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Finding the Right Target

Federalism is the underlying issue in challenges to the Brady Act

BY RICHARD C. REUBEN

It is no surprise that the most significant handgun control law passed by Congress has produced a potential blockbuster case before the U.S. Supreme Court.

After all, intense debate has been going on for years over the extent of the right to bear arms under

be disqualified under the Brady Act from making their purchases.

Although the law enforcement profession has been at the forefront of efforts to restrict the spread of guns, the act's provisions requiring police to screen prospective handgun buyers has many sheriffs, well, up in arms and has brought them into alliance with traditional pistol pack-

provisions requiring his office to register prospective buyers and check their backgrounds usurp state power in violation of the 10th Amendment by "conscripting" local authorities to enforce the federal law.

"States are neither regional offices nor administrative agencies of the federal government," argues Stephen P. Halbrook, a Fairfax, Va., solo practitioner in his brief for several sheriffs challenging the act. "Whatever the outer limits of [state] sovereignty may be, one thing is clear: The federal government may not compel states to enact or administer a federal program."

Halbrook is relying heavily on an important 1992 Court decision in *New York v. United States*, 505 U.S. 144, that a federal hazardous waste disposal law violated the 10th Amendment because it forced, or "commandeered," states to pass laws carrying out federal objectives.

That decision has been cited frequently in subsequent challenges to a wide range of federal laws, but the lower courts have bogged down on the central question of just what constitutes commandeering.

In the Brady Act cases, the federal government is urging the justices to apply a narrow definition of commandeering. Under this approach, the government contends in its brief, "The constitutional line is crossed only when Congress compels the states to make law in their sovereign capacities—but not when Congress requires the assistance of state or local officers in carrying out a broadly applicable federal law."

A secondary argument is that the act also exceeds the scope of congressional power under the commerce clause of the Constitution. That position draws on the Court's decision in *United States v. Lopez*, 115 S. Ct. 1624 (1995), which struck down a law barring the possession of guns near school grounds.

But experts agree it is unlikely the Court will use the Brady Act cases to parse *Lopez*, too. More guidance on *Lopez* is needed, of course, but it may be enough to gain clarification of *New York v. United States*.

And someday, the justices might even get around to the Second Amendment. ■



Sheriff Jay Printz contends that his officers are being conscripted to enforce federal law.

the Second Amendment. Congress took more than a decade to pass the Brady Handgun Control Act of 1993, 18 U.S.C. § 922(s), named for James Brady, the press secretary to President Reagan who was wounded in a 1981 assassination attempt.

But while a pair of cases challenging the Brady Act might have been expected to provide the setting for a constitutional showdown over the meaning of the Second Amendment, they have instead become another battleground in the Court's ongoing struggle over federalism.

The key issue in *Printz v. United States*, No. 95-1478, and *Mack v. United States*, No. 95-1503, argued in December, is whether Congress was empowered to enact legislation requiring state and local law enforcement officers to engage in "reasonable efforts" to determine whether prospective handgun buyers should

ers and states' righters concerned with unfunded federal mandates to state and local governments.

Together, those interests have challenged the law as an act of congressional excess. The federal appellate courts are split on the issue. The 5th U.S. Circuit Court of Appeals based in New Orleans has struck down the challenged provisions, while the 2nd Circuit based in New York City and the 9th Circuit based in San Francisco have upheld them.

Appellate Decisions Up for Review

The justices have chosen to formally review *Printz* and *Mack* out of the oft-reversed 9th Circuit—leaving some insiders snickering about foregone conclusions at the Court. But the nature of the issues suggests the call may be much closer, and the impact of the Court's ruling is likely to be much broader than the future of the act itself.

Lawyers for Sheriff Jay Printz of Ravalli County, Mont., say the

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