STATEMENT OF DENNIS A. HENIGAN, DIRECTOR, LEGAL ACTION PROJECT, BRADY CENTER TO PREVENT GUN VIOLENCE SUBMITTED TO THE SENATE JUDICIARY COMMITTEE ON THE NOMINATION OF SAMUEL A. ALITO, JR. TO BE AN ASSOCIATE JUSTICE OF THE UNITED STATES SUPREME COURT

January 19, 2006

My name is Dennis A. Henigan. I am the Director of the Legal Action Project of the Brady Center to Prevent Gun Violence. The Brady Center, and its sister organization the Brady Campaign to Prevent Gun Violence, are the nation's largest national, non-partisan, grassroots organizations leading the fight to prevent gun violence.

The Brady Center strongly opposes the nomination of Samuel A. Alito, Jr. to the U.S. Supreme Court. The Brady Center does not take this position lightly. This is the first time the Brady Center has ever opposed a Supreme Court nomination.

Judge Alito's nomination poses serious dangers to the safety of our communities, our families, and our children, as evidenced by his troubling dissent in *United States v. Rybar*, 103 F.3d 273 (3rd Cir. 1996), *cert. denied*, 522 U.S. 807 (1997). In that opinion, he concluded that the federal ban on possession of machine guns is unconstitutional. His dissent is an example of judicial activism at its worst – a federal judge showing scant deference to our elected representatives in Congress on an issue of public safety. If Judge Alito's view were to be adopted by the Supreme Court, it would place other federal restrictions on gun possession in jeopardy, such as the ban on the possession of firearms

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that are undetectable by metal detectors and the ban on possession of handguns by juveniles. *See* 18 U.S.C. § 922(p) (prohibiting possession of undetectable firearms manufactured after the date of enactment in 1988); 18 U.S.C. § 922(x) (generally prohibiting possession of handguns by juveniles).

The Rybar Machine Gun Case

The *Rybar* case concerned the arrest of Raymond Rybar, Jr., a federally licensed gun dealer. Rybar attended a gun show in Monroeville, Pennsylvania on April 4, 1992. He possessed a fully automatic Chinese Type 54, 7.62-millimeter submachine gun, which he sold to Thomas Baublitz. The next day Rybar returned to the gun show and sold Baublitz another fully automatic firearm, a U.S. Military M-3, .45 caliber submachine gun. The guns were sold for a total of $600. Rybar pleaded guilty to two counts of unlawfully possessing a machine gun under 18 U.S.C. § 922(o), with the condition that he be allowed to appeal to allege that the federal machine gun possession restrictions are unconstitutional.

Machine guns are fully automatic weapons that have been heavily regulated by Congress since 1934. They fire continuously with one pull of the trigger and can discharge hundreds of rounds in seconds. In 1986, Congress enacted the Firearm Owners' Protection Act, which severely weakened federal gun laws, but contained one redeeming provision banning the future manufacture of machine guns for the civilian market. It also banned the transfer and possession of machine guns not lawfully possessed before May 19, 1986, the effective date of the Act. *See* 18 U.S.C. § 922(o). These "grandfathered" machine guns remain subject to the strict registration, possession

and transfer requirements and taxes of the National Firearms Act of 1934, 26 U.S.C. § 5801 *et seq.*

Rybar challenged the constitutionality of the machine gun ban based on the Supreme Court's ruling in *United States v. Lopez,* 514 U.S. 549 (1995). In *Lopez*, the Supreme Court struck down the federal Gun-Free School Zones Act, which prohibited the possession of a firearm within 1,000 feet of a school. The Court ruled 5-4 that the Act was not a permissible exercise of Congressional Commerce Clause power. The Court held that Congress may regulate under its commerce power: (1) "the use of the channels of interstate commerce;" (2) "the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities;" and (3) those activities "that substantially affect interstate commerce." *Lopez*, at 558-59. The Supreme Court held that the Gun-Free School Zones Act did not fit within any of these commerce powers.

The majority in *Rybar* upheld the constitutionality of the federal machine gun ban and distinguished the Supreme Court's ruling in *Lopez*. The *Rybar* majority noted that unlike in *Lopez*, where Congress was regulating gun possession in school zones for the first time, Congress has heavily regulated machine guns since 1934. *Rybar*, at 279. The court cited:

> Congressional findings generated throughout Congress' history of firearms regulation [that] link both the flow of firearms across state lines and their consequential indiscriminate availability with the resulting violent criminal acts that are beyond the effective control of the states.

Id. This "explicit connection of the interstate flow of firearms to the increasing serious violent crime in this country" demonstrated Congress' commerce power to enact the

machine gun ban, to address what "Congress saw as … a problem of 'national concern.'" *Id.* The court concluded that the machine gun ban was constitutional because,

> [It] targets the possession of machine guns as a demand-side measure to lessen the stimulus that prospective acquisition would have on the commerce in machine guns. It follows, and we hold, that the authority of Congress to enact § 922(o) [the machine gun ban] under the Commerce Clause can be sustained under the third category identified by the Supreme Court: as a regulation of an activity that "substantially affects" commerce.

Id. at 283.

Judge Alito's Rybar Dissent

Judge Alito, however, dissented and wrote that the federal machine gun ban amounted to an unconstitutional exercise of Congressional power under the Commerce Clause. He attempted to erect arbitrary hurdles to Congressional efforts to reduce the availability of machine guns to criminals. Dismissing years of regulation by Congress and Congressional findings concerning the impact of illegal guns and criminal gun violence on interstate commerce, Judge Alito called the machine gun ban a "novel law" and demanded that Congress and the President "assemble[] empirical evidence" for him to review to determine whether the ban was constitutional. *Rybar*, at 287, 294. In Judge Alito's view, such "empirical evidence," if provided by Congress, "*might*" be sufficient to persuade him to uphold the law. *Id.* at 287 (emphasis added). Judge Alito also stated that Congress could fix the law by re-enacting it to only allow prosecutions against persons possessing a machine gun that has traveled in interstate commerce. *Id.* The courts have never held Congress to such a requirement, which would severely limit the ability of law enforcement to protect the public from the clear dangers of fully automatic weapons. His recommended fix was based on his personal view that such a requirement "has not posed any noticeable problems for federal law enforcement." *Id.*

Judge Alito's self-imposed requirement of evidentiary proof, beyond the substantial findings already made by Congress, was sharply criticized by the *Rybar* majority as having "no authority" in the law. *Id.* at 282. Indeed, the Supreme Court in *Lopez* itself held, "Congress normally is not required to make formal findings as to the substantial burdens that an activity has on interstate commerce." *Lopez*, at 560. The majority stressed that Judge Alito's attempt to create new hurdles for Congress and the President tramples "a basic tenet of the constitutional separation of powers." The majority further noted that Judge Alito's requirement that "Congress or the Executive ... play Show and Tell with the federal courts at the peril of invalidation of a Congressional statute" "runs counter to the deference that the judiciary owes to its two coordinate branches of government...." *Rybar*, at 282. As to Judge Alito's suggested "fix" to the law by limiting its scope to machine guns that have traveled in interstate commerce, the majority noted that courts "have rejected the argument that *Lopez* requires federal criminal statutes to contain a jurisdictional element." *Id.* at 285.

Courts Uniformly Disagree With Judge Alito's Activist Dissent

Prior to Judge Alito's activist dissent, every appellate court to consider the constitutionality of the federal machine gun ban upheld the law. Likewise, every appellate court to rule after Judge Alito's dissent also upheld the law, except for one panel in a Ninth Circuit case that was later vacated by the U.S. Supreme Court. That Ninth Circuit case, *United States v. Stewart*, 348 F.3d 1132 (9th Cir. 2003), was vacated following the Supreme Court's recent ruling in *Gonzales v. Raich*, 125 S.Ct. 2195, 2208 (2005), which repudiated Judge Alito's reasoning in his *Rybar* dissent. As of today, the Second, Third, Fifth, Sixth, Seventh, Eighth, Ninth, Tenth and Eleventh Circuits have all

found the machine gun ban to be constitutional. The following is a summary of the case law examining the constitutionality of the machine gun ban. In each case a criminal defendant appealed his guilty plea or conviction for violation of the machine gun ban based on a Commerce Clause challenge, and in each case the courts denied the appeals.

In rulings prior to Judge Alito's dissent, the Fifth, Sixth, Seventh, Eighth, Ninth, and Tenth Circuits upheld the constitutionality of the machine gun ban. In *United States v. Kirk*, (5th Cir.), *aff'd en banc*, 105 F.3d 997 (5th Cir.), *cert. denied*, 522 U.S. 808 (1997), William J. Kirk had been charged with unlawful possession of an M-16 machine gun; an EA Company Rifle, .223 caliber, model J-15 machine gun that he had converted from a semiautomatic weapon; an Uzi machine gun; and an Action Arms Limited Uzi carbine, Model A, 9 millimeter, which had been converted to a machinegun by the addition of an Uzi machine bolt. He pled guilty with the condition that he be permitted to appeal. The Fifth Circuit denied his appeal, holding that the ban was a constitutional exercise of Congressional commerce power. The Fifth Circuit cited its own opinion in the *Lopez* case, which distinguished the machine gun ban from the Gun-Free School Zones Act, and was affirmed by the Supreme Court:

> [The machine gun ban is] restricted to a narrow class of highly destructive, sophisticated weapons that have been either manufactured or imported after enactment of the Firearms Owners Protection Act, which is more suggestive of a nexus to or affect on interstate or foreign commerce than possession of any firearms whatever, no matter when or where originated, within one thousand feet of the grounds of any school.

Id. at 796, *citing United States v. Lopez*, 2 F.3d 1342 (5th Cir. 1993), *aff'd*, 514 U.S. 549 (1995).

Likewise, in *United States v. Beuckelaere*, 91 F.3d 781 (6th Cir. 1996), the Sixth Circuit upheld the constitutionality of the law in a challenge brought by Gary

Beuckelaere. Beuckelaere collected assault weapons and had a total of 13 weapons at his residence, including two machine guns. He also purchased literature from a gun dealer containing instructions on how to convert a Cobray M/11 semi-automatic pistol into a machine gun. The court distinguished *Lopez*, holding that Congress properly acted to regulate the "extensive, intricate, and definitely national market for machineguns." *Id.* at 784. In *United States v. Kenney*, 91 F.3d 884 (7th Cir. 1996), John Kenney was arrested for unlawful possession of an Intratec TEC-9 semiautomatic pistol that had been converted to fire as a machine gun. Kenney claimed he needed the machine gun because of his unspecified "past dealings in Central America." He pled guilty and appealed. The Seventh Circuit denied his appeal, distinguishing *Lopez* and concluding that

> the local conduct of machine gun possession, including possession resulting from home manufacture, [serves] to effectuate [the machine gun ban's] purpose of freezing the number of legally possessed machine guns at 1986 levels, an effect that is closely entwined with regulating interstate commerce.

Id. at 890. Also, in *United States v. Pearson*, 8 F.3d 631 (8th Cir. 1993), *cert. denied*, 511 U.S. 1126 (1994), the Eighth Circuit ruled prior to *Lopez* that Congress could, under the Commerce Clause, properly criminalize Robin Pearson's illegal possession of an Uzi carbine, a Heckler & Koch 9mm machine gun, a PWA Commando .223 caliber machine gun, an Uzi machine pistol, and a weapon with an attached silencer.

Similarly, in *United States v. Rambo*, 74 F.3d 948 (9th Cir.), *cert. denied*, 519 U.S. 819 (1996), the court sustained the conviction of Charles Roy Rambo for unlawful possession of a machine gun. The court upheld the law, highlighting the importance to public safety of prohibiting the possession of fully automatic machine guns:

> By regulating the market in machineguns, including regulating intrastate machinegun possession, Congress has effectively regulated the interstate trafficking in machineguns.

Id. at 952. In *United States v. Wilks*, 58 F.3d 1518 (10th Cir. 1995), the Tenth Circuit also upheld the law, sustaining the conviction of Larry Francis Wilks for illegal possession of a machine gun. The Court distinguished Lopez, explaining:

> Whereas [the Gun-Free School Zones Act] sought to regulate an activity which by its nature was purely intrastate and could not substantially affect commerce even when incidents of those activities were aggregated together, ... [the machine gun ban] regulates machineguns, which by their nature are "a commodity ... transferred across state lines for profit by business entities."

Id. at 1521, *quoting United States v. Hunter*, 843 F.Supp. 235, 249 (E.D. Mich. 1994).

The courts continued to uniformly reject Judge Alito's reasoning after his dissent was published. Indeed the most recent Supreme Court ruling on Congressional Commerce Clause power squarely rejected Judge Alito's extreme view. In *Gonzales v. Raich*, 125 S.Ct. 2195 (2005), six Justices, including Justice Antonin Scalia, upheld Congressional power under the Commerce Clause to regulate the intrastate production and possession of marijuana for medical purposes. The Court noted that Congress began regulating marijuana in 1937, first taxing it and later banning its possession. *Id.* at 2202. This was remarkably similar to Congress' initial 1930's regulation of machine guns by taxation, and later through a possession ban. The Court in *Raich* upheld the federal ban on marijuana possession, noting that its "case law firmly establishes Congress' power to regulate purely local activities that are part of an economic 'class of activities' that have a substantial effect on interstate commerce." *Id.* at 2205. It stressed that it was irrelevant that Congress did not include specific findings on the need to ban intrastate marijuana possession, because the Court has "never required Congress to make particularized findings in order to legislate," *id.* at 2208, refuting Judge Alito's remarks in his *Rybar* dissent that Congress should "assemble[] empirical evidence" for him to review to

determine whether Congress included sufficient findings to sustain the law. *Rybar*, at 287.

Following the Supreme Court's ruling in *Raich*, the Supreme Court vacated the Ninth Circuit's ruling in *United States v. Stewart*, 348 F.3d 1132 (9th Cir. 2003), the only appellate court case to find the machine gun ban to be unconstitutional. In that case, a Ninth Circuit panel split 2-1 in ruling that the machine gun ban was unconstitutional as applied to intrastate possession of a machine gun. The Supreme Court vacated this ruling in 2005, following its ruling in *Raich*. Every other federal appeals court to consider the constitutionality of the machine gun ban since Judge Alito's *Rybar* dissent upheld the law. *See United States v. Franklyn*, 157 F.3d 90 (2nd Cir. 1998), *cert. denied*, 525 U.S. 1112 (1999); *United States v. Knutson*, 113 F.3d 27 (5th Cir. 1997); *United States v. Gonzales*, 121 F.3d 928 (5th Cir. 1997), *cert. denied*, 522 U.S. 1063 (1998) and *cert. denied*, 522 U.S. 1131 (1998); *United States v. Haney*, 264 F.3d 1161 (10th Cir. 2001), *cert. denied*, 536 U.S. 907 (2002).

In His Testimony Before The Senate Judiciary Committee, Judge Alito Failed To Acknowledge The Flawed Legal Reasoning In His Rybar Dissent

In his testimony before the Senate Judiciary Committee, Judge Alito refused to acknowledge the flawed legal reasoning of his dissent in *Rybar*. In an exchange with Senator Charles Schumer, Judge Alito refused to change his view despite being confronted with the Supreme Court's recent ruling in *Raich* repudiating Judge Alito's view.

In addition, in his testimony, Judge Alito defended his *Rybar* dissent by stating that, in his view, it would be "easy" for Congress to fix the law to comport with the Constitution. He suggested that Congress could re-enact the ban and limit federal

prosecutions only to criminals who possess machine guns that have crossed state lines. Yet limiting Congressional power to prohibit machine guns only if they have crossed state lines has no basis in the law. Further, it would tie the hands of prosecutors who protect the public by cracking down on criminals who convert semiautomatic firearms to fully automatic machine guns without the machine guns crossing state lines.

In a troubling revelation that his decision was based on his personal views, Judge Alito admitted, in response to questions by Senator Jon Kyl, that his view was based on his personal experience as a prosecutor. Judge Alito stated:

> [A]ll that's necessary is that is to show that the firearm at some point in its history passed in interstate or foreign commerce.... From my experience, this was never a practical problem and this was how all the federal firearms statutes had been framed.

Senate Judiciary Committee Hearing Transcript, Jan. 10, 2006. It is not up to unelected federal judges to second-guess the wisdom of Congress based on their personal experience, particularly on issues of public safety. Judge Alito's continuing refusal to acknowledge his flawed legal reasoning in declaring the federal machine gun ban unconstitutional places law enforcement and the public in great jeopardy.

Moreover, Judge Alito's personal experience is based on flawed information. Contrary to his assertion, prosecutors frequently prosecute criminals who possess illegal fully automatic machine guns that have not crossed state lines, particularly those that have been converted from legal semiautomatic weapons. Moreover, Judge Alito's claim that "all the federal firearms statutes" require proof of interstate commerce is incorrect. Several federal laws protect the public without requiring illegal guns to cross state lines, including laws barring firearms not detectable by metal detectors and handgun possession by juveniles. *See* 18 U.S.C. § 922(p) (prohibiting possession of undetectable firearms

manufactured after the date of enactment in 1988); 18 U.S.C. § 922(x) (generally prohibiting possession of handguns by juveniles). These laws would be placed in jeopardy if Judge Alito's views were to be adopted by the Supreme Court.

The Dangers of Judge Alito's Dissent

If Judge Alito's view had prevailed, the federal ban on machine gun possession would have been struck down. Apart from the fact that Judge Alito's position in *Rybar* was legally indefensible, it also is fair to ask: If Alito's view had prevailed in the federal courts, what would have been the real world consequences for the American people? As shown by the cases described below, if federal authorities were unable to bring charges of machine gun possession against violent criminals, it would increase the risk of injury and death, particularly to law enforcement personnel who must face gun-wielding criminals on a daily basis.

Below are examples of actual criminal use of machine guns to kill, injure and threaten law enforcement officers. As these cases demonstrate, it is difficult to imagine a more horrifying scenario for our police than a criminal armed with a fully automatic weapon that can fire hundreds of rounds in seconds. Also listed are examples of successful federal prosecutions of violent criminals, including drug lords, white supremacists and terrorists, for violation of the machine gun possession statute. In each case, the statute was used to put these criminals behind bars before they could commit violent attacks on police and other citizens.

Under federal sentencing guidelines, a violation of the federal machine gun possession ban alone means up to 5 years behind bars, but in combination with other offenses can dramatically increase prison time. For example, possession of a machine

gun in furtherance of a crime of violence or drug trafficking crime carries an automatic 30-year prison term.[1]

Machine Gun Shootings

North Hollywood, California – Bank of America Robbery

On February 28, 1997, bank robbers Larry Eugene Phillips, Jr. and Emil Dechebal Matasareanu turned North Hollywood, California into a war zone. During a botched robbery of a Bank of America, in which they wore body armor and carried fully automatic machine guns (with a trunk full of spare ammunition clips and additional machine guns in their getaway car), they ended up engaging in a massive firefight with police.

Once they were surrounded at the bank, they fired armor-piercing bullets at anything that moved – about 1,100 rounds in the course of an hour – wounding 11 Los Angeles police officers and 7 bystanders in the process. The two assailants completely outgunned the first group of responding officers, wounding 9 officers and 3 civilians in the first 5 minutes of the firefight. Their machine-gun firepower was so immense that it ultimately took 350 police officers, including SWAT teams and armored personnel carriers, and more than an hour to kill them in the siege. This was one of the most violent shootouts in U.S. history.

Waco, Texas – Branch Davidian Shootout

Perhaps even more notorious than the West Hollywood shootout, the 51-day government siege of David Koresh's Branch Davidian complex near Waco, Texas on February 28, 1993, was initiated because the Bureau of Alcohol, Tobacco and Firearms

[1] *See* USSG § 2K2.4(b) and 18 U.S.C. § 924(c)(1)(C)(ii).

(ATF) learned that Koresh and his followers had been converting semi-automatic weapons into illegal fully automatic machine guns.

A large group of federal agents, attempting to execute a search warrant of the Branch Davidian compound were met by a hail of machine gun fire from Koresh's followers. Four officers were killed and twenty were wounded in the ensuing firefight. (Many other Branch Davidians were killed by their own gunfire.) Koresh's followers had access to a much larger arsenal than the two North Hollywood bank robbers, and it required the government to bring in an army of federal agents and very heavy firepower to subdue the Davidian compound.

Newington, Connecticut – Officer Slain By M16 Machine Gun[2]

Officer Peter Lavery of the Newington Police Department was slain on December 30, 2004 during a response to a domestic violence dispute. As Lavery and his backup descended into the cellar of the residence where the dispute occurred, he was fired on and killed with a fully automatic M16 machine gun, the weapon used by US armed forces.

West Virginia – Marijuana Growers Fire Machine Gun at West Virginia State Police[3]

On September 1, 1999, the West Virginia State Police Special Response Team and other law enforcement officers entered a heavily wooded area to apprehend two marijuana growers – Bobby Wayne Hager and Everett Hager. Police were able to arrest and handcuff Bobby Wayne Hager without being shot at, but as he was being handcuffed, Bobby Wayne shouted, "Everett, they're coming to get you. Everett, they're coming to get you." Shortly thereafter, Everett opened fire on law enforcement officers with a fully automatic SKS machine gun. Luckily, Everett did not hit any of the officers, and he was

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[2] *See* Eric Reed, *Case Closed on Slain Cop*, New Britain Herald, May 27, 2005.

[3] *United States v. Hager*, 22 Fed. Appx. 230 (4th Cir. 2001).

arrested. Both Bobby Wayne and Everett were charged and convicted under federal law with unlawful possession of a machine gun and other crimes.

San Juan, Puerto Rico – Drug Lords Shoot Two Federal Officers[4]

Drug lords with ties to the both the Cali and Medellin cartels in Colombia were involved in trafficking cocaine from Colombia to Puerto Rico and New York. In the course of carrying out numerous federal crimes, defendant and his conspirators fired on and seriously wounded two federal agents with automatic weapons. On defendant's orders, members of the conspiracy murdered another individual.

Machine Gun Prosecutions

Tyler, Texas – Antigovernment Terrorist Planning Assault on IRS Building Sought to Procure an Arsenal of Automatic Weapons[5]

Charles Ray Polk was a car salesman in Tyler, Texas and boasted of a desire to blow up federal buildings and kill federal employees. Polk identified himself as "third in command" of an organization he identified as "Constitutional America." In 1995, Polk sought to procure an arsenal of automatic weapons and explosives from undercover agents, to be used in coordinated assaults on IRS buildings in Austin, Texas.

Polk stated that he and his group planned to blow up the federal buildings and then enlist mercenaries who knew how to use M-60 and Uzi machine guns and who "don't mind shooting people if they get in the way." The defendant compiled a small arsenal of nearly 50 weapons and then paid an undercover federal agent to secure plastic explosives, machine guns and rocket propelled grenades as well as hand grenades. He had detailed information about the Austin building and a clear plan for where explosives

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[4] *United States v. Escobar-deJesus*, 187 F.3d 148 (1st Cir. 1999).

[5] *United States v. Polk*, 118 F.3d 286 (5th Cir. 1997).

should be placed to ensure the building was destroyed. When an undercover agent asked him about the innocent people who would die during his plan the defendant replied: "Doesn't hurt my feelings," and "all I can say, gentlemen, is shit happens." The defendant also possessed a map detailing other I.R.S. buildings in other cities the defendant planned to target after the Austin bombing.

Polk was convicted of violating the federal ban on machine gun possession. Polk argued that the ban was an unconstitutional violation of the U.S. Constitution's Commerce Clause. The 5th Circuit rejected this view and upheld his conviction.

Southern Illinois – White Supremacists Intending to Rob Banks and Armored Cars and Carry Out Assassinations Convicted of Machine Gun Possession[6]

Defendants were founding members of the "New Order," a white supremacist group that sought to "unit[e] white supremacist groups in a violent struggle against those would resist the creation of a 'pure white Christian country.'" McGiffen, the lead coordinator who was also a Grand Dragon in the Illinois Ku Klux Clan "regularly used...force to maintain members' allegiance." McGiffen threatened to kill one member if he ever talked to anyone about their group again after the member told his mother about their plans. The group decided to carry out a string of robberies of banks and armored cars to finance their scheme. The group stockpiled weapons and was particularly fond of automatic weapons "for their destructive capability." The group accumulated a significant stockpile of weapons – including several automatic weapons. a rocket, dynamite and homemade hand grenades to carry out the assassination of Morris Dees and the destruction of the Southern Poverty Law Center and other crimes.

[6] *United States v. McGiffen*, 267 F.3d 581 (7th Cir. 2001).

Thankfully, federal authorities arrested the defendants before they could carry out their plans.

Mississippi – Leader of Vice Lords Gang Arrested With Machine Gun[7]

Michael Starnes, leader of a gun trafficking gang known as the "Unknown Vice Lords," was arrested after firing gunshots into a trailer home in retaliation for a shooting involving of one of his gang members. Police seized more than a dozen guns from the motel room where he was apprehended, his car, and his apartment, including a fully automatic AR-15 machine gun. Starnes had committed so many offenses that he was sentenced to 145 years in prison.

Georgia – Arsenal of Automatic Weapons and Pipe Bombs Accumulated By Member of Private Militia Terrified of "New World Order"[8]

Donald Wayne Wright claimed he was "spooked" by the threat of the "New World Order," so he began stockpiling automatic weapons and ammunition and pipe bombs and meeting with members of a "militia." He intended to keep his arsenal until the "threat" of the new world order and the devil arose and it was time to fight.

Federal authorities, who received a tip that Mr. Wright wanted to know how to reassemble a .50 caliber machine gun, obtained a warrant to search his premises. They uncovered a huge arsenal, including several machine guns, pipe bombs, 2300 rounds of ammunition, M16 rifle parts, a booby trap device, a handgun, several semi-automatic rifles, The Anarchists' Cookbook, several pieces of literature on weapons and military skills, as well as several pieces of right-wing propaganda materials.

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[7] *United States v. Starnes*, 2005 WL 3309685 (5th Cir. 2005).

[8] *United States v. Wright*, 117 F.3d 1267 (11th Cir. 1997).

Montana – Convicted Felon Threatened Federal Agents With Machine Gun[9]

David Burgart, a convicted felon on bail on a charge of felony assault of a police officer was apprehended after he failed to show up at a pre-trial conference. He was found at a Montana camping area where he and others who were a part of a militia group were "stockpiling weapons, ammunition and survival gear." The defendant attempted to flee from authorities again and after a seven-hour standoff during which he threatened federal agents with the machine gun he possessed, Burgart was arrested.

California – North Valley Jewish Community Center Assailant Buford Furrow Also Charged With Machine Gun Possession[10]

Buford Furrow, the white supremacist who embarked on a hate-crime spree in California in 1999, murdering US postal worker Joseph Ileto and shooting five individuals at the North Valley Jewish Community Center, was also charged with illegal possession of a machine gun.

Mississippi – Convicted Felon Apprehended With Arsenal of Sixty Guns, Including Machine Guns[11]

J.R. Morgan was a convicted felon who came to the attention of federal authorities when a gun used in a crime was traced back to him. The defendant had nearly sixty firearms at his home, including a machine gun and a silencer. He liked to frequent gun shows where he would buy and resell guns without a license.

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[9] *United States v. Burgart*, 116 Fed. Appx. 124 (9th Cir. 2004).

[10] *United States v. Furrow, Jr.*, 125 F.Supp.2d 1178 (C.D. Cal. 2000).

[11] *United States v. Morgan*, 216 F.3d 557 (6th Cir. 2000).

Michigan – Drug Dealer Had Nearly 90 Firearms at His Home[12]

Defendant Ronald Napolean Wolfe had a marijuana growing operation at his home. Upon executing a search officers found and seized 86 firearms, including multiple machine guns.

Indiana – Bank Robbers Used Machine Guns[13]

Criss Duncan and Ralph Berkey robbed the National City Bank in Leesburg, Indiana in 2003. Each was armed with assault rifles modified to be fully automatic.

Texas – Cocaine Traffickers Pulled Machine Gun on Federal Officers[14]

Enrique Gonzales Jr. and his co-defendants were engaged in a cocaine trafficking ring in Houston, Texas. When federal agents initiated an undercover drug buy to arrest them, one of the co-defendants pulled a machine gun and threatened to fire, but was persuaded to put the gun down by an officer who had his police pistol trained directly on him.

Illinois – Convicted Felon Set Up Phony Corporation in Attempt to Evade Firearms Laws[15]

Joseph Fleischli, who had previously been convicted of four felonies, tried to set up a sham firearms manufacturing company in the names of his father- and mother-in-law. Fleischli had previously been denied a federal firearms license by the Bureau of Alcohol, Tobacco, Firearms & Explosives. Once law enforcement became aware of Fleischli's scheme, they searched his premises and found numerous illegal machine guns and explosive devices.

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[12] *United States v. Wolfe*, 32 F. Supp. 2d 945 (E.D. Mich. 1999).

[13] *United States v. Duncan*, 413 F.3d 680 (7th Cir. 2005).

[14] *United States v. Gonzales*, 121 F.3d 928 (5th Cir. 1997).

[15] *United States v. Fleischli*, 305 F.3d 643 (7th Cir. 2002).

North Dakota – Methamphetamine Dealer Prosecuted For Possessing More Than 50 Firearms, Including a Machine Gun and Street Sweeper Shotgun[16]

Mark Backer owned a shop where he sold methamphetamines and other drugs on the side. Upon executing a search warrant, officers discovered a large cache of firearms, including a machine gun, Street Sweeper shotgun, and a gun with an obliterated serial number.

Montana – Drug Traffickers Possessed Machine Guns and Tools For Converting Weapons Into Fully Automatic Firearms[17]

Two drug traffickers, Patrick Neiss and James Daychild, were charged with numerous drug and gun violations, including for machine gun possession. At the house that served as their site of operation agents found several semi-automatic firearms, a semi-automatic rifle that had been converted into a machine gun, and all of the tools and materials necessary to convert other semi-automatic weapons into fully automatic firearms. The court found "ominous" evidence that defendants posed a "definite danger" to the community.

Tennessee – Gun Collector Assembled Machine Guns from Parts "Kits" Obtained Through the Mail[18]

A federal drug task force executing a search warrant found four machine guns in the possession of Bobby Fisher, who admitted to assembling them from parts "kits" he ordered through an advertisement in *Shotgun News*.

As these cases demonstrate, criminals have used machine guns in deadly crimes around the country, and many of these machine guns have been converted from legal

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[16] *United States v. Backer*, 419 F.3d 882 (8th Cir. 2005).

[17] *United States v.Daychild*, 357 F.3d 1082 (9th Cir. 2004).

[18] *United States v. Fisher*, 149 Fed. Appx. 379 (6th Cir. 2005).

semiautomatic guns to illegal fully automatic guns by their owners. A key element of the federal machine gun ban is its prohibition on the possession of machine guns even if they have been converted to machine guns by their owners and the machine guns have not crossed state lines. If Judge Alito had prevailed in *Rybar*, the federal government would have been prevented from prosecuting criminals who possess machine guns. Such a restriction on federal law enforcement would have posed a grave danger to the public and law enforcement officers who face criminals possessing these dangerous weapons.

For these reasons, the Brady Center to Prevent Gun Violence opposes the nomination of Samuel A. Alito, Jr. to the United States Supreme Court.

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