

RECEIVED  
OFFICIAL TRANSCRIPT SUPREME COURT, U.S.  
MARSHAL'S OFFICE

PROCEEDINGS BEFORE  
'96 DEC 10 P1:49

**THE SUPREME COURT  
OF THE  
UNITED STATES**

CAPTION: JAY PRINTZ, SHERIFF/CORONER, RAVALLI  
COUNTY, MONTANA, Petitioners  
v. UNITED STATES and RICHARD MACK, SHERIFF,  
GRAHAM COUNTY v. UNITED STATES  
CASE NO: No. 95-1478, No. 95-1503  
PLACE: Washington, D.C.  
DATE: Tuesday, December 3, 1996  
PAGES: 1-57

ALDERSON REPORTING COMPANY  
1111 14TH STREET, N.W.  
WASHINGTON, D.C. 20005-5650

202 289-2260

**LIBRARY**  
DEC 11 1996  
Supreme Court U.S.

1 IN THE SUPREME COURT OF THE UNITED STATES

2 - - - - -X

3 JAY PRINTZ, SHERIFF/CORONER, :

4 RAVALLI COUNTY, MONTANA, :

5 Petitioners :

6 v. : No. 95-1478

7 UNITED STATES :

8 and :

9 RICHARD MACK, SHERIFF, GRAHAM :

10 COUNTY :

11 v. : No. 95-1503

12 UNITED STATES :

13 - - - - -X

14 Washington, D.C.

15 Tuesday, December 3, 1996

16 The above-entitled matter came on for oral  
17 argument before the Supreme Court of the United States at  
18 10:02 a.m.

19 APPEARANCES:

20 STEPHEN P. HALBROOK, ESQ., Fairfax, Virginia; on behalf of  
21 the Petitioners.

22 WALTER DELLINGER, ESQ., Acting Solicitor General,  
23 Department of Justice, Washington, D.C.; on behalf of  
24 the Respondent.

C O N T E N T S

1		
2	ORAL ARGUMENT OF	PAGE
3	STEPHEN P. HALBROOK, ESQ.	
4	On behalf of the Petitioners	3
5	ORAL ARGUMENT OF	
6	WALTER DELLINGER, ESQ.	
7	On behalf of the Respondent	32
8		
9		
10		
11		
12		
13		
14		
15		
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		

1 P R O C E E D I N G S

2 (10:02 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument  
4 now in Number 95-1478, Jay Printz, the sheriff of Ravalli  
5 County, Montana -- is that the correct pronunciation of  
6 Ravalli?

7 MR. HALBROOK: Ravalli, yes, Your Honor.

8 CHIEF JUSTICE REHNQUIST: And United States v.  
9 Richard Mack, the sheriff of Graham County, Arizona.

10 Mr. Halbrook.

11 ORAL ARGUMENT OF STEPHEN P. HALBROOK

12 ON BEHALF OF THE PETITIONERS

13 MR. HALBROOK: Mr. Chief Justice, and may it  
14 please the Court:

15 In the Federal-State context, this Court has  
16 upheld laws passed under the spending power, the commerce  
17 power, including the power to preempt State legislation,  
18 and the Article VI duty of State judges to hear Federal  
19 causes of action. The interim provisions of the Brady act  
20 at issue here is not an exercise of any of those powers.

21 The Court of Appeals for the Ninth Circuit held  
22 that, in essence, Congress may commandeer the sheriffs  
23 departments of our country as long as the laws concerned  
24 do not interfere unduly with their duties. The only  
25 alternative for the States is to enact laws which meet

1 Congress' standards to get out from under or exempt  
2 themselves from the Federal commands to --

3 QUESTION: May I ask a preliminary question,  
4 please?

5 MR. HALBROOK: Yes, Your Honor.

6 QUESTION: You represent both Sheriff Printz and  
7 Sheriff Mack?

8 MR. HALBROOK: Yes, Your Honor.

9 QUESTION: Sheriff Mack lost the election for  
10 sheriff of Graham County in the last election?

11 MR. HALBROOK: That's correct. As of January,  
12 this coming January, Sheriff Mack --

13 QUESTION: What date?

14 MR. HALBROOK: I believe it's January 1, Your  
15 Honor.

16 QUESTION: Mm-hmm, and will the case likely  
17 become moot as to Sheriff Mack on that date?

18 MR. HALBROOK: Well, I note that the successor  
19 in office has been identified to the Clerk, and I believe  
20 that this matter will be addressed further in the future,  
21 but I don't think it will be moot. Depending on -- under  
22 this Court's rule the succession in office is automatic,  
23 is my understanding, unless that person withdraws.

24 QUESTION: Mm-hmm.

25 MR. HALBROOK: And Sheriff Mack may also be

1 employed by a police department in the same county and, as  
2 such, would continue doing the same kinds of duties that  
3 are at issue here.

4 QUESTION: Well, but he wouldn't be a CEO then,  
5 would he --

6 QUESTION: Yes.

7 QUESTION: -- or whatever you call the -- he  
8 wouldn't be covered by the statute.

9 QUESTION: A chief law enforcement officer.

10 QUESTION: CLO.

11 MR. HALBROOK: He would continue to be a chief  
12 law enforcement officer as defined by the statute here,  
13 and therefore he would be in a position of conducting the  
14 checks.

15 QUESTION: And would you mind telling us where  
16 in the record we can find the evidence about the extent of  
17 the burden on the sheriffs departments in enforcing this  
18 law?

19 MR. HALBROOK: Yes, Your Honor.

20 QUESTION: Is there some reference to the record  
21 where we can find --

22 MR. HALBROOK: In both cases there were  
23 affidavits, and then there was a hearing with testimony,  
24 and I would refer Your Honor in the Printz, the petition,  
25 the appendix to the Printz petition for cert, the

1 affidavit -- I'm sorry. It's in the joint appendix.

2 That will be at page 9a of the joint appendix,  
3 and the exhibits at 19a, and then a partial transcript of  
4 the hearing where testimony was heard at page 25a, and in  
5 the Mack appendices there would be the affidavit in the  
6 joint appendix at page 5 --

7 QUESTION: Maybe you can file that with the  
8 Clerk later, the references, please.

9 MR. HALBROOK: Yes, Your Honor.

10 QUESTION: Would you like to summarize for us  
11 what it showed in your view as to the extent of the  
12 burden?

13 MR. HALBROOK: Yes, Your Honor.

14 QUESTION: How many applications are filed in  
15 theses two counties, and how much time of the deputies is  
16 required to deal with it.

17 MR. HALBROOK: Yes, Your Honor.

18 In regard to the Printz case, we have  
19 approximately a dozen officers. We have a situation where  
20 the checks were estimated to take between 1 hour per day  
21 and several days, in the case of a very thorough check.  
22 In the case of Mack, we have testimony that the checks  
23 routinely took 1 to 2 hours per day.

24 These are departments where between one-and-a-  
25 half and two officers are on patrol at any given time.

1 These are --

2 QUESTION: Well, it would be rather strange to  
3 have one-and-a-half on patrol, wouldn't it?

4 (Laughter.)

5 MR. HALBROOK: That's just an average Your  
6 Honor. In the case of Graham County I believe there were  
7 10 deputies, total, employed and when you count time off  
8 and 8-hour days and what-not, you end up with an average  
9 of one-and-a-half and, in the case of Ravalli County,  
10 Montana, we have about two on patrol at any given time.

11 QUESTION: Well, do you think that that's  
12 determinative here, how extensive the incursion upon the  
13 officer's duties are?

14 MR. HALBROOK: No, Justice Scalia.

15 QUESTION: I mean, would the statute be  
16 constitutional as to those officers who didn't take a  
17 large proportion of their time --

18 MR. HALBROOK: Not at all.

19 QUESTION: -- and unconstitutional as to others?

20 MR. HALBROOK: Not at all. These are just the  
21 facts of the case. I think that these departments could  
22 have plenty of staff and not much to do and these commands  
23 would be unconstitutional.

24 We've not heard cited yet a specific provision  
25 of the Constitution that justifies these commands. We've



1 seen a lot of dancing around the Commerce Clause and  
2 Article VI of the Constitution and my answer is no, that  
3 regardless of the burden or lack thereof, that these  
4 commands are not constitutional.

5 QUESTION: Well, has Congress imposed a burden  
6 on these chief law enforcement officers to report, or some  
7 State official to report on traffic fatalities, for  
8 example?

9 MR. HALBROOK: Your Honor, that comes under the  
10 spending power. There is a provision in regard to highway  
11 funds that provides that to get the highway funds there  
12 are a number of burdens on the States, including the  
13 drinking age and including --

14 QUESTION: In exchange for receiving the highway  
15 funds.

16 MR. HALBROOK: That's correct, Your Honor.

17 QUESTION: Is that -- excuse me.

18 QUESTION: Now, the Government has -- the SG has  
19 filed a brief citing any number of cases, instances  
20 through the years where Congress has required States or  
21 local officials to perform some duties, and you assert  
22 that in every case it was linked somehow to funding?

23 MR. HALBROOK: As far as we could determine, the  
24 statutes we looked at that were prominently cited by the  
25 Government -- the one that you mentioned, the fatalities

1 reporting, and then the reporting the missing children  
2 relates to the National Crime Information Center, which is  
3 a voluntary system of record reporting between the Federal  
4 Government and the States -- and we haven't found an  
5 instance where there was not some nexus with receipt of a  
6 grant or some other --

7 QUESTION: Inducement to --

8 MR. HALBROOK: Inducement that would be under  
9 the spending power.

10 QUESTION: Now, did --

11 QUESTION: How about some of the early cases  
12 that seem to involve immigration and required court clerks  
13 to keep some sort of a record or take some sort of an  
14 affidavit, a State court.

15 MR. HALBROOK: In our view that clearly comes  
16 under Article VI, the special duty of State judges to hear  
17 Federal causes of action and to do other things that  
18 Congress passes that relate to the Article VI provision  
19 and Congress, under Article I, section 8, is empowered to  
20 enact a uniform rule of naturalization, and we interpret  
21 those early naturalization statutes as being under that  
22 provision and then being applied through the State  
23 judiciary through Article VI.

24 QUESTION: Well, you don't think that under the  
25 uniform rule of naturalization that Congress could compel

1 State sheriffs to make background checks of aliens, do  
2 you?

3 MR. HALBROOK: Absolutely not, because the  
4 sheriff is not a State judge, and Article VI refers  
5 explicitly to State judges.

6 QUESTION: Yes, so -- but I don't think a whole  
7 lot turns, then, on the power of Congress to pass uniform  
8 rules of naturalization. Congress is acting within its  
9 appropriate sphere, just as it acts within its appropriate  
10 sphere under the Commerce Clause.

11 MR. HALBROOK: And the State judges have to  
12 apply that through Article VI, so I think the clearest  
13 example of the early Congress that applies here was the  
14 same day that Congress passed the Tenth Amendment they  
15 passed a resolution that the States would be encouraged to  
16 enact legislation authorizing State local officials,  
17 rather, to keep Federal prisoners in their jails. It was  
18 seen as a completely voluntary function for which the  
19 sheriffs would be paid.

20 QUESTION: Mr. Halbrook, the Government in its  
21 brief on page 31 has a footnote 21 citing several laws.  
22 Do all of those, as far as you know, fit within the kind  
23 of, we give you this and in return you give us that?

24 MR. HALBROOK: I don't know whether all of them  
25 do. I know that several of them do, and these are very --

1 some of them are very obscure laws. I don't know that  
2 there's ever been any litigation on them, so I cannot say  
3 that there is a specific power in the case of every one of  
4 these laws that one could link, for example, to the  
5 spending power.

6 QUESTION: Well, my question is, are you saying  
7 that there's nothing like this, that in every case there's  
8 either something explicit in the Constitution, like the  
9 obligation of State courts that you get from Article VI,  
10 or extradition? Is this the first of a kind, or is there  
11 anything that you would concede is like it?

12 MR. HALBROOK: Well, I think there may be some  
13 of these laws -- for example, I believe there's one cited  
14 here about underground storage facilities, where the  
15 States are supposed to inventory and report underground  
16 storage facilities and frankly, Your Honor, I was not able  
17 to find a specific item in that statute that related to  
18 the spending power. It's just one of those obscure laws  
19 that I'm not really sure what the basis of it is.

20 QUESTION: May --

21 MR. HALBROOK: But in terms of precedents for  
22 this law that we have here, I think the law in New York v.  
23 United States was one that was on all fours with the laws  
24 here in terms of the --

25 QUESTION: May I ask not about precedent but

1 just about your theory of the case?

2 Is it your position that, without having any  
3 spending power at all, but just acting under the Commerce  
4 Clause, Congress would not have the power to have States  
5 report to it the number of fatalities involving children  
6 caused by airbags for -- in 30-day period, or something  
7 like that? It would not have the power to do that?

8 MR. HALBROOK: Justice Stevens, we find no power  
9 in the Constitution just to do that.

10 QUESTION: Well, the power -- I suppose the  
11 argument would be the power is to regulate commerce, and  
12 they're trying to improve safety on the highways and all  
13 the rest of it by getting this data, but you'd say that  
14 the Commerce Clause doesn't authorize that.

15 MR. HALBROOK: It would authorize commerce to be  
16 regulated, but it would not authorize the immersion of the  
17 States --

18 QUESTION: Requiring information to be provided  
19 by the States.

20 MR. HALBROOK: -- to do that kind of reporting,  
21 and I'd like to point out that this reporting --

22 QUESTION: Couldn't Congress do it under this  
23 spending help they give the States for the road systems?

24 MR. HALBROOK: That's the way they do that --

25 QUESTION: Yes.

1 MR. HALBROOK: -- now. That is the basis for  
2 this law.

3 QUESTION: Mr. Halbrook, the obligation, as I  
4 understand it, on the part of the law enforcement officers  
5 is to use reasonable efforts. Is that it?

6 MR. HALBROOK: That's correct.

7 QUESTION: Do whatever's reasonable. Is there  
8 in the statute any mechanism for review by anybody as to  
9 whether a given law enforcement officer did use reasonable  
10 efforts?

11 MR. HALBROOK: No, Your Honor. It's a very  
12 vague term, and basically the law says that the CLEO, or  
13 the chief law enforcement officer, shall use reasonable  
14 efforts to ascertain whether receipt or possession of a  
15 handgun is lawful, but then it goes on to say, including,  
16 and we interpret this as a minimum that has to be carried  
17 out, including research into whatever State and local  
18 record-keeping systems are available and in the national  
19 system designated by the Attorney General.

20 QUESTION: Do you think it would be open to a  
21 court, to this Court to construe that reasonable effort  
22 criterion as one which turns on the law enforcement  
23 officer's own view of what in relation to all of his other  
24 responsibilities, and in relation to his resources, is  
25 reasonable? Can he be the judge of reasonableness?

1 MR. HALBROOK: To some extent, perhaps, because  
2 the language is there, but I think that there's a  
3 vanishing point or an ending point. If he doesn't do  
4 any -- makes no effort whatever to conduct these  
5 background checks and to make these legal determinations,  
6 it seems that he is not making a reasonable effort.

7 QUESTION: Well, unless he is the judge of  
8 reasonableness. If he were the sole judge of  
9 reasonableness, so that there was, in effect, no review of  
10 the adequacy of his efforts, would you have a case?

11 MR. HALBROOK: I don't think he is the sole  
12 judge, because --

13 QUESTION: No, but I'm asking you to assume my  
14 hypothesis. If he were -- if the statute were construed  
15 in such a way as to make him the sole judge, would you  
16 have a case?

17 MR. HALBROOK: We would have no case if it was  
18 totally optional, and I think your hypothetical would be  
19 equivalent to changing shall to may.

20 QUESTION: Well, that isn't optional. I mean,  
21 if I'm -- if I am compelled to make an honest judgment  
22 about whether I have the resources to do this, presumably  
23 I'm not going to, you know, perjure myself, and I will  
24 therefore as a practical matter be compelled to use  
25 resources if they are available.

1 MR. HALBROOK: Well --

2 QUESTION: Wouldn't I?

3 MR. HALBROOK: As I -- I agree with you, and as  
4 I understood the question --

5 QUESTION: So therefore your answer should be,  
6 we would continue to have a case because it would, indeed,  
7 continue to compel the State officers to do something.

8 MR. HALBROOK: As I understood the question,  
9 there will be no duty at all, and if there is any --

10 QUESTION: No, that wasn't the question.

11 QUESTION: No, the question was -- no, I'm  
12 sorry.

13 The question was, there was no review, that the  
14 final decision as to what was reasonable would be the  
15 decision of the law enforcement officer and there would be  
16 no review of that decision. That's the hypothesis.

17 MR. HALBROOK: Well --

18 QUESTION: On that hypothesis, would you have --

19 MR. HALBROOK: -- I would still have one problem  
20 left, I think.

21 QUESTION: Okay.

22 MR. HALBROOK: Which is the perception of the  
23 sheriff as not being a law-abiding sheriff.

24 In other words, if Congress enacts a law,  
25 constituents in the community, many of them think the law



1 should be enforced if it's on the books, and the sheriff  
2 in all cases decides that he doesn't have to do anything  
3 and he completely rejects any execution of the law or  
4 consideration of execution of the law, then he does have  
5 the political damage, and this is a particular

6 QUESTION: Well, he would have -- and I think  
7 your point is well-taken, but would that -- would that  
8 place him in the position that the opinion in the New York  
9 case, for example, described as being essentially an agent  
10 or employee, as it were, of the national Government to  
11 carry out a national Government policy? It might put him  
12 in a political spot, I think you're right. But would that  
13 rise to the level of the obligation that in the broader  
14 passages in the New York case was condemned as  
15 unconstitutional?

16 MR. HALBROOK: Well, I think it would still come  
17 under the prohibition on requiring a State to administer a  
18 Federal regulatory program in the sense that there's got  
19 to be some kind of minimal requirement.

20 QUESTION: Well, of course, in this situation  
21 are there not criminal penalties for someone who doesn't  
22 follow the requirements of the statute?

23 MR. HALBROOK: Your Honor, the --

24 QUESTION: So it would be a jury that would be  
25 interpreting, presumably, whether the sheriff had

1 reasonably performed the requirements under the statute  
2 and could result in a criminal punishment, as I read the  
3 statute.

4 MR. HALBROOK: The statute broadly says whoever  
5 violates 922(s) is subject to incarceration.

6 QUESTION: Right.

7 MR. HALBROOK: And the -- one district court  
8 held that that meant exactly what it said in the Mack  
9 case, that that was a threat of criminal prosecution when  
10 the law was first enacted and, in fact, the Bureau of  
11 Alcohol, Tobacco and Firearms spokesman on this law said  
12 that there were criminal penalties that applied to law  
13 enforcement officers.

14 However, none of the appellate courts have held  
15 that the criminal penalties apply. They have held  
16 basically that that issue is moot because the Justice  
17 Department interpreted the law not to apply -- interpreted  
18 criminal penalties not to apply to CLEO's.

19 QUESTION: And what is your position?

20 MR. HALBROOK: My position --

21 QUESTION: Do the criminal penalties apply to  
22 your client?

23 MR. HALBROOK: It says whoever. I think under  
24 the plain language of the statute it does apply.

25 QUESTION: Is that your position that it does

1 apply, that you're taking the position before us that your  
2 clients are subject to the criminal penalties?

3 MR. HALBROOK: What I have to say, because I  
4 represent real clients here, is that if the Government  
5 says they don't apply and -- the criminal penalties don't  
6 apply and these are my clients, I'm going to agree with  
7 the Government, because I do not want my clients subject  
8 to a court ruling saying that criminal penalties apply to  
9 conduct.

10 QUESTION: And that's a reasonable enough  
11 position, isn't it?

12 There are a lot of statutes, for example, that  
13 impose civil penalties and criminal penalties upon  
14 regulatory violations and they have a general penalty  
15 provision that says whoever violates --

16 MR. HALBROOK: Right.

17 QUESTION: -- this law, and there are a lot of  
18 provisions in the statute that require the Secretary to  
19 conduct rulemaking, that require the Secretary to do this  
20 or that.

21 I don't know anybody who's ever tried to  
22 prosecute the Secretary if he fails to conduct a  
23 rulemaking. I mean, it's a violation of the APA, but it's  
24 hard to say he's in violation of the act within the  
25 meaning of the penalty provision.

1                   MR. HALBROOK: Well, I think you have to look at  
2 each statute and what the criminal penalties say, but in  
3 this case --

4                   QUESTION: Is that a reasonable way to interpret  
5 this?

6                   MR. HALBROOK: Well, Your Honor it says --

7                   QUESTION: That, you know, we're going to go  
8 after the sheriffs?

9                   MR. HALBROOK: It says dealers shall do certain  
10 things, and then it says CLEO's shall do certain things.  
11 The word shall appears in both, and if you want to say  
12 that the criminal penalties don't apply to the sheriffs, I  
13 don't know, maybe they don't apply to the dealers, either.  
14 I don't know who they apply to.

15                   QUESTION: But I take it your position here, as  
16 you announced it a moment ago, is the Justice Department  
17 says those penalties don't apply to the sheriffs and  
18 that's your position here too, is that correct?

19                   MR. HALBROOK: Well, I have to say, frankly  
20 we're in a dilemma, because we're faced with the language  
21 of the statute, which is clear enough, and when we went  
22 into this litigation we asked for preliminary injunctions  
23 protecting our clients from criminal prosecution, and then  
24 the Justice Department came up with a memorandum saying  
25 that we're not going to interpret the law in that way, so

1 we certainly would like to preserve in essence these  
2 letters of immunity that our clients are not pros --

3 QUESTION: But as I understand your brief,  
4 your -- in your view the statute would be equally  
5 unconstitutional whether it has the criminal penalties or  
6 not.

7 MR. HALBROOK: Oh, absolutely.

8 QUESTION: So why are we fussing about this  
9 issue, I wonder.

10 (Laughter.)

11 MR. HALBROOK: We think there's other -- I mean,  
12 the Government has said --

13 QUESTION: Except you have to answer questions  
14 that are put.

15 (Laughter.)

16 MR. HALBROOK: The Government has clearly argued  
17 that they could bring the sheriffs into court on mandamus  
18 or injunction actions if they don't enforce these laws.

19 QUESTION: There's something of a paradox in  
20 this whole area, is there not, in that if you prevail it  
21 means that you 1) have a huge Federal bureaucracy, or 2)  
22 withdrawal of funds, perhaps funds well in excess of  
23 what -- the funds that you would really expend in this  
24 area. In a way, if you prevail you might be striking a  
25 blow for big Government.

1 MR. HALBROOK: Absolutely not, Your Honor. The  
2 funds are specifically prohibited to go to CLEO's. The  
3 funds are for the updating of the --

4 QUESTION: I'm assuming a complete revision of  
5 the act.

6 MR. HALBROOK: Well, not even then, because by  
7 November of 1998 there is to be on line the permanent  
8 Brady act provisions under which the Federal Government  
9 will undertake these functions. There will be an instant  
10 check where the Federal Bureau of Investigation,  
11 basically, will be conducting --

12 QUESTION: Yes.

13 MR. HALBROOK: -- background checks, and all of  
14 our Tenth Amendment problems go away with that.

15 QUESTION: Well, wouldn't they go away as well  
16 if the Government offered money to chief law enforcement  
17 officers to administer the program, and you would have an  
18 option whether to accept the money and administer it or  
19 not.

20 MR. HALBROOK: As long as the option was  
21 there --

22 QUESTION: You wouldn't be here under those  
23 circumstances.

24 MR. HALBROOK: We would not be here, absolutely  
25 not. But there was no money, and there was no option in

1 this case.

2 QUESTION: Now, do a lot of chief law  
3 enforcement officers around the country comply voluntarily  
4 with this act?

5 MR. HALBROOK: Well, I don't know how the word  
6 voluntarily would --

7 QUESTION: Well, they are complying.

8 MR. HALBROOK: They are complying.

9 QUESTION: Like 40 States or more?

10 MR. HALBROOK: Actually, the Brady act, the  
11 provisions we're talking about only apply in about half  
12 the States.

13 QUESTION: Mm-hmm.

14 MR. HALBROOK: Maybe 24 States.

15 QUESTION: Some of them have enacted their own  
16 program, so --

17 MR. HALBROOK: Some States --

18 QUESTION: -- that's sufficient?

19 MR. HALBROOK: Yes, Your Honor. Some States  
20 already had laws on the books that met the Federal  
21 criteria, and in other States --

22 QUESTION: And some are complying without  
23 protest.

24 MR. HALBROOK: Well, I'm not sure what you mean.  
25 I mean, some States enacted laws to get out from under

1 this provision. That's how we get up to the 50 percent of  
2 the States are exempt from this.

3 QUESTION: Yes.

4 MR. HALBROOK: And then, as far as compliance,  
5 I'm not sure how much compliance there is, even in the  
6 States where -- even on the part of the law enforcement  
7 personnel who support this law. The brief of the State of  
8 Maryland and other States says that -- in support of  
9 Government said that all you have to do is the computer,  
10 the Federal computer check, and that's not what the law  
11 says. It seems like they're nullifying the law if that's  
12 all they're doing, because it --

13 QUESTION: It says States as well, does it not,  
14 records?

15 MR. HALBROOK: All available State and local  
16 records.

17 QUESTION: Yes.

18 QUESTION: May I ask you a question? I want to  
19 be sure I understand your position now, prompted by  
20 Justice Kennedy's question.

21 Supposing they amended the statute to say that  
22 all the investigations shall be done by Federal employees,  
23 FBI agents or something, but that the chief law  
24 enforcement officer of each community must make available  
25 to the Federal officer any records that will help him find



1 out this information, would that be constitutional?

2 MR. HALBROOK: No, Your Honor.

3 QUESTION: That would not.

4 MR. HALBROOK: Not as --

5 QUESTION: That's just the question that I have,  
6 actually. I mean, if you track this through, I take it  
7 there's a statute, for example, which says that States  
8 have to report missing children, right?

9 MR. HALBROOK: A statute that's based on highway  
10 funding, yes.

11 QUESTION: It's not -- I just see they're  
12 setting up a task force, and they say in the task force --  
13 what it says here is every Federal, State, and local law  
14 enforcement shall report each case of a missing child  
15 under age 18.

16 MR. HALBROOK: To the NCIC.

17 QUESTION: Yes, right. Period.

18 MR. HALBROOK: Yes, right.

19 QUESTION: Not whether you take money, you don't  
20 take money, so I take it you're saying that's  
21 unconstitutional, too.

22 MR. HALBROOK: Well, I interpret that as being  
23 based on NCIC.

24 QUESTION: I don't see anything here that says  
25 you have to do it only if you take money.

1 MR. HALBROOK: Your Honor, when you look at the  
2 other provisions establishing the NCIC --

3 QUESTION: Then if it says you only have to do  
4 it if you take money, then I'm not right. It's not a good  
5 example. There must be an example, maybe it's this case,  
6 where Congress has the power under the Commerce Clause to  
7 say, report some things, right? But the issue is whether  
8 it's necessary and proper.

9 MR. HALBROOK: Correct.

10 QUESTION: That's the issue.

11 Now, why is it that in Germany, in Switzerland,  
12 in the Common Market, in many other federal associations,  
13 people think it is more respectful of the States to impose  
14 minor duties upon State officials than to set up central  
15 bureaucracies?

16 Where is it in our history, or our Constitution,  
17 or in the language, that it is more respectful of States  
18 to have a Nationwide computer system run by the FBI than  
19 to impose minor reporting requirements on State officials?

20 What is it in law, or history, or anything you  
21 want to refer to that says it's more consistent with  
22 States rights?

23 MR. HALBROOK: In our Constitution, Your  
24 Honor --

25 QUESTION: Where does it say that?

1 MR. HALBROOK: It says that the President shall  
2 take care that the laws be faithfully executed, and it  
3 provides for a Federal executive branch to execute the  
4 laws that Congress passes.

5 QUESTION: And why is that more respectful of  
6 State rights to set up, let's say, a Federal police  
7 service than to say the local police service has to report  
8 a few things?

9 MR. HALBROOK: Well --

10 QUESTION: In other countries they think the  
11 opposite, and so what I'm looking for is history or  
12 language that says why it is here the opposite.

13 MR. HALBROOK: Because of the text of the  
14 Constitution and the intent of the Framers we've rejected  
15 the so-called New Jersey plan under which the Federal laws  
16 would be executed by State and local officials, and that's  
17 the plan that we have. That's our Constitution.

18 QUESTION: Of course, when the Federal  
19 Government executes the laws the Federal Government also  
20 has to pay for their execution, right?

21 MR. HALBROOK: They pay for it --

22 QUESTION: So if you vote for a massive  
23 regulatory program you also have to vote for the taxes at  
24 the Federal level, which makes Federal representatives  
25 less popular back home.

1 MR. HALBROOK: And it --

2 QUESTION: It's much easier if you allow the --  
3 impose an obligation on the States to do it and the State  
4 legislators can take the heat by raising the taxes.

5 MR. HALBROOK: It's also clear in terms of  
6 political responsibility who's responsible for enacting  
7 the law and executing the law, and that's something that's  
8 broken down here.

9 We have Congress passing a law, taking credit to  
10 that extent, but then having the administration of the law  
11 being imposed on the shoulders of local law enforcement  
12 officials.

13 QUESTION: Let me follow up on an earlier answer  
14 you gave, Mr. Halbrook. I understood you to say that even  
15 if the Federal Government were to send out people to look  
16 at State records, that that would not be permissible, and  
17 I think that's a rather strange answer, if I understood it  
18 correctly.

19 Certainly, in -- say, in voting rights cases,  
20 Federal, FBI people come and look at State voter  
21 registrations. If no activity were required on the part  
22 of a State agent, just the Federal Government would send  
23 an agent to look at some, say, criminal history records,  
24 would that be violative of the Constitution?

25 MR. HALBROOK: Well, in the Voting Act cases,

1 we've got the Fifteenth Amendment and we've got several  
2 other amendments that relate to voting rights.

3 QUESTION: But here you have the Commerce  
4 Clause, which certainly gives general authority over  
5 things that move in commerce, and there's no challenge  
6 here on that ground.

7 MR. HALBROOK: Well, these are not commercial  
8 records they would be looking at. There's no nexus to  
9 interstate commerce if they want to go through the  
10 records, but this is the kind of thing where cooperative  
11 federalism really works. There's always been the sharing  
12 of information voluntarily. It's not a problem.

13 QUESTION: No, but you're saying it would be  
14 unconstitutional to require that challenge. Wasn't that  
15 your answer to Justice Stevens?

16 MR. HALBROOK: Yes, Your Honor. I don't know  
17 what the constitutional --

18 QUESTION: Well, take criminal --

19 MR. HALBROOK: -- authorization would be.

20 QUESTION: Just take criminal records, for  
21 example, not necessarily tied to commerce. You mean it  
22 would -- I take it it's your position that it would be  
23 unconstitutional to require access by a Federal  
24 investigator to State conviction records, is that correct?  
25 Is that your position?

1 MR. HALBROOK: Access from a police department,  
2 perhaps, but by the same token, there's no constitutional  
3 power that the States would have to require the Federal  
4 Government to share their records, but it's the kind of  
5 thing that comes under cooperative federalism where --

6 QUESTION: That's an extreme position. I  
7 thought you were here taking the position that this  
8 particular program required the county to expend its  
9 efforts and occupy the time of their deputies to devote  
10 first and foremost to the execution of this particular  
11 law, as opposed to their own needs for hunting murderers  
12 or rapists or robbers. I thought that was the position.

13 MR. HALBROOK: Absolutely that is why we're  
14 here.

15 QUESTION: Yes, but you're changing your  
16 position --

17 QUESTION: And I think that's totally different  
18 when you say no, we wouldn't even agree that a law that  
19 says a Federal agent can come and look at State records --

20 MR. HALBROOK: Your Honor --

21 QUESTION: -- would be allowed. I mean, that's  
22 a remarkable difference in position.

23 MR. HALBROOK: That's a hypothetical question.  
24 That issue hasn't been briefed here.

25 QUESTION: No, but your position, counsel --

1 MR. HALBROOK: -- the citation to the authority  
2 for that.

3 QUESTION: Your position, counsel, has been that  
4 there's a lack of power here.

5 MR. HALBROOK: Yes, Your Honor.

6 QUESTION: And even if it's 10 minutes a month  
7 required by the officer, if the Federal Government orders  
8 it, you can't do it.

9 MR. HALBROOK: I don't --

10 QUESTION: If it's 10 minutes a month or 10  
11 minutes a year. That's your position.

12 MR. HALBROOK: That's our position, absolutely.

13 QUESTION: And if they pay a million dollars, if  
14 they pay a million dollars of the cost, if the State says,  
15 we don't want your million dollars, we don't want a  
16 billion dollars, we don't want to do it, period --

17 MR. HALBROOK: Yes --

18 QUESTION: -- in your position, they can't be  
19 forced --

20 MR. HALBROOK: That's been the precedents of  
21 this Court under --

22 QUESTION: I thought it was 10 minutes a month  
23 in the execution of a Federal law, 10 minutes a month in  
24 acting in an executive capacity to implement -- not to  
25 obey, but to implement a Federal law.

1           Isn't there a difference between that and simply  
2 obeying a subpoena for documents, or a statute that  
3 requires information to be provided, which statute could  
4 apply to public -- to private individuals as well as to a  
5 Government.

6           MR. HALBROOK: Yes, Your Honor. We don't object  
7 to that, and we don't object to subpoenas.

8           This Court's precedents under the --

9           QUESTION: But requiring information to be  
10 turned over is something that you can do vis-a-vis a  
11 private citizen. It doesn't treat the Government as a  
12 Government. You're treating the State as a governmental  
13 institution, however, when you require it to enforce a  
14 law.

15          MR. HALBROOK: If it's a law that applies  
16 universally under this Court's precedents such as Garcia,  
17 this law would be valid. If it's --

18          QUESTION: Yes, but private citizens cannot open  
19 up public records. Private citizens don't have authority  
20 to make public records available.

21          If the State has its own secret files on people  
22 who violated the law, the question is, can the Federal  
23 Government command the State to make -- give access to  
24 those documents, and you say no.

25          MR. HALBROOK: Well, if it's records related to



1 criminal conduct and subject to a subpoena, we have no  
2 problem at all with those records.

3 QUESTION: Yes, but I'm not talking about a  
4 subpoena.

5 QUESTION: Thank you, Mr. Halbrook.

6 MR. HALBROOK: Thank you, Your Honor.

7 QUESTION: General Dellinger, we'll hear from  
8 you.

9 ORAL ARGUMENT OF WALTER DELLINGER

10 ON BEHALF OF THE RESPONDENT

11 GENERAL DELLINGER: Mr. Chief Justice, and may  
12 it please the Court:

13 Mr. Halbrook's answers at oral argument are, I  
14 believe, fully consistent with the position that they have  
15 taken in their brief, and I think for understandable  
16 reasons.

17 They believe that there's an entire failure of  
18 power on the part of the Federal Government to enact a law  
19 of this kind just as if it were the Government of Brazil  
20 or the King of Belgium.

21 QUESTION: Well, can the State require the  
22 Federal Government to do something?

23 GENERAL DELLINGER: No, and --

24 QUESTION: Why doesn't it work in reverse?

25 GENERAL DELLINGER: Because of the Supremacy

1 Clause, I think, Justice Kennedy. The --

2 QUESTION: Well, but there's a Federal design  
3 here, and the question is whether or not it is consistent  
4 with the political relation that subsists between the  
5 citizens to have one Government interfere with another.

6 GENERAL DELLINGER: The Supremacy Clause  
7 resolved that issue, Justice Kennedy, where Congress is  
8 acting as it is here, fully within the core of one of its  
9 enumerated powers.

10 The three critical points, I think, are first  
11 that -- just to tell you what I think I would hope to  
12 discuss -- are first that, because this law does not  
13 impermissibly require the States to govern but, rather,  
14 essentially applies Federal law to local law enforcement  
15 officers and to gun dealers, requiring them to exchange  
16 vital information, and because Brady uses local law  
17 enforcement as the source of this information for the very  
18 good reason that these offices have, for now, the most  
19 ready access to the relevant information, and finally,  
20 because the interim Brady provisions are by definition so  
21 reasonable in their approach that it is necessary to  
22 resort to resurrecting a rigid rule like the repudiated  
23 position of Kentucky v. Dennison --

24 QUESTION: Well, suppose that the Congress had  
25 said that because we have an emergency here and we're not

1 up and running, that for 5 years gun permits, gun transfer  
2 forms will be processed by the House of Representatives in  
3 their field offices, in their home offices. The entire  
4 burden of complying with the act was up to the Congress of  
5 the United States, the individual Congressmen and their  
6 staffs. That would be a clear violation of separation of  
7 powers, would it not? You don't think the Congress itself  
8 could administer this scheme through its congressional  
9 field offices?

10 GENERAL DELLINGER: Congress may not be saddled  
11 with a duty of executive branch Government.

12 QUESTION: It saddles -- it saddles --

13 GENERAL DELLINGER: I agree with that.

14 QUESTION: All right.

15 GENERAL DELLINGER: But --

16 QUESTION: And that is because there are some  
17 very basic notions of accountability that underlie  
18 separation of powers.

19 Why should, if the Congress could not ignore  
20 separation of powers, how can it ignore the Federal  
21 balance when the same consideration are applicable -- that  
22 is to say, a blurring of political accountability?

23 GENERAL DELLINGER: Well, I -- it is not the  
24 case that Congress is ignoring the principles of  
25 federalism, Your Honor. I think the act is quite

1 sensitive to those concerns.

2 I would not necessarily concede that Congress  
3 could not seek information that was in the hands of  
4 congressional offices and require them to transmit it. If  
5 Congress can require congressional offices to --

6 QUESTION: Well, my hypothetical was a rather  
7 strange hypothetical --

8 GENERAL DELLINGER: Well, I understand that.

9 QUESTION: -- I will admit.

10 GENERAL DELLINGER: Yes, I understand that,  
11 Justice Kennedy, and it's a fair one, but it is important  
12 to realize the extent to which this is a law that applies  
13 to --

14 QUESTION: Well, let me ask you whether you  
15 think that under the constitutional framework we have,  
16 which preserves States as sovereign entities, the Congress  
17 can pass a law mandating that every State administer  
18 Congress' welfare plan without offering financial  
19 assistance and an option to the States to do that?

20 Can they just pass a law saying we think it's in  
21 the public interest to resolve issues of poverty, and we  
22 mandate the States to carry out our extensive program that  
23 we devise, and the States are to manage it. No money, no  
24 option. You go do it, States.

25 Or some health program, or some State highway

1 safety program, same thing. Can Congress just pass it,  
2 and without giving the States and option or funding for it  
3 say, you attend to this, States. You manage it. You  
4 enforce these laws we pass.

5 Can they do that?

6 GENERAL DELLINGER: Justice O'Connor, Congress  
7 can impose upon State and local government officials the  
8 responsibility for assisting in the execution of a Federal  
9 program as long as, first, it does not implicate the  
10 serious concerns of State sovereignty and political  
11 accountability that are identified in New York --

12 QUESTION: Well, don't you think it does when  
13 Congress says, we're passing this law and setting a  
14 national standard for health care, or welfare --

15 GENERAL DELLINGER: I think --

16 QUESTION: -- or highway safety, and passes it  
17 off to the States directly to administer those programs,  
18 not giving them an option, not funding it. Not giving  
19 them an option to take money and participate.

20 GENERAL DELLINGER: I understand that. My  
21 answer is a predictive one, that it would quite likely be  
22 the case that such a program would, in fact, run afoul of  
23 the principles of sovereignty and accountability because  
24 it would place the States in a position of making policy  
25 according to a Federal mandate.

1           QUESTION: And this is just a smaller version of  
2 that example --

3           GENERAL DELLINGER: I --

4           QUESTION: -- is it not?

5           QUESTION: Let me put a hypothetical where it  
6 wouldn't put the states in the position of making any  
7 policy. It's a federally designed welfare program. All  
8 the -- every jot and tiddle of it is set forth in painful  
9 detail in the statute.

10           Your answer, then, would have to be, then it  
11 would be okay. Congress could go home and say, well,  
12 we've balanced the budget, having left all of the welfare  
13 cost to the States. Your answer would be yes, that's  
14 constitutional, right?

15           GENERAL DELLINGER: My answer is that that --

16           QUESTION: No policy judgments left to the  
17 States.

18           GENERAL DELLINGER: My answer is that such a  
19 statute would not, as you define it, violate the  
20 principles of sovereignty and accountability set out --

21           QUESTION: The answer is yes.

22           GENERAL DELLINGER: Now -- yes, exactly. Now, I  
23 do not --

24           QUESTION: Because you think that it is -- and  
25 this is what the Government's brief says. It seems to me

1 totally counterintuitive that it is better when you leave  
2 the States no option, no policy judgments at all, and make  
3 them simply dance like marionettes on the fingers of the  
4 Federal Government. That's okay. But it is bad if you  
5 leave the States some policy judgment. I mean, that's so  
6 counterintuitive. Why wouldn't that make it worse, to  
7 leave them no policy judgment, rather than make it better?

8 GENERAL DELLINGER: Because, for the reasons  
9 this Court sets forth in *New York v. United States*.

10 QUESTION: *New York v. United States* gave the  
11 States an option. They could manage the waste or they  
12 could, by taking over it themselves, act purely  
13 executively rather than legislatively.

14 GENERAL DELLINGER: What Congress --

15 QUESTION: That would have been purely executive  
16 action. That option was available in *New York*, and we  
17 nonetheless held that it was bad.

18 GENERAL DELLINGER: What Congress has done here  
19 is, I think, Justice O'Connor, not a smaller version of  
20 that large program, because they have been careful to take  
21 responsibility for the policy choices and then for the  
22 administrative policy choices.

23 This act is administered by the Departments of  
24 Justice and Treasury, by the ATF, the FBI, by Assistant  
25 U.S. Attorneys, by the Bureau of --

1 QUESTION: Well, I think Justice Scalia has  
2 addressed that point in exploring whether taking away the  
3 policy choices saves it.

4 GENERAL DELLINGER: Yes.

5 QUESTION: The notion that the Federal  
6 Government can just commandeer State and local government  
7 totally to administer some federally enacted program, all  
8 the details of which are spelled out, is the question.

9 GENERAL DELLINGER: I think it is important to  
10 note what Congress cannot do.

11 First of all, in answer to your question and  
12 Justice Scalia's about the extent of the burden, there is  
13 some limit, as this Court suggested in Garcia, to how much  
14 of a purely financial burden Congress could put on the  
15 States if Congress made all the policy choices itself.  
16 That -- and answering those hypothetically is difficult,  
17 because it would depend on the degree of the national  
18 interest.

19 In 1917, Congress had every State government  
20 devote its entire resources for a brief period of time to  
21 registering people for the World War I draft. You would  
22 want to know the degree of flexibility and discretion that  
23 were permitted to the States to carry out their own  
24 functions.

25 QUESTION: Also you would say there was some



1 difference between wartime and peacetime as to  
2 congressional authority.

3 GENERAL DELLINGER: Yes, Mr. Chief Justice. It  
4 would depend upon that and all the other circumstances as  
5 to how great a burden Congress could put.

6 But I want to be clear that we believe that,  
7 under the vital principles of New York v. United States,  
8 there are provisions that would be unconstitutional, that  
9 are different from the provision here.

10 For example, even if it only cost the State \$5  
11 and their officials 5 minutes of their time, the  
12 Constitution would be violated if Congress had decided to  
13 off-load some of the political responsibility here by  
14 requiring each city council and county commission to vote  
15 in the provisions of the Brady act.

16 Even though that's fairly costless, requiring  
17 them to act like puppets and to call the roll saying, all  
18 those in favor raise your hand, and they're required to  
19 raise their hand when they're not in favor, or have some  
20 other draconian alternative, such as taking title to  
21 handgun liability. That would violate the sovereignty  
22 principles.

23 Similarly, if Congress had said that the States  
24 must, by the year 2010, reduce the number of handgun sales  
25 in the State by 50 percent, it would be worse than simply

1 having Congress take the political responsibility for the  
2 choices Congress made, because the States would then be  
3 forced to undertake what might be politically unpopular  
4 choices to solve a problem --

5 QUESTION: They can do that with the  
6 environment, can't they? I mean, aren't there hundreds of  
7 billions of dollars of unfunded mandates that the States  
8 complain about and create a political issue?

9 I mean, what's the line? From what I read, the  
10 CAMEL is lots and lots of money in obligations that  
11 Congress imposes upon the States all the time.

12 GENERAL DELLINGER: Well, under the --

13 QUESTION: So what's the principle of federalism  
14 that says they can do that but asking a police officer to  
15 report a missing child, or asking a police officer to  
16 report a safety statistic, or to look something up in a  
17 computer, suddenly is a violation of the Tenth Amendment,  
18 but imposing hundreds of billions of dollars of costs, as  
19 Congress does in many laws, is not? What's the principle?

20 GENERAL DELLINGER: I don't believe there is any  
21 principle.

22 QUESTION: I don't believe there's any such  
23 unfunded mandate. What unfunded mandates are you talking  
24 about?

25 QUESTION: I know -- mandates in -- I'm not

1 saying here. I just read in the newspaper --

2 GENERAL DELLINGER: Well --

3 QUESTION: -- that there is a thing called  
4 unfunded mandates --

5 GENERAL DELLINGER: Yes, but --

6 QUESTION: -- that the States complain about.

7 GENERAL DELLINGER: Justice Breyer, those are  
8 often unfunded within the context of some other provision  
9 where the courts -- where the States ostensibly have a  
10 choice. I mean, I do believe they --

11 QUESTION: If you don't do it, we'll do it, and  
12 the States do it simply to avoid having the Federal --

13 GENERAL DELLINGER: Well --

14 QUESTION: But you don't have to do it. If you  
15 don't have to do it --

16 GENERAL DELLINGER: That's correct.

17 QUESTION: -- we'll send the Feds in.

18 GENERAL DELLINGER: Those are not  
19 constitutionally impermissible, but if Congress were to  
20 pass the Perfectly Clean Air Act of 1998 and say to the  
21 States, you've got to have 99-44/100 percent pure air by  
22 the year 2000, Congress gets all the credit, and the  
23 States are then forced to choose between adopting  
24 mandatory car-pooling, or exorbitant gasoline taxes.

25 That's not what happens here when Congress takes

1 the political responsibility, and I believe that once  
2 you're in this area, although we believe and have as our  
3 most difficult question thinking about what the outer  
4 limit would be if Congress were, contrary to 200 years of  
5 its history, to start imposing burdens so substantial,  
6 even though they did not implicate sovereignty and  
7 accountability, that the States would be impaired in  
8 carrying out their functions.

9 I think the more serious question is the one  
10 that I think that Mr. Halbrook dealt with as well as he  
11 can, which is, what is the principle that tells Congress,  
12 that has extraordinary legislative power to regulate these  
13 mobile items called handguns, that they simply may not  
14 impose these duties on gun dealers and local law  
15 enforcement officers who are sitting there on the  
16 information, if they'll look it up, to tell Congress when  
17 guns are being sold to violent felons and other dangerous  
18 buyers.

19 QUESTION: Only governmental duties cannot be  
20 imposed, is all he's saying. If it's informational -- or  
21 it's all he should be saying.

22 GENERAL DELLINGER: Well --

23 (Laughter.)

24 QUESTION: It can get information --

25 GENERAL DELLINGER: As Justice Stevens --

1 QUESTION: It can get information from the --  
2 from a Government just as it can get information from an  
3 individual, but to require a Government to perform  
4 governmental functions is something else.

5 GENERAL DELLINGER: Well, this -- it would be,  
6 Justice Scalia, in the sense of New York v. United States,  
7 if those governmental functions were the kind of policy  
8 impositions that Congress was imposing with the Low Level  
9 Radioactive Waste Act at issue in New York, that forced  
10 the States to undertake the hard policy choices that  
11 Congress, in fact, made here.

12 What they are -- here, Congress is simply  
13 telling the States to do something that local, State, and  
14 Federal Governments have done for a very long time.

15 QUESTION: No unpleasant policy choices are left  
16 for the local government. They -- the local government  
17 does not have to decide whether (a) to raise taxes, or (b)  
18 to divert police officers from hunting murderers and  
19 rapists to looking up these records, or (3) -- I don't  
20 know what, to declare bankruptcy.

21 Aren't these all unpleasant policy choices that  
22 the Government has imposed upon the localities?

23 GENERAL DELLINGER: The only policy choice that  
24 I think you could honestly call a policy choice that  
25 Congress requires the chief local law enforcement officers

1 to engage in here is one that creates the flexibility of  
2 the Brady act. It is telling them that the efforts that  
3 they need to make need only be reasonable efforts. They  
4 give them the flexibility to decide --

5 QUESTION: Well, why isn't that enough of a  
6 policy choice to create the problem?

7 I mean, it seems to me that even assuming that  
8 the scheme is not voluntary, and I take it you're not  
9 conceding that it is, the local law enforcement --

10 GENERAL DELLINGER: We do not -- we do not take  
11 the position that it is voluntary.

12 QUESTION: Right, so that the local law  
13 enforcement officer has got a real policy choice, number  
14 1, in choosing between his Brady act responsibilities and  
15 whatever other local law enforcement abilities he's got,  
16 and number 2, I suppose even independently of that, he's  
17 at least got an initial policy choice to make about how  
18 intrusive an investigation is reasonable enough, and I  
19 would suppose that that latter decision could be  
20 politically a very explosive one in some communities.

21 So even on your own standard, why isn't that  
22 enough for unconstitutionality?

23 GENERAL DELLINGER: Because the kind of policy  
24 choice that he's making -- if you -- I have to agree that  
25 you can call anything a policy choice. I don't agree that

1 the way this act works imposes or forces the CLEO to make  
2 these decisions about intrusiveness.

3 That is to say, he decides what efforts are  
4 reasonable. He gets guidance from -- the Alcohol, Tobacco  
5 and Firearms Bureau of the Department of Treasury has put  
6 out guidance and they have said --

7 QUESTION: Well, that may be fine, but the  
8 people who are being investigated I don't think either  
9 know or much care that there may be a BATF memo, and  
10 the -- to the extent there is flexibility it's the local  
11 officer's choice and, to the extent that he is even  
12 exercising guidance from BATF in his relationship to his  
13 constituents, he is still being placed, in effect, in the  
14 position of a policymaker.

15 GENERAL DELLINGER: This is, I think, a  
16 difficult point in the case, but I think it is a policy  
17 choice so limited and so beneficial in its flexibility --  
18 that is, rather than saying you must check a certain  
19 number of records, what the Brady act says is, we're going  
20 to give you flexibility to make the kind of choice you  
21 have to make already, of how you allocate your resources.

22 What Brady does is simply to add one more  
23 additional item to the list of duties --

24 QUESTION: Well, but it has to be done in 5  
25 days, and so the local county has some massive prison

1 escape, or riots going on, and the sheriff can't send his  
2 deputies out to deal with that because he's only got 5  
3 days to apply, and doesn't the Bureau of Alcohol, Tobacco,  
4 and Firearms take a position in the memo that the criminal  
5 penalties do apply to these sheriffs? I think there are  
6 some problems --

7 GENERAL DELLINGER: Justice O'Connor, first of  
8 all, the -- it is emphatically the case that where there's  
9 a prison breakout the sheriff has the discretion to do no,  
10 zero, Brady act checks where it's not -- where -- this is  
11 entrusted to his sound discretion. The reason that the  
12 reasonable efforts clause is put in there is precisely so  
13 that he could choose to carry out his State functions  
14 instead. The --

15 QUESTION: Doesn't the reasonableness include  
16 the amount of funding that the county gives the sheriff?  
17 Doesn't the county have to provide enough funding to allow  
18 him to do this duty that's been imposed upon him?  
19 Wouldn't it be declared unreasonable if the county clearly  
20 has not provided the sheriff's office enough funds to do  
21 it?

22 GENERAL DELLINGER: He is required to make some  
23 judgments. He's required to make some choices. He has  
24 some political accountability for those choices. I don't  
25 deny any of those things, but all of the political



1 responsibility that can possibly be claimed has been taken  
2 by the Federal agencies in this case. You can call --

3 QUESTION: Well, what about a situation in which  
4 the county says, as a footnote to the budget, not a penny  
5 of the sheriff's budget is going to be spent doing Brady  
6 act investigations.

7 GENERAL DELLINGER: That --

8 QUESTION: It seems to me the point of political  
9 accountability at that point is directly on the sheriff.

10 GENERAL DELLINGER: Justice Souter, when the  
11 State says you may not do any Brady act checks, or you may  
12 not spend a penny doing Brady act checks, that statute is  
13 preempted under the Supremacy Clause by the Brady act.

14 The -- every private who sorts potatoes thinks  
15 that -- between large and small ones thinks that when you  
16 get a medium sized potato you're making a policy choice,  
17 but here, it is only in the flexibility about the amount  
18 of resources to be expended.

19 Think about how -- the same choices are going to  
20 be made when the State has to have somebody report missing  
21 children to a national system --

22 QUESTION: What if the board of supervisors from  
23 one of these counties says, you know, you're doing a lot  
24 of stuff for us already, and go ahead and do the Brady act  
25 stuff, but put it at the bottom of the list, and then

1 as -- it turns out, in fact, that they put it at the  
2 bottom of the list and they never get to it.

3 GENERAL DELLINGER: If there are -- this is a  
4 law that is entrusted to the sound discretion of the law  
5 enforcement officer.

6 QUESTION: Well, and the way they exercise their  
7 discretion --

8 GENERAL DELLINGER: My --

9 QUESTION: -- is they obey the board of  
10 supervisors and put the Brady act stuff last.

11 GENERAL DELLINGER: My answer would be that it  
12 would not be reasonable to make an a priori determination  
13 going forward that this was always the last matter to be  
14 done.

15 The fact of the matter is, Justice O'Connor I  
16 think asked an important question, don't many CLEO's like  
17 this law, and they're happy to comply with it. I mean,  
18 the answer is not just some, the answer is most, but I  
19 mean -- in fact, they wanted this duty. They want -- the  
20 major law enforcement organizations wanted this duty  
21 placed on local law enforcement for some of the reasons  
22 Justice Kennedy suggested.

23 QUESTION: Well, we don't ordinarily decide  
24 constitutional questions -- I mean, are we going to say to  
25 someone who raises a First Amendment claim, gee, plenty of

1 other people have obeyed this law, and here you are  
2 complaining about it?

3 (Laughter.)

4 GENERAL DELLINGER: No, Mr. Chief Justice. My  
5 point is that they wanted it for a very good reason, for  
6 the reason suggested in part by a question from Justice  
7 Kennedy, that the alternative of having these duties  
8 imposed upon a substantial Federal bureaucracy when they  
9 are more easily done in the 3,000 counties that have more  
10 local familiarity --

11 QUESTION: Well, but I suppose the answer to  
12 that is, as the Constitution recognizes, that each branch  
13 of the Government, State and Federal, has to make a  
14 certain cost-benefit choice, and if Congress wants to have  
15 some huge program, I suppose it can pay the political cost  
16 for it.

17 GENERAL DELLINGER: In this case the -- given  
18 the fact that you have, for example, 56 FBI field offices,  
19 one for every 30 counties, it would be extraordinarily  
20 inconvenient, as well as inefficient, and the relevant  
21 records are where local law enforcement is.

22 Congress didn't do this simply to off-load its  
23 burdens. That's where the arrest warrants are for  
24 fugitives from justice that are not on the NCIC, where you  
25 could look up the local search warrants.

50

ALDERSON REPORTING COMPANY, INC.  
1111 FOURTEENTH STREET, N.W.  
SUITE 400  
WASHINGTON, D.C. 20005  
(202) 289-2260  
(800) FOR DEPO

1 Justice O'Connor naturally leads to the question  
2 why not make it voluntary if most CLEO's want it? I think  
3 there's something much more serious than a free ride or  
4 problem here. This is a chain that may be no stronger  
5 than its weakest link, and I think the reason that local  
6 law enforcement offices wanted Congress to make this  
7 mandatory was that they understood that if you have one  
8 county in a region or a State that simply announces we are  
9 not going to look up and find out whether gun buyers are  
10 felons, that's the counties where felons will buy  
11 their guns --

12 QUESTION: So federalism is now being used to  
13 ensure uniformity. I thought it was for just the opposite  
14 purpose.

15 GENERAL DELLINGER: Federalism is being used  
16 here, Justice Kennedy, to mitigate in this case the  
17 effects of the enormous interstate mobility in handguns by  
18 ensuring that there is some effort made to see which  
19 illegal buyers are doing so before guns are sold. It --

20 QUESTION: Would you agree with me that this is  
21 a very rare exercise of Federal power? I noticed in your  
22 brief that you could find very few examples. It's  
23 surprising how --

24 GENERAL DELLINGER: I think that observation --

25 QUESTION: And it's

1 surprising how often the Federal Government tells the  
2 State -- or how rarely it tells a State you must do  
3 something.

4 GENERAL DELLINGER: Justice Kennedy, yes.

5 QUESTION: As opposed to the fact that you  
6 shouldn't do something under the Supremacy --

7 GENERAL DELLINGER: I agree with that  
8 observation and I think that in a sense it cuts both ways  
9 here. It shows, I think, that Congress has not abused the  
10 fact that when it's acting under its legislative power it  
11 may call upon -- impose, require some duties on local  
12 offices. It has not abused that, even though I think the  
13 founders would be surprised.

14 QUESTION: So if it is necessary and proper in  
15 carrying out --

16 GENERAL DELLINGER: Where it's necessary and  
17 proper.

18 QUESTION: If it is necessary and proper.

19 GENERAL DELLINGER: If it is necessary and  
20 proper.

21 QUESTION: If it is --

22 GENERAL DELLINGER: Yes.

23 QUESTION: -- necessary and proper on occasion  
24 to impose minor duties, but not take over whole programs  
25 and implementation of enormous kinds of welfare programs

1 or whatever, what's the distinction?

2 What is it that makes it okay to impose a duty  
3 upon a State court to hear Federal cases, upon a Governor  
4 to extradite officials, upon policemen to report missing  
5 children, but doesn't impose a duty upon those same  
6 officials that's really much more burdensome than that.  
7 What's the principle?

8 GENERAL DELLINGER: Well --

9 QUESTION: How do you interpret the Necessary  
10 and Proper Clause to get there, in light of the Tenth  
11 Amendment interests, et cetera?

12 GENERAL DELLINGER: I take your question to be,  
13 where you have a law such as this that does not implicate  
14 the concerns of sovereignty and accountability, what  
15 happens if the number of those duties expands so greatly  
16 that it begins to inhibit the ability of the States to  
17 carry out their functions, unlike this law, which builds  
18 in the flexibility to carry out State functions.

19 I think that is a question that, of course, you  
20 need not decide here. I think you -- because of Justice  
21 Kennedy's observation about how rarely Congress has used  
22 this, you will probably never have to decide --

23 QUESTION: But -- well, my particular question  
24 is --

25 GENERAL DELLINGER: -- the standard will be,

1 Justice Breyer -- the standard will be whether you have so  
2 seriously interfered with the ability of the State to  
3 carry out its own functions, in light, perhaps, of whether  
4 it's the war power or some other very serious national  
5 emergency that is causing you to do it.

6 It is not unlike a question that would come up  
7 under other issues, even under laws of general  
8 applicability that might at some point interfere with the  
9 State's --

10 QUESTION: General Dellinger, may I ask --

11 QUESTION: Mr. Dellinger, may I ask you one  
12 basic question? Do you think the Tenth Amendment has  
13 different meaning, depending on what affirmative  
14 exercise -- what power of Congress it is relying on,  
15 whether it's the Commerce Clause, the War Powers Clause,  
16 the Spending Clause? Does the Tenth Amendment vary in its  
17 meaning, depending on the clause, in your view?

18 GENERAL DELLINGER: It may, Justice Stevens,  
19 with respect to the Civil War amendments, which, I think  
20 as the Chief Justice has noted, were designed as a --

21 QUESTION: All right.

22 GENERAL DELLINGER: -- as a limit on it.

23 I do not think it otherwise varies, except that  
24 it is important not to wholly disentangle these issues.

25 This is so fully within Congress' commerce

1 power. Because at the time of the Constitution handguns  
2 were made locally by craftsmen and available only locally,  
3 it is due in significant measure to commerce among the  
4 States and the extraordinary mobility of handguns that  
5 guns made anywhere are now available everywhere that roads  
6 or waterways or airports can reach, and it was to mitigate  
7 the harm of that cheap national availability that Congress  
8 tried to take steps in '68 to prevent those guns from  
9 being sold to persons who were convicted felons --

10 QUESTION: But what Congress has done here is  
11 say local police officers are available throughout the  
12 country also, and therefore we can regulate --

13 GENERAL DELLINGER: Justice Kennedy, I think it  
14 is significant that it's not merely their availability,  
15 but the fact that they were uniquely well-situated.

16 The frustration is that a gun dealer who is  
17 forbidden to sell a gun to a convicted felon but doesn't  
18 know who they are -- he gets a form that they check off  
19 that says they're not convicted felons. The information  
20 that this individual may be a convicted felon is right  
21 there in the same town. It may be a few blocks away in  
22 the office of the local law enforcement chief.

23 So in the 5 years before we get this national  
24 system online, which will itself not contain all of the  
25 categories of 922(g) -- it's a rough and ready way to get



1 the most readily available information with minimal  
2 efforts to check reasonable records. It makes all the  
3 sense in the world in this interim period.

4 Why not wait until there's a national system  
5 with these records available at the gun dealer's desk?  
6 The answer is that there are 13,000 handgun murders a year  
7 in this country.

8 QUESTION: A Federal system is often  
9 inefficient, is all that you're saying. I mean -- yeah.

10 GENERAL DELLINGER: Sometimes --

11 QUESTION: That's why not many countries in the  
12 world have it.

13 GENERAL DELLINGER: Sometimes --

14 QUESTION: It's a lot easier to do everything,  
15 you know, by command from --

16 GENERAL DELLINGER: Sometimes the solution to a  
17 serious problem can't be reconciled with the requirements  
18 of the Constitution, but this is not such a case.

19 QUESTION: General Dellinger, may I ask you

20 GENERAL DELLINGER: Yes.

21 QUESTION: -- before you finish if you could  
22 just address the severability question, because you said  
23 something before about, if you -- if it was voluntary it  
24 wouldn't work, because everybody would buy their guns in a  
25 place that doesn't participate.

1           GENERAL DELLINGER: Thank you for allowing me to  
2 say that it doesn't work as well --

3           (Laughter.)

4           GENERAL DELLINGER: -- if it were voluntary.  
5 That is to say, if one CLEO could put up a sign saying, we  
6 won't check for records, it will not, but it nonetheless  
7 works as Congress intended, and therefore I think there's  
8 no serious question of nonseverability here.

9           Thank you.

10          CHIEF JUSTICE REHNQUIST: Thank you, General  
11 Dellinger.

12          The case is submitted.

13          (Whereupon, at 11:02 a.m., the case in the  
14 above-entitled matter was submitted.)

## CERTIFICATION

*Alderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of The United States in the Matter of:*

JAY PRINTZ, SHERIFF/CORONER RAVALLI COUNTY, MONTANA,  
Petitioners v. UNITED STATES and RICHARD MACK, SHERIFF, GRAHAM  
COUNTY v. UNITED STATES

No. 95-1478, No. 95-1503

*and that these attached pages constitutes the original transcript of the proceedings for the records of the court.*

BY Ann Marie Federico

(REPORTER)