

# “BRADY” OR NOT?

## A Comprehensive Examination of the Brady Bill

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*This article examines the effectiveness of the Brady Act, and the recent constitutional challenge to the Act. Wesley Lasseigne is a law student at the University of Arkansas at Little Rock.*

Is the “Brady Bill,”<sup>2</sup> which imposes a background check and a five-day waiting period on retail handgun purchasers, an effective way of keeping handguns out of the hands of convicted felons? Ask Reilly Johnson, a prisoner serving a life sentence in New Mexico. In 1991, during debates on the Brady Bill, Johnson asked some of his fellow inmates about their thoughts on the issue and how they would go about getting a handgun upon release:

- “Where do I get a gun? That’s easy. I steal it or I buy one from someone who stole it.”
- “Once I’m outta’ the joint, it’ll take me maybe an hour to get a gun. If you know a junkie, you know where to buy one. Junkies are the residential burglars.”
- (When told that California’s waiting period law had caught felons trying to buy guns in gun stores) “You gotta be kiddin’! Somebody that tried to buy a gun from a place where you have to give your real

name has taken one too many pulls on the Krylon silver.”<sup>3</sup>

The statements of these prisoners are consistent with polling data of felony prisoners in other states.<sup>4</sup> In these polls, prisoners reported that a background check system would not hinder them from obtaining a handgun upon release.<sup>5</sup> In support of this data, a study funded by the National Institute of Justice confirms the conclusion that criminals predominately obtain their handguns from sources other than retail outlets. In their survey of 939 convicted felons, James Wright and Peter Rossi found that only 147 of the criminals obtained their most recent handgun from a source that would be concerned about the legality of the transaction.<sup>6</sup> Therefore, no more than one out of every five criminals can be expected to purchase a handgun from a licensed dealer.<sup>7</sup> Those with criminal minds are the very ones we wish to prevent from obtaining a handgun, but are also the ones who seem most capable of circumventing any background check system that is put into effect.

The current background check system, under the Brady Bill, can be circumvented in several ways. The person wanting to obtain a handgun can utilize the services of a “straw-man.” The “straw-man” can be anyone who does not have a criminal record and can otherwise pass a background check, usually a friend or relative of the actual purchaser. After the “straw-man” obtains the handgun from the dealer, he or she turns it over to the actual purchaser, thus frustrating the system.

The background check is also susceptible to prohibited purchasers who obtain and use false identification. A prohibited purchaser would go about this by having his or her photograph placed on a drivers license or other state issued identification card along with the information of someone who is able to pass the background check. The criminal then presents this “fake identification” to the dealer he wishes to purchase a handgun from. The dealer then takes the information from the identification presented to run a background check, after which

the criminal will be allowed to purchase the handgun, again frustrating the system.

The preceding hypothetical scenarios, as well as the New Mexican prisoners' suggestions on how they would obtain a handgun, are just a few examples of how easily someone can get around the current background check system. The background check provisions of the Brady Bill apply only to sales by licensed firearm dealers, and therefore do not cover private sales at gun shows or through classified ads.<sup>8</sup> Furthermore, while the Brady Bill contains eight categories of prohibited purchasers, the background checks being conducted in most states focus primarily on felony convictions.<sup>9</sup> Accordingly, the background check provision of the Brady Bill is not an effective way to prevent prohibited purchasers from obtaining handguns.

The other virtue touted by supporters of the Brady Bill was the waiting period provision. Gun control advocates championed the provision as a "cooling-off" period which would reduce the number of handguns being used in crimes of passion, as well as the number of suicides, by forcing the individual to take time to reevaluate his choice.<sup>10</sup> Congress implicitly disagreed with this rationale because, under the terms of the Brady Bill, the waiting period will lapse in November 1998, when the Attorney General is supposed to have in place a national instant background check system.<sup>11</sup> Apparently, Congress thought of the waiting period only as a "facilitator" to the background checks.<sup>12</sup>

De-emphasizing the usefulness of the waiting period provision as a "cooling-off" period was probably wise. According to criminologist Gary Kleck, a number of conditions need to be fulfilled for a "cooling-off" period to prevent a homicide:

- (1) The gun the killer uses is the only one he owns or the only one he could have used in the crime; (2) the killer acquires the gun from a source that would be expected to obey gun control laws (i.e., a licensed dealer); (3) the gun was purchased and used in the

homicide in a time period shorter than the “cooling-off” period.<sup>13</sup>

Kleck also suggests that a waiting period will not be effective in preventing homicides unless several other criteria are met:

(1) The killer is the kind of person who would not be willing to kill even after waiting; in other words, the killing is an isolated act rather than the culmination of a long history of assaults by the killer; (2) the killer could not acquire and successfully use a gun that does not require a cooling off period (such as a long gun in most states); (3) the killer would not be able to complete the homicide with any weapon other than a gun; (4) the killer would not be able or willing to obtain a gun from a [non-retail] source.<sup>14</sup>

This article will explore: (1) the requirements of the Brady Bill; (2) data on the Brady Bill’s implementation and effectiveness; (3) the U.S. Supreme Court’s recent decision that the background check provision of the Brady Bill is unconstitutional; and (4) the states’ reaction to that defeat. The conclusion will present some of the problems with the current system under the Brady Bill and some concerns that must be addressed in order to have a more effective system.

## I. IT TOOK AN ACT OF CONGRESS . . .

The Brady Handgun Violence Protection Act of 1993,<sup>15</sup> commonly referred to as the “Brady Bill,”<sup>16</sup> became effective on February 28, 1994. Prior to that date, there was nothing in the federal law to prevent an individual from purchasing handguns, other than being required to fill out a form which stated that the potential purchaser was not a felon, ever dishonorably discharged

from a branch of the armed services, under indictment, or a fugitive.<sup>17</sup> Despite this lack of federal law, when the Brady Bill was passed, twenty-two states already required some form of background check for would-be handgun purchasers.<sup>18</sup>

Keeping firearms out of the hands of those persons whom society deems to be dangerous and irresponsible is one of the primary goals of the United States gun control policy.<sup>19</sup> This goal is evidenced by the Gun Control Act of 1968,<sup>20</sup> which prohibits a federal firearm licensee (FFL) from transferring handguns to any person who is either under twenty-one, not a resident in the dealer's State, or prohibited by state or local law from purchasing or possessing firearms.<sup>21</sup> The Gun Control Act also forbids possession of a firearm by and transfer of a firearm to convicted felons, fugitives from justice,<sup>22</sup> unlawful users of controlled substances, persons adjudicated as mentally defective or committed to mental institutions, aliens unlawfully present in the United States, persons dishonorably discharged from the Armed Forces, persons who have renounced their citizenship, and persons who have been subjected to certain restraining orders or who have been convicted of a misdemeanor offense involving domestic violence.<sup>23</sup> Public policy deems persons who fall into one of the prohibited categories as inherently irresponsible.

Federal gun control law seeks to establish a balance between preventing those persons in the previously mentioned categories from purchasing and possessing firearms and allowing law abiding citizens to obtain firearms with relative ease.<sup>24</sup> In 1993, Congress furthered this regulatory goal by enacting the Brady Bill which implements measures to enforce existing prohibitions.<sup>25</sup> The Brady Bill requires the Attorney General to establish a National Instant Criminal Background Check System (NICS) by November 30, 1998 and immediately put into place interim provisions until that system becomes operative.<sup>26</sup>

Under the interim provisions, a FFL must receive from the potential purchaser a written statement, referred to as the "Brady Form," containing his or her name, address, and date of birth, along with a sworn statement that the purchaser is not a member

of any of the prohibited categories.<sup>27</sup> The FFL is directed to verify the identity of the purchaser by examining an identification document such as a driver's license or passport.<sup>28</sup> Within one day, the FFL must provide the chief law enforcement officer (CLEO) of the purchaser's residence with notice of the contents and a copy of the Brady Form.<sup>29</sup> The sale may be consummated when the FFL has been notified by the CLEO that the sale is approved or when five business days, measured from the time the CLEO receives the requisite information, have passed without a response from the CLEO.<sup>30</sup>

Several alternatives to the interim provisions are provided by the Brady Bill. A FFL may sell a handgun immediately if the purchaser possesses a state handgun permit that was issued subsequent to a background check<sup>31</sup> or if state law provides for an instant background check.<sup>32</sup> Those purchasers who present a written statement from the CLEO that their need for the handgun is based on a *threat to life* are also exempt from the background check and waiting period provisions of the Brady Bill.<sup>33</sup> The background check may also be waived if it is determined that compliance would be impractical for the CLEO.<sup>34</sup>

In states that do not provide for instant background checks or for handgun permits to handgun purchasers, the CLEOs must perform certain duties before the sale of a handgun may be consummated. Upon receipt of the required notice from the FFL, the CLEO "shall make a reasonable effort<sup>35</sup> to ascertain within five business days whether receipt or possession would be in violation of the law, including research in whatever state or local record-keeping systems are available, and in a national system designated by the Attorney General."<sup>36</sup> The Brady Bill does not require that the CLEO take any particular steps in conducting these background checks. Therefore, it seems that "reasonable" is in the discretion of the CLEO, depending on the types of records available in that jurisdiction and the resources that he may use.<sup>37</sup>

CLEOs who determine that a pending transaction would be unlawful *may* notify the FFL to that effect, but are not required to

do so.<sup>38</sup> Those CLEOs who choose to notify a FFL that a transaction would be unlawful and that the prospective purchaser is ineligible to receive a handgun must, upon request and within twenty days of the rejection, provide the denied purchaser with a written statement of the reasons for that determination.<sup>39</sup> If no information is discovered by the CLEO that would render the purchase unlawful, he must destroy any records in his possession relating to the transfer, including his copy of the Brady Form.<sup>40</sup> It must be noted that there is some controversy as to whether the attempted possession of a handgun by a felon is a crime under federal law, and whether the Brady Bill gives law enforcement officials grounds to arrest one who makes such an attempt.<sup>41</sup> A rejected purchaser can be prosecuted for knowingly making a false statement to a FFL if he lied on the Brady form regarding his felony record or one of the other disabling categories.<sup>42</sup>

## II. IT WAS A SPLIT DECISION . . .

The procedures that a FFL must follow before consummating the sale of a handgun vary between each state. A state is classified as either a “Brady State” or a “Brady-Alternative State.” The Brady States, which numbered twenty-three at the end of 1996, are subject to the procedures and requirements of the Brady Bill.<sup>43</sup> The remaining twenty-seven states are classified as Brady-Alternative States by the Bureau of Alcohol, Tobacco and Firearms (BATF) and are exempt from the Brady Bill due to the enactment of state legislation that meets or exceeds the requirements of the Brady Bill.<sup>44</sup>

According to the BATF the original Brady-Alternative States are: California, Connecticut, Delaware, Florida, Hawaii, Illinois, Indiana, Iowa, Maryland, Massachusetts, Michigan, Missouri, Nebraska, New Jersey, New York, Oregon, Virginia, and Wisconsin.<sup>45</sup> These states have provisions that met the requirements for the Brady Bill on the date it became effective.

States which later became Brady-Alternative States (with date of exemption) are: Colorado (3/94), Georgia (1/96), Idaho (6/94), Minnesota (8/94), New Hampshire (1/95), North Carolina (12/95), Tennessee (5/94), Utah (3/94), and Washington (6/96).<sup>46</sup> Only eleven of the Brady-Alternative States are exempt because of state law provisions requiring an instant background check prior to the purchase of a handgun and include: Colorado, Delaware, Florida, Georgia, Idaho, Illinois, New Hampshire, Oregon, Utah, Virginia, and Wisconsin.<sup>47</sup> The remaining sixteen states are exempt because of permit requirements for handgun purchases. Idaho, Illinois and Oregon are exempt for both reasons.<sup>48</sup>

The provisions of the Brady Bill or its alternative state provisions are applicable to FFLs<sup>49</sup> in all fifty states.<sup>50</sup> The alternative provisions also apply to pawnshop redemptions<sup>51</sup> in twelve states, including: Alaska, Colorado, Connecticut, Florida (after 90 days), Georgia (after 1 year), Illinois, Minnesota, Missouri, New York, Rhode Island, Tennessee, and Utah.<sup>52</sup> Private sales<sup>53</sup> are also covered by alternative provisions in fourteen: California, Hawaii, Indiana, Iowa, Maryland, Massachusetts, Michigan, Minnesota, New Jersey, North Carolina, North Dakota, Pennsylvania, Rhode Island, and Tennessee.<sup>54</sup>

### A. Background Checks

All fifty states have access to the federally operated National Crime Information Center (NCIC) database and can check its information to see if an individual is “wanted.”<sup>55</sup> Likewise, every state can access the NCIC’s Interstate Identification Index (III) database, which is a national system containing information provided by each state on individuals who have a criminal record.<sup>56</sup> Those who are authorized to access the system will be made aware of the states that have a record on a particular individual and information regarding the individual’s criminal history in that state. At the end of 1996, every state was making

use of these two federal databases in relation to background checks for the sale of handguns.<sup>57</sup>

The existence of databases and their coverage varies at the state level. Computerized criminal history databases, which contain at a minimum felony arrests and dispositions, were maintained and checked by forty-nine states at the end of 1996, with Mississippi being the only exception.<sup>58</sup> Databases containing “fugitive” information were maintained and checked by forty-five states at the end of 1996, with Hawaii, Indiana, Kansas, Mississippi, and Oklahoma being the only states which did not have such databases.<sup>59</sup> At the end of 1996, databases covering restraining orders were maintained and checked by only thirty-two states.<sup>60</sup> Those states which did *not* utilize such databases include: Alabama, Arizona, Delaware, Georgia, Hawaii, Indiana, Kansas, Louisiana, Minnesota, Mississippi, Montana, Nebraska, Nevada, New Mexico, Oklahoma, Pennsylvania, South Carolina, and Wyoming.<sup>61</sup> The coverage of mental health information in databases is less common and at the end of 1996 only sixteen states were using them for background checks including: California, Delaware, Georgia, Hawaii, Illinois, Iowa, Massachusetts, Michigan, Minnesota, New Jersey, New York, Oregon, Rhode Island, Virginia, Washington, and Wisconsin.<sup>62</sup>

## B. Waiting Periods

Under the Brady Bill, a FFL must wait five business days after the CLEO has received the copy of the Brady Form before he can transfer a handgun to a purchaser.<sup>63</sup> However, if a state is exempt from the Brady Bill it is not required to have in place a waiting period before the consummation of a sale of a handgun. Despite this, twelve of the Brady-Alternative States require a waiting period under state law before a handgun can be transferred from an FFL to a consumer. These states are (with length of waiting period in days): California (15; 10 as of April 1, 1997), Connecticut (14), Florida (3), Hawaii (14), Illinois (3), Indiana (7), Iowa (3), Maryland (7), New Jersey (7), Tennessee

(15), Washington (5), and Wisconsin (2).<sup>64</sup> Of the twenty-three Brady States, six require additional waiting periods on top of the five day waiting period that the Brady Bill requires, which include (with additional waiting period on top of Brady Bill in days): Alabama (2), Kentucky (5), Ohio (5), Pennsylvania (2), Rhode Island (7), and South Dakota (2).<sup>65</sup>

### III. IT'S A MATTER LEFT TO THE STATES . . .

In a recent 5-4 decision, the United States Supreme Court struck down the Brady Bill's requirement for background checks prior to handgun purchases.<sup>66</sup> The sheriffs of Ravalli County, Montana and Graham County, Arizona challenged the background check on the grounds that Congress lacks the constitutional authority to require local law enforcement officers to set up and carry out federally imposed regulatory operations.<sup>67</sup> The Court ruled that the provisions of the Brady Bill requiring the CLEOs to perform the background checks are unconstitutional in that they violate our system of dual sovereignty.<sup>68</sup>

Under this ruling, the CLEOs are not required to perform the background checks under the Brady Bill or accept copies of the Brady Form from FFLs.<sup>69</sup> However, it should be noted that the states and their respective CLEOs can voluntarily continue to follow the provisions of the Brady Bill.<sup>70</sup> The Court did not address the validity of the requirements that FFLs forward to the CLEO the requisite notice of the contents and a copy of the Brady Form or whether the FFLs must continue to wait five business days before consummating the sale.<sup>71</sup> Sending notice of the contents and a copy of the Brady Form only burdens the FFL, and waiting five business days only burdens the purchaser.<sup>72</sup> Neither group was involved in the litigation.<sup>73</sup> Accordingly, these provisions are still intact and FFLs must continue to follow them.<sup>74</sup>

The government sought to sustain the Brady Bill on the grounds that: (1) early statutes imposed obligations on state courts;<sup>75</sup> (2) the Brady Bill does not run contrary to the principle established in *New York v. United States*<sup>76</sup> because it does not require the states to make policy, but only requires them to “assist in the implementation of federal law” and “provide only limited, non-policymaking, help in enforcing the law”<sup>77</sup> (3) requiring state officials to perform ministerial duties is not contradictory to the principle of *New York* because it does not diminish the accountability of state or federal officials;<sup>78</sup> and (4) the Brady Bill only places a minimal and temporary burden on state officers.<sup>79</sup>

The Court began its analysis by characterizing the Brady Bill as directing state law enforcement officers “to participate, albeit only temporarily, in the administration of a federally enacted regulatory scheme.”<sup>80</sup> Because there is no constitutional text that addresses the unconstitutionality of congressional action that compels state officers to execute federal laws, the Court looked to the historical understanding and practice, structure of the Constitution, and its prior jurisprudence to rule on the issue at hand.<sup>81</sup>

In addressing the government’s first argument, the Court could find no evidence that the early Congresses assumed that the federal government could command the state’s executive power through legislation, unless specifically authorized by the Constitution.<sup>82</sup> The Court, in its review of legislation brought to its attention by the government, concluded that the earliest laws required judges, not executive officers, to enforce federal directives relating to judicial power in accord with the Supremacy Clause of the Constitution.<sup>83</sup> The Court felt that it could be argued that the number of statutes imposing obligations on state courts, “contrasted with the utter lack of statutes imposing obligations on the States’ executive (notwithstanding the attractiveness of that course to Congress),” suggests that one may assume the absence of such power.<sup>84</sup>

The Court stated that the other, more recent federal statutes, brought to its attention by the government, can be best described as “conditions upon the grant of federal funding than as mandates to the States.”<sup>85</sup> In referring to the most recent legislation cited by the government, the Court stated that:

Even assuming they represent assertion of the very same congressional power challenged here, they are of such recent vintage that they are no more probative than the statute before us of a constitutional tradition that lends meaning to the text. Their persuasive force is far outweighed by almost two centuries of apparent congressional avoidance of the practice of requiring state officials to implement federal regulatory schemes.<sup>86</sup>

The Court next examined the structure of the Constitution in search of a controlling principle.<sup>87</sup> The Court found that implicit in the structure of the Constitution is a system of “dual sovereignty.”<sup>88</sup> According to Madison in *The Federalist* No. 39, the states retained a “residuary of inviolable sovereignty,” even though they surrendered many of their powers to the new Federal Government.<sup>89</sup> Furthermore, the Tenth Amendment to the Constitution explicitly asserts that “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.”<sup>90</sup>

The Court noted that according to *The Federalist* No. 15, “The Framers’s experience under the Articles of Confederation had persuaded them that using the States as the instruments of federal governance was both ineffectual and provocative of federal-state conflict.”<sup>91</sup> The Court set forth the historical record concerning dual sovereignty in *New York v. United States*, 505 U.S. 144, 166 (1995), concluding that “The Framers explicitly chose a Constitution that confers upon Congress the power to regulate individuals, not States.”<sup>92</sup> The Court noted that the separation of the two sovereigns is one of the Constitution’s

structural protections of liberty and that “The power of the Federal Government would be augmented immeasurably if it were able to impress into its service — and at no cost to itself — the police officers of the 50 States.”<sup>93</sup> Furthermore, the Constitution specifically places the responsibility of administering and executing the laws enacted by Congress on the President and his appointees.<sup>94</sup> The unity of the executive department, insisted upon by the Framers, insures both vigor and accountability.<sup>95</sup> That unity would be shattered, and the power of the President reduced, if Congress could act as effectively without him by requiring state officers to execute its laws.<sup>96</sup>

The Court found precedent in *New York v. United States*, where it was “confronted squarely” with a statute that unequivocally required the states to enact a federal regulatory program through the “take title” provisions of the Low-Level Radioactive Waste Policy Amendments Act of 1985.<sup>97</sup> In *New York*, the Court held that the “Federal Government may not compel the States to enact or administer a federal regulatory program.”<sup>98</sup>

The government attempted to distinguish *New York* with its third argument, claiming that the Brady Bill does not require the states to make policy, but only requires them to “assist in the implementation of federal law” and “provide only limited, non-policy-making help in enforcing the law.”<sup>99</sup> The Court stated that the line the government was asking the Court to draw was reminiscent of “the line that separates proper congressional conferral of Executive power from unconstitutional delegation of legislative authority for federal separation-of-powers purposes.”<sup>100</sup> The Court felt that the line between “making” and “enforcing” law, and between “policy-making” and “implementation,” would be equally difficult to draw, and noted that even if the Brady Bill “leaves no ‘policy-making’ discretion with the States,” it would still result in an intrusion on state sovereignty.<sup>101</sup> The Court stated that:

It is no more compatible with [the States'] independence and autonomy that their officers be "dragooned" into administering federal law, than it would be compatible with the independence and autonomy of the United States that its officers be impressed into service for the execution of state laws.<sup>102</sup>

The Court also rejected the government's third argument that requiring state officials to perform ministerial duties does not run contrary to the principle of *New York*, because it does not diminish the accountability of state or federal officials.<sup>103</sup> The Court stated that:

By forcing state governments to absorb the financial burden of implementing a federal regulatory program, members of Congress can take credit for "solving" problems without having to ask their constituents to pay for the solutions with higher federal taxes. And even when the States are not forced to absorb the costs of implementing a federal program, they are still put in the position of taking the blame for its burdensomeness and for its defects.<sup>104</sup>

The government's fourth and final argument that the Brady Bill only placed a minimal and temporary burden on the state officers was, likewise, found to be unpersuasive.<sup>105</sup> The very principle of separate state sovereignty is offended by such a law as the Brady Bill, and balancing the various interests can not overcome such a fundamental defect.<sup>106</sup> Furthermore, the Court stated in *New York v. United States*, 505 U.S. 144, 187 that:

Much of the Constitution is concerned with setting forth the form of our government, and the courts have traditionally invalidated measures deviating from that form. The result may appear “formalistic” in a given case to partisans of the measure at issue, because such measures are typically the product of the era’s perceived necessity. But the Constitution protects us from our own best intentions: It divides power among sovereigns and among branches of government precisely so that we may resist the temptation to concentrate power in one location as an expedient solution to the crisis of the day.<sup>107</sup>

The United Supreme Court’s ruling on the Brady Bill in *Printz v. United States* only affects the twenty-three Brady States.<sup>107</sup> The Brady-Alternative States, by definition, are exempt from this ruling.<sup>108</sup> According to a report from Rep. Charles E. Schumer (D-Brooklyn and Queens), ninety-four percent of the CLEOs affected by the Court’s ruling support the Brady Bill and will voluntarily continue the background checks for handgun purchases.<sup>109</sup> Schumer’s researchers contacted all 1,450 designated CLEOs in the Brady States by telephone.<sup>110</sup> Of those contacted, 1,179 reported that the background checks would continue, 70 reported that the background checks had stopped, and 203 CLEOs did not respond or could not be reached.<sup>111</sup> Most of the CLEOs that have stopped the background checks are from small jurisdictions.<sup>112</sup> According to the report, the total population living within these small jurisdiction is 1,695,090 people, representing just 0.6% of the United States population.<sup>113</sup>

States are currently performing background checks for handgun purchases on a voluntary basis. Originally, Arkansas and Ohio refused to continue the background checks after the United States Supreme Court struck down the Brady Bill provision in *Printz v. United States*.<sup>114</sup>

#### A. Arkansas

The Arkansas State Police, as the designated CLEO, have refused to continue conducting background checks for handgun purchases, citing a lack of statutory authority.<sup>115</sup> Initially, the Arkansas Attorney General's office advised the State Police that continuing the checks, for which the agency charged a \$15.00 fee, could lead to lawsuits under the Arkansas Constitution as an "illegal exaction."<sup>116</sup> Arkansas Attorney General Winston Bryant later issued an opinion that the background checks would not be illegal under the Arkansas Constitution or Arkansas Code.<sup>117</sup> Seven months after the decision in *Printz v. United States*, the Arkansas Attorney General's office decided that they would resume the background checks.<sup>118</sup>

The Attorney General's effort, while admirable, did not solve the problem due to state law which prohibits the Attorney General's office from sharing information learned from the Arkansas Crime Information Center with non-law enforcement agencies.<sup>119</sup> However, through an agreement with the Arkansas State Police, the Attorney General's office will conduct the background check and pass on any information along with a copy of the application to the State Police which will review the information and warn gun dealers of individuals flagged by the background check.<sup>120</sup> While the State Police are still not comfortable with their participation in the background checks, the Attorney General's office agreed to defend the agency in any related litigation.<sup>121</sup> Final approval of the agreement is contingent on approval by the Arkansas Crime Information Center's board of directors.<sup>122</sup>

## B. Ohio

According to Ohio Attorney General Betty Montgomery, she has no authority under state law to require background checks.<sup>123</sup> However, after facing a torrent of criticism and discussions with United States Attorney General Janet Reno, Montgomery announced that the background checks could continue on a voluntary basis.<sup>124</sup> As a result, background checks were

suspended for only three days before being reinstated.<sup>125</sup> Ohio's Bureau of Criminal Identification and Investigation, as the designated CLEO, will continue to conduct background checks on individuals who give their consent, by having the purchaser sign a waiver along with the required Brady Form.<sup>126</sup> As an incentive to consent to the background checks, Montgomery's office is guaranteeing the results will be back within two days, making those who do not consent wait the five business days required by the Brady Bill.<sup>127</sup> Furthermore, Ohio still imposes a \$13.00 fee on those who consent to the background check, as well as those who do not.<sup>128</sup> According to Mark Weaver, Deputy Attorney General for Ohio, 65-70% of the purchasers are voluntarily consenting to the background checks.<sup>129</sup>

#### IV. A LOOK AT THE NUMBERS . . .

According to the Bureau of Justice Statistics (BJS), there were approximately 7.8 million applications to purchase handguns, and an estimated 173,000 rejections between the inception of the Brady Bill and end of 1996.<sup>130</sup> During 1996 alone, 70,000 out of an estimated 2,593,000 applications for the purchase were rejected as a result of presale background checks, constituting a rejection rate of 2.7%.<sup>131</sup> The rejection rate for the Brady States did not differ significantly from that of the Brady-Alternative States. The Brady States rejected 25,000 out of 816,000 applications, or 3.1%, while the Brady-Alternative States rejected 45,000 out of 1,778,000 applications, or 2.5%.<sup>132</sup> The most prevalent reason for rejection was that the applicant had a prior felony conviction or was under indictment, and accounted for 67.8% of rejections in all states.<sup>133</sup> The next most prevalent reasons for rejection, was the applicant being a fugitive from justice, accounting for 6.0%, and violations of state law prohibitions, accounting for 5.5%.<sup>134</sup> Rejections due to the applicant being under a restraining order accounted for 3.9%.<sup>135</sup>

Mental illness accounted for 3% of the handgun application rejections in the sixteen states which checked such databases, and accounted for 1.5% of all rejections.<sup>136</sup> Drug addiction accounted for 1.2% of the rejections, while local law prohibitions only accounted for 0.7%, leaving 13.4% to be attributed to the other prohibited categories of purchasers under the GCA.<sup>137</sup>

## V. PROGRESS YET TO BE MADE . . .

Background checks and waiting periods are, for the most part, ineffective. The Brady Bill, while aimed at a growing concern, is not getting the job done. The current system, under the Brady Bill, provides for eight categories of prohibited purchasers.<sup>138</sup> Of those eight categories, felony convictions is the only one that is being checked nationwide.<sup>139</sup> The remaining seven categories, remain unchecked in most states. This appears to be a fatal flaw in the Brady Bill.

While this federally implemented program seeks to achieve uniformity in the law throughout the 50 states, it fails in that each state chooses for itself which categories of prohibited purchasers are worthy of being maintained in databases and checked for handgun purchases.<sup>140</sup> This problem will be alleviated, to some extent, by the implementation of the National Instant Criminal Background Check System (NICS) but the federal government must look to the states to provide the information that will be loaded into the database.<sup>141</sup>

In order for a background check to be effective, it must check all categories of prohibited purchasers. Therefore, every category of prohibited purchasers must be maintained in the NICS database that FFLs will be checking prior to consummating the sale of a handgun. This will require the States to maintain and provide to the NICS database information on individuals who fall into any one of the prohibited categories. Requiring the States to maintain this information could prove be problematic, in that the

States might bring a Tenth Amendment challenge similar to that in *Printz v. United States*,<sup>142</sup> on the theory that requiring the States to maintain this information could be viewed as requiring them to implement a federal regulatory program. Furthermore, maintaining such databases will bring up “privacy” issues. Do we really want a database that includes mental health records, etc.?

The Brady Bill is also flawed in that it only applies to handgun purchases from FFLs.<sup>143</sup> Criminals, and presumably other prohibited purchasers, do not buy their handguns from FFLs, they buy them in the secondary markets or steal them.<sup>144</sup> In order for any gun control measure to be effective, it must apply to all transfers of ownership of handguns. This includes private sales,<sup>145</sup> trades, pawnshop redemptions,<sup>146</sup> and any other transfer of ownership other than a sale to a FFL.<sup>147</sup> This could prove to be impractical in that there is no effective way to police compliance short of requiring the registration of handguns in a manner similar to the current registration and transfer of title requirements for automobiles. Registration, of course, is another issue strongly opposed by control opponents. The only way this could work, without a registration provision, would be to impose strict penalties on those who fail to comply with such a requirement. While this might compel the compliance of law abiding citizens, there would still be no way to police such compliance, leaving no incentive for criminals to play by the rules. By definition, criminals are accustomed to breaking the law. Why would this law be any different?

I am of the opinion that background checks have some utility. However, the current background check system, under the Brady Bill, is ineffective in preventing the majority of prohibited purchasers from obtaining a handgun. As previously mentioned, those with criminal minds are the ones we want to prevent from obtaining a handgun but, are also the ones most capable of circumventing a background check system.<sup>148</sup> Before we can have an effective federal background check system, Congress must deal with the previously mentioned problems, as well as reducing the ways that the current system can be circumvented.

The other major provision of the Brady Bill is the waiting period. According to the terms of the Brady Bill, the waiting period requirement will terminate on November 30, 1998.<sup>149</sup> Therefore, there will not be a “cooling-off” period intact in the Brady States, or the Brady-Alternative States that have not implemented their own waiting periods, when the interim provisions of the Brady Bill expire. However, if one takes the view of criminologist Gary Kleck, this will have little effect on preventing murders or suicides.<sup>150</sup> This is not to say that a cooling-off period does not save some lives. However, a waiting period might also cost the lives of those who are not able to acquire a handgun to protect themselves from imminent danger.<sup>151</sup> In this sense, we must weigh the effects of waiting periods, and determine whether they actually save or cost more lives before making a conclusion on their effectiveness.

If a cost-benefit approach is taken on this issue, a waiting period should be provided for if it actually saves more lives than it costs. However, there is no accurate way to collect such data since there are hundreds, if not thousands, of unreported instances that would be relevant to this issue. If it were found that it saves more lives than it costs, I would support a waiting period provision. This again could be seen as a “cooling-off” period which would aid in the reduction of suicides and crimes of passion. However, I think that such a period should be limited to two days, meaning that a purchaser could pick up his or her handgun on the third day following the purchase.

In order to have effective background checks and waiting period laws, they must be dealt with at the federal level to insure that the requirements will be uniform throughout the nation. For this to be done, Congress must find some way to address the above concerns without infringing upon state sovereignty and further burdening the rights of law abiding citizens. Our representatives have decided that we need some form of background check system, and arguably a waiting period, for handgun purchases. If we are to be burdened with such requirements, it is only just that the system be revised to operate

correctly. “Brady” or not, any background check or waiting period, that places a burden on law abiding citizens, should accomplish the purpose for which it is intended.<sup>152</sup>

### ENDNOTES

1. Third-year law student, University of Arkansas at Little Rock School of Law. This paper was originally submitted as a project for Professor Andrew McClurg’s course in “Gun Violence and the Law.” I extend my appreciation to Professor McClurg in helping me arrive at my goal of publication. I dedicate this article to all of my devoted family, especially Paul and Dorothy Lasseigne of Rayne, Louisiana, and in memory my grandfather, Tom Region of Alexandria, Louisiana.

2. Brady Handgun Violence Protection Act of 1993 codified at 18 U.S.C. § 922(q)-(t) (1994) (*hereinafter* Brady Bill). *See infra* notes 13-40 and accompanying text for a full discussion on the Act’s provisions.

3. David B. Kopel, *Background Checks and Waiting Periods, in GUNS: WHO SHOULD HAVE THEM?* 53, 76-77 (David B. Kopel ed., 1995) (citing Reilly Johnson, “Brady Bill” Gets Guffaws from Guys Behind Bars, SANTE FE NEW MEXICAN, June 30, 1991). “[O]ne too many pulls on the Krylon silver” is presumably a reference to huffing paint in order to get a cheap high.

4. *Id.* at 77.

5. *Id.*

6. JAMES D. WRIGHT AND PETER H. ROSSI, U.S. DEPT. OF JUSTICE, THE ARMED CRIMINAL IN AMERICA: A SURVEY OF INCARCERATED FELONS 36 (1985).

7. *Id.*

8. *See infra* notes 20 and 24 for a discussion on who is required to obtain a license to sell firearms.

9. *See infra* notes 54-61 and accompanying text for a discussion on what categories the states are checking; *see also infra* notes 164-171 for a discussion of the categories for which handgun purchase applications are denied.

10. Kopel, *supra* note 2, at 85.

11. Kopel, *supra* note 2, at 85. *See infra* note 25 and accompanying text for a discussion on the expiration of the interim provisions of the Brady Bill.

12. Kopel, *supra* note 2, at 85.

13. Kopel, *supra* note 2, at 85. Kleck's gun policy book POINT BLANK, the most significant contribution to criminology in a three year period, won the American Society of Criminology's Hindelang Prize. Kopel, *supra* note 2, at 85. Kleck also found, in reviewing 1982 Florida homicides, that 0.9% of homicides fit all three criteria, estimating that nationally 0.5% would fit all three criteria. Kopel, *supra* note 2, at 85.

14. Kopel, *supra* note 2, at 85. Kleck did not find any Florida homicides which a "cooling-period" would have prevented. Kopel, *supra* note 2, at 85. Kleck, a supporter of the background check, believes that a "cooling-off" period does no good itself and offers no advantages to an instant check. Kopel, *supra* note 2, at 85.

15. 18 U.S.C. § 922(q)-(t) (1994).

16. The Brady Bill was originally named for Sarah Brady. Later, it was said to be named for the former White House Press Secretary James Brady who was shot and left partially paralyzed in the assassination attempt on President Ronald Reagan on March 30, 1981. Following his recovery, Brady and his wife Sarah became passionate gun control advocates and lobbied heavily for the passage of the Brady Bill. *See* Kopel *supra* note 2, at footnote 1(citing Handgun Control, Inc., *What You Should Know about the Brady Bill* (brochure, 1987)). *See also* Steven A. Holmes, *Old Ally Wounds Gun Control Foes*, N.Y. TIMES, March 30, 1991, at A1; 139 CONG. REC. 16, 417 (daily ed. Nov. 19, 1993).

17. Richard M. Aborn, *The Battle Over The Brady Bill And The Future of Gun Control Advocacy*, 22 FORDHAM URB. L.J. 417, 418 (1995).

18. *Id.* at 418 n.11. The 22 states were not listed and do not conform to the original Brady-Alternative States since there were only 18 of them.

19. James B. Jacobs & Kimberly A. Potter, *Keeping Guns Out of the "Wrong" Hands: The Brady Law and the Limits of Regulation*, 86 J. CRIM. L. & CRIMINOLOGY 93, 93 (1995).

20. 18 U.S.C. §§ 921-922 (1994).

21. *Id.* § 922(b). A Federal Firearm Licensee (FFL) is referred to as a "dealer" in the United States Code. The term "dealer" includes any person engaged in the

business of selling firearms at the wholesale or retail levels, any person engaged in the business of repairing firearms or of making or fitting special barrels, stocks, or trigger mechanisms to firearms, or any person who is a pawnbroker. 18 U.S.C. § 921(a)(11). A “pawnbroker” is defined as any person whose business or occupation includes the taking or receiving, by way of pledge or pawn, of any firearm as security for the payment or repayment of money. *Id.* § 921(a)(12). Furthermore, no person can engage in dealing firearms until he has filed an application with and received a license to do so from the Secretary of the Treasury. *Id.* §§ 923(a), 921(a)(18).

22. *Id.* § 921(a)(15). “The term fugitive from justice means any person who has fled from any State to avoid prosecution for a crime or to avoid giving testimony in any criminal proceeding.” *Id.*

23. *Id.* § 922(d), (g). The provisions dealing with domestic violence, applicable to intimate partners and children, are known as the “Lautenberg Amendment” and did not become effective until 1996. The restraining order prohibition applies only if there was a hearing and factual findings by the court issuing the restraining order that the restrained individual represents a threat or by its terms explicitly prohibits the use, attempted use, or threatened use of physical force that would reasonably be expected to cause bodily injury, or the individual was convicted of a misdemeanor crime of domestic violence. *Id.* § 922(d)(8)-(9), (g)(8)-(9).

24. Jacobs & Potter, *supra* note 18, at 93.

25. Jacobs & Potter, *supra* note 18, at 95; *see also* 18 U.S.C. § 923 (a)(1)-(2) (1994). Federal law prohibits any unlicensed person from engaging in the business of selling firearms. Individual gun owners wishing to sell a few of their guns need not obtain a license, but they may not sell a firearm to a person whom they know or have reasonable cause to believe that such person belongs to a prohibited class. 18 U.S.C. § 922(d). Violations of §922(d) are subject to a fine, up to 10 years imprisonment, or both. 18 U.S.C. § 924(a)(2).

26. Pub. L. 103-159, *amended by* Pub. L. 103-322, 103 Stat. 2074 (Sept. 13, 1994) (found in note titled National Instant Criminal Background Check System following 18 U.S.C.. § 922 (1994))

(b) Establishment of System. Not later than 60 months after the date of the enactment of this Act, the Attorney General shall establish a national instant criminal background check system that any licensee may contact, by telephone or by other electronic means in addition to the telephone, for information, to be supplied immediately, on

whether receipt of a firearm by a prospective transferee would violate section 922 of title 1, United States Code, or State law.

*Id.* It appears that the waiting period will expire on November 30, 1998, even if the national instant background check system is not operational. *See* Aborn, *supra* note 16, at 426. "Under the provisions of the Brady Act, the NICS [National Instant Criminal Background Check System] must be established no later than November 1998, at which time the procedures related to the 5-day waiting period of the interim system will be eliminated." BUREAU OF JUSTICE STATISTICS, U.S. DEPT. OF JUSTICE, NCJ-16570, PRESALE HANDGUN CHECKS, 1996, at 4 (1997). "Section 103(b) of the Brady Act requires that the National Instant Criminal Background Check System (NICS) become operational in November 1998. At that time, Federal waiting period requirements will no longer be applicable and presale firearm inquiries will be based on an inquiry to the NICS." BUREAU OF JUSTICE STATISTICS, U.S. DEPT. OF JUSTICE, NCJ-165589, NATIONAL CRIMINAL HISTORY IMPROVEMENT PROGRAM: FISCAL YEAR 1997 PROGRAM ANNOUNCEMENT 2 (1997). According to an article in *Government Computer News* the Department of Justice will have the national instant check on-line next year. NRA-ILA FAX ALERT, FBI CLAIMS INSTANT CHECK TO BE ON-LINE IN 1998, VOL. 4, NO. 35, (AUG. 29, 1997).

27. 18 U.S.C. § 922(s)(1)(A)(i)(I), (s)(3) (1994).

28. *Id.* § 922(s)(1)(A)(i)(II).

29. *Id.* § 922(s)(1)(A)(i)(III). "For purposes of this subsection, the term 'chief law enforcement officer' means the chief of police, the sheriff, or an equivalent officer or the designee of any such individual." *Id.* § 922(s)(8).

30. *Id.* § 922(s)(1)(A)(ii).

31. *Id.* § 922(s)(1)(C).

32. *Id.* § 922(s)(1)(D).

33. 18 U.S.C. § 922(s)(1)(B) (1994). This alternative provision seems to be somewhat impractical. It is doubtful that the poor and minorities, who are the victims of most violent crimes, will be able to promptly obtain an appointment with the CLEO administrator who can issue an authorization to bypass the Brady Bill requirements. Kopel, *supra* note 2, at 65. If the CLEO administrator who is authorized to issue these immediate permits is out of town, busy, or uninterested, the potential victim is out of luck. Kopel, *supra* note 2, at 65. Furthermore, there must be a direct *threat to life*. Threats of rape, aggravated

assault, or mayhem are not grounds for even a sympathetic CLEO administrator to bypass the requirements of the Brady Bill. Kopel, *supra* note 2, at 65.

34. 18 U.S.C. § 922(s)(1)(F). Compliance may be impractical if:

(i) the ratio of the number of law enforcement officers of the State in which the transfer is to occur to the number of square miles of land area of the State does not exceed 0.0025; (ii) the business premises of the transferor at which the transfer is to occur are extremely remote in relation to the chief law enforcement officer; and (iii) there is an absence of telecommunications facilities in the geographical area in which the business premises are located.

*Id.* § 922(s)(1)(F)(i)-(iii).

35. The Bureau of Alcohol, Tobacco, and Firearms interprets the reasonable effort language as requiring “some minimal effort to check commonly available records.” Mack v. United States, 856 F.Supp. 1372, 1376 (D. Ariz. 1994).

36. 18 U.S.C. § 922(s)(2) (1994).

37. Jacobs & Potter, *supra* note 18, at 99.

38. Printz v. United States, 117 S. Ct. 2365, 2369 (1997). See 18 U.S.C. § 922(s)(7)(A)-(B) (1994).

(7) A chief law enforcement officer or other person responsible for providing criminal history background information pursuant to this subsection shall not be liable in an action at law for damages--(A) for failure to prevent the sale or transfer of a handgun to a person whose receipt or possession of the handgun is unlawful under this section; or (B) for preventing such a sale or transfer to a person who may lawfully receive or possess a handgun.

*Id.*

39. 18 U.S.C. § 922(s)(6)(C) (1994).

40. *Id.* § 922(s)(6)(B)(i).

41. See Jacobs & Potter, *supra* note 18, at 100.

It is important to note that Brady does not provide for arrest of an ex-felon who has attempted to purchase a handgun. In fact, there is no federal law making attempted possession by a felon a crime. A rejected purchaser can be prosecuted only for making a false statement; if the rejected purchaser lied on

the Brady Form regarding a past felony record or one of the disabilities, he could be prosecuted for knowingly making a false statement to an FFL.

Jacobs & Potter, *supra* note 18, at 100. *Cf.* Kopel, *supra* note 2, at 81. “Any person with a felony conviction who attempts to purchase a gun commits...in almost all states, a state felony.” Kopel, *supra* note 2, at 81.

42. Jacobs & Potter, *supra* note 18, at 100; *see* 18 U.S.C. § 922(a)(6) (1994).

43. REGIONAL JUSTICE INFORMATION SERVICE, U.S. DEPT. OF JUSTICE, NCJ-163918, SURVEY OF STATE PROCEDURES RELATED TO FIREARM SALES, 1996, at 64 (1997).

44. *Id.*

45. *Id.*

46. *Id.*

47. *Id.*

48. *Id.*

49. *See* 18 U.S.C. § 922(b) (1994); *see also supra* notes 20 and 24 for a discussion on who is required to be licensed.

50. REGIONAL JUSTICE INFORMATION SERVICE, *supra* note 42, at 67.

51. Pawnshop redemptions differ from sales in that the transferee owns the gun which was pledged as collateral on a loan and is regaining possession of the gun after repaying the loan. Pawnbrokers are required to be licensed as an FFL if they participate in any firearm transactions. *See* 18 U.S.C. §§ 921(a)(11)-(12), 923(a) (1994).

52. REGIONAL JUSTICE INFORMATION SERVICE, *supra* note 42, at 67.

53. A person is not considered to be engaged in the business of dealing in firearms if they make “occasional sales, exchanges, or purchases of firearms for the enhancement of a personal collection or for a hobby, or who sells all or part of his personal collection of firearms . . . .” 18 U.S.C. §921(a)(21)(C) (1994).

54. REGIONAL JUSTICE INFORMATION SERVICE, *supra* note 42, at 67.

55. REGIONAL JUSTICE INFORMATION SERVICE, *supra* note 42, at 66. The NCIC consists of 17 files which contain more than 10 million records, plus 24 million criminal history records contained in the Interstate Identification Index (III) which are accessible through NCIC. *National Crime Information Cen-*

*ter: 30 Years on the Beat*, THE INVESTIGATOR (FBI, Washington D.C.), Dec. 1996/Jan. 1997, at 2. Some of the more notable files contained in NCIC include: Missing Persons, Unidentified Persons, Interstate Identification Index, U.S. Secret Service Protective (names & other information on those believed to pose a threat to the President), Foreign Fugitive, and Violent Gang/Terrorist. *Id.* The NCIC computer is currently housed in the FBI headquarters with connecting terminals throughout the United States, Canada, Puerto Rico, and the U.S. Virgin Islands in police departments, sheriffs' offices, state police facilities, Federal law enforcement agencies, and other criminal justice agencies. *Id.* NCIC users access the NCIC computer through state computer systems known as "control terminal agencies." *Id.*

56. REGIONAL JUSTICE INFORMATION SERVICE, *supra* note 42, at 66.

57. REGIONAL JUSTICE INFORMATION SERVICE, *supra* note 42, at 66.

58. REGIONAL JUSTICE INFORMATION SERVICE, *supra* note 42, at 66.

59. REGIONAL JUSTICE INFORMATION SERVICE, *supra* note 42, at 66.

60. REGIONAL JUSTICE INFORMATION SERVICE, *supra* note 42, at 66. In Arkansas the CLEO has access to the following data on a fully automated statewide computer network: fugitive, criminal history, court restraining order, and some domestic violence information. REGIONAL JUSTICE INFORMATION SERVICE, *supra* note 41, at 4.

61. REGIONAL JUSTICE INFORMATION SERVICE, *supra* note 42, at 66.

62. REGIONAL JUSTICE INFORMATION SERVICE, *supra* note 42, at 66.

63. 18 U.S.C. § 922(s)(1)(A)(ii) (1994).

64. REGIONAL JUSTICE INFORMATION SERVICE, *supra* note 42, at 64.

65. REGIONAL JUSTICE INFORMATION SERVICE, *supra* note 42, at 64.

66. *Printz v. United States*, 117 S.Ct. 2365, 2384 (1997).

67. *Id.* at 2369.

68. *Id.* at 2384.

69. *Id.* at 2384; *see supra* notes 28-29 and accompanying text for a discussion of these statutory provisions.

70. *Printz*, 117 S.Ct. at 2384. “These two provisions have conceivable application to a CLEO, in other words, only if he has chosen, voluntarily, to participate in administration of the federal scheme.” *Id.*

71. *Id.*

There is involved in this Brady Act conundrum a severability question, which the parties have briefed and argued: whether firearms dealers in the jurisdictions at issue here, and in other jurisdictions, remain obliged to forward to the CLEO (even if he will not accept it) the requisite notice of the contents (and a copy) of the Brady Form, §§ 922(s)(1)(A)(i)(III) and (IV); and to wait five business days before consummating the sale, § 922(s)(1)(A)(ii). These are important questions, but we have no business answering them in these cases. These provisions burden only firearms dealers and purchasers, and no plaintiff in either of those categories is before us here. We decline to speculate regarding the rights and obligations of parties not before the court.

*Id.*

72. *Id.*

73. *Id.*

74. Mark Waller, *Police Lack Proof But Hate to See Gun Check Go*, ARK. DEMOCRAT-GAZETTE, July 3, 1997, at 1B. The Bureau of Alcohol Tobacco and Firearms issued an “Open Letter to All Federal Firearm Licensees” telling all dealers to continue to have buyers fill out a form providing background information and to continue sending the form to the state’s CLEO. *Id.*

75. *Printz*, 117 S.Ct. at 2370.

76. In *New York v. United States*, 505 U.S. 144 (1992), the Court concluded that the “Federal Government may not compel the States to enact or administer a federal regulatory program.” *Id.* at 188.

77. *Printz*, 117 S.Ct. at 2380.

78. *Id.* at 2382.

79. *Id.* at 2383.

80. *Id.* at 2369.

81. *Id.* at 2370.

82. *Id.* at 2372.

83. *Id.* at 2371. “[T]he Laws of the United States . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby.’ It is understandable why courts should have been viewed distinctively in this regard; unlike legislatures and executives, they applied the law of other sovereigns all the time.” *Id.* (citation omitted).

84. *Id.*

85. *Id.* at 2376. Congress may place conditions upon the receipt of federal funding, even if the effect of the congressional purpose is to regulate. The “Necessary and Proper” Clause of the Constitution is the authority typically used by Congress to justify conditions on the use of federal funds. *See* *Steward Machine Co. v. Davis*, 301 U.S. 548 (1937) (Upheld provision of the Social Security Act allowing employers to receive a credit against federal tax for any contribution to a state-enacted unemployment plan, but only where the state passed a plan meeting congressionally defined requirements.); *South Dakota v. Dole*, 483 U.S. 203 (1987) (Upheld statute that withholds federal highway funds from states that permit persons under the age of 21 to purchase or possess in public any alcoholic beverage.).

86. *Printz*, 117 S.Ct. at 2376.

87. *Printz*, 117 S.Ct. at 2376-79.

88. *Id.* at 2376.

89. *Id.*

90. *Id.*

91. *Id.*

92. *Id.* at 2377.

93. *Printz*, 117 S.Ct. at 2378.

94. *Id.*

95. *Id.*

96. *Id.*

97. *Id.*; *see* *New York v. United States*, 505 U.S. 144, 188 (1992).

98. *Printz*, 117 S.Ct. at 2378; *see* *New York v. United States*, 505 U.S. 144, 188 (1992).

99. *Printz*, 117 S.Ct. at 2380.

100. *Id.*; see *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 530 (1935); *Panama Refining Co. v. Ryan*, 293 U.S. 388, 428-29 (1935).

101. *Printz*, 117 S.Ct. at 2380-81.

102. *Id.* at 2381.

103. *Id.* at 2382; see *supra* notes 75, 91, 96-98, *infra* note 106 and accompanying text for references to the holding of *New York v. United States*, 505 U.S. 144 (1992).

104. *Printz*, 117 S.Ct. at 2382.

105. *Id.* at 2383. According to the Court, there was considerable disagreement over the extent of the burden placed on the CLEOs, but that detail was of no significance in the case at bar. *Id.*

106. *Printz*, 117 S.Ct. at 2383.

107. *Id.*

107. See *supra* note 42 and accompanying text as to definition of “Brady States”.

108. See *supra* note 43 and accompanying text as to definition of “Brady-Alternative States”.

109. *Schumer Survey Shows Background Checks Continue Despite Supreme Court Ruling: Over 94% of Police Support Brady Law by Continuing Checks*, NEWS: CHARLES E. SCHUMER (Representative Charles E. Schumer newsletter, Washington, D.C.), July 16, 1997.

110. *Id.*

111. *Id.*

112. *Id.* (all jurisdictions considered by the survey to be “small” has a population under 150,000; the average population of the “small” jurisdictions is 24,928).

113. *Id.*

114. See Erin Gibson, *Troopers Dropping Gun Check Arkansas Reacts to Brady Ruling*, ARK. DEMOCRAT-GAZETTE, July 2, 1997, at 1A; Jim Brooks, *Gun Dealers Must Send Forms That Return “Refused,”* ARK. DEMOCRAT-GAZETTE, Aug. 9, 1997, at 1B; *Schumer Survey Shows Back-*

*ground Checks Continue Despite Supreme Court Ruling: Over 94% of Police Support Brady Law by Continuing Checks, supra* note 109; Alan Johnson, *Montgomery, Reno Hold Different Views of Gun Law*, THE COLUMBUS DISPATCH, Aug. 15, 1997, at 5B (According to the Ohio Revised Code (cite not given), “No state official shall command, order or direct an investigator to perform any duty or service that is not authorized by law.”).

115. *See* Gibson *supra* note 114; Brooks *supra* note 114. According to Sergeant Darrel Stayton, the Legal Affairs contact in the Director’s Office of the Arkansas State Police, there are two possible openings for potential liability. Interview with Sergeant Darrell Stayton, Legal Affairs contact in the Director’s Office of the Arkansas State Police, in Little Rock, Ark. (Nov. 25, 1997). First, there needs to be statutory authority at the state level authorizing the Arkansas State Police to conduct the background checks. *Id.* The authority cited by the Arkansas Attorney General is not specific and, therefore does not convince the Arkansas State Police that they are authorized to conduct the background checks for handgun purchases, since it is not one of the enumerated reasons for conducting such checks. *Id.* Second, liability could arise through charging a fee that is not authorized. *Id.* The enumerated authority to conduct background checks for other non-criminal law purposes contains provisions for who will be charged a fee and in what amount, handgun purchases is not included among those provisions. *Id.* To further complicate matters, if there is no authority to conduct background checks, charging a fee for the checks would be deemed a “tax” and could then be considered an “illegal exaction.” *Id.* This opens up the possibility for a taxpayers’ suit. *Id.* In suits alleging an illegal exaction, officers of state agencies are subject to personal liability and double the amount of damages, here the amount of fees collected after resuming the background checks. *Id.*

116. Joe Stumps, *Arkansas Won’t Touch Gun Checks “Unwarranted,” Chief Cop Says*, ARK. DEMOCRAT-GAZETTE, July 29, 1997, at 1A. *See* ARK. CONST. art. XVI, § 13; *Pledger v. Featherlite Precast Corp.*, 308 Ark. 124, 128, 823 S.W.2d 852, 855 (1992), *cert. denied*, 506 U.S. 826 (1992) (recognizing that an illegal exaction” can take two forms: (1) a misapplication of public funds and (2) an illegal tax).

117. *Op.* Ark. Att’y Gen. 97-253 (1997). ARK. CODE ANN. §§ 12-12-1009, -1011 (Michie Repl. 1995) grant the Arkansas State Police authority to disseminate conviction information to FFLs. *Id.* ARK. CODE ANN. § 12-12-1012 (Michie Repl. 1995) authorizes the Dept. of Arkansas State Police Identification Bureau to charge a fee for criminal history information for noncriminal

justice purposes, which cannot exceed \$20. *Id.* Such a fee does not constitute an “illegal exaction” under the ARK. CONST. art. XVI, § 13, which states: “Any citizen of any county, city or town may institute suit in behalf of himself and all others interested, to protect the inhabitants thereof against the enforcement of any illegal exactions whatever.” *Id.* “Illegal exaction” has been defined by the Arkansas Supreme Court as taking the form of (1) a misapplication of public funds, and (2) an illegal tax. *Id.* (citing *Pledger v. Featherlite Precast Corp.*, 308 Ark. 124, 823 S.W.2d 852 (1992), *cert. denied*, 506 U.S. 826 (1992)). The situation involved here clearly does not constitute a misapplication of public funds. *Id.* Such a fee would not be considered a tax because it is imposed in the government’s exercise of its police powers rather than general revenue purposes. *Id.* (citing *Barnhart v. City of Fayetteville*, 321 Ark. 197, 900 S.W.2d 539 (1995)). The Attorney General is of the opinion that the charge constitutes a “fee” rather than a “tax” and that the “illegal exaction” clause of the Arkansas Constitution will not be implicated. *Id.*

118. Rachel O’Neal, *Pasts Figure Again In Bid to Buy a Gun; Bryant Brings Back Background Checks*, ARK. DEMOCRAT-GAZETTE, January 15, 1998, at 1A.

119. Rachel O’Neal, *Chief of Records Voices Concern Over Background Checks*, ARK. DEMOCRAT-GAZETTE, January 23, 1998, at 1B. Pending, conviction and nonconviction information available through the Arkansas Crime Information Center, plus information obtained through the Interstate Identification Index or from another state’s record system, shall be disseminated to criminal justice agencies and official for the administration of criminal justice.” ARK. CODE ANN. § 12-12-1008(a) (Michie Repl. 1995). “The use of this system is restricted to serving the informational needs of governmental criminal justice agencies and others specifically authorized by law through a communications network connecting local, county, state, and federal authorities to a centralized state repository of information. ARK. CODE ANN. § 12-12-207(b) (Michie Repl. 1995).

120. Jim Kordsmeier, *State Police Agree to Tell Gun Dealers When to Halt Sales; Started Notifications Monday; Struck Tentative Deal With Bryant on Friday*, ARK. DEMOCRAT-GAZETTE, February 11, 1998, at 1B.

121. *State Police Aim to Fix Glitch in Gun Law*, THE DALLAS MORNING NEWS, February 7, 1998, at 41A.

122. Kordsmeier, *supra* note 120, at 1B.

123. *Schumer Survey Shows Background Checks Continue Despite Supreme Court Ruling: Over 94% of Police Support Brady Law by Continuing Checks*, *supra* note 109; *see also* Alan Johnson, *Montgomery, Reno Hold Different Views of Gun Law*, THE COLUMBUS DISPATCH, Aug. 15, 1997, at 5B (According to the Ohio Revised Code (cite not given), "No state official shall command, order or direct an investigator to perform any duty or service that is not authorized by law.").

124. Michael Hawthorne, *Ohio Gun Checks On Again, Under Fire Attorney General Changes Mind*, THE CINCINNATI ENQUIRER, July 1, 1997, at B01 (In defending her earlier decision to stop the checks, Montgomery said, "No one should expect Ohio's chief legal officer to take it upon herself to preempt the state legislature and invade individual privacy."); *see also* Alan Johnson, *Gun-Buyer Checks Become Voluntary; Montgomery Decides to Restart Program*, THE COLUMBIA DISPATCH, July 1, 1997, at 1A (According to Montgomery, "Obtaining individual permission resolves the problem of our lack of legal authority to conduct a check.").

125. Telephone Interview with Lonnie Rudasill, Bur. of Criminal Identification, Ohio (October 10, 1997).

126. *Schumer Survey Shows Background Checks Continue Despite Supreme Court Ruling: Over 94% of Police Support Brady Law by Continuing Checks*, *supra* note 109; *see also* Rudasill interview, *supra* note 125. The names of those who do not consent to the background check are forwarded to the BATF. Joe Hallett, *Ohio to Continue Checking On Gun Buyers Voluntarily*, THE PLAIN DEALER, July 1, 1997, at 4B. BATF still has authority to conduct criminal background checks without a gun buyer's consent. *Id.* This process is not working as planned, because the BATF is returning the forms to Ohio without doing the background checks. Johnson, *supra* note 123.

127. Hawthorne, *supra* note 124, at B01.

128. Alan Johnson, *Montgomery Offers to Pay Agency to do Brady Background Checks*, THE COLUMBUS DISPATCH, August 6, 1997, at 1C.

129. Jerry Zremski, *Kerlikowske Worried as Ohio Ends Gun Checks*, THE BUFFALO NEWS, July 17, 1997, at 1B.

130. BUREAU OF JUSTICE STATISTICS, U.S. DEPT. OF JUSTICE, NCJ-16570, PRESALE HANDGUN CHECKS, 1996 1 (1997) (data collected by the Regional Justice Information Service (REJIS), through a cooperative agreement with BJS

under the Firearms Inquiries Statistics program (FIST); estimates of applications and rejections for handgun purchases include Brady & Brady-Alternative States; data does not indicate whether rejected purchasers later obtained a handgun through other means).

131. *Id.*

132. *Id.* at 2.

133. *Id.*

134. *Id.*

135. *Id.* (only 32 states check databases for restraining orders).

136. BUREAU OF JUSTICE STATISTICS, *supra* note 130, at 2.

137. BUREAU OF JUSTICE STATISTICS, *supra* note 130, at 2. (the other categories include illegal aliens, juveniles, persons discharged from the armed services dishonorably, persons who have renounced their U.S. citizenship, domestic violence, and other unspecified persons).

138. *See supra* notes 18-22 and accompanying text for a discussion on the categories of prohibited purchasers.

139. *See supra* notes 54-61 and accompanying text for a discussion on the categories being checked by the individual states; *see also supra* notes 133-137 for a discussion on what categories are actually prohibiting handgun purchases.

140. *See supra* notes 34-36 and accompanying text for a discussion on the background check that the CLEO must perform in conjunction with a handgun purchase under the Brady Bill; *see also* notes 54-61 for a discussion on the prohibited categories actually being checked by the individual states.

141. *See supra* note 25 and accompanying text for a discussion on the National Instant Criminal Background Check System (NICS).

142. *See supra* notes 65-106 and accompanying text for a discussion of the holding in *Printz v. United States*, 117 S.Ct. 2365 (1997).

143. *See supra* note 24 and accompanying text for a discussion of the applicability of the Brady Bill to FFLs only.

144. *See supra* notes 2-6 for a discussion on the prisoners' statements and the Wright and Rossi study.

145. *See supra* notes 52 for a definition of “private sales”; *see also supra* notes 52-53 for a list of the Brady-Alternative States that have provisions applicable to such sales.

146. *See supra* note 50 for a definition of “pawnshop redemption”; *see also supra* notes 50-51 and accompanying text for a list of the Brady-Alternative States that have provisions applicable to pawnshop redemptions. A case could be made against the applicability to pawnshop redemptions in that the individual receiving the handgun is already the owner and only relinquished its possession to serve as collateral for a loan. However, we do not want to return handguns to criminals or those who are members of any other prohibited category because of this quirk.

147. FFLs are subject to the provisions of the Brady Bill and would have to comply with them upon resale of the purchased handgun.

148. *See supra* notes 2-7 and accompanying text for a discussion on a few of the ways in which the current background check system can be circumvented.

149. *See supra* note 25 and accompanying text for a discussion on the expiration of the interim provisions of the Brady Bill.

150. *See supra* notes 9-13 and accompanying text for a discussion on the waiting period requirement and a look at the criteria that Gary Kleck says must be met in order for a waiting period to prevent homicides.

151. *See* David B. Kopel, *Background Checks and Waiting Periods*, in *GUNS: WHO SHOULD HAVE THEM?* 53, 61-65 (David B. Kopel ed., 1995) for some examples of murders that could have been prevented had there not been a waiting period and how the lack of a waiting period aided some individuals in defending their lives.

152. *See supra* notes 18-24 for a discussion on the primary goal of the United States gun control policy.