



## Violence Policy Center

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## BACKGROUND ON SUPREME COURT NOMINEE SAMUEL ALITO

- o ***Supreme Court nominee Judge Samuel Alito voted to strike down the 1986 federal ban on machine guns.***
- o ***In the case of U.S. v. Rybar, Judge Alito was the lone dissenter in a decision upholding the conviction of a gun dealer who sold illegal machine guns at a Pennsylvania gun show.***
- o ***Application of Judge Alito's unusual and extremely restrictive view of Congressional regulatory power could imperil virtually every federal law that currently regulates firearms, ammunition, and explosives.***

### A Vote for Full-Auto Machine Guns

Federal Firearms License (FFL) holder Raymond Rybar was convicted of illegal possession and transfer of unregistered machine guns, a violation of the 1986 federal ban on machine guns (18 USC §922(o)). The illegal sales took place in 1992 at a Pennsylvania gun show.

Rybar challenged the constitutionality of the federal machine gun ban on two grounds: (1) that the provision exceeded Congress' regulatory authority under the Commerce Clause; and, (2) it offended Rybar's "right" to keep and bear arms under the Second Amendment. One of the guns at issue was an M-3 45 caliber submachine gun, an example of which is pictured below:



*M-3 Type submachine gun*

The majority's 1996 opinion in *U.S. v. Rybar*<sup>a</sup> upheld the conviction and ruled that the machine gun prohibition was a permissible regulation of an activity that substantially affected commerce. Judge Alito was the sole dissenter. Citing *U.S. v. Lopez*,<sup>b</sup> the Supreme Court's 1995 decision striking down the federal Gun-Free School Zones Act on Commerce Clause grounds, Judge Alito 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....

The majority boldly rejected this idea stating, "Nothing in *Lopez* requires either Congress or the Executive to play Show and Tell with the federal courts at the peril of invalidation of a Congressional statute." The majority also rejected Rybar's Second Amendment challenge to the machine gun regulation. Judge Alito's dissent was silent on the appellant's Second Amendment argument. The United States Supreme Court declined to hear the appellant's appeal.

### **From 1934 to 1986: Banning Machine Guns**

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 Dillinger. Congress heard ample evidence



*John Dillinger's 1921 Colt Thompson*

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<sup>a</sup> *U.S. v. Rybar*, 103 F.3d 273 (3d Cir. 1996).

<sup>b</sup> *U.S. v. Lopez*, 514 U.S. 549 (1995).

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.<sup>c</sup>

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.<sup>d</sup>

The NFA imposed a transfer tax and registration requirement on machine guns. As the majority opinion in *Rybar* notes, the NFA was enacted under the taxing power of



*Chicago Police Captain John Stege, holding an open gun case displaying a machine gun (1927)*

Congress, but 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.

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<sup>c</sup> "House Hearings on National Firearms Act," April/May, 1934.

<sup>d</sup> <http://www.fbi.gov/libref/historic/famcases/capone/capone.htm>

The 1986 machine gun ban was passed despite the vociferous objections of the gun lobby. After the law's enactment, then-NRA Institute for Legislative Action Executive Director, now NRA Executive Vice President, Wayne LaPierre stated, "Repealing the machine gun amendment...will be a high priority," and promised the NRA's members that the organization would "actively work toward the repeal of the recent machine gun ban and will take all necessary steps to educate the public on the sporting uses and legal ownership of automatic firearms."<sup>e</sup> LaPierre found little support for the idea in Congress.



*Common Ground: In 1986 the NRA, like Judge Alito, urged that the federal machine gun ban be overturned*

## **Federal Gun and Explosives Laws at Risk**

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.<sup>f</sup>

<sup>e</sup> "NRA to Fight Machine Gun Ban," *Monitor*, Volume 13, Number 13, August 15, 1986.

<sup>f</sup> *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).

In *Rybar*, Judge Alito reasoned that the Supreme Court’s decision in *Lopez*, which invalidated a federal law prohibiting gun possession on school grounds, compelled the conclusion that possession of a firearm—apparently any type of firearm—is not “economic” or “commercial” activity subject to federal regulation. Application of this unusual and extremely restrictive view of Congressional regulatory power could imperil virtually every federal law that currently regulates firearms and ammunition—including federal bans on non-detectable handguns and some armor-piercing handgun ammunition. Even federal regulation of explosives could be jeopardized, most notably the 2002 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 Samuel 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.<sup>9</sup> In a time of increased concern regarding homeland security, such views are not only counter-intuitive, but exceedingly dangerous.

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*The Violence Policy Center is a national educational organization working to stop gun death and injury in America. For more information, please visit [www.vpc.org](http://www.vpc.org).*

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<sup>9</sup> No less an authority on fighting terrorism than former Israeli prime minister Benjamin Netanyahu cites tightening gun control laws as an essential element of combating terror. In his book *Fighting Terrorism: How Democracies Can Defeat the International Terrorist Network*, Netanyahu notes that although firearms ownership is widespread in Israel—a democracy under constant threat of terror attack—access to handguns is carefully screened and ownership of certain “powerful weapons” is prohibited. He adds this trenchant observation: “Forbidding the ownership of machine guns is not a denial of the right to own a weapon for self-defense; it is a denial of the right to organize private armies—a right which no society can grant without eventually having to fight those armies. The continued existence in the United States of heavily armed anti-government militias numbering thousands of members is a grotesque distortion of the idea of civil freedom, which should be brought to a speedy end” (p. 141).