Violence Policy Center

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The Honorable Arlen Specter
Chairman
United States Senate Judiciary Committee
711 Hart Senate Office Building
Washington, D.C. 20510

The Honorable Patrick Leahy
Ranking Member
United States Senate Judiciary Committee
433 Russell Senate Office Building
Washington, D.C. 20510

Dear Senators Specter and Leahy:

The Violence Policy Center (VPC) is a national non-profit organization dedicated to reducing violence in America. The VPC opposes the nomination of Judge Samuel Alito to the United States Supreme Court.

Our primary objection to the nomination of Judge Alito is his hostility to the authority of Congress to regulate the possession and transfer of firearms, specifically machine guns.

In 1996, Judge Alito wrote a dissent in *U.S. v. Rybar*[1] arguing that the federal machine gun ban exceeded Congress' regulatory authority under the Commerce Clause. Judge Alito argued that possession of a machine gun does not facilitate crime in a way that impacts interstate commerce. Judge Alito also challenged Congress' fact-finding, and even judgment, in enacting the machine gun ban, asserting:

> ...we are left with no congressional findings and no appreciable empirical support for the proposition that the purely intrastate possession of machine guns, by facilitating the commission of certain crimes, has a substantial effect on interstate commerce, and without such support I do not see how the statutory provision at issue here can be sustained....

Judge Alito apparently chose to ignore the history of Congressional fact-finding and action to regulate machine guns.

<u>From 1934 to 1986: Banning Machine Guns</u>

The National Firearms Act of 1934 (NFA) was the first major federal statute to regulate firearms, including machine guns. The 1934 law was Congress' response to the wave of gun violence precipitated by Prohibition and the notorious interstate robbery sprees of criminals such as John

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[1] 103 F.3d 273 (3d Cir. 1996), *cert. denied* 522 U.S. 807 (1997).

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Dillinger. Congress heard ample evidence that immediate regulation of machine guns was necessary to stem a rising tide of gun violence. At the 1934 hearings in the U.S. House of Representatives that ultimately led to the legislation, Attorney General Homer Cummings warned:

> There are more people in the underworld today armed with deadly weapons, in fact, twice as many, as there are in the Army and the Navy of the United States combined....[T]here are at least 500,000 of these people who are warring against society and who are carrying about with them or have available at hand, weapons of the most deadly character.[2]

As the Federal Bureau of Investigation's current website notes:

> Perhaps the St. Valentine's Day Massacre on February 14, 1929, might be regarded as the culminating violence of the Chicago gang era, as seven members or associates of the 'Bugs' Moran mob were machine-gunned against a garage wall by rivals posing as police.[3]

Infamous North Hollywood Shootout Demonstrates Danger of Alito's Views

The year after Judge Alito argued that there was "no appreciable empirical support for the proposition that the purely intrastate possession of machine guns, by facilitating the commission of certain crimes, has a substantial effect on interstate commerce..."[4] and that Congress therefore lacked the authority to ban machine guns, the unique threat that machine guns pose to public safety and their potential to have a devastating impact on interstate commerce was graphically illustrated in North Hollywood, California, when two men armed with illegal fully-automatic AK-47s equipped with 100-round magazines loaded with armor-piercing ammunition robbed a Bank of America. The bank robbers used assault weapons that they had converted from semiautomatic to fully automatic fire—a practice that Judge Alito actually defended in his dissent in *Rybar*.[5] Ten police officers were wounded in the firefight. The disparity in weaponry between the robbers and police was so lopsided that officers ran to a nearby gun shop to borrow seven rifles and ammunition. A police officer involved in the unprecedented shootout stated, "We knew we were outgunned because we didn't have automatic weapons."

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[2] "House Hearings on National Firearms Act," April/May, 1934.

[3] http://www.fbi.gov/libref/historic/famcases/capone/capone.htm

[4] 103 F.3d 273, 294 (3d Cir. 1996).

[5] *Id.* at 289. Judge Alito took issue with the majority's contention that regulating intrastate possession helped law enforcement detect illegal transfers. Judge Alito stated "...it is not true that every possession criminalized by 18 U.S.C. § 922(o) must be preceded by an 'unlawful transfer.' A lawfully possessed semiautomatic weapon could be converted by its owner into an automatic."

Congress' Authority to Regulate Firearms and Explosives is Essential to Public Safety

The National Firearms Act imposed a transfer tax and registration requirement on machine guns and, as the majority opinion in *Rybar* noted, was enacted under the taxing power of Congress. However, all subsequent federal firearms legislation was enacted under the Commerce Clause, including the 1986 Firearms Owners' Protection Act (FOPA) which contains the federal machine gun ban.

Other federal statutes enacted under the Commerce Clause include: the Federal Firearms Act of 1938, which requires firearm manufacturers and dealers to obtain federal licenses before engaging in interstate commerce; and, the Gun Control Act of 1968, which broadened existing restrictions on handguns to include a ban on interstate sales, banned mail-order sales of shotguns and rifles, and prohibited the importation of so-called Saturday Night Specials—inexpensive, short-barreled handguns of the type used by Sirhan Sirhan to kill Senator Robert Kennedy. The recently expired federal assault weapons ban survived two challenges arguing that Congress had exceeded its authority under the Commerce Clause in enacting the ban.[6]

In fact, the regulation of intrastate conduct is the cornerstone of federal gun and explosives regulation. The prohibition on interstate handgun transfers is a key tool to prevent illegal gun trafficking. Moreover, in 2002 Congress passed the Safe Explosives Act, which expanded the licensing authority of the federal Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) to include the intrastate manufacture, purchase, and use of explosives. If Judge Alito's views on firearms and public safety, as expressed through his minority opinion in *U.S. v. Rybar*, became the law of the land, all Americans would be at greater risk from virtually uncontrollable firearms proliferation. The federal government would be almost powerless to keep firearms, ammunition, and other deadly commodities out of the hands of criminals and even terrorists. In a time of increased concern regarding homeland security, such views are not only counter-intuitive, but exceedingly dangerous. The Violence Policy Center urges you to reject the nomination of Judge Alito to the United States Supreme Court.

Sincerely,

M. Kristen Rand
Legislative Director

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[6] *Olympic Arms v. Magaw*, 91 F. Supp. 2d 1061 (E.D. Mich. 2000), *aff'd*, 301 F.3d 384 (6th Cir. 2002); *Navegar, Inc. v. United States*, 192 F.3d 1050 (D.C. Cir. 1999).