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When Gun Control Meets the Constitution

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WHEN GUN CONTROL MEETS THE CONSTITUTION

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Sheriff Richard Mack of Graham County, Arizona disapproves of gun control laws, and especially does not like the Brady Handgun Violence Prevention Act ("Brady Act").[1] Nor does he like the federal government telling him how to run his sheriff's office. Graham County, located in the lower southeast corner of the state, approximately 100 miles east of Tucson, encompasses over 4,500 square miles and is populated by about 28,000 residents. With only twelve sworn officers—himself included—to patrol this county's vast expanse of American desert and protect its inhabitants, Sheriff Mack believes the job is plenty big enough to keep him and his deputies busy without additional duties being thrust upon him from Washington.

So, earlier this year when Sheriff Mack received notice from the Bureau of Alcohol, Tobacco and Firearms ("BATF") directing him, under the newly-enacted Brady Act, to conduct background checks on county residents wanting to purchase handguns,[2] he sued to have the law declared unconstitutional.[3] More importantly, he won,[4] and in so doing, never used the words "Second Amendment."

This Article examines the relationship between Congress and the states in the context of national gun control. It traces the history of Second Amendment challenges and examines the flawed policy behind the enactment of the Brady Act. Finally, the Article analyzes how other constitutional protections, most notably the

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1 18 U.S.C. § 922(s) (1994).

2 *Id.* (requiring chief law enforcement officer to make reasonable efforts to ascertain, within five business days, whether receipt or possession of firearm by applicant violates Brady Act).

3 Mack v. United States, 856 F. Supp. 1372, 1374 (D. Ariz. 1994) (seeking injunctive and declaratory relief from 18 U.S.C. § 922(s) (1994)).

4 *Mack*, 856 F. Supp. at 1384 (granting in part, request for injunctive relief and declaring 18 U.S.C. § 922(s) (1994) unconstitutional).

Tenth Amendment, can be successfully utilized to check the rapid expanse of the federal government in this hotly-debated area.

I. FAULTY LEGISLATION

With the passage of the Brady Act[5]—about seven years after first being introduced in Congress—gun control advocates claimed a major victory in the war on crime and guns. Supporters, however, quickly recharacterized the measure as only a first step in stemming gun violence—acknowledging the many shortcomings of the Brady Act and attempting to garner support for even more restrictive measures.[6] Based upon what is known about the nature of violent crime, the Brady Act has a rather dismal promise for success. The Brady Act also calls into question whether Congress has exceeded its authority in requiring the states to carry out the terms of the legislation. Given what is known about crime and the criminal acquisition of firearms, readers should ask the same questions Sheriff Mack did: Will the Brady Act effectively stem criminal access to firearms? And, more importantly, is it good public policy and grounded in the Constitution? The answer to both questions is a resounding *no*.

The Brady Act was named after former White House press secretary James Brady who was critically injured in John Hinckley's 1981 assassination attempt on President Ronald Reagan. The legislation represents a watered-down attempt by Congress to impose a waiting period and background check on persons wishing to purchase handguns from federally licensed gun dealers in states that had not previously regulated the issue to Congress's satisfaction. The law does not, for example, lessen California's fifteen-day waiting period,[7] nor does it alter the instantaneous background checks used in Virginia[8] and Delaware.[9] Those states which lack

[5] 18 U.S.C. § 922(s) (1994).

[6] Brady Act II has already been introduced in the Senate by Senator Howard Metzenbaum, *see* S. 1878, 103d Cong., 2d Sess. (1994), and in the House of Representatives by Representative Charles Schumer, *see* H.R. 3932, 103d Cong., 2d Sess. (1994), as the Gun Violence Prevention Act of 1994.

[7] CAL. PENAL CODE § 12071(B)(3)(A) (West 1992) (providing that prior to January 1, 1996, no firearm shall be delivered within 15 days of application for purchase).

[8] VA. CODE ANN. § 18.2-308.2:2 (Michie Supp. 1994) (requiring prospective firearm purchaser to consent to have dealers obtain criminal history information prior to sale).

[9] DEL. CODE ANN. tit. 11, § 1448A (Supp. 1992) (seller shall not deliver firearm until obtaining completed consent form and performing background check).

an instant check or waiting period of at least five days[10] are forced to implement a mandatory five-day waiting period for the purpose of allowing state law enforcement agencies to conduct a criminal background check on would-be handgun purchasers from federally licensed gun dealers. In so doing, the Brady Act not only raises significant constitutional questions regarding infringements on the right to keep and bear arms, but also the collateral issues of states' rights, unfunded mandates, and impermissible federalism.

A. The Brady Act is Simply Not Workable

Like other gun control laws, the Brady Act was sold to the American public as a "common sense" crime-fighting measure designed in part to keep handguns out of the wrong hands. Commendable? Absolutely. Workable? Absolutely not.

Research confirms what common sense has long told us: Criminals do not, to any appreciable degree, buy handguns from federally licensed firearms dealers. Thus, almost by definition, criminals are outside the scope and reach of the Brady Act's provisions, since it is highly unlikely that they would seek to procure their guns from legitimate dealers in the first place. As espoused by Professors James D. Wright and Peter H. Rossi in their book *Armed and Considered Dangerous*:[11] "More predatory criminals, acquiring a handgun specifically for use in crime, heavily exploited informal, off-the-record means and sources and rarely went through customary retail channels."[12] Based on prison surveys of over 2,000 convicted felons, Wright and Rossi found that roughly sixteen percent of all firearms owned by felons were obtained from legitimate sources.[13] Furthermore, only about seven percent of handguns owned by violent felons were obtained through legitimate channels.[14] Thus, felons generally avoided retail outlets, and the more predatory felons were especially likely to do so.[15] Since the vast majority of felons generally, and violent felons in particular, do not acquire handguns from licensed deal-

[10] *See* 18 PA. CONS. STAT. ANN. § 6111 (1984) (Pennsylvania's 48-hour waiting period will be increased to five days).

[11] JAMES D. WRIGHT & PETER H. ROSSI, ARMED AND CONSIDERED DANGEROUS: A SURVEY OF FELONS AND THEIR FIREARMS (1986).

[12] *Id.* at 187.

[13] *Id.* at 185.

[14] *Id.* at 186.

[15] *Id.*

ers, the Brady Act will only minimally curtail transfers to this class of disqualified persons *even if it otherwise works exactly as it was designed to.*

Disqualifying only persons with *existing records* of felony convictions or involuntary mental commitments from purchasing guns is yet another limitation on the effectiveness of the Brady Act.[16] Many states do not have complete, accurate, up-to-date computerized records which track dispositions of criminal charges. Such inadequacy not only leads to wrongful denials for persons charged and later acquitted of criminal conduct, but also leads to failures in identifying those persons who have been convicted of a felony or involuntarily committed—who are thus barred by federal law from purchasing or possessing firearms. Furthermore, the Brady Act does not hinder the acquisition of handguns by persons who engage in criminal activity but evade arrest or conviction. Nor can this law identify and alert authorities of those persons who may be mentally unstable, drug abusers, or others for whom complete criminal or mental information does not exist, or is not readily discoverable.[17]

B. Congress Exceeding Its Granted Authority

Is it proper for the federal government to require state law enforcement agencies to spend time and resources conducting background checks on overwhelmingly law-abiding citizens? Several reasons suggest that it is not. One can conclude from economic and criminal justice considerations alone that the policies behind the Brady Act are badly flawed. As Sheriff Mack testified, supplying the money, equipment, and manpower to conduct background checks drains resources from already overburdened law enforcement agencies—like the Graham County Sheriff's Office—many of which are already experiencing critical shortages due to the ever increasing crime rate coupled with fiscal constraints driven by state, county, and municipal budgetary cutbacks. Additionally, the officers needed to perform the background checks, and accompanying paperwork reduces the number of officers available for street duty—where the likelihood that serious criminal activity

[16] 18 U.S.C. § 922(s)(3)(B) (1994).

[17] *See* Gray v. San Francisco Gun Exch., 207 Cal. App. 3d 151, 153 (Ct. App. 1989) (mental patient circumvented 15-day waiting period and later committed murder).

will be detected or deterred is far greater. Finally, although perhaps more subtly, police and legislators are sending a message to criminals that "we would rather spend our time investigating law-abiding citizens than trying to catch real criminals like you."

C. *Other Problems With the Brady Act*

It can also be argued that free access to firearms should be promoted, not hampered, as a crime fighting tool. Florida State University Professor Gary Kleck explains that civilians lawfully use privately-owned firearms to defend themselves against criminal attack up to 2.4 million times per year, and such defensive uses significantly outnumber the criminal uses of firearms in America.[18] Therefore, from a utilitarian standpoint, gun laws such as the Brady Act which make it more cumbersome to lawfully acquire firearms, actually hinder citizens' ability to protect themselves from crime.

Finally, no law can help law enforcement agencies predict who will commit a crime. Recent history is replete with accounts of persons who legally purchased firearms after undergoing a lengthy background investigation, only to perpetrate some horrific act of violence at a future date. Among these are Patrick Purdy who murdered five children and wounded thirty in a schoolyard shooting in Stockton, California in 1989;[19] and Colin Ferguson, the convicted gunman who shot twenty-five passengers, killing six, on the Long Island Railroad outside New York City last December.[20] Both Purdy and Ferguson had purchased firearms in California, complying with the state's fifteen-day waiting period, and apparently passing the required background checks before obtaining the weapons ultimately used in the murders of eleven people and the wounding of many more.

[18] J. Neil Schulman, *Q and A—Guns, Crime, and Self-Defense*, ORANGE COUNTY REG., Sept. 19, 1993, at C3 (summarizing Dr. Kleck's findings in his "National Self-Defense Survey").

[19] *See* Nelson Kempsky et al., A Report to Attorney General John K. Van de Kamp on Patrick Edward Purdy and the Cleveland School Killings 2 (1989) (on file with author). Although Purdy purchased the rifle used in the shootings in Oregon, he carried with him—and committed suicide with—a handgun purchased in California only weeks before the January 17th shootings. *Id.* at 5-6.

[20] Christine Spolar & Jessica Crosby, *Driver's License Was Key to Suspect's Gun Purchase*, WASH. POST, Dec. 10, 1993, at A15 (Ferguson used temporary motel address which was never verified; state granted permission to sell to Ferguson since he had no criminal record).

California's stringent waiting period did not prevent these tragedies, nor could it have done so. At the time they purchased the firearms, both Purdy and Ferguson had felony-free records—although Purdy had several felony arrests that had been plea-bargained to misdemeanors by a revolving-door criminal justice system.

Even John Hinckley, Jr., whose deranged criminal act spawned the birth of the Brady Act, could not have been discovered during a background check. At the time he bought the handgun later used to shoot President Reagan, James Brady, and two law enforcement agents, Hinckley had no felony record; no record of involuntary commitment for mental disease or defect; nor was he a fugitive from justice or other person disqualified under the federal law from purchasing firearms.[21] Hinckley, however, had a prior federal felony arrest for attempting to board a passenger aircraft with three handguns in his possession—a charge that was also plea-bargained to a misdemeanor. Hinckley paid a $50 fine, $12.50 in court costs, and forfeited the firearms—only to walk away and resurface months later at the Washington Hilton Hotel on March 30, 1981, re-armed and obviously more careful as to how he transported his weapons.[22]

The Brady Act will not work as envisioned so long as prosecutors are empowered to plea-bargain felony offenses down to misdemeanors—provided every other part of the system works the way it is designed to. The chance that the Brady Act will succeed, and thus deny felons access to firearms, is further diminished by the likelihood of mistakes, clerical errors, faulty recordkeeping and retrieval, and a host of other maladies associated with governmental bureaucracies. Meanwhile, law-abiding persons become even more discouraged when the government's only answer to this dilemma is more calls for gun control, not less.

Even if the Brady Act could have prevented some of these so-called random acts of violence—which we have previously shown to be virtually impossible—is this type of law a legitimate legislative act of the federal government, or, as Sheriff Mack believes, has Congress gone too far in imposing its will on the states? The

[21] United States v. Hinkley, 672 F.2d 115, 119 (D.C. Cir. 1982) (affirming district court's suppression order).

[22] Opposition to Defendant's Motion for Bail and Trial Transcript at 1559, United States v. Hinckley, 525 F. Supp. 1342 (D.D.C. 1981) (No. 81-306).

question is not what power the federal government should have, but rather, what powers in fact have been given by the people?[23]

Gun control proponents are quick to point out that no federal court has invalidated a gun control law on Second Amendment grounds[24]—presumably as their justification or rationale for enacting even more restrictive measures in the future. Yet, even as this Article goes to print, several federal district courts have already struck down certain provisions of the Brady Act as being violative of the Tenth Amendment to the United States Constitution.[25] In a similar vein, the United States Court of Appeals for the Fifth Circuit struck down the Gun Free School Zones Act[26] for failing to allege a sufficient nexus to the Commerce Clause.[27] Therefore, simply because the Supreme Court has never squarely dealt with the Second Amendment issue does not render the Brady Act safe from constitutional challenge under a number of other legal theories.

II. THE HISTORY OF GUN CONTROL

In order to comprehend fully the constitutional implications triggered by the enactment of gun control laws in general, and the Brady Act in particular, a brief look back into history is required. The Second Amendment to the United States Constitution provides that: "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms shall not be infringed."[28]

For the approximate 150-year period from the founding of this country in 1789 until 1939, only four cases were decided by the

[23] *See* United States v. Butler, 297 U.S. 1, 63 (1936) (noting Congress only has power provided by Constitution).

[24] *But see* Robert Dowlut, *Federal and State Constitutional Guarantees to Arms*, 15 U. DAYTON L. REV. 59, 79 (1989) (observing that state courts have voided laws on Second Amendment grounds on 21 prior occasions).

[25] *See* Mack v. United States, 856 F. Supp. 1372, 1381 (D. Ariz. 1994) (mandating state officials to perform background checks exceeds congressional authority and violates Tenth Amendment); *see also* McGee v. United States, 863 F. Supp. 321, 327 (S.D. Miss. 1994) (holding it unconstitutional for Congress to direct and compel local sheriffs to carry out Brady provisions); Frank v. United States, 860 F. Supp. 1030, 1042 (D. Vt. 1994) (holding Federal Statutory Program requirement of Brady Act unconstitutional); Printz v. United States, 854 F. Supp. 1503, 1519 (D. Mont. 1994) (declaring background check provision unconstitutional).

[26] 18 U.S.C. § 922(q)(1)(A) (1994).

[27] United States v. Lopez, 2 F.3d 1342, 1367-68 (5th Cir. 1993), *cert. granted*, 114 S. Ct. 1536 (1994).

[28] U.S. CONST. amend. II.

United States Supreme Court interpreting the meaning of the Second Amendment.[29] Three of these cases, *Cruikshank*, *Presser*, and *Miller v. Texas*, while nominally decided on Second Amendment grounds, in truth, dealt with only peripheral issues related to firearms and did not squarely ascribe any significant meaning to the Second Amendment. A fifth case, *Dred Scott v. Sanford*,[30] while predating all federal Second Amendment jurisprudence, was nonetheless important in defining the parameters of the Second Amendment as a right of citizenship:

> More especially, it cannot be believed that the large slaveholding states regarded them as included in the word "citizens" or would have consented to a constitution which might compel them to receive them in that character from another state. For if they were so received, and entitled to the privileges and immunities of citizens . . . [i]t would give to citizens of the negro race, who were recognized as citizens in any one state of the Union, the right to enter every other state wherever they pleased, singly or in companies, without pass or passport . . . and it would give to them the full liberty of speech in public and in private, upon all subjects upon which its own citizens might speak; to hold public meetings upon political affairs, and to keep and carry arms wherever they went.[31]

The predominant reason no Second Amendment jurisprudence developed during this period was that the United States had few, if any, laws aimed at controlling the manufacture, possession, or sale of any type of firearms. The laws that did exist were generally state statutes designed to prevent weapons from reaching the hands of slaves,[32] or local ordinances aimed at controlling the behavior of drunken cowboys in frontier border towns.

[29] *See* United States v. Miller, 307 U.S. 174, 178 (1939) (declaring Second Amendment does not guarantee citizens right to bear shotgun having barrel of less than 18 inches); Miller v. Texas, 153 U.S. 535, 538 (1894) (ruling Texas statute prohibiting carrying of dangerous weapons not denial of Second Amendment rights); Presser v. Illinois, 116 U.S. 252, 264 (1886) (holding states cannot prohibit United States from maintaining public security in allowing citizens right to bear arms as reserved military); United States v. Cruikshank, 92 U.S. 542, 553 (1875) (stating only real effect of Second Amendment is to restrict powers of national government, leaving people to look for protection from local government). *See generally* DAVID T. HARDY, ORIGINS AND DEVELOPMENT OF THE SECOND AMENDMENT *passim* (1986) (discussing history of Second Amendment).

[30] 60 U.S. (19 How.) 393 (1856).

[31] *Id.* at 416-17.

[32] *See id.* at 420.

Most early judicial opinions concerning the right to keep and bear arms were state court decisions interpreting parallel provisions of state constitutions.[33] This remained largely the status quo until the passage of the National Firearms Act of 1934 ("NFA").[34] The NFA was the first major attempt by Congress to regulate any aspect of the firearms issue on a wholesale basis. The NFA was passed in response to the growing criminal misuse of fully automatic weapons by members of organized crime during the era of Prohibition.

In its approach to firearms control, the NFA was patterned after the previously enacted Harrison Narcotics Act,[35] which was based upon the taxing authority of the federal government.[36] The NFA applied only to machine guns, submachine guns, sawed-off rifles, sawed-off shotguns, gadget guns disguised to resemble some innocent device, gun silencers, and the like.[37] While all of the now-regulated commodities encompassed by the NFA remained perfectly legal for citizens to own—at least under federal law—a special tax was attached to each and every transaction involving the transfer of weapons within the purview of the NFA. Additionally, the NFA created, for the first time, a central registry of all weapons delineated by the NFA which was (and still is) maintained by the Department of the Treasury's BATF. According to Robert Kukla:

> The reason the [NFA] had been established under the taxing powers of the Federal Government was because the narcotics legislation, which had been set up along similar lines, had already been successfully court-tested as to its constitutionality in the lawful exercise of Federal taxing power. It must be remembered that such a circuitous route was necessary in the opinion of the then U.S. Attorney General, Homer S. Cummings, because of a two-fold problem. There was no constitutional grant of police powers to the Federal Government. There was the glaring presence of the Second Amendment to the Constitution, combined with the embarrassing

[33] *See* Bliss v. Commonwealth, 12 Ky. (2 Litt.) 90, 93 (1822) (striking down 1813 concealed carry prohibition as violative of state constitutional guarantee); *cf.* Nunn v. State, 1 Ga. 243, 251 (1846) (declaring 1837 pistol ban violated federal constitutional amendment).

[34] 26 U.S.C. § 5801 (1988).

[35] Pub. L. No. 63-323, 38 Stat. 785 (1914) (repealed 1970).

[36] *See* ROBERT J. KUKLA, GUN CONTROL 71 (Harlon B. Carter ed., 1973).

[37] *Id.*

appropriateness of machine guns and submachine guns to any conceivable militia.[38]

A. *Origins of the Modern Gun Control Debate*

The origins of the modern gun control debate can be traced to a rather ambiguous decision rendered in *United States v. Miller*,[39] which is an outgrowth of the NFA and the only case to date that squarely addressed the issue of whether citizens have an unencumbered right to own and possess firearms of their choosing. The problem is that while *Miller* brought the question of the meaning of the Second Amendment before the Supreme Court, the Court did not answer the question in terms anyone could readily comprehend—thus setting the stage for political debates for the next fifty-five years. Due to the uncertainty created by this decision, a closer look at just what *Miller* said, and did not say, is in order.

Jack Miller and Frank Layton were indicted in the United States District Court for the Western District of Arkansas for transporting, in interstate commerce, a double-barreled twelve gauge shotgun having a barrel less than eighteen inches in length (i.e., a sawed-off shotgun) without having registered the weapon or possessing the tax-stamped documents as required by the NFA.[40] At trial, the defendants demurred, alleging that the NFA was "not a revenue measure but an attempt to usurp police power reserved to the States,"[41] and that "it offend[ed] the inhibition of the Second Amendment to the Constitution."[42] The district court concluded that section eleven of the NFA violated the Second Amendment, and quashed the indictments.[43] The Government then appealed directly to the Supreme Court, but Miller and Layton, having felt vindicated by the district court, did not appear, either in person or by counsel. Thus, perhaps the most important Second Amendment case to come before the Supreme Court was

[38] *Id.*
[39] 307 U.S. 174 (1939).
[40] *Id.* at 175.
[41] *Id.* at 176.
[42] *Id.*
[43] *Id.* at 175-77 n.1. *See* 26 U.S.C. § 1132(11) (1934). This provision provides: "It shall be unlawful for any person who is required to register as provided in section 5 hereof and who shall not have so registered, or any other person who has not in his possession a stamp-affixed order as provided in section 4 hereof, to ship, carry, or deliver any firearm in interstate commerce." *Id.*

decided only on the brief and oral argument of the Government in what amounted to an *ex parte* proceeding. Even with this advantage, however, the Government did not win a clear-cut victory. The Court held:

> In the absence of any evidence tending to show that possession or use of a "shotgun having a barrel of less than eighteen inches in length" at this time has some reasonable relationship to the preservation or efficiency of a well regulated militia, we cannot say that the Second Amendment guarantees the right to keep and bear such an instrument. Certainly it is not within judicial notice that this weapon is any part of the ordinary military equipment or that its use could contribute to the common defense.[44]

Did the Court intend to imply that the weapon would be protected under the Second Amendment if Miller or Layton appeared and offered some evidence that the sawed-off shotgun did have some military application (as anyone who fought in the trenches of World War I could attest)? Or, was the Court looking for a constitutionally permissible way to restrict access to certain firearms through a limited reading of the Second Amendment?

B. Other Gun Control Legislation

While the passage of the NFA in 1934 marked the beginning of the modern era of gun control at the national level, it was certainly not the only legislative foray into the field. The NFA was followed almost immediately by the 1938 Federal Firearms Act,[45] and thirty years later by the enactment the Gun Control Act of 1968 ("GCA").[46] Passed in the aftermath of the assassinations of Senator Robert Kennedy and Dr. Martin Luther King, Jr., the GCA brought sweeping changes to the body of law governing firearms. For the first time, federal law now prohibited mail order sales of firearms; restricted access to approved classes of persons; prohibited interstate sales of handguns; and set minimum ages to

[44] United States v. Miller, 307 U.S. 174, 178 (1939) (quoting Aymette v. State, 21 Tenn. (2 Hum.) 154, 158 (1840)). The remainder of the opinion merely traces the historical origins and composition of "the militia" without further elaboration as to the meaning of the Second Amendment itself. *Id.*

[45] Pub. L. No. 90-618, 82 Stat. 1250 (1938) (repealed 1968, current version codified as amended at 18 U.S.C. §§ 921-928 (1994)).

[46] 18 U.S.C. § 921 (1968) (the Gun Control Act of 1968 replaced Federal Firearms Act, which was repealed in 1968).

purchase handguns, rifles, and shotguns.[47] The Brady Act brought further federal restrictions mandating a five-day waiting period and background check for would-be handgun purchasers.[48] Additionally, just last August, Congress passed the Violent Crime and Law Enforcement Act of 1994,[49] which will ban nineteen semiautomatic firearms by name, and scores of additional firearms by definition.[50] All told, there are now over 20,000 federal, state, and local laws which control some aspect of the possession, manufacture, sale, or use of firearms.[51]

III. THE BRADY ACT

It is against this backdrop that Congress enacted the Brady Act in the latter part of 1993, and set the stage for Sheriff Mack's lawsuit. Failing to heed the Supreme Court's warning one year earlier in *New York v. United States*[52] that under the Tenth Amendment, Congress may not conscript state governments as Congress's agents,[53] congressional drafters nonetheless included within the Brady Act a background check requirement. This provision requires the "chief law enforcement officer" ("CLEO")[54] in each jurisdiction to make a "reasonable effort to ascertain . . . whether receipt or possession [of a handgun by the prospective buyer] would be in violation of the law, including research in whatever State and local recordkeeping systems are available and in a national system designated by the Attorney General."[55]

Under the statutory scheme of the Brady Act, the CLEO performs the background check on the basis of a sworn statement which the prospective purchaser provides to the gun dealer and

[47] 18 U.S.C. § 921 (1968); *see also* 114 CONG. REC. 27,464 (1968) (statement of Sen. Dodd indicating limitations on mail order purchases of weapons was new provision).

[48] 18 U.S.C. § 922(s)(1) (1994).

[49] Pub. L. No. 103-322, 108 Stat. 1796 (1994).

[50] *Id.* § 110102(b).

[51] *See* Ronald Lewis, *Outlawing Guns Is No Remedy*, TIMES-PICAYUNE (New Orleans), Oct. 12, 1993, at B6 (noting criminals thrive on prohibited goods).

[52] New York v. United States, 112 S. Ct. 2408, 2429 (1992) (invalidating take-title provision of Low-Level Radioactive Waste Act of 1985, 42 U.S.C. § 2021c(a)(1)(A) (Supp. V 1993)).

[53] 112 S. Ct. at 2432. "[W]here the government directs the state to regulate, it may be state officials who will bear the brunt of public disapproval." *Id.*

[54] 18 U.S.C. § 922(s)(8) (1994). Chief law enforcement officer is defined under the Brady Act as "the chief of police, the sheriff, or an equivalent officer or the designee of any such individual." *Id.*

[55] 18 U.S.C. § 922(s)(2) (1994).

the gun dealer in turn provides to the CLEO.[56] The CLEO must destroy the sworn statement within twenty days of the date of the transfer unless the CLEO determines that the transfer would violate the law.[57] If the CLEO determines that the transfer would violate the law, the CLEO must, within twenty days of a request, provide reasons to the denied purchaser for that determination.[58] The Brady Act also amended the penalty provision of the existing federal criminal code by providing that anyone who knowingly violates its provisions shall be subject to a fine, imprisonment, or both.[59]

A. *Sheriff Mack Challenging the Brady Act*

Sheriff Mack feared that he could be held criminally liable if he did not perform the background checks required by the Brady Act. At the same time, he was worried that he would anger citizens and voters if he did perform the checks. Sheriff Mack determined that he simply had no choice and brought suit in the United States District Court for Arizona to enjoin enforcement of the Brady Act.[60]

According to Judge David M. Roll: "The issue is not, however, whether Congress possesses the raw power to regulate [under the Commerce Clause] the transfer of handguns. Clearly it does. The thorny question is whether the Tenth Amendment limits the power of Congress to regulate in the way it has chosen."[61] Relying heavily on the language of *New York v. United States*,[62] Mack's suit alleged, in part, that the Brady Act is an unconstitutional invasion of states' rights under the Tenth Amendment.[63] In addition to his Tenth Amendment claim, Mack alleged that requiring the CLEO to make a "reasonable" attempt to conduct a background check—without defining that term further—was so vague as to

[56] *Id.* § 922(s)(1)(A)(i)(III).

[57] *Id.* § 922(s)(5)(B)(i).

[58] *Id.* § 922(s)(6)(C).

[59] 18 U.S.C. § 924(a)(5) (1994) (stating that fine shall not exceed $1,000 and imprisonment shall not exceed one year).

[60] Mack v. United States, 856 F. Supp. 1372, 1375-76 (D. Ariz. 1994).

[61] *Id.* at 1379.

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

[63] *Mack*, 856 F. Supp. at 1378. The Tenth Amendment provides: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. CONST. amend. X.

violate the Due Process Clause of the Fifth Amendment.[64] Finally, Mack argued that forcing him to conduct the background checks under threat of legal sanctions, but without remuneration or reimbursement, amounted to "involuntary servitude" in violation of the Thirteenth Amendment.[65]

Discussing the Tenth Amendment claim, Judge Roll noted:

> The district court for the District of Montana [having just decided a challenge to the Brady Act in *Printz* which was nearly identical to this one] framed the inquiry as follows: "This case turns on the proper relationship between the federal government and the several states, and in particular, on the constitutionality of federally imposed, unfunded mandates to the States."[66]

In *New York*, the Supreme Court "reviewed the history of the decisional law construing the delicate balance struck between the federalist compromise and a state's authority."[67] Writing for the majority in *New York*, Justice Sandra Day O'Connor posited that "while Congress has substantial power under the Constitution to encourage the States[,] . . . the Constitution does not confer upon Congress the ability to compel the States . . . ."[68] Justice O'Connor, describing the limitations imposed on Congress by the Tenth Amendment, stated: "Where a federal interest is sufficiently strong to cause Congress to legislate, it must do so directly; it may not conscript state governments as its agents."[69]

The statute at issue in *New York* was the Low-Level Radioactive Waste Policy Amendments Act of 1985 (the "Low-Level Waste Act").[70] The Low-Level Waste Act "offered state governments the choice of either regulating pursuant to Congressional dictates or accepting ownership of low level radioactive waste."[71] The *New York* Court found that portion of the statute invalid under the

[64] 856 F. Supp. at 1381.

[65] *Id.* at 1382. The Thirteenth Amendment provides that "[n]either slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or anyplace subject to their jurisdiction." U.S. CONST. amend. XIII.

[66] *Mack*, 856 F. Supp. at 1379 (quoting Printz v. United States, 854 F. Supp. 1503, 1506-07 (D. Mont. 1994)).

[67] *Mack*, 856 F. Supp. at 1379.

[68] 112 S. Ct. at 2414.

[69] *Id.* at 2429.

[70] 42 U.S.C. § 2021b (1988).

[71] *Mack*, 856 F. Supp. at 1379.

Tenth Amendment because it "commandeer[ed] the legislative processes of the States *by directly compelling them to enact* and *enforce a federal regulatory program.*"[72]

Similarly, when striking down the background check portion of the Brady Act, Judge Roll noted that Congress was again impermissibly attempting to directly compel the enforcement of a federal regulatory program by requiring the CLEOs to perform criminal background checks—using their own departmental resources—under the threat of criminal and/or civil penalties. "Such a command [from Congress] would clearly involve the type of government conduct found to be unconstitutional in *New York v. United States.*"[73] Thus, Sheriff Mack prevailed on his Tenth Amendment claim, and the background check provision of the Brady Act was ruled unconstitutional.[74]

Sheriff Mack also prevailed on his Fifth Amendment claim which arose out of the Brady Act's requirement that a CLEO make a "reasonable effort" to perform a background check within five business days. This requirement includes performing research in a national system of records designated by the Attorney General, as well as researching any "available" state and local records.[75] The term "reasonable effort," however, is not defined by the statute.[76] It has been recognized that a statute is unconstitutionally vague if it threatens sanctions without giving fair warning of the conduct that is proscribed or demanded.[77] Moreover, the "void for vagueness" doctrine requires that a penal statute define the criminal offense with such definiteness that ordinary people can understand what conduct is prohibited.[78]

The Government's position, directly contrary to the plain language of the statute, was enunciated in an official opinion issued by the Department of Justice Office of Legal Counsel. The Government contends that CLEOs were not subjected to any potential criminal penalty, and thus, the Fifth Amendment claim was inap-

[72] *New York*, 112 S. Ct. at 2428 (quoting Hodel v. Virginia Surface Mining & Reclamation Ass'n, 452 U.S. 264, 288 (1981)) (emphasis added).

[73] *Mack*, 856 F. Supp. at 1380.

[74] *Id.* at 1381 (arguing Brady Act forces states to expend time and resources).

[75] 18 U.S.C. § 922(s)(2) (1994).

[76] *Mack*, 856 F. Supp. at 1382.

[77] *See* Grayned v. Rockford, 408 U.S. 104, 108-09 (1972) (vague laws may "tax the innocent" and lead to arbitrary enforcement).

[78] *See* United States v. Dischner, 974 F.2d 1502, 1510 (9th Cir. 1992) (quoting Kolender v. Lawson, 461 U.S. 352, 357 (1983)), *cert. denied*, 113 S. Ct. 1290 (1993).

plicable.[79] Finding the Government's position "untenable"[80] and unconstitutional under the Due Process Clause, Judge Roll ruled the challenged requirement imprecise and indefinite. Judge Roll stated:

> The United States offers one definition to complete the void. It insists that Sheriff Mack is not under a mandatory obligation to determine the legality of handgun transfers. The government's interpretation of the enforcement provisions merely directs the CLEO to determine whether, in light of the resources available in the specific jurisdiction, it would be reasonable to conduct a background check after notice of the proposed sale by a licensed gun seller. The government claims the Act would allow ever changing obligations, as appropriate, in light of individual circumstances. At various times and through various agencies, the government has posited that criminal sanctions do not apply to CLEOs or that criminal sanctions may apply, but only if the CLEO fails to expend "minimal efforts" in pursuit of his or her investigatory duties.[81]

Additionally, the Government's counsel admitted during oral argument: "And I think that [the BATF] letter makes clear and our position makes clear that the reasonable search is vague. And it has to be different for each Sheriff, because each Sheriff might have a different number of Brady Acts coming in . . . . There are so many different situations that reasonable search is open for interpretation. And our claim here is that interpretation should be done by the Sheriff."[82]

Plaintiff's counsel, David Hardy, noted the irony of the Government's argument in his closing argument: "I will only note that we are also arguing vagueness here. This is the first time I ever heard any Government stand up and take the position that a law was essentially to be interpreted by those subject to it, and whatever they felt was proper must be proper."[83]

Sheriff Mack was not so fortunate on his Thirteenth Amendment challenge. Involuntary servitude in violation of the Thir-

[79] *Mack*, 856 F. Supp. at 1377.
[80] *Id.* at 1382.
[81] *Id.* at 1381-82.
[82] Record at 48-49, Mack v. United States, 856 F. Supp. 1372 (D. Ariz. 1994) (No. CV 94-113).
[83] *Id.* at 58.

teenth Amendment "occurs when an individual coerces another into . . . service by improper or wrongful conduct that is intended to cause, and does cause, the other person to believe that he or she has no alternative but to perform the labor."[84]

In denying Mack's claim of involuntary servitude, Judge Roll posited:

> In *United States v. Kozminski* the Supreme Court found that a conviction for violating a statute enacted to enforce the Thirteenth Amendment required proof that the alleged victims were "forced to work for the defendant by the use or threat of physical restraint or physical injury" or by law, rather than merely by psychological coercion. Where as here a person is free to refuse to work without incurring legal sanctions, the Thirteenth Amendment is not violated, even if the choice is a painful one. Mack need only quit his job to be free of the duties imposed upon him by the Act. Under these circumstances, the Thirteenth Amendment is not implicated.[85]

In sum, Sheriff Mack prevailed upon two of his three constitutional claims, and the portion of the law requiring CLEOs to perform background checks was held unconstitutional. But, because of a severability provision within the Act itself, the five-day waiting period remained intact and enforceable in those states that did not already have an instant check, or a waiting period of longer than five days.[86] In so ruling, Judge Roll specifically found that Sheriff Mack had standing to assert his Tenth Amendment claims,[87] and that the Brady Act was not only vague, but impermissibly violated the delicate balance of federal-state relations.[88]

CONCLUSION

As this Article goes to print, federal district court judges in Montana,[89] Mississippi,[90] Texas,[91] Vermont,[92] and Arizona[93] have

[84] *Mack*, 856 F. Supp. at 1382 (quoting Brogan v. San Mateo County, 901 F.2d 762, 764 (9th Cir. 1990)) (additional citations omitted).

[85] *Mack*, 856 F. Supp. at 1382 (quoting United States v. Kozminski, 487 U.S. 931, 952 (1988)) (citations omitted).

[86] *Mack*, 856 F. Supp. at 1383; *see* 18 U.S.C. § 928 (1994).

[87] *Mack*, 856 F. Supp. at 1375-76 (noting that Mack's risk of criminal sanctions, should he disobey the statute, is "sufficient injury" to satisfy "cases or controversies" requirement of Article III, § 2 of U.S. Constitution).

[88] 856 F. Supp. at 1381.

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

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

issued rulings on challenges to the Brady Act. All of these challenges were essentially based upon identical claims. Similar lawsuits are currently pending in Louisiana and Wyoming. The results, however, have been mixed. In Texas, all portions of the law were found constitutional.[94] Meanwhile, the Federal District Court for the Southern District of Mississippi struck down the background check but found that the criminal provisions did not apply, and thus, Sheriff McGee lacked standing to pursue that claim.[95] The ruling, however, was binding on Sheriff McGee. Similarly, the Vermont District Court held the background check provision unconstitutional under the Tenth Amendment, but limited the scope of the ruling only to the Federal District of Vermont.[96] The Montana opinion in *Printz* was virtually identical to *Mack*.[97] Both found the background check provision invalid under the Tenth Amendment, and both granted injunctive relief not only to the respective plaintiffs, but to all chief law enforcement officers nationwide.

Assuming that each Circuit Courts of Appeals upholds the district court decision within that circuit, the Brady Act will almost certainly be headed to the United States Supreme Court to resolve the split between *Koog* in the Fifth Circuit, and *Mack* and *Printz* in the Ninth Circuit. Furthermore, there will be many state officials waiting anxiously for the outcome, because the issue in these cases is really more of unfunded federal mandates than accessibility to handguns.

And Sheriff Mack probably could not be happier.

[91] Koog v. United States, 852 F. Supp. 1376 (W.D. Tex. 1994).
[92] Frank v. United States, 860 F. Supp. 1030 (D. Vt. 1994).
[93] Mack v. United States, 856 F. Supp. 1372 (D. Ariz 1994).
[94] *Koog*, 852 F. Supp. at 1389 (finding that Koog lacked standing to bring Fifth Amendment challenge).
[95] McGee v. United States, 863 F. Supp. 321, 327 (S.D. Miss. 1994).
[96] *Frank*, 860 F. Supp. at 1044.
[97] *Printz*, 854 F. Supp. at 1503. *Printz*, however, did not reach the Fifth Amendment claim.