civil Rights Act of 1964 on states that accept federal education funds); Oklahoma v. United States Civil Service Comm'n, 330 U.S. 127, 143-44 (1947) (upholding Hatch Act requirement that states restrict the political activities of officials administering federal grants); see also Ivanhoe Irrigation Dist. v. McCracken, 357 U.S. 275, 295 (1958) ("the Federal Government may establish and impose reasonable conditions relevant to federal interest in [a federally financed irrigation] project and to the over-all objectives thereof"); Oklahoma v. Schweiker, 655 F.2d 401, 406-07 (D.C. Cir. 1981) (restrictions on federal grants have never been subject to a "rigid nexus" test requiring that those conditions be "precisely related to the purpose of the federal funds whose receipt is conditioned") (discussing cases).

Justice O'Connor, dissenting in Dole, referred to a "direct relationship" requirement. See id. at 216-17. But this formulation received no mention in Justice O'Connor's subsequent opinion for the Court in New York. Moreover, even Justice O'Connor's dissent in Dole appeared to accept that restrictions on "how federal monies [are] to be expended" need not be rooted in the specific purposes of affected funding programs. Id. at 217 (discussing Oklahoma v. United States Civil Service Commission's approval of Hatch Act restrictions on political activities of state highway officials).

We are unaware of any case in which a federal court has invoked the coercion limit on the spending power to invalidate a condition that Congress has placed on federal grants to the states. In Nevada v. Skinner, 884 F.2d 445 (9th Cir. 1989), cert. denied, 493 U.S. 1070 (1990), the Ninth Circuit reviewed Dole and other Supreme Court cases and questioned the existence of any definable "coercion" test for conditions on federal grants. The court questioned the appropriateness of judicial inquiry into the intensity of the temptation that federal grants present to state officials, observing that "[t]he difficulty if not the impropriety of making judicial judgments regarding a state's financial capabilities renders the coercion theory highly suspect as a method for resolving disputes between federal and state governments." 884 F.2d at 448. Other courts have expressed similar skepticism concerning the notion that conditions on federal grants to the states could be struck down as unconstitutionally coercive.[5]

Six judges of the Fourth Circuit, however, recently signalled their inclination to invalidate one particular piece of conditional spending power legislation on coercion grounds. See Virginia Dep't of Educ. v. Riley, 106 F.3d 559, 569-72 (4th Cir. Feb. 5, 1997) (en banc) (Luttig, J., speaking for six of thirteen judges) (dictum). There, Virginia challenged a Department of Education ruling that the state, in order to receive federal grants for special education, was required to provide educational services to all disabled students, including students who had been expelled from public schools for reasons unrelated to their disabilities. The Department's ruling was overturned on the grounds that this funding condition was not clearly expressed in the underlying statute. Six judges, however, expressed the view that a "Tenth Amendment claim of the highest order" would be presented if Congress actually had authorized the Department of Education to withhold the state's entire grant ($60 million per year) for failure to provide educational services to 126 expelled students. Apart from this minority dictum, however, current case law provides no guidance as to the point at which permissible financial pressure becomes impermissible compulsion.

In addition to federal legislation commanding states to regulate or encouraging state action through conditions on federal grants, New York also considered legislation relying on the conditional exercise of the commerce power to encourage state action in the service of federal goals. With respect to the latter, the Court stated:

> Where federal regulation of private activity is within the scope of the Commerce

[5] See, e.g., Schweiker, 655 F.2d at 413-14 (courts "not suited" to determining whether states are faced with "an offer they cannot refuse or merely a hard choice"); South Dakota v. Adams, 506 F. Supp. 50, 57 (D. S.D. 1980) ("There is a vast difference between requiring a state to adopt certain regulations and denying funding to a state that refuses to adopt them."), aff'd sub nom. South Dakota v. Goldschmidt, 635 F.2d 698 (8th Cir. 1980), cert. denied sub nom. South Dakota v. Lewis, 451 U.S. 984 (1981); see also Virginia v. Browner, 80 F.3d 869, 881-82 (4th Cir. 1996) (states not coerced by Clean Air Act provisions that restrict permissible use of federal highway funds in states that decline to establish permitting programs for air emissions), cert. denied, 117 U.S. 764 (1997). But cf. United States v. Butler, 297 U.S. 1, 74-78 (1936) (holding that Congress, which under then-prevailing Commerce Clause doctrine lacked power to limit the production of agricultural commodities by direct regulation, also lacked authority to induce farmers to reduce production through financial incentives implemented under the taxing and spending powers).

> Clause, we have recognized the ability of Congress to offer States the choice of regulating that activity according to federal standards or having state law preempted by federal regulation.

505 U.S. at 173-74 (citing Hodel, 452 U.S. at 288, and FERC v. Mississippi, 456 U.S. 742, 764-65 (1982)).[6] It is true that New York suggested, without deciding, that Congress's power to offer such choices to the states might violate the Constitution if the threat of federal regulation resulted in pressure on states that was tantamount to "outright coercion." See id. at 166. Nonetheless, in practice the Supreme Court has upheld, both in New York and in FERC, provisions that appear to have established strong inducements for states to take actions that Congress could not have compelled directly.

New York upheld an incentive under which a state that declines to "regulate the disposal of radioactive waste in accordance with federal standards by attaining local or regional self-sufficiency [in waste disposal capacity]" must accept that its "residents who produce radioactive waste will be subject to federal regulation authorizing sited States and regions to deny access to their disposal sites." 505 U.S. at 174; see id. at 153. The Court approved this "conditional exercise of Congress' commerce power" as a constitutionally permissible means of encouraging states to assume responsibility for waste generated within their borders, notwithstanding that lost access to licensed disposal sites would undoubtedly cause great hardship to a wide range of radioactive waste generators including nuclear power plants and hospitals. See id. at 174, 176.[7] So, too, in FERC v. Mississippi, the Court rejected a Tenth Amendment challenge to provisions of an act directing state regulatory commissions to consider adopting federally prescribed rate structures and regulatory standards. The Court found that these provisions, properly viewed, merely imposed conditions on continued state operation in a field that Congress had the power to preempt. In other words, since states were free to withdraw from regulating utilities altogether (and despite the high cost of dismantling longstanding state programs to regulate natural monopoly markets for utility services), the provision was found not to infringe upon constitutionally protected attributes of state sovereignty. See id. at 764-66.[8]

[6] See also Browner, 80 F.3d at 882 (Congress may constitutionally require states to participate in the Clean Air Act's preferred, federal-state scheme for controlling air emissions if they want the benefit of federal forbearance from federally imposed reductions).

[7] Indeed, it was the "crisis" brought on by earlier threats of state-ordered access restrictions that prompted Congress to enact the LLRWPA. See New York, 505 U.S. at 190 (White, J., dissenting in part).

[8] The FERC majority specifically rejected the dissent's objection that Congress's power to place conditions on the exercise of Commerce Clause powers "compels state agencies either to function as bureaucratic puppets of the Federal Government or to abandon regulation of an entire field traditionally reserved to state authority." Id. at 783 (O'Connor, J., dissenting in part). Congress's power to offer this choice to the states in the majority's view, was fully supported by its established authority to "condition the validity of state enactments in a preemptible area on their conformity with federal law," even where such conditioning could be characterized as an "attempt to 'coerce' the states into enacting nationally desirable legislation." Id. at 767-68 n. 30. See also Hodel, 452 U.S. at 288-89 (rejecting a claim that statute impermissibly "coerce[d] the states" by threatening "federal usurpation" of the states' traditional regulatory role if they declined to enforce certain minimum federal standards); Ponca Tribe of Oklahoma

As these cases make clear, conditional exercises of the commerce power, relied upon by Congress as incentives for desired state action, need not be burden-free or innocuous to pass constitutional muster.

Consideration of Specific Legislative Responses

You have asked us to assess the constitutionality of three potential legislative responses to an adverse decision in Printz. Our preliminary views, informed by the principles summarized above, follow.

1. Conditions on the Receipt of Federal Funds

We understand this potential response to require new legislation that would withhold future federal grants from noncomplying jurisdictions. Under current law, we believe that such legislation could be drafted in a constitutional manner, although it would present certain litigation risks that should be weighed in any evaluation of possible responses to an adverse decision in Printz.

Properly drafted legislation to cut federal grants to jurisdictions whose CLEOs decline to perform background checks would not raise significant difficulties under the four limitations on conditional spending power legislation that New York expressly addresses. The contemplated conditions would unquestionably be in pursuit of the general welfare and could easily be drafted to provide clear notice to the participating jurisdictions. Moreover, as long as the affected federal grant programs lent support to state and local violent crime prevention and law enforcement, the conditions would also seem to be sufficiently related to the purpose of the grants. Congress could reasonably conclude that inadequate enforcement of GCA restrictions on gun ownership[9] reduces the effectiveness of crime control efforts in general and decide, on this basis, to reduce federal funding of crime control programs in states and localities that decline to take reasonable efforts to enforce the GCA.[10] Finally, the contemplated condition would not violate any "independent constitutional prohibition[s]," New York, 505 U.S. at 171-72, since background checks on prospective handgun purchasers, performed by state and local CLEOs, do not, in themselves, violate the Constitution.

v. Oklahoma, 37 F.3d 1422, 1433-34 (10th Cir. 1994) (relying on FERC as authority for rejecting Tenth Amendment challenge to Congress's instructions to the states in the Indian Gaming Regulatory Act), overruled on other grounds, Seminole Tribe of Florida v. Florida, 116 S. Ct. 1114 (1996).

[9] See supra note 1.

[10] Even where federal funds are earmarked for assisting state and local law enforcement efforts directed at preventing trade in illegal drugs without mentioning violent crime in particular, a reduction in funds for failure to enforce the GCA restrictions would seem reasonable since drugs and guns have been held to be intimately associated. See, e.g., United States v. Clark, 24 F.3d 299, 304 (D.C. Cir. 1994) (investigative stop not converted into arrest because it was reasonable to require drug suspect to exit car at gunpoint and kneel on ground in light of fact that "it was not uncommon for guns and drugs to be associated").

Dole's suggestion that conditional spending power legislation could "pass the point at which 'pressure turns into compulsion,'" 483 U.S. at 211 (quoting Steward Machine, 301 U.S. at 590), is more problematic. The effort to obtain state and local cooperation in a national background-check program through the imposition of conditions on federal grants might be attacked as unconstitutionally coercive. Dole rejected a similar challenge to a requerement that states adopt a minimum drinking age of at least twenty-one in order to receive their full allocation of federal highway funds. 483 U.S. at 208-209 & n.3. Indeed, the Court has never struck down a conditional exercise of Congress's Spending Clause power on the ground that it amounted to coercion, and some lower courts have questioned whether "a sovereign state which is always free to increase its tax revenues [can] ever be coerced by the withholding of federal funds." Skinner, 884 F.2d at 448; accord California v. United States, 104 F.3d 1086, 1092 (9th Cir. 1997). However, as noted above, six judges of the Fourth Circuit have recently expressed the view that such unconstitutional "coercion" can occur in the funding context and have suggested that the relationship between the severity of the funding reduction and the magnitude of the federal interest involved is critical to the coercion inquiry. See Riley, 106 F.3d at 569-72 (Luttig, J., speaking for six of thirteen judges) (dictum).

Although we believe, in light of this authority, that legislation conditioning federal anti-crime grants on the performance of Brady background checks could be drafted in a constitutionally acceptable manner, we caution that such legislation, enacted in the wake of an adverse decision by the Supreme Court in Printz, might present an attractive target for the first invocation of the anti-compulsion doctrine to strike down a federal law. To provide an effective replacement for the challenged provisions, conditional spending power legislation would need to make the financial stakes for states and localities high enough to persuade most, if not all, to direct their CLEOs to perform background checks. While the boundary between encouragement and coercion is indistinct, litigation risks undoubtedly increase with the strength of the financial threat. The timing of the contemplated legislation would heighten the risk. Congress would quite clearly be attempting to accomplish indirectly what the Court would have just held that it could not accomplish directly. Opponents of the Brady Act might well be able to find some judges who would be prepared to rule that an effective spending power fix was simply too coercive.

2. Federal Background Checks in Noncomplying Jurisdictions

We understand this proposal as providing for federal background checks in jurisdictions where the relevant CLEO declines to perform that function. Where the CLEO conducts the checks, potential purchasers would have to wait no more than five days for such clearance. Where the federal government must step in, we understand that logistical problems might require a longer waiting period. We believe that this approach would be constitutional under current law.

"Where federal regulation of private activity is within the scope of the Commerce Clause," the Supreme Court has said, "Congress [may] . . . offer States the choice of regulating that activity according to federal standards or having state law preempted by federal regulation."

New York, 505 U.S. at 173-74; see also Hodel, 452 U.S. at 288; FERC, 456 U.S. at 764-65. Legislation calling for substantively equivalent, though somewhat slower, federal background checks in noncooperating jurisdictions would place the burden of state and local noncooperation on private individuals rather than on state and local governments. It would also allow "state residents [who] would prefer their government to devote its attention and resources to problems other than those deemed important by Congress, [to] . . . choose to have the Federal Government rather than the State bear the expense of a federally mandated regulatory program, and [to] . . . continue to supplement that program to the extent state law is not preempted." New York, 505 U.S. at 168. The failure of any CLEO to perform checks would result only in longer waiting periods for firearms dealers and purchasers because the federal government is required to act. If the state is unwilling to incur the expense of conducting checks, the federal government would stand ready to provide a similar service.

Even if the conditional exercise of the Commerce Clause power is subject to a "coercion" limit -- a possibility suggested by New York (see id. at 166) -- we believe that, under current law, the federal government can clearly impose genuine federal regulation in jurisdictions that fail to perform background checks. A risk of invalidation would arise only if contingent federal controls, to be imposed in lieu of acceptable state efforts, were seen to function not as alternative regulations but as threats against regulated parties, designed to force states into assuming the responsibilities that Congress has assigned them. Therefore, a system resulting in substantially longer waiting periods in jurisdictions where state officers have declined to perform checks could face claims of coercion if courts became persuaded that the longer waiting period served solely or primarily to induce state compliance.[11] Absent unjustified delay, however, a requirement that federal background checks precede handgun sales in jurisdictions that decline to conduct such checks themselves would be constitutional under current law and unlikely to face any serious federalism-based constitutional challenge.

3. Handgun Sales Allowed Only Where a Relevant CLEO Participates

We understand that this potential response would prohibit the sale of handguns in jurisdictions where all relevant CLEO refuse to conduct background checks. This proposal would allow sales as long as a backgrsound check was conducted by a CLEO whose jurisdiction included either the purchaser's residence or the seller's place of business. We believe this proposal would be constitutional under current law. It would also, however, present litigation risks similar to those that arise in the conditional spending context.

[11] Such a concern could thus be heightened if, in jurisdictions where the relevant CLEOs decline to perform background checks, the federal government did not perform background checks itself, but instead simply imposed a very long waiting period. Such a waiting period in noncomplying jurisdictions might be justified as serving a "cooling off" function, but might be characterized by gun control opponents as a means of coercing state compliance with federal goals. Although we believe that a constitutional "cooling-off" period could be crafted under current law, this proposal would raise some of the litigation risks discussed in connection with the conditional ban on handgun sales, discussed below.

Analyzed under New York, this proposal would be constitutional. If Congress can constitutionally ban handgun sales altogether, it is presumptively empowered to impose such a ban selectively where states and localities refrain from performing background checks. Like the second incentive for state action that the Supreme Court upheld in New York, which provided that a state decision not to participate in the federal scheme would result in a federally imposed burden on state residents instead of upon the state itself, a federal ban on handgun sales in noncomplying jurisdictions would allow states to choose between regulating in accordance with federal standards or stepping aside to allow alternative federal regulation. The burden of a decision not to cooperate would fall on handgun sellers and purchasers, not on the state itself.[12] Although a court, as noted above, might conclude that certain extraordinary conditional Commerce Clause legislation has the effect of unconstitutionally coercing states to act in a certain manner,[13] we believe that this proposal, if properly crafted, would be constitutional under current law. Certainly where federal controls are a reasonable effort to ensure that, in the face of state officers' decisions not to perform background checks, prohibited persons are prevented from purchasing handguns, and not an effort simply to punish citizens of noncooperating state jurisdictions as a means of effecting state compliance, such legislation would be constitutional.

Nonetheless, concerns regarding the potential for litigation exist, as they do with the conditional spending proposal. This legislative solution could also present an attractive opportunity for those who wish to extend federalism-based limits on Congress's powers under the Commerce Clause, including limits based on coercion.[14] Although we would take issue with any such characterization, challengers would undoubtedly allege that any contingent ban on the sale of handguns functioned less as federal regulation in lieu of effective state action than

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[12] The burden on residents of noncomplying jurisdictions under the proposal we are considering here differs from the burden created by the conditional commerce power provisions that the Supreme Court upheld in New York. Under the scheme that New York upheld, residents of states that failed to cooperate with the federal program only lost guaranteed access to out-of-state waste facilities. They were free to negotiate access or to attempt to develop their own, in-state capacity. The contemplated background check provisions, in contrast, would result in a legal ban on handgun purchases where the relevant CLEOs declined to perform background checks. For example, a firearms dealer in a jurisdiction where the CLEO declined to perform background checks would be prohibited from selling to local residents. That dealer's only lawful customers would come from other in-state jurisdictions where the CLEO was willing to perform checks on its residents. Conversely, the purchaser who resides in a noncomplying jurisdiction would be required to travel to another in-state jurisdiction where the CLEO was willing to perform a background check on non-local purchasers. Thus, while many desired transactions might be proscribed, a dealer would be completely prohibited from selling, and a customer would be completely prohibited from purchasing, handguns only in the unlikely event that no CLEO in the state was willing to perform the required background checks. See 18 U.S.C. § 922(b)(3) (prohibition on out-of-state sales).

[13] See New York, 505 U.S. at 166 (Congress's power under both the Spending and Commerce Clauses permits providing incentives to states that are "short of outright coercion").

[14] One might reasonably argue, however, that a provision that does not operate upon the state as a sovereign, but rather upon individuals who may then bring pressure to bear upon the state, could only in the most extraordinary circumstances be deemed unduly coercive.

as a bare attempt to coerce states into performing a federally assigned role.

THE WHITE HOUSE
WASHINGTON

Chuck -

This memo reflects what we were able to generate from OLC and OPD immediately - in case of a Monday decision. OLC is working on a more detailed analysis

Bill + Karen: Good memo
– I'd like to send this
to Rahm – note one
edit on p. 4

CR

PRELIMINARY DRAFT

MEMORANDUM FOR CHARLES F. C. RUFF

FROM: BILL MARSHALL
KAREN A. POPP

DATE: April 3, 1997

REGARDING: Brady Bill Options

The following presents an overview of the various legislative options available to the Administration should the Supreme Court strike down the local law enforcement background check requirements of the Brady Law. As you will note, we have identified both the policy issues and the legal issues that are present in each alternative. The legal analysis can only be preliminary, however, because the constitutionality of any particular legislative proposal will depend on how the Supreme Court crafts its Brady Law decision. For this reason, the Justice Department has strenuously requested that the Administration not make any decision regarding possible legislative responses until there has been time to analyze the Supreme Court's decision.

I. OBJECTIVES

In assessing any possible response to an adverse judicial decision we should consider three separate, and potentially conflicting, objectives.

A. Policy -- advance the substantive policies of the Brady Bill of providing background checks for the purchasers of all handguns.

B. Political -- provide a clear answer to those claiming that the advancement of the policies advanced by the Brady Bill have been derailed.

C. Legal -- propose a legislative solution that is constitutionally sound and minimizes the opportunity for opponents to advance new and potentially damaging legal theories.

II. LEGISLATIVE OPTIONS

A. Quid Pro Quo Funding

This option would condition the receipt of federal monies for crime programs upon state and local communities agreeing to abide by the background check requirements.

1. Policy concerns. This option would provoke resistance in the law enforcement community. There are also some real world questions as to whether there are any programs to which compliance with the Brady Law could be realistically tied. Finally, there may also be a practical problem in that, for a variety of reasons including the normal timings of grant allocation, there may not be any grant monies to use as leverage for the relatively short period between the date of a Supreme Court opinion and late 1998 when the federal government will assume background check responsibilities.

2. Legal issues. Congress is generally free, under the Spending Clause, to use conditions on federal grants to states as a means of encouraging state action in the service of federally defined goals. Recent decisions, however, have identified two potential limitations on conditional spending power legislation. First, the purposes of the grant condition must be related to the purposes of the grant program. The more attenuated the connection between the purposes of Brady Law background checks and the conditional federal grants, the greater the risk of invalidation. Second, some judges have indicated a willingness to hold that legislation which withdraws funding, can under some circumstances, cross the line from encouragement to coercion and thereby violate constitutional principles of federalism. Although under current law a properly drafted spending program should survive constitutional scrutiny, such a law might also be used as a vehicle for opponents to test this 'coercion' principle.

B. Federal Preemptive Regulation in Noncomplying Jurisdictions

This option would impose on non-complying localities regulations which could work as alternatives to background checks in furthering Brady Law policies. Alternatively, imposition of these requirements might encourage non-complying localities to reconsider their options and voluntarily comply with the Brady Law itself.

Examples in this category include mandating a relatively long waiting period for gun purchasers which can only be shortened by completion of a background check. A second possibility is a requirement that guns may not be purchased at all in localities that do not voluntarily adopt background check requirements. A third option is to send all background checks for non-complying localities to federal agencies for whatever reasonable period it might take those federal agencies to complete those checks.

1. Policy concerns. The imposition of restrictions on the purchase of guns in non-complying communities could promote voluntary compliance with Brady; and if a locality refused to comply, the new strictures could be an effective tool in checking the sale of handguns to persons with problematic backgrounds. On the other hand, the imposition of harsh strictures

would impose penalties on those who would be otherwise eligible to purchase guns under Brady. In addition, providing disincentives for persons to buy guns in non-complying localities places the brunt of enforcement on arguably innocent third parties --gun dealers. Affecting third parties in this manner could provoke an unfavorable backlash.

2. Legal concerns. In areas where Congress has authority under the Commerce Clause to regulate private activity directly, it also has the authority to offer States a choice between regulating in conformity with federal standards or ceding the field to preemptive federal regulation. However, as with the spending power, noted above, the courts may rule that conditional Commerce Clause legislation might also be so coercive as to violate federalism concerns. Distinguishing permissible encouragement from unlawful coercion in this context is not clear. Although the federal government may impose genuine federal regulation in jurisdictions that fail to perform background checks, regulations designed to force States into assuming the responsibilities that Congress has assigned to them may be invalidated. Thus, mandating longer waiting periods in jurisdictions where local officers refuse to conduct background checks, would be suspectable to coercion claims if the delay were not justified.

C. Federal Operation of the System

This option would turn over the background check operation to the FBI or ATF immediately, or, if that is not feasible, would seek to move up the date that the FBI would assume operations.

1. Policy concerns. DOJ is unable to definitively determine when the FBI would be in a position to take over the background check operation. The time when such an appraisal can be made is also indeterminate. In addition, the cost of placing the responsibility for all background checks in the hands of the FBI at this time may be significant. DOJ is attempting to determine whether ATF may be currently in a position to assume the background check responsibilities.

2. Legal issues. This approach would rely on Congress' well established power to regulate gun sales in or affecting interstate commerce. It would not raise any significant constitutional issues.

D. Requiring Background Checks as a Precondition to Handgun Sales

This option would prohibit federally licensed firearms dealers from selling handguns unless the chief law enforcement official has certified that he/she will conduct a background check.

1. Policy concerns. This option places the brunt of enforcement on arguably innocent third parties -- gun dealers and persons otherwise eligible to purchase guns under Brady.

2. Legal issues. Congressional power to ban handgun sales altogether under the Commerce Clause presumptively includes the power to impose a ban selectively, where States and localities refrain from performing background checks. Absent coercion, as discussed above,

a properly crafted provision should pass constitutional muster. In other words, as long as the federal controls are to ensure that prohibited persons are prevented from purchasing handguns, and not to coerce local authorities into conducting the background checks, the legislation would be constitutional.

E. No Legislative Response

1. Policy concerns. While there will undoubtedly be pressure to pursue a legislative response if there is an adverse Supreme Court decision, there are also policy reasons that ~~mitigate~~ militate against legislative action. These concerns deserve significant considerations.

a. First, an adverse decision raises essentially only timing concerns. The FBI is scheduled to take over the background check operation in late 1998.

b. Second, the Court's decision would apply only to 24 states (alternative systems that meet federal standards are already in place in the other jurisdictions) and even in those 24 states, many law enforcement officers have announced or are expected to announce that they will continue to voluntarily comply with Brady law requirements.

c. Third, a new legislative proposal is unlikely to pass.

d. Fourth, if a bill does pass it may play into the litigation strategy of the anti-gun control forces who would be free to pick and choose among federal court judges in an effort to obtain a favorable decision and a favorable precedent.

2. Legal issues. Not applicable.

III. TIMING OF A LEGISLATIVE RESPONSE

There has been some suggestion that the Administration propose a legislative response to an adverse Supreme Court decision on the day of that decision. As overriding concern, however, is that a cohesive and meaningful response must necessarily require serious study of the judicial opinion. Moreover, even if the response was well-thought out and adequately anticipated the Court's argument, an immediate cry for legislative intervention would likely be perceived as unduly reflexive and politically driven.

IV. ALTERNATIVES TO A LEGISLATIVE RESPONSE

In lieu of, or in addition to, the Administration could respond to an adverse Supreme Court decision by a communications event bringing together law enforcement officials who would agree to voluntarily enforce the Brady Law's provisions. The President could also issue a statement after the decision was rendered.