

1. “identification of the firearm;” 2. “date of registration;” and 3. “identification and address of person entitled to possession of the firearm.”<sup>66</sup> Additionally, “A person possessing a firearm registered as required by this section shall retain proof of registration which shall be made available to the Secretary [now Attorney General; effectively, any BATFE Special Agent] upon request.”<sup>67</sup>

The NFRTR has been the source of debate in the Congress since the late 1970’s, and federally licensed NFA dealers have “suspected” for years that the NFRTR records were incomplete and lacked reliability, because their firearms inventories were not accurately reflected in the NFRTR-generated reports, which came to light when the BATFE performed compliance inspections.<sup>68</sup> These inaccuracies have caused some lawful possessors of NFA weapons to fear, “[S]ome overzealous ATF agent will attempt to make a Registry error into a SWAT visit.”<sup>69</sup>

#### IV. The Inaccuracy of the NFRTR

Prior to the enactment of the NFA, Karl T. Frederick, then President of the National Rifle Association, voiced concerns over the possibility of citizens who lawfully registered their NFA weapons being turned into criminals for losing their registration papers.<sup>70</sup> While the issue of accuracy, completeness, and reliability of the NFRTR only

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<sup>66</sup> § 5841(a)(1)-(3).

<sup>67</sup> § 5841(e); 6 U.S.C. § 531; 116 Stat. 2135 (2003).

<sup>68</sup> Introductory Statement of Dan Shea, editor of Small Arms Review, leading an article by Eric M. Larson, *Voluntary Amnesty Registrations Under the National Firearms Act: Current Prospects and Some History From 1934 to 1968*, SMALL ARMS REVIEW, May 2000, at 41.

<sup>69</sup> *Id.*

<sup>70</sup> U.S. Congress, House Committee on Ways and Means, *H.R. 9066*, 73rd Cong., 2nd Sess., at 57 (Washington, GPO, 1934), available at <http://www.nfaa.org/documents/NFA-1934house.pdf>.

came to the Congress' attention in 1979, the BATFE was well aware, in December of 1968, that the 1968 Amnesty was a complete disaster.<sup>71</sup>

In 1979, then-Senator Jim McClure, on behalf of the NRA Firearms Museum, contacted the BATFE over its determination to bring a forfeiture action against the Museum, alleging seven weapons were illegally possessed, since they were not found in the registry.<sup>72</sup> While the BATFE had already begun a forfeiture action, *United States v. Seven Miscellaneous Firearms*, the district court, disconcerted by the allegations of the inaccuracy, found none of the weapons to be firearms that required registration.<sup>73</sup>

At the same time, the Congress heard testimony that the BATFE alleged J. Curtis Earl, a federally licensed NFA dealer, illegally possessed 475 unregistered firearms.<sup>74</sup> While ATF had consulted microfiche copies of NFRTR records, the attorney who represented Mr. Earl noted that Mr. Earl,

[T]urned to his file cabinet and began to produce the original records of their registration, and one by one the firearms came off the floor and back

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“[A]s a matter of human experience, the owner of a gun is going to lose papers, they are going to get mislaid, they are going to get burned up, if he cannot turn them up when required to do so he is liable to go to jail. I think there ought to be a simple method of obtaining a copy of that paper from the authorities with whom the original was filed. . . . If not, in the actual operation, you are going to create criminals.” *Id.*

<sup>71</sup> U.S. Dep’t of Justice, Criminal Div., *Memorandum: Response to letter from Senator McClure*, by Philip B. Heymann and Lawrence Lippe, at 2-3 (Nov. 29, 1979), available at <http://www.nfaa.org/documents/DOJAmnestyMemo1979.pdf>.

<sup>72</sup> *Id.* at 1.

<sup>73</sup> *Id.*; *United States v. Seven Miscellaneous Firearms*, 503 F. Supp. 565, 579 (D.D.C. 1980). NFA Branch Chief Wayne Miller commented on the decision, bizarrely declaring “Considerable evidence was received that [ATF’s] officials have for many years recognized the inadequacy and incompleteness of the Bureau’s records. The Court is not required to pass judgment on this, because the Government has failed to show that these seven items are firearms.” U.S. Congress, House Committee on Appropriations, Subcommittee on the Treasury, Postal Service, and General Government Appropriations, *Treasury Postal Service, and General Government Appropriations for Fiscal Year 1998, Part 5, Testimony of Members of Congress and Other Interested Individuals and Organizations*, 105th Cong., 1st Sess., at 97 (Washington, GPO, 1997), available at <http://www.nfaa.org/documents/1997testimony.pdf>.

<sup>74</sup> U.S. Congress, Senate Committee on Appropriations, *Oversight Hearings on Bureau Alcohol, Tobacco & Firearms*, 96th Cong., 1st Sess. at 39 (Washington GPO 1979), available at [http://www.nfaa.org/documents/1979\\_Hearing\\_Excerpts.pdf](http://www.nfaa.org/documents/1979_Hearing_Excerpts.pdf).

onto his racks. At the end, he could show that he had registered every single one of these 475 firearms. ATF's records were grossly incorrect.<sup>75</sup> In response to a request by Senator McClure, the Criminal Division of the Department of Justice stated that if BATFE determines that "a particular individual or weapon is registered" and BATF finds that its "files are missing," then "the only solution would be to declare another amnesty period."<sup>76</sup> However, no amnesty period was established in response to the Earl case.

In the 1980's, defense attorneys, in several federal court cases, began requesting, during discovery, internal BATFE memoranda and reports that documented problems regarding the accuracy of the NFRTR.<sup>77</sup> One of the procured BATFE memoranda, written by the NFA Branch Chief, declared,

Our response to inquires on the existence or nonexistence of proper registration of an NFA firearm is the basis for seizure, arrests, prosecution, fines, and imprisonments. Our testimony or certification of the nonexistence of such record is evidence subject to close examination in court. *We continuously discover discrepancies and inaccuracies in the registration file which, if discovered during trial, would destroy the future credibility of such evidence.* One resultant possibility is that a defendant who maintains he had properly registered his firearm but had lost his approved form could, subsequent to his arrest based on non-registration, locate his lost document. *If the court should discover that our negligence caused an unwarranted arrest and trial, the resultant loss of public trust would be irreparable. Just as serious is the possibility that an innocent man might be convicted if he could not find his registrant form and we certified that he had not registered the firearm when, in fact, we had failed to locate his registration in the Record [NFRTR].*<sup>78</sup> [emphasis added]

<sup>75</sup> Letter to Ernest S. Istook, Jr., Chairman, Subcommittee on Treasury, Postal Service and General Government, from David T. Hardy, Esq., dated April 10, 2001, *available at* <http://www.nfaa.org/documents/BardHard.pdf>.

<sup>76</sup> U.S. Department of Justice, Criminal Division, *Memorandum: Response to letter from Senator McClure*, by Philip B. Heymann and Lawrence Lippe, Nov. 29, 1979, at 4, *available at* <http://www.nfaa.org/documents/DOJamnestyMemo1979.pdf>.

<sup>77</sup> Congressional Research Service, *Memorandum: ATF's National Firearms Registration and Transfer Record: Issues Regarding Data Accuracy, Completeness, and Reliability*, by William J. Krouse, Nov. 28, 2005, at 6 (citing to *United States v. Stout*, 667 F.2d 1347 (11th Cir. 1982), *available at* <http://www.nfaa.org/documents/CRSmemoNFRTR0001.pdf>; *United States v. Seven Miscellaneous Firearms*, 503 F. Supp. 565 (D.D.C. 1980)).

<sup>78</sup> NFA Branch Chief memorandum to ATF Assistant Director for Technical and Scientific Services, *Purification and Verification of the National Firearms Registration and Transfer Record*, Apr. 3,

However, the then-Assistant Director of the BATFE, continued to assert that the inaccuracies had been corrected and that the NFRTR was accurate and reliable for “criminal proceedings.”<sup>79</sup>

More disconcerting is the October 1995 “Roll Call” training video of then NFA Branch Chief, Thomas B. Busey, in which Mr. Busey orders BATFE staff to continue to commit perjury when testifying about the NFRTR: “Let me say that when we testify in court, we testify that the database [NFRTR] is 100 percent accurate. That’s what we testify to, and we will always testify to that. As you probably well know, that may not be 100 percent true.”<sup>80</sup> Mr. Busey continued, “If our database were absolutely error free, we could simply run the name of individual and his first name, and if it didn’t come up, we could guarantee everyone that that individual doesn’t have a Title II [NFA] weapon registered to him.”<sup>81</sup> Furthermore, Chief Busey stated that the error rate in the NFRTR was between 49 and 50%, before he became NFA Branch Chief, which means all cases prosecuted for illegal possession of a firearm, prior to 1994, had a one in two chance of the legally registered weapon’s record not existing or being discoverable in the NFRTR.<sup>82</sup> Chief Busey then declared that the current, as of 1995, inaccuracy rate was below 8%,

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1975, reproduced in *Oversight Hearings on Bureau of Alcohol, Tobacco, and Firearms*, Senate Committee on Appropriations, 96th Cong., 1st Sess., at 42 (Washington, GPO, 1979), available at [http://www.nfaaa.org/documents/1979\\_Hearing\\_Excerpts.pdf](http://www.nfaaa.org/documents/1979_Hearing_Excerpts.pdf).

<sup>79</sup> Bureau of Alcohol, Tobacco, and Firearms, Status Report: National Firearms Registration and Transfer Record (NFRTR), by Deron A. Dobbs, July 1, 1981, at 17, available at <http://www.nfaaa.org/documents/DeronDobbs.pdf>.

<sup>80</sup> BATFE/NFRTR *Roll Call* Training Video, Oct. 1995, available at [http://www.nfaaa.org/documents/rollcall\\_highlights.mp4](http://www.nfaaa.org/documents/rollcall_highlights.mp4) or as text <http://www.nfaaa.org/documents/BuseyTranscript.pdf> at 20.

<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

while at the same time the BATFE was attesting to the court that the NFRTR was 100% accurate.<sup>83</sup>

## V. Congressional Hearings/OIG Audits

The Congress has been aware of the problems of the NFRTR since the 1970's; yet the courts, for the most part, have been relatively uninformed or unaware of such proceedings.<sup>84</sup> The hearings and testimonies on the NFA, and more specifically the inaccuracy in the NFRTR, are massive, some encompassing more than 900 pages; thus, the hearings will be broken down by date, and only the most pertinent information will be discussed, because an article could be written on each hearing. These hearings memorialize the inaccuracy of the NFRTR, misleading statements by the BATFE, official audits that fail to follow Generally Accepted Government Auditing Standards (GAGAS) based on *Government Auditing Standards*,<sup>85</sup> lack of internal controls within the BATFE, and BATFE's failure to follow procedure, as well as, the Congress's and BATFE's failure to rectify the NFRTR. While the Department of the Treasury, Office of Inspector General, purports to have based its 1998 audit reports on GAGAS, inspection of various unpublished Work Papers from these audits disclose that pertinent findings were omitted from the published audit reports, and render a more accurate and complete version of the serious errors in the NFRTR and BATFE mismanagement.

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<sup>83</sup> *Id.*

<sup>84</sup> U.S. Dep't of Justice, Criminal Div., *Memorandum: Response to letter from Senator McClure*, by Philip B. Heymann and Lawrence Lippe, 2-3 (Nov. 29, 1979), available at <http://www.nfaa.org/documents/DOJAmnestyMemo1979.pdf>.

<sup>85</sup> The audits described in this article fell within the scope of COMPTROLLER GENERAL OF THE UNITED STATES, *GOVERNMENT AUDITING STANDARDS*, (Washington, D.C., U.S. GPO, 1994), which has since been updated.

## A. 1934-1980

Since the previous section, The Inaccuracies in the NFRTR, dealt mainly with issues that arose from 1933 to the 1980's, I will not reiterate those occurrences. However, in 1968, after *U.S. v. Haynes* invalidated the registration provision of the NFA,<sup>86</sup> the Congress held hearings on new legislation, which would become the GCA.<sup>87</sup> The testimony most pertinent to this article is that of then Internal Revenue Service Commissioner Sheldon S. Cohen on the effect of *U.S. v. Haynes* on enforcement of the NFA. Although his statements do not acknowledge or characterize the inaccuracy of the NFRTR, they illustrate the likely impact on the BATFE's ability to prosecute individuals if a new amnesty period was established.<sup>88</sup> Commissioner Cohen stated, "We had been averaging, under the National Firearms Act, about 60 to 70 prosecutions per month for National Firearms Act violations. Since the first of this year, when the *Haynes* decision was rendered, we are down to about something in the excess of 40 a month."<sup>89</sup> Hence, *U.S. v. Haynes* apparently hampered the BATFE's ability to prosecute individuals in just one out of three cases, presumably limited to cases for Possession of an Unregistered Firearm. Thus, establishing a new amnesty period will not prevent the BATFE from prosecuting violations of the NFA; and as will be shown, BATFE could still successfully prosecute some Possession of Unregistered Firearm cases.

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<sup>86</sup> Haynes v. United States, 390 U.S. 85, 100 (1968).

<sup>87</sup> U.S. Congress, Senate Committee on the Judiciary, Subcommittee to Investigate Juvenile Delinquency, *Pursuant to S. Res. 240*, 90th Cong., 2nd Sess., (Washington, GPO, 1968), available at [http://www.nfaa.org/documents/IRS\\_Commissioner\\_GCA\\_Hearing.pdf](http://www.nfaa.org/documents/IRS_Commissioner_GCA_Hearing.pdf).

<sup>88</sup> *Id.* at 661.

<sup>89</sup> *Id.*

## B. 1980-1995

In 1983, then Senator Robert Dole, before the Committee on the Judiciary, proposed amending the NFA to establish a “continuing registration period during which possessors of unregistered National Firearms Act (NFA) weapons could register such weapons.”<sup>90</sup> In response to Senator Dole’s Dole’s proposed amendment, then-ATF Deputy Assistant Secretary for Enforcement Robert E. Powis declared “Having provided a 30-day period within which possessors of unregistered weapons could register them with impunity, the 1968 amnesty served its purpose. Therefore, unregistered weapons could no longer be legitimately registered and possessor’s retention of them violated the law.”<sup>91</sup> However, as will be shown in the 1998 audits of the NFRTR by the Treasury Department Inspector General, and further documented by Eric M. Larson in his 2001 Congressional testimony, Mr. Powis’s statement contradicts the fact that BATFE registered thousands of NFA firearms after the 1968 amnesty period expired, and thus knowingly and willfully misled the Congress in an official capacity as the representative of a federal law enforcement agency.<sup>92</sup>

In 1992, the BATFE threatened charging Noel Napolilli, a retired public school teacher, with Possession of an Unregistered Firearm because BATFE said it could find no record of his MP-40 machine gun, serial number 4202, in the NFRTR.<sup>93</sup> When Mr.

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<sup>90</sup> U.S. Congress, Senate Committee on the Judiciary, *S. 914*, 98th Cong., 1st Sess., at 62 (Washington, GPO, 1984), *available at* <http://www.nfaa.org/documents/DolaNFAamend.pdf>.

<sup>91</sup> *Id.* at 63.

<sup>92</sup> Eric M. Larson, *Errors in the National Firearms Registration and Transfer Record: A New Amnesty Period May be Required to Correct Them*, prepared for the Subcommittee on Treasury, Postal Services, and General Government of the Committee on Appropriations, at 57-67, Apr. 8, 1997, *available at* <http://www.nfaa.org/documents/1997testimony.pdf>.

<sup>93</sup> U.S. Congress, House Committee on Appropriations, Subcommittee on the Treasury, Postal Service, and General Government Appropriations, *Treasury Postal Service, and General Government*

Napolilli provided a copy of the Form 3 that the BATFE had approved, later shown to be a copy that the BATFE made and sent to him, rather than one of the copies prepared in duplicate that the BATFE approved, the BATFE claimed the document was a forgery.<sup>94</sup> Even though its own Forensic Document Laboratory examined the Form 3 and determined the document was genuine, the BATFE nevertheless seized and forfeited the firearm.<sup>95</sup>

While BATFE contended the firearm had been illegally registered as “remanufactured” because BATFE said it bore no evidence of remanufacture, the fact that BATFE lost all of its computerized and hard copy records of the firearm precluded a definitive determination.<sup>96</sup> BATFE wrote to James Jefferies, III, Mr. Napolilli’s attorney, that, “We agree with your observation that prior to Mr. Napolilli’s production of the above mentioned Form 3, ATF had no record of registration of the MP40 machinegun to Mr. Napolilli or any other person.”<sup>97</sup> Mr. Napolilli, left with no other option, filed suit.<sup>98</sup> However, he dropped his suit against the BATFE, “because my wife and I were fearful of BATF reprisal, the seizure of my sizeable firearms collection, ... and being harassed by constant ‘inspections.’ There was substantial evidence that these things would likely

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*Appropriations for Fiscal Year 1999, Part 5, Testimony of Member of Congress and Other Interested Individuals and Organizations*, 105th Cong., 2nd Sess., at 33-34 (Washington, GPO, 1998), available at <http://www.nfaoa.org/documents/NoelNapolilli.pdf>.

<sup>94</sup> *Id.* at 33.

<sup>95</sup> *Id.*

<sup>96</sup> *Id.* It should be noted that the gun was not forensically examined by an independent expert.

<sup>97</sup> Letter from Wayne Miller, Chief, National Firearms Act Branch, Bureau of Alcohol, Tobacco and Firearms to James H. Jeffries III, dated Sept. 18, 1992, available at <http://www.nfaoa.org/documents/ATF-WayneMillerLetter-1992.pdf>.

<sup>98</sup> U.S. Congress, House Committee on Appropriations, Subcommittee on the Treasury, Postal Service, and General Government Appropriations, *Treasury Postal Service, and General Government Appropriations for Fiscal Year 1999, Part 5, Testimony of Member of Congress and Other Interested Individuals and Organizations*, 105th Cong., 2nd Sess., at 84-86 (Washington, GPO, 1998) available at <http://www.nfaoa.org/documents/NoelNapolilli.pdf>.



occur based on other incidents with which I was familiar.”<sup>99</sup> Mr. Napolilli continued, “[I later] learned that a BATF employee destroyed other registration documents to avoid having to work on them and that their database approached a 50% error rate.”<sup>100</sup>

Mr. Napolilli’s predicament occurred shortly before a new round of hearings and testimonies on the inaccuracy of the NFRTR, as well as two audits of the NFRTR by the Treasury Department Inspector General published in 1998, which would continue for over the next decade. Indeed, in 2006, then Attorney General Gonzales refuted the BATFE’s position on refusing to accept previously approved paperwork. When Representative Chris Cannon asked, why do “I have just in my district many, many people who have this problem, and they have paperwork that came from the ATF that is - it's ignored by ATF,” Attorney General Gonzales replied, “That shouldn't be the case.”<sup>101</sup>

### C. 1995-1998

As discussed in the section The Inaccuracy in the NFRTR, in the “Roll Call” training video then-BATFE Chief Busey ordered NFA Branch staff to commit perjury when testifying about the accuracy of the NFRTR.<sup>102</sup> The BATFE tried to mitigate Busey’s remarks by offering a “correction;” NFA Specialist, Gary N. Schaible, stated

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<sup>99</sup> *Id.* at 33.

<sup>100</sup> *Id.*

<sup>101</sup> U.S. Congress, House Committee on the Judiciary, Department of Justice, *Serial No. 109-137*, 109th Cong., 2nd Sess., at 27 (Washington, GPO, 2006), *available at* <http://www.nfaoa.org/documents/DOJHearingserialno109-137.pdf>.

<sup>102</sup> BATFE/NFRTR *Roll Call* Training Video, Oct. 1995, *available at* [http://www.nfaoa.org/documents/rollcall\\_highlights.mp4](http://www.nfaoa.org/documents/rollcall_highlights.mp4) or as text <http://www.nfaoa.org/documents/BuseyTranscript.pdf>. This was obtained by a Freedom of Information Act (FOIA) request in 1996 by attorney James H. Jeffries.

under oath, “I have never testified that the data base [NFRTR] is 100 percent accurate nor, to the best of my knowledge, has any other of the NFA branch personnel, including Mr. Busey.”<sup>103</sup> However, Schaible’s statement, which carefully avoids characterizing the true error rate of the NFRTR, raises doubts about the legitimacy and trustworthiness of any and all certifications that the BATFE might give in a criminal proceeding, as will be discussed in the section, The Intersection of the Federal Rules of Evidence and the NFRTR. Since the BATFE concedes that the NFRTR is not 100% accurate, how can any court deprive an individual of his/her liberty based on this inaccurate database, in the absence of a valid and reliable estimate such as would be obtained by a GAGAS audit? Surely, this, combined with the Napolilli incident, meets the standard for reasonable doubt, in any proceeding.

Representative David Funderburk was not amused by the Busey comments and Schaible follow up. As a result, he proffered comments made by attorney James Jefferies into the Congressional Record:

Consider this matter in its starkest terms: a senior BATF official lecturing other senior BATF officials at BATF national headquarters in Washington, DC, declares openly and without apparent embarrassment or hesitation that BATF officers testifying under oath in Federal--and State--courts have routinely perjured themselves about the accuracy of official government records in order to send gun-owning citizens to prison and/or deprive them of their property. Just who is the criminal in these cases?<sup>104</sup>

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<sup>103</sup> U.S. Congress, House Committee on Appropriations, Subcommittee on the Treasury, Postal Service, and General Government Appropriations, *Treasury Postal Service, and General Government Appropriations for Fiscal Year 1997, Part 5, Testimony of Member of Congress and Other Interested Individuals and Organizations*, 104th Cong., 2nd Sess., at 183 (Washington, GPO, 1996), available at <http://www.nfaoa.org/documents/Schaiblecorrect.pdf>. See also, U.S. Congress, House Committee on Appropriations, Subcommittee on the Treasury, Postal Service, and General Government Appropriations, *Treasury Postal Service, and General Government Appropriations for Fiscal Year 1999, Part 5, Testimony of Member of Congress and Other Interested Individuals and Organizations*, 105th Cong., 2nd Sess., at 146-171 (Washington, GPO, 1998), available at <http://www.nfaoa.org/documents/LeaSuretest.pdf>.

<sup>104</sup> 142 Cong. Rec. E 1461 (1996) (statement of Honorable David Funderburk reiterating James H. Jefferies, *Institutional Perjury*, VOICE FOR THE DEFENSE, Vol. 28, No. 4, Oct. 1996, at 28-30, available at <http://www.nfaoa.org/documents/1998testimony.pdf>).

The record continues, “After reviewing the incriminating [Busey] tape, BATF officials discussed whether they could get away with destroying it.”<sup>105</sup> To push the point home,

Representative Funderburk reiterated Jefferies comment that,

When the fog had cleared Justice learned that the NFR&TR inaccuracy problem had been the subject of internal BATF discussion since at least 1979. BATF's files were replete with minutes of meetings, statistical studies, memoranda, correspondence, et cetera, admiring the problem. The only thing missing was any attempt to correct the problem, or to reveal it to anyone outside the agency.<sup>106</sup>

Most damaging was Jefferies legal opinion of the incident,

The indirect consequences of BATF's conduct will not be so readily apparent but are potentially devastating. All across the country assistant U.S. attorneys, U.S. district judges, and other Federal and local law enforcement officials are going to learn what most defense lawyers and gun dealers have known for years and what the aftermath of Waco and Ruby Ridge starkly illustrated: *BATF officers and agents lie, dissemble, and cover up on an institutionalized basis. These are not aberrations; they are an institutional ethic, an organizational way of life. Just who is the criminal in these cases?*<sup>107</sup> [emphasis added].

In 1996, the BATFE charged John Daniel LeaSure with illegal possession of firearms, in a case where the testimony of Mr. Schaible would later be impeached by an internal BATFE investigation into the destruction of NFA documents by BATFE employees.<sup>108</sup> Mr. Schaible testified, under oath, when asked if he was aware of BATFE employees throwing away NFA documents so they would not have to process them, he answered, “Yes.”<sup>109</sup> When asked if NFA Branch Clerks throwing away such documents could have resulted in the BATFE believing Mr. LeaSure to be in possession of allegedly

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<sup>105</sup> *Id.*

<sup>106</sup> *Id.*

<sup>107</sup> *Id.* at E 1461-62.

<sup>108</sup> U.S. v. LeaSure, No 4:95cr54 (E.D. Va. May 21, 1996); Transcript of Record at 217, U.S. v. LeaSure, No 4:95cr54 (E.D. Va. May 21, 1996), *available at* <http://www.nfaa.org/documents/LeaSureTrial.pdf>.

<sup>109</sup> Transcript of Record at 236, U.S. v. LeaSure, No 4:95cr54 (E.D. Va. May 21, 1996), *available at* <http://www.nfaa.org/documents/LeaSureTrial.pdf>.

unregistered firearms, Mr. Schiabile responded, “Certainly.”<sup>110</sup> More disconcerting is when Mr. Schiabile was asked whether these employees were fired, he responded, “No.”<sup>111</sup> With this information, the learned and Honorable John A. Mackenzie, United States District Court, Eastern District of Virginia, dismissed the convictions for illegal possession of firearms because, based on the BATFE’s own testimony, the BATFE itself may have destroyed Mr. LeaSure’s registration documents.<sup>112</sup> As Jefferies’ comments, which Representative Funderburk would later read into the Congressional Record, declare, “In essence Schaible was testifying that ‘We can’t find an official record and therefore the defendant is guilty.’ What we now know is that Schaible should have testified that ‘We can’t find half our records—even when we know they’re there—and therefore we’re not sure if anyone is guilty.’”<sup>113</sup>

This admonition in the Congressional Record, however, did not stop Mr. Schiabile from changing his story during an internal 1997 BATFE investigation into the destruction of NFA documents by BATFE employees. During the investigation, Mr. Schiabile told investigators, under oath, that one may have construed from his testimony, “that ATF employees were destroying documents, but this was not the case.”<sup>114</sup> Mr. Schiabile’s sworn testimony in the *LeaSure* case clearly and legally establishes that the BATFE

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<sup>110</sup> *Id.* at 237.

<sup>111</sup> *Id.*

<sup>112</sup> *Id.* at 239.

<sup>113</sup> 142 Cong. Rec. E 1461 (1996) (statement of Honorable David Funderburk).

<sup>114</sup> U.S. Congress, House Committee on Appropriations, Subcommittee on the Treasury, Postal Service, and General Government Appropriations, *Treasury Postal Service, and General Government Appropriations for Fiscal Year 1999, Part 5, Testimony of Member of Congress and Other Interested Individuals and Organizations*, 105th Cong., 2nd Sess., at 90 (Washington, GPO, 1998), available at <http://www.nfaaa.org/documents/1998testimony.pdf>. Mr. Schaible’s contradictory sworn testimony has been analyzed separately at some length; see “ATF Specialist Gary N. Schaible’s Contradictory Sworn Testimonies Regarding the Destruction of NFA Documents at ATF,” Eric M. Larson, *Work Papers on Errors in the National Firearms Registration and Transfer Record, and Other Issues Regarding the Bureau of Alcohol, Tobacco, and Firearms*, at 15-19 (Apr. 2, 1999), available at: <http://www.nfaaa.org/documents/Critiqueof1998IGreports.pdf>.

destroyed NFA documents; otherwise, the United States would have appealed the decision to dismiss the convictions. To appeal and lose would have resulted in the Court of Appeals upholding the verdict and writing case law that would have invalidated the NFRTR.

#### D. 1998

In October 1997, the Department of the Treasury, Office of Inspector General, at the request of Representative Dan Burton, then Chairman of the House Committee on Government Reform and Oversight, began investigating allegations that the NFRTR was inaccurate, incomplete and, therefore, unreliable.<sup>115</sup> Chairman Burton requested the investigation in response to five specific allegations by a private citizen, based on statistical and documentary evidence, which “may be valid and legitimate.”<sup>116</sup> The Treasury Department Inspector General rendered a report on the citizen’s allegations in October 1998.<sup>117</sup>

The investigation found, among other things, that “National Firearms Act (NFA) documents had been destroyed about 10 years ago by contract employees. We could not obtain an accurate estimate as to the types and number of records destroyed”<sup>118</sup> and “ATF

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<sup>115</sup> U.S. Department of the Treasury, Office of Inspector General, *Special Report on Allegations Concerning the Bureau of Alcohol, Tobacco, and Firearm’s Registration and Recordkeeping of the National Firearms Registration and Transfer Records*, OIG-99-009, 1 (Washington, Oct. 26, 1998), available at <http://www.nfaa.org/documents/TreasuryOIG-99-009-1998.pdf>.

<sup>116</sup> Treasury Department, Inspector General, *Work Paper Bundle A, 1998 audit of NFRTR*; available at [http://www.nfaa.org/documents/Work\\_Papers\\_A.pdf](http://www.nfaa.org/documents/Work_Papers_A.pdf) at 53-54.

<sup>117</sup> U.S. Department of the Treasury, Office of Inspector General, *Special Report on Allegations Concerning the Bureau of Alcohol, Tobacco, and Firearm’s Registration and Recordkeeping of the National Firearms Registration and Transfer Records*, OIG-99-009, at 1 (Washington, Oct. 26, 1998), available at <http://www.nfaa.org/documents/TreasuryOIG-99-009-1998.pdf>.

<sup>118</sup> *Id.* at 1. This is in direct contradiction to Mr. Schiabe’s later testimony.

granted amnesty NFA registrations to individuals after December 1, 1968 on a limited basis [almost 2,500 registrations] providing certain conditions were met. ATF did not publish its intent to grant an amnesty period as required by the Gun Control Act.”<sup>119</sup>

More importantly, the audit Work Papers memorialize a comment made by an Assistant Special Agent-in-Charge at the Baltimore field office: “When [redacted] first started with the agency in 1971, it was still under IRS. When ATF was made a separate Bureau in 1972, it was not an amicable split from IRS. He believes much of the documentation prior to 1972 *may have been destroyed* or maintained by IRS.”<sup>120</sup> [emphasis added].

The Treasury Department Inspector General undertook a separate audit of the NFRTR in addition to the one initiated in response to the citizen complaint, which examined other aspects of the NFRTR. This additional audit of the NFRTR was published in December of 1998.<sup>121</sup> The additional audit revealed that the BATFE allowed unauthorized access to the database by individuals no longer employed by the BATFE, remittance checks were left unsecured, transfers were not processed in a timely manner, and NFA weapons are registered to dead people.<sup>122</sup> Furthermore, and more disconcerting, the audit found that when the BATFE combined the existing NFRTR database with its new upgraded NFRTR database, “ATF *did not* have adequate assurance

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<sup>119</sup> *Id.* at 1, 13. It should be recognized that BATFE may have sought to provide an opportunity for certain applicants unable to participate in the amnesty because they were outside the continental United States, an opportunity to register unregistered firearms. Individuals on vacation, or serving overseas in the U.S. armed forces, may have been unaware of and unable to register their firearms due to the relatively short, 30-day amnesty period.

<sup>120</sup> U.S. Department of the Treasury, Office of Inspector General, *Work Papers C*, A-CH-98-001, at C-18, available at [http://www.nfaa.org/documents/Work\\_Papers\\_C.pdf](http://www.nfaa.org/documents/Work_Papers_C.pdf) at 33-34.

<sup>121</sup> U.S. Department of the Treasury, Office of Inspector General, *Audit Report on Allegations Concerning the Bureau of Alcohol, Tobacco, and Firearms' Administration of the National Firearms Registration and Transfer Record*, OIG-99-018, (Washington, Dec. 18, 1998) available at <http://www.nfaa.org/documents/TreasuryOIG-99-018-1998.pdf>.

<sup>122</sup> *Id.* at 1-23.

that all of the entries had been transferred in order to make *the registry complete for its intended use.*”<sup>123</sup>[emphasis added]. The audit found, “An initial review by the OIG showed that the prior registry reflected a total registration of 2,545,425 compared to a total registration of 2,548,918 in the new database.”<sup>124</sup> Thus, the registry mysteriously grew by 3,493 entries. However, the Work Papers for this audit tell a much different story: “[redacted] also provided an additional report, Weapon Inventory of Current Owner. The total weapons count for this report is greater than the Annual Registration Activity Report. The variance between the two reports is 212,734.”<sup>125</sup>

The audit declared, “ATF officials advised us that in September 1997, they had reconciled the two databases, but *they did not keep any record of it.*”<sup>126</sup> [emphasis added]. Thus, the BATFE denied the Treasury Department Inspector General the ability to determine the truth value of their statement. Instead, in June of 1998, the BATFE did its own audit of the reconciliation and, “ATF reported to us that 407 records (entries) from the old database were not found in the new database.”<sup>127</sup> Thus, these are just the records to which were known; this audit does not depict all those records which were missing or destroyed, although properly registered. Specifically, consider the statement by a Treasury IG auditor Gary Wilk in an unpublished audit Work Paper that in repeated efforts to reconcile the “discrepancies observed” during the audit, BATFE did not clearly “demonstrate that the computer system, typically in use, provides reliable and valid data

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<sup>123</sup> *Id.* at 10.

<sup>124</sup> *Id.* at 11.

<sup>125</sup> U.S. Department of the Treasury, Office of Inspector General, *Work Papers C*, A-CH-98-001, at C-37 available at [http://www.nfaoa.org/documents/Work\\_Papers\\_C.pdf](http://www.nfaoa.org/documents/Work_Papers_C.pdf) at 65.

<sup>126</sup> U.S. Department of the Treasury, Office of Inspector General, *Audit Report on Allegations Concerning the Bureau of Alcohol, Tobacco, and Firearms' Administration of the National Firearms Registration and Transfer Record*, OIG-99-018, at 11 (Washington, Dec. 18, 1998) available at <http://www.nfaoa.org/documents/TreasuryOIG-99-018-1998.pdf>.

<sup>127</sup> *Id.*

when a search is performed. ATF did demonstrate that they have the capacity to generate various information from various sources but the original documentation remains missing and the accuracy of the documentation provided cannot be assured.”<sup>128</sup>

More troubling is the audit report’s statement, “In addition to the discrepancies between the old and the new databases, we observed discrepancies between the database and original registration documents.”<sup>129</sup> The audit report went on to state concern with a registration category labeled “Other” where, “If form numbers were incorrectly entered into the registry, the entry would also be included in this category.”<sup>130</sup> Yet another concern was the use of a Form 4467, which was used by the BATFE to register firearms during the 1968 Amnesty.<sup>131</sup> Thus, if the BATFE does a search for a Form 4, which is the typical form used for transfer to an individual, the search would not yield a result, if the form had been entered in the “Other” or “4467” categories.

The audit report continued,

ATF has certain formal procedures for entering data into the registry’s database. However, the data entry errors such as those we found in our sample occurred because employees had not correctly entered some data. Also, supervisors or other employees did not always verify data entered into the database because of time limitations and other priorities. In response to our draft report, ATF officials also believed that discrepancies summarized in our table may be data entry errors and/or failures to enter information in accordance with established procedures.<sup>132</sup>

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<sup>128</sup> U.S. Department of the Treasury, Office of Inspector General, *Work Papers F*, A-CH-98-001, at F-52, available at [http://www.nfaoa.org/documents/Work\\_Papers\\_F.pdf](http://www.nfaoa.org/documents/Work_Papers_F.pdf) at 62. These findings, while limited to Forms 4467, cannot depict the true accuracy and completeness of the NFRTR. No search, however diligent, can possibly locate a document that has been lost or destroyed.

<sup>129</sup> U.S. Department of the Treasury, Office of Inspector General, *Audit Report on Allegations Concerning the Bureau of Alcohol, Tobacco, and Firearms’ Administration of the National Firearms Registration and Transfer Record*, OIG-99-018, at 11 (Washington, Dec. 18, 1998) available at <http://www.nfaoa.org/documents/TreasuryOIG-99-018-1998.pdf>.

<sup>130</sup> *Id.*

<sup>131</sup> *Id.*

<sup>132</sup> *Id.* at 12.



Thus, these “errors” may cause a search of the NFRTR to fail to locate numerous legally registered firearms; this audit finding is virtually identical to determinations made by the Department of Justice Inspector General in its June 2007 report on a “review” of the NFRTR.

Incredibly, even in light of this evidence of NFRTR inaccuracies, “ATF officials conclude that none of the identified discrepancies would affect the accuracy of a certificate of non-registration prepared by the NFA Branch for use in support of a criminal prosecution in United States district court.”<sup>133</sup> The report continued, “[A]TF stated that it can identify all records that might possibly be the record sought,”<sup>134</sup> which contradicts the BATFE’s admittance that it lost all of Mr. Napolilli’s records,<sup>135</sup> the destruction of numerous NFA documents 10 years ago,<sup>136</sup> and those 407 missing records.<sup>137</sup> Lastly, it must be noted that the samples drawn by the auditors were smaller than those that would ordinarily be drawn to establish standard estimates of precision and confidence.

As explained in the report, “Because of the error rate we found in our discovery sample and actions that ATF had underway to improve the quality of the registry, we did not implement a full statistical sampling plan.”<sup>138</sup> While this was the only information

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<sup>133</sup> *Id.* at 13.

<sup>134</sup> *Id.*

<sup>135</sup> Letter from Wayne Miller, Chief, National Firearms Act Branch, Bureau of Alcohol, Tobacco and Firearms to James H. Jeffries III, dated Sept. 18, 1992, *available at* <http://www.nfaa.org/documents/ATF-WayneMillerLetter-1992.pdf>.

<sup>136</sup> U.S. Department of the Treasury, Office of Inspector General, *Special Report on Allegations Concerning the Bureau of Alcohol, Tobacco, and Firearm’s Registration and Recordkeeping of the National Firearms Registration and Transfer Records*, OIG-99-009, at 1 (Washington, Oct. 26, 1998) *available at* <http://www.nfaa.org/documents/TreasuryOIG-99-009-1998.pdf>.

<sup>137</sup> U.S. Department of the Treasury, Office of Inspector General, *Audit Report on Allegations Concerning the Bureau of Alcohol, Tobacco, and Firearms’ Administration of the National Firearms Registration and Transfer Record*, OIG-99-018, at 11 (Washington, Dec. 18, 1998) *available at* <http://www.nfaa.org/documents/TreasuryOIG-99-018-1998.pdf>.

<sup>138</sup> *Id.* at 23.

provided to the public, the Work Papers, once again, explain why neither the actual error rate was listed, nor was the full statistical sampling plan implemented, in a discussion of audit findings the Treasury Department Inspector General omitted from the final reports.

Of the 528 records and documents reviewed: We discovered a total of 395 errors or omissions of which 176 were Critical to the NFA mission and the remaining 219 were Administrative... We were unable to adequately identify 14,301 Unknown records contained within the category 'Other.'

These records have subsequently been tentatively identified as 9,621 miscoded Form 6 and 4,680 unknown (database conversion errors).<sup>139</sup>

Hence, the overall error rate, without consideration for the "Other" category, was

74.8%, and Critical error rate was 33.3%. To better understand the distinction between Critical and Administrative errors, "[T]he name of the weapon owner and the weapon serial number were critical," but "[T]he address, date the document was received, the date of birth of the applicant, and weapon description were [not] critical;" hence, not critical has been termed Administrative.<sup>140</sup> More interesting, to this end, is the fact that "Table 3: Sampling Results: Error Rate Estimates" has been completely redacted.<sup>141</sup>

In a "Discovery" sample of seventy Form 4467s, the Treasury Department Inspector General determined that "Our discovery sample indicated an 18.4% error rate, one error per error Form 4467 in a 'critical' field."<sup>142</sup> Because of concerns that the "critical error" rate was too high, the BATFE staff told the Treasury Department Inspector General's auditors to use different definitions of "critical error" to determine the 4.3% error rate that can be calculated from data that the OIG formally reported;

<sup>139</sup> U.S. Department of the Treasury, Office of Inspector General, *Work Papers H*, A-CH-98-001, at H-0, available at [http://www.nfaoa.org/documents/Work\\_Papers\\_H.pdf](http://www.nfaoa.org/documents/Work_Papers_H.pdf) at 28.

<sup>140</sup> U.S. Department of the Treasury, Office of Inspector General, *Work Papers F*, A-CH-98-001, at F-37 available at [http://www.nfaoa.org/documents/Work\\_Papers\\_F.pdf](http://www.nfaoa.org/documents/Work_Papers_F.pdf) at 48.

<sup>141</sup> U.S. Department of the Treasury, Office of Inspector General, *Work Papers H*, A-CH-98-001, available at [http://www.nfaoa.org/documents/Work\\_Papers\\_H.pdf](http://www.nfaoa.org/documents/Work_Papers_H.pdf) at 35.

<sup>142</sup> *Id.* at H-1, PDF at 32-60.

namely, 6 critical errors out of a “Discovery” sample of 141 cases.<sup>143</sup> There is evidence that in other, different, internal BATFE efforts in 1995 to reduce the error rate in the NFRTR, the BATFE staff manipulated the definition of “Significant Error,” including “Approved wrong firearm to transferee,” “Approved form never updated in NFRTR,” and “Misspelled and/or Incomplete names,” by simply redefining these as an “Error”<sup>144</sup>

The discrepancy between the OIG and BATFE’s definition of “critical error” requires an examination of the Congressional Intent for a definition of “critical error.” The Congress, in 1968, defined “critical” information as: “(1) the identification of the firearm, (2) date of registration, and (3) identification and address of the person entitled to possession of the firearm.”<sup>145</sup> Therefore, since the Congress felt these factors were crucial to the database, it was Congress’s intent that the absence of, or error in, any of these data fields correlates to a “critical error.” This definition is likely to yield a much higher error rate; thus, the BATFE is unlikely to support such a determination, even though the definition represents the original Congressional intent.

Eric M. Larson, a Senior Analyst at the U.S. Government Accountability Office, whose complaint in his capacity as a private citizen to the House Committee on Government Reform and Oversight resulted in the 1998 audits of the NFRTR, agreed that the above are critical errors, “but they represent only the barest minimum guideline

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<sup>143</sup> *Id.*

<sup>144</sup> Eric Larson, *Work Papers on Errors in the National Firearms Registration and Transfer Record, and Other Issues Regarding the Bureau of Alcohol, Tobacco, and Firearms*, at 38 (Apr. 2, 1999), available at [http://www.nfaoa.org/documents/ATF\\_Significant\\_Error.pdf](http://www.nfaoa.org/documents/ATF_Significant_Error.pdf). That is just a portion of the entire Work Papers, which can be found here: <http://www.nfaoa.org/documents/Critiqueof1998IGreports.pdf>.

<sup>145</sup> U.S. Congress, Senate Committee on Judiciary, *Report No. 1501: Gun Control Act of 1968*, 90th Cong., 2nd Sess., at 42 (1968), available at <http://www.nfaoa.org/documents/SenateReport1501-GCA1968.pdf>.

standards.”<sup>146</sup> Mr. Larson continued, “To be accurate and reliable, ‘the identification of the firearm’ should include (1) serial number, (2) manufacturer, (3) name or model number of firearm, and (4) type of firearm (machine gun, short-barreled shotgun, any other weapon, and so forth).”<sup>147</sup> Furthermore, “The ‘identification and address of the person entitled to possess the firearm’ should include correct spelling of at least the last name, and a current address.”<sup>148</sup>

While Mr. Larson’s guideline standards are more encompassing, the BATFE appears to have determined that even those guideline standards were not sufficient as critical fields in its interpretation of the Congressional mandate for the 1968 Amnesty and included the registrant’s date of birth, social security number and other information. Accordingly, in the January 1969 edition of Title 26 C.F.R, Section 179.201, the BATFE declared,

The return, Form 4467, shall show the name, address, place of business or employment, employer identification number or social security number, and date of birth of the registrant, the date the firearm was acquired, the place where the firearm usually is kept, the name, and address of the manufacturer, the type, model, length of barrel, overall length (when applicable), caliber or gauge, serial number, and other identifying marks of the firearms, and if an unserviceable firearm, the manner in which it was rendered unserviceable. *Upon registering the firearm, the Director shall retain the original Form 4467 as part of the National Firearms Registration and Transfer Record.*<sup>149</sup> [emphasis added].

It seems a failure of due diligence for BATFE to fail to determine that the information specified in the 1969 regulations is not “critical” information in audits of the NFRTR,

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<sup>146</sup> Letter from Eric M. Larson, Response to Questions asked by Joshua Prince, to Joshua Prince, at 4, dated Jan. 1, 2008, *available at* [http://blog.princelaw.com/assets/2008/1/5/Eric\\_Larson\\_letter\\_to\\_Joshua\\_Prince.pdf](http://blog.princelaw.com/assets/2008/1/5/Eric_Larson_letter_to_Joshua_Prince.pdf). Mr. Larson stated that his comments reflect his personal opinions, and do not represent the policy or position of the U.S. Government Accountability Office (GAO).

<sup>147</sup> *Id.*

<sup>148</sup> *Id.* at 4-5.

<sup>149</sup> 26 C.F.R. 179.201 (1969), *available at* <http://blog.princelaw.com/assets/2008/1/9/1969-CFR-ATF-amnesty-reg.pdf>.

when it specifically interpreted its Congressional mandate to require the Director to collect this information on the Form 4467s to implement the 1968 amnesty, which was designed to register unregistered firearms and reliably identify them and their owners.<sup>150</sup>

Nevertheless, given the evidence auditors discovered that the NFRTR was inaccurate and incomplete, it is astonishing that the Treasury Department Inspector General sought to distance himself from the issue of whether the NFRTR was accurate enough to sustain criminal prosecutions:

Our [audit] scope did not include a review of the accuracy of ATF's certifications in criminal prosecutions that no record of registration of a particular weapon could be found in the registry. We also did not evaluate the procedures that ATF personnel use to search the registry to enable them to provide an assurance to the court that no such registration exists in specific cases. Accordingly, this report does not provide an opinion as to the accuracy of the registry searches conducted by ATF.<sup>151</sup>

In 1998, the issues surrounding accuracy, or lack thereof, the NFRTR did not end with the 1998 audit. Robert I. Landies, an Ohio firearms dealer, contacted the BATFE in 1998 regarding the fact that they had transferred NFA firearms for which he had not submitted transfer applications, experienced "misplacement of transfer applications by ATF," and "receipt of approved registrations for firearms which do not appear in the NFRTR."<sup>152</sup> The BATFE responded, "The implementation of a new database and the realignment of branch functions and duties have significantly impacted upon the

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<sup>150</sup> In the light of trends toward using biometric identifiers, a gradual tightening of standards to acquire state-issued identification and related documents, such as driver's licenses, particularly under provisions of the Real ID Act, it may be advisable for the NFRTR to formally comply with federal provisions for positive identification that are and will be implemented in future, in its standards for positively identifying owners of NFA firearms. Similarly, BATFE might consider establishing standards for the reliable identification of individual NFA firearms

<sup>151</sup> U.S. Department of the Treasury, Office of Inspector General, *Audit Report on Allegations Concerning the Bureau of Alcohol, Tobacco, and Firearms' Administration of the National Firearms Registration and Transfer Record*, OIG-99-018, at 4 (Washington, Dec. 18, 1998) available at <http://www.nfaa.org/documents/TreasuryOIG-99-018-1998.pdf>.

<sup>152</sup> Letter from Jimmy Wooten, Assistant Director, Firearms, Explosives & Arson, Bureau of Alcohol, Tobacco and Firearms, to Robert I. Landies, Ohio Ordnance Works, dated May 26, 1998, bearing symbols F:SD:NFA:WJO 179.101 98-5593, available at <http://www.nfaa.org/documents/LandiesLetterNFRTR1998.pdf>.

processing of applications and notices in recent months.”<sup>153</sup> The BATFE completely sidestepped the issues of missing records in the NFRTR and transfers of NFA weapons to other individuals, when no application for transfer was submitted. Yet, the BATFE contends that the database is accurate.

#### E. 1999-2002

In 1999, the Disclosure Division of BATFE stated, in response to a FOIA request, that the NFRTR data records submitted to the Department of Treasury Inspector General were not accurate: “The report you refer to was submitted to the Inspector General of the Treasury, with the understanding that the report was *not* accurate, because some of the report functions associated with the database [NFRTR] are not working properly.”<sup>154</sup> [original emphasis]. The BATFE continued, “Our letter dated April 20, 1999 advised you of the *inaccuracies* we are *still* experiencing.”<sup>155</sup> [emphasis added]. Thus, the Disclosure Division, with responsibility to produce NFRTR records, contradicts the BATFE’s statement in the 1998 audit that the NFRTR was accurate.<sup>156</sup>

In 2000, concerned about BATFE’s answers to three questions it posed about errors in the NFRTR, the House Subcommittee on Treasury, Postal Service, and General

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<sup>153</sup>

*Id.*

<sup>154</sup> Letter from Averill P. Graham, Disclosure Specialist, Bureau of Alcohol, Tobacco and Firearms, to Eric M. Larson, dated May 18, 1999, bearing symbols 112000 99-1420, *available at* <http://www.nfaaa.org/documents/AverillGrahamletter1999.pdf>.

<sup>155</sup>

*Id.*

<sup>156</sup> U.S. Department of the Treasury, Office of Inspector General, *Audit Report on Allegations Concerning the Bureau of Alcohol, Tobacco, and Firearms’ Administration of the National Firearms Registration and Transfer Record*, OIG-99-018, at 13 (Washington, Dec. 18, 1998), *available at* <http://www.nfaaa.org/documents/TreasuryOIG-99-018-1998.pdf>. “ATF officials conclude that none of the identified discrepancies would affect the accuracy of a certificate of non-registration prepared by the NFA Branch for use in support of a criminal prosecution in United States district court.” *Id.*

Government Appropriations, which requested Dr. Fritz J. Scheuren, an internationally recognized expert in administrative records and statistics, to evaluate the BATFE's responses to three questions asked by the Subcommittee.<sup>157</sup> Dr. Scheuren, then affiliated with The Urban Institute, more recently a past President of the American Statistical Association and currently Vice President, Statistics, National Opinion Research Center, University of Chicago, told the Subcommittee, regarding the technology question: “. . . that very serious problems were uncovered in ATF's recordkeeping systems. In fact, in my own long experience [after reading the two Treasury Department Inspector General audit reports on the NFRTR], I cannot think of any instance where poorer results were obtained.”<sup>158</sup> For the remaining questions on searchability of the NFRTR and heirs who inherit firearms, Dr. Scheuren “found the ATF answer to be unresponsive and too general to be useful,” and that “ATF indicated that it has no system to identify or track the firearm transfers to heirs,” respectively and was thus unable to answer the Subcommittee's questions.<sup>159</sup> Dr. Scheuren concluded:

I can only offer a qualified opinion on the ATF's answers but if their responses are to be taken at face value, two conclusions arise: (1) ATF has serious material weaknesses in its firearm registration system which it has yet to acknowledge, and (2) the ATF steps taken to improve its recordkeeping system clearly lack thoroughness and probably lack timeliness as well.<sup>160</sup>

Dr. Scheuren offered three recommendations: 1. The BATFE should allow for outside, independent audit organizations to give a more complete assessment; 2. the audits should

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<sup>157</sup> U.S. Congress, House Committee on Appropriations, Subcommittee on the Treasury, Postal Service, and General Government Appropriations, *Treasury Postal Service, and General Government Appropriations for Fiscal Year 2002, Part 3, Statements of Members of Congress and Other Interested Individuals and Organizations*, 107th Cong., 1st Sess., at 23-26 (Washington, GPO, 2001), available at <http://www.nfaa.org/documents/FritzScheuren.pdf>. To see Dr. Scheuren's resume, please find it at [http://www.nfaa.org/documents/Scheuren\\_Resume\\_July\\_2007.pdf](http://www.nfaa.org/documents/Scheuren_Resume_July_2007.pdf).

<sup>158</sup> *Id.* at 24

<sup>159</sup> *Id.*

<sup>160</sup> *Id.* at 25.

be annual; and 3. the BATFE needs to implement some form of check to determine if an individual, who owns a registered NFA weapon, died during that year.<sup>161</sup> The BATFE, however, at a separate appropriations hearing on its budget, rejected Dr. Sheuren's suggestions; for example, it stated that "strong internal controls for the NFRTR" would result from improvements it was making, rendering an audit unnecessary, and declined to specifically answer other questions.<sup>162</sup>

Then, in 2001, in responding to a concerned citizen, the BATFE stated, "This is in response to your undated letters to the Bureau of Alcohol, Tobacco, and Firearms (ATF) requesting a guarantee, either by letter or notarized statement, from ATF that your *registered* National Firearms Act (NFA) firearms will never be confiscated as contraband."<sup>163</sup> [emphasis added]. The BATFE continued, "We will *not* provide you with such a guarantee."<sup>164</sup> [emphasis added]. One can only read such a statement in utter confusion and disbelief. The BATFE has approved the transfer of a weapon; yet, it will not guarantee it is lawful? What is the purpose of the BATFE's approval if such is not a guarantee? How can the BATFE approve an application by a law-abiding individual, only to later classify the firearm as contraband and turn the individual into a criminal? While it is conceivable that the statutory law may change prohibiting the ownership of such firearms, a guarantee could be given based on statutory law remaining the same. Nonetheless, it is clear that the BATFE does not wish for the Congress and Judiciary to answer these questions.

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<sup>161</sup> *Id.*

<sup>162</sup> U.S. Congress, House Committee on Appropriations, Subcommittee on the Treasury, Postal Service, and General Government Appropriations, *Treasury Postal Service, and General Government Appropriations for Fiscal Year 2002, Part I*, 107th Cong., 1st Sess., at 478 (Washington, GPO, 2002), available at <http://www.nfaoa.org/documents/NFRTRdocpack.pdf>.

<sup>163</sup> Letter from Arthur Resnick, Chief, National Firearms Act Branch, to [redacted] bearing symbols 901040:GS, 5320/2001-0161, available at <http://www.nfaoa.org/documents/NoGuarantees.pdf>.

<sup>164</sup> *Id.*



Congress' concern over the accuracy and reliability of the NFRTR resulted in the following "report language" in BATFE's Fiscal Year 2001 appropriation:<sup>165</sup> "To address the NFRTR accuracy problem in part, Congress appropriates \$500,000 to improve ATF's 'operations, electronic filing systems, and database accuracy for the National Licensing Center, Imports Branch, and the NFA Branch' for each fiscal year, 2001 and 2002."<sup>166</sup> The language of the Fiscal Year 2003 appropriations report indicated the continuation of such funding.<sup>167</sup>

In 2002, the Treasury Department Inspector General initiated a new audit of the NFRTR.<sup>168</sup> The purported purpose of this audit was to determine "Has ATF taken appropriate steps to improve the completeness, accuracy, and processing times of the NFRTR."<sup>169</sup> However,

On December 10, 2004, a former IG staff member who worked on the original 1997-98 audits of the NFRTR, and also been assigned to work on the new 2002 audit, said that the audit team was told to terminate this audit before it was completed; box up the materials and ship them to the IG; and that none of the audit materials were turned over to the Department of Justice Inspector General when ATF was transferred to the Department of Justice on January 24, 2003. Consequently, it appears that the Department of Justice Inspector General may not be aware of the problems with and Congressional concerns about the accuracy and completeness of the NFRTR data base.<sup>170</sup>

#### F. 2003-2007

<sup>165</sup> Congressional Research Service, *Memorandum: ATF's National Firearms Registration and Transfer Record: Issues Regarding Data Accuracy, Completeness, and Reliability*, by William J. Krouse, Nov. 28, 2005, at 16 (quoting H.Rept. 106-765 (H.R. 4871), at 23-24), available at <http://www.nfaa.org/documents/CRSmemoNFRTR0001.pdf>.

<sup>166</sup> *Id.* (quoting H.Rept. 107-152 (H.R. 2590), at 20).

<sup>167</sup> *Id.*

<sup>168</sup> U.S. Department of the Treasury, Office of Inspector General, *Annual Plan Fiscal Year 2003*, available at <http://www.nfaa.org/documents/TreasuryIG2003auditofNFRTR.pdf>.

<sup>169</sup> *Id.* at 74.

<sup>170</sup> National Firearms Act Owners Association [NFAOA], <http://www.nfaa.org/resources.html>, click ATF and Department of Treasury Inspector General investigations and audits of the NFRTR, and related documents, text of: Treasury IG starts new audit of NFRTR in 2002, then terminates it before completion (last visited on Nov. 3, 2007).

The Department of Justice Inspector General did not address completeness and accuracy of the NFRTR, until 2007, when it published a report of a limited review of the NFRTR. There was no evidence the IG considered the 2005 testimony of BATFE Inspector George Semonick in *U.S. v. Wrenn*, regarding the condition of the NFRTR.<sup>171</sup> Inspector Semonick testified under oath that "there was a discrepancy" between firearms records maintained by defendant Wrenn and those maintained in the NFRTR.<sup>172</sup> He also confirmed "that the records, the records kept by ATF, were deficient."<sup>173</sup>

In 2005, the Congressional Research Service [CRS], in response to a request by Rep. Jim Gibbons, issued a memorandum on the "accuracy, completeness, and reliability," of the NFRTR, which summarized most Congressional hearing records, OIG reports, other documented concerns of the NFRTR's inaccuracy, and juxtaposes the arguments BATFE offers against a future amnesty with rejoinders, which will be addressed in the section Amnesty: the Nexus between the Congressional Intent and the Inaccuracy of the NFRTR.<sup>174</sup> There is no mention of, or evidence that, the Department of Justice Inspector General considered the CRS memorandum on the NFRTR in its 2007 report.

The 2007 review by the Department of Justice Inspector General found, "[T]hat since 2004, the NFA Branch has improved significantly the timeliness of both processing NFA weapons applications and responding to customer inquiries. However, continuing

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<sup>171</sup> *U.S. v. Wrenn*, No. 1:04-045 (D.S.C. Nov. 8 2005); Transcript of Record, *U.S. v. Wrenn*, No. 1:04-045 (D.S.C. Nov. 8 2005), *available at* <http://www.nfaa.org/documents/SemonickTestimony.pdf>.

<sup>172</sup> Transcript of Record at 22, *U.S. v. Wrenn*, No. 1:04-045 (D.S.C. Nov. 8 2005), *available at* <http://www.nfaa.org/documents/SemonickTestimony.pdf>.

<sup>173</sup> *Id.*

<sup>174</sup> Congressional Research Service, *Memorandum: ATF's National Firearms Registration and Transfer Record: Issues Regarding Data Accuracy, Completeness, and Reliability*, by William J. Krouse, Nov. 28, 2005, at 1, *available at* <http://www.nfaa.org/documents/CRSmemoNFRTR0001.pdf>.

management and technical deficiencies contribute to *inaccuracies in the NFRTR database*.<sup>175</sup> [emphasis added]. The report declared,

Several NFA Branch personnel described the NFRTR programming as obsolete, or becoming obsolete, and identified flaws that make it difficult to work with the database and to ensure that decisions based on NFRTR reports and queries are correct. The flaws include: (1) older NFRTR records with empty data fields can improperly exclude the records from search results, (2) the NFRTR can erroneously generate two separate records for one weapon, (3) the system lacks controls to prevent inconsistent data entry, (4) the system lists incorrect owners of NFA weapons on queries and reports, and (5) when multiple weapons are registered on a single form, a change entered in the NFRTR for one weapon incorrectly applies the change to all the weapons listed on that form.<sup>176</sup>

Furthermore, the report states, “[T]he NFA requires owners to retain the approved NFA weapons application form as proof of a weapon’s registration and make it available to ATF upon request. *If the NFA weapons owner can produce the registration paperwork, ATF assumes the error is in the NFRTR and fixes it in the database.*”<sup>177</sup> [emphasis added]. Thus, the DOJ Inspector General determined that the NFRTR is inaccurate because firearm registrations are missing; hence, it logically follows that some legally registered firearms would not be identified in a diligent search of the NFRTR. This clearly exposes an individual, who lost his/her paperwork, to the hazards of unwarranted federal prosecution, due to the inaccuracy of the NFRTR.

With regards to the Congressional money earmarked to correct the inaccuracies in the NFRTR,

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<sup>175</sup> U.S. Department of the Justice, Office of Inspector General, *The Bureau of Alcohol, Tobacco, Firearms and Explosives’ National Firearms Registration and Transfer Record*, I-2007-006, at iii (June 2007), available at <http://www.nfaa.org/documents/DOJ-OIG2007NFRTRreport.pdf>.

<sup>176</sup> *Id.* at viii.

<sup>177</sup> *Id.* at 31. The report fails to define what it terms “the error . . . in the NFRTR;” logically, it could only mean that BATFE (1) failed to update the record of an approved transfer of a registered firearm, having lost its copy of the approved transfer; (2) lost all records of the registered firearm, as occurred in the Napolilli case; and/or (3) some other situation whereby BATFE was unable to locate the record of a registered NFA firearm. Presumably, a FOIA request for Work Papers from this “review” of the NFRTR could clarify this critical issue, but the DOJ has refused the portion of my FOIA seeking such Work Papers. An appeal is pending.

ATF received budget allocations in fiscal year (FY) 2001 and FY 2002 for FIT [Firearms Integration Technology]; however, ATF reallocated the funding to another priority mission, which exhausted the funding by 2004. Any continued work on FIT was dependent on congressionally earmarked funds (which were exhausted during 2005) and the acquisition of specific funds to perform specific tasks.<sup>178</sup>

The report continued on that a special “Information Technology Specialist” position was established to “determine the best approach to correcting errors in NFRTR records.”<sup>179</sup>

Thus, as of 2007, the DOJ-OIG and BATFE acknowledge that the NFRTR is inaccurate.

Nonetheless, the report concluded,

Despite the concerns of both the citizens who wrote the letters to Congress that prompted our review and federal firearms dealers that errors in the NFRTR leave them vulnerable to unwarranted sanctions and criminal charges, we concluded, based on ATF documents and interviews with ATF personnel and NFA weapons industry representatives, that errors in NFRTR records have not resulted in inappropriate criminal charges against individuals or licensees.<sup>180</sup>

What is left unsaid in the 2007 report is what occurs when the BATFE decides to prosecute individuals on a charge of Possession of an Unregistered Firearm; to encourage the “voluntary abandonment” of firearms to ATF; or to seize and forfeit firearms for which ATF claims it can find no registration record in the NFRTR. It would be illogical for the BATFE to prosecute individuals who were able to procure copies of their NFA registration paperwork. But, what about those who could not because such paperwork was lost, due to misplacement, flood, fire, or other acts of God? What happened in those cases? The 2007 report does not say, and the Department of Justice Inspector General apparently declined to try and find out, demonstrating a failure of due diligence.

The methodology of the 2007 report is also troubling because it appears to rely on statements by the BATFE staff that uses the NFRTR, to characterize the accuracy and

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<sup>178</sup> *Id.* at viii.

<sup>179</sup> *Id.*

<sup>180</sup> *Id.* at x.

completeness of the NFRTR, rather than to conduct an audit according to GAGAS. A more conclusive and reliable way to conduct an audit or review of the accuracy and completeness of the NFRTR would be to (1) obtain a random sample of federally licensed NFA firearms dealers, (2) visit each dealer and conduct an independent inventory of NFA firearms in stock, and (3) compare those lists to records of firearms in the NFRTR. Such a reverse check on the NFRTR would likely yield a better characterization of the accuracy and completeness of the NFRTR than occurred by using the Department of Justice Inspector General's methodology in its review of the NFRTR.

While the report is appropriately characterized as a "review" rather than an audit, no doubt for that reason, it is still striking how inaccurate the NFRTR data are reported to be, and that the NFRTR data were – as will be discussed shortly – "These errors affect the NFRTR's reliability as a regulatory tool when it is used during compliance inspections of federal firearms licensees."<sup>181</sup> The DOJ-OIG's failure to investigate the effect of these errors when the NFRTR is used to prosecute citizens for Possession of Unregistered Firearm seems like a failure of due diligence.

Clearly, the Inspector General's report is inappropriately based merely on an assumption of trustworthiness of BATFE statements, rather than independent verification of such statements based on scientific sampling procedures and application of GAGAS, and estimating true "critical error" rates. How can one conclude that errors in the NFRTR records have not resulted in inappropriate criminal charges against individuals or licensees, when 1. the absence of a record could clearly not be known, if it is missing from the NFRTR, as the DOJ-OIG determined; 2. the absence of the record of a registered weapon, caused ATF to suspect Noel Napolilli of counterfeiting the

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<sup>181</sup> *Id.* at iii.

registration document he produced, and later to determine the firearm was contraband in the absence of documents that could have settled its classification definitively;<sup>182</sup> 3. then BATFE NFA Branch Chief Busey's statement that the accuracy rate, prior to his directorship, was at 49-50%;<sup>183</sup> 4. the loss of 475 records of one J. Curtis. Earl;<sup>184</sup> and 5) at least three OIG reports that reliably document "critical errors" in the NFRTR? Clearly, as Mark Twain said, "The more you explain it, the more I don't understand it."<sup>185</sup> How the DOJ-OIG comes to this conclusion, in light of the aforementioned instances, is a mind boggling wonder of the world. Furthermore, as the DOJ-OIG declares, "[T]he NFRTR database has technical problems, and its software programming is considered by the NFA Branch to be flawed. The lack of consistency in processing procedures, combined with database technical issues, results in errors in records, reports, and queries produced from the NFRTR that affect its reliability."<sup>186</sup>

The only conclusion, which makes sense, is that the DOJ-OIG sought to protect the BATFE; yet, the DOJ-OIG could not perjure itself to completely protect the BATFE. The fact that the DOJ-OIG declares the NFRTR to be inaccurate; yet, refuses to acknowledge that law-biding citizens may have had criminal charges brought against him/her, is a continuing failure of logic and of due diligence by federal law enforcement.

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<sup>182</sup> U.S. Congress, House Committee on Appropriations, Subcommittee on the Treasury, Postal Service, and General Government Appropriations, *Treasury Postal Service, and General Government Appropriations for Fiscal Year 1999, Part 5, Testimony of Member of Congress and Other Interested Individuals and Organizations*, 105th Cong., 2nd Sess., at 33-34 (Washington, GPO, 1998), available at <http://www.nfaaa.org/documents/NoelNapolilli.pdf>.

<sup>183</sup> BATFE/NFRTR Roll Call Training Video, Oct. 1995, available at [http://www.nfaaa.org/documents/rollcall\\_highlights.mp4](http://www.nfaaa.org/documents/rollcall_highlights.mp4) or as text <http://www.nfaaa.org/documents/BuseyTranscript.pdf>.

<sup>184</sup> Letter from David T. Hardy, Esq., to Ernest S. Istook, Jr., Chairman, Subcommittee on Treasury, Postal Service and General Government, dated April 10, 2001, available at <http://www.nfaaa.org/documents/BardHard.pdf>.

<sup>185</sup> Mark Twain

<sup>186</sup> U.S. Department of the Justice, Office of Inspector General, *The Bureau of Alcohol, Tobacco, Firearms and Explosives' National Firearms Registration and Transfer Record*, I-2007-006, at 11 (June 2007), available at <http://www.nfaaa.org/documents/DOJ-OIG2007NFRTRreport.pdf>.

This report also inquired as to training of new individuals, who would input information into the NFRTR.

One Examiner described the training as ‘sloppy’ and further stated: ‘Someone [a more experienced staff member] would sit with the new Examiners on occasion to go over how to use the NFRTR, but it was not for a long time and was not consistent . . . . Examiners just started working on the computer.’<sup>187</sup>

Yet, these are the employees upon whom law-abiding individuals rely upon to do their job with the utmost accuracy. An erroneous entry can result in an innocent citizen being criminally charged; however, as the report would have one believe, this is a fallacy. I proffer that the DOG-OIG try to explain this alleged fallacy to Mr. Napolilli, who was unjustly deprived of valuable personal property, and all those others who are in jail because they lost their paperwork. Incredibly, the report states:

Staff members told us that as a result of inadequate and unstructured training at the beginning of their employment, *they were uncertain how to use the NFRTR*, lacked skill in processing the applications or conducting searches, were not familiar with the NFA, and did not have all the information necessary to accomplish their jobs. Staff stated that it was difficult to become familiar with the NFRTR and navigate through the database, *a vital skill needed to process applications and conduct records checks*. One Examiner told us that because of poor training not all staff members are “on the same page” on how they approach the work and applications may be processed incorrectly.<sup>188</sup> [emphasis added].

The report determined that, “Incomplete and inaccurate training leads to errors in the NFRTR and in decisions based on the NFRTR.”<sup>189</sup>

The most important implication for the NFRTR is the report’s finding: “If the NFA weapons owner can produce the registration paperwork, ATF assumes the error is in the NFRTR and fixes it in the database,” because it fulfills the Department of Justice

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<sup>187</sup> *Id.* at 21.

<sup>188</sup> *Id.* at 21-22.

<sup>189</sup> *Id.* at 22.

standard, articulated to the Congress in 1979, for requiring a new amnesty period.<sup>190</sup> Specifically, if the BATFE determines that "a particular individual or weapon is registered" and BATFE finds that its "files are missing," then "the only solution would be to declare another amnesty period."<sup>191</sup> Unfortunately, the Department of Justice Inspector General fails to address this critical point anywhere in its "review" of the NFRTR, despite its outrageous finding that "files are missing" from the NFRTR. As Firearms law expert and attorney Stephen P. Halbrook commented: "[I]f the owner or the executor of a deceased owner cannot find the registration paperwork, which may be lost or destroyed, and if the record cannot be found in the NFRTR, then a voluntary abandonment of the firearm may be inducted or even a criminal prosecution initiated. On such issues the report is not sufficiently informative."<sup>192</sup>

In an effort to obtain current expert opinion on the accuracy of the NFRTR, I contacted Dr. Fritz Scheuren, an internationally recognized expert in administrative records and statistics and asked if he would be willing to update his 2000 Congressional Testimony and opine whether the NFRTR is sufficiently accurate to be used as evidence in a criminal proceeding.<sup>193</sup> He graciously responded to my request by sharing his thoughts and forwarding his updated findings to House of Representatives, Subcommittee

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<sup>190</sup> *Id.* at 31.

<sup>191</sup> U.S. Department of Justice, Criminal Division, *Memorandum: Response to letter from Senator McClure*, by Philip B. Heymann and Lawrence Lippe, Nov. 29, 1979, at 4, available at <http://www.nfaa.org/documents/DOJAmnestyMemo1979.pdf>.

<sup>192</sup> STEPHEN HALBROOK, FIREARMS LAW DESKBOOK, 545 (Thomson/West 2008).

<sup>193</sup> U.S. Congress, House Committee on Appropriations, Subcommittee on the Treasury, Postal Service, and General Government Appropriations, *Treasury Postal Service, and General Government Appropriations for Fiscal Year 2002, Part 3, Statements of Members of Congress and Other Interested Individuals and Organizations*, 107th Cong., 1st Sess., at 23-26 (Washington, GPO, 2001), available at <http://www.nfaa.org/documents/FritzScheuren.pdf>. To see Dr. Scheuren's resume, please find it at [http://www.nfaa.org/documents/Scheuren\\_Resume\\_July\\_2007.pdf](http://www.nfaa.org/documents/Scheuren_Resume_July_2007.pdf). I also contacted other experts who might have informed the issues addressed in this article, including former IRS Commissioner Sheldon S. Cohen and Philip B. Heymann, co-author of the 1979 Department of Justice determination of standards required to establish a new amnesty period, but they declined comment.



on Commerce, Justice, Science, and Related Agencies, Committee on Appropriations, House of Representatives. Dr. Schueren wrote, “I again reviewed the NFRTR situation and found that ATF still has serious material weaknesses in its firearm registration system that it has failed to recognize. *In my considered professional judgment, these errors render the NFRTR questionable as a source of evidence in federal law enforcement.*”<sup>194</sup> [emphasis added].

## VI. The Absence of Paperwork is not a Defense

The issue of NFA paperwork is particularly critical regarding machineguns. The reason is that under 18 U.S.C. § 922(o), which bans the making of new machineguns, the Government does not have to prove that a machinegun is not registered to convict the defendant of illegally possessing it.<sup>195</sup> The Government has only to allege that the machinegun is illegally possessed; the defendant may only prove lawful possession through an affirmative defense, by producing his or her approved NFA paperwork.<sup>196</sup> Thus, despite having the means, capabilities, and Congressional mandate to ensure the NFRTR is accurate and complete, the Government is not accountable for losing or deliberately destroying paperwork that would exonerate an innocent defendant.<sup>197</sup>

Where does this leave the individual who lawfully registered his/her weapon, but due to natural disaster, such as hurricanes, wildfires, floods, and earthquakes, loses

<sup>194</sup> Letter to Alan B. Mollohan, Chairman, Subcommittee on Commerce, Justice, Science, and Related Agencies, Committee on Appropriations, by Fritz J. Scheuren, VP Statistics NORC, 1 (Dec. 11 2007); *available at* [http://www.nfaa.org/documents/Scheuren\\_Committee\\_Chair\\_Letter.pdf](http://www.nfaa.org/documents/Scheuren_Committee_Chair_Letter.pdf).

<sup>195</sup> 18 U.S.C. § 922(o); *United States v. Just*, 74 F.3d 902, 904 (8th Cir. 1996); *United States v. Gravenmeir*, 121 F.3d 526, 528 (9th Cir. 1997); *United States v. Franklyn*, 157 F.3d 90, 93 (2d Cir. 1998).

<sup>196</sup> *Id.*

<sup>197</sup> 26 U.S.C. § 5841.

his/her paperwork through no fault of his/her own? Do we as a society want these individuals to risk life and limb to save their paperwork for fear that the Government has lost its copy of the paperwork? What if the individual is denied access to his paperwork due to a State of Emergency? To force an individual to risk life and limb or face conviction and imprisonment, for a lawfully registered firearm, goes against our sense of justness and fairness. But, how often does this occur?

#### A. Error Letters

An “Error Letter” is a letter sent by the BATFE to the applicant seeking to transfer, register, or determine the status of, a NFA firearm. An Error Letter declares, “We do not show [serial number] as being registered [in the NFRTR]. Please send proof of ownership.”<sup>198</sup> In my conversations with numerous dealers, they acknowledge that these Error Letters are extremely common and most, if not all, NFA dealers have a pile of them in their records; however, most dealers are fearful of retribution by the BATFE if they disclose these records.<sup>199</sup> Nevertheless, NFA dealer Saeid Shafizadeh, owner of Pars

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<sup>198</sup> Department of the Treasury, Bureau of Alcohol, Tobacco, and Firearms, *Error Letter*, C:F:N:ERRORLTR, available at [http://blog.princelaw.com/assets/2007/12/28/Whited\\_Out\\_Error\\_Letter.pdf](http://blog.princelaw.com/assets/2007/12/28/Whited_Out_Error_Letter.pdf). This letter has been redacted (whited out) because it is personal tax information, since the NFRTR was in error, and the weapon had been legally registered. Most individuals are fearful of sharing this information for fear of retribution. Nonetheless, there are/have been several different forms of Error Letters, that this author is aware of, and can be found at: <http://www.nfaa.org/documents/1999statement.pdf> at 15; <http://blog.princelaw.com/assets/2007/12/28/WheatonCase.pdf> at 3-4. Both of these Error Letters were in error, meaning that the individual had legally registered the firearm and luckily had proof of the registration.

<sup>199</sup> This information was obtained in private conversation between myself and six dealers. These dealers asked to remain anonymous, due to fear of retribution. They all informed me that since they deal with the BATFE on a daily business, their livelihoods would be at stake by disclosing the information. It must also be noted that all Error Letters would need the approval of the past and current registrant, since it is tax information, which cannot be disclosed without such approval, unless redacted to veil pertinent tax information.

International, received an Error Letter in 2007, which has been misplaced, but he retained a copy of his response to the BATFE and made it publicly available.<sup>200</sup> In his response, he included a copy of the BATFE approved Form 3 and asserted concerns over the accuracy and completeness of the NFRTR.<sup>201</sup> Most troubling is the fact that the BATFE approved his Form 3 on April 12, 2007 and by June 4, 2007, the BATFE had no record of the approved form.<sup>202</sup>

Since an Error Letter is based on a determination by the BATFE that a firearm is not in the NFRTR, meaning the BATFE takes the position that the firearm is not registered and thus, the information about the firearm is not protected tax information, this author submitted a Freedom of Information Act [FOIA] request for all Error Letters.<sup>203</sup> The BATFE denied the request, “Because all information on such registration forms is collected under the tax code, release of this information would be in direct violation of the Tax Reform Act.”<sup>204</sup>

The denial of the FOIA is illogical by the plain meaning of an Error Letter, unless the BATFE is willing to admit that all Error Letters are in error, meaning that all the Error Letters sent by the BATFE, based on a search of the NFRTR, were sent to individuals who possessed legally registered firearms, for which they had approved

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<sup>200</sup> Letter to Mr. Kenneth E. Houchens, Chief National Firearms Act Branch, *NFA Letter Control Number [redacted, Title II Firearms Serial Number [redacted]]*, by Saeid Shafizadeh, (July 11, 2007), available at <http://www.nfaoa.org/documents/ParsLetter2007.pdf>. Mr. Warren Kreiser, in a private communication, informed me that he also received two Error Letters about one year ago, to which he submitted BATFE approved Forms.

<sup>201</sup> *Id.*

<sup>202</sup> *Id.* It must be noted that Mr. Shafizadeh has documented numerous issue with the BATFE and errors in the NFRTR over the years. See Mr. Shafizadeh declaration, available at <http://www.gunowners.com/ip10.htm>.

<sup>203</sup> Letter to Ms. Alma McCoy, BATFE Disclosure Specialist, *Freedom of Information Act request for Error Letters*, by Joshua Prince, (Nov. 2 2007), available at [http://blog.princelaw.com/assets/2007/12/28/Response\\_to\\_BATFE\\_CATEGORY\\_FOIA\\_Response.pdf](http://blog.princelaw.com/assets/2007/12/28/Response_to_BATFE_CATEGORY_FOIA_Response.pdf).

<sup>204</sup> Letter to Joshua Prince, *Freedom of Information Act request for Error Letters*, by Alma McCoy, BATFE Disclosure Specialist, (Dec. 14, 2007), available at [http://blog.princelaw.com/assets/2007/12/28/BATFE\\_Error\\_Letter\\_Response.pdf](http://blog.princelaw.com/assets/2007/12/28/BATFE_Error_Letter_Response.pdf).

paperwork. However, in all likelihood, there are a mix of Error Letters which are Correct and Error Letters which are Incorrect.

An Error Letter which is Correct is one which correctly declares that a specific firearm is not registered, because it never was registered. Per the BATFE's refusal of the FOIA, it is impossible for something that does not exist to be covered as tax information. Pursuant to 26 U.S.C. 6103(b), tax information must fall within the definition of "return information."<sup>205</sup> The absence of a record is not included in the definition of "return information."<sup>206</sup> Hence, the BATFE's response, "Because all information on such registration forms is collected under the tax code" is immaterial, since the request was for "Error Letters" stating that no registration exists. Thus, if no registration exists, it is not and cannot be covered by "tax information" or any other exception to FOIA requests and does not violate the Tax Reform Act.

An Error Letter which is Incorrect is one where, although the NFRTR does not show the weapon to be registered, the individual can provide proof that the weapon was correctly registered and the NFRTR is in error.<sup>207</sup> In essence, the Error Letter is in error, which would connote that some of the information on these Error Letters could be covered by the Tax Reform Act. However, the BATFE releases summary statistics of NFRTR transactions, as well as statistics on machineguns and other NFA firearms, in the

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<sup>205</sup> 26 U.S.C. §§ 6103(b)(1)-(2).

<sup>206</sup> § 6103(b)(2).

<sup>207</sup> Department of Justice Office, Inspector General, Evaluation and Inspections Division, *The Bureau of Alcohol, Tobacco, Firearms and Explosives' National Firearms Registration and Transfer Record, Report Number I-2007-006*, Washington, D.C.: Department of Justice, June 2007, at 31, available at <http://www.nfaoa.org/documents/DOJ-OIG2007NFRTRreport.pdf>. "Additionally, the NFA requires owners to retain the approved NFA weapons application form as proof of a weapon's registration and make it available to ATF upon request. If the NFA weapons owner can produce the registration paperwork, ATF assumes the error is in the NFRTR and fixes it in the database." *Id.*

publication *Commerce in Firearms*.<sup>208</sup> The BATFE, by its own actions and publications, acknowledges that summary statistics can be disclosed, including currently registered NFA firearms, if aggregated into large categories where individuals cannot be identified. Thus, the BATFE legally can provide summary statistics on all Error Letters which are Incorrect, as well as Correct, where all identifiable or protected information is redacted or not included.

This author filed an appeal to the BATFE's decision, since these Error Letters would depict the current accuracy, or lack thereof, of the NFRTR, especially since a complete GAGAS audit has not been conducted.<sup>209</sup> If, as many federally licensed NFA dealers contend, the BATFE has issued hundreds, or even thousands, of these Error Letters, it would depict to a jury the likelihood, or absence thereof, that a criminal defendant may have legally registered his/her firearm, but the BATFE lost his/her registration. More importantly, the fact that the number of NFA firearms registered in the NFRTR continues to rise, may depict that the BATFE has sent out numerous Error Letters which were in error, illustrating the inaccuracy of the NFRTR.<sup>210</sup>

#### B. The BATFE's Improper Denial of Exculpatory Evidence

<sup>208</sup> ALCOHOL, TOBACCO, AND FIREARMS BUREAU, COMMERCE IN FIREARMS IN THE UNITED STATES (2000), available at <http://permanent.access.gpo.gov/lps4006/020400report.pdf>.

<sup>209</sup> Letter to Office of Information and Privacy, *Appeal of Decision from Freedom of Information Act request for Error Letters*, by Joshua Prince, (Dec. 19, 2007), available at [http://blog.princelaw.com/assets/2007/12/28/Error\\_Letter\\_Appeal.pdf](http://blog.princelaw.com/assets/2007/12/28/Error_Letter_Appeal.pdf). Appeal still pending.

<sup>210</sup> Eric Larson, *Work Papers on Errors in the National Firearms Registration and Transfer Record, and Other Issues Regarding the Bureau of Alcohol, Tobacco, and Firearms*, inserted between pages 5 and 6 (Apr. 2, 1999), available at <http://www.nfaog.org/documents/Critiqueof1998IGreports.pdf> at 18-26. This depicts that in each year, from 1992 to 1996, the total of machinegun owned in the past year, is drastically different, sometimes a variation of over 5,000 machineguns, than the previous years declared total machinegun owned. *Id.* For instance, in 1995 the total amount of machine guns owned was 21,742; yet in 1996 listing, the total number of machineguns for 1995 is 16,437. *Id.* at 18-20. This is a difference of 5,305.

The BATFE's efforts to cover up errors in the NFRTR, under conditions applicable to the Tax Code, must be viewed in light of BATFE withholding exculpatory information in a criminal trial under the false premise that such information was protected under the Tax Code. Suppose BATFE wanted to convict a defendant of Possession of an Unregistered Firearm, in a case where the defendant, through no fault of his or her own, lost the NFA paperwork on his or her firearm, and BATFE had such paperwork and decided not to disclose it, knowing that would ensure the defendant's illegal conviction? The BATFE's conduct in a recent criminal case illustrates that BATFE is capable of doing just that.

In *U.S. v. Olofson*,<sup>211</sup> "Mr. Olofson, a Drill Instructor in the National Guard, was asked by Robert Kiernicki to teach him how to shoot a firearm."<sup>212</sup> Mr. Olofson did so and after Mr. Kiernicki was proficient with firearms, Mr. Olofson lent Mr. Kiernicki a used AR-15 rifle.<sup>213</sup> On one occasion, the rifle malfunctioned resulting in three rounds being fired.<sup>214</sup> The BATFE's Firearm Technology Branch [FTB] tested the weapon and declared, it "is just a rifle."<sup>215</sup> However, Special Agent in charge Jody Keeku was not pleased with this outcome and had the firearm sent back to the FTB for a new test to be performed with irregular, but commercially available, ammunition.<sup>216</sup> This time, Special

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<sup>211</sup> United States v. Olofson, No. 06-CR-320 (E.D. WI. Jan. 1, 2008). While the documents have not yet been made available, many of the documents have been posted by Mr. Olofson at <http://www.ak47.net/forums/topic.html?b=1&f=6&t=507483&page=1>.

<sup>212</sup> Post by Len Savage, Firearms Design Expert, available at <http://www.subguns.com/boards/mgmsg.cgi?read=638985>.

<sup>213</sup> *Id.*

<sup>214</sup> *Id.*

<sup>215</sup> *Id.* This declaration is an expression declaring that the rifle is not a machinegun but a regular semiautomatic rifle.

<sup>216</sup> *Id.*

Agent Keeku was pleased with the results. The FTB determined that it was a machinegun when used with the special ammunition.<sup>217</sup>

The case now becomes extremely interesting since Mr. Olofson purchased the semiautomatic rifle from Olympic Arms, which, when manufactured, was legally manufactured with M-16 fire control parts.<sup>218</sup> More importantly, at the time of manufacture, BATFE sent a letter to manufactures declaring that the use of such fire control parts did not constitute a machinegun, because those parts, by themselves, should not, without some major malfunction, cause the rifle to fire fully automatic.<sup>219</sup> Moreover, in 1986, BATFE requested that Olympic complete a “safety recall” due to the possibility of AR-15s, previously built with M-16 fire control parts, “malfunctioning,” resulting in the rifle going “full auto.”<sup>220</sup>

When the defense sought to acquire the abovementioned letters, in a motion to compel discovery, the BATFE Chief Counsel argued that for the Honorable Charles N. Clevert to decide the relevance of or exculpatory nature of the documents, Judge Clevert would have to see the document; however, the BATFE “claims it is privileged from disclosing correspondence with persons or companies on guns because it is a tax issue” under 26 U.S.C. 6103.<sup>221</sup> More disconcerting, BATFE Chief Counsel declared, through

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<sup>217</sup> *Id.*

<sup>218</sup> *Id.* The general difference between the AR-15 and M-16 is the full auto capability of the M-16; however, it must be noted there are some AR-15s, which are full auto. There are numerous part which make a M-16 full auto, none of which, independently, can transform a semiautomatic AR-15 into a machinegun. When Olympic Arms manufactured the rifle in question, it was built with an M-16 trigger, disconnect, and hammer; the combination of which, still would not transform the rifle into a machinegun.

<sup>219</sup> Private Correspondence with Len Savage, on file with author.

<sup>220</sup> Post by Len Savage, Firearms Design Expert, available at <http://www.subguns.com/boards/mgmsg.cgi?read=638985>.

<sup>221</sup> Mr. Olofson’s recount of the events, available at <http://www.ak47.net/forums/topic.html?b=1&f=6&t=507483&page=29>.

AUSA Haanstad, “The Court will have take our word, that the documents in question contain tax information, and contain no exculpatory evidence.”<sup>222</sup>

While it is clear that the BATFE letters are not tax information, pursuant to 26 U.S.C. 6103, the BATFE is willing to assert whatever is necessary to obtain the ends to which it seeks. Instead of these letters informing the jurors on the BATFE’s prior positions and the alleged failure of Olympic to comply with the BATFE’s requested safety recall on Mr. Olofson’s rifle, Mr. Olofson was found guilty of transfer of a machinegun.<sup>223</sup> Is this the justice that we seek? Do we honestly want to send Mr. Olofson, a former National Guard, to jail because his weapon malfunctioned, through no fault of his own?

This issue of a firearm malfunctioning, resulting in fully automatic fire, was brought up in *U.S. v. Aguilar-Espinosa*.<sup>224</sup> The court declared, “[T]he law is not intended to trap the unwary, innocent, and well intentioned citizen who possess an otherwise semi-automatic weapon that, by repeated use of the weapon, by the inevitable wear and tear of sporting activities, or by means of mere inattention, happenstance, or illfortune, fires more than semi-automatically.”<sup>225</sup> If we decide to prosecute individuals whose firearms malfunction, the results could be devastating.<sup>226</sup> As firearms law expert Stephen Halbrook states, “*Staples* illustrates that the malfunction defense is alive and

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<sup>222</sup> Post by Len Savage, Firearms Design Expert, available at <http://www.subguns.com/boards/mgmsg.cgi?read=638985>.

<sup>223</sup> Mr. Olofson’s recount of the events, available at <http://www.ak47.net/forums/topic.html?b=1&f=6&t=507483&page=29>. See also, [http://www.wnd.com/news/article.asp?ARTICLE\\_ID=59650](http://www.wnd.com/news/article.asp?ARTICLE_ID=59650).

<sup>224</sup> *United States v. Aguilar-Espinosa*, 57 F. Supp. 2d 1359 (D. Fla. 1999).

<sup>225</sup> *Id.* at 1362-63; cited to in STEPHEN HALBROOK, FIREARMS LAW DESKBOOK, 453-454 (Thomson/West 2008).

<sup>226</sup> If such occurs, the law-abiding citizen whose firearm malfunctions will not seek corrective measures, for fear of prosecution. Where will all these “malfunctioning” firearms go? Will they be buried? Will they be thrown into the trash? Will they end up on the Black Market? Surely, none of these are a desired result but we must be cognizant of results of our actions.



well as a jury issue;”<sup>227</sup> however, the malfunction defense will be moot if the BATFE is allowed to dictate to the court what constitutes tax information, which, in the BATFE’s opinion, includes legal interpretations of the law. The result of denying exculpatory evidence will be even more devastating for a system of justice that prides itself on ensuring that the innocent are not found guilty.

### C. Accuracy and Completeness of the NFRTR

How accurate is the NFRTR? Nobody outside of the BATFE knows, but a summary table of NFRTR errors compiled from public documents is not encouraging.<sup>228</sup> In 1994, documents released by BATFE in response to a FOIA stated an examination of 25,611 NFRTR records disclosed 1,567 “Errors” (6%) and 373 “Significant Errors” (1%) while another 36,903 records had 2,155 “Errors” (6%); however, the BATFE changed the definition of most “Significant Errors” to “Errors,” in an obvious effort to manipulate the statistics.<sup>229</sup> In 1998, the Treasury Department Inspector General used various definitions of “critical” error, which produced different estimates, only some of which are known.<sup>230</sup> The “critical” error rate for a sample of about 140 Forms 4467 was calculated to be 4.3% by one definition (in the published report) and 18.4% by another definition (in

<sup>227</sup> STEPHEN HALBROOK, *FIREARMS LAW DESKBOOK*, 440 (Thomson/West 2008) (citing to *United States v. Staples*, 971 F.2d 608 (10th Cir. 1992)).

<sup>228</sup> Summary of Errors in the National Firearms Registration and Transfer Record Disclosed in Audits or Reviews by ATF or the Treasury Department Inspector General, 1994 to 1998, *available at* <http://www.nfaaa.org/documents/SummaryNFRTRerror1.pdf>.

<sup>229</sup> Eric Larson, *Work Papers on Errors in the National Firearms Registration and Transfer Record, and Other Issues Regarding the Bureau of Alcohol, Tobacco, and Firearms*, at 38 (Apr. 2, 1999), *available at* [http://www.nfaaa.org/documents/ATF\\_Significant\\_Error.pdf](http://www.nfaaa.org/documents/ATF_Significant_Error.pdf). That is just a portion of the entire Work Papers, which can be found here: <http://www.nfaaa.org/documents/Critiqueof1998IGreports.pdf>.

<sup>230</sup> See Section V Congressional Hearings/OIG Audits, subsection d. 1998.

unpublished audit Work Papers).<sup>231</sup> The “critical” error rates for “Letter” and “Other” categories were 8.4% and 7.9%, respectively, in the published 1998 audit report, and were redacted completely in the unpublished audit Work Papers. It is difficult to conclude that the NFRTR is accurate and complete from these data, but even this limited audit work proves that the type(s) and extent of “critical” errors in the NFRTR remain unknown.<sup>232</sup> Given the repeated and consistent failures of the Treasury Department Inspector General and the Department of Justice Inspector General to perform due diligence, the only way to determine the accuracy and completeness of the NFRTR may be to contract with an outside entity to conduct a GAGAS audit, conforming with the Congressional intent of what constitutes a “critical” error.

Since all prosecutions for Possession on an Unregistered Firearm are based on a search of the NFRTR, its accuracy and completeness are crucial in any proceeding. Accuracy relates to a determination of how accurate the data in a database must be;<sup>233</sup> whereas, completeness ensures that “[n]o records are missing and that no records have missing data elements.”<sup>234</sup> Moreover, in many databases, including the NFRTR, “[m]issing entire records can have disastrous consequences.”<sup>235</sup> Since most of the data errors in the NFRTR are due to data entry failures and deletions, the BATFE needs to institute a database entry system that edits the entry “to ensure that all data entering the database/list are of high quality.”<sup>236</sup> More importantly, “The role of editing needs to be

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<sup>231</sup> *Id.*

<sup>232</sup> *See*, Summary of Errors in the National Firearms Registration and Transfer Record Disclosed in Results of Audits or Reviews by ATF or the Treasury Department Inspector General, 1994 to 1998, available at <http://www.nfaaa.org/documents/SummaryNFRTRerror1.pdf>

<sup>233</sup> THOMAS N. HERZOG, FRITZ J. SCHEUREN & WILLIAM E. WINKLER, DATA QUALITY AND RECORD LINKAGE TECHNIQUES 8 (Springer Science+Business Media 2007).

<sup>234</sup> *Id.* at 10.

<sup>235</sup> *Id.*

<sup>236</sup> *Id.* at 11.

re-examined, and more emphasis placed on using editing to learn about the data collection process, in order to concentrate on preventing errors rather than fixing them.”<sup>237</sup>

A way to ensure data accuracy is through “record linkage techniques” such as linking two or more databases. One method for ensuring accuracy is to require that all applications be entered by at least two different BATFE examiners, into at least two separate and distinct databases, and if the entries do not match, require the data to be re-entered until the databases match exactly, a standard practice currently in use by survey organizations and other entities.<sup>238</sup> Currently, the NFRTR is a single database where individual examiners input the information into the database. However, this is only part of the problem with the current NFRTR.

Since a search of the NFRTR database is deterministic, meaning a record can only be found if it matches exactly to that which is searched, any misspellings, omissions, or unusual characters, will result in no match.<sup>239</sup> If, however, the database allowed for probabilistic searches, meaning the search will yield results identical to and similar to the search, in order from most similar to least similar, there would be a much higher probability of finding an erroneous entry.<sup>240</sup> Thus, it is crucial that the NFRTR database software be modified for probabilistic searches to ensure that lawfully registered firearms can be found, where BATFE examiners omit, or misspell data entries; otherwise, an innocent defendant may be convicted, if he/she lost his/her paperwork, and the deterministic search yields no results, due to errors in the original entry.

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<sup>237</sup> *Id.*

<sup>238</sup> *Id.* at 11-12.

<sup>239</sup> *Id.* at 82-83.

<sup>240</sup> *Id.* at 83-92.

## D. Firearm Law Experts on the Absence of Paperwork and Status of the NFRTR

Attorney Stephen Halbrook, author of *Firearms Law Deskbook*, and firearms law expert, declared, “[C]ontroversy over the accuracy of the NFRTR continues unabated. The BATF has not acknowledged the OIG’s findings of error and various discrepancies in the NFRTR, taken appropriate corrective actions, or fully answered questions about the NFRTR posed by the Subcommittee on Treasury, Postal Service, and general Government.”<sup>241</sup> He continues,

These errors or discrepancies include the OIG’s findings that an unknown number of NFA documents were destroyed by BATF contract employees; that ATF may not have followed correct legal procedures in registering thousands of NFA firearms after the amnesty period .... ; that more than 100,000 NFA firearms are currently registered to persons who may be deceased.<sup>242</sup>

In August 2001, during a compliance inspection of a NFA dealer, “The BATF Examiner determined that 60% of the NFA firearms listed in the BATF’s NFRTR computer printout were no longer in the dealer inventory. In fact, the dealer had transferred all of these firearms to various transferees pursuant to authorization by BATF.”<sup>243</sup>

Most disconcerting is his determination, “[I]f the owner or the executor of a deceased owner cannot find the registration paperwork, which may be lost or destroyed, and if the record cannot be found in the NFRTR, then a voluntary abandonment of the firearm may be induced or even a criminal prosecution initiated.”<sup>244</sup> He further asserts, “It is unclear whether the BATF is capable of correcting the errors identified by the

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<sup>241</sup> STEPHEN HALBROOK, *FIREARMS LAW DESKBOOK*, 535 (Thomson/West 2008).

<sup>242</sup> *Id.* at 535-36.

<sup>243</sup> *Id.* at 538.

<sup>244</sup> *Id.* at 545.

OIG.”<sup>245</sup> In 2004, a former “OIG staff member .... stated ‘We found there were still serious problems with the NFRTR data that, to the best of my knowledge, are still uncorrected.’”<sup>246</sup> Mr. Halbrook asserts, “[A]n amnesty period should be declared to allow the registration of firearms with an uncertain registration status.”<sup>247</sup> He further advises, “In any prosecution for NFA offenses in which lack of registration is an element of the offense, counsel should carefully consider whether this element can be proven beyond a reasonable doubt in the light of the above considerations.”<sup>248</sup>

Lastly, in a 2001 letter to the House Subcommittee on Treasury, Postal Service, and General Government, he declared, “Unless and until the BATF can conform its records to acceptable standards of accuracy, the Subcommittee should consider legislation to prohibit the use of the NFRTR database in civil and criminal proceedings.”<sup>249</sup>

Attorney Richard Gardiner, another expert in firearms law, declared, In my opinion, any system of records that is as unreliable as the NFRTR cannot be used to prove, beyond a reasonable doubt, that a particular firearm is not registered. Once a record is lost, no matter how good the record-keeping after that, the missing record makes the system unreliable from then on.<sup>250</sup>

James O. Bardwell, a firearms law attorney who for nearly half a dozen years, ending in 2001, devoted considerable effort to compiling a legal web site devoted to NFA issues, including sections on the NFRTR, told the House Subcommittee on Treasury, Postal Service, and General Government, Committee on Appropriations that, “Several of

<sup>245</sup> *Id.* at 539. For a full understanding of all the problems, which Attorney Halbrook states, see the entire § 7:3 of his book.

<sup>246</sup> *Id.* at 543 (citing a telephone interview by Eric Larson).

<sup>247</sup> *Id.* at 539.

<sup>248</sup> *Id.* at 545-46.

<sup>249</sup> Letter to Ernest J. Istook, Chairman, Subcommittee on Treasury, Postal Service and General Government, (Feb. 14, 2001), *available at* <http://www.nfaa.org/documents/2001statement.pdf> at 10.

<sup>250</sup> Personal Communication on Dec. 24, 2007, in possession of author.

these errors [in the NFRTR] are potentially very serious, and could cause unwarranted legal difficulties for innocent persons.”<sup>251</sup> He continued,

If a registration record cannot be found because the ATF misspelled the owner’s name, then the owner of a lawfully registered firearm .... will become the target of a criminal investigation. And if the owner has the misfortune to have lost his registration paperwork, his troubles will be greatly compounded.<sup>252</sup>

He advises, “An amnesty period which would allow the voluntary re-registration of these firearms by their current owners could solve the problems. While ATF has authority under existing laws to declare an amnesty, they are reluctant to do so without Congressional direction.”<sup>253</sup>

Long-time firearms attorney, and NFA expert, David Hardy, wrote to the Subcommittee on Treasury, Postal Service and General Government, stating, “I am writing you now because of my concern that errors in the NFRTR may result in ATF prosecuting innocent persons and convicting them for the illegal possession of unregistered NFA firearms, even though the firearms were in fact [lawfully] registered.”<sup>254</sup> Mr. Hardy continues, “I find it personally stunning that no formal investigation has been initiated in [sic] into the accuracy and completeness of the entire NFRTR, in light of the ATF’s admission” of losing Mr. Napolilli’s paperwork.<sup>255</sup> He questions, “How does the ATF know it has never lost documents before? How does ATF know that it has not caused unlawful prosecution of innocent persons who did lawfully

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<sup>251</sup> Letter to Ernest J. Istook, Chairman, Subcommittee on Treasury, Postal Service and General Government, (Apr. 13, 2001), *available at* <http://www.nfaoa.org/documents/BardHard.pdf> at 2.

<sup>252</sup> *Id.* at 3. Attorney Bardwell added: “I do not understand how ATF employees can regularly offer sworn statements in court that a given person does not have a firearm registered to him when their records are so poorly kept, and so poorly indexed.” *Id.*

<sup>253</sup> *Id.* at 4.

<sup>254</sup> Letter to Ernest J. Istook, Chairman, Subcommittee on Treasury, Postal Service and General Government, (Apr. 10, 2001), *available at* <http://www.nfaoa.org/documents/BardHard.pdf> at 6.

<sup>255</sup> *Id.* at 8.

register his firearm, and lost the registration through no fault of his own?”<sup>256</sup> He concludes by asking the Subcommittee to initiate an investigation into the accuracy and completeness of the NFRTR, “because ATF has strong institutional, and undoubtedly political, interests in not being truthful,” regarding the current accuracy, or lack thereof, of the NFRTR.<sup>257</sup>

Even more interesting, the State of New Hampshire, through its House of Representatives, sent a petition letter to the Subcommittee, stating, “ATF’s failure to correct these errors [in the NFRTR] is an insult to all law-abiding gun owners, because it undermines the very legal protections ATF is supposed to uphold.”<sup>258</sup> It continues,

What would be fair, is to establish a new amnesty period to provide the current lawful owners of NFA firearms an opportunity to re-register those firearms. An amnesty seems to be the easiest way to correct many of the NFRTR errors. An amnesty period would give reasonable protection to law abiding citizens whose NFA paperwork ATF may have lost or destroyed.<sup>259</sup>

Dr. Fritz Scheuren, Vice President, Statistics, National Opinion Research Center, a former elected President of the American Statistical Association, declared that the NFRTR is “questionable as a source of evidence in federal law enforcement.”<sup>260</sup>

Furthermore, Dr. Scheuren asserted that “(1) ATF has serious material weaknesses in its

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<sup>256</sup> *Id.*

<sup>257</sup> *Id.* at 10.

<sup>258</sup> Letter to Ernest J. Istook, Chairman, Subcommittee on Treasury, Postal Service and General Government, (Apr. 2, 2001), *available at* <http://www.nfaa.org/documents/BardHard.pdf> at 12.

<sup>259</sup> *Id.* at 13. The letter concludes by stating, “We would hope that your Subcommittee will consider strongly encouraging ATF to correct the serious errors in the NFRTR, and provide a written plan, with priorities and timetables, stating exactly how these errors will be corrected. Included in this plan should be an amnesty to allow law-abiding owners of NFA firearms the opportunity to re-register them so as to remove any ‘contraband’ status that has resulted from ATF employees not following the law or procedures in the conduct of their official duties. If ATF effuses to correct these errors in the NFRTR in a fair and open way, We hope your Subcommittee will consider withholding ATF’s operating funds to prevent ATF from prosecuting innocent people, or illegally seizing their valuable firearms.” *Id.*

<sup>260</sup> Letter to Alan B. Mollohan, Chairman, Subcommittee on Commerce, Justice, Science, and Related Agencies, Committee on Appropriations, by Fritz J. Scheuren, Vice President, Statistics, National Opinion Research Center, at 1 (Dec. 11, 2007); *available at* [http://www.nfaa.org/documents/Scheuren\\_Committee\\_Chair\\_Letter.pdf](http://www.nfaa.org/documents/Scheuren_Committee_Chair_Letter.pdf).

firearm registration system which it has yet to acknowledge and (2) the ATF steps taken to improve its recordkeeping continue to lack thoroughness” and “[m]y reading of the OIG reports suggests that very serious problems were uncovered in ATF’s recordkeeping systems. In fact, in my long experience, I cannot think of any instance where poorer results were obtained.”<sup>261</sup>

In testifying at a motion in limine hearing on September 24, 2007, in *U.S. v. Giambro*, Eric M. Larson, Senior Analyst of the U.S. Government Accountability Office, in his capacity as a private citizen and based on his independent research, declared that the NFRTR was not sufficiently accurate to sustain a criminal or civil prosecution and “that there is reasonable doubt to its accuracy.”<sup>262</sup> Mr. Larson stated that his opinion was based on,

(1) the errors disclosed in the NFRTR as a result of my analyses of NFRTR data released by ATF, which were confirmed by the Treasury Department Inspector General; (2) the likelihood of similar errors throughout the database based on my independent research; (3) the standard articulated by the Criminal Division of the Department of Justice that if a registered person or firearm is encountered, and ATF’s ‘files are missing’ then ‘the only solution’ is to establish a new amnesty period; and (4) the fact that the Department of Justice Inspector general determined that ATF is adding firearm registration to the NFRTR, and fixes the database and assumes the NFRTR is in error, as stated on page 31 of the June 2007 report.<sup>263</sup>

Mr. Larson also cited a letter dated July 11, 2007, in which Saeid Shafizadeh, a federally licensed firearms dealer, complained to then-NFA Branch Chief Kenneth Houchens

<sup>261</sup> *Id.* at 1-2. It should also be noted that Dr. Scheuren declared that in the second edition of his book, the NFRTR would be included, when he stated, “Even though the first edition of the book has just come out we are already contemplating a second edition and plan to include the ATF issues discussed above in a new chapter. Will the story we tell have a happy ending or continue to be stalemated? We are hoping that changes will be made, so we can report a success and not a failure.” *Id.* at 3.

<sup>262</sup> Letter from Eric M. Larson, Response to Questions asked by Joshua Prince, to Joshua Prince, at 3-4, dated Jan. 1, 2008, *available at* [http://blog.princelaw.com/assets/2008/1/5/Eric\\_Larson\\_letter\\_to\\_Joshua\\_Prince.pdf](http://blog.princelaw.com/assets/2008/1/5/Eric_Larson_letter_to_Joshua_Prince.pdf). Mr. Larson stated that his comments reflect his personal opinions, and do not represent the policy or position of the U.S. Government Accountability Office (GAO).

<sup>263</sup> *Id.*



about BATFE's contention that it had no record of a firearm that BATFE had approved for transfer to his company, Pars International Corporation, on April 12, 2007.<sup>264</sup> Mr. Shafizadeh noted that he had submitted an application to BATFE on June 4, 2007, to transfer the firearm; that BATFE responded by stating "the firearm is not shown registered" to Pars International Corporation, less than two months after ATF registered the firearm to Pars; provided Mr. Houchens with a copy of the approved April 12, 2007, BATFE registration document; and expressed concern over the inaccuracy of the NFRTR.<sup>265</sup> He articulated his frustration to Mr. Larson by stating, "Over the past 25 years I have written many letters of that nature to no avail."<sup>266</sup>

More importantly, Mr. Shafizadeh's error letter and copy of the approved registration further confirms that the BATFE continues to reject Dr. Scheuren's recommendation of mandatory annual audits, as it did in 2001, when it stated,

We do not believe an independent audit of the database is needed. The ongoing efforts we are making to ensure the completeness and accuracy of the NFRTR by imaging and indexing the documents, performing database verification, and linking the retrieval system with the imaging system will result in strong internal controls for the NFRTR.<sup>267</sup>

If the BATFE's "ongoing efforts" to improve the NFRTR were successful, the BATFE should not lose an approved transfer application in as little as two months, let alone, ever. There should be sufficient redundancy in the NFRTR system to preclude losing any approved transfer application.

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<sup>264</sup> *Id.* at 4.

<sup>265</sup> *Id.*

<sup>266</sup> *Id.* Mr. Shafizadeh has memorialized his concerns over the accuracy and completeness of the NFRTR in his affidavit, available at <http://www.gunowners.com/ip10.htm>.

<sup>267</sup> U.S. Congress, House Committee on Appropriations, Subcommittee on the Treasury, Postal Service, and General Government Appropriations, *Treasury Postal Service, and General Government Appropriations for Fiscal Year 2002, Part I*, 107th Cong., 1st Sess., at 478 (Washington, GPO, 2002), available at <http://www.nfaoa.org/documents/NFRTRdocpack.pdf>.

With regards to the Treasury Department Inspector General's failure to complete a GAGAS audit, Mr. Larson asserted, "[T]he failure of the Treasury IG to draw the larger samples that would be necessary to establish more precision in its estimates of 'critical errors' seems to me to be a failure of due diligence, as well as GAGAS standards regarding 'abuse' at the time."<sup>268</sup> He continued, "It was particularly troubling that the Treasury IG specifically declined to determine whether ATF's search procedures were adequate to ensure the validity of the certificates that ATF uses in Federal District Court as evidence that particular firearms are not registered in the NFRTR, given these errors."<sup>269</sup>

Furthermore,

Unless and until a GAGAS audit is done, the type and extent of errors in the NFRTR will continue to be unknown. Taking just one NFRTR category—Form 4467—at face value for the published audit results, which include a 4.3% "critical error" rate within the 57,238 Forms 4467 in the NFRTR at that time, that equals 2,461 "critical errors."<sup>270</sup> It must be noted that this is only the "critical error" rate for Form 4467 and does not include Form 1, Form 2, Form 3, Form 4, and Form 5 categories, each of which, may show the same, if not a higher, error rate, since at the time of the 1998 audit, these other categories represented 85% of the NFRTR transactions.<sup>271</sup> If the error rate is the same, it would equate to over 16,242 "critical errors" in these other categories, for a total of at

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<sup>268</sup> *Id.* at 1. "Abuse is distinct from illegal acts and other noncompliance. When abuse occurs, no law, regulation, contract provision, or grant agreement is violated. Rather, the conduct of a government program falls short of societal expectations for prudent behavior. Auditors should be alert to situations or transactions that could be indicative of abuse. When information comes to the auditors attention (through audit procedures, tips, or other means) indicating that abuse may have occurred, auditors should consider whether the possible abuse could significantly affect the audit results. If it could, the auditors should extend the audit steps and procedures, as necessary, to determine if the abuse occurred and, if so, to determine its effect on the audit results." *Id.* at 2 (citing to COMPTROLLER GENERAL OF THE UNITED STATES, GOVERNMENT AUDITING STANDARDS, (Washington, D.C., U.S. GPO, 1994).

<sup>269</sup> *Id.* at 1-2.

<sup>270</sup> *Id.* at 2.

<sup>271</sup> *Id.* Mr. Larson acknowledges that the Form 4 data that he has analyzed shows patterns of error similar to those of the Form 4467 data.

least 18,703 “critical errors.” One must also keep in mind that the BATFE altered the definition of what constitutes a “critical error,” in direct contradiction to the Congressional intent; thus, the actual “critical error” rate is likely to be much higher than has been publicly and officially reported.<sup>272</sup>

## VII. The Intersection of Procedural Due Process and the NFRTR

“No person shall be .... deprived of life, liberty, or property, without due process of law.”<sup>273</sup> Due process of law has a dual aspect, substantive and procedural.<sup>274</sup>

A procedural due process limitation, unlike its substantive counterpart, does not require that the government refrain from making a substantive choice to infringe upon a person's life, liberty, or property interest. It simply requires that the government provide "due process" before making such a decision. The goal is to minimize the risk of substantive error, to assure fairness in the decision-making process, and to assure that the individual affected has a participatory role in the process. The touchstone of procedural due process is the fundamental requirement that an individual be given the opportunity to be heard "in a meaningful manner."<sup>275</sup>

The cornerstone of due process is the prevention of abusive governmental power.<sup>276</sup> As the Supreme Court declared, “[O]ur Constitution imposes .... standards necessary to ensure that judicial proceedings are fundamentally fair. A wise public policy, however,

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<sup>272</sup> To see how the definition of “critical error” was changed by the BATFE, see Section V. Congressional Hearings/OIG Reports, subsection d. 1998. Specifically, 26 C.F.R. 179.201 (1969) declares: “The return, Form 4467, shall show the name, address, place of business or employment, employer identification number or social security number, and date of birth of the registrant, the date the firearm was acquired, the place where the firearm usually is kept, the name, and address of the manufacturer, the type, model, length of barrel, overall length (when applicable), caliber or gauge, serial number, and other identifying marks of the firearms, and if an unserviceable firearm, the manner in which it was rendered unserviceable. Upon registering the firearm, the Director shall retain the original Form 4467 as part of the National Firearms Registration and Transfer Record.” 26 C.F.R. 179.201 (1969), *available at* <http://blog.princelaw.com/assets/2008/1/9/1969-CFR-ATF-amnesty-regis.pdf>.

<sup>273</sup> U.S. CONST. amend. V.

<sup>274</sup> Howard v. Grinage, 82 F.3d 1343, 1349 (6th Cir. 1996).

<sup>275</sup> *Id.* (citing to *Loudermill v. Cleveland Bd. of Educ.*, 721 F.2d 550, 563 (6th Cir. 1983)).

<sup>276</sup> *Weimer v. Amen*, 870 F.2d 1400, 1405 (8th Cir. 1989) (citing to *Daniels v. Williams*, 474 U.S. 327, 330-31 (1986)).

may require that higher standards be adopted than those minimally tolerable under the Constitution.”<sup>277</sup>

With regards to the admission of the NFRTR as evidence or a court’s refusal to admit evidence of the NFRTR’s inaccuracy, the proper focus is on the interplay between due process of the law and criminal procedure. This is illustrated by the holding in *Adamson v. Mazzuca*, “For a habeas petitioner to prevail on a claim that an evidentiary error amounted to a deprivation of due process, he must show that the error was so pervasive as to have denied him a fundamentally fair trial.”<sup>278</sup> The court continued,

The standard is “whether the erroneously admitted evidence, viewed objectively in light of the entire record before the jury, was sufficiently material to provide the basis for conviction or to remove a reasonable doubt that would have existed on the record without it. In short it must have been ‘crucial, critical, highly significant.’”<sup>279</sup>

The Supreme Court similarly held that, “[t]he Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.”<sup>280</sup>

In any trial, where the Government seeks to admit a Certificate of Nonexistence of a Record (CNR),<sup>281</sup> based on a search of the NFRTR, as evidence, a court must either deny such admission or allow the defendant to present all evidence of the inaccuracy of the NFRTR, or the likely outcome is that the defendant’s due process rights will be violated. Since all cases for illegal possession of NFA firearm are based solely on whether the firearm was registered or not, the accuracy or lack thereof is crucial, critical, and highly significant in the determination of guilt. Since the Government must prove

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<sup>277</sup> *Lassiter v. Dep’t of Social Services*, 452 U.S. 18, 33 (U.S. 1981).

<sup>278</sup> *Adamson v. Mazzuca*, No. 01-CV-0143, 2003 U.S. Dist. LEXIS 13634, at \*17 (D.N.Y. July 23, 2003) (citing to *United States v. Agurs*, 427 U.S. 97, 108, (1976)).

<sup>279</sup> *Id.* (citing *Collins v. Scully*, 755 F.2d 16, 19 (2d Cir. 1985)).

<sup>280</sup> *In re Winship*, 397 U.S. 358, 364 (1970).

<sup>281</sup> Fed. R. Evid. 803(10)

beyond a reasonable doubt that the firearm in question was possessed illegally, it is nearly impossible for any individual to be found guilty, given the DOJ-OIG's report stating, "If the NFA weapons owner can produce the registration paperwork, ATF assumes the error is in the NFRTR and fixes it in the database"<sup>282</sup> and Dr. Scheuren's comments, "[A]TF still has serious material weaknesses in its firearm registration system that it has failed to recognize" and "In my considered professional judgment, these errors render the NFRTR questionable as a source of evidence in federal law enforcement."<sup>283</sup>

With the consistent Congressional testimony, hearings, and Inspector General reports by the Treasury Department and Department of Justice, if a court denies the admission valid and reliable evidence showing or substantiating the inaccuracies of the NFRTR, the defendant's fundamental right to a fair trial is violated. Our system of Justice, based on justness and fairness, is one where we concern ourselves with ensuring that innocent defendants, as well as those who may or may not be innocent, are protected, and only those who can be found guilty beyond a reasonable doubt are deprived of their liberty.<sup>284</sup> Since the Government holds the power to correct the NFRTR, we cannot hold the absence of a record in the NFRTR against a defendant, who may have lawfully registered the firearm but no longer has proof of registration, which may have been lost because of a fire, tornado, flood, accident of some type, or just plain human error. If the Government, with extensive means and capabilities, cannot ensure that records will not be lost, how can we, as society founded

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<sup>282</sup> U.S. Department of the Justice, Office of Inspector General, *The Bureau of Alcohol, Tobacco, Firearms and Explosives' National Firearms Registration and Transfer Record*, I-2007-006, at 31 (June 2007), available at <http://www.nfaog.org/documents/DOJ-OIG2007NFRTRreport.pdf>.

<sup>283</sup> Letter to Alan B. Mollohan, Chairman, Subcommittee on Commerce, Justice, Science, and Related Agencies, Committee on Appropriations, by Fritz J. Scheuren, VP Statistics NORC, 1 (Dec. 11 2007); available at [http://www.nfaog.org/documents/Scheuren\\_Committee\\_Chair\\_Letter.pdf](http://www.nfaog.org/documents/Scheuren_Committee_Chair_Letter.pdf).

<sup>284</sup> "Procedural due process rules are meant to protect persons not from the deprivation, but from the mistaken or unjustified deprivation of life, liberty, or property." *Carey v. Piphus*, 435 U.S. 247, 259 (1978).

on justness and fairness, deprive a possibly innocent defendant of his/her liberty, due to a lost Government record?<sup>285</sup>

### VIII. The Intersection of the Federal Rules of Evidence and the NFRTR<sup>286</sup>

The interaction of the inaccuracies of the NFRTR and the Federal Rules of Evidence is where Due Process issues arise. By asserting that the NFRTR is inaccurate, the defendant is declaring that any evidence of the nonexistence of his/her registration is inadmissible. Federal Rule of Evidence, Rule 803(10), provides that there exists an exception to the hearsay rule in situations of accurate records:

To prove the absence of a record, report, statement, or data compilation, in any form, or the nonoccurrence or nonexistence of a matter of which a record, report, statement, or data compilation, in any form, was regularly made and preserved by a public office or agency, evidence in the form of a certification in accordance with rule 902, or testimony, that diligent search failed to disclose the record, report, statement, or data compilation, or entry.<sup>287</sup>

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<sup>285</sup> Is a scenario imaginable under which a citizen would be denied Social Security payments because the Government lost its copies of the citizen's earnings history? Such records, of course, exist in duplicate at the Internal Revenue Service. Could not a similar duplicate set of NFRTR data be established to ensure that innocent citizens will not be victimized by NFA Branch Clerks who throw away NFA documents because they don't feel like working on them?

<sup>286</sup> Over the years, there have been several cases where, as this author will show, appellate courts have erroneously upheld the admission of Certificate of Nonexistence of a Record because these courts were unaware or misled to believe the NFRTR to be accurate. *See*, *United States v. Rith*, 164 F.3d 1323 (10th Cir. 1999); *United States v. Harrison*, No. 95-1678, 1996 U.S. App. LEXIS 13225 (2d Cir. 1996); *United States v. Shaffer*, 1993 U.S. App. LEXIS 1461 (9th Cir. 1993); *United States v. Rigsby*, 943 F.2d 631 (6th Cir. 1991); *United States v. Sullivan*, 919 F.2d 1403 (10th Cir. 1990); *United States v. Metzger*, 778 F.2d 1195, 1202 (6th Cir. 1985); *United States v. Combs*, 762 F.2d 1343, 1348 (9th Cir. 1985); *United States v. Toner*, 728 F.2d 115, 120 (2d Cir. 1984); *United States v. Beason*, 690 F.2d 439, 445 (5th Cir. 1982); *United States v. Moschetta*, 673 F.2d 96 (5th Cir. 1982). As firearms law expert Stephen Halbrook states, the use of Certificates of Non-Existence of a Record, in light of the inaccuracy of the NFRTR, "[m]ay well give rise to a meritorious petition for a writ of habeas corpus or, after discharge from probation, a writ of error coram nobis. In fact, large numbers of persons convicted of unregistered firearms may well be entitled to collateral relief." STEPHEN HALBROOK, *FIREARMS LAW DESKBOOK*, 488 (Thomson/West 2007).

<sup>287</sup> Fed. R. Evid. 803(10)

While the BATFE is likely to offer two Certificates of Nonexistence of a Record (CNR) to show, under 803(10), that the neither the defendant's name nor the firearm's serial number exist in the NFRTR, such certificates are based on a search of the NFRTR but fail to acknowledge the numerous Treasury Department and Justice Department Inspector General reports and Congressional Hearings, which depict the NFRTR as inaccurate.<sup>288</sup>

The hearsay exception contains the principle that, "Evidence that is otherwise admissible under an exception to the hearsay rule is admissible primarily because evidence of that kind is generally trustworthy, but if, in a particular instance, the circumstances indicate a lack of trustworthiness, the evidence should be excluded."<sup>289</sup> Nonetheless, Chief United States District Judge George Z. Singal, U.S. District Court for the District of Maine, held that defendant Giambro failed to meet this standard because he could not show that the NFRTR was inaccurate as it pertained to him.<sup>290</sup> This holding lacks any form of commonsense, since one cannot show an absence of a record, but for the record not existing. While Judge Singal based his decision on *U.S. v. Rith*, which declared that in relation to a Sixth Amendment challenge, the defendant failed to allege any "defect in the NFRTR as it pertain[ed] to him. General claims of unreliability, particularly those that rely upon outdated information, are not sufficient to raise a constitutional deficiency," he failed to accept the evidence of the inaccuracies in the NFRTR, since the late 1970's and up until the present time, which depict a consistent trend of audits, Congressional Hearings, and Congressional Actions to rectify the

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<sup>288</sup> United States v. Giambro, No. 07-41-P-S, 2007 U.S. Dist. LEXIS 61072, at \*2 (D. Me. 2007)

<sup>289</sup> United States v. Robinson, 544 F.2d 110, 115 (2d Cir. 1976)

<sup>290</sup> United States v. Giambro, No. 07-41-P-S, 2007 U.S. Dist. LEXIS 61072, at \*3 (D. Me. 2007)

NFRTR.<sup>291</sup> Furthermore, Judge Singal's reliance on *U.S. v. Rith* may have been in error given the Supreme Court's decision in *Crawford v. Washington*, which is discussed in the section The Intersection of Confrontation Clause and the NFRTR.<sup>292</sup>

Nevertheless, with regards to Judge Singal's decision, a defendant lacks any and all power to request an audit, since the information is a provision of the tax code and thus confidential. Hence, the defendant must rely solely on audits by the Treasury Department Inspector General, a review by the Department of Justice Inspector General, both of which are seemingly flawed, information divulged in Congressional Hearings and public documents which become available and accessible.<sup>293</sup> More importantly, any certificates offered by the BATFE should be viewed with extreme skepticism given the Busey tape, where BATFE agents were ordered to perjure themselves when speaking about the accuracy of the NFRTR.<sup>294</sup> Clearly, this tape, as well as the audits and Congressional Hearings, render the BATFE certifications and sworn testimony untrustworthy and unless and until the NFRTR is subjected to a complete, independent, GAGAS audit and the results made public, all evidence related to the NFRTR should be deemed inadmissible.

As the Supreme Court declared, when speaking about the trustworthiness aspect of Rule 803(10), "[I]t provides [an] ample provision for escape if sufficient negative factors are present."<sup>295</sup> The Court continued,

That "provision for escape" is contained in the final clause of the Rule: evaluative reports are admissible "unless the sources of information or

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<sup>291</sup> United States v. Giambro, No. 07-41-P-S, 2007 U.S. Dist. LEXIS 61072, at \*3 (D. Me. 2007) (citing United States v. Rith, 164 F.3d 1323, 1337 (10th Cir. 1999)).

<sup>292</sup> Crawford v. Washington, 541 U.S. 36 (2004).

<sup>293</sup> See, in particular, the "Resources" page of the National Firearms Act Owners Association, at <http://www.nfaa.org/resources.html> (visited July 26, 2008).

<sup>294</sup> BATFE/NFRTR Roll Call Training Video, Oct. 1995, available at [http://www.nfaa.org/documents/rollcall\\_highlights.mp4](http://www.nfaa.org/documents/rollcall_highlights.mp4) or as text <http://www.nfaa.org/documents/BuseyTranscript.pdf>.

<sup>295</sup> Beech Aircraft Corp. v. Rainey, 488 U.S. 153, 167 (1988).



other circumstances indicate lack of trustworthiness." This trustworthiness inquiry -- and not an arbitrary distinction between "fact" and "opinion" -- was the Committee's primary safeguard against the admission of unreliable evidence, and it is important to note that it applies to all elements of the report. Thus, a trial judge has the discretion, and indeed the obligation, to exclude an entire report or portions thereof -- whether narrow "factual" statements or broader "conclusions" -- that she determines to be untrust-worthy.<sup>296</sup>

Furthermore, the Court stated, "[T]he admission of a report containing 'conclusions' is subject to the ultimate safeguard -- the opponent's right to present evidence tending to contradict or diminish the weight of those conclusions."<sup>297</sup>

In *United States v. Yakobov*, 803(10)'s application to the NFRTR was a central issue because the ATF provided certificates that Mr. Yakobov's name did not exist in the registry, but they failed to show a diligent search of the registry for possible misspellings.<sup>298</sup> The learned Second Circuit declared, "An essential requirement of Rule 803(10) is that evidence of the absence of a record be the result of a "diligent search."<sup>299</sup> The court continued, "Diligence is the standard set by Rule 803(10), . . . and it is a good one. It insures that evidence of this kind will be reliable, and reliability is the foundation upon which all exceptions to the hearsay rule are built."<sup>300</sup> The court concluded that

"[N]otwithstanding the ATF Certificate's recitation of a diligent search, the face of the document itself suggests that the search conducted to determine whether Yakobov had applied for or obtained a license to deal in firearms was not diligent. The ATF Certificate states that Hall searched for a license or application for "Jakubov, Simantov." There is no indication that any search was made under the name "Yakobov" or "Yakubov." The use instead of misspelled versions of both Yakobov's first and last names hardly suggests diligence, and the spelling of Yakobov's last name with an initial "J" seems likely to have prevented the discovery of any license or application for Yakobov, if one existed."<sup>301</sup>

<sup>296</sup> Beech Aircraft Corp, 488 U.S. at 167 (1988) (citing Advisory Committee's Notes on Fed. R. Evid. 803(8)).

<sup>297</sup> Beech Aircraft Corp, 488 U.S. at 168 (1988).

<sup>298</sup> *United States v. Yakobov*, 712 F.2d 20, 22 (2d Cir. 1983)

<sup>299</sup> *Id.* at 24 (citing *United States v. Robinson*, 544 F.2d 110, 115 (2d Cir. 1976)).

<sup>300</sup> *Id.* (citing *United States v. Robinson*, 544 F.2d 110, 115 (2d Cir. 1976))

<sup>301</sup> *Id.*

Furthermore, "It hardly requires extended discussion to demonstrate that a casual or partial search cannot justify the conclusion that there was no record, and we conclude that the ATF Certificate was not admissible under Rule 803(10)."<sup>302</sup>

Thus, the court properly concluded that the BATFE's certification was not valid. One can only assume that if the court were presented with this situation today, in light of the inaccuracy of the NFRTR, it would find any search of the NFRTR to lack diligence, especially considering the BATFE's acceptance, in one instance, that it had lost 475 records of one individual and nearly 30 years later, in 2007, the DOJ Inspector General's report declared, "If the NFA weapons owner can produce the registration paperwork, ATF assumes the error is in the NFRTR and fixes it in the database."<sup>303</sup>

#### IX. The Intersection of Confrontation Clause and the NFRTR

The Confrontation Clause provides, "In all criminal prosecutions, the accused shall enjoy the right .... to be confronted with the witnesses against him."<sup>304</sup> In *Crawford v. Washington*, the Supreme Court held that the admission of testimonial hearsay in a criminal proceeding is barred, unless the declarant is unavailable and the accused has had a prior opportunity for cross-examination.<sup>305</sup> Thus, the *Crawford* analysis requires a court

<sup>302</sup> *Id.* (citing *United States v. Robinson*, 544 F.2d 110, 115 (2d Cir. 1976).

<sup>303</sup> U.S. Congress, Senate Committee on Appropriations, *Oversight Hearings on Bureau Alcohol, Tobacco & Firearms*, 96th Cong., 1st Sess. at 39 (Washington, GPO, 1979); Letter from David T. Hardy, Esq., to Ernest S. Istook, Jr., Chairman, Subcommittee on Treasury, Postal Service and General Government, dated April 10, 2001, *available at* <http://www.nfaa.org/documents/BardHard.pdf>; U.S. Department of the Justice, Office of Inspector General, *The Bureau of Alcohol, Tobacco, Firearms and Explosives' National Firearms Registration and Transfer Record*, I-2007-006, at 31 (June 2007), *available at* <http://www.nfaa.org/documents/DOJ-OIG2007NFRTRreport.pdf>.

<sup>304</sup> U.S. CONST. amend. VI.

<sup>305</sup> *Crawford v. Washington*, 541 U.S. 36, 68 (2004)

to consider two issues: 1. whether the out-of-court statement was hearsay; and 2. whether the out-of-court statement was testimonial.<sup>306</sup>

The issue becomes whether the admission of a Certificate of Nonexistence of a Record (CNR) is hearsay. “Hearsay is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.”<sup>307</sup> Any CNR that the BATFE submits are statements made by a declarant, not present at trial, and those statements are offered into evidence to prove the truth of the matter asserted; specifically that, after a diligent search for the defendant’s name and/or firearm’s serial number, no evidence was found that the firearm was registered to the defendant. Hence, any CNR is hearsay.

Then the issue becomes whether or not a CNR is testimonial. In *Crawford*, the Supreme Court declined to provide “a comprehensive definition of testimonial.”<sup>308</sup> However, the Court listed three formulations of the “core class of testimonial statements:”<sup>309</sup> 1. “*ex parte* in-court testimony or its functional equivalent – that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pre-trial statements that declarants would reasonably expect to be used prosecutorially,”<sup>310</sup> 2. “extrajudicial statements .... Contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions,”<sup>311</sup> and 3. “statements that were made under circumstances

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<sup>306</sup> Id.; United State v. Maher, 454 F.3d 12, 20 (1<sup>st</sup> Cir. 2006).

<sup>307</sup> Fed. R. Evid. 801(c).

<sup>308</sup> Crawford, 541 U.S. at 68.

<sup>309</sup> Id. at 51.

<sup>310</sup> Id.

<sup>311</sup> Id. at 51-51 (quoting White v. Illinois, 502 U.S. 346, 365 (1992)).

which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.”<sup>312</sup>

In applying Crawford to a CNR prepared by the BATFE, it is testimonial under all of the formulations. The CNR is a formal document prepared by the custodian of the NFRTR, to be used at trial; thus, it is both an extrajudicial statement and a custodial examination, which the defendant is unable to cross-examine. Furthermore, under the third formulation, “an objectively reasonable person in [the declarant’s] shoes would understand that the statement would be used in prosecuting [the defendant] at trial.”<sup>313</sup> However, the Government is likely to argue that even if the CNR was only created in anticipation of litigation, “[T]he reasonableness of an expectation of prosecutorial use ‘do[es] not transform an otherwise non-testimonial business record, made in the normal course of business, into testimonial evidence.’”<sup>314</sup> These courts held that CNRs are not barred by the Confrontation Clause because they closely resemble business records, which, under *Crawford*, constitute a common law exception to the right of confrontation.<sup>315</sup>

Thus, the Government is likely to argue that “certificates of authenticity were admissible at common law, even when created with an eye toward litigation” and that a “CNR, by analogy to a certificate of authenticity, should be treated like a business

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<sup>312</sup> *Id.* at 52.

<sup>313</sup> *United States v. Maher*, 454 F.3d 13, 21 (1st Cir. 2006). See also *United States v. Brito*, 427 F.3d 53, 60 (1st Cir. 2005). Other courts of appeals have adopted similar tests. See *United States v. Gilbertson*, 435 F.3d 790, 795-96 (7th Cir. 2006); *United States v. Hinton* 423 F.3d 355, 359-60 (3d Cir. 2005); *United States v. Cromer*, 389 F.3d 662, 673-74 (6th Cir. 2004); *United States v. Saget*, 377 F.3d 223, 228-29 (2d Cir. 2004) ;

<sup>314</sup> *United States v. Earle*, 488 F.3d 537, 544 (1st Cir. 2007). See also, *United States v. Urqhart*, 469 F.3d 745, 748-49 (8th Cir. 2006); *United States v. Cervantes-Flores*, 421 F.3d 825, 830-34 (9th Cir. 2005); *United States v. Rueda-Rivera*, 396 F.3d 678, 680 (5th Cir. 2005).

<sup>315</sup> *Id.*; *Crawford* 541 U.S. at 56. “Most of the hearsay exceptions covered statements that by their nature were not testimonial – for example, business records or statements in furtherance of a conspiracy.” *Crawford*, 541 U.S. at 56.

record.”<sup>316</sup> In essence, the Government is arguing that “[B]oth certificates of authenticity and CNRs .... merely reflect the state of a set of routinely kept business records existing prior to litigation.”<sup>317</sup> However, Government’s logic is faulty because “a certificate of authenticity merely establishes the validity of a second document that contain probative evidence, whereas a CNR *itself* contain probative evidence.”<sup>318</sup> [original emphasis]. As the First Circuit Court of Appeals pointed out in *U.S. v. Earle*, with regards to a certificate of authenticity, there is little to be gained by cross-examining the authenticator; however, “a defendant might benefit from cross-examining the maker of the CNR as to the details of the search, and from exploring the possibility that a record has been overlooked, misfiled, or otherwise lost.”<sup>319</sup> In *U.S. v. Nicely*, the learned First Circuit Court of Appeals declared,

The government argues that negative public records admissible under the hearsay exception in Federal Rule of Evidence 803(10) should be equally immune from constitutional challenge. Even so, we are somewhat troubled by the government's extensive use of affidavits in this case. Unlike routine searches of easily pinpointed data compilations that courts have upheld in the past, this case presents us with a situation where the affidavits were based on a far-ranging review of different Department files for any evidence that the government considered a currency reform proposal along the lines represented to SCT. Under these circumstances, especially absent any explanation from the government as to why it could not have easily called on these Treasury officials to testify in person, use of affidavits in lieu of Department officials who conducted the search may unjustifiably circumscribe defendants' confrontation rights. We think that the district court must carefully scrutinize any similar use of such evidence on retrial.<sup>320</sup>

Furthermore, “even if a certificate of authenticity were admissible at common law, it is clear that CNRs were not so admissible, and this was so perhaps for reasons

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<sup>316</sup> Earle, 488 F.3d at 544.

<sup>317</sup> *Id.*

<sup>318</sup> *Id.* at 545.

<sup>319</sup> *Id.*

<sup>320</sup> United States v. Nicely, 922 F.2d 850, 860 (D.C. Cir. 1991).

unrelated to the rule of completeness.”<sup>321</sup> In *U.S. v. Bass*, the Seventh Circuit Court of Appeals held that “Proof that something is not to be found in the records may not be made by a mere certificate of the custodian, but must be shown by testimony with opportunity to cross-examine.”<sup>322</sup> In *U.S. v. Bukis*, the Eastern District Court of Pennsylvania held that “[P]roof that something is not to be found in the records may not be made by mere certificate of the custodian, but is a matter of fact which must be shown by the testimony of a person who has searched the records, with an opportunity to cross-examine.”<sup>323</sup> Lastly, the Court in *Crawford* declared, “We cannot agree with THE CHIEF JUSTICE that the fact ‘[t]hat a statement might be testimonial does nothing to undermine the wisdom of one of these [hearsay] exceptions.’”<sup>324</sup> (alterations in the original).

One must remember that the NFRTR is tax information; thus, the criminal defendant must rely solely on the BATFE’s search, which may or may not be adequate. Thus, any CNR prepared by the BATFE for a criminal proceeding should be barred, unless the defendant is at least afforded an opportunity to cross-examine the individual who composed the CNR. Anything less would violate the defendant’s Constitutional right to confront the witnesses against him/her. Furthermore, the learned 10th Circuit in *U.S. v. Rose* declared, “There may be circumstances in which one who wishes to impeach the quality of a recordkeeping system must be allowed to examine the system's operation.”<sup>325</sup>

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<sup>321</sup> *Id.* (citing Fed. R. Evid. 803 notes; 5 Wigmore § 1678(7), at 867). “At common law, the rule of completeness required that the whole of a document be shown forth, in proving any part of it, so that the tribunal may judge better of the significance of the whole and the precise interpretation of any part. At common law, therefore, it was entirely settled that no custodian had authority to certify any less than the entire and literal terms of the original – in short, a copy in the strict sense of the word; and the rule was applied to all varieties of documents.” 5 Wigmore § 1678(6), at 863.

<sup>322</sup> *United States v. Bass*, 64 F.2d 467, 470 (7th Cir. 1933).

<sup>323</sup> *United States v. Bukis*, 17 F. Supp. 77, 78 (E.D. Pa. 1936).

<sup>324</sup> *Crawford*, 541 U.S. at 56 n.7 (quoting *id.* at 74 (Rehnquist, C.J., concurring)).

<sup>325</sup> *United States v. Rose*, 695 F.2d 1356, 1358 (10th Cir. 1982).

## X. Amnesty: the Nexus between the Congressional Intent and the Inaccuracy of the NFRTR

The solution to the NFRTR inaccuracy problem is an amnesty period, where an individual can register the NFA firearm(s) in his/her possession, to some extent, regardless of the current status of the weapon, in the registry. Amnesty was designed, in the CGA of 1968, as a safeguard, to ensure that the NFRTR remained accurate.<sup>326</sup> As the evidence, previously provided, shows, the BATFE admitted in numerous declarations and on numerous occasions that the NFRTR is inaccurate; for them to state otherwise, depicts with what ease and what measures, the BATFE is willing to go, including perjury. Furthermore, the Office of Inspector General, of the Department of Justice, declared that “If the NFA weapons owner [sic] can produce the registration paperwork [of a firearm that is not in the registry], ATF assumes the error is in the NFRTR and fixes it in the database.”<sup>327</sup> This is a critical point, because in 1979, the Criminal Division of the Department of Justice advised the Congress that if the BATFE determines that “a particular individual or weapon is registered” and the BATFE finds that its “files are missing,” then “the only solution would be to declare another amnesty period.”<sup>328</sup> Since the Department of Justice Inspector General has published valid and reliable evidence that “ATF assumes the error is in the NFRTR,” it is difficult to conclude that the criteria

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<sup>326</sup> 90 P. L. 618; 82 Stat. 1235, § 207(b),(d); *Haynes v. United States*, 390 U.S. 85 (1968) (holding that the registration of NFA weapons would likely incriminate those individuals registering unregistered NFA).

<sup>327</sup> U.S. Department of the Justice, Office of Inspector General, *The Bureau of Alcohol, Tobacco, Firearms and Explosives' National Firearms Registration and Transfer*, I-2007-006, at 31 (Washington, June 2007), available at <http://www.nfaog.org/documents/DOJ-OIG2007NFRTRreport.pdf>.

<sup>328</sup> U.S. Department of Justice, Criminal Division, *Memorandum: Response to letter from Senator McClure*, by Philip B. Heymann and Lawrence Lippe, at 4 (Nov. 29, 1979), available at <http://www.nfaog.org/documents/DOJamnestyMemo1979.pdf>.

for establishing a new amnesty period was not met upon publication of the Inspector General's report in June 2007.

While the BATFE, in 1999, contended that FOPA precludes future amnesty periods that would allow the registration of unregistered machineguns,<sup>329</sup> the BATFE's position has since changed, acknowledging that, "The 1968 amendments also provided for the establishment of additional amnesty periods not exceeding 90 days per period. To date, no additional amnesty periods have been declared."<sup>330</sup> The BATFE now contends that the denial of such amnesty periods is, "[P]rincipally because additional periods could jeopardize pending ATF investigations and prosecutions of NFA violations."<sup>331</sup> As will be shown, the BATFE's argument is completely without merit.

Amnesty will require a multi-pronged action, involving both the judiciary and the legislature, to ensure that the inaccuracies of the NFRTR are rectified, hopefully for the last time. Below is my proposition for amnesty, which is divided in four main subsets of Judiciary, Legislature, BATFE's arguments against an amnesty, and Amnesty.

#### A. Judiciary

The Judiciary will be the first prong, which will require the Legislature to take action.

The Judiciary must declare, that as a matter of law, the NFRTR is not legally sufficient to be used in criminal proceedings. Given that the Legislature has known and been made

<sup>329</sup> U.S. Congress, House Committee on Appropriations, Subcommittee on the Treasury, Postal Service, and General Government Appropriations, *Treasury Postal Service, and General Government Appropriations for Fiscal Year 1998, Part 5, Statements of Members of Congress and Other Interested Individuals*, 106th Cong., 2nd Sess., at 26 (Washington, GPO, 2000), available at <http://www.nfaaa.org/documents/2000statement.pdf>.

<sup>330</sup> BATFE, *ATF National Firearms Act Handbook*, at 23 (June 2007), available at [http://www.atf.gov/firearms/nfa/nfa\\_handbook/index.htm](http://www.atf.gov/firearms/nfa/nfa_handbook/index.htm).

<sup>331</sup> *Id.*



repeatedly aware of the inaccuracies, since the late 1970's, and failed to take successful corrective action, the Judiciary must step up, to protect citizens, who lawfully registered their NFA firearms, from being deprived of their Constitutional rights and protections. Such a declaration, by the Judiciary, will force the Legislature either to immediately correct the NFRTR, or to acquiesce that the Legislature no longer feels it necessary, due to the Second Amendment, to prosecute individuals for possession of NFA firearms. Assuming that the Legislature is not willing to nullify the NFA, GCA, and FOIA, in relation to NFA firearms, the following corrective action must be taken by the Legislature.

#### B. Legislature

The Legislature may need to begin by considering whether existing law sufficiently provides for an amnesty period that would render the NFRTR accurate and complete, something that may not have been contemplated in drafting the original amnesty provision. First, the GCA may have to be amended by striking "not to exceed ninety days in the case of any single period" in 82 Stat. 1235 § 207(d), if a complete re-registration is not possible in ninety days.<sup>332</sup> Secondly, 18 U.S.C § 922(o)(2)(B) will need to be amended by striking or modifying "[A]ny lawful transfer or lawful possession of a

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<sup>332</sup> Philip Heymann, in explaining the failures of the 1968 Amnesty, declared, "The amnesty period spawned a massive volume of registrations, transfers and correspondence which the clerical staff was ill-equipped to handle. As a result, some weapons were registered, some were mistakenly registered by part number rather than serial number, and some documents were misfiled. The staff responsible for the system was aware of these problems." U.S. Department of Justice, Criminal Division, *Memorandum: Response to letter from Senator McClure*, by Philip B. Heymann and Lawrence Lippe, at 2-3 (Nov. 29, 1979), available at <http://www.nfaa.org/documents/DOJAmnestyMemo1979.pdf>.

machinegun that was lawfully possessed before the date this subsection takes effect."<sup>333</sup>

This will allow for the new registration of NFA firearms that were registered and the BATFE lost the registration; thus, in the eyes of the BATFE, making those firearms unlawfully possessed in 1986. Following these actions, if necessary, the Legislature must initiate, if the Attorney General refuses to do so, a new amnesty period, with regulations, to ensure that the NFRTR becomes at least ninety-nine percent accurate, and stays as such.

Furthermore, the Legislature must pass legislation requiring that the BATFE implement Electronic Form (E-Forms) for the registration and transfer of NFA firearms. As will be discussed in the below subsection Amnesty, this will ensure the accuracy and completeness of the NFRTR by removing the human component of entry of information into the NFRTR.<sup>334</sup> Lastly, the Legislature must require that the new NFRTR database be searchable via probabilistic searches and that only probabilistic searches be used in

<sup>333</sup> The BATFE previously contended that FOIA prevents a new amnesty; however, the BATFE has now taken the position that they have the power to authorize a new amnesty, but choose not to do so, so as not to "jeopardize pending ATF investigations and prosecutions of NFA violations." BATFE, *ATF National Firearms Act Handbook*, at 23 (June 2007), available at [http://www.atf.gov/firearms/nfa/nfa\\_handbook/index.htm](http://www.atf.gov/firearms/nfa/nfa_handbook/index.htm). Also, under current law, an unregistered NFA firearm or device cannot be registered. This situation evolved from a problem under the original NFA, which required persons to register NFA firearms and the federal government to make these data available to local, state and other federal officials upon request. But, individuals who possessed NFA firearms in violation of state or local law risked the hazards of prosecution by supplying the registration information required by the federal government, which violated their 5th Amendment rights, guaranteed by the U.S. Constitution, against self-incrimination. On January 29, 1968, the U.S. Supreme Court ruled that "a proper claim of the privilege is understood to provide a full defense to any prosecution either for failure to register . . . or . . . for possession of a [NFA] firearm which has not been registered." *Haynes v. United States*, 390 U.S. 85, 99 (1968). The Congress resolved this conflict in amending the NFA under Title II of the Gun Control Act of 1968 by: (1) prohibiting any information required to comply with the NFA to be used against a registrant or applicant to be used against a registrant or applicant in a criminal proceeding with respect to a violation of law occurring prior to or concurrently with the filing of the application or registration, or the compiling of the records containing the information or evidence; (2) establishing an amnesty period from November 2, 1968, to December 1, 1968, when persons could register unregistered NFA firearms with full immunity from prosecution; and (3) prohibiting the release of any information about the registration status or ownership of any NFA firearm.

<sup>334</sup> E-Forms have already been made available by Titleii.com. To see the available forms, see <http://www.titleii.com/Forms.htm>. If you click any of the Forms, you can type in the correct information, which is then entered onto the appropriate BATFE Form. While Titleii.com's E-Forms do not allow for the uploading of pictures, it serves to show how easy and cheap it is to create E-Forms.

criminal prosecutions; thus, allowing for records which are in error, to possibly be found.<sup>335</sup>

### C. BATFE Amnesty Refusal Rationale and Rebuttals Thereof

The most comprehensive list of reasons offered by the BATFE to oppose establishing a new amnesty period were given by the BATFE to the Subcommittee on Treasury, Postal Service and General Government, Committee on Appropriations, in November 1999. The only known formal rebuttals were by Eric M. Larson in his 2000 statement<sup>336</sup> and an analysis by William J. Krouse of the Congressional Research Service in 2005, of both the BATFE's reasons and Mr. Larson's rebuttals.<sup>337</sup>

1. "An Amnesty would suspend enforcement of the NFA. Pending investigations and prosecutions for violations of the NFA might have to be terminated."<sup>338</sup> To begin with, the suspension of enforcement of the NFA, for a short period of time, is the primary reason for an amnesty, especially in light of individuals being prosecuted, who lawfully registered their firearms, but through not fault of their own, their paperwork was lost or destroyed, such as Mr. Napolilli. Moreover, a successful amnesty would enable the

<sup>335</sup> THOMAS N. HERZOG, FRITZ J. SCHEUREN & WILLIAM E. WINKLER, DATA QUALITY AND RECORD LINKAGE TECHNIQUES 82-92 (Springer Science+Business Media 2007).

<sup>336</sup> U.S. Congress, House Committee on Appropriations, Subcommittee on the Treasury, Postal Service, and General Government Appropriations, *Treasury Postal Service, and General Government Appropriations for Fiscal Year 2001, Part 5, Statements of Members of Congress and Other Interested Individuals and Organizations*, 106th Cong., 2nd Sess., at 26 (Washington, GPO, 2000), available at, <http://www.nfaa.org/documents/2000statement.pdf>.

<sup>337</sup> Congressional Research Service, *Memorandum: ATF's National Firearms Registration and Transfer Record: Issues Regarding Data Accuracy, Completeness, and Reliability*, by William J. Krouse, Nov. 28, 2005, available at <http://www.nfaa.org/documents/CRSmemoNFRTR0001.pdf>.

<sup>338</sup> U.S. Congress, House Committee on Appropriations, Subcommittee on the Treasury, Postal Service, and General Government Appropriations, *Treasury Postal Service, and General Government Appropriations for Fiscal Year 2001, Part 5, Statements of Members of Congress and Other Interested Individuals and Organizations*, 106th Cong., 2nd Sess., (Washington, GPO, 2000), available at, <http://www.nfaa.org/documents/2000statement.pdf>.

BATFE to prosecute more individuals, with a greater accuracy, and limit tax payer money being used for mistaken and/or frivolous prosecution. Our system of Justice strives for only the guilty to be convicted; thus, the BATFE should desire to ensure that only the guilty are prosecuted. A successful amnesty would better ensure that only the guilty are likely to be prosecuted, while providing more accurate, and more easily accessible, data records.

That the BATFE would tell the Congress that an amnesty “would suspend enforcement of the NFA” is not borne out by the historical record, and is seriously misleading. The reason is that in 1968, then-IRS Commissioner Cohen, in his testimony to Congress after the invalidation of the registration provision of the NFA, due to the Supreme Court’s decision in *Haynes*, declared that only one-third of the NFA prosecutions were affected.<sup>339</sup> There is no evidence that invalidating the registration provision of the NFA temporarily to render the NFRTR accurate and complete would “suspend enforcement of the NFA.” Rather, it would strengthen the NFA by strengthening the NFRTR. Moreover, as Mr. Larson declared, “An amnesty period has the greatest chances of correcting the greatest number of errors in the NFRTR the IG identified, and ATF has not proposed any viable alternative.”<sup>340</sup>

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<sup>339</sup> US Congress, Senate, Committee on the Judiciary, Subcommittee to Investigate Juvenile Delinquency, *S. Res. 240*, 90th Cong. 2nd Sess., at 661 (Washington, GPO, 1968), *available at* [http://www.nfaoa.org/documents/IRS\\_Commissioner\\_GCA\\_Hearing.pdf](http://www.nfaoa.org/documents/IRS_Commissioner_GCA_Hearing.pdf). Commissioner Cohen declared, “The National Act prosecutions have fallen as a result of the *Haynes* decision. We had been averaging, under the national act, about 60 to 70 prosecutions per month for national act violations. Since the first of the year, when the *Haynes* decision was rendered, we are down to about something in excess of 40 a month. So we are talking about 35 to 40 percent in the area of prosecutions under *Haynes*.” *Id.* at 661-62.

<sup>340</sup> U.S. Congress, House Committee on Appropriations, Subcommittee on the Treasury, Postal Service, and General Government Appropriations, *Treasury Postal Service, and General Government Appropriations for Fiscal Year 2001, Part 5, Statements of Members of Congress and Other Interested Individuals and Organizations*, 106th Cong., 2nd Sess., at 23 (Washington, GPO, 2000), *available at*, <http://www.nfaoa.org/documents/2000statement.pdf>.

2. “Section 922(o), Title 18, U.S.C. prohibits the possession of machine guns not lawfully possessed prior to its effective date, May 19, 1986. The possession of any machine gun registered during a new amnesty period would still violate section 922(o).”<sup>341</sup> The BATFE continues on, “With respect to section 922(o), the law makes no provisions for an amnesty,”<sup>342</sup> but it is also fair to say that there’s nothing in 922(o) that would specifically preclude an amnesty, either. The BATFE now acknowledges that § 207 (d) of the Gun Control Act of 1968 allows for a new amnesty, which could be administratively established by the Attorney General at any time, but they have chosen not to initiate such, so as not to “jeopardize pending ATF investigations and prosecutions of NFA violations.”<sup>343</sup> Even if one assumes the BATFE’s previous interpretation that section 922(o) precludes an amnesty for machineguns is correct, the Congress retains the power to authorize a new amnesty.

3. “Amnesty would provide the criminally inclined an opportunity to possess unregistered NFA weapons with impunity.”<sup>344</sup> As Mr. Larson points out, “The ‘criminally inclined’ already ‘possess unregistered weapons with impunity.’ An amnesty would not change that.”<sup>345</sup> Furthermore, as Mr. Krouse points out, “As to the ‘criminally

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<sup>341</sup> *Id.* at 26.

<sup>342</sup> *Id.*

<sup>343</sup> The BATFE has now taken the position that they have the power to authorize a new amnesty, but choose not to do so, so as not to “jeopardize pending ATF investigations and prosecutions of NFA violations.” BATFE, *ATF National Firearms Act Handbook*, at 23 (June 2007), available at [http://www.atf.gov/firearms/nfa/nfa\\_handbook/index.htm](http://www.atf.gov/firearms/nfa/nfa_handbook/index.htm); 82 Stat. 1235, § 207(b), (d).

<sup>344</sup> U.S. Congress, House Committee on Appropriations, Subcommittee on the Treasury, Postal Service, and General Government Appropriations, *Treasury Postal Service, and General Government Appropriations for Fiscal Year 2001, Part 5, Statements of Members of Congress and Other Interested Individuals and Organizations*, 106th Cong., 2nd Sess., at 26 (Washington, GPO, 2000), available at, <http://www.nfaaa.org/documents/2000statement.pdf>.

<sup>345</sup> *Id.* Mr. Larson states: “As noted on page 11 of the January 2000 issues of *American Rifleman*, Federal law on registration was defined in 1968 by the U.S. Supreme Court in *Haynes v. United States* (390 U.S. 85), ‘when it declared that ... existing federal case law says with great finality that gun registration only applies to the law-abiding.’” *Id.* The quoted language in Mr. Larson’s rebuttal is a recitation of the BATFE’s language in opposition to an amnesty period.

inclined,’ there is no way to determine such a condition under current law or otherwise.”<sup>346</sup> However, if the BATFE is concerned about individuals registering firearms, which would not have been previously registrable, § 207 (b), (d), does not limit prosecution for making false statements. Irregardless, the accuracy and completeness of the NFRTR is instrumental in ensuring that law-abiding citizens are not prosecuted, which should take precedence over the possibility of additional, not previously registrable, weapons being added to the NFRTR.

4. “Anyone, including felons, mental incompetents, and persons whose possession of firearms would violate State and local laws, could register NFA weapons.”<sup>347</sup> “Excluding them from the amnesty, as well as disallowing any registration that ‘would violate State and local laws’ would address this concern.”<sup>348</sup> In fact, under current law, the NFA represents an odd, continuing law enforcement contradiction because (1) under the 1968 amnesty, a person who possessed an NFA firearm or device in violation of state or local law, could register the firearm or device, and BATFE was legally precluded from disclosing that information; and (2) as state laws change in future, e.g., to prohibit the possession of silencers, machine guns, short-barreled shotguns or other selected NFA firearms or devices, persons who live in those states who possess these items on the basis of an amnesty registration or subsequent legal transfer are transformed into violators of

<sup>346</sup> Congressional Research Service, *Memorandum: ATF’s National Firearms Registration and Transfer Record: Issues Regarding Data Accuracy, Completeness, and Reliability*, by William J. Krouse, Nov. 28, 2005, at 17 (citing to *United States v. Stout*, 667 F.2d 1347 (11th Cir. 1982), available at <http://www.nfaa.org/documents/CRSmemoNFRTR0001.pdf>). Mr. Krouse gives the example of *Bryan v. United States*, 542 U.S. 184, 191-92, explaining that “while ‘the term knowingly does not necessarily have any reference to a culpable state of mind or to knowledge of the law,’ a ‘willful’ violation is committed when and individual acts with knowledge that his conduct is unlawful.” *Id.* at 17 fn. 99.

<sup>347</sup> U.S. Congress, House Committee on Appropriations, Subcommittee on the Treasury, Postal Service, and General Government Appropriations, *Treasury Postal Service, and General Government Appropriations for Fiscal Year 2001, Part 5, Statements of Members of Congress and Other Interested Individuals and Organizations*, 106th Cong., 2nd Sess., at 26 (Washington, GPO, 2000), available at <http://www.nfaa.org/documents/2000statement.pdf>.

<sup>348</sup> *Id.*

state or local firearms laws, and there is no legal mechanism under which BATFE could legally notify state or local law enforcement authorities of that fact. Legislation such as the foregoing could resolve this law enforcement contradiction.<sup>349</sup>

5. “A new amnesty for registering machine gun, bombs, grenades, silencers, etc, will be perceived as a retreat by the Administration from its position of favoring stronger gun controls, e.g., banning the possession of semiautomatic assault weapons.”<sup>350</sup> Since the 1994 Assault Weapon Ban was not renewed, the Administration’s position is no longer favoring stronger gun controls, but rather reinforcing the Bill of Rights, namely the Second Amendment. Nevertheless, as Mr. Larson points out, “Offering an opportunity to correct defective records would more reasonably be seen as enhancing the Administrations position.”<sup>351</sup> Furthermore, individuals can currently register newly manufactured silencers, AOW’s, and short-barreled firearms by application to the BATFE.

6. “An upsurge in the making of NFA weapons particularly, short-barrel shotguns, can be expected as individuals seize the opportunity to acquire NFA weapons without incurring the 200 making tax.”<sup>352</sup> The BATFE continued, “Also, the \$200 transfer tax would be avoided by unlawful transfers to persons who would register the weapon during the amnesty.”<sup>353</sup> While these are legitimate concerns, the possibility that law-abiding

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<sup>349</sup> Under the original NFA and during the 1968 Amnesty, a Chief Law Enforcement Officer (CLEO) signature, fingerprints of the applicant, and photo of the applicant were not required for an original registration of an unregistered NFA weapon. The registration was on a Form 1 or Form 4467.

<sup>350</sup> U.S. Congress, House Committee on Appropriations, Subcommittee on the Treasury, Postal Service, and General Government Appropriations, *Treasury Postal Service, and General Government Appropriations for Fiscal Year 2001, Part 5, Statements of Members of Congress and Other Interested Individuals and Organizations*, 106th Cong., 2nd Sess., at 27 (Washington, GPO, 2000), available at, <http://www.nfaoa.org/documents/2000statement.pdf>.

<sup>351</sup> *Id.*

<sup>352</sup> *Id.*

<sup>353</sup> *Id.*

individuals are being prosecuted and convicted, severely outweighs a concern of a possible loss of \$200 per application for making a NFA firearm.<sup>354</sup> As Mr. Krouse points out, “The amnesty provision(s) could be crafted to limit its scope to firearms that were commercially manufactured in original configurations that made them subject to the NFA.”<sup>355</sup> Nevertheless, this issue is addressed in the next section Amnesty, subsection Amnesty Process.

7. “Firearm imported with certain restrictions, such as for sales samples or law enforcement use only, would be transferred to persons who would register the weapons during the amnesty and circumvent the restrictions.”<sup>356</sup> As Mr. Larson points out, “There are relatively few of these firearms, which can come from only two places: (1) law enforcement agencies; or (2) Class III dealers. There would be no reason for a Class III dealer, much less a law enforcement agency, to knowingly violate existing law.”<sup>357</sup> He continues, “Also, ATF could easily disapprove any application to illegally transfer the ownership of such a firearm—which is already legally registered.”<sup>358</sup>

8. “It would create ill-will on the part of person who have been prosecuted for possession of unregistered NFA weapons, had their weapons seized, or voluntarily abandoned their weapon to the ATF in the past.” The only reason for reasonable ill-will

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<sup>354</sup> It must be noted that there has never been a tax for registering a NFA firearm, even under the NFA of 1934 and 1968 Amnesty. The \$200 tax is for making and transferring NFA firearms, other than AOWs, which require a tax of \$200 for making and a tax of \$5 for transferring.

<sup>355</sup> Congressional Research Service, *Memorandum: ATF’s National Firearms Registration and Transfer Record: Issues Regarding Data Accuracy, Completeness, and Reliability*, by William J. Krouse, Nov. 28, 2005, at 17, available at <http://www.nfaa.org/documents/CRSmemoNFRTR0001.pdf>.

<sup>356</sup> U.S. Congress, House Committee on Appropriations, Subcommittee on the Treasury, Postal Service, and General Government Appropriations, *Treasury Postal Service, and General Government Appropriations for Fiscal Year 2001, Part 5, Statements of Members of Congress and Other Interested Individuals and Organizations*, 106th Cong., 2nd Sess., at 27 (Washington, GPO, 2000), available at, <http://www.nfaa.org/documents/2000statement.pdf>.

<sup>357</sup> *Id.*

<sup>358</sup> *Id.* Congress must be cognizant of the possibility of the BATFE denying applications to register a firearm and the effect of such, if the legal process cannot be completed by the end of the amnesty period.



to be created is if the BATFE has prosecuted individuals for possession of unregistered NFA weapons, when that individual had legally registered his/her weapon, but his/her paperwork was lost or destroyed. Furthermore, as Mr. Larson points out, “[A]n amnesty would likely enhance ATF’s public image.”<sup>359</sup> More importantly, even if ill-will results, it is crucial that the Government not prosecute innocent individuals, who merely lost their paperwork.

9. “A new amnesty would reward those who have unlawfully stockpiled unregistered contraband in anticipation of registering them during a future amnesty and encourage people to retain or acquire unregistered firearms in the expectation of other such periods.”<sup>360</sup> The BATFE has failed to provide any evidence that such would occur or encourage individuals to stockpile unregistered NFA weapons.<sup>361</sup> More importantly, post-successful-amnesty, the use of the NFRTR in criminal prosecutions of these individuals should be flawless. It is also important to realize that the BATFE has administratively removed thousands of NFA firearms from purview of the NFA, as collector’s items; to the extent these firearms were unregistered, the BATFE has itself created an expectation of “reward” in the sense it claims. Specifically, “ATF May Have Already Removed 50,000 to 100,000 or More Individual NFA Firearms from the NFA as Collector's Items.”<sup>362</sup>

10. “An additional amnesty would only be a temporary solution. It would be only a matter of time before people would claim they did not know about the amnesty or did

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<sup>359</sup> *Id.*

<sup>360</sup> *Id.*

<sup>361</sup> *Id.*

<sup>362</sup> U.S. Congress, House Committee on Appropriations, Subcommittee on the Treasury, Postal Service, and General Government Appropriations, *Treasury Postal Service, and General Government Appropriations for Fiscal Year 1998, Part 5, Testimony of Members of Congress and Other Interested Individuals and Organizations*, 105th Cong., 1st Sess., at 30-32 (Washington, GPO, 1997), available at <http://www.nfaoa.org/documents/1997testimony.pdf>.

not realize they had an NFA weapon in their possession.”<sup>363</sup> To begin with, an additional amnesty should NOT only be a temporary solution. If the BATFE properly conducts the amnesty and, thereafter, continuously and meticulously checks, maintains, and improves the NFRTR, future GAGAS audits by the GAO should depict the NFRTR as sufficient for criminal proceedings. Moreover, while ignorance of the law is not generally recognized as a legitimate defense, a serious effort by BATFE to continuously publicize the amnesty period at the national, state, and local levels at least 90 days before and continuously during the amnesty, as discussed in the next section, would go a long way towards restoring credibility in the Government and in BATFE<sup>364</sup> “In fact an amnesty would strengthen ATF’s legal cases by, among other things, enhancing the accuracy and reliability of ATF’s records.”<sup>365</sup> More importantly, and continually overlooked by the BATFE, the purpose of an amnesty in this instance is to ensure that law-abiding citizens are not prosecuted for possession of an unregistered weapon, which was legally registered, but for which the NFRTR is in error and the paperwork has been lost or destroyed, or unjustly deprived of their valuable personal property—possibly a rare firearm that is a family heirloom.

#### D. Amnesty<sup>366</sup>

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<sup>363</sup> U.S. Congress, House Committee on Appropriations, Subcommittee on the Treasury, Postal Service, and General Government Appropriations, *Treasury Postal Service, and General Government Appropriations for Fiscal Year 2001, Part 5, Statements of Members of Congress and Other Interested Individuals and Organizations*, 106th Cong., 2nd Sess., at 26 (Washington, GPO, 2000), available at, <http://www.nfaa.org/documents/2000statement.pdf>.

<sup>364</sup> *Id.*

<sup>365</sup> *Id.*

<sup>366</sup> H.R. 2088, 109th Cong. (2005)(reintroduced as H.R. 1141, 110th Cong. (2007). The Veterans’ Heritage Firearms Act should be consulted in the institution of any amnesty. The work, foresight, and understanding of all issues, is clearly depicted in this Act. Some provisions in this section have been taken

For purposes of this article, the term “individual” connotes an individual person, corporation, or trust, since a NFA firearm may be registered under any of the aforementioned entities.

BATFE Re-Organization: The BATFE shall institute a new division, The NFA-Amnesty and Firearms Classification Division, whose duties shall include (1) processing all Amnesty related registrations, (2) classifying firearms as "collector's items," "curios and relics," or "antique firearms" under provisions of the NFA and/or the GCA, and (3) determining whether unregistered NFA firearms encountered after the amnesty provision expires should be registered, destroyed or removed from the purview of the NFA and/or the GCA.

Time Period: The new amnesty shall last for a period of 90 days, unless changed by Congress. The BATFE shall immediately preceding and during the amnesty, continuously nationally publicize the amnesty. This shall be implemented through posters in U.S. Post Offices, public service announcements, advertisement in major firearm publications, letters to those with currently registered NFA firearms, and distribution of materials through all Federal Firearm Licensees. Furthermore, the BATFE shall be responsible for informing the Congress of the status of the new amnesty period every fifteen days, during the new amnesty and new amnesty extensions, if necessary. If the BATFE fails to accurately inform the Congress of the amount of pending registrations,

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and/or modified from the Veterans' Heritage Firearms Act of 2007, *available at* <http://www.nfaoa.org/documents/H.R.1141VeteransHeritageFirearmsAct.pdf>.

after ninety days, or that set by Congress, and at any, if any, amnesty period extension(s), a new amnesty shall be immediately instituted.

Furthermore, any registrations filed by an individual and denied by the BATFE, shall be reviewed by a court of competent jurisdiction. A decision in the favor of the applicant shall be entered into the NFRTR, even if the amnesty period has ended. At no time, during judicial process, shall the BATFE have the right to destroy, convert, or obtain title to the firearm in question.

Forms Amended: All BATFE forms, namely Form 1, Form 2, Form 3, Form 4, and Form 5 [herein, Form], shall be modified to E-Forms and amended to include an Estate Verification Portion.

The implementation of E-Forms will ensure the accuracy and completeness of the NFRTR by removing the human component of inputting data into the database. Jeffery W. Koch of the Office of E-Government & Information Technology, in response to my question about implementing E-Forms, declared, “There is merit in the idea. And in general, the Gov[ernmen]t has a goal of increasing electronic filing, and of citizen self-service.”<sup>367</sup> Since many of the errors in the NFRTR are the result of typographical errors or omissions, by requiring the use of E-Forms, the data entered by the applicant, submitted electronically, can be stripped by the database program, entered into the appropriate data fields, directed to the appropriate examiner, and alert the examiner if data fields are incomplete or missing.<sup>368</sup>

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<sup>367</sup> Private Communication from Jeffery W. Koch, on file with the author.

<sup>368</sup> E-Forms have already been made available by Titleii.com. To see the available forms, see <http://www.titleii.com/Forms.htm>. If you click any of the Forms, you can type in the correct information,

This process is depicted by the following: The BATFE implements E-Forms on its website for the registration and transfer of NFA firearms. The applicant logs onto the website, picks the appropriate Form, and enters all the appropriate information. If any data field is omitted, the program will not allow the individual to submit the uncompleted E-Form. If the applicant is an individual, not a Corporation or Trust, the E-Form will allow for the uploading of the applicant's picture, as required by the current Forms. Once completed, the applicant will submit the E-Form. At that point, the program will acknowledge the submission of the E-Form and produce a Control Number for the applicant to use in any correspondence with the BATFE regarding his/her E-Form submission. The program will also inform the applicant, if the applicant is an individual, not a Corporation or Trust, that he/she must submit the appropriate completed finger print card, to the appropriate address, referencing the Control Number.

The program will then read the data fields, enabling it to determine the appropriate examiner, and forward the E-Form information and the prior registration information to the appropriate examiner for his/her review.<sup>369</sup> The examiner will then review the information ensuring that all fields are complete, correct, and correspond with the prior registration information. If the examiner finds an error, the program will make a backup of the original submission, which will be attached to the electronic record, and allow the examiner to make the appropriate changes.<sup>370</sup> Since the need for examiner intervention should be extremely limited, the possibilities of typographical errors and

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which is then entered onto the appropriate BATFE Form. While Titleii.com's E-Forms do not allow for the uploading of pictures, it serves to show how easy and cheap it is to create E-Forms.

<sup>369</sup> Currently, the BATFE assigns examiners based on the current owner's last name. By implementing E-Form and the programming I have discussed, this could easily be changed in the future if the BATFE decides to change its procedures.

<sup>370</sup> This will ensure that the examiner does not accidentally delete the appropriate information. This backup will be searchable, just as the regular NFRTR is, to ensure that the appropriate information can be found.

omission should be drastically reduced, if not completely eliminated.<sup>371</sup> Once all information has been submitted and approved by the examiner, the information will be entered into the NFRTR. The program will then print out a paper copy of the Form to be signed by the examiner, as well as a digital copy burnt onto a CD, which will be digitally signed, all of which will be mailed to the applicant. This will allow the applicant to print out new copies of his/her Form if he/she loses the paper copy, while ensuring to the BATFE that it is a legitimate copy via the digital signature.<sup>372</sup>

The Estate Verification Portion shall require a registering individual to place the name and address of an individual to contact [herein Individual Contact], upon his/her death. Where possible, the Social Security Number of the Individual Contact(s) shall be listed. There shall be space provided for up to three individuals, but only one individual need be listed. Furthermore, the BATFE shall institute a check box, next to each individual's name, which shall allow the registering individual to enable the individual listed to check the current status of the registration, while the registering individual is still alive. If a form is processed, absent an Individual Contact, the BATFE shall be held solely responsible for determination of the executor/administrator/heir of the firearm. In no instance shall the absence of an Individual Contact, or the inability of the BATFE to determine the executor/administrator/heir, be a forfeiture of the firearm(s).

If the firearm to be registered during the amnesty is a machinegun, the applicant shall be required to certify that to his/her knowledge, the machinegun was not

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<sup>371</sup> While typographical and omission errors can be reduced, if not eliminated, the database's accuracy and completeness will rest with the NFA examiners and annual audits.

<sup>372</sup> In the light of trends toward using biometric identifiers, a gradual tightening of standards to acquire state-issued identification and related documents, such as driver's licenses, particularly under provisions of the Real ID Act, it may be advisable for the NFRTR to formally comply with federal provisions for positive identification that are and will be implemented in future, in its standards for positively identifying owners of NFA firearms. Similarly, BATFE might consider establishing standards for the reliable identification of individual NFA firearms

manufactured after May 19, 1986. If the BATFE determines the machinegun was manufactured after May 19, 1986, and it proves that the applicant had knowledge of this, the applicant may be prosecuted for making a false statement.

Amnesty Generally: The Attorney General shall publish in the Federal Register the institution of all amnesties, as well as, nationally publicizing the amnesty 90 days prior to, and during, the 90 day amnesty period. No information or evidence required to be submitted by an individual to register a firearm under an amnesty period shall be used, directly or indirectly, as evidence against the individual, in any criminal proceeding or concurrent violation of the law. The furnishing of false information shall be a prosecutable offense, not protected under the above amnesty provision; thus, allowing the use of information and evidence submitted to the BATFE for the prosecution of false information.

Amnesty Process: Each person in the United States, who is in possession of a firearm defined by the NFA, CGA, and FOPA, shall register his/her NFA firearm with the BATFE NFA-Amnesty Division without payment of any tax or filing fee,<sup>373</sup> on an E-Form to be provided at no cost by the Attorney General. The amnesty registration form shall include the same data elements appearing on Form 4467, which was used to registered unregistered firearms during the 1968 Amnesty, and an attestation that possession of the firearm by the registrant will not, to the best of the registrant's knowledge, violate any federal, state or local law. While the applicant must provide

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<sup>373</sup> No tax or filing fee was incurred by the applicant under the original NFA or during the 1968 Amnesty.

sufficient information to reliably identify himself or herself, and the failure of the applicant to do so may constitute grounds for disapproving the registration, in accordance with established procedures for registering unregistered firearms under the original National Firearms Act, and during the 1968 Amnesty, no applicant shall be required to submit fingerprints, photographs, or certification by any law enforcement agency. In the absence of clear and convincing evidence to the contrary, the Attorney General shall accept the information provided as true and accurate, and shall treat any form that is postmarked during the amnesty period as received during the amnesty period. If the Attorney General determines that an individual may not register a firearm during the amnesty period, the Attorney General shall, under the request of such individual, (1) provide the individual any evidence on which the Attorney General's decision is based, and (2) promptly hold a hearing to review the determination.

The court of law may find the following: 1. Pursuant to § 922(o), the weapon was not legally possessed as of May 19, 1986;<sup>374</sup> thus, requiring the immediate forfeiture of the weapon; 2. Pursuant to § 922(o), the weapon was legally possessed as of May 19, 1986 ;<sup>375</sup> thus, the BATFE must register the firearm. In no instance shall any weapon be destroyed by the BATFE, prior to the exhaustion of all possible court proceedings. Furthermore, if the court finds that the firearm was legally possessed prior to May 19, 1986, the BATFE shall pay all reasonable attorney fees of the applicant.

The BATFE NFA-Amnesty Division and Firearms Classification Division shall be responsible for instituting a new NFRTR: The new database will allow for the

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<sup>374</sup> The term "legally possessed" means to have a legal property right to it, even in the absence of registration paperwork from the BATFE.

<sup>375</sup> *Id.*



stripping of data from the E-Forms and probabilistic searches. The old database will be kept, as a backup, for twenty-five years. This will ensure that all previously registered firearms are registered in the new NFRTR and that an individual is not prosecuted for a firearm, which was registered in the old NFRTR, but not in the new NFRTR.

Post Amnesty: The BATFE shall be responsible for maintaining the accuracy of the new NFRTR. After the completion of the necessary amnesty period(s), the U.S. Government Accountability Office shall conduct a GAGAS audit of the entire NFRTR. Furthermore, the U.S. Government Accountability Office shall, on a tri-annual basis, audit the NFRTR to determine its accuracy; during other years, the Department of Justice, Inspector General shall be responsible for an annual audit of the NFRTR. In any instance, where the NFRTR is determined to be less than ninety-nine percent accurate, an amnesty period shall be established within 90 days after the audit findings are published.

The BATFE shall inspect the Social Security Master Death File, every year, to ascertain if any registrants have expired.<sup>376</sup> Upon certification of the death of a registrant, the BATFE, if the estate has not previously contacted them, shall use the Individual Contact information to inform the estate of the registration requirements of the particular firearm(s). The BATFE's failure to locate the executor/administrator/heir shall not constitute grounds for seizure and forfeiture of the firearm.

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<sup>376</sup> THOMAS N. HERZOG, FRITZ J. SCHEUREN & WILLIAM E. WINKLER, DATA QUALITY AND RECORD LINKAGE TECHNIQUES 174 (Springer Science+Business Media 2007).

NFRTR Defense: In any criminal proceeding, an individual may offer the NFRTR audit records to the court, for the jury's consideration, unless the new NFRTR is one-hundred percent accurate and there are no records depicting otherwise.

## XI. Conclusion

As has been depicted, the NFRTR is in a state of disarray, allowing for the prosecution of individuals who lawfully registered their firearms, but through no fault of their own, the paperwork was lost or destroyed. This problem has been documented in Congressional Testimony, since the late 1970's, and continues through today. Mr. Napolilli would likely have been convicted of a possession of an unregistered firearm, if he had not found a copy of his paperwork. Even then, the BATFE believed the paperwork to be a forgery, and even when the BATFE determined it was not, they refused to return the firearm. Then, there is current day Error Letter from the BATFE to Mr. Shafizadeh, owner of Pars International, where the firearm had been transferred in April 2007, only for the BATFE lose all records of such, by June 2007. Luckily, Mr. Shafizadeh could provide copies of the approved paperwork, but where would he be, if such was not the case? One must remember that neither a citizen nor a criminal defendant has the authority to review the NFRTR because it is tax information. Thus, how is a defendant able to confront the database, when he/she cannot even search it, to ensure that the BATFE's search was not in error?

How is it possible for a Governmental Agency to knowingly consistently lose and/or destroy paperwork, and yet, rely on the absence of paperwork in criminal

prosecutions? This violates our sense of justness and fairness, and must be corrected. As has been depicted by firearm law experts, an internationally recognized expert in administrative records and statistics, and a senior analyst at the GAO,<sup>377</sup> the only way to correct the NFRTR is through an amnesty. While Congressional Hearings on how to implement an amnesty will likely take several months, the Congress must act immediately to stop the prosecutions of individuals, who are unable to show approved paperwork, because of the inaccuracy, completeness, and reliability of the NFRTR, until the NFRTR is adequately corrected. If the Congress is unable or unwilling to ensure that justice prevails, the Judiciary must find, as a matter of law, that the NFRTR is insufficient in criminal prosecutions.

As Mr. Scheuren declared in his letter,

Even though the first edition of the book has just come out we are already contemplating a second edition and plan to include the ATF issues discussed above in a new chapter. Will the story we tell have a happy ending or continue to be stalemated? We are hoping that changes will be made, so we can report a success and not a failure.<sup>378</sup>

I too hope that a success can be reported, and that, without Legislative or Judicial action, the NFRTR will be corrected. However, in looking at the continual trend of inaction, such is not likely to be the case, especially in light of then-NFA Branch Chief's statement,

If the court should discover that our negligence caused an unwarranted arrest and trial, the resultant loss of public trust would be irreparable. Just as serious is the possibility that an innocent man might be convicted if he could not find his registrant form and we certified that he had not

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<sup>377</sup> Eric M. Larson stated that his comments reflect his personal opinions, and do not represent the policy or position of U.S. Government Accountability Office.

<sup>378</sup> Letter to Alan B. Mollohan, Chairman, Subcommittee on Commerce, Justice, Science, and Related Agencies, Committee on Appropriations, by Fritz J. Scheuren, VP Statistics NORC, 2 (Dec. 11 2007); *available at* [http://www.nfaoa.org/documents/Scheuren\\_Committee\\_Chair\\_Letter.pdf](http://www.nfaoa.org/documents/Scheuren_Committee_Chair_Letter.pdf).

registered the firearm when, in fact, we had failed to locate his registration in the Record [NFRTR].<sup>379</sup>

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<sup>379</sup> NFA Branch Chief memorandum to ATF Assistant Director for Technical and Scientific Services, *Purification and Verification of the National Firearms Registration and Transfer Record*, Apr. 3, 1975, reproduced in *Oversight Hearings on Bureau of Alcohol, Tobacco, and Firearms*, Senate Committee on Appropriations, 96th Cong., 1st Sess., at 42 (Washington, GPO, 1979), available at [http://www.nfaoa.org/documents/1979\\_Hearing\\_Excerpts.pdf](http://www.nfaoa.org/documents/1979_Hearing_Excerpts.pdf).

## **Exhibit 22**

**(Testimony of Eric Larson)**

**TREASURY, POSTAL SERVICE, AND GENERAL  
GOVERNMENT APPROPRIATIONS FOR  
FISCAL YEAR 1999**

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**HEARINGS**  
BEFORE A  
SUBCOMMITTEE OF THE  
COMMITTEE ON APPROPRIATIONS  
HOUSE OF REPRESENTATIVES  
ONE HUNDRED FIFTH CONGRESS  
SECOND SESSION

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COMMITTEE ON THE TREASURY, POSTAL SERVICE, AND GENERAL  
GOVERNMENT APPROPRIATIONS

**JIM KOLBE, Arizona, *Chairman***

**FRANK R. WOLF, Virginia**

**ERNEST J. ISTOOK, Jr., Oklahoma**

**MICHAEL P. FORBES, New York**

**ANNE M. NORTHUP, Kentucky**

**ROBERT B. ADERHOLT, Alabama**

**STENY H. HOYE, Maryland**

**CARRIE P. MEEK, Florida**

**DAVID E. PRICE, North Carolina**

NOTE: Under Committee Rules, Mr. Livingston, as Chairman of the Full Committee, and Mr. Ober, as Ranking  
Minority Member of the Full Committee, are authorized to sit as Members of all Subcommittees.

**MICHELLE MURPHY, BOB SCHMIDT, JEFF ASHWOOD, and TAMMY HUGHES,**  
*Staff Assistants*

**PART 5**

**STATEMENTS OF MEMBERS OF CONGRESS AND OTHER  
INTERESTED INDIVIDUALS AND ORGANIZATIONS**



U.S. GOVERNMENT PRINTING OFFICE

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WASHINGTON : 1998

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Statement on

Proposed Removal of the National Firearms Registration and Transfer Record  
from the Custody of the Bureau of Alcohol, Tobacco and Firearms  
and its Proposed Relocation to the Department of Justice

by

Eric M. Larson<sup>1</sup>

Presented

before the

Subcommittee on Treasury, Postal Service and General Government  
of the  
Committee on Appropriations  
House of Representatives

B-107 Rayburn House Office Building  
Washington, D.C.

April 3, 1998

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<sup>1</sup>Eric M. Larson is a Contributing Editor to the *Official R. L. Wilson Price Guide to Gun Collecting*, the *Blue Book of Gun Values*, the *Standard Catalog of Firearms*, the *Official Price Guide to Antique and Modern Firearms*, and has been a Life Member of the National Rifle Association of America since 1968. His research has been published in *The Gun Report*, *CADA Gun Journal*, *Machine Gun News*, *Guns Illustrated*, *Small Arms Review*, *The Gun Journal*, and he is author of *Variations of the Smooth Bore H&R Handy-Gun: A Pocket Guide to Their Identification*. A journalist and demographer by training, he graduated with honors in 1974 from the University of Texas at Austin, where he also earned a Ph.D. and three master's degrees.

Mr. Chairman and Members of the Subcommittee:

My name is Eric M. Larson. I testified before this Subcommittee in 1996, and in 1997, and am doing so again this year, regarding serious errors in the National Firearms Registration and Transfer Record (NFRTR). The NFRTR was established under the National Firearms Act (NFA) of 1934. The NFA is designed to control firearms thought to be commonly used by criminals by requiring registration of the firearms, and using prohibitive taxes to reduce their manufacture, distribution, and ownership. It is a harsh federal law to discourage illegally manufacturing, selling, or possessing hand grenades, machine guns, and similar weapons, and the cutting down of conventional shotguns or rifles (regardless of their caliber) to make concealable firearms. Any violation of the NFA is a felony, carrying a penalty of up to a \$10,000 fine and 10 years imprisonment upon conviction.

The NFRTR is a permanent record of all transactions involving NFA firearms in the United States. It is currently located within the Bureau of Alcohol, Tobacco and Firearms (BATF), which under current law is responsible for administering the NFA. The NFRTR contains a variety of records, including the original registrations and subsequent transfers of NFA firearms to state and local law enforcement officers, state and local museums, private citizens who are legally qualified to own such firearms and are not prohibited from doing so under state or local law, of transfers to and from federally licensed NFA firearms dealers, and records of NFA firearms manufacture by federally licensed NFA firearms manufacturers. Because of the severe penalties for violations of the NFA, accurate record-keeping is essential to avoid unjust prosecutions, and the unlawful seizure of validly registered NFA firearms.

I am appearing before you today to respectfully ask the Subcommittee to consider removing the NFRTR from custody of the Bureau of Alcohol, Tobacco and Firearms (BATF), and to permanently reassign its functions to the Department of Justice. As you probably know, the Department of Justice is responsible for the "instant background check" of persons who wish to purchase handguns, which is scheduled to go into effect this year. Therefore, it would be relatively easy to incorporate the NFRTR into the existing infrastructure, and modifications to allow for administration of the NFRTR would likely be very minor. Removal of the NFRTR from BATF will also place these records within a professional organization that is capable of maintaining them, and probably will require a badly needed 100% record verification. The BATF (and, possibly, other law enforcement agencies) would continue to have access to the information in the NFRTR, for legitimate law enforcement purposes.

My knowledge about errors in the NFRTR evolved from the study of certain rare firearms that fell under the NFA in 1934 largely for technical reasons, not because they were commonly associated with criminal activities. Today, these firearms are historical artifacts that reflect a bygone era when there were no federal controls, and virtually no state controls, on firearms design. Thus, they represent a unique niche in U.S. firearms genealogy, because there is nothing else like them, and they are highly prized by collectors. As my research on these guns was published in major, reputable firearm reference books, collectors and persons who had inherited these firearms began contacting me. The BATF has represented my sole interest in discussing errors in the NFRTR to seek the



removal of these firearms from the NFA as collector's items, but that is not correct. In fact, my interests and this situation evolved as the result of my discovery of serious errors in the NFRTR, and my 1996 testimony makes that absolutely clear. It is in BATF's interest to try and focus attention away from errors in the NFRTR or impugn my motives, and that is what BATF has been doing.

BATF is correct in portraying me as a collector, but what changed my interest is the fact that some people who inherited some of these firearms told me that BATF alleged the firearms were not registered, then declared the firearms were contraband and must be forfeited to the Government, and apparently, some were. In other instances, people who were enraged by this situation told me they scoured their premises, found a valid registration document—and showed it to BATF. Then, allegedly, BATF said a mistake had been made and the NFRTR was amended to register the firearms to the new, lawful owner. In every instance, the people involved told me they were afraid of BATF, and didn't want to be identified, but wanted me to know this information. While there certainly is a "collector's item" interest in this situation, the loss or destruction of firearm registration records by the BATF clearly places my concerns in another dimension that is removed from gun collecting.

I was aware of these allegations for a number of years, but there seemed no way of proving them one way or the other because of the veil of secrecy that shields NFRTR records from public disclosure. The reason is that the NFA itself prohibits their disclosure as does the Tax Code of 1986, under which the BATF has deemed them to be "tax returns." The BATF also apparently uses the "tax return" angle to cover up wrongdoing by its agents and employees.

From my perspective, the situation regarding the firearms I was researching changed dramatically in March 1996, for two reasons.

First, I was asked by L. Richard Littlefield, then President of the Collectors Arms Dealers Association (CADA) to testify before this Subcommittee about getting a more reasonable treatment, as the law allows, for the smooth bore I&R Handy-Gun, Marble's Game Getter Gun, and similar firearms that came under the NFA in 1934 mainly for technical reasons. I'd known Dick since about 1989, and he was aware of my research, but CADA's testimony was not limited to these firearms. Indeed, one of the reasons CADA testified in 1996 was to ask for a change in the law to allow federally licensed firearms dealers to buy or transfer "curio or relic" firearms among themselves at gun shows. The law itself at that time was silent on the issue (that is, nothing in the legal code prohibited such transactions), but BATF took the position that such transactions were illegal, and nobody wanted to incur the legal expense of fighting the BATF. So, the law was ultimately changed to allow federally licensed firearms dealers to be able to buy and sell guns from each other at gun shows.

The second reason was that for the first time, valid and reliable evidence of the mismanagement and destruction of NFRTR records became available. This is a document that has been called the Bussey Transcript, which was released under a Freedom of Information Act Request. This document is the record of a videotaped training session at BATF headquarters which occurred on October 18, 1995. At the session the then-Chief of the National Firearms Act Branch, Mr. Thomas Bussey, stated that the error rate in the NFRTR was 50% when he first assumed his duties the year before; and that

BATF always testified in court that the NFRTR was 100% accurate, although that was not 100% true. Toward the end of his presentation, Mr. Boney discussed correcting a number of errors that he described, and stated:

What we're going to do is we're going to go back, starting with the latest entry and working back to the oldest entry and review every hard copy of every document with its entry into the data base to see if it's correct. I think originally we figured this would take 751 man days to do this with five people sitting at a computer eight hours a day.

But it's the only way that we can feel that we can ever get it completely accurate. *It was fine to begin putting everything in accurate a year ago or at least be guaranteed a year ago it was correct, but what are you going to do with the entries that go back to the early '80s and the '70s and the '60s?* [boldface added for emphasis].

It was an astonishing admission. Based on Mr. Boney's statements, and information about alleged errors in the NFRTR from firearms collectors, I analysed statistical data that BATF had publicly released each year on NFRTR transaction activities since approximately 1990. In my 1996 testimony, I documented obvious errors in the NFRTR, including the fact that every year since at least 1992, the BATF reported registrations of firearms during years and in categories which they cannot logically or legally exist, and the apparent addition of firearms to the NFRTR for years before 1971. I also included a copy of the Boney Transcript in the Appendix to my 1996 testimony.

On May 21, 1996, less than a month after my testimony, U.S. District Judge John A. MacKenzie dismissed five convictions for nonregistration of NFA firearms on appeal, declaring that the NFRTR records were too unreliable to support a conviction. In fact, a BATF Special Agent, Mr. Gary H. Schaible, testified that BATF employees would in fact have destroyed the documents in question. The U.S. Attorney prosecuting the case declined to cross-examine, and the BATF has not appealed the dismissals. The BATF wants this case to go away. As I will show it isn't going to go away, because it is the object of continuing action in Federal Court.

Astonishingly, the BATF made no apparent effort to correct the problems that I identified, because I detected them in the next round of data it released the following year. So, I returned to testify before this Subcommittee nearly a year later using these data, and this time extensively documented credible instances of apparent mismanagement, misconduct and criminal wrongdoing by BATF. On May 10, 1997, I formally complained to the Treasury Department Inspector General (IG) about several specific events, but on June 5, 1997, the IG wrote and told me that it was declining to investigate—and was referring my complaint to BATF. In an effort to try and prevent what surely would have been another coverup, I contacted the House Committee on Government Reform and Oversight. In early October 1997, the Committee ordered the IG to: (1) independently audit the BATF's firearm registration practices; and (2) evaluate the BATF's internal report. The Treasury Department Inspector General has not, to the best of my knowledge, yet reported its findings to the House Committee.

Although the BATF internal report was completed in September 1997, I was unable to obtain a copy until late January 1998. The results were no surprise: the BATF completely exonerated itself, and its responses to my allegations seem to raise public scenery chewing to a new level. In response to statistical evidence I presented that BATF was adding firearms to the NFRTR after being confronted by their owners with valid registration documents, BATF stated that such apparent increases "may be" due to reclassifications of forms. Yet, when I asked NFRTR guardian Gary N. Shaible in April 1996 whether BATF had added firearms to the NFRTR because lawful owners presented valid documents of which BATF had no record, he stated: "Yes, I assume that's happened." Thus, it appears likely that at least some people have been unjustly prosecuted for possessing a lawfully registered firearm, for which BATF lost or destroyed the registration documents.

In an internal 1981 BATF report I obtained under a Freedom of Information Act request, but which BATF apparently released to me by mistake (I hadn't known it existed, and had not requested it), a long-time BATF employee stated that some firearms were registered to people who would then have been 112 years old—and that BATF knew they were dead! BATF's data show that of 14,259 NFA firearms registered from 1934 to 1939, 11,175 (78%) are still owned by the same person or organization who registered or obtained them that year. A person who was 21 years old in 1939 would be 80 years old in 1998. Is it safe to conclude that most of them are now dead?

Of the 58,904 firearms registered during the 1968 amnesty, 50,314 (85%) are still owned by the same people. Someone who was 21 years old in 1968 would be aged 51 in 1998; a 65-year-old would today be 95. At least some of these people are dead. Yet, BATF states in its internal report that some firearms may be registered to dead people, but BATF has no knowledge of this.

Mr. Chairman, each of the 58,904 amnesty registration forms has a social security number on it, it was a required data field for the registration to be accepted. It would take no more than a few hours to determine from the Social Security Death Index exactly how many of these 58,904 NFA firearms are registered to people who are dead. What does this say about the ability of the Government to keep track of firearms it believes are dangerous?

And how pervasive is this problem? Well, according to the most recent data BATF has publicly released (as of December 31, 1996), exactly 108,556 persons have never legally transferred the ownership of machineguns, bazookas, sawed-off shotguns, hand grenades, anti-tank rifles, and similar devices that they registered or acquired by transfer in or before 1971. Inasmuch as the NFA was enacted in 1934, this corresponds to ownership periods of from 27 to 64 years. Someone who registered an NFA firearm at age 65 in 1934 (the specific example cited by the BATF employee in the 1981 internal report) would have been 112 years old in 1981; in 1998, such a person would be 129 years old. Is this sound management on the part of the BATF? I think not.

I could go on at some length about these and similar issues, and have reserved them for the attachments to my testimony, but feel that I must discuss two more situations here. One of them potentially affects me personally; the other is valid and reliable evidence of both perjury and an attempt by BATF to continue to try and cover up errors in the NFRTR.

After my April 1996 testimony, through a series of Freedom of Information Act requests, I discovered that four firearms in my personal collection were apparently registered or transferred illegally by the BATF years before I lawfully acquired them. All of these firearms are smooth bore H&R Handy-Guns, and bear serial numbers 5592, 29691, 50885, and 53637. Two of them are new-in-box, are quite valuable, and came from the H&R Factory Collection. I documented this in my April 1997 testimony. As the attachments to my testimony today document, on January 31, 1998, I formally requested a statement from Nereida W. Levine, Chief of the National Firearms Act Branch, asking if the BATF plans to seize these firearms as contraband, and undertake a forfeiture action. In a letter dated March 3, 1998, Chief Levine confirmed what I already knew—namely, that the NFRTR shows that the firearms are legally registered to me, a question that I did not ask.

The question Chief Levine left unanswered, and which I re-asked in an immediate followup letter dated March 6, 1998, is whether the BATF considers these specific firearms as subject to seizure and forfeiture. I have received no response to this letter to date, and I don't believe it is because Chief Levine is unable to read. I think I have received no response because I have placed BATF between a rock and a hard place, namely, if BATF declares the firearms are contraband because BATF itself illegally registered or transferred them, that means the BATF has admitted at least some of what I have alleged, which is that the accuracy and integrity of the NFRTR has been compromised.

I frankly do not know if the BATF will move to seize these firearms after all this blows over. If so, I'll have documents to show to the U.S. Attorney who prosecutes that action, demonstrating that I have repeatedly attempted to deal with this matter as a responsible citizen by contacting the BATF, as well as my elected representatives in the Congress. Mr. Chairman, Members of the Subcommittee, if you legally bought something in a transaction that the Government approved years ago, how would you feel about having your Government forcibly invade your home, seize those items, and go to Federal Court to permanently take them away from you without any compensation? That is a tension that I have lived with for more than a year now, and I can tell you that I don't like it. Would you?

The second situation is evidence of both perjury and an attempt to continue to cover up errors in the NFRTR. Specifically, Mr. Schaible told a completely different story in the 1997 BATF internal report than he did under oath in federal court. In the 1997 internal BATF report, Mr. Schaible stated under oath that the registration documents I was referring to in my complaint were thought to have been destroyed some 8 years ago by contract employees, not BATF employees. Yet, my question specifically referred to the May 21, 1996, testimony, which Mr. Schaible gave under oath in Federal Court, and referred specifically to the BATF employees that Mr. Schaible stated could have destroyed the documents in 1994, which is considerably later than the 1986-87 time frame BATF cites. I have repeatedly gone over each word of each document, and I can find no obvious explanation for this blatant discrepancy. I understand that David N. Montague, Esq., a private attorney representing the defendant in this case, filed a Writ of Habeas Corpus on March 25, 1998, in federal court regarding the single outstanding conviction based, in part, on the discrepant testimony of Mr. Schaible. It seems to me as though the BATF is continuing to try and cover all of this up.

In an article entitled "Institutional Perjury," published in the October 1996 issue of *Voice for the Defense*, author James H. Jeffries III, Esq., stated that "the Busby tape was clearly exculpatory and clearly implicated every National Firearms Act prosecution and forfeiture in living memory." He concluded:

All across the country Assistant United States Attorneys, United States District Judges, and other federal and local law enforcement officials are going to learn what most defense lawyers and gun dealers have known for years and what the aftermath of Waco and Ruby Ridge starkly illustrated: BATF officers and agents lie, dissemble and cover up on an institutionalized basis. These are not aberrations; they are an institutional way of life. Just who is the criminal in these cases?

For the above reasons, and the documented evidence I have presented in my 1996 and 1997 testimonies, as well as in the self-explanatory attachments to this testimony, I would like to respectfully ask the Subcommittee to consider removing the NFRTR from custody of the Bureau of Alcohol, Tobacco and Firearms (BATF), and to permanently reassign its functions to the Department of Justice. The Department of Justice is the entity which actually conducts all of the background checks that the BATF, and other law enforcement agencies, use at trial for violations of the law, and has a much better system than does the BATF for assuring the accuracy and integrity of those records. In contrast, the BATF has destroyed NFRTR records, lied about it, and continued to lie about it.

As you know, the "instant background check" for persons who wish to purchase handguns is scheduled to go into effect later this year, and the Department of Justice is responsible for doing these record checks. Moving the NFRTR from BATF to the Department of Justice would mean that BATF (or its successor—I am hopeful of change in this area) would still certainly have access to these records for legitimate law enforcement purposes; however, the BATF could no longer illegally manipulate or destroy these records. The Department of Justice would have no institutional reason to do so and, indeed, would likely be more objective about maintaining their accuracy and integrity. In my judgement, by its past actions and continuing efforts at trying to cover up its wrongdoings, the BATF has forfeited any right to custody of the NFRTR.

When I was a student in the first Intergovernmental Relations class that the late, great, Barbara C. Jordan taught in 1979 at the Lyndon B. Johnson School of Public Affairs at the University of Texas at Austin, she told us:

**"Government by the people is not a spectator sport."**

Enough said, and I thank you all for the opportunity to present this information.

Statement on

Proposed Removal of the National Firearms Registration and Transfer Record  
from the Custody of the Bureau of Alcohol, Tobacco and Firearms  
and its Proposed Relocation to the Department of Justice

**APPENDIX AND TESTIMONIAL EXHIBITS**

by

Eric M. Larson<sup>1</sup>

Presented

before the

Subcommittee on Treasury, Postal Service and General Government  
of the  
Committee on Appropriations  
House of Representatives

B-307 Rayburn House Office Building  
Washington, D.C.

April 3, 1998

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<sup>1</sup>Eric M. Larson is a Contributing Editor to the *Official R. L. Wilson Price Guide to Gun Collecting*, the *Blue Book of Gun Values*, the *Standard Catalog of Firearms*, the *Official Price Guide to Antique and Modern Firearms*, and has been a Life Member of the National Rifle Association of America since 1968. His research has been published in *The Gun Report*, *CADA Gun Journal*, *Machine Gun News*, *Guns Illustrated*, *Small Arms Review*, *The Gun Journal*, and he is author of *Variations of the Smooth Bore H&R Handy-Gun: A Pocket Guide to Their Identification*. A journalist and demographer by training, he graduated with honors in 1974 from the University of Texas at Austin, where he also earned a Ph.D. and three master's degrees.

231 Napolilli Lane  
Fairbanks, Alaska 99712

1/19/98

Dear Chairman Burton,

My name is Noel Napolilli. I am a retired public school teacher of 28 years. I am writing to you regarding the seizure of my German MP-40, by BATF, in 1993.

I recently learned that my case was included in formal testimony last April before the House Subcommittee on Treasury, Postal Service and General Government Appropriations. I also discovered that it was specifically brought to the attention of Ms. Carol Bergen of the Treasury Department Office of Inspector General last October, although she has not contacted me.

Therefore I will not go into the legalities regarding my case here. I believe that the facts will speak for themselves. I simply would ask for your help in encouraging BATF to return my MP-40.

As you know, I sued BATF for the return of my MP-40 (serial 4212) when they refused to return it to me after I had voluntarily sent it to them for review of the firearm and it's registration paperwork (Form 3). I sent these to them because they questioned the fact that the MP-40 was legally registered. Their laboratory analysis determined that my paperwork was not a forgery, yet they still would not return my firearm or acknowledge its registration, because they had no record of it in their data base. In 1994, after many months of litigation, I dropped the suit against the advice of my counsils. This was because my wife and I were fearful of BATF reprisals, the seizure of my sizable firearm collection, being "black balled" in future transactions requiring BATF approval and being harassed by constant "inspections". There was substantial evidence that these things would likely occur based on other incidents with which I was familiar. I also had to consider that the cost of continuing litigation against BATF was going to far exceed the value of the firearm involved. I was very upset about having to drop this case at the time. It became worse after I learned that BATF employees had destroyed other registration documents to avoid having to work on them and that their data base approached a 50% error rate. I feel that this entire incident was unnecessary and cavalier on BATF's part.

I would respectfully request your assistance in anyway you would be willing to provide.

Sincerely,

  
Noel Napolilli

cc

Chairman Orrin G. Hatch Committee on the Judiciary  
Chairman Jim Kolbe Subcommittee on Treasury, Postal Service and General Government

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF ALASKA AT FAIRBANKS

NOEL E. NAPOLILLI,	)	
	)	
Plaintiff,	)	
	)	
V.	)	CIVIL ACTION NO.
	)	FS3-0037 (JKS)
UNITED STATES OF AMERICA,	)	
	)	COMPLAINT FOR RETURN
Defendant.	)	OF PROPERTY

COMPLAINT

Plaintiff, Noel E. Napolilli, by undersigned counsel, brings the following complaint and for his cause of action alleges and complains as follows:

1. The plaintiff, Noel E. Napolilli, is a natural individual and an adult citizen of the State of Alaska and the United States of America, residing at 251 Napolilli Lane, Fairbanks, Alaska 99712, within the jurisdiction of this Court.

2. The defendant, United States of America, is the national sovereign and may be found within the jurisdiction of this Court.

3. This is an action for the return of personal property of the plaintiff wrongfully and illegally seized from the plaintiff by the United States and wrongfully and illegally withheld by the United States from the plaintiff. The events and acts complained of herein occurred in the State of Alaska and therefore within the jurisdiction of this Court.

4. The Court has jurisdiction over the parties to and the subject matter of this action by virtue of the provisions of Sections 1331, 1346(a)(2), 1356, 2201 and 2463 of Title 28 of the United States Code; Sections 5872(b) and 7323 of the Internal Revenue Code of 1986, Title 26 of the United States Code; Section 924(d)(1) of Title 18 of the United States Code and Federal Rule of Criminal Procedure 41(e); and the Court's equitable and anomalous jurisdiction.

5. Venue is proper in this judicial district by virtue of the provisions of Sections 1391(b) and 1402(a)(1) of Title 28 of the United States Code.



6. The plaintiff, Noel E. Napolilli, is, and at all times pertinent to this complaint was, licensed by the Bureau of Alcohol, Tobacco and Firearms of the United States Department of the Treasury (hereafter "BATF"), an agency and instrumentality of the defendant United States of America, as a dealer in firearms, doing business as Nap Armament, a sole proprietorship. He is, and at all times pertinent to this complaint was, a BATF Class 3 Special Occupational Taxpayer, that is, one who may engage in the purchase and sale of machineguns and other firearms as defined by Section 5845 of the National Firearms Act of 1934, as amended, 26 U.S.C. section 5845, Internal Revenue Code of 1986.

7. On or about July 13, 1985, the plaintiff purchased from a federally licensed Fairbanks, Alaska, firearms dealer a federally registered MP-40 machinegun, caliber 9 millimeter, serial number 4212 (hereafter "the firearm"), a World War II era German military machinegun commonly but mistakenly referred to as a "Schmalzeer."

8. On or about August 26, 1985, the National Firearms Act Branch of BATF in Washington, D.C., through its authorized representative Gary Schaible, approved the transfer of the firearm from the seller to the plaintiff by execution of the required BATF Form 3, "Application for Tax-Exempt Transfer of Firearm and Registration to Special (Occupational) Taxpayer."

9. Following the official registration and transfer approval described in paragraph 8, above, plaintiff took possession of the firearm and remained in peaceful, uninterrupted and lawful possession of it until on or about February 3, 1992. Plaintiff has remained the sole and lawful owner of the firearm from July 13, 1985, through the date of filing of this complaint.

10. In September of 1991, BATF conducted a firearms dealer compliance inspection of the plaintiff's business. The inspection was satisfactory, with the exception that plaintiff had in his possession four National Firearms Act firearms (including the MP-40 which is the subject of this action) which the BATF inspector's inventory did not show as being registered to the plaintiff.

11. BATF was ultimately able to determine that its records were incorrect as to three of the four questioned firearms, and that those three were in fact lawfully registered to and properly in the possession of the plaintiff. BATF was apparently unable to determine from its own records however that the MP-40 was lawfully registered to the plaintiff (or to anyone).

12. In December 1991, plaintiff was requested by the National Firearms Act Branch of BATF in Washington, D.C., to

provide it with a copy of his Form 3 transfer and registration of the firearm and the plaintiff did so.

13. BATF Forms 3 are required by Treasury Regulations to be submitted in duplicate original. When the transfer and registration is approved, one original Form 3 remains with BATF as part of the National Firearms Registration and Transfer Record (26 U.S.C. section 5841(a)) and the second original is returned to the transferor for transmission with the firearm to the transferee. The transferee of a National Firearms Act firearm must retain possession of the duplicate original Form 3 as long as the firearm exists and is registered to him/her.

14. Confronted with a copy of an approved transfer and registration form which it apparently could not find in its own records, BATF took the position that the Form 3 must be a forgery. BATF then demanded the original form from the plaintiff with the expressed intention of submitting it to a BATF laboratory analysis. Plaintiff provided BATF with his original Form 3 as well as the firearm itself.

15. BATF's laboratory examination determined that the Form 3 was not altered or fabricated. The necessary implication of BATF's laboratory examination result, and of its course of behavior, is that BATF has lost or destroyed its own records of the firearm's provenance which BATF is mandated by 26 U.S.C. section 5841(a) to maintain.

16. BATF's lost or destroyed records would have consisted under the National Firearms Act of one of the following:

(A) A Form 1, "Application to Make and Register a Firearm" (non-commercial manufacture by an individual); or

(B) A Form 2, "Notice of Firearms Manufactured or Imported" (manufacture by a licensed manufacturer or importation by a licensed importer); or

(C) A Form 6, "Application and Permit for Importation of Firearms, Ammunition and Implements of War (not for use by Members of the United States Armed Forces)" (importation by a commercial importer); or

(D) A Form 6, Part II, "Application and Permit for Importation of Firearms, Ammunition and Implements of War (for use by Members of the United States Armed Forces)" (importation by a non-commercial, U.S. service-member importer); or

(E) A Form 10, "Application for Registration of Firearms Acquired by Certain Governmental Entities" (by a law enforcement or military organization); or

(F) An IRS (ATF) Form 4467, "Registration of Certain Firearms during November 1968" (registration of existing but unregistered firearms during a thirty-day amnesty period in 1968); as well as some combination of the following forms for each successive registration and transfer:

(G) A Form 3, "Application for Tax-Exempt Transfer of Firearm and Registration to Special (Occupational) Taxpayer," (a tax-exempt transfer between special occupational taxpayers, i.e., importers, dealers and manufacturers); and/or

(H) A Form 4, "Application for Tax Paid Transfer and Registration of Firearm," (a tax-paid transfer to an individual who is not an importer, manufacturer or dealer); and/or

(I) A Form 5, "Application for Tax Exempt Transfer and Registration of a Firearm," (a transfer from a decedent's estates or a law enforcement organizations). In summary, the missing BATF records would show the complete history of the firearm since its manufacture or importation into the United States.

17. Undeterred by its inability to establish a forged registration or to locate its own registration records, BATF submitted the firearm to a technical examination and concluded that the firearm must have, at some undetermined time in the past, by person or persons unknown, been falsely registered by the original registrant as "remanufactured," a category of registration whereby a firearm previously rendered legally inoperable is restored to operating condition and registered or reregistered as an operable National Firearms Act firearm.

18. BATF has no evidence the firearm in question was originally registered as "remanufactured," or that it was otherwise registered improperly or unlawfully, and its determination to that effect is arbitrary, capricious and without foundation in fact or law. Moreover, BATF has lost or destroyed the original registration records, which it is mandated by law to retain and preserve, and which would establish beyond any question how the firearm was originally registered.

19. Purchasers of registered National Firearms Act firearms, such as the plaintiff, have no legal or practical means of determining the pedigree of a registered firearm and are totally at the mercy of BATF's approval of the transfer application and

registration (BATF Form 3, 4 or 5) by which the purchasers obtain authority to receive and possess the firearm. BATF refuses to disclose to subsequent registrants the prior registration and transfer forms pertaining to any National Firearms Act firearm, citing the taxpayer privacy provisions of the Internal Revenue Code, 26 U.S.C. section 6103. Thus, purchasers/transferees of National Firearms Act firearms are totally at the mercy of BATF's competence and diligence, or lack thereof, in obtaining valid and permanent possession of a validly registered firearm, and in being able to subsequently effect a legal transfer of such firearm. By their very nature, legally restricted and often of historical significance, National Firearms Act firearms ordinarily are valued at thousands of dollars each.

20. BATF is barred by its own violation(s) of law in losing or destroying required records from challenging the original registration of plaintiff's firearm and from drawing a single negative inference of improper registration from several possible types of registration, all others of which would be lawful and proper.

21. BATF is estopped from challenging the original registration of plaintiff's firearm by virtue of the approvals of the firearm's registration and transfer to the plaintiff, and to plaintiff's predecessor owner(s) and registrant(s).

22. In or about March 1992 BATF advised the plaintiff that it was refusing to return the firearm and that BATF intended to administratively forfeit the firearms as "contraband."

23. Despite repeated demands by the plaintiff, by counsel for plaintiff, and by members of Alaska's congressional delegation, BATF has refused to return the firearm. BATF's refusal constitutes an illegal seizure of the firearm and a taking of plaintiff's property without due process of law.

24. The United States is mandated by law to commence any "action or proceeding for the forfeiture of firearms ... within one hundred and twenty days of such seizure." 18 U.S.C. section 924(d)(1). The retention of the firearm by the United States and its failure to commence such a forfeiture action or proceeding is a denial of due process of law and an unconstitutional taking of plaintiff's property. The United States has lost any jurisdiction over the firearm which it might otherwise have had.

WHEREFORE, the plaintiff requests the following relief:

1. A declaratory judgment that BATF's seizure of the firearm and its refusal to return it are arbitrary, capricious and unlawful.

2. A determination that the United States is estopped by its conduct from determining that the firearm is not lawfully registered and properly in the possession of the plaintiff.

3. A determination that the United States has violated the provisions of the Firearm Owners' Protection Act of 1986, 18 U.S.C. section 924(d)(1), and is barred from forfeiting the firearm.

4. An order requiring the United States to immediately return the firearm to the plaintiff.

5. An award of the plaintiff's costs, expenses and reasonable attorney fees incurred in prosecuting this action.

6. A judgment for such other and further relief as is just and proper.

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# Institutional Perjury

By James H. Jeffries, III

**O**n October 18, 1995, Thomas A. Busey, then Chief of the National Firearms Act Branch of the Bureau of Alcohol, Tobacco and Firearms (hereafter "BATF") made a videotaped training presentation to BATF Headquarters personnel during a roll call training session. "Roll call training" is weekly or periodic in-house training for BATF officials — a routine show-and-tell whereby bureaucrats learn about each other's duties and functions.

Busey's National Firearms Act Branch administers the National Firearms Act of 1934,<sup>1</sup> the taxation and regulatory scheme governing machineguns, silencers, short-barreled rifles and shotguns, destructive devices, etc. In his capacity of NFA Branch Chief Busey was the official custodian of the National Firearm Registration and Transfer Record (hereafter "NFR&TR") mandated by 26 U.S.C. 5841.

Busey's presentation was anything but jocular, routine or customary. In describing the NFR&TR, Busey made the startling revelation that officials under his supervision routinely perjure themselves when testifying in court about the accuracy of the NFR&TR.

Every prosecution and forfeiture action brought by the United States and involving an allegedly unregistered NFA firearm requires testimony under oath by a duly-authorized custodian of the NFR&TR that after a diligent search of the official records of which he/she is custodian, no record of the registration of the

firearm in question was found (or was found but showed a different registrant than the person being prosecuted).<sup>2</sup> An alternative method of proving the same facts is by admission into evidence of a certified copy under official Treasury Department seal of a similar written declaration by the custodian.<sup>3</sup> This is a critical element of the government's proof and, according to Busey, occurred 880 times in 1995 alone (presumably Fiscal Year 1995).

Busey began his roll call presentation by acknowledging that "Our first and main responsibility is to make accurate entries and to maintain accuracy of the NFR&TR...." Moments later Busey makes the astonishing statement that

... when we testify in court, we testify that the data base is 100 percent accurate. That's what we testify to, and we will always testify to that. As you probably well know, that may not be 100 percent true.

Busey then goes on for several minutes describing the types of errors which creep into the NFR&TR and then repeats his damning admission:

So the information on the 728,000 weapons that are in the data base has to be 100 percent accurate. Like I told you before, we testify in court and, of course, our certifications testify to that, too, when we're not physically there to testify, that we are 100 percent accurate.

How bad was the error rate in the NFR&TR? Busey again:

... when I first came in a year

ago, our error rate was between 4% and 10 percent, so you can imagine what the accuracy of the NFR&TR could be, if your error rate is 4% to 10 percent.

Does anyone recall the phrase, "Hey, close enough for government work?"

Consider this matter in its starkest terms: a senior BATF official lecturing other senior BATF officials at BATF national headquarters in Washington, D.C., declares openly and without apparent embarrassment or hesitation that BATF officers testifying under oath in federal (and state) courts have routinely perjured themselves about the accuracy of official government records in order to send gun-owning citizens to prison and/or deprive them of their property. Just who is the criminal in these cases?

All this was too brazen for even some BATF officials to stomach. Acting on tips from several BATF officials (there are honest men and women in government, even in BATF), I promptly filed a Freedom of Information Act<sup>1</sup> demand precisely describing the Bussey tape. The first reaction was predictable. After reviewing the incriminating tape, BATF officials discussed whether they could get away with destroying it. Worse heads prevailed; obviously any outsider who knew of the tape probably would learn of its destruction — and I would have. Or perhaps all the official shenanigans were on loan to the White House.

After much toying and toying with a disowned Department of Justice a transcript of the Bussey tape was sent to me in February 1996. The Department of Justice was disowned because the Bussey tape was clearly Brady material. Every defense lawyer knows that under the Supreme Court's 1987 decision in *Brady v. Maryland*, 373 U.S. 83, the government is required in all criminal prosecutions to provide the defense, in advance of trial, with any evidence tending to show the defendant's innocence. Failure to do so can result in dismissal of an indictment, reversal of a conviction, or other sanctions. Willful failure to produce Brady material can constitute contempt of court, professional misconduct, or even a crime.

The Bussey tape was clearly passively and clearly implicated every National Firearms Act prosecution and forfeiture in living memory. Worse yet, Bussey was only the tip of the iceberg. When the fog had cleared Justice learned that the NFR&TR inaccuracy problem had been the subject of internal BATF discussions since at least 1979. BATF's files were replete with minutes of meetings, statistical studies, memoranda, correspondence, etc., admitting the problem. The only thing missing was any attempt to correct the problem, or to reveal it to anyone outside the agency.<sup>2</sup>

Justice has now summoned the painful chore of advising every NFA defendant in the accuracy of the inaccuracy. It did this with a recent mass mailing by United States Attorneys in defense lawyers and defendants of relevant BATF documents, including the Bussey transcript.

The direct consequences of this institutional perjury are just now beginning to occur. In Newport News, VA, on May 21, 1996, United States District Judge John A. MacKenzie, after reviewing the Bussey transcript, promptly dismissed five counts of an indictment charging John D. Leaseure with possession of machineguns not registered to him.<sup>3</sup> Leaseure, a Class II NFA manufacturer,<sup>4</sup> had received BATF transfer

approval for the five guns, but then declined to void the transfers and keep the guns, as he was legally permitted to do. He promptly faxed the voided Forms 3 to NFA Branch.<sup>5</sup>

BATF subsequently raided Leaseure and charged him with illegally possessing the five NFA firearms which, according to the NFR&TR, were registered to someone else. The government ignored the fact that on the date Leaseure said he voided the transfers there was a 21-minute call on his toll records from his fax number to NFA Branch's fax number — at a time when he could have had no idea he would one day be prosecuted for continuing to possess the guns. Rather, the prosecution produced NFA Branch firearms specialist Gary Schaible to testify as custodian of the NFR&TR that the government's official records did not show any voided transfers, and therefore Leaseure was in illegal possession of the guns.<sup>6</sup>

In essence Schaible was testifying that "We can't find an official record and therefore the defendant is guilty." What we now know is that Schaible should have testified that "We can't find half our records — even when we know they're there — and therefore we're not sure if anyone is guilty."

The government's case was not solid when Schaible was forced to admit on cross-examination that two NFA Branch statements were recently transferred because they had been caught shredding NFA registration documents in order to avoid having to work on them.<sup>7</sup> How did they were "transferred?" Not disciplined. Not fired. Not prosecuted. Not destroyed in place. Transferred! And who is the criminal in these cases?

It is too early to predict how many new trials, appeals and habeas corpus actions will result from this affair. Also of importance is the number of convicted felons presently suffering legal disabilities<sup>8</sup> from flawed firearms convictions and what effect the Bussey disclosures will have in their situation.

The indirect consequences of BATF's conduct will not be as readily apparent but are potentially devastating. All across the country Attorneys, United States Attorneys, United States District Judges, and other federal and local law enforcement officials are going to learn what most defense lawyers and gun dealers have known for years and what the aftermath of Waco and Ruby Ridge starkly illustrated: BATF officers and agents lie, disavow and cover up on an institutionalized basis. These are not aberrations; they are an institutionalized ethic, an organizational way of life. Just who is the criminal in these cases?

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Lawyers and defendants in NFA cases who have not received the "Bussey" package from the United States Attorney should be making prompt demands — both for the package and for an explanation of why it was not timely produced. I am acting as an informal clearing house for these matters. Those lawyers or dealers with questions or problems, or with new information, involving the Bussey phenomenon, or its continuing aftermath, are invited to contact me at (910) 282-6024.

[The author is a retired U.S. Department of Justice lawyer and a retired colonel in the Marine Corps Reserve practicing firearms law in Oenoboro, NC. He is a 1959 graduate of the University of Kentucky and a 1962 graduate of the UK College of Law, where he was Note Editor of the Kentucky Law Journal. He is an associate member of TCDLA and holds BATF in (quasi) high regard.]

1. Public Law No. 474, ch. 757, 48 Stat. 1236-1240 (Act of June 26, 1934), 26 U.S.C. (132-132a), as amended by Act of April 10, 1936, ch. 169, 49 Stat. 1192, as codified by chap. 736, Act of August 16, 1954 (Internal Revenue Code of 1954), 68A Stat. 721-729; as amended by Public Law No. 85-659, Title II, 203, 72 Stat. 1427, 1428 (Act of September 2, 1958), as amended by Public Law No. 86-478, 1-3, 74 Stat. 149 (Act of June 1, 1960); as amended by Public Law No. 90-618, Title II, 201, 82 Stat. 1227-1235 (Act of October 22, 1968); as amended by Public Law No. 94-455, 90 Stat. 1834 (Act of October 4, 1976); as amended by Public Law No. 99-308, 109, 100 Stat. 449, 460 (Act of May 19, 1986); and as amended by

Public Law No. 100-203, 101 Stat. 1330 (Act of December 22, 1987); Internal Revenue Code of 1986, Title 26 United States Code, ch. 53, 26 U.S.C. 5801-5872 (Title II of the Tax Reform Act of 1986).

2. See Federal Rule of Criminal Procedure 27 and Federal Rule of Civil Procedure 44. See also Rules 803(8), 901(b)(7), 902(1), (2), (4), and 1005 of the Federal Rules of Evidence.

3. *Ibid.*

4. 5 U.S.C. 552.

5. The first rule of a bureaucrat is "Never disturb a body at rest." The second, "If I don't do anything, I can't do anything wrong." The third, "When in doubt, murmur."

6. United States v. Lenzore, Criminal No. 4-95CR54 (E.D. Va., Newport News Div.).

7. "Special Occupational Taxpayers" under 26 U.S.C. 5801 fall into one of three categories: Class III dealers can possess, sell and transfer NFA firearms; Class II manufacturers can, in addition, manufacture and register them; Class I importers can, in addition to all the foregoing, import them. All SOTs are also required to possess Federal Firearms Licenses, which themselves come in six different classifications. Throw in the import and export licenses and permits required, the various taxes imposed, and the state and local licensing and registration schemes involved, the mandatory record-keeping required, and the shipping and transportation limitations concerned, and you have a lawyer's paradise.

8. BATF Form 3 are used to authorize out-of-state dealer-to-dealer transfers and to re-register the firearm(s) involved to the transferee. There are numerous other transfer and registration forms used depending upon the nature of the transaction, the status of the parties involved, and the type of firearm and its origin.

9. Violations of the NFA are all 10-year, \$10,000 felonies. See 26 U.S.C. 5871. NFA firearms, which carry some impressive sticker prices, are also forfeit if used in any violation of the NFA. See 26 U.S.C. 5872.

10. We are left to conjecture where the NFA Branch offender is located in relation to its fat machine.

11. In addition to the loss of civil rights imposed on convicted felons by the laws of most states, felons permanently lose the right under federal law to possess firearms, as well as being potentially debarrated from service in the armed forces, civil employment in government, receiving security clearances, bidding on federal contracts, etc.

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If you would like registration information please contact:

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2914 Exposition, D-710, Austin, Texas 78703 OR  
ph: 512-476-9463, fax: 512-472-8418 e-mail: evb@evb.com

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CHARLES T. CANADY  
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(COMMITTEE ON THE JUDICIARY)  
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March 11, 1998

Mr. Craig Smith  
1519 S Lake Rochelle Dr.  
Winter Haven, FL 33861-9645

Dear Mr. Smith:

Thank you for contacting me regarding an article alleging mismanagement, misconduct, and criminal wrongdoing by the Bureau of Alcohol, Tobacco, and Firearms (BATF). I appreciate hearing your views on this important issue.

Enclosed is the BATF's response to the article. I hope this information is helpful to you.

As a member of the House Judiciary Committee (which has BATF oversight jurisdiction), I will remember your concerns. Again, thank you for taking the time to contact my office. Please let me know whenever you have concerns regarding issues before the Congress.

Sincerely yours,

*Charles T. Canady*

Charles T. Canady  
Member of Congress

CTC:jm

Enclosure

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DIRECTOR

DEPARTMENT OF THE TREASURY  
BUREAU OF ALCOHOL, TOBACCO AND FIREARMS  
WASHINGTON, D.C. 20536

FEB 13 1998

FEB 9 1998

Honorable Charles T. Canady  
U.S. House of Representatives  
Washington, DC 20515

Dear Mr. Canady:

This is in response to your November 13, 1997, request concerning allegations made by Mr. Eric M. Larson of mismanagement, misconduct and criminal wrongdoing by the Bureau of Alcohol, Tobacco and Firearms (ATF). Mr. Larson's allegations were contained in the October 3, 1997 issue of "Gun List." We apologize for the delay in responding to your request.

By way of background, Mr. Larson has been requesting information on the H & R Handy Gun and the Marble Game Getter firearms since approximately 1985 or 1987. Mr. Larson has requested that these firearms be removed from the scope of the National Firearms Act (NFA). Whenever Mr. Larson has contacted ATF with a question or request, ATF has provided the available information. In May of 1997, the Assistant Inspector General (IG) for Investigations, Department of the Treasury, received a letter from Mr. Larson making allegations against various ATF employees. The IG's Office forwarded the letter to the Director of ATF to conduct an appropriate investigation into these allegations. The article contained in "Gun List" references these allegations and suggests that the IG's Office has acted inappropriately in allowing ATF to investigate allegations of misconduct made against the agency.

Initially, we would note that it is the function of ATF's Office of Inspection to investigate allegations of wrongdoing made against ATF employees and that it was entirely proper for the IG's Office to forward Mr. Larson's letter to ATF for investigation. Furthermore, while ATF did conduct an internal investigation into the allegations made by Mr. Larson,

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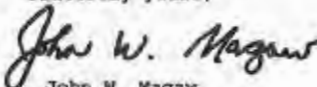
-2-

Honorable Charles T. Canady

the IG's Office also initiated an independent investigation into these allegations and that investigation is still ongoing. Due to this ongoing investigation we are unable to comment further on any action that might be taken with respect to the allegations made by Mr. Larson.

We hope that this information proves helpful in responding to your constituent. Please let me know if we can be of further assistance.

Sincerely yours,

A handwritten signature in dark ink, reading "John W. Magaw". The signature is written in a cursive style with a large, stylized "J" and "M".

John W. Magaw  
Director

## GUN TALK

© David Keiser/Art

### Establishing Bill Of Rights Day— December 15

On Thursday, 12/7/91, the Bill of Rights in the United States Constitution inspired how Jewish Zerkow, founder of Jew for The Free Press, on October 20th, 1991, wants to remember that Bill and that historic year with a nationally organized Bill Of Rights Day.

Critics believe all the rights we enjoy in America are part of a strange concoction by the founding fathers. If we gave the average members of our society a list of the rights we have, they'd probably tell others, "Oh, I agree. I've seen this stuff in books. These rights are personal freedom and so

As environmental gas emissions and, increasingly, water pollution of streams, rivers, drainage pits, tailwaters, the settlement of forests should like to meet equipment to have them dry. As companies working for many countries, we will build the necessary equipment for drying of the transport of peat and bark during a number of years and in some cases for the use of it. There is a need for gas and water in 1980-1990.

[illegible]

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In the end, I learned a lot about my company and the industry. I received a lot of support from my colleagues and a 20-page manual. Thank you for all the help and support.

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## GUN LIST

[illegible]

## THE STANDARD REPORT



■ **Prüfung:** Schriftlich

## What Happens When The BATF Breaks The Law?

**L**ate April, Rite 54, *Laurel of Thailand* Pans. Marijuana dominated traffic in the market of phantasms, concerned and criminal wrongdoing to the Bureau of Alcohol, Tobacco and Firearms (BAZF) in intensive police. Crispin. His change country of fire-arms owners. But so far the only result by it self saying insurance from BAZF. Can you imagine that?

Two known facts for the smart and tech-savvy musician: reliability. His work is unique—bringers like *Electric Blue*, *Electric Blue*, and the recently three *Electric Blue* albums. It's known to such people, the books on *Standard Catalog of Flowers*, on *Blue Book of Gasoline* and the *Official Price Guide to Antiques and Modern Flowers*.

The guest site (unpublished data) and biology goals must be reviewed with BSA/BSA.

of the 100 were registered in Germany with world travel bans (12 cases) but the WHO's *Asian* entry was only small: BATHY was not listed data show that of 14,250 COXA flu virus registered from 1994-2000, 11,323 (79 percent) are still owned by the same person or organization. Of 10,000 flu virus registered during the 1990s, almost 9,312 (93 percent) are still owned by the same people who registered or obtained them close by. What does this say about the ability of the government to keep track of flu virus in Asia and elsewhere?

**NATF Employees Demand Election**  
In 1976, a federal district court dismissed the complaint for interference of property interest. NFA claims an appeal with NATF denied. Agents Gary D. Schaefer notified the NATF employees that

"A federal district court dismissed five convictions for possession of unregistered firearms...a BATF Special Agent testified that BATF employees destroyed registration documents rather than working on them."

under the Transport Vessels Act (TVA) of 1984, enacted by Congress in response to and under "mandatory provisions" derived from EISA. EISA does not require it to be approved by Congress.

The study uncovered a 19% decline in cases of the principal BSE agent from 1980 to 1990, but laboratory-confirmed SFA infections remained. The researchers were not sure whether the drop in SFA was due to changes in the animal feed supply or to changes in the way the disease is detected. The researchers also noted that the decline in SFA was not seen in cattle, sheep, or goats, which may be due to the fact that these animals are not fed SFA. The researchers also noted that the decline in SFA was not seen in cattle, sheep, or goats, which may be due to the fact that these animals are not fed SFA.

On April 4, 1997, Eric's mother, Audrey, filed a Motion Subpoenaing the Veterans Affairs Super-aid Program Governance Administration (VA) & Funds BATT (the testimony appears in the grand jury hearing transcript, which may be obtained by e-mail from the U.S. Government Printing Office, Congressional Sales Office, Washington, DC 20540 (202) 512-2400. Specify issue No. 242494-0010-1).

diversity expression documents collected within three days (United States vs. John Daniel Insull, 650 U.S. 101, 49 AFTR2d 100-1009, 9th Cir. Va., May 21, 1986). The U.S. attorney prosecuting the case declined to cross-examine Seibels, and GALT has not appended the transcript.

[illegible]

Dr. Max (a 1987 EPA award) to the Tropical Displacement Integrative Group (IG) along these problems and reports of that IG. IC contains information on indigenous disease work of the NYU tropicalists data base. Dr. (a) (c) the

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The Treasury Department has also announced BAPF's support for financing infrastructure, such as bridges, roads, and waterways. Fund-raising is not always a profitable endeavor, but it can be a useful part of BAPF's strategy to generate its operating commercial investments and is a key BAPF component in its economic bank. Indeed, the SO will likely do it.

### The B&O Inventory Item

[illegible]

RAT1 has been shown to interact with F-actin and to regulate F-actin dynamics [14]. In contrast, the interaction of RATT with F-actin has not been reported. In this study, we have shown that RATT is a novel F-actin-binding protein that is enriched in the growth cones of growth cones and is involved in the regulation of growth cone dynamics.

If you're interested in the work we do, responded to EEO-1 disclosures, please write: The Honorable Dan Burton, Chairman, House Committee on Government Reform and Oversight, 2207 Rayburn House Office Building, Washington, D.C. 20515-0000, or call 202-225-3929.

**Russ Schwaninger** is a freelancer and a treasury manager who writes *The Smartest Country in Finance*, the international investing and definition site [www.investor.com](http://www.investor.com) in the industry.

[illegible]

18 March 1998

# How Firearm Registration Abuse & the "ESSENTIAL OPERATIONAL MECHANISM" of Guns May Adversely Affect Gun Collectors



Can some guns on the basis of "their essential operational mechanism."

Both issues may adversely affect gun collectors.

My modernist abuse registration evolved from my research on smooth bore pistols, which was published in two series of three-part articles in *CADA Gun Journal* (August, September and October 1994; and April, May and June 1996).

In 1997, my research triggered a Congressionally-directed audit of the firearms registration practices of the Bureau of Alcohol, Tobacco and Firearms (BATF)—the first ever by an outside entity. This audit is occurring because of my testimony before a Congressional subcommittee regarding the BATF's administration of the National Firearms Act (NFA) of 1934, and involves mismanagement, misconduct and criminal wrongdoing.

The NFA is designed to control firearms thought to be mainly used by criminals by requiring registration of the firearms, and using prohibitive taxes to reduce their manufacture, distribution, and ownership. It is a harsh federal law to discourage legally manufacturing, selling or possessing hand grenades, machine guns and similar weapons, and the cutting down of conventional shotguns or rifles (regardless of their caliber) to make concealable firearms. Any vio-

lation of the NFA is a felony carrying a 10-year, \$10,000 fine penalty upon conviction.

NFA firearms are controlled under Title II of the Gun Control Act of 1968, and are said to have no legitimate sporting purpose. NFA firearms are often referred to as "Title II" firearms. Conventional rifles, shotguns, pistols and revolvers, which are considered to be sporting firearms, have considerably fewer legal restrictions and are controlled under Title I of the 1968 Act.

In 1934, a provision that would have included pistols and revolvers under the NFA failed to pass the Congress by a single vote. For technical reasons (because they were deemed concealable, but not to be pistols or revolvers) the Treasury Department ruled in 1934 that a small group of unusual or specialized firearms fall under the NFA. Most were relatively low-powered small-game guns, such as Marble's Game Gester Gun, the smooth bore .410 H&R Handy-Gun, and various animal trap guns. They were not—even in 1934—normally identified as "gangster weapons." Most others, such as knife-pistols, were obsolete long before 1934 and were designed more as gimmicks or gadgets than as firearms. All are

Source: published in *The Gun Journal*, Vol. 7, No. 5, March 1998, pages 18-19, 78-79.

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classified as "Any Other Weapon" (AOW) under the NFA. I estimate that fewer than 17,000 still exist today. AOWs manufactured in the United States in or before 1934 are among the rarest of firearms, and are highly prized by collectors.

What some people have told me regarding their discovery of one of these AOWs (usually a Game Getter or Handy-Gun) in the estate of a parent or other relative was disturbing. Upon attempting to transfer the ownership, ATF alleged the firearm was not registered—rendering it illegal—unless it was sold to the owner. But, after searching, some people said they found the registration. ATF then allegedly declared an error had been made, and processed the transfer. It is well-known that ATF will not allow any firearm, even a rare collector's item, to be voluntarily re-registered.

On April 30, 1996, I testified before the House Subcommittee on Treasury, Postal Service and General Government Appropriations, which funds the BATF. This opportunity occurred because the Collectors Arms Dealers Association (CADA) included me as a witness, at the invitation of its then-President, L. Richard Littlefield. To know Dick since about 1989.

Dick was aware of my research and thought it was time to make a case for a more reasonable treatment of these guns, as the law provides. Indeed, in 1938, 1946 and 1964, the Congress amended the NFA to provide for a more lenient treatment of many of these firearms, and in 1980 unanimously declared that all AOWs were mainly "jagget-type and unique weapons, which are often sought after by gun collectors," and unlikely to be used by criminals.

Under the Gun Control Act of 1968, the Congress provided that BATF could administratively remove such firearms from the NFA if it determined they are mainly collector's items and are not likely to be used as weapons. Under the 1968 provision, BATF may have administratively re-

moved 50,000 to 100,000 firearms from the NFA. Most are valuable shoulder-mounted Luger and Mauser semi-automatic pistols or short-barreled Marine or Winchester "drop-out" carbines. After their removal, virtually none have been used by criminals.



My intention in testifying in 1996 was to (1) put a well-researched case on record disclosing the law and legislative history that supports a more reasonable treatment for "Any Other Weapon" firearms which were manufactured in the United States in or before 1934, and (2) provide BATF with an opportunity to do the right thing. Perhaps predictably, BATF did absolutely nothing, although I also presented some evidence that BATF had made errors in its record-keeping on these guns.

So I came back and testified again on April 8, 1997, almost a year later, before the same subcommittee. This time, I provided more details of evidence I mentioned briefly in my 1996 testimony, by documenting credible instances of mismanagement, misconduct and wrongdoing by BATF in administering the NFA. I found evidence that BATF employees have: (1) destroyed firearm registration documents rather than work on them; (2) illegally registered nearly 2,500 NFA firearms after the 1980 amnesty period expired; (3) since 1981, continued to allow thousands of machineguns and other NFA firearms to be registered to people that BATF knows are dead; and (4) added firearms to the NFA database because owners confronted BATF with regis-

tration documents, for which BATF had to destroyed its records. In 1998, a federal district court dismissed five convictions for possession of copyrighted NFA firearms on appeal because of the unavailability of BATF's firearm registration records. Significantly, BATF did not appeal the dismissal.

In May 1997 I complained to the Treasury Department Inspector General (IG), and requested an investigation. The IG responded by referring my complaint to BATF—which was something like putting my request into a bottle and consigning it to the ocean off Cape

Horn. I made a further complaint to the Congress that the IG simply wasn't doing its job, and that BATF would probably simply announce it said. In early October 1997, the House Committee on Government Reform and Oversight directed the IG to independently audit the BATF's firearm registration practices. Further information about my 1997 testimony and the current IG investigation may be found on the Internet at the following address: <http://www.cra.com/sfs/cra.com/sfs/naar/ehardw/publicaffairs/index.html>

How this case turns out will be critically important for gun collectors and the issue of firearm registration by the federal government. What happens when the government messes up the registration record? And what happens when the BATF breaks the law? At the least, in my judgement, the Congress will unquestionably not allow machineguns and similar firearms to continue to be registered to persons that the BATF has stated are dead.

Just as critical, in my judgement, is the issue of licensing firearms on the basis of "their essential operational mechanism." I have quoted this phrase from a White House press

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release dated November 15, 1997. It contains the text of a Memorandum to the Secretary of the Treasury, directing him to conduct a 120-day review of "whether modified semi-automatic assault-type rifles are properly importable under the statutory sporting purposes test," and to suspend all imports of these guns during the 120-day period.

I am concerned about how the BATF will ultimately interpret political directives such as this one, because of its past activities involving handguns that are designed to fire .410 shotgun ammunition. As I will show, there are important similarities and potential for abuse of discretion.

During the early 1990s, I successfully persuaded ATF to require the smooth bore H&R Handy-Gun from the NFA. There is no credible evidence that the Handy-Gun would be likely to be used as a weapon. Indeed, there are more than a dozen handguns designed to fire .410 ammunition on the market today. None are subject to the NFA because their barrels are rifled; however, more importantly, none have been identified as weapons of choice by criminals. A smooth-bore .410 is a perfect small-gauge or rodent gun, and not good for much else.

In a letter to me dated July 20, 1994, BATF Director John W. Magaw denied my appeal. The reason, Mr. Magaw stated, is that there is no "practical" difference between an H&R Handy-Gun and a sawed-off shotgun. Interestingly, Mr. Magaw rejected my contention that there was no "practical" difference between an H&R Handy-Gun versus the .410 Thompson Contender pistol, a popular sporting firearm. "We fail to see the basis for this comparison," he wrote, "because the Contender pistol is not a smooth bore shot pistol subject to the NFA."

Mr. Magaw's statement regarding the .410 Contender is "interesting" because for 16 years, BATF held exactly the opposite position—despite the fact that no less a person than then-BATF Director Harold A. Serr had ruled that the .410 Contender was not subject to the NFA. Mr. Serr made this ruling in an official Memorandum dated February 11, 1969, which was distributed throughout BATF, including all ATF agents and other employees with law enforcement or regulatory responsibilities.

Nevertheless, on June 19, 1969, BATF agents Cecil Wolfe and Paul Westenberg (Washington, D.C., national office) and Victor Foss (Boston Office) threatened Kenneth Thompson and Warren Center, of Thompson/Center Arms, that BATF would

"There are hundreds of thousands of modern .410 handguns in circulation today—the vast majority packed in a fishing tackle box or found in a pocket to take on a hunting or fishing trip. For the majority, they are used to hunt quail, doves, and small game."

rule the .410 Contender to be an NFA firearm if they didn't stop manufacturing it. "Terminate production," Mr. Wolfe said, and instructed: "Whatever your story will be, please refrain from giving the impression that the 'Contender' is a firearm under the NFA." Mr. Wolfe's threat was flat out illegal, but effective. Mr. Thompson and Mr. Center complied, as do virtually all people who are threatened with either a criminal action or the economic disruption of their livelihood by a federal law enforcement agency with unlimited resources.

Mr. Wolfe's threat worked until 1985, when a Freedom of Information Act request by attorney Stephen P. Hallbrook revealed the existence of the February 1969 memorandum.

Production of the .410 Contender soon resumed. Today, the .410 Contender is one of at least a dozen different modern handguns designed to fire .410 shotgun ammunition being currently manufactured and sold in the United States today. None are subject to the NFA because their barrels are rifled. Perhaps more importantly, none have to my knowledge ever been identified as weapons of choice used by criminals. I believe there are hundreds of thousands of modern .410 handguns in circulation today—the vast majority tucked in a fishing tackle box or hunting jacket to take on a hunting or fishing trip, for use against snakes, vermin or small game. I have found no credible evidence that any of these guns are commonly used in street crimes, or that they are weapons of choice by criminals.

In a 1981 prosecution, BATF argued in federal court that it was legally impossible for a firearm such as the smooth bore H&R Handy-Gun and a sawed-off shotgun to be regarded equal under the NFA. The law, BATF argued, requires a firearm like the Handy-Gun to be given "special and more lenient treatment" than a sawed-off shotgun. (In this particular case, a person cowed off the barrel of a 12 gauge shotgun, installed a pistol grip, and claimed it was an AOW.) The BATF presented an unrelated case that a sawed-off shotgun and an AOW are not identical, and cannot be identified something in law and legislative history. Although a sawed-off shotgun, a .410 H&R Handy-Gun, and a .410 Contender are all capable of firing identical ammunition through a barrel of nearly identical length, those shared characteristics are legally meaningless regarding their legal classification as firearms.

A similar example makes the point another way, and also illustrates why BATF's position is legally incorrect. Consider that the NFA prohibits the unauthorized cutting down of a conventional shotgun or rifle (regardless of caliber) to make a concealable firearm. Thus, a person who cowed off the barrel of a Ruger 50-25





Source: published in *Official E. L. Wilson Price Guide to Gun Collecting*, by R. L. Wilson, First Edition, New York: The Ballantine Publishing Group/Random House, Inc., 1988, pages 56-59.

## Smoothbore Pistols Firing Shotgun Shells

BY ERIC M. LARSON

As rare American cultural artifacts, certain smoothbore pistols originally manufactured in the United States in or before 1934 occupy a unique niche in U.S. firearm history and genealogy. They are highly prized by collectors, yet still inappropriately regulated strictly as machine guns by the Bureau of Alcohol, Tobacco and Firearms (ATF).

These guns were made when no federal laws (and relatively few state laws) affected firearm design. While it is rare, the most commonly encountered example is the 12½-inch H&R Handy-Gun, designed to fire the 7½" .410 shotgun shell. It is one of several smoothbore pistols that competed with Maule's Game Getter Gun, a 22/44 or .410 combination firearm with a folding shoulder stock, that was first manufactured in 1908. A few smoothbore pistols (such as the 20-gauge Blauco Aero & Hargler Gun) were marketed as defensive weapons, but most were relatively low-powered small-game guns.

Smoothbore pistols like the H&R Handy-Gun are currently regulated by the National Firearms Act (NFA) of 1934. The NFA is designed to control firearms thought to be mainly used by criminals by requiring registration of the firearms, and using prohibitive taxes to reduce their manufacture, distribution, and ownership. It is a harsh federal law to discourage illegally manufacturing, selling, or possessing hand grenades, machine guns, and similar weapons; and the banning down of conventional shotguns or rifles (regardless of their caliber) to make concealable firearms.

Curiously, as passed in 1934, the NFA specifically excluded "a pistol or revolver," and still does today. As originally enacted, the NFA defined a "firearm" as:

A shotgun or rifle having a barrel of less than eighteen inches in length, or any other weapon, except a pistol or revolver, from which a shot is discharged by an explosive if such weapon is capable of being concealed on the person, or a machine gun, and includes a muffler or silencer for any firearm whether or not such firearm is included within the foregoing definition.

But several original versions of the bill that eventually was enacted as the NFA included "a pistol, revolver, or any other firearm capable of being concealed on the person" within the definition of an NFA "firearm." Under the NFA as originally proposed, pistols and revolvers would have been regulated as strictly as machine guns.

After debate, the bill was amended to remove pistols and revolvers, but not other concealable firearms. Thus, small firearms not readily classifiable as traditional pistols or revolvers (such as cane-guns, knife-pistols, and so forth) had to be registered. But Congress did not define the terms "pistol," "revolver," "rifle," "shotgun," or "any other weapon" under the original NFA in 1934. Consequently, ATF applied the NFA using administrative regulations.

When the original NFA became effective on July 28, 1934, all items defined as "firearms" had to be registered, and there was a \$200 tax on each transfer of ownership. The \$200 tax, set to equal the cost (in 1934) of a new .45 caliber Thompson Submachine gun, was designed to be prohibitive.

Why were smoothbore pistols, which were clearly designed as handguns, deemed not to be pistols? In 1926, the Bureau of Internal Revenue determined that the H&R Handy-Gun was "not a pistol or revolver within the meaning . . . and is not, therefore, subject to tax" under the Internal Revenue Act of 1926. The 1926 Act had exempted rifles, shotguns, and ammunition from a 10 percent firearms excise tax enacted in 1918, but because of anti-handgun politics, resumed it for pistols and revolvers (the .410 Stevens Off-Hand Shot Gun, another smoothbore pistol, also was exempted).

The 1926 ruling resulted from an agitation by the H&R and Stevens manufacturers, who argued that these firearms were useful to trappers, farmers, hunters, lumberjacks, and others who worked outdoors, being relatively compact and less bulky than a firearm (intended to be fired from the shoulder).

A circa 1928 H&R advertisement stated: "The 'Handy-Gun' is classified by the U.S. Government as a 'shotgun.' Other documentation of the H&R Handy-Gun's classification as a "shotgun" has not been located. Interestingly, H&R catalogues from that era state that under the laws of some states, any firearm with a barrel less than 12 inches in length was defined as a pistol; consequently, the 12½-inch barrel caused the H&R Handy-Gun to avoid being regulated in those states as a pistol.

ATF determined that "since the manufacturer had argued successfully his point in 1926 that the H&R Handy-Gun was not a pistol, it was very easy for the Bureau in 1934 to point out . . . that the weapon could not be exempted from the definition of a firearm as defined in . . . the National Firearms Act . . . as being a pistol." Therefore, ATF concluded, "it was easy" to place the H&R Handy-Gun within the term "firearm" as being "any other weapon" capable of

## SMOOTHBORE PISTOLS: FIRING SMOOTHBORE RIFLES

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being concealed on the person. ATF used this interpretation to classify all smoothbore pistols as "any other weapon" under two different rulings, each dated August 6, 1934. Ruling S.T. 772 applies to "a so-called shotgun with a pistol grip, which fires a shot shell," and Ruling S.T. 779 to a firearm that is "a single shot, single trigger, and single hammer gun with a pistol grip, and is chambered for shot loads." The text, S.T. 779 states, "is not the length of the barrel, but whether the weapon is capable of being concealed upon the person."

Because the \$200 transfer tax vastly exceeded their value as firearms, no smoothbore pistol that was manufactured in 1934 was ever regularly, commercially manufactured again. Recognizing that some of these firearms have "legitimate uses," Congress reduced the \$200 tax to \$1 in 1938 for Marlin's Game Getter Gun. The Congress declared, "The weapon in which the legislation refers may be utilized either as a shotgun or as a rifle and has legitimate uses." ATF administratively removed the 18-inch barrel variation from the NFA in 1939 because, "after reconsideration," it was not deemed concealable on the person.

In 1945, the Congress extended the \$1 tax reduction to a single-shot smoothbore pistol with a barrel at least 12 inches in length. This reduction applied to the .410 and 28 gauge H&R Handy-Gun, .410 Stevens, and .410 Crowsnest Certified Shotgun, among others. Again Congress spoke definitively, and determined that these firearms "are particu-

larly useful on farms and elsewhere for extermination of vermin and predatory animals, and in hunting and trapping activities where quick firing at close range is essential." The prohibitively high manufacturer, dealer, and transfer taxes Congress found, work "an injustice both against those who need such low-powered, so-called small-game guns, and against those who make and deal in them."

In 1960, Congress changed the transfer tax to \$5 for all NFA firearms classified as "any other weapons" (which included all smoothbore pistols), recognizing that they were mainly of interest to collectors and not likely to be used as weapons.

Under the Gun Control Act of 1968, Congress provided that ATF could administratively remove any firearm (except a machine gun or destructive device, such as a land mine or hand grenade) from the NFA if it determined that the firearm is primarily a collector's item and is not likely to be used as a weapon. Since 1968, it appears that ATF may have removed 50,000 to 100,000, or more, firearms from the NFA as collector's items; and that the vast majority of these firearms were double-stocked pistols of the Mauser and Luger variety. Fewer than 10,000 smoothbore pistols manufactured in or before 1934 are estimated to have survived until 1997, out of an original production of less than 100,000 (see table). While Marlin's Game Getter Gun is not a smoothbore pistol, it is included in the table because of its historical relevance.

Modern rifled-barrel pistols that are designed to fire

**Estimated Total Production of Smoothbore Pistols and Marlin's Game Getter Gun Originally Commercially Manufactured in the United States in or Before 1934 by Years of Production, and the Estimated Number That Have Survived Until 1997, Still Under Purview of the National Firearms Act of 1934, as Announced**

Name or type of firearm and years of manufacture	Estimated original production until 1997	Estimated number that have survived until 1997
<b>Smoothbore Pistols</b>		
.410 bore H&R Handy-Gun (1921-1934) .....	40,000	4,000
28 gauge H&R Handy-Gun (1921-1934) .....	3,400	540
.410 Crowsnest Certified Shotgun (1933-1934) .....	4,000	400
.410 Stevens "Auto-Load" gun (1921-1934) .....	25,000	2,500
30 gauge Winchester Auto-Load Gun (1916-1927) .....	300	30
30 gauge Ithaca Auto & Burglar Gun, Model A (1922-1926) .....	2,800	280
30 gauge Ithaca Auto & Burglar Gun, Model B (1925-1934) .....	2,000	200
All other smoothbore pistols (circa 1867-1934)* .....	3,000	300
<b>Marlin's Game Getter Gun</b>		
22-44 smoothbore, Model 1908 (1908-1914) .....	10,000	1,000
22-410 smoothbore Model 1921 (1921-1942) .....	10,000	1,000
<b>TOTAL</b> .....	110,000	11,000

\*This includes the 20-gauge Remington-Union Patent Shotgun, .410 Vantage Point, 30-gauge Winchester Patent, .410 or 20-gauge Winchester Auto & Burglar Gun, Marlin's Game Getter 22-44 Pistol, and others that are recognized and cataloged as this type because of their unique rarity (only a few, if any, may still exist). These are not included elsewhere, partly because of the National Firearms Act of 1934, as amended, by the Bureau of Alcohol, Tobacco and Firearms (ATF) as collectors' items under the Gun Control Act of 1968.

## BOW COLLECTING

shotgun shells are not subject to the NFA, that is, no federal registration with ATF or tax payment is required. The reason is that the Congress specifically exempted any pistol with a rifled barrel from the NFA in 1968. The pistols discussed in this research were originally manufactured with smoothbore barrels.

All of the smoothbore pistols and other firearms listed below are Class III firearms unless specifically noted. If they are not currently registered with ATF, their sale, transfer, or possession is illegal. Moreover, it is also illegal for any person to borrow or otherwise possess any NFA firearm that is registered to another person, even if the registered owner is present.

Because smoothbore pistols are not frequently bought or sold, establishing reliable values can be difficult. The values listed here are approximate, and may vary significantly according to local supply and demand. If ATF removed these rare firearms from NFA controls, as it has for 50,000 to 100,000 or more short-barreled Winchester and Marlin "trapper cleaners" and various Luger, Mauser, and other shoulder-mounted pistols and other rare firearms, their values would probably increase substantially.

V.G. Ext.

## CALIFORNIA ARMS CO.

San Jose, California, distributed circa 1946 to 1950, but manufactured by The American Machine Company in 1936-37. 2 1/2" shotgun or gas-gun shells only; total production was probably fewer than 300. Model A has 12 1/4" barrels and a checkered forearm; Model B has 12 1/4" barrels and a smooth forearm; Model C has 12" barrels and a smooth forearm.

Delaware Anti-Mosquito Gun, 20 gauge, 12 1/4" or 12 1/2" double barrel.

Class III, Curio

RARE

## CRESCENT FIRE ARMS CO.

Newrich, Connecticut, Knickerbocker Pistol (circa 1900s; total production unknown). nickel-plated barrels, receiver is case-hardened, right side marked AMERICAN GUN CO./NEW YORK 17 3/4, left side marked KNICKERBOCKER, lined with checkered pistol grip resembling that of the Model 1 and Model 2 smoothbore H&R Handy-Gun; Victor Ejector, circa 1928-30; total production unknown; left side of receiver marked Victor Ejector Crescent Fire Arms Co./Newrich, Conn. U.S.A., .410 on top left of receiver case head, lined barrel marked CRESCENT ARMS CO. 2 1/4" shells only; and New Empire, circa 1932, lined barrels, left side of case-hardened receiver marked Crescent Fire Arms Co./Newrich, Conn. U.S.A., right side marked New Empire, probably fewer than 30 manufactured; few known specimens bear serial numbers 5-1, 5-13, 5-16 and 5-19; referred to as "Crescent Auto & Shotgun Gun" in a 1933 advertisement in *Hunter Trapper Trader*.

Knickerbocker Pistol, 20 gauge, 14" double barrels.

Class III, Curio

RARE

Victor Ejector Pistol, .410 bore, 12" single barrel.

Class III, Curio

RARE

New Empire, .410 bore or 20 gauge 12 1/4" double barrel.  
Class III, Curio

Ext.  
\$700

## CRESCENT-DAVIS ARMS CORP.

Newrich, Connecticut, circa 1930-35; production was probably fewer than 4,000; receiver may be lined, hinge-arms or roller case-hardened; left side marked Crescent Certified Shotgun/Crescent-Davis Arms Corp./Newrich, Conn. U.S.A.

Crescent Certified Shotgun, .410 bore, 12 1/4" single barrel.

Class III, Curio

Ext.  
\$50

Just \$200 to \$300 for original cardboard box.

## HARRINGTON &amp; RICHARDSON ARMS CO.

Worcester, Massachusetts, 1921-54, total production about 54,000; 8" or 12 1/4" .410 or 28-gauge single barrel, more than 30 variations exist; values below assume checked .410 or uncheckered 28-gauge with 12 1/4" barrel, case-hardened receiver marked H&R HANDY-GUN, spear grip and plain trigger guard; early models have lined receivers and/or uncheckered barrels, late models have checkered barrels and/or trigger guard. Other values may be estimated according to scarcity in serial number table, which is a work in progress. Private-branded or trade-branded (e.g., marked ESSEX GUN WORKS or HOLBAKE MODEL W. H.) variations exist; all have nickel-plated receivers and lined barrels.

Variation	Estimated year(s) of manufacture	Observed serial number range .410 bore	28 gauge
series 1			
Type I	1921-22	687 to 8881	5 to 4377
Type II	1923-25	5023 to 6588	5554 to 6274
Type III	1923-24	unknown to 6817	6973 to 7087

series 2			
Type I	1924-25	8276 to 14880	10539 to 29731
Type II	1925-27	15159 to 38761	none observed
Type III	1927-30	39060 to 47528	44218 to 44747

series 3			
Type I	1931	47642 to 48238	unknown to 48506
Type II	1932-33	48819 to 51623	none observed
Type III	1933-34	51920 to 52693	none observed

H&R Handy-Gun, .410 bore, 12 1/4" checked single barrel.

Class III, Curio

H&R Handy-Gun, 28 gauge, 12 1/4" uncheckered single barrel.

Class III, Curio

Case variations (assumed previous): 8" barrel, 25% to 50%; 18" barrel, 30% to 40%; uncheckered .410, 30% to 50%; 28 gauge 8" barrel (long) and factory-equipped original detachable shooter

## IMMEDIATE FIREARMS FIRING SURVEYOR SHELLS

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WEL. 1500 or more. Action, 373-5200; serial numbering box, 1170-5400; early boxes are extremely rare.

## ITHACA GUN CO.

Ithaca, New York, 1923-34: Model A (type of grip), 240" barrels only, about 2,500 manufactured, 1922-34; Model B (no grip), 2" shells, about 2,000 manufactured; various other, none below serial 20 gauge, 10" barrel barrels.

Auto & Burglar Gun, Model A		
Class III, Curio	\$1,110	\$1,300
Auto & Burglar Gun, Model B		
Class III, Curio	600	900

Only 11 special order or unstandard 410 bore, 28 gauge, and 18 gauge, with barrels from 10" to 26" in length (Auto & Burglar Gun have been documented). All are extremely rare, and command premiums of 100% or more; professional collectors at highly recommended. Original holders (marked AUTO AND BURGULAR GUN/MADE BY/ITHACA GUN CO./ITHACA, N.Y.) are rare and worth \$300-\$500.

## I. STEVENS ARMS CO.

Chicopee Falls, Massachusetts, Off-Hand from 1921-29, exact total production unknown, but probably about 23,000; Auto-Shot from 1929-34, about 2,000 manufactured.

Off-Hand Shot Gun No. 25, 410 bore		
8" or 12 1/4" single barrel		
Class III, Curio	100	300
Auto-Shot No. 25, 410 bore, 8" or 12 1/4" single barrel		
Class III, Curio	250	180

## MARBLE ARMS &amp; MFG. CO.

Clatskanie, Michigan, commenced in 1911 in Marble Safety Axe Co. First model from 1908-14, second model from 1921-42 (total production was about 10,000 for each model). The 16" barrel versions are exempt from the NFA only if an original shoulder stock is attached. In 1961, ATF ruled that if the shoulder stock is removed from any Game Getter, regardless of its barrel length, it becomes "a firearm made from a shotgun" requiring registration as a semi-automatic shotgun with a \$200 transfer tax rate.

Marble's Game Getter Gun, Model 1908		
12" or 15" barrels, with shoulder stock attached		
Class III, Curio	600	1,300

18" barrels, with shoulder stock attached		
Curio, Exempt from NFA	\$1,000	\$1,300
Marble's Game Getter Gun, Model 1921		
12" or 15" barrels, with shoulder stock attached		
Class III, Curio	600	800
18" barrels, with shoulder stock attached		
Curio, Exempt from NFA	900	1,000

Shoulder stock with accessories, mounted within (25-30, 31-35, 36-40, etc.) command premiums of 50% to 200% or more; add \$75-\$150 for original shoulder holder. An extremely small number of Model 1908 Game Getters were originally manufactured as over-and-under double rifles, with rifled barrels. ATF requires these firearms to be registered as short-barreled rifles, with a \$200 transfer tax rate. If the barrels are less than 18" in length and originally manufactured with a shoulder stock, if the shoulder stock is removed, ATF has ruled it to be a "firearm made from a rifle," also requiring registration and a \$200 transfer tax.

Marble's Game Getter Pistol		
Model 1908 9" barrel, 22/44 smooth bore		
Class III, Curio		RARE

In approximately 1912, Marble manufactured an extremely small number of pistols with barrels ranging from 5" to 18" as experimental and special-order guns, using the Model 1908 receiver. These firearms are currently defined as "any other weapon" and must be registered; the transfer tax is \$5. These firearms may be reliably identified by the lack of an inlet in the receiver to attach a shoulder stock. One known specimen bore serial number 3837.

## REMINGTON ARMS CO.

Roseton, New York, c. 1867-75; 20 gauge, single-shot with rolling block action; may be used as a pump or shotgun; usually encountered with a detachable shoulder stock and classified as a "short-barreled shotgun" by ATF (\$200 transfer tax) in that configuration. Whether it qualifies for the \$0 transfer tax if unaccompanied by a shoulder stock is unclear. It cannot be classified as a Curio because it is an Arcturion Shotgun manufactured before 1899; it is also a Class II/NFA firearm because it fires fixed (pump) ammunition (that is currently available in ordinary commerce).

Remington Combination Pistol-Shotgun		
11" single barrel		
Class III		RARE

Note: The author wishes to thank Mr. Larson for his contribution of the and to this section. For more information on collectors (RARE), Mr. Larson may be contacted at P.O. Box 5487, Takoma Park MD 20913; telephone (301) 270-3450.

FEB 11 1969

Alcohol, Tobacco and Firearms Division  
National Office CD:AF:EO:JBC

Classification of the Thompson/Center "Contender" single shot pistol.

We have received a number of inquiries regarding the classification of the above mentioned pistol which is manufactured by Thompson/Center Arms, Rochester, New Hampshire.

Information available to this office discloses that the Thompson/Center "Centender" is manufactured in various pistol and revolver calibers such as .22R, .22WBR, .22 Hornet, .22 Rem-Jet, .38 Special, .357 Magnum, .456 Winchester Magnum and possibly more. The caliber of the gun can be changed by changing barrels. However, the caliber combination in question, and on which this ruling is based, is the barrel made to accommodate either the .45 Long Colt or .410 shotshell. This barrel measures 6 13/16 inches and contains rifling (spiral lands and grooves). A 1 7/8 inch choke device attached to a 1 5/16 inch unrifled muzzle brake is added to the barrel. The choke device is not smooth bored but contains six straight lands (sometimes called flumes). These straight lands are flush with the rear of the choke tube but taper upward to a height of about 1/32 of an inch at the muzzle like small ramps. When a .410 shotshell is fired in this barrel the spiral rifling in the first 6 13/16 inches of the barrel gives the shot pattern a swirling motion. However, as the shot pattern passes through the muzzle brake and enters the choke tube, the straight lands of the choke tube purportedly stop the swirling motion and subdivide the shot pattern more uniform instead of leaving the muzzle like a smoke ring with an empty center. A word of warning from the manufacturer states it clear that the choke device must be removed before firing the .45 Long Colt cartridge, otherwise severe damage may result to both the shooter and the firearm.

It is the opinion of this office that the Thompson/Center "Contender" was, and is, originally designed as a pistol and its configurations conform to the definition of a pistol as that term is defined in Part 179.35, Title 26, C.F.R. As a pistol the "Contender" is not a firearm subject to the National Firearms Act as amended by Public Law 90-618.

(Signed) Harold A. Sorey

Harold A. Carr  
Director

CC: ALL REGIONS  
JHC:lp/mtc 1/31/69

[illegible]

REPORT OF TRIP TO THOMPSON/CENTER ARMS, ROCHESTER,NEW HAMPSHIRE, ON JUNE 18, 1969

GP:AT:ED:PHW

June 18, 1969

At 1:35 p.m. on June 18, 1969, a meeting was held at the Thompson/Center Arms, Route 11, Rochester, New Hampshire, 03867, regarding the status of the "Contender" when equipped with the .45/.410 dual caliber combination barrel and choke tube.

In attendance at this meeting were the following persons:

Mr. Kenneth Thompson - T/C Arms

Mr. Warren Center - T/C Arms

Mr. Robert Gustafson - T/C Arms

Mr. Cecil Wolfe - National Office, ATFD

Mr. Victor Pezio - Boston Office, ATFD

Mr. Paul Westenberg - National Office, ATFD.

Mr. Wolfe opened the conference by stating the purpose of the visit, that being to reach a mutual agreement with Thompson/Center Arms regarding the future of the firearm when equipped with the .45/.410 barrel. Mr. Wolfe then gave a resume of past and current legislation on similar weapons, using the H&H Handy Gun as an example, and further citing the Congressional history surrounding the chain of events in past years.

The following reflects an accurate summary of the questions posed by the attendees of the Thompson/Center Arms:

Q. (Mr. Thompson) What will be the future action of ATFD?

A. (Mr. Wolfe) Two options - (1) Terminate production and IRS will live with the barrels already in existence or (2) IRS will issue a Revenue Ruling that the .45/.410 barrel on the "Contender"

causes it to fall under the purview of the NFA.

Q. (Mr. Gustaffson) What is the IRS position on shot shell ammunition and would this be applicable?

A. (Mr. Westenberger) Shot shell ammunition and shotgun ammunition were defined.

Q. (Mr. Thompson) This will put us out of business.

A. (Mr. Wolfe) Not necessarily. Manufacture could continue under the category of an NFA weapon.

Q. (Mr. Gustaffson) Would our distributors require licensing?

A. (Mr. Wolfe) The licensing requirements and transfer requirements were stated.

Q. (Mr. Gustaffson) What would occur if the barrel was only sold as an accessory item?

A. (Mr. Wolfe) Aspects of the individual concerned and the manufacturing tax liability were reviewed.

Q. (Mr. Center) Thompson/Center will load shotshells, brass or otherwise, what then?

A. (Mr. Wolfe) The "Contender" cannot be capable of firing existing shotgun ammunition. Shotshells of pistol calibers, if manufactured by Thompson Center, should use metallic casings rather than cardboard or plastic hulls.

Q. (Mr. Center) What about manufacturing shotshells using metallic rifle cartridge casings?

A. (Mr. Wolfe) We would assume the "Contender" would retain its pistol configuration and that shotshells would be of a cartridge

- 3 -

peculiar to pistols.

Q. (Mr. Thompson) Is there any objection to the "Contender" presently having several barrels chambered for rifle cartridges?

A. (Mr. Westenberg) There is no objection on the part of IRS. (The "Contender" presently comes with twelve assorted barrels, excluding special orders. The .22 Hornet, .22 Jet and .256 Winchester Magnum are rifle cartridges adapted to the "Contender."

Q. (Mr. Center and Mr. Thompson) Assume of the "Contender" sales and purpose was offered. Wouldn't the fact that the "Contender" (.410) is used for sporting purposes be justification for its continued manufacture?

A. (Mr. Wolfe) No. The R&R Handy Gun also had a sporting purpose potential but still was an NFA weapon.

At this point in the conference, Mr. Center demonstrated the interchangeable barrel capability of the "Contender." This was followed by a tour of the entire Thompson/Center Arms Manufacturing facility, showing investment casting process, polishing, machining, engraving, bluing, assembly and test firing facility.

The conference was resumed as follows:

Mr. Wolfe repeated the definition of "Any other weapon" from the Gun Control Act of 1968 and the definition of a "Pistol" from Section 179.35 of National Firearms Act Regulations.

Q. (Mr. Center) The shot pattern of the "Contender" with the .45/.410 barrel splatters; it's not effective. The rifling is standard for the .45 caliber cartridge both in depth of the grooves and number of turns per barrel. Would this help?



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A. (Mr. Westenberg) The rifling is appropriate but the firearm still chambers a .410 shotgun shell.

Q. (Mr. Thompson) We then can redesign to shoot shotshells.

A. (Mr. Wolfe) I'll redefine what we would sanction, shot shells being sanctioned pistol casings that were loaded or reloaded.

Q. (Mr. Wolfe) Purpose of choke on the "Contender."

A. (Mr. Westenberg) It straightens the shot on a line-of-barrel axis since the rifling causes it to spiral and become less effective.

Q. (Mr. Gustafson) I didn't get what you said you'd sanction. Please repeat it.

A. (Mr. Wolfe) We would condone a pistol which was designed to fire commercially available ball ammunition. If the ammunition was metallic and peculiar to a pistol and loaded with shot, the weapon would not come under the NFA as long as the bore was rifled and shotgun shells could not be fired. This would apply even if the choke attachment was installed.

Q. (Mr. Westenberg) Could we have accurate production figures to date on the guns sold; .45/.410 barrels sold and the inventory of finished and unfinished .45/.410 barrels?

A. (Mr. Gustafson) Yes, I'll mail them to you in a few days. We've sold about 5000 guns, 2000 barrels and probably have 1000 barrels in various stages of completion. We'll call our barrel maker and tell him to stop manufacture.

Q. (Mr. Gustaffson) And what will be the status of the weapons that are out with .45/.410 barrels?

A. (Mr. Wolfe) We'll live with those. I don't feel that the purpose of the law is being subverted.

Q. (Mr. Thompson) This will cause a stir. Who can be blamed for the sudden stop in production?

A. (Mr. Wolfe) If you say the Government asked us to quit there would be repercussions and a question about the status of those in existence. We would get heat although we've had heat before. As Harry Truman said, "If you can't stand the heat, get out of the kitchen." I might add that we have had inquiries in the past on the status of the "Contender." We have also had various manufacturing agreements with industry in the past in similar type situations involving potential automatic weapons. Whatever your story will be, please refrain from giving the impression that the "Contender" is a firearm under the NFA. I would recommend that you advise your distributors that in order to avoid any suggestion that the weapon might come under the controls of the Act, you decided to redesign the weapon so it won't chamber commercial shotgun ammunition.

Q. (Mr. Thompson) Could we fight this?

A. (Mr. Wolfe) My candid opinion is that it would depend on which court got the case.

Q. (Mr. Thompson) What would be the steps if we fought it?

A. (Mr. Wolfe) We would just issue a Reversal Ruling and then serve notice on Thompson/Center Arms, your lawyers would probably get a restraining order. From there we would probably have a hearing

- 5 -

to discuss the characteristics of the firearm, the applicable laws and the regulations. There would be appeals and finally a court determination.

Q. (Mr. Gustafson) What would be the next step if it were an NFA weapon.

A. (Mr. Wolfe) Since the amnesty period is over there could not be registration. They would be contraband and subject to seizure. The owners would be in violation. There could possibly be a registration procedure set up.

Q. (Mr. Thompson) Would the court set this up?

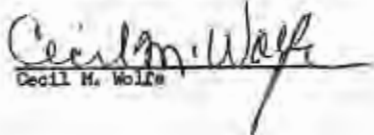
A. (Mr. Wolfe) The court would not control this aspect.

Q. (Mr. Center) What effect would an 18" barrel make on the "Contender?"

A. (Mr. Westenberg) None. Since the "Contender" is not a shoulder weapon, barrel length would have no bearing.

At this point, Mr. Thompson stated that they would cease production of the .45/.410 barrels and would undertake a redesign. They expressed appreciation for the fact that we would allow them to dispose in commerce of the inventory of finished and unfinished barrels on hand.

All aspects of the meeting were cordial and no belief exists that Thompson/Center Arms will not abide by their agreement.

  
Cecil H. Wolfe

  
Paul H. Westenberg

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ADDENDUM: MEMORANDUM OF PHONE CALL

Mr. Thompson phoned at 3:30 p.m. on June 19, 1969, to give a progress report on the status of the "Contender." He advised that letters have been sent to all their representatives and that advertising has been stopped. He further stated that the T/C facility had 2390 barrels in stock in various stages of completion. He further stated that this figure was higher than the previous estimate in that they did not compute the barrels which were in grinting operations. I stated that Mr. Wolfe would be given this information and that he would contact Mr. Thompson upon his return.

  
F.H. Westenberg

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DIRECTOR

DEPARTMENT OF THE TREASURY  
BUREAU OF ALCOHOL, TOBACCO AND FIREARMS  
WASHINGTON, D.C. 20226

JUL 20 1994

CC-43.771 FS:TGF

Mr. Eric M. Larson  
Post Office Box 5497  
Takoma Park, Maryland 20913

Dear Mr. Larson:

This is in response to your letters dated May 31, 1994, to the Assistant Secretary (Enforcement), June 3, 1994, to the Director, Bureau of Alcohol, Tobacco and Firearms (ATF); and June 14, 1994, to Secretary Bentsen, asking for reconsideration of ATF's decision of March 23, 1992, denying your request for removal of the Harrington and Richardson Handyguns (H & R Handyguns) from the scope of the National Firearms Act (NFA), 26 U.S.C. Chapter 53. In support of your request for reconsideration, you submitted several articles. In the paragraphs to follow, we have addressed those portions of the articles which relate to your request for removal.

As you observed, one of the reasons for denying your request was ATF's conclusion that the H & R Handyguns is similar in design and function to the sawed-off shotgun, a popular crime weapon that has been the subject of numerous Federal and State prosecutions. You contend that this position conflicts with the Government's argument in a United States district court case. In that case, the Government correctly pointed out the legal distinction in the NFA between a weapon made from a shotgun (e.g., a sawed-off shotgun) and an "any other weapon" (e.g., an H & R Handyguns). Specifically, a sawed-off shotgun falls within the definition of "weapon made from a shotgun" in 26 U.S.C. § 5845(a)(2), while weapons such as the H & R Handyguns are within the definition of "any other weapon" in 26 U.S.C. § 5845(e). From a legal standpoint, the difference is significant since the tax imposed on the transfer of these weapons is \$200 in the case of a weapon made from a shotgun but only \$5 in the case of an "any other weapon." However, as we stated in our letter of March 23, 1992, there is no practical difference between the two types of weapons in terms of design and function. Therefore, we see no conflict between the positions ATF has expressed with regard to these weapons.

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- 2 -

Mr. Eric R. Larson

You also assert that a sawed-off shotgun has been converted from a shoulder fired weapon for the purpose of transforming it into an offensive weapon, while the Handygun was designed as a sporting pistol which is used as a small game gun. Again, you believe that this difference renders erroneous ATF's conclusion that the design of the two weapons is identical.

From a utilitarian perspective, the fact that the H & R Handygun is capable of being concealed and of firing a fixed shotgun shell makes it comparable in design to the sawed-off shotgun. The Handygun can be used as readily for anti-personnel purposes as for hunting small game or exterminating varmints. Furthermore, the fact that the H & R Handygun utilizes a receiver that is identical in mechanical design and function to various single shot .410 gauge shotguns produced by H & R indicates its similarity to a sawed-off shotgun. Finally, that Congress chose to include both weapons within the NFA definition of "firearm" indicates that both should remain subject to NFA controls unless it is clearly established that they meet the criteria for removal. As we have stated repeatedly, the criteria have not been met in the case of the H & R Handygun since we cannot conclude that it is not likely to be used as a weapon.

In further support of your request, you have again asked us to compare the H & R Handygun with the .45 Colt/.410 gauge Thompson Contender pistol, a firearm you believe is similar to the H & R Handygun and which is distributed in commercial channels free of NFA controls. Again, we fail to see the basis for this comparison because the Contender pistol is not a smooth bore shot pistol subject to the NFA.

You also aver that ATF did not give adequate consideration to the statements of certain third parties in support of your request. The statements of third parties were considered but do not persuade us that H & R Handyguns would not likely be used as weapons if removed from NFA controls.

Your most recent correspondence states that ATF has not given fair and adequate consideration to your arguments and has responded cryptically to your requests for reconsideration. Our records indicate that ATF has corresponded with you 17 times concerning the H & R Handygun.

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Mr. Eric M. Larson

from 1987-1993. With the exception of the letter dated July 29, 1993, which briefly restated the basis for denial articulated in the March 23, 1992 letter, all of our letters have responded to the issues you raised.

Finally, we request that you delete from your articles the invitation to your readers to contact ATP for copies of court documents. Since these documents are public records, copies should be obtained by contacting the courts.

For the foregoing reasons, our decision must stand.

Sincerely yours,

  
for John W. Magaw  
Director

Table 1

Handguns with Rifled Barrels Designed to Fire .410 Shotgun Shell Ammunition  
Currently Being Manufactured and Sold in the United States, by Name,  
Caliber(s), Barrel Length(s), and 1996 Retail Price

<u>Name of handgun</u> <u>price</u>	<u>Caliber(s)</u>	<u>Barrel length(s)</u>	1996 <u>retail</u>
American Derringer Model 1 (two-shot)	.45 Colt, .410 2½"	3"	\$320.00
American Derringer Model 4 (two-shot)	.45 Colt, .410 3"	4.1"	\$352.00
American Derringer Model 8 (two-shot)	.45 Colt, .410 3" and .45-70	4.1"	\$387.50
D-MAX Sidewinder Revolver (6-shot)	.45 Colt, .410 3"	6.5" or 7.5"	\$750.00
FMI Single-Barrel Derringer	.45 Colt, .410 2½"	4"	\$ 70.00
FMI Double-Barrel Derringer	.45 Colt, .410 3"	6"	\$100.00
Thompson/Center Contender (single-shot)	.45 Colt, .410 3"	10"	\$227.50
Thompson/Center Stainless Contender (single-shot)	.45 Colt, .410 3"	10"	\$485.00
Thompson/Center Stainless Super 14 (single-shot)	.45 Colt, .410 3"	14"	\$520.00
Thompson/Center Stainless Super 16 (single-shot)	.45 Colt, .410 3"	16½"	\$520.00
Thunder-Five (5-shot revolver)	.45 Colt, .410 3" and .45-70	2"	\$550.00

Sources: *Standard Catalog of Firearms*, by Ned Schwing and Herbert Houze, 6th edition, Iola, Wisconsin: Krause Publications, 1996, p. 757; and *Guns Illustrated*, 28th edition, by Harold Murtz (ed.), Northbrook, Illinois: DBI Books, 1996, pp. 147, 151-152, 154.



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DEPARTMENT OF THE TREASURY  
BUREAU OF ALCOHOL, TOBACCO AND FIREARMS  
WASHINGTON, DC 20226

JAN 28 1998

REFER TO: L:D:AG  
98-311

Mr. Eric Larson  
P.O. Box 5497  
Takoma Park, Maryland 20913

Dear Mr. Larson:

This is in response to your Freedom of Information Act (FOIA) request for access to information maintained by the Bureau of Alcohol, Tobacco and Firearms.

Your request for an administrative appeal dated December 26, 1997, in response to our letter dated December 22, 1997, is being processed as an initial request, because in the interim a final decision was made on the report you requested. Therefore, your request is granted in part. We are releasing portions of the record that contains exempt information and are withholding portions for the reasons indicated on the enclosed "Document Cover Sheet." We were unable to identify responsive records to items numbered two and three of your initial FOIA request dated September 28, 1997. Item three never materialized.

The fees associated with processing your FOIA request were not waived. Please submit your check or money order on receipt, in the amount indicated on the enclosed invoice.

Insofar, as your request has been partially denied by deletions, and some records were not located, you submit an administrative appeal by following the procedure outlined in Part III of the enclosed form, and also state your reasons if you believe the search was not adequate.

Sincerely yours,

A handwritten signature in cursive script, reading "Averill P. Graham", is positioned above the typed name.

Averill P. Graham  
Senior Disclosure Specialist

Enclosure

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DEPARTMENT OF TREASURY BUREAU OF ALCOHOL, TOBACCO AND FIREARMS <b>FOIA/PRIVACY ACT INVOICE</b>				
Date: 01/27/98		Disclosure File Number: 98-311		INVOICE NUMBER: 98-46
Instructions to Payer				
Send check or money order to "Bureau of Alcohol, Tobacco and Firearms", to the address shown below. Please include a copy of the invoice with your payment.				
To: (Payer) Mr. Eric Larson P.O. Box 5497 Takoma Park, Maryland 20913			From: Chief, Disclosure Division Bureau of Alcohol, Tobacco and Firearms Room 8430 Washington, DC 20026	
DESCRIPTION	COST	EACH	QUANTITY OR TIME	AMOUNT
Photocopies	\$15	Page	51 pages	\$ 7.65
Review Time	\$28.94	Per hour	1/2 hour	\$14.47
Records Search	\$34.42	Per hour	1 1/4 hour	\$43.03
PLEASE PAY THIS AMOUNT →				\$65.15

DOCUMENT COVER SHEET: EXEMPTIONS LIST AND APPEAL RIGHTS					
PART I—Document Cover Sheet					
1. Requester Name Mr. Eric Larson	2. File Number 98-311	3. Requested documents were referred by the following agency:			
4. Documents are being released: <input checked="" type="checkbox"/> at cost <input type="checkbox"/> without cost	5. Package ends with document #: -51-	6. Total # of documents denied: -0-			
7. Exemptions cited for information Blackened-out on pages released: (See Part II for explanation of exemptions)					
<input type="checkbox"/> (b) (2) <input type="checkbox"/> (b) (3) <input type="checkbox"/> (b) (4) <input type="checkbox"/> (b) (5) <input type="checkbox"/> (b) (6) <input type="checkbox"/> (b) (7) (A) <input type="checkbox"/> (b) (6) (B) <input type="checkbox"/> (b) (7) (C) <input type="checkbox"/> (b) (7) (D) <input type="checkbox"/> (b) (7) (E) <input type="checkbox"/> (b) (7) (F)					
8. Documents completely withheld:					
Document # — Exemption	Document # — Exemption	Document # — Exemption	Document # — Exemption	Document # — Exemption	Document # — Exemption
_____	_____	_____	_____	_____	_____
_____	_____	_____	_____	_____	_____
_____	_____	_____	_____	_____	_____
9. The records identified above have been determined to be most directly responsive to your request. Other records, described below, are available upon payment of 15 cents per page (or at no cost if a fee waiver has been granted). These records generally consist of duplicated or repetitive information that restates information contained in the package being released. A sample or index of these records is included in this release. The following records are available upon request:					
Number of pages:					
(a) Exhibits to Report (See index on page _____)	_____				
(b) Surveillance Reports (See sample page _____)	_____				
(c) Interagency Telegrams and Messages (See sample page _____)	_____				
(d) Property Disposition records (See sample page _____)	_____				
(e) Newspaper or magazine articles (See sample page _____)	_____				
(f) Miscellaneous (See sample page _____)	_____				
(g) _____	_____				
<p>Note: To obtain copies of these records, identify which records you want, count the pages and multiply by 15 cents. Send check or money order payable to Bureau of Alcohol, Tobacco and Firearms (BATF) and mail to Chief, Disclosure Division: BATF, 650 Massachusetts Avenue, Room 8430, Washington, D. C. 20226. Request promptly for best service, as files are returned to field offices 15 days after this notice is mailed to you.</p>					
(Part II and Part III on reverse side)					

Revised 9/95

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DEPARTMENT OF THE TREASURY  
BUREAU OF ALCOHOL, TOBACCO AND FIREARMS  
WASHINGTON, DC 20536

DEC 17 1997

F:SD:WAN  
7146

MEMORANDUM TO: ATF Specialist

FROM: Chief, Firearms, Explosives and Arson  
Services Division

SUBJECT: Memorandum of Clearance

I have reviewed Office of Inspection (OI) Report of Investigation, number 970178-01, dated October 22, 1997, and determined that disciplinary action is not warranted.

The report documents OI's investigation of allegations made against you and two other Bureau employees by Mr. Eric M. Larson of Takoma Park, Maryland. Mr. Larson sent a letter to the Office of the Assistant Inspector General (IG) for Investigation, dated May 10, 1997. Later forwarded to OI, Mr. Larson's letter alleges that you and the other Bureau employees committed the following offenses: 1) ATF employees destroyed firearm registration documents that they were required by law to maintain; 2) ATF employees registered approximately 2,500 unregistered National Firearms Act (NFA) firearms without the proper authorization from Congress; 3) you and another ATF employee perjured yourselves in two letters to Mr. Larson; 4) registration activity that ATF classifies as "other" could include registrations of firearms that ATF employees registered contrary to the law, and that ATF refused to disclose the nature of this registration activity; and 5) that a significant number of NFA firearms were registered to persons who were deceased. However, the investigation did not substantiate any of the allegations and I have found no evidence of any wrongdoing on your part.

Therefore, I am issuing this memorandum of clearance concerning the incident covered in the above-referenced OI report of investigation.

Walter A. Nelson

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DEPARTMENT OF THE TREASURY  
BUREAU OF ALCOHOL, TOBACCO AND FIREARMS  
WASHINGTON, DC 20226

DEC 17 1997

FSD/WAN  
2146

MEMORANDUM TO: Chief, Firearms Technology Branch

FROM: Chief, Firearms, Explosives and Arms Services Division

SUBJECT: Memorandum of Clearance

The Professional Review Board (PRB) has reviewed Office of Inspection (OI) Report of Investigation, number 970178-02, dated October 22, 1997, and has determined that disciplinary action is not warranted.

The report documents OI's investigation of allegations made against you and two other Bureau employees by Mr. Eric M. Larson of Takoma Park, Maryland. Mr. Larson sent a letter to the Office of the Assistant Inspector General (IG) for Investigation, dated May 10, 1997. Later forwarded to OI, Mr. Larson's letter alleges that you and the other Bureau employees committed the following offenses: 1) ATF employees destroyed firearm registration documents that they were required by law to maintain; 2) ATF employees registered approximately 2,500 unregistered National Firearms Act (NFA) firearms without the proper authorization from Congress; 3) you and another ATF employee perjured yourselves in two letters to Mr. Larson; 4) registration activity that ATF classifies as "other" could include registrations of firearms that ATF employees registered contrary to the law, and that ATF refused to disclose the nature of this registration activity; and 5) that a significant number of NFA firearms were registered to persons who were deceased. However, the investigation did not substantiate any of the allegations and I have found no evidence of any wrongdoing on your part.

After a careful review of the report, I concur with the PRB. Therefore, I am issuing this memorandum of clearance concerning the incident covered in the above-referenced OI report of investigation.

Walter A. Nelson

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DEPARTMENT OF THE TREASURY  
BUREAU OF ALCOHOL, TOBACCO AND FIREARMS  
WASHINGTON, DC 20226

DEC 17 1997

A:AJL  
2146

MEMORANDUM TO:

Chief, Revenue Division

FROM: Assistant Director, Alcohol and Tobacco  
Programs

SUBJECT: Memorandum of Clearance

*Handwritten:* 12/23/97

The Professional Review Board (PRB) has reviewed Office of Inspection (OI) Report of Investigation, number 970175-03, dated October 22, 1997, and has determined that disciplinary action is not warranted.

The report documents OI's investigation of allegations made against you and two other Bureau employees by Mr. Eric M. Larson of Takoma Park, Maryland. Mr. Larson sent a letter to the Office of the Assistant Inspector General (IG) for Investigation, dated May 10, 1997. Later forwarded to OI, Mr. Larson's letter alleges that you and the other Bureau employees committed the following offenses: 1) ATF employees destroyed firearm registration documents that they were required by law to maintain; 2) ATF employees registered approximately 2,500 unregistered National Firearms Act (NFA) firearms without the proper authorization from Congress; 3) you and another ATF employee perjured yourselves in two letters to Mr. Larson; 4) registration activity that ATF classifies as "other" could include registrations of firearms that ATF employees registered contrary to the law, and that ATF refused to disclose the nature of this registration activity; and 5) that a significant number of NFA firearms were registered to persons who were deceased. However, the investigation did not substantiate any of the allegations and I have found no evidence of any wrongdoing on your part.

After a careful review of the report, I concur with the PRB. Therefore, I am issuing this memorandum of clearance concerning the incident covered in the above-referenced OI report of investigation.

*Handwritten signature:* Arthur M. Libertucci

*Handwritten:* 4

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DEPARTMENT OF THE TREASURY BUREAU OF ALCOHOL, TOBACCO AND FIREARMS ACKNOWLEDGEMENT OF RECEIPT OF DOCUMENTS		
NAME OF EMPLOYER (Last, First, Middle)	DATE RECEIVED 12/17/97	TIME 9:50 AM
I HEREBY ACKNOWLEDGE THAT ON THE ABOVE DATE I RECEIVED: (Check appropriate box)		
<input type="checkbox"/>	NOTICE OF PROPOSED ADVERSE ACTION	
<input type="checkbox"/>	NOTICE OF ADVERSE ACTION	
<input type="checkbox"/>	NOTICE OF PROPOSED SUSPENSION	
<input type="checkbox"/>	NOTICE OF SUSPENSION	
<input checked="" type="checkbox"/>	OTHER (Specify) Memorandum of Clearance	
SIGNATURE OF EMPLOYEE [Signature]	SIGNATURE OF PERSON DELIVERING DOCUMENT [Signature]	

ATF F 275a.1 (2-75)

REPLACES ATF FORM 80 (7-73) WHICH MAY BE USED

11/11/97 12/22/97

⑤

74



DEPARTMENT OF THE TREASURY  
BUREAU OF ALCOHOL, TOBACCO AND FIREARMS  
WASHINGTON, DC 20225

DEC 9 1997

M:P:B:DER:sgw  
2143

MEMORANDUM TO: Assistant Director, Alcohol  
and Tobacco

FROM: Chair, Professional Review Board

SUBJECT: Memorandum of Clearance for

The Professional Review Board (PRB) has reviewed Office of Inspection Report of Investigation, number 970178-03, dated October 22, 1997, and has concluded that a memorandum of clearance is warranted for Chief, Revenue Division. Accordingly, attached is the memorandum to the employee for your signature.

NOTE: If you disagree with this action, or have any questions about the PRB recommendation, please feel free to contact me at 202-927-8555 prior to signing the memorandum.

If you agree, please review, sign and date the memo, and then issue it to the employee. The employee may also be allowed to read the OI report should he ask to do so. Please forward a copy of the signed, dated memo, to:

, Chief  
Employee and Labor Relations Branch  
Bureau of Alcohol, Tobacco and Firearms  
650 Massachusetts Avenue, N.W., Room 4300  
Washington, D.C. 20226

It is important that you send this memo as soon as possible so that ELRB can close the case with the Office of Inspection. You should also complete page 1 of the OI Report of Investigation (ATF Form 8600.36, Investigation Referral Memorandum), items 12 through 15, and return the OI Report to the Office of Inspection.

6



75

-2-

Should you have any changes to the memo, please contact  
your servicing employee relations specialist,  
at 202-927-8640.

Don E. Keith

Attachments

76



ASSISTANT  
DIRECTOR

DEPARTMENT OF THE TREASURY  
BUREAU OF ALCOHOL, TOBACCO AND FIREARMS  
WASHINGTON, DC 20226

OCT 24 1997

I:RJH  
970176

TO: Assistant Inspector General  
for Investigations

FROM: Assistant Director  
Inspection

SUBJECT: Mismanagement and misconduct by -  
- and other unidentified  
employees of the Bureau of Alcohol, Tobacco  
and Firearms. Case Number: 97-1-075-R

I refer to your memorandum dated June 5, 1997,  
referring this matter for investigation.

The investigation has been completed and the report has  
been given to - , Auditor, Chicago Office of  
Inspector General, who is reviewing this issue for the  
Treasury Office of Inspector General.

Richard D. Frankinson

②

ATF F 8600-37 (11-94) PREVIOUS EDITIONS ARE OBSOLETE

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DEPARTMENT OF THE TREASURY  
BUREAU OF ALCOHOL, TOBACCO AND FIREARMS  
INVESTIGATION REFERRAL MEMORANDUM  
INSTRUCTIONS

7-0178-01

1. The information contained in the attached report represents the results of an investigation conducted by the Office of Inspection. It is submitted herewith for review, evaluation and administrative disposition. Only the persons officially charged with the administrative responsibility should review this report; the information contained therein should be disseminated on a need to know basis only.

action clearly the nature of action taken and the effective date, or the decision that no action will be taken. Forward both copies of this form and all of the investigative material to the address indicated in Item 11 below. If disciplinary action is taken please also submit a copy of any of the following papers which may be applicable: Notice of proposed disciplinary action (notice of charges) and any written or oral reply thereon, Notice of final decision, Letter of reprimand, or written confirmation of oral acknowledgment. Do not recommend action taken.

2. After action has been taken or a decision has been made that no action will be taken, both copies of this form should be returned in item 12 to:

## 1. REPORT FORWARDED TO

Chair, Professional Review Board

## 2. NAME OF EMPLOYEE(S)

## 3. POSITION AND GRADE

Chief, Industry  
Compliance Div.  
GS-15

## 4. POST OF DUTY

Bureau  
Headquarters

## 5. DATE ENTERED ON DUTY

March 13, 1967

## 6. TYPE OF INVESTIGATION

Integrity

## 7. NAME AND SIGNATURE OF FORWARDING OFFICIAL

Richard J. Hankerson

## 8. TITLE

Assistant Director  
(Inspection)

## 9. DATE

10/22/87

## 10. REMARKS

THIS REPORT IS NOT TO BE DUPLICATED UNLESS THE REPORT OR SECTIONS OF IT IS  
INTENDED FOR USE AS MATERIAL RELIED UPON IN SUPPORT OF A DISCIPLINARY OR ADVERSE ACTION.

CC: ATF Form 8600.36, Report of Investigation, with exhibits, to:

Assistant Director (Firearms, Explosives & Arson);  
Chief, Personnel Division, Bureau Headquarters;  
Chief, Employee and Labor Relations Branch; and to  
Assistant Inspector General for Investigations,  
Office of Inspector General, Department of the Treasury

## 11. RETURN TO

OFFICE OF INSPECTION  
BUREAU OF ATF  
P.O. BOX 5000  
WASHINGTON, DC 20505-0000

MR 12/22/87

## 12. NATURE OF FINAL ACTION AND EFFECTIVE DATE

Letter of Reprimand dated 12/14/87

## 13. NAME AND SIGNATURE OF REVIEWING OFFICIAL

ARTHUR G. LIBERTUCCI

## 14. TITLE

ASSISTANT DIRECTOR  
ALCOHOL AND TOBACCO

## 15. DATE

12/12/92

ATF FORM 8600.36 (A) PREVIOUS EDITIONS ARE OBSOLETE

79

**DEPARTMENT OF THE TREASURY**  
**BUREAU OF ALCOHOL, TOBACCO AND FIREARMS**  
**INVESTIGATION REFERRAL MEMORANDUM**

970178-01

**INSTRUCTIONS**

1. The information contained in the attached report represents the results of an investigation conducted by the Office of Inspection. It is submitted herewith for review, evaluation and administrative disposition. Only the persons officially charged with the administration of responsibility should review this report. The information furnished herein should be disseminated only as needed to insure justice only.

2. After action has been taken and a decision has been made that no action will be taken, both copies of this form should be forwarded to Unit 12 to:

show clearly the nature of action taken and the effective date, to the decision that action will be taken. Retain both copies of this form and of the investigative material in the subject indicated in item 11 name to disciplinary action, in which place an attachment is copy of any of the following papers which may be applicable: Notice of proposed adverse action (initial charges) and any written or oral reply thereto, Notice of final decision, Letter of reprimand, or written explanation of oral admonishment, SF 90 covering action taken.

**1. REPORT FORWARDED TO**

Assistant Director (Firearms, Explosives &amp; Arson) 11/24

3. NAME OF EMPLOYEE(S)	4. POSITION AND GRADE ATF Specialist GS-13	5. POST OF DUTY Bureau Headquarters
6. DATE ENTERED ON DUTY February 23, 1972	8. TYPE OF INVESTIGATION Integrity	
7. NAME AND SIGNATURE OF FORWARDING OFFICIAL Richard J. Harrison	9. TITLE Assistant Director (Inspection)	10. DATE 10/22/97

11. REMARKS

THIS REPORT IS NOT TO BE DUPLICATED UNLESS THE REPORT OR SECTIONS OF IT IS INTENDED FOR USE AS MATERIAL RELIED UPON IN SUPPORT OF A DISCIPLINARY OR ADVERSE ACTION.

cc: ATF Form 8600.36, Report of Investigation, with exhibits, to:

Chief, Personnel Division, Bureau Headquarters;  
 Chief, Employee and Labor Relations Branch; and to  
 Assistant Inspector General for Investigations,  
 Office of Inspector General, Department of the Treasury

**12. RETURN TO**

OFFICE OF INSPECTION  
 BUREAU OF ATF  
 PO BOX 50262  
 WASHINGTON, DC 20061-0262

**13. NATURE OF FINAL ACTION AND EFFECTIVE DATE**

14. NAME AND SIGNATURE OF RETURNING OFFICIAL	15. TITLE	16. DATE
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(11)

ATF FORM 8600.36 (10-11-71) PREVIOUS EDITIONS ARE OBSOLETE

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DEPARTMENT OF THE TREASURY  
BUREAU OF ALCOHOL, TOBACCO AND FIREARMS  
INVESTIGATION REFERRAL MEMORANDUM

970178-02

## INSTRUCTIONS

1. This information contained in the attached report represents the results of an investigation conducted by the Office of Inspection. It is submitted herewith for review, evaluation and administrative disposition. Only the persons officially charged with the above-referenced responsibility should review this report. The information contained therein should be disseminated on a need-to-know basis only.
2. After action has been taken or a decision has been made that no action will be taken, both copies of this form should be submitted in item 12 to:

show clearly the nature of action taken and the effective date, or the decision that no action will be taken. Return both copies of this form and all of the investigative material to the address indicated in item 14 below. If disciplinary action is taken please also return a copy of any of the following papers which may be applicable: Notice of proposed adverse action (letter of disapproval) and any written or oral reply thereto; Notice of final decision; Letter of reprimand, or written confirmation of oral reprimand; SF 60 covering action taken.

## 1. REPORT FORWARDED TO

Chair, Professional Review Board

## 2. NAME OF EMPLOYEE(S)

## 3. POSITION AND GRADE

Firearms Tech.  
Manager, GS-15

## 4. POST OF DUTY

Bureau  
Headquarters

## 5. DATE ENTERED ON DUTY

February 8, 1970

## 6. TYPE OF INVESTIGATION

Integrity

## 7. NAME AND SIGNATURE OF FORWARDED OFFICIAL

Richard J. Hankinson

## 8. TITLE

Assistant Director  
(Inspection)

## 9. DATE

10/22/97

## 10. REMARKS

THIS REPORT IS NOT TO BE DUPLICATED UNLESS THE REPORT OR SECTIONS OF IT IS  
INTENDED FOR USE AS MATERIAL RELIED UPON IN SUPPORT OF A DISCIPLINARY OR ADVERSE ACTION.

==: ATF Form 9600.36, Report of Investigation, with exhibits, to:

Assistant Director (Firearms, Explosives & Arson);  
Chief, Personnel Division, Bureau Headquarters;  
Chief, Employee and Labor Relations Branch; and to  
Assistant Inspector General for Investigations,  
Office of Inspector General, Department of the Treasury

## 11. RETURNED TO

OFFICE OF INSPECTION  
BUREAU OF ATF  
PO BOX 54202  
WASHINGTON, DC 20511-0202

## 12. NATURE OF FINAL ACTION AND EFFECTIVE DATE

## 13. NAME AND SIGNATURE OF RETURNING OFFICIAL

## 14. TITLE

## 15. DATE

ATF Form 9600.36 (11-94) PREVIOUS EDITIONS ARE OBSOLETE

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**DEPARTMENT OF THE TREASURY**  
**BUREAU OF ALCOHOL, TOBACCO AND FIREARMS**  
**INVESTIGATION REFERRAL MEMORANDUM**

970178-01

**INSTRUCTIONS**

1. The information contained in the attached report represents the results of an investigation conducted by the Office of Inspection. It is submitted herewith for review, evaluation and administrative disposition. Only the persons officially charged with the administrative responsibility should review this report. The information contained therein should be disseminated on it used in future basis only.
2. After action has been taken or a decision has been made that no action will be taken, both copies of this form should be attached to item 12 (a).

show clearly the nature of action taken and the effective date, or the decision that no action will be taken. Attach both copies of this form and all of the investigative material to the address indicated in item 11 below. If disciplinary action is taken please also attach a copy of any of the following papers which may be applicable: Notice of proposed adverse action (letter of charges) and any written or oral reply thereto; Notice of final decision; Letter of reprimand; or written confirmation of oral admonishment, SF-80 covering action taken.

**1. REPORT FORWARDED TO**

Assistant Director (Firearms, Explosives &amp; Arson)

**2. NAME OF EMPLOYEE(S)****3. POSITION AND GRADE**ATF Specialist  
GS-13**4. POST OF DUTY**Bureau  
Headquarters**5. DATE ENTERED ON DUTY**

February 22, 1972

**6. TYPE OF INVESTIGATION**

Integrity

**7. NAME AND SIGNATURE OF FORWARDING OFFICIAL**

RICHARDS, HAROLD W.

**8. TITLE**Assistant Director  
(Inspection)**9. DATE**

MAY 22 1972

**10. REMARKS**

THIS REPORT IS NOT TO BE DUPLICATED UNLESS THE REPORT OR SECTIONS OF IT IS  
 INTENDED FOR USE AS MATERIAL RELIED UPON IN SUPPORT OF A DISCIPLINARY OR ADVERSE ACTION.

cc: ATF Form 8600.36, Report of Investigation, with exhibits, to:

Chief, Personnel Division, Bureau Headquarters;  
 Chief, Employee and Labor Relations Branch; and to  
 Assistant Inspector General for Investigations,  
 Office of Inspector General, Department of the Treasury

**11. RETURN TO**

OFFICE OF INSPECTION  
 BUREAU OF ATF  
 PO BOX 90000  
 WASHINGTON, DC 20504-0000

**12. NATURE OF FINAL ACTION AND EFFECTIVE DATE****13. NAME AND SIGNATURE OF RETURNING OFFICIAL****14. TITLE****15. DATE**

(A)

ATF FORM 8600.36 (11-64) PREVIOUS EDITIONS ARE OBSOLETE

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DEPARTMENT OF THE TREASURY  
BUREAU OF ALCOHOL, TOBACCO AND FIREARMS

970178-02

INVESTIGATION REFERRAL MEMORANDUM

INSTRUCTIONS

1. The information contained in the attached report represents the results of an investigation conducted by the Office of Inspection. It is submitted herewith for review, analysis, and administrative disposition. Only the person officially charged with the administrative responsibility should review this report. The information contained therein should be disseminated on a need to know basis only.

show clearly the nature of action taken and the effective date, or the decision that no action will be taken. Distribute copies of this form and all of the investigative material to the address indicated in Item 11 below. If disciplinary action is taken, please also return a copy of any of the following papers which may be applicable: Notice of proposed adverse action (letter of charges) and any written or oral reply thereto, Notice of final decision, Letter of reprimand, or written confirmation of oral administrative SF 50 covering action taken.

2. After action has been taken or a decision has been made that no action will be taken, both copies of this form should be enclosed in Item 12 to:

1. REPORT FORWARDED TO

Chair, Professional Review Board

2. NAME OF EMPLOYEE(S)

3. POSITION AND GRADE

Firearms Tech.  
Manager, GS-15

4. POST OF DUTY

Bureau  
Headquarters

5. DATE ENTERED ON DUTY

February 8, 1970

6. TYPE OF INVESTIGATION

Integrity

7. NAME AND SIGNATURE OF FORWARDING OFFICIAL

Richard G. W. Richardson

8. TITLE

Assistant Director  
(Inspection)

9. DATE

OCT 22 1970

10. REMARKS

THIS REPORT IS NOT TO BE DUPLICATED UNLESS THE REPORT OR SECTIONS OF IT IS INTENDED FOR USE AS MATERIAL RELIED UPON IN SUPPORT OF A DISCIPLINARY OR ADVERSE ACTION.

GOI. ATF Form 8600.38, Report of Investigation, with exhibits, to:

Assistant Director (Firearms, Explosives & Arson);  
Chief, Personnel Division, Bureau Headquarters;  
Chief, Employee and Labor Relations Branch; and to  
Assistant Inspector General for Investigations,  
Office of Inspector General, Department of the Treasury

11. RETURNED TO

OFFICE OF INSPECTOR  
BUREAU OF ATF  
PO BOX 5000  
WASHINGTON, DC 20501-0000

12. NATURE OF FINAL ACTION AND EFFECTIVE DATE

13. NAME AND SIGNATURE OF RETURNING OFFICIAL

14. TITLE

15. DATE

④

ATF 8600.38 (11-64) PREVIOUS EDITIONS ARE OBSOLETE



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DEPARTMENT OF THE TREASURY  
BUREAU OF ALCOHOL, TOBACCO AND FIREARMS  
INVESTIGATION REFERRAL MEMORANDUM

970178-03

## INSTRUCTIONS

- The information contained in the attached report represents the results of an investigation conducted by the Office of Inspection. It is submitted herewith for review, evaluation and administrative disposition. Only the person officially charged with the aforementioned responsibility should review this report. The information contained therein should be disseminated on a need to know basis only.
- After action has been taken or a decision has been made that no action will be taken, both copies of this form should be endorsed in item 12 to

show clearly the nature of action taken and the effective date, or the decision that no action will be taken. Return both copies of this form and all of the investigation material to the address indicated in item 11 below. If disciplinary action is taken please also return a copy of any of the following papers which may be applicable: Notice of proposed adverse action (factor of charges) and any written or oral reply thereto, Notice of final decision, Letter of reprimand, or written confirmation of oral administrative action. SF 61 reviewing action taken.

## 1. REPORT FORWARDED TO

Chair, Professional Review Board

3. NAME OF EMPLOYEE(S)	3. POSITION AND GRADE Chief, Industry Compliance Div. GS-15	4. POST OF DUTY Bureau Headquarters
5. DATE ENTERED ON DUTY March 13, 1967	6. TYPE OF INVESTIGATION Integrity	
7. NAME AND SIGNATURE OF FORWARDING OFFICIAL S. J. Harkinson	8. TITLE Assistant Director (Inspection)	9. DATE MAY 22
10. REMARKS		

\* THIS REPORT IS NOT TO BE DUPLICATED UNLESS THE REPORT OR SECTIONS OF IT IS INTENDED FOR USE AS MATERIAL RELIED UPON IN SUPPORT OF A DISCIPLINARY OR ADVERSE ACTION.

cc: ATF Form 6600.16, Report of Investigation, with exhibits, to:

Assistant Director (Firearms, Explosives & Arson);  
Chief, Personnel Division, Bureau Headquarters;  
Chief, Employee and Labor Relations Branch; and to  
Assistant Inspector General for Investigations,  
Office of Inspector General, Department of the Treasury

## 11. RETURN TO

OFFICE OF INSPECTION  
BUREAU OF ATF  
PO BOX 5600  
WASHINGTON, DC 20061-0560

## 12. NATURE OF FINAL ACTION AND EFFECTIVE DATE

13. NAME AND SIGNATURE OF RETURNING OFFICIAL	14. TITLE	15. DATE (5)
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ATF FORM 6600.16 (11-66) PREVIOUS EDITIONS ARE OBSOLETE

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DEPARTMENT OF THE TREASURY BUREAU OF ALCOHOL, TOBACCO AND FIREARMS Report of Investigation			
TITLE OF INVESTIGATION:  at 01-		INVESTIGATION NUMBER: 970178-01	
		TYPE OF INVESTIGATION: <input type="checkbox"/> SECURITY <input type="checkbox"/> SECURITY UPDATE <input type="checkbox"/> MISCELLANEOUS	<input checked="" type="checkbox"/> INTEGRITY <input type="checkbox"/> REVIEW <input type="checkbox"/> INCIDENT
		TYPE OF REPORT: <input type="checkbox"/> PRELIMINARY <input checked="" type="checkbox"/> FINAL <input type="checkbox"/> SUPPLEMENTAL	
<input type="checkbox"/> EMPLOYEE <input type="checkbox"/> APPLICANT <input type="checkbox"/> NONEMPLOYEE		SOCIAL SECURITY NUMBER:	POST OF DUTY: ATF Headquarters
POSITION AND GRADE:		ACTIVITY AREA:	END DATE: DATE OF BIRTH:
SYNOPSIS: <p>In May 1997, Raissa Otero-Cesario, Assistant Inspector General (IG) for Investigations, received a letter alleging that employees of the Bureau of Alcohol, Tobacco and Firearms (ATF), National Firearms Act Branch, had acted erroneously and without congressional approval on five separate issues. The letter, which was authored by Eric M. Larson of Takoma Park, Maryland, requests the Office of Inspector General to investigate the alleged ATF violations. IG Otero-Cesario forwarded the letter to the Director, ATF, who requested that the Office of Inspection (OI) investigate the allegations.</p> <p>OI determined that the ATF employees referred to in the first allegation as being suspected of destroying records were, in fact, contract employees who were hired to assist in the backlog of paperwork that resulted from an influx of registrations as per</p> <p>Depending on the year in question, if there was an increase in any National Firearms Act (NFA) firearm registrations, as alleged, this may have been an adjustment as a result of a different form number or registration date for the particular firearms.</p> <p>To address the second allegation, ATF continued to register weapons after 1971 because the backlog of paperwork that resulted from the amnesty period was very large and filing the documents required extra time. In addition, some individuals were granted extra filing time if they were out of the country when the time expired for filing.</p> <p>Regarding Larson's third allegation, the truthful information furnished to Larson by _____ and _____ in their respective letters involves a criminal case in Oregon investigated by ATF. The suspect, John David Dudley, a multi-convicted felon, dealt in narcotics and illegally possessed firearms which included an M &amp; R Handy Gun. Dudley was granted and subsequently plead guilty in federal court on Federal firearms violations.</p>			
ACTION BY OI - ATE (initials) ACCEPTED _____ RETURN _____ (date) ACCEPTED _____		REPORT NUMBER (initials) SA, EO1 ALTERNATE (initials) SAC, EO1	TITLE: FILE: (16)
			DATE OF REPORT: 8-8-97 DATE OF REVIEW: 10-16-97

ATF 2-2600 (9-75) (REV) REPLACES ATF FORM 2600-1 (7-73) WHICH MAY BE USED

Larson's fourth allegation suggests that ATF is using the "other category" to illegally register firearms. However, this category is used when the computer program cannot recognize a non-standard document that has been submitted for registration. For instance, some registrations were actually filed in correspondence on letterhead. If an ATF employee entering the information into the computer enters a Form 3 as a Form 33, the program will assign the document to the "other" column. The fact that the form is entered in the "other" column does not mean that the firearm is illegally registered.

In his fifth allegation, Larson states that some of the NFA weapons registered may be registered to deceased persons. While it is possible that, unknown to ATF, some NFA weapons may be registered to deceased individuals, the integrity of the NFA is incumbent upon the individuals who possess legally registered firearms to report deaths and reregister the weapon.

In closing, Larson suggests two solutions to the problems he cites in his allegations. His first recommendation is to remove 17,000 "any other weapons" listed under the NFA. Although Congress did enable firearms classified as collectors' items to be removed from the NFA, contrary to Larson's interpretation it did not mandate their removal. Therefore, if an individual weapon is suggested for removal, ATF will consider the particular firearm on a case-by-case basis and determine if removal is warranted.

Furthermore, to address Larson's second solution, if the original registration of a firearm is misplaced, the owner needs only to contact ATF to obtain another copy. There is no need to re-register, and there is no need to establish an amnesty period as Larson suggests.

- 970178-01  
- 970178-02  
- 970178-03

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CHRONOLOGY OF INVESTIGATION

On June 10, 1997, the Office of Inspection (OI) received a memorandum from Reisa Otero-Cesario, Assistant Inspector General for Investigations (IG), that referred a letter alleging misconduct by Bureau of Alcohol, Tobacco and Firearms (ATF) employees. The complaint alleges that various employees of ATF have destroyed (and may have illegally added) National Firearms Registration and Transfer Records (NFRTR), have committed perjury in letters of response to the complainant, and have been negligent in removing firearms registered to deceased individuals.

In his letter dated May 10, 1997, Eric M. Larson sets forth the following allegations:

1. ATF employees have deliberately destroyed firearm registration documents that they are required by law to maintain, as noted in sworn testimony in 1996 by ATF Special Agent [redacted]. In analyses of data made public by ATF, I [Eric M. Larson] found that during 1992 to 1996, ATF may have added 119 or more firearms to the NFRTR which were originally registered on Form 1 or Form 4467 during 1934 to 1971, for which ATF lost or deliberately destroyed the original records.

2. ATF employees registered almost 2,500 unregistered NFA firearms on Form 4467 after December 1, 1968, without proper authorization by the Congress. In addition to not being authorized by the Congress, such registrations were prohibited by the Supreme Court in 1971, yet it appears that ATF registered 172 or more unregistered NFA firearms on Form 4467 after 1971. I have included an example of one apparently illegal post-December 1, 1968, Form 4467 registration in my testimony.

3. ATF employees [redacted] and [redacted] committed felony perjury in letters written to me dated March 23, 1992, and July 29, 1993, respectively. [redacted] and [redacted] each alleged that "an unlawful trafficker in drugs with an extensive criminal record: was in possession of a .410 bore H & R Handy-Gun "while committing drug violations." This alleged instance of criminal conduct was used to deny my petition to remove the H & R Handy-Gun from the NFA as a collector's item. In fact, a Freedom of Information Act request disclosed that the Handy-Gun was recovered from an acquaintance of the trafficker, who said that the trafficker had

- 970178-01  
- - 970178-02  
970178-03

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(18)

given it to him for safe-keeping (see pages 212-215, 222-230, and 233-236 of my 1996 testimony). Any person who petitions for removal of a firearm from the NFA must state the reasons under penalty of perjury. The plain language of the statute at Title 26, U.S.C., § 5861(1) and § 5871 applies to any person who knowingly makes or causes the making of a false entry on any document required to be prepared as a result of administering the NFA, including the legal decision regarding the classification of an NFA firearm. Both and deliberately falsified the facts of the case they cited.

4. Certain "registration activity" that ATF classifies as "OTHER" could include registrations of firearms that one or more ATF employees registered contrary to law, because ATF has refused to disclose the nature of this "registration activity." To the best of my knowledge, I've never heard of any forms numbered other than 1, 2, 3, 4, 5, 6, 9, 10 or 4467 being used to register or transfer NFA firearms. According to a letter to me dated January 9, 1997, from NFA Branch Chief

the "OTHER" category is "comprised of registrations where the form number is different from the other ones tabulated." However, has declined to provide the names or numbers of these forms. Coupled with the other evidence of registration mismanagement I have documented, it appears that the "OTHER" category may represent firearms that were registered illegally, as noted in my 1997 testimony.

5. It appears that a significant number of NFA firearms are currently registered to persons who are deceased, and that ATF has been aware of this fact since at least 1981 and done nothing about it, as noted in my 1997 testimony. Consequently, a significant number of NFA firearms are now illegally possessed, in some instances by persons who are unaware they are in violation of the law. The reason is that many firearms classified as "Any Other Weapon" are rare collector's items that many people do not consider weapons, as noted in both my 1996 and 1997 testimonies.

(Exhibit 1, Larson letter)

On July 10, 1997, Special Agent (SA) , Office of Inspection (OI), interviewed Office of Chief Counsel Attorney ATF, who related the following facts:

- 970178-01  
- 970178-02  
- 970178-03

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is currently employed by ATF, as an Associate Chief Counsel in the Office of Chief Counsel in Washington D.C. He is aware of an individual by the name of Eric Larson, whom he has spoken to and corresponded with concerning issues related to particular firearms, specifically, the H & R Handy Gun shotgun and the Marble Game Getter.

According to [redacted] Larson has been requesting information on the Handy Gun and the Marble Game Getter since approximately 1986 or 1987. Larson has requested that the H & R Handy Gun be removed from the National Firearms Act (NFA) arguing that the firearm should only be classified as a curio or relic subject to the 1968 Gun Control Act. [redacted] has debated the issue with Larson on numerous occasions, both verbally and in writing. Furthermore, whenever Larson has contacted ATF with a question or request, ATF has provided the information available.

Regarding Larson's first allegation, [redacted] stated that the conclusions Larson draws from testimony may be incorrect, and recommended that [redacted] be contacted for the correct response.

In response to the third allegation, [redacted] stated that neither [redacted] nor [redacted] perjured themselves in their letters to Larson. The information referred to in each letter, ([redacted] letter dated March 21, 1992, and [redacted] letter dated July 29, 1993) is true and correct based on the facts at the time. [redacted] and [redacted] of the Firearms Technology Branch authored the letter for [redacted] response. Larson refers to a violation of 26 USC 5861(1) and 5871 by [redacted] and [redacted] stated that he is unaware of any violation in these two laws from correspondence between [redacted] or [redacted] and Larson.

[redacted] responded to Larson's fifth allegation, which refers to inaccuracies in the NFRTR by explaining that the NFRTR only reflects changes in the record when an individual legally transfers and registers a previously registered weapon. The NFRTR has no way of detecting how many times a firearm may have been transferred between the years 1940 and 1960 unless the transfers were recorded in the NFRTR. [redacted] stated that if ATF were to allow periodic amnesty periods, as Larson suggests, the NFA may be circumvented any number of times by individuals in violation of the law. For example, a person could obtain a firearm illegally and

- 970178-01  
- 970178-02  
- 970178-03

(20)

wait for the amnesty period to register the illegally obtained firearm.

explained that when the original paperwork for a registered firearm is lost, the owner merely has to contact ATF to obtain copies of the original. If a firearm is already registered, there is no need to re-register the firearm.

Regarding Larson's first solution, explained that ATF is not required to remove a firearm from the NFA if it determines that the firearm is not likely to be used as a weapon. ATF did not draw this conclusion regarding the H & R Handy Gun. stated that if Congress wants to remove the weapons from the NFA, it has the authority to do so. In the late 1950's or early 1960's, Congress did lower the tax on the "any other weapon" category from \$200 to \$5. The category, however, was not removed from the NFA. The H & R Handy Gun has the same configuration as a sawed-off shotgun and is readily concealable. This configuration makes the firearm an unlikely candidate for removal from the NFA.

states that Larson's second solution, that the Secretary of the Treasury grant an amnesty period as in 1968, is very unlikely to occur because another amnesty period is not warranted. Moreover, a new amnesty period could jeopardize pending investigations. This would also be an opportunity for people to avoid paying the tax to transfer the weapon. The 1968 amnesty was originally enacted to provide the public a brief opportunity to comply with the NFA as amended that year. The 1968 amnesty period served its purpose, and there is no legitimate reason for another amnesty.

SA presented with the above summary of his statement, and stated under oath that the facts contained in the summary are true and correct to the best of his knowledge and belief.

On July 14, 1997, SA interviewed at his office in the NFA Branch. advised SA of the following information:

stated that he has been employed by ATF for the past 25 years and has been assigned to the NFA Branch for approximately 16 years.

He is aware of an individual by the name of Eric Larson and has spoken with Larson about statistics concerning NFA weapons. states that Larson has been writing letters to ATF for many years regarding NFA weapons, in particular the S & R Handy Gun.

In response to Larson's first allegation regarding testimony in U.S. District Court, made reference to certain documents being destroyed at the NFA Branch. stated he made the comments in reference to thousands of Title II firearms

manufactured by that were being exported to Various manufacturers were forwarding the paperwork for these firearms. However, not all of the paperwork was entered properly into the NFA system. It was suspected that some of the contract employees had destroyed some of the documents in an effort to reduce case load. admits that

Larson may have construed from his testimony that ATF employees were destroying documents, but this was not the case. suggested that if there was an increase in any NFA firearm registrations, it may have resulted from the changes made to reflect different form numbers being located and entered or from the transposition of registration dates on the original form. Such changes would have been added to the NFEETR.

then addressed the second allegation in the letter, which concerns the filing of the proper paperwork for NFA firearms during the amnesty period Congress enacted in 1968. He explained that the backlog of paperwork received as a result of the amnesty program back in 1968 was very large, and the filing of these documents required extra time in order to get the registrations documented. In addition, paperwork was also received late, because certain groups of individuals were granted an extended period to file the paperwork. These individuals would have been granted extensions if, for example they were overseas when the amnesty period closed.

Regarding the fourth allegation, stated that Larson is referring to the statistics maintained by the NFA Branch. The 'other' category Larson refers to in his letter is a category designated by the computer program that produces statistics when a standard form number is not provided. For instance, an individual entering the information into the ATF computer may enter a Form 1 as 31. This form would then be placed in the 'other' category. If an application for

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registration were received in correspondence on letterhead, without a form number, this would also be placed in the 'other' category. The fact that the form has been placed in the 'other' category does not mean the form cannot be located. All registration correspondence is numbered and identified for proper filing.

In response to the fifth allegation, [redacted] stated that if a possessor of a legally registered NFA weapon passes away and the beneficiary of the estate wants to register that firearm in his or her name, ATF will do whatever is necessary to assist that individual in registering the firearm. The individual needs only to contact the NFA Branch, and an ATF employee will assist in any way.

[redacted] asserted in response to Larson's first solution that ATF will not arbitrarily remove any firearms from the NFA. Congress has the authority to do so and, if Congress deems it necessary to remove some of these firearms, it will do so.

In response to Larson's second solution, he stated that ATF will provide anyone copies of registration forms for documents that may have been misplaced or lost. Another amnesty period has been discussed by Congress, the White House, and ATF; however, the idea was rejected because of pending investigations and other issues related to the registration problems that may arise.

SA [redacted] provided [redacted] with the above summary of his statement, and [redacted] stated under oath that the facts contained in the summary are true and correct to the best of his knowledge and belief.

On July 21, 1997, SA [redacted] interviewed [redacted] Chief of the Industry Compliance Branch. [redacted] advised SA [redacted] that he has spoken with Larson on the telephone concerning the removal of the H & R Handy Gun. [redacted] also advised SA [redacted] of the following facts:

He was the Chief of the NFA Branch in 1986 and 1987 and was unaware of any documents being destroyed by any ATF employee. At that time, some paperwork was missing and some contract employees hired by ATF were suspected of misplacing ATF paperwork.

stated that the Handy Gun has a configuration similar to the sawed-off or short-barreled shotgun. He likewise stated that it is within the purview of Congress to remove the firearm from the NFA.

Finally, also stated that when the paperwork for a legally registered NFA firearm is lost, the owner need only contact ATF for copies of the original. ATF has the original documents, and a copy can be forwarded to the legal owner.

Another amnesty period for the registration of NFA weapons must be authorized by Congress and the Secretary of the Treasury.

SA presented with the above summary, and stated under oath that the facts contained in the summary are true and correct to the best of his knowledge and belief.

(Exhibit 2, Letter from to Eric Larson dated July 29, 1993)

On July 31, 1997, SA contacted Eric Larson by telephone to arrange an interview concerning his correspondence to the IG. Over the telephone, Larson stated that NFA status of a firearm known as the Game Getter put him over the edge on this issue, and he felt that there should be one person in the United States that stands up for what he believes in. Larson stated that he works for the Government Accounting Office (GAO) in the section that audits ATF. Larson added that he is not involved in the audit of ATF. He stated that he would like to meet with SA and he would try to think of anything he may have forgotten to put in his letter to the IG.

On August 1, 1997, SA interviewed , Chief of the Firearms Technology Branch, ATF. stated that he has been employed by ATF since November 1972 and knows of Eric Larson. advised SA of the following:

The letter that Larson refers to was authored by ATF Counsel from information obtained by Assistant Chief of the Firearms Technology Branch.

stated that if Congress wants to change the law as it pertains to some NFA weapons, he would have no problem with it. Congress has the authority to amend the law with respect to NFA weapons. If the law were changed, ATF would adhere to whatever change was made.

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He added that ATF would help, in any way possible, an individual obtain proper paperwork for NFA registration.

(Exhibit 1, Letter from  
23, 1992)

to Eric Larson dated March

On August 1, 1997, SA interviewed [redacted] Chief of the Firearms and Explosives Regulatory Section, ATF. [redacted] informed that he has been employed by ATF for the past 25 years and has been in his current position since January 1996. [redacted] stated that he knows of an individual by the name of Eric Larson and has written a response letter to Larson. [redacted] advised SA [redacted] of the following:

With regard to Larson's fifth allegation, if the relatives of a deceased person notify ATF about the death of a firearm owner and wish to reregister the firearm, ATF will help, in any way it can, to facilitate the registration process. However, the only way ATF would be aware of someone's passing away is if the family of the deceased advised ATF.

In response to Larson's first solution, [redacted] is not aware that ATF can legally remove NFA firearms without the approval of the Congress.

In response to Larson's second solution, ATF does not have the authority to establish a 90-day waiting period. If the original copy of the NFA registration is lost, the owner of the firearm need only contact ATF and a copy will be provided.

SA [redacted] provided [redacted] with the previous summary, and stated under oath that the facts contained in the summary are true and correct to the best of his knowledge and belief.

On August 1, 1997, SA [redacted] interviewed [redacted] Chief of the National Firearms Act Branch, ATF. [redacted] stated that she has been employed by ATF for 11 years and has been in her current position since March 1996. She knows of an individual by the name of Eric Larson and has had corresponded with him. [redacted] advised SA [redacted] of the following:

In reference to Larson's first allegation, [redacted] stated that she is unaware of any original documents being destroyed by any ATF employees. The testimony given in U.S. District Court by [redacted] concerned contract employees hired by ATF who were suspected of destroying or misplacing ATF documents. Such activity

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is by no means recent and occurred well over 8 years ago.

Regarding Larson's fourth allegation, the "other" category of registrations is used to capture non-standard documents. For instance, if a Form 1 is entered as a Form 33, the computer software would automatically place the form in the "other" column. If an individual files a registration on correspondence with letterhead, the entry is also entered as "other." Furthermore, if errors are located, they are corrected.

Concerning Larson's fifth allegation, if heirs or executors of estates of deceased individuals wish to transfer legally registered firearms to themselves, they must contact ATF. ATF will conduct a query for the individual and the particular firearm and advise the individual of the procedure to register. If an executor finds a firearm that is not registered, ATF will advise of abandonment procedures for the weapon. stated that family of the deceased go through enough without having to worry about firearms they were unaware of.

In response to Larson's first solution, Levine stated that ATF should not make a blanket removal of some 17,000 firearms classified as "any other weapons." She suggested that some of these weapons may be looked at on a case-by-case basis and examined individually for removal from the NFA.

Regarding Larson's second solution, copies of lost registrations are requested by registered owners and the requests are responded to. There would be no reason for another amnesty period, as it would serve no purpose.

SA provided with the previous summary, and stated under oath that the facts contained in the summary are true and correct to the best of her knowledge and belief.

(Exhibit 4, Letter from  
January 9, 1997)

to Eric Larson dated

On August 1, 1997, SAs and  
Eric Larson and his attorney,  
following:

OI, met with  
Larson stated the

He had nothing to add to his allegations, and he felt he had filed everything that pertained to the issue.

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He stated that he received the case information referred to in his third allegation through the Freedom of Information Act. This was the only case pertaining to the issue that he had received, and he felt that ATF had no other cases pertaining to the misuse of the H & R Handy Gun.

On August 5, 1997, SA [redacted] interviewed [redacted] Assistant Chief of the Firearms Technology Branch, who has been employed with ATF since 1973. [redacted] stated the following:

He knows of Eric Larson and has supplied information about the H & R Handy Gun to the Office of Chief Counsel for responses to Larson's inquiries. The case cited by Larson refers to a case from the Portland, Oregon, Post of Duty in which an H & R Handy Gun with a metal cannabis leaf tacked onto the stock was seized during an investigation. The firearm was taken into custody from an acquaintance of an individual by the name of John D. Dudley. The case included a Title 26 charge and a felon-in-possession charge. Dudley, however, was not charged with possession of the firearm in question.

There are numerous cases across the United States involving the criminal possession of an H & R Handy Gun. [redacted] cited three other investigations that he is aware of that took place between 1990 and 1992. This does not preclude the possibility that other investigations may have been going on that [redacted] was unaware of. The fact that only one was presented to Larson under his Freedom of Information request does not mean that there were no other investigations of this sort taking place or that no cases had been adjudicated prior to Larson's request.

SA [redacted] presented [redacted] with the previous summary, and [redacted] stated under oath that the facts contained in the summary are true and correct to the best of his knowledge and belief.

On August 5, 1997, SA [redacted] telephoned SA [redacted] of the Portland, Oregon, Field Office about defendant John Dudley. SA [redacted] stated the following:

He investigated a previously convicted felon by the name of John David Dudley of Jacksonville, Oregon, in 1990. Dudley was suspected of methamphetamine trafficking, possession of stolen property, and being a felon in possession of firearms.

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was contacted by a local task force concerning Dudley after Dudley was stopped on a traffic violation and found to be in possession of an unregistered pen gun and a Browning 9mm handgun. Shortly thereafter, a State search warrant was executed at the residence of one of Dudley's associates, Recovered from were 27 firearms, including an H & R Handy Gun, which, along with all of the other firearms located, allegedly belonged to Dudley. advised authorities that Dudley requested that keep the firearms at his residence. Dudley was taken into custody, and presented the case to the U.S. Attorney's Office for prosecution. The Assistant United States Attorney (AUSA) handling the case decided to indict Dudley on possession of the two firearms found during the traffic stop. The AUSA decided not to indict Dudley for the other 27 firearms that were recovered from Dudley was indicted for violations of 18 U.S.C. 922(g)(1) and Title 26 5861(d). Dudley was subsequently sentenced in July 1991 to 60 months imprisonment followed by 36 months supervision.

(Exhibit S, Copy of ATF Form 3270.1 reference IN #93360-90-4058 S.)

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LIST OF EXHIBITS

1. Letter from Eric Larson Takoma Park, Maryland, to Inspector General Valerie Lau, dated May 10, 1997.
2. Letter from - Chief of the Firearms and Explosives Division, to Eric Larson, dated July 29, 1993.
3. Letter from , Chief of the Firearms Technology Branch, to Eric Larson dated March 23, 1992.
4. Letter from Chief of the National Firearms Act Branch to Eric Larson, dated January 9, 1997.
5. Copy of ATF Form 3270.1 regarding John David Dudley, investigation #93360-90-4058 S from Portland, Oregon, Field Office.

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May 10, 1997

Ms. Valerie Lau, Inspector General  
Office of the Inspector General  
Department of the Treasury  
1500 Pennsylvania Avenue, N.W., Room 2412  
Washington, D.C. 20220

Dear General:

I am writing to call your attention to, and provide specific documented valid and reliable evidence of, what appear to me to be serious instances of mismanagement, misconduct and illegality by employees of the Bureau of Alcohol, Tobacco and Firearms (ATF) in administering our Nation's federal gun control laws. I have presented this evidence in testimony to the House Appropriations Subcommittee on April 30, 1996,<sup>1</sup> and on April 8, 1997.<sup>2</sup> I have enclosed a copy of my 1997 testimony for your convenience of reference.

All of these instances of apparent mismanagement, misconduct and illegality involve the National Firearms Act (NFA) of 1934, as amended, which is a statute that falls under the Tax Code of 1986, and thus involves taxpayer information. Taxpayer information is secret under Internal Revenue Service (IRS) rules and the law, but under court rules and criminal case law, prosecutors are required to disclose any information that could be used to impeach a government witness. Consequently, the instances I have identified here appear to affect certain types of prosecutions for alleged violations of the NFA, and in particular the alleged nonregistration of NFA firearms.

Based on my 1996 and 1997 testimonies, it appears that one or more ATF employees have, in the course of their official duties, committed a number of serious acts which are contrary

<sup>1</sup>Statement of "Curio or Relic" Firearms Manufactured in or Before 1934 Which Are Also Classified in the "Any Other Weapon" Category Under the National Firearms Act (NFA) of 1934, as Amended," by Eric M. Larson, in *Treasury, Postal Service and General Government Appropriations for Fiscal Year 1997, Part 5. Testimony of Members of Congress and Other Interested Individuals and Organizations. Hearings Before a Subcommittee of the Committee on Appropriations, House of Representatives, 104th Congress, 2nd Session. Washington, D.C.: U.S. Government Printing Office, 1996, pages 37-274.*

<sup>2</sup>Statement on Proposed Removal of Certain Firearms Manufactured in the United States in or Before 1934 from Purview of the National Firearms Act (NFA) of 1934, as Amended, and Their Reclassification as "Firearms" as Defined in Title 18, U.S.C., Chapter 44," and "Errors in the National Firearms Registration and Transfer Record: A New Amnesty Period May be Required to Correct Them."

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EXHIBIT NO. /



to law. Consequently, I would like to respectfully ask you to consider conducting a criminal investigation of a number of specific instances where it appears that ATF employees have violated the law. From the nature of these possible violations, it appears that it may be desirable for you to consider conducting a forensic audit of the National Firearms Registration and Transfer Record (NFRTR), as these data may have been illegally created or altered. It may also be necessary to have such a forensic audit conducted by an entity which is totally independent from ATF, to avoid any conflict of interest that would obviously result from allowing ATF to investigate itself.

These specific alleged acts are as follows:

1. ATF employees have deliberately destroyed original firearm registration documents that they are required by law to maintain, as noted in sworn testimony in 1996 by ATF Special Agent Gary N. Schaible.<sup>3</sup> In analyses of data made public by ATF, I found that during 1992 to 1996, ATF may have added 119 or more firearms to the NFRTR which were originally registered on Form 1 or Form 4467 during 1934 to 1971, for which ATF lost or deliberately destroyed the original records.

2. ATF employees registered almost 2,500 unregistered NFA firearms on Form 4467 after December 1, 1968, without proper authorization by the Congress. In addition to not being authorized by the Congress, such registrations were prohibited by the Supreme Court in 1971, yet it appears that ATF registered 172 or more unregistered NFA firearms on Form 4467 after 1971. I have included an example of one apparently illegal post-December 1, 1968, Form 4467 registration in my 1997 testimony.

3. ATF employees Edward M. Owen, Jr. and Terry L. Cates committed felony perjury in letters written to me dated March 23, 1992, and July 29, 1993, respectively. Mr. Owen and Mr. Cates each alleged that "an unlawful trafficker in drugs with an extensive criminal record" was in possession of a .410 bore H&R Handy-Gun "while committing drug violations." This alleged instance of criminal conduct was used to deny my petition to remove the H&R Handy-Gun from the NFA as a collector's item. In fact, a Freedom of Information Act request disclosed that the Handy-Gun was recovered from an acquaintance of the trafficker, who said that the trafficker had given it to him for safe-keeping (see pages 212-215, 222-230, and 233-236 of my 1996 testimony). Any person who petitions for removal of a firearm from the NFA must state the reasons under penalty of perjury. The plain language of the statute at Title 26, U.S.C., § 5861(i) and § 5871 applies to any person who knowingly makes or causes the making of a false entry on any document required to be prepared as a result of

<sup>3</sup>United States vs. John Daniel Leasure, Criminal No. 4:95CR54, Newport News, Virginia, May 21, 1996. Transcript of Proceedings before the Honorable John A. Mackenzie, United States District Judge. United States Court, Eastern District of Virginia, Newport News Division.

administering the NFA, including a legal decision regarding the classification of an NFA firearm. Both Mr. Owen and Mr. Cates deliberately falsified the facts of the case they cited.

4. Certain "registration activity" that ATF classifies as "OTHER" could include registrations of firearms that one or more ATF employees registered contrary to law, because ATF has refused to disclose the nature of this "registration activity." To the best of my knowledge, I've never heard of any forms numbered other than 1, 2, 3, 4, 5, 6, 9, 10 or 4457 being used to register or transfer NFA firearms. According to a letter to me dated January 9, 1997, from NFA Branch Chief Nereida W. Levine, the "OTHER" category is "comprised of registrations where the form number is different from the other ones tabulated." Ms. Levine, however, has declined to provide the names or numbers of these forms. Coupled with the other evidence of registration mismanagement I have documented, it appears that the "OTHER" category may represent firearms that were registered illegally, as noted in my 1997 testimony.

5. It appears that a significant number of NFA firearms are currently registered to persons who are deceased, and that ATF has been aware of this fact since at least 1981 and done nothing about it, as noted in my 1997 testimony. Consequently, a significant number of NFA firearms are now illegally possessed, in some instances by persons who are unaware they are in violation of the law. The reason is that many firearms classified as "Any Other Weapon" are rare collector's items that many people do not consider weapons, as noted in both my 1996 and 1997 testimonies.

ATF's most recent data (as of December 31, 1996) disclose that of the 14,359 firearms registered during 1934 to 1939, exactly 11,175 (78.4 percent) are still currently owned by the person or government entity that registered or acquired it during that same time period. And of the 58,004 firearms registered in 1968, a stunning 85.4 percent are still owned as of 1996 by the same persons who registered or received them by transfer in 1968. Consider that in 1981, an internal ATF study reported:

We have the condition where people who registered firearms under the original National Firearms Act at age 65 would now be 112 years old. We know that these people are dead and their heirs have not taken the necessary steps to contact us so that the involuntary transfer created by the registrant's death can be formalized.<sup>4</sup>

One result of ATF's negligence is that some persons who own certain rare, valuable firearms that have special value to collectors have been instantly transformed into criminals. The reason is that through natural disasters (such as the recent floods in North Dakota, house fires, and similar tragic events), the owners of these firearms have lost their copies of the documents which prove their lawful ownership, and the law does not allow these firearms

<sup>4</sup>"Status Report: National Firearms Registration and Transfer Record (NFRTR)," by Deron A. Dobbs. Internal ATF report dated July 1, 1981.

to be voluntarily re-registered. I believe there are two possible solutions to this problem, and neither requires legislation. The reason is that each solution may be achieved by administrative action on the part of ATF. These solutions are:

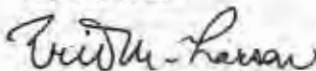
1. Administratively removing approximately 17,000 "curio or relic" firearms classified as "any other weapon" under the NFA, which were originally commercially manufactured in or before 1934 (but not replicas thereof). The Congress determined that these "any other weapon" firearms were mainly collector's items and not likely to be used as weapons in 1960. It was not until 1968 that the Congress passed legislation enabling these firearms to be removed from the NFA as collector's items.
2. Establishing a 90-day amnesty period to allow persons who may have innocently lost their copies of the registration form to re-register these firearms. The Congress has authorized such amnesty periods to be established by the Secretary of the Treasury under § 207(d) of the Gun Control Act of 1968.

For the past several years, in response to my petitions or requests, ATF has refused to implement either solution that I have proposed. I believe that removing these firearms from the NFA is an ideal solution, but also believe that an amnesty period may also be an appropriate solution.

I hope that you will take prompt action to resolve the problems that I have documented. If you have any further questions, please contact me.

Thank you.

Very truly yours,



Eric M. Larson  
P.O. Box 5487  
Takoma Park, Maryland 20913  
(301) 270-3450

cc: The Honorable Janet Reno  
Attorney General  
Department of Justice

The Honorable Bill Archer  
Chairman  
House Committee on Ways and Means

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DEPARTMENT OF THE TREASURY  
BUREAU OF ALCOHOL, TOBACCO AND FIREARMS

JUL 29 1993

Mr. Eric M. Larson  
Post Office Box 5497  
Takoma Park, MD 20913-5497

Dear Mr. Larson:

This is in response to your July 12, 1993, follow-up letter to Treasury Secretary Bentsen. In your letter you take issue with our response, on Secretary's Bentsen's behalf, to your June 14, 1993, request that the H & R Handyguns be removed from the National Firearms Act (NFA).

H & R Handyguns currently fall within the "any other weapon" category of NFA weapons. As defined in 26 U.S.C. 5845(e), the term "any other weapon" means:

(A)ny weapon or device capable of being concealed on the person from which a shot can be discharged through the energy of an explosive, a pistol or revolver having a barrel with a smooth bore designed or redesigned to fire a fixed shotgun shell. . . . Such term shall not include a pistol or a revolver having a rifled bore, or rifles bores, or weapons designed, made, or intended to be fired from the shoulder and not capable of firing fixed ammunition.

The weapons meet this definition because of their concealability on the person (having an approximate overall length of 17 inches), and because they are smooth bore pistols designed to fire a fixed shotgun shell. They have been subject to the NFA since the Act was originally enacted in 1934.

The H & R Handyguns was manufactured between 1920 and 1934. Although the exact number of Handyguns manufactured is unknown, available information suggests that between 20,000 and 25,000 were made in different gauges and calibers. The value of the Handyguns is estimated to range from \$400 to \$600 for standard variations, with scarcer versions exceeding that amount.

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EXHIBIT NO. 2

Mr. Eric S. Larson

Pursuant to 26 U.S.C. 5845(a) and the regulations in 27 C.F.R. 179.25, the Bureau of Alcohol, Tobacco and Firearms (ATF) may remove weapons other than machineguns and destructive devices from the scope of the NFA which, although originally designed as weapons, are determined by reason of their date of manufacture, value, design, and other characteristics to be primarily collector's items and not likely to be used as weapons.

The removal of weapons from the scope of the NFA is an action not taken lightly by ATF, and the requester has a heavy burden of establishing that an item is not likely to be used as a weapon. This is particularly true where, as in the present case, a substantial number of weapons are sought to be removed. In addition, your request requires close scrutiny in view of prior congressional action with respect to H & R Handguns and similar NFA weapons.

In 1945 and 1960, Congress amended the NFA by changing the rate of tax on the transfer of these smooth bore shot pistols with the scope of the "any other weapon" category. Because the weapons were found to be of interest to collectors and useful for certain legitimate purposes, Congress in 1945 reduced the original \$200 transfer tax to \$1 and in 1960 changed the transfer tax to \$5 for all weapons within the category "any other weapon." It is significant that, although the shot pistols were considered collector's items, Congress did not choose to remove them from the NFA. Moreover, the legislative history shows that Congress deliberately left these weapons within the purview of the NFA:

However, this "any other weapon" category will continue to be subject to the present control provisions applicable to all firearms under present law. As a result, the safeguards of present law are maintained, while applicable taxes are lowered to the level which makes it possible for gun collectors to obtain novel weapons in the category . . .

S. Rep. No. 1103, 86th Cong., 2d Sess. 2, reprinted in 1960 U.S. Code Cong. & Admin. News 2111.

As previously stated, one of the criteria to be considered in acting upon a removal request is the "design" of the weapon. The design and function of the H & R Handgun are identical to that of the sawed-off shotgun, which is also

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Mr. Eric M. Larson

subject to the NFA. Both weapons are smooth bore handguns which fire a fixed shotgun shell and are concealable on the person. The weapons differ in two regards, neither of which relate to their design or functions: (1) the typical saved-off shotgun is made by converting an existing shotgun into a shot pistol, whereas the H & R Handygun was originally manufactured as a shot pistol; and (2) the saved-off shotgun is subject to the NFA because it fits within the definition of "Weapon made from a shotgun" in 26 U.S.C. 5845(a)(2), whereas the H & R Handygun is within the NFA definition of "any other weapon." Practically speaking, however, the two weapons are substantially the same.

The saved-off shotgun is a popular crime weapon and has been the subject of numerous Federal and State prosecutions. This is attributable in part to the availability of such weapons. As stated above, saved-off shotguns are produced by simply altering conventional, sporting shotguns which are readily available in the marketplace and which are not themselves subject to the NFA's registration or other requirements.

Although H & R Handyguns have not frequently been used in crimes, these weapons have been found in the possession of criminals. The subject of a recent ATF case was an unlawful trafficker in drugs with an extensive criminal record. While committing drug violations, this person was in possession of two NFA weapons, a saved-off Savage Arms shotgun and a .410 bore H & R Handygun. H & R Handyguns may well become a crime problem if they become readily available in commerce. We believe that their limited availability is affected by the fact that the weapons have not been manufactured since the 1930's, as well as the fact that they have been subject to NFA controls since 1934. Under the NFA, weapons not registered in the National Firearms Registration and Transfer Record are contraband and cannot be lawfully transferred. Possessors of registered weapons may only transfer the weapons pursuant to applications approved by ATF. Transfer applications are denied if the transferees' receipt and possession of the weapons would violate any law.

As stated above, the removal of a weapon from the NFA requires a finding that it would not likely be used as a weapon. We believe that removal of H & R Handyguns would increase the circulation of these weapons in commerce and their availability to those who would use them for criminal purposes. Because of the number of weapons originally manufactured, we cannot conclude that they would not find

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Mr. Eric W. Larson

their way into criminal hands and be put to unlawful use. As previously stated, it is believed that 20,000 to 25,000 were manufactured, but the precise figure is unknown. In addition, we do not believe that the value of the weapons is so high as to make the weapons inaccessible to criminals. Because the weapons are identical in design to the sawed-off shotgun, we have no doubt that those acquired by criminals would be used for unlawful purposes. For the above reasons, it has not been established that the weapons would not likely be used as weapons if removed from the NFA.

In support of your request, you have cited examples of ATF's removal of certain other weapons from the NFA. Specifically, you refer to Mauser and Luger pistols with shoulder stocks and trapper carbines. In our view, these weapons are distinguishable from the H & R Handyguns in that neither they nor any similar weapons have constituted a crime problem. You also suggest that we compare the H & R Handyguns with the .45 Colt/410 bore Thompson Contender pistol, a firearm which you state is similar to the H & R Handyguns, is distributed in commercial channels today, and is not considered a crime weapon. We do not believe this to be a valid comparison because the Thompson Contender pistol is not a smooth bore shot pistol and is not a weapon subject to the NFA.

Accordingly, we must affirm our denial of your request to remove the H & R Handyguns from the scope of the NFA since we cannot conclude that such weapons, if removed from the Act, would not likely be used as weapons.

Sincerely yours,

Teddy L. Cates  
Chief, Firearms and Explosives Division

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MAR 23 1992

CC-40,647 EE:CLK

Mr. Eric M. Larson  
Post Office Box 5497  
Tacoma Park, Maryland 20913-5497

Dear Mr. Larson:

This is in response to your request for removal of the Harrington and Richardson Handygun (H & R Handygun) from the scope of the National Firearms Act (NFA), 26 U.S.C. Chapter 53.

The weapons in question are .410 and 28 gauge H & R Handyguns which currently fall within the "any other weapon" category of NFA weapons. As defined in 26 U.S.C. § 5845(e), the term "any other weapon" means:

(A) any weapon or device capable of being concealed on the person from which a shot can be discharged through the energy of an explosive, a pistol or revolver having a barrel with a smooth bore designed or redesigned to fire a fixed shotgun shell. . . . Such term shall not include a pistol or a revolver having a rifled bore, or rifles bores, or weapons designed, made, or intended to be fired from the shoulder and not capable of firing fixed ammunition.

The weapons meet this definition because of their concealability on the person (having an approximate overall length of 17 inches), and because they are smooth bore pistols designed to fire a fixed shotgun shell. They have been subject to the NFA since the Act was originally enacted in 1934.

The H & R Handygun was manufactured between 1920 and 1934. Although the exact number of Handyguns manufactured is unknown, available information suggests that between 20,000 and 25,000 were made in different gauges and calibers. The value of the Handygun is estimated to range from \$400 to \$600 for standard variations, with scarcer versions exceeding that amount.

(38)

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EXHIBIT NO. 3



Mr. Eric M. Larson

Pursuant to 26 U.S.C. § 5845(a) and the regulations in 27 C.F.R. § 179.25, the Bureau of Alcohol, Tobacco and Firearms (ATF) may remove weapons other than machineguns and destructive devices from the scope of the NFA which, although originally designed as weapons, are determined by reason of their date of manufacture, value, design, and other characteristics to be primarily collector's items and not likely to be used as weapons.

The removal of weapons from the scope of the NFA is an action not taken lightly by ATF, and the requester has a heavy burden of establishing that an item is not likely to be used as a weapon. This is particularly true where, as in the present case, a substantial number of weapons are sought to be removed. In addition, your request requires close scrutiny in view of prior congressional action with respect to H & R Handguns and similar NFA weapons.

In 1945 and 1960, Congress amended the NFA by changing the rate of tax on the transfer of these smooth bore shot pistols within the scope of the "any other weapon" category. Because the weapons were found to be of interest to collectors and useful for certain legitimate purposes, Congress in 1945 reduced the original \$200 transfer tax to \$1 and in 1960 changed the transfer tax to \$5 for all weapons within the category "any other weapon." It is significant that, although the shot pistols were considered collector's items, Congress did not choose to remove them from the NFA. Moreover, the legislative history shows that Congress deliberately left these weapons within the purview of the NFA:

However, this "any other weapon" category will continue to be subject to the present control provisions applicable to all firearms under present law. As a result, the safeguards of present law are maintained, while applicable taxes are lowered to the level which makes it possible for gun collectors to obtain novel weapons in this category.

S. Rep. No. 1303, 86th Cong., 2d Sess. 2, reprinted in 1960 U.S. Code Cong. & Admin. News 2111.

As previously stated, one of the criteria to be considered in acting upon a removal request is the "design" of the weapon. The design and function of the H & R Handgun are identical to that of the sawed-off shotgun, which is also

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Mr. Eric M. Larson

subject to the NFA. Both weapons are smooth bore handguns which fire a fixed shotgun shell and are concealable on the person. The weapons differ in two regards, neither of which relate to their design or function: (1) the typical sawed-off shotgun is made by converting an existing shotgun into a shot pistol, whereas the H & R Handygun was originally manufactured as a shot pistol; and (2) the sawed-off shotgun is subject to the NFA because it fits within the definition of "weapon made from a shotgun" in 26 U.S.C. § 5845(e)(2), whereas the H & R Handygun is within the NFA definition of "any other weapon." Practically speaking, however, the two weapons are substantially the same.

The sawed-off shotgun is a popular crime weapon and has been the subject of numerous Federal and State prosecutions. This is attributable in part to the availability of such weapons. As stated above, sawed-off shotguns are produced by simply altering conventional, sporting shotguns which are readily available in the marketplace and which are not themselves subject to the NFA's registration or other requirements.

Although H & R Handyguns have not frequently been used in crimes, these weapons have been found in the possession of criminals. The subject of a recent ATF case was an unlawful trafficker in drugs with an extensive criminal record. While committing drug violations, this person was in possession of two NFA weapons, a sawed-off Savage Arms shotgun and a .410 gauge H & R Handygun. H & R Handyguns may well become a crime problem if they become readily available in commerce. We believe that their limited availability is affected by the fact that the weapons have not been manufactured since the 1930's, as well as the fact that they have been subject to NFA controls since 1934. Under the NFA, weapons not registered in the National Firearms Registration and Transfer Record are contraband and cannot be lawfully transferred. Possessors of registered weapons may only transfer the weapons pursuant to applications approved by ATF. Transfer applications are denied if the transferees' receipt and possession of the weapons would violate any law.

As stated above, the removal of a weapon from the NFA requires a finding that it would not likely be used as a weapon. We believe that removal of H & R Handyguns would increase the circulation of these weapons in commerce and their availability to those who would use them for criminal purposes. Because of the number of weapons originally manufactured, we cannot conclude that they would not find

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Mr. Eric M. Larson

their way into criminal hands and be put to unlawful use. As previously stated, it is believed that 20,000 to 25,000 were manufactured, but the precise figure is unknown. In addition, we do not believe that the value of the weapons is so high as to make the weapons inaccessible to criminals. Because the weapons are identical in design to the sawed-off shotgun, we have no doubt that those acquired by criminals would be used for unlawful purposes. For the above reasons, it has not been established that the weapons would not likely be used as weapons if removed from the NFA.

In support of your request, you have cited examples of ATF's removal of certain other weapons from the NFA. Specifically, you refer to Mauser and Luger pistols with shoulder stocks and trapper carbines. In our view, these weapons are distinguishable from the H & R Handyguns in that neither they nor any similar weapons have constituted a crime problem. You also referred to ATF's "removal" of the Marble Game Getter with an 18-inch barrel from the "any other weapon" category. This weapon was not removed from the NFA because it was not subject to the Act in the first place. Because of its overall length, it is not considered concealable on the person and, therefore, does not fall within the definition of "any other weapon." You also suggest that we compare the H & R Handyguns with the .45 Colt/410 gauge Thompson Contender pistol, a firearm which you state is similar to the H & R Handyguns, is distributed in commercial channels today, and is not considered a crime weapon. We do not believe this to be a valid comparison because the Thompson Contender pistol is not a smooth bore shot pistol and is not a weapon subject to the NFA.

Accordingly, we must deny your request to remove the H & R Handyguns from the scope of the NFA since we cannot conclude that such weapons, if removed from the Act, would not likely be used as weapons. Nevertheless, we commend you for your thorough research and presentation and regret that our decision could not be more favorable.

Sincerely yours,

SIGNED

Edward M. Owen, Jr.  
Chief, Firearms Technology Branch

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1/18/19

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DEPARTMENT OF THE TREASURY  
BUREAU OF ALCOHOL, TOBACCO AND FIREARMS  
WASHINGTON, D.C. 20226

LARS 0997

JAN - 9 1997

E:RE:FK:GS

Mr. Eric M. Larson  
P.O. Box 5497  
Takoma Park, MD 20913

Dear Mr. Larson:

This is in response to your letter of November 21, 1996, in which you request confirmation of statements made about data in the "NEA REGISTRATION ACTIVITY - ANNUAL COMPARISON" table. You enclosed a copy of the table with data through December 31, 1995.

The table shows Form 4467 registrations after 1971 and before 1968. We believe that there are errors in the date or form fields which cause the registrations to appear in those years.

The table shows pre-1934 data. This data results from errors, blanks, or misrepresented characters in the date field which cause the registrations to appear prior to 1934. This statistical report was developed several years after the implementation of the automated database and the programmer apparently included a procedure to capture these date ranges because errors in the date field showed dates prior to 1934.

You asked about the "OTHER" column in the table. This category would be comprised of registrations where the form number is different from the other ones tabulated. An incorrect form number would be counted in that column.

In regard to items 5 and 6 of your letter, we are constantly verifying the information in our database. If we do locate a record where the date, form number,

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EXHIBIT NO. 4

ATF 3/21/97  
Date: 10-12-92

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Mr. Eric M. Larson

or other information was not entered correctly, we enter the correct information. These actions may then result in an adjustment to previously generated statistics.

We would like to point out that errors in the date or form number fields would not affect the thoroughness of a search of the database by NFA Branch personnel. We use a search methodology that ensures a thorough review of the database for all possible responsive entries and an examination of the original registration document.

Finally, you asked whether a firearm would be added to the Registry if a person possessed a valid registration that was not in the Registry. The document that person possesses is his or her evidence of registration. It would be added to the National Firearms Registration and Transfer Record if the information was not already in the Record.

We trust this has been responsive to your request. Should any additional information be needed, please contact us at (202) 927-8330.

Sincerely yours,

Chief, National Firearms Act Branch

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DEPARTMENT OF THE JUDICIARY, OFFICE OF THE ATTORNEY GENERAL		F. FIREARMS AND FIREARMS		INVESTIGATION TYPE		Page 1 of 1	
REPORT OF INVESTIGATION (Law Enforcement)				<input type="checkbox"/> RECURRING <input checked="" type="checkbox"/> RECURRENT <input type="checkbox"/> SIGNIFICANT		(2) CIP Details: PY-90-Narcotics	
Special Agent in Charge Seattle District Office							
TITLE OF INVESTIGATION DUDLEY, John David				INVESTIGATION No. (Judge Signed Bill) 45150-90-4015X			
TYPE OF REPORT (Judge Signed Bill)				BUREAU PROGRAM		PROJECTED	
PRECEDENCE	COLLATERAL (Priority)	TITLE 1	TITLE 2	TITLE 3	TITLE 4	TITLE 5	TITLE 6
STATUS	COLLATERAL (Priority)	TITLE 7	TITLE 8	TITLE 9	TITLE 10	TITLE 11	TITLE 12
FORM	COLLATERAL (Priority)	TITLE 13	TITLE 14	TITLE 15	TITLE 16	TITLE 17	TITLE 18
SUPPLEMENTAL	COLLATERAL (Priority)	TITLE 19	TITLE 20	TITLE 21	TITLE 22	TITLE 23	TITLE 24
DETAILS				OTHER (Specify)			
<p>This status report relates to alleged violations of federal firearms laws by John David Dudley, a multiple convicted felon, who was unlawfully using and carrying firearms while trafficking in drugs in the Judicial District of Oregon. This investigation is classified as CIP: Narcotics.</p> <p>John David Dudley has a criminal history dating back to 1977. Dudley's criminal history reflects four felony convictions, one for first degree theft and three for the delivery and possession of controlled substances. Dudley also has four misdemeanor convictions, numerous arrests for both the possession and delivery of controlled substances, six-con in possession of a firearm, parole violations, burglary, theft and most recently, the manufacture of controlled substances. John Dudley is currently under two separate Oregon state indictments for possession of a controlled substance, methamphetamine and marijuana; manufacturing a controlled substance, methamphetamine; criminal conspiracy; and six-con in possession of a firearm.</p> <p>On November 29, 1989, based on information received from a confidential informant about drug activity, the Jackson County Narcotics Enforcement Team (JACNET), served a search warrant at John Dudley's residence, Oregon. During service of this warrant, a small quantity of methamphetamine, photos of a "Streetsweeper" shotgun lying on the car seat of John Dudley's Corvette and the owner's manual for the "Streetsweeper" were seized. On November 30, 1989, John Dudley was subsequently arrested for possession of a controlled substance/methamphetamine.</p> <p>On March 30, 1990, a search warrant was served on a shop building located at Oregon. Officers discovered a methamphetamine lab and numerous firearms in a hidden compartment next to the lab. Evidence was found that linked John Dudley and another individual to the lab. JACNET officers found drug records and property in the lab that relate to John Dudley.</p> <p>On April 12, 1990, a search warrant was served at John Dudley's residence (described as a fifth wheel trailer) Oregon. During this search, an AMT, .45 caliber pistol, bearing serial number B23196,</p>							
10. SUBMITTED BY (Name)				11. TITLE AND OFFICE		12. DATE	
13. SUBMITTED BY (Name)				14. TITLE AND OFFICE		15. DATE	
16. SUBMITTED BY (Name)				17. TITLE AND OFFICE		18. DATE	

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DEPARTMENT OF THE TREASURY BUREAU OF ALCOHOL, TOBACCO AND FIREARMS		PAGE 2	
REPORT OF INVESTIGATION—CONTINUATION SHEET (Criminal Enforcement)		OF 3 PAGES	
FIELD OF INVESTIGATION DUDLEY, John David		LABORATORY 93360-90-40583	
DETAILS (Continued)			
<p>was found in a gym bag that also contained several ounces of both methamphetamine and marijuana. Numerous letters, receipts for telephone bills and other correspondence in the name of John Dudley were found in this same residence. Prior to the service of the warrant, John Dudley was stopped while leaving his property and advised of the warrant; he chose not to remain on the premises. In another trailer on this same property, an associate of John Dudley, was found to be in possession of a small amount of methamphetamine. He was arrested for the possession of a controlled substance/methamphetamine. Subsequently, John Dudley was indicted in state court for (1) manufacturing a controlled substance, methamphetamine, (2) possession of a controlled substance, methamphetamine, (3) possession of a controlled substance, marijuana, and (4) ex-con in possession of a firearm.</p> <p>On April 31, 1990, a weapon made from a shotgun was seized during a consent search of Oregon, pursuant to an arrest warrant for John Dudley. A resident of stated that "Dudley owns all the guns" that were found in the residence, and that Dudley and had brought the guns over to house at different times during a two-week period. A total of 27 firearms, including the weapon made from a shotgun, were found and seized from the residence. Three of the above firearms were found to be stolen.</p> <p>On June 1, 1990, sheriff's deputies went to Oregon, (John Dudley's residence) to do a follow-up investigation of a burglary, and smelled phenylacetic acid and P2P on the property. Based upon the deputies' experiences with methamphetamine laboratories and the odors associated with the chemicals used in the making of methamphetamine, a search warrant was issued and executed at the address. In addition to stolen property, an operating methamphetamine lab was discovered in a shed located on the property. Four firearms were seized during execution of the search warrant, including a shotgun which was strategically placed atop the doorway leading into the methamphetamine laboratory. Subsequently, John Dudley and two other suspects were indicted in state court for (1) criminal conspiracy, (2) manufacturing a controlled substance, (3) possession of a controlled substance, and (4) ex-con in possession of a firearm. Arrest warrants were issued for all three; John Dudley turned himself in and was released on bail.</p> <p>A firearms trace of the Dobray "Streetsweeper", 12 ga., semiauto shotgun, bearing serial number 6193, found during a search warrant on the residence of revealed that it was purchased by Both individuals are known associates of John Dudley. transported several firearms, including the Dobray "Streetsweeper" shotgun, to residence, allegedly at John Dudley's request.</p> <p>The Jackson County Narcotics Enforcement Team currently has a total of 33 firearms in custody from various seizures that are linked to John David Dudley.</p>			

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DEPARTMENT OF THE TREASURY BUREAU OF ALCOHOL, TOBACCO AND FIREARMS <b>REPORT OF INVESTIGATION—CONTINUATION SHEET</b> (Criminal Enforcement)		PAGE 3 OF 3 PAGES
TITLE OF INVESTIGATION <b>DUDLEY, John David</b>		UNIQUE IDENTIFIER <b>93160-90-40585</b>
DETAIL (Continued) A trace has been initiated on several of the other firearms that were seized by JACNET.  At present, ATF/Portland has no property in custody relating to this case.  AUSA has expressed interest in pursuing federal prosecution for violations of federal firearms laws in this case.  Investigation to continue.		

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DEPARTMENT OF THE TREASURY - BUREAU OF FINANCE		1. INVESTIGATION BY		Page 1 of 1	
REPORT OF INVESTIGATION (Law Enforcement)		<input checked="" type="checkbox"/> ROUTINE <input type="checkbox"/> SENSITIVE <input type="checkbox"/> SIGNIFICANT		- 3 - PART	
TO Special Agent in Charge Seattle District Office		1. MONITORING INVESTIGATION INFORMATION (Name and Position) CIP Seattle; FY-90-Narcotics			
TITLE OF INVESTIGATION DUDLEY, John David		2. INVESTIGATION NO. (Jacket Number, etc.) 91160-90-4058E			
TYPE OF REPORT (Select appropriate boxes)		3. BUREAU NUMBER		4. PRIORITY	
PRELIMINARY	COLLATERAL (Name)	A. TITLE	FOREWARD	1. REPORTED OFFENSE	
STATUS	COLLATERAL (Name)	TITLEA		TERMINAL CLASSIFICATION	
FINAL	INTELLIGENCE	TITLEB	EXPLOSIVE	GCE	
SUPPLEMENTAL	RECORDS (Name)	TITLEC		HAR	
		TITLED		CLAR	
		TITLED		DAG	
		TITLED		OTHER (Specify)	
		TITLED		Y 2-111111	

**DETAILS**

This status report relates to alleged violations of federal firearms laws by John David Dudley, a multiple convicted felon, who was unlawfully using and carrying firearms while trafficking in drugs in the Judicial District of Oregon. This investigation is classified as CIP: Narcotics.

John David Dudley has a criminal history dating back to 1977. Dudley's criminal history reflects four felony convictions, one for first degree theft and three for the delivery and possession of controlled substances. Dudley also has four misdemeanor convictions, numerous arrests for both the possession and delivery of controlled substances, ex-con in possession of a firearm, parole violations, burglary, theft and most recently, the manufacture of controlled substances. John Dudley is currently under two separate Oregon state indictments for possession of a controlled substance, methamphetamine, and marijuana; manufacturing a controlled substance, methamphetamine; criminal conspiracy; and ex-con in possession of a firearm.

As described in the previous status report, from November 1989 to June 1990, five search warrants were executed by the Jackson County Narcotics Enforcement Team (JACNET) on John Dudley's residence or his associates' residences that contained Dudley's property. During these search warrants, numerous firearms, various quantities of both methamphetamine and marijuana, a "boxed" methamphetamine lab and an operating methamphetamine lab were discovered by police officers. During an April 21, 1990, search warrant on one of John Dudley's associates, two Title II firearms were found that belonged to Dudley.

**THE FOLLOWING EVENTS HAVE OCCURRED SINCE THE LAST STATUS REPORT:**

On December 31, 1990, a Jackson County Sheriff's deputy spotted a stolen vehicle and followed it until the vehicle came to a stop. Two white males exited the vehicle and the deputy immediately recognized the driver as being John Dudley. Both John Dudley and his passenger were taken into custody for the unauthorized use of a motor vehicle (was later released). Officers discovered a pistol, in plain view, wedged between the console and passenger side seat. Officers found that the pistol, an F.N. Browning .400 pistol, bearing serial number 295501, was loaded, complete with

5. SUBMITTED BY	6. TITLE AND OFFICE	7. DATE
	AS/A, Portland, OR POC	
	8. TITLE AND OFFICE	
	9. DATE	
10. APPROVED BY	11. TITLE AND OFFICE	12. DATE
	12. DATE	
	13. TITLE AND OFFICE	
	14. DATE	

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DEPARTMENT OF THE TREASURY BUREAU OF ALCOHOL, TOBACCO AND FIREARMS		PAGE 1
REPORT OF INVESTIGATION - CONTINUATION SHEET (Criminal Enforcement)		
FILE OR INVESTIGATION DUDLEY, John David	INVESTIGATION 93360-90-40508	
<p>DETAILS (Continued)</p> <p>one round in the chamber and ready to fire. A computer check on the pistol revealed that it had been stolen during a residential burglary in Jackson County two months previously. Officers also discovered a cylindrical metal object in Dudley's left jacket pocket. Upon further examination the object proved to be a .38 caliber pen gun. The .38 caliber pen gun does not have a serial number. John Dudley was arrested for the unauthorized use of a motor vehicle and was now in possession of a weapon.</p> <p>On January 2, 1990, AUSA _____ agreed to indict John Dudley for felon in possession and the unlawful possession of an unregistered Title II firearm, based upon Dudley's December 31, 1990, arrest. Based upon the rationale that Dudley intimidates several of the potential witnesses against him and that once he is in custody, these same witnesses may be willing to testify, AUSA _____ wants to make a supplemental indictment on several of Dudley's previous arrests after he is taken into federal custody.</p> <p>On January 3, 1990, the F.W. Browning 9mm pistol, described above, was fingerprinted by the Jackson County Sheriff's laboratory with negative results. Both the F.W. Browning, 9mm pistol, bearing serial number 295501, and the suspected .38 caliber pen gun, no serial number, discovered during the December 31, 1990, arrest of John Dudley, were taken into custody by ATF/Portland. Additionally, the two unregistered Title II firearms, allegedly owned by John Dudley and seized in an April 31, 1990, JACKET search warrant, were taken into custody by ATF/Portland:</p> <ol style="list-style-type: none"> <li>1. Savage Arms, Stevens Model 94, Series M, 12 gauge shotgun, bearing serial number R000079, barrel length of 13-3/4 inches, and an overall length of 31-11/16 inches.</li> <li>2. Harrington &amp; Richardson, H &amp; R Handy-Gun, .410-12 m/m choke, bearing serial number 37757, barrel length of 12-1/8 inches.</li> </ol> <p>The .38 caliber pen-gun, taken from John Dudley on December 31, 1990, will be sent to Firearms Technology Branch for a Title II determination.</p> <p>An NFA search was conducted under the name of John David Dudley, with negative results.</p> <p>On January 9, 1991, this case was presented before a federal grand jury. It is anticipated that Dudley will be indicted for his 12/31/90 illegal possession of two firearms.</p> <p>Investigation to continue.</p> <p>ATTACHMENTS:</p> <p>ATF # 3100.7 - Case Summary ATF # 3400.14 - Property Inventory list</p>		

DETAILS

This report is submitted to update the status and request property disposition regarding the investigation of John David Budley. Budley is a multiple convicted felon, who was unlawfully using and carrying firearms while trafficking in drugs in the Judicial District of Oregon. This investigation is classified as CIP: Narcotics.

John David Budley has a criminal history dating back to 1977. Budley's criminal history reflects four felony convictions, one for first degree theft and three for the delivery and possession of controlled substances. Budley also has four misdemeanor convictions, numerous arrests for both the possession and delivery of controlled substances, ex-con in possession of a firearm, parole violations, burglary, theft and most recently, the manufacture of controlled substances.

As described in the previous status reports, from November 1989 to June 1990, five search warrants were executed by the Jackson County Narcotics Enforcement Team (JACNET) on John Budley's residence or his associates' residences that contained Budley's property. During these search warrants, numerous firearms, various quantities of both methamphetamine and marijuana, a "boxed" methamphetamine lab and an operating methamphetamine lab were discovered by police officers. During an April 21, 1990, search warrant on one of John Budley's associates, two Title II firearms were found that belonged to Budley. On December 31, 1990, John Budley was stopped while driving a stolen vehicle and found to be in possession of a 9mm pistol and a .38 caliber pen-gun, he was arrested for the unauthorized use of a motor vehicle and ex-con in possession of a weapon.

An NFA search was conducted under the name of John David Budley, with negative results.

On January 5, 1991, this case was presented before a federal grand jury. John Budley was subsequently indicted for violations of Federal Firearms Laws, Title 18 U.S.C., Section 922(g), and Title 18 U.S.C., Sections 5861(d) & 5871.

10. SUBMITTED BY (Name)	11. TITLE AND OFFICE S/A, Portland, OR POD	12. DATE 08/12/91
13.	14. TITLE AND OFFICE ARAC, Portland, OR POD	15. DATE 08/12/91

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DEPARTMENT OF THE TREASURY BUREAU OF ALCOHOL, TOBACCO AND FIREARMS REPORT OF INVESTIGATION—CONTINUATION SHEET (Criminal Enforcement)		PAGE <u>2</u> OF <u>2</u> PAGES
TITLE OF INVESTIGATION <b>DUDLEY, John David</b>		JOURNAL NUMBER <b>53260-90-40585</b>
DETAILS (Continued)		
<p>On January 17, 1991, John Dudley was arrested by ATF/Portland, and he is currently in the custody of the Federal Bureau of Prisons.</p> <p>On May 9, 1991, John David Dudley pled guilty to the original indictment.</p> <p>On July 22, 1991, John David Dudley was sentenced to 60 months imprisonment with three years of supervised release. Permission is requested to destroy the seized property in this investigation and to release the retained property back to the Jackson County Sheriff's Office.</p>		
ATTACHMENTS:		
ATF F 3270.6 - Progress Record of Defendant ATF F 3400.16 - Property Inventory - Request for Disposition (3) ATF F 1850.23 - Release of Property		

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DEPARTMENT OF THE TREASURY - BUREAU OF ALCOHOL, TOBACCO AND FIREARMS		
PROGRESS RECORD OF DEFENDANT		
1. INVESTIGATION NUMBER (Through suspect) 93360-90-4058S	2. COURT DOCKET NUMBER CR91-60011	3. JUDICIAL DISTRICT OREGON
4. COPY TO (Check appropriate box)		
<input type="checkbox"/> ASSOCIATE DIRECTOR Law Enforcement <input checked="" type="checkbox"/> OTHER (Specify) <u>S/A Mike Meadows</u>		
<input checked="" type="checkbox"/> SPECIAL AGENT IN CHARGE         _____		
<input type="checkbox"/> CHIEF, EXPLOSIVES TECHNOLOGY BRANCH         _____		
<input type="checkbox"/> CHEMIST IN CHARGE (Specify location) _____		
5. RESULT OF GRAND JURY HEARING OR INFORMATION FILED (List each count, including citation and narrative of statute.)		6. DATE
<u>DUDLEY, John David</u> True Bill Indictment Count 1: Title 18 U.S.C., 922(g)(1) Felon in Possession of Firearm Count 2: Title 26 U.S.C., 5861(d) and 5871 Possession of an Unregistered Title II Firearm		01/11/91
7. RESULTS OF TRIAL OR OTHER FINAL DISPOSITION (Including appeal) (List all counts. Use reverse for additional space.)		8. DATE
PLED GUILTY to both counts 1 and 2 of the original indictment. Sentenced to 60 months imprisonment followed by three years supervised release.		05/09/91 07/22/91

## Responses to the Bureau of Alcohol, Tobacco and Firearms' Internal Investigation of my complaint:

My five original allegations quoted from my letter dated May 10, 1997, to the Treasury Department Inspector General:	BATF's responses quoted from the "Synopsis" of its internal investigation and final report dated September 8, 1997:	My comments:
<p>"1. ATF employees have deliberately destroyed original firearm registration documents that they are required by law to maintain, as noted in sworn testimony in 1996 by ATF Special Agent Gary N. Schaible.</p> <p>In analyses of data made public by ATF, I found that during 1992 to 1996, ATF may have added 119 or more firearms to the NFRTR, which were originally registered on Form 1 or Form 4467 during 1934 to 1971, for which ATF lost or deliberately destroyed the original records."</p>	<p>"OI determined that the ATF employees referred to in the first allegation as being suspected of destroying records were, in fact, contract employees who were hired to assist in the backlog of paperwork that resulted from an influx of registrations as per [deleted by ATF]."</p> <p>"Depending on the year in question, if there was an increase in any National Firearm Act (NFA) firearm registrations, as alleged, this may have been an adjustment as a result of a different form number or registration data for the particular firearm."</p>	<p>Page 21 (references are to the FOIA page numbers) states that contract employees were suspected regarding missing NFA paperwork during 1986-87; on page 22, Mr. Schaible apparently identifies this same incident as the subject of his May 21, 1996, testimony, yet in his 1996 testimony Mr. Schaible states that BATF employees could have thrown away the defendant's registration documents in 1994. It does not appear that these discrepant statements, each made under oath, can be reconciled.</p> <p>BATF offers no empirical evidence for this hypothetical interpretation, and does not even directly answer the question. Proof of firearms being added may be established by determining if a "docket number" (first created in 1976 for keeping track of incoming paperwork) is found on the records of firearms registered in or before 1971, and by other methods that BATF apparently did not employ.</p>

<p>"2. ATF employees registered almost 2,500 unregistered NFA firearms on Form 4467 after December 1, 1968, without proper authorization by the Congress.</p> <p>In addition to not being authorized by the Congress, such registrations were prohibited by the Supreme Court in 1971, yet it appears that ATF registered more than 172 unregistered NFA firearms on Form 4467 after 1971.</p> <p>I have included an example of one apparently illegal post-December 1, 1968, Form 4467 registration in my 1997 testimony."</p>	<p>"To address the second allegation, ATF continued to register weapons after 1971 because the backlog of paperwork that resulted from the amnesty period was very large and filing the documents required extra time. In addition, some individuals were granted extra filing time if they were out of the country when the time expired for filing.</p>	<p>A statement on Form 4467 states that "This form cannot be accepted for registration of a firearm except when received by Director during the time period November 2, 1968, through December 1, 1968." As my 1997 testimony documents, each Form 4467 had a date/time stamp applied on the rear to indicate receipt, and actual time filed in some cases was in 1969; however, a Freedom of Information Act request disclosed that the date of registration, which BATF reports in its statistics, is the actual date the form was filled out by the person who registered the firearm, and BATF's own data indicate that nearly 2,500 firearms were registered on Form 4467 after 1968.</p> <p>BATF has not answered whether it has illegally registered firearms on Form 4467, despite clear evidence that it has done so. Notably, BATF has not disclosed any required notice in the <i>Federal Register</i> or other Congressional authorization to accept registrations after December 1, 1968.</p>
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<p>"3. ATF employees Edward M. Owen, Jr. and Terry L. Cates committed felony perjury in letters written to me dated March 23, 1992 and July 29, 1993, respectively.</p> <p>Mr. Owen and Mr. Cates each alleged that "an unlawful trafficker in drugs with an extensive criminal record" was in possession of a .410 bore H&amp;R Handy-Gun "while committing drug violations."</p> <p>This alleged instance of criminal conduct was used to deny my petition to remove the H&amp;R Handy-Gun from the NFA as a collector's item.</p>	<p>"Regarding Larson's third allegation, the truthful information furnished to Larson by [deleted by ATF] and [deleted by ATF] in their respective letters involves a criminal case in Oregon investigated by ATF. The suspect, John David Dudley, a multi-convicted felon, dealt in narcotics and illegally possessed firearms which included an H&amp;R Handy-Gun. Dudley was charged and subsequently pled guilty in Federal court on Federal firearms violations.</p>	<p>The H&amp;R Handy-Gun in question was, in fact, in the possession of an acquaintance of the drug trafficker at the time of the violations. BATF's manner of stating "possession" implies that the trafficker was carrying the H&amp;R Handy-Gun on his person at the time the drug crimes were committed. BATF has interpreted that the drug trafficker was in "constructive" possession of the H&amp;R Handy-Gun, even though he was not charged with illegally possessing it (see page 27 of the internal BATF report). There is the truth, and then there is the legal truth.</p>
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<p>[3. continued] In fact, a Freedom of Information Act Request disclosed that the Handy-Gun was recovered from an acquaintance of the trafficker, who said that the trafficker had given it to him for safe-keeping (see pages 212-215, 222-230, and 233-236 of my 1996 testimony).</p> <p>Any person who petitions for removal of a firearm from the NFA must state the reasons under penalty of perjury.</p> <p>The plain language of the statute at Title 26, U.S.C., § 5861(f) and § 5871 applies to any person who knowingly makes or causes the making of a false entry on any document required to be prepared as a result of administering the NFA.</p> <p>Both Mr. Owen and Mr. Cates deliberately falsified the facts of the case they cited."</p>		<p>As noted, the characterization may not have been legally false; however, it was definitely misleading.</p>
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<p>"4. Certain 'registration activity' that ATF classifies as "OTHER" could include registrations of firearms that one or more ATF employees registered contrary to law, because ATF has refused to disclose the nature of this 'registration activity.'</p> <p>In the best of my knowledge, I've never heard of any forms numbered other than 1, 2, 3, 4, 5, 6, 9, 10 or 4467 being used to register or transfer NFA firearms.</p> <p>According to a letter to me dated January 9, 1997, from NFA Branch Chief Nereida W. Levine, the 'OTHER' category is 'comprised of registrations where the form number is different from the other ones tabulated.'</p> <p>Ms. Levine, however, has declined to provide the names or numbers of these forms.</p> <p>Coupled with the other evidence of registration mismanagement I have documented, it appears that the "OTHER" category may represent firearms that were registered illegally, as noted in my 1997 testimony."</p>	<p>Larson's fourth allegation suggests that ATF is using the "other" category to illegally register firearms. However, this category is used when the computer program cannot recognize a non-standard document that has been submitted for registration.</p> <p>For instance, some registrations were actually filed in correspondence on letterhead.</p> <p>If an ATF employee entering the information into the computer enters a Form 3 as a Form 33, the program will assign the document to the "other" column.</p> <p>The fact that the form is entered in the "other" column does not mean that the firearm is illegally registered.</p>	<p>During each year from 1992 to 1996 (the most recent year for which the BATF has released NFRTR data), there were more than 8,000 entries under the "OTHER" data category. What are these "non-standard documents?"</p> <p>There is a separate "LTR" category, which Gary Schaible stated contains firearms that were registered or transferred on letterhead, when standard forms were not available.</p> <p>A normal computer program for sensitive documents would not accept the incorrect entry of a form, and data entry could not proceed. How many other errors were created in the NFRTR because of a failure to properly debug the computer software?</p> <p>Neither does it mean that an incorrectly registered or transferred firearm can be located in the NFRTR. Consider the statement of Mr. Thomas Busey in the October 1995 "Roll Call Training" session: "It was fine to begin putting everything in accurate a year ago or at least be guaranteed a year ago it was correct, but what are you going to do with the entries that go back to the early '80s and the '70s and the '60s?"</p>
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<p>"5. It appears that a significant number of NFA firearms are registered to persons who are deceased, and that ATF has been aware of this fact since at least 1981 and done nothing about it, as noted in my 1997 testimony.</p> <p>Consequently, a significant number of NFA firearms are now illegally possessed by persons who are unaware that they are in violation of the law.</p> <p>The reason is that many firearms classified as 'Any Other Weapon' are rare collector's items that many people do not consider weapons, as noted in both my 1996 and 1997 testimonies.</p>	<p>"In his fifth allegation, Larson states that some of the NFA weapons may be registered to deceased persons. While it is possible that, unknown to ATF, some NFA weapons may be registered to deceased individuals, the integrity of the NFA is incumbent upon the individuals who possess legally registered firearms to report deaths and reregister the weapon.</p>	<p>"Unknown to ATF?" Excuse me.</p> <p>As my testimony and letter to the IG state, an internal BATF report dated July 1, 1981, by BATF employee Deron Dobbs, states: "We have the condition where people who registered firearms under the original National Firearms Act at age 65 would now be 112 years old. We know that these people are dead and their heirs have not taken the necessary steps to contact us so that the involuntary transfer created by the registrant's death can be formalized."</p>
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<p>[5, continued] ATF's most recent data (as of December 31, 1996) disclose that of the 14,259 firearms registered during 1934 to 1939, exactly 11,175 (78.4 percent) are still currently owned by the person or entity that registered or acquired it during that same time period.</p> <p>And of the 58,904 firearms registered in 1968, a stunning 85.4 percent are still owned as of 1996 by the same persons who registered or received them by transfer in 1968.</p> <p>Consider that in 1981, an internal ATF study reported: 'We have the condition where people who registered firearms under the original National Firearms Act at age 65 would now be 112 years old.</p> <p>We know that these people are dead and their heirs have not taken the necessary steps to contact us so that the involuntary transfer created by the registrant's death can be formalized."</p>		<p>BATF's most recent (as of December 31, 1996) data disclose that exactly 108, 556 persons have never legally transferred the ownership of machineguns, bazookas, sawed-off shotguns, hand grenades, anti-tank rifles, and similar devices that they registered or acquired by transfer in or before 1971.</p> <p>Of the 58,904 amnesty registrations, 50,314 (85.4%) are still owned by the same person. Since the social security number was a required data field, it would take no more than a few hours to determine from the Social Security Death Index exactly how many NFA firearms are registered to people who are dead—and when those people died.</p>
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My summary of the problems, issues, and proposed solutions, quoted from my letter dated May 10, 1997, to the Treasury Department Inspector General:	BATF's responses quoted from the "Synopsis" of its internal investigation and final report dated September 8, 1997:	My comments:
<p>"One result of ATF's negligence is that some persons who own certain rare, valuable firearms that have special value to collectors have been instantly transformed into criminals.</p> <p>The reason is that through natural disasters (such as the recent floods in North Dakota, house fires, and similar tragic events), the owners of these firearms have lost their copies of the documents which prove their lawful ownership, and the law does not allow these firearms to be voluntarily re-registered."</p>		<p>The 5th Amendment apparently applies to the Bureau of Alcohol, Tobacco and Firearms as an institution. But who answers for the institution?</p>

<p><b>SOLUTION #1:</b> "Administratively removing approximately 17,000 'curio or relic' firearms classified as 'any other weapon' under the NFA, which were originally commercially manufactured in or before 1934 (but not replicas thereof).</p> <p>The Congress determined that these 'any other weapon' firearms were mainly collector's items and not likely to be used as weapons in 1960.</p> <p>It was not until 1968 that the Congress passed legislation enabling these firearms to be removed from the NFA as collector's items."</p>	<p>[Larson's] first recommendation is to remove 17,000 "any other weapons" listed under the NFA.</p> <p>Although Congress did enable firearms classified as collector's items to be removed from the NFA, contrary to Larson's interpretation it did not mandate their removal. Therefore, if an individual weapon is suggested for removal, ATF will consider the particular firearm on a case-by-case basis and determine if removal is warranted.</p>	<p>I never stated anywhere in my letter of complaint, or in either my 1996 or 1997 testimony, that the Congress mandated any firearm to be removed from the NFA as a collector's item. Identify exactly where I stated this. That is not what the law says, and I didn't say that. On page 115 of my 1996 testimony, I did state: "Mr. Chairman, no legal evidence exists to show that the Congress sought to exclude the [Marble's 'Game Getter Gun'] from the removal provision under the 1968 Act." I made this statement because of the fact that the BATF formally determined (in writing) that the Game Getter was mainly a collector's item and was unlikely to be used as a weapon; however, the BATF legal counsel later took the position that it nevertheless could not be removed because the Congress excluded it from the removal provision. My 1996 testimony (see pages 107 to 118) cites the law, legislative history, and documents that there is no legally valid and reliable evidence to support BATF's interpretation.</p>
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SOLUTION #2: "Establishing a 90-day amnesty period to allow persons who may have innocently lost their copies of the registration forms to re-register these firearms.

The Congress has authorized such amnesty periods to be established by the Secretary of the Treasury under § 207(d) of the Gun Control Act of 1968."

"Furthermore, to address Larson's second solution, if the original registration of a firearm is misplaced, the owner needs only to contact ATF to obtain another copy.

There is no need to re-register, and there is no need to establish an amnesty period as Larson suggests.

BATF presumes a fact not in evidence, and for which reasonable doubt exists: namely, that BATF has not lost or destroyed its copies of original registrations. It appears that for more than 100,000 NFA firearms, there is just a single document (the original registration) in the NFRTR to prove ownership. As noted in my 1996 testimony (see pages 92 to 95) and 1997 testimony (see page 72), I asked Mr. Gary Schaible if BATF had ever added firearms to the NFRTR because BATF had no record of the original registration—but the original owner did. He stated: "Yes. I assume that's happened." BATF's conclusion is premature, since it appears that BATF has lost or destroyed original registrations.

In a "Response to letter from Senator [James A.] McClure" dated November 29, 1979, bearing symbols LL:JJD:ajw, Philip B. Heyman, Assistant Attorney General, Criminal Division; and Lawrence Lippe, Chief, General Litigation & Legal Advice Section, Criminal Division, Department of Justice, stated that if an individual had a valid NFA firearm registration document, but that BATF could not find any record of it in the NFRTR, "the only solution would be to declare another amnesty period. The Secretary [of the Treasury] is empowered to do this under existing legislation."

January 31, 1998

Nerida W. Levine  
Chief, National Firearms Act Branch  
Bureau of Alcohol, Tobacco and Firearms  
650 Massachusetts Avenue, N.W.  
Washington, D.C. 20226

Dear Chief Levine:

I am writing this letter to request from you a written statement from the Bureau of Alcohol, Tobacco and Firearms (BATF) regarding the legal status of four National Firearms Act (NFA) firearms that I currently own, which apparently were illegally registered years before I acquired them, as well as the BATF's policy regarding the legal status of other NFA firearms that may have been illegally registered without the knowledge of their current owners.

I discussed these issues at some length in my 1997 testimony before the Subcommittee on Treasury, Postal Service and General Government Appropriations, to the point of specifically identifying each firearm by serial number and citing or providing relevant documentation.

It is perplexing that BATF did not address any of these issues in its recent internal investigation that is based on my testimony. I also find it difficult to imagine that you, as Chief of the National Firearms Act Branch, would not be concerned about the accuracy and integrity of the National Firearms Registration and Transfer Record (NFRTR). After all, the only documentation that any lawful owner of an NFA firearm has to justify the legality of its possession, are documents issued by the NFA branch.

What if NFA firearms were registered illegally? What if BATF's records are inaccurate, or missing? What if BATF chooses to confiscate an affected NFA firearm—even though its current owner acquired the firearm lawfully, BATF approved the transaction, and the current owner had no knowledge of past defects in the history of the firearm which BATF later interprets as transforming the firearm into illegal contraband? Can the lawful owner have faith in the "title" to his or her firearm, and rely totally upon the documentation of an approved transaction by the BATF as evidence that he or she lawfully possesses the firearm? Apparently not.

My concerns are not hypothetical, theoretical, or a "fishing expedition" to try and create problems that do not exist, because BATF has already confiscated at least one NFA firearm after alleging it was illegally registered at some time in the past, though without knowledge by its owner and after BATF had approved the transfer of its ownership.

It is a fact that BATF confiscated an NFA firearm from Noel Napolilli of Fairbanks, Alaska, on the grounds that it had been illegally registered sometime in the past by unknown persons, although BATF issued Mr. Napolilli a lawful registration document for the firearm when he purchased it for \$2,500 in 1985. When BATF moved to seize the firearm in 1993, Mr. Napolilli filed a lawsuit to



demand its return, but dropped the lawsuit before the case could be brought to trial. James H. Jeffries III, Esq., of Greensboro, North Carolina, who acted as Mr. Napollili's attorney, told me that the case was dropped because Mr. Napollili's wife was afraid that BATF agents were going to kill Mr. Napollili in retaliation for the lawsuit. Since this period was during the unpleasantness at Ruby Ridge and Waco, Mr. Napollili's wife's concerns may be understandable, and probably any person who is married can understand the need for domestic tranquility. In any case, Mr. Napollili, as far as he knew, lawfully purchased the firearm and was issued a registration document by BATF in 1985. Suddenly, in 1992, BATF alleged there was absolutely no record that the firearm had ever been registered, even though BATF had issued a registration document entitling Mr. Napollili to lawfully possess the firearm. I included a copy of the Napollili case with my April 8, 1997, testimony, and at that time the Subcommittee placed it into its permanent files.

The Tax Code and the NFA each prohibit disclosure of the past history of NFA firearms because such information or documents are considered to be "tax return" information, so the average person who owns an NFA firearm cannot learn anything about its provenance—legal or otherwise. My case is rather unusual because through the humble virtue of diligence I learned the history of certain firearms that I own. The average person has no means of questioning a forfeiture action by BATF based on the provenance of a firearm, or any protection against BATF flat out lying.

I am the current lawful owner of four smooth bore H&R Handy-Guns bearing serial numbers 5592, 29691, 50885, and 53637, as evidenced by my possession of a BATF issued-and-approved Form 4 for each firearm. These are the only documents which evidence my lawful ownership of these firearms, and BATF is the only entity which can issue them. I obtained some documents, or copies of documents, regarding past transfers of these firearms from the former owners, mainly because they respected my dedication as a firearms researcher and thought the documents would be an interesting addition to my collection.

It was not until 1996, under various Freedom of Information (FOIA) requests, that I was able to learn from BATF the dates of original registration of the firearms that I own. On the basis of this information supplied by BATF, I believe that the four firearms identified above were illegally registered by BATF and that BATF may attempt to confiscate them as contraband at some unknown time in the future for that reason. Since the accuracy and integrity of BATF's firearm registration records is unknown, the situation that I have identified is of potential concern to tens of thousands of people who probably believe they legally own firearms after receiving approved registration and transfer forms from the BATF. The apparently illegal registrations of my firearms on Form 3 or Form 4 considerably widens the potential for other illegal registrations, because these are very commonly used in ordinary transactions to transfer title of ownership.

A group of smooth bore H&R Handy-Guns bearing serial numbers 5592, 43950, 50885, 52531, and 53637 were transferred by and from H&R to Peter Dowd in 1986, using a Form 3 transfer form approved by BATF. Yet, these were not "new" firearms; these guns had existed since at least 1934. As my 1997 testimony documents, H&R advised BATF in writing on November 27, 1953, that "H & R has not manufactured Handy-Guns since the [NFA] law was passed in 1934," and later states that "in the last two (2) years, all our Handy Guns in .410 gauge and 28 gauge were exported to

Canada." Serial numbers 5592 and 50885 are new in their original boxes, and former H&R employees have advised me that H&R had possessed these guns for many years. Yet, under a FOIA request, BATF stated that three of these guns—which I bought during the early 1990s—were originally registered by BATF on April 16, 1986, the date of application for their transfer by H&R; indeed, this is the same date listed on the Form 3 transfer from H&R to Mr. Dowd.

A manufacturer is supposed to register unregistered NFA firearms it has manufactured on Form 2, and Form 3 is supposed to be only used to transfer the ownership of NFA firearms that are already registered. Registering an NFA firearm on Form 3 seems to be a clever way to register an unregistrable NFA firearm, because it places the firearm into the NFRTR, and raises questions about the accuracy and integrity of the NFRTR—and the conduct of whomever approved the transfers (in this particular case, the Form 3 transfers were approved by Gary Scheible via facsimile signature, which may also raise questions about who has access to the signature facsimile machine). As you may know, the U.S. Supreme Court prohibited the registration of such unregistered NFA firearms on April 5, 1971. Consequently, it appears that BATF illegally registered the five firearms described above, three of which I lawfully purchased and was issued lawful registrations by BATF.

The other smooth bore H&R Handy-Gun in question that I own is a rare 28 gauge bearing serial number 29691. I purchased it from the estate of its former owner, whose executrix gave me the old registration (a Form 4 that was approved by BATF on March 23, 1972). According to BATF, this firearm was originally registered on March 2, 1972, more than a year after the U.S. Supreme Court prohibited such a registration. Finally, the old Form 4 that I possess bears the signature of the person who approved its transfer to its now-deceased former owner, the Director of the then-Alcohol, Tobacco and Firearms Division, Rex D. Davis. Based on examples of Mr. Davis' signature on official BATF letters in an unrelated court case during the same time period, it appears that Mr. Davis is not the person who signed this Form 4. Thus, in addition to the firearm being illegally registered by BATF, it appears that someone within BATF forged Mr. Davis' signature. Both of the events that I have documented—an apparently illegal registration, and an apparently forged transfer document—definitely are violations of the NFA.

I respectfully request that you, as Chief of the NFA Branch, state in writing to me what BATF's policy is regarding the legal status of these four smooth bore H&R Handy-Guns and, specifically, whether BATF regards them as lawfully owned by me or as unlawful contraband because they were apparently illegally registered or illegally transferred (or both) without my knowledge by BATF years before I purchased them. This is a law enforcement, compliance, regulatory, and policy issue that potentially affects me as well as thousands of other persons who have lawfully purchased NFA firearms as evidenced by BATF's approvals of these transactions.

I am going to let personal concerns involving selected NFA firearms that I legally purchased speak, in part, as well, for the many people who have contacted me over the years about similar concerns. These people are genuinely terrified of BATF as an arm of the Internal Revenue Service (IRS), and as a law enforcement agency that has in the past over-reacted in situations in which human life was apparently unnecessarily lost. No person should fear being victimized by the unlawful actions of a federal law enforcement agency.

If you are unable or unwilling to provide me with a written official answer, and policy position, addressing these issues, I am going to take action against you personally regarding your conduct in the performance of your official duties, through appropriate channels.

Very truly yours,

*(signed—Eric M. Larson)*

Eric M. Larson  
P.O. Box 5497  
Takoma Park, Maryland 20913

cc: Ms. Carol Bergen, Office of the Inspector General, Department of the Treasury  
The Honorable Jim Kolbe, Chairman  
Subcommittee on Treasury, Postal Service and General Government  
The Honorable Dan Burton, Chairman  
House Committee on Government Reform and Oversight  
The Honorable Orrin G. Hatch, Chairman  
Senate Committee on the Judiciary

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DEPARTMENT OF THE TREASURY  
BUREAU OF ALCOHOL, TOBACCO AND FIREARMS  
WASHINGTON, D.C. 20226

MAR - 3 1998

F:NFA:GS  
179.101/98-4516

Mr. Eric M. Larson  
PO Box 5497  
Takoma Park, MD 20913

Dear Mr. Larson:

This is in response to your letter of January 31, 1998, in which you request confirmation of the registration status of four Harrington and Richardson Handy Guns.

The National Firearms Registration and Transfer Record reflects that the following four Handy Guns are lawfully registered to you as follows:

Serial number 5592, Form 4, approved October 6, 1989  
Serial number 29691, Form 4, approved August 22, 1994  
Serial number 50885, Form 4, approved October 24, 1989  
Serial number 53637, Form 4, approved October 17, 1990

Should any additional information be needed, please contact us at (202) 927-8330.

Sincerely yours,

A handwritten signature in dark ink, appearing to read "Nereida W. Levine", is written over a horizontal line.

Nereida W. Levine  
Chief, National Firearms Act Branch

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March 6, 1998

Nereida W. Levine, Chief  
National Firearms Act Branch  
Bureau of Alcohol, Tobacco and Firearms  
650 Massachusetts Avenue, N.W.  
Washington, D.C. 20226

Dear Chief Levine:

Thank you for your letter of March 3, 1998, responding to my letter dated January 31, 1998, regarding the legal status of four (4) H&R Handy-Guns that are currently registered to me, given that they were apparently illegally registered by BATF without my knowledge many years before I purchased them, and thus these firearms may be subject to forfeiture. These firearms bear serial numbers 5592, 29691, 50885, and 53637. I raised a number of questions about these specific firearms, as well as about BATF's policies regarding NFA firearms it may have illegally registered or transferred in the past—unknown to their current lawful owners.

Your letter states that "the National Firearms Registration Record reflects that the[se] four Handy Guns are lawfully registered" to me. This response does not fully address the issues that I raised, as explained below.

There are three things at issue. One is whether I could be prosecuted for possessing these guns—was there some crime? I think the answer is clearly no. It is not a crime to possess a firearm that was ever transferred or registered in violation of the National Firearms Act (NFA). Nothing in Title 26, United States Code, § 5861 says so.

Second is whether any of these four firearms are subject to forfeiture under Title 26, United States Code, § 5872. That seems to encompass any firearm ever involved in a violation of the statute. I don't see how a statement that the listed guns are registered to me means BATF is claiming the listed guns were never, to its knowledge, involved in a violation of the NFA.

In short, I believe I am safe from criminal prosecution with regard to these four firearms, and I have always thought that. However, then as now, I don't see any representation from BATF that BATF doesn't think these four firearms are not subject to forfeiture. I don't see how just because BATF states these firearms are registered to me, means they were never registered or transferred in violation of the NFA and, therefore, subject to forfeiture.

Third is what BATF's position is regarding the legal status of NFA firearms that the BATF itself illegally registered or transferred. The law seems to state that such firearms are subject to forfeiture regardless of when the violation of law occurred, and regardless of whether the person who bought the firearms was aware of any such violations. Does BATF take any position that there is a statute of limitations upon such forfeitures?

An important element of my January 31, 1998, letter asked BATF for a statement regarding its viewpoint regarding a forfeiture action or actions against these specific firearms. I would, therefore, very much appreciate it if you would be kind enough to state what BATF's policy is regarding any possible forfeiture action against these four specific firearms. If BATF intends to seize these firearms because BATF without my knowledge illegally registered or transferred any of them in the past before I lawfully purchased them, I would like to be informed immediately. If BATF does not intend to seize these firearms, I would appreciate it if you would be kind enough to state, in writing, that BATF does not regard any of these firearms as subject to forfeiture.

I recognize there is, unfortunately, an adversarial element regarding interpretations of law as it regards gun control. I honestly wish this was not so. I hope that you will accept my good wishes and apologies for continuing to bring matters of concern to your attention. My reason for doing so is that I would like to have these issues publicly and openly resolved.

Thank you.

Sincerely,

*(Signed—Eric M. Larson)*

Eric M. Larson  
P.O. Box 5497  
Takoma Park, Maryland 20913

cc: The Honorable Dan Burton, Chairman  
House Committee on Government Reform and Oversight

The Honorable Jim Kolbe, Chairman  
House Subcommittee on Treasury, Postal Service, and General Government

The Honorable Orrin G. Hatch, Chairman  
Senate Committee on the Judiciary

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February 11, 1998

John W. Magaw  
 Director  
 Bureau of Alcohol, Tobacco and Firearms  
 650 Massachusetts Avenue, N.W.  
 Washington, D.C. 20226

Dear Director Magaw:

I am writing to alert you to a serious flaw in the Bureau of Alcohol, Tobacco and Firearms' (BATF) recent internal report that was submitted to the Treasury Department Inspector General in response to my May 10, 1997, letter describing apparent mismanagement, misconduct, and criminal wrongdoing by BATF agents or employees. Right now I am preparing a detailed rebuttal of many of the report's findings, but in the meantime would like to respectfully request that you consider addressing one of the most egregious flaws in the internal BATF investigation. I am taking the time to write to you personally, because I plan to ask Chairman Jim Kolbe, Subcommittee on Treasury, Postal Service, and General Government Appropriations, to request you to address these matters in a formal hearing this Spring.

What I'm asking you to consider doing now is pretty simple: namely, doing some straightforward computer runs using existing data to determine if BATF has added firearms to the National Firearms Registration and Transfer Record (NFRTR) because there was no record of the registration of said firearms, after BATF was confronted with a valid registration document by their lawful owners. I will describe how I became aware of this problem, what I did to independently determine that it actually existed, and will identify a method for detecting the extent of this problem.

As my research on the smooth bore H&R Handy-Gun, and other "Any Other Weapon" category NFA firearms has become better known, through publication in the *Standard Catalog of Firearms*, the *Blue Book of Gun Values*, and the *Official Price Guide to Antique and Modern Firearms*, a number of people have contacted me for additional information. What some of these people alleged was very disturbing—that BATF had moved to confiscate a family heirloom firearm because the firearm was allegedly not registered, but BATF added the firearm to the NFRTR data base after the lawful owner produced a valid registration. This has not been a common event, and I don't think more than five people have ever told me this. Because the NFA and the Tax Code each require an NFA document to be regarded as a "tax return," these records aren't open for inspection or research.

Until the Thomas Busey matter came up and a transcript of Mr. Busey's remarks in his capacity as Chief of the National Firearms Act Branch about serious errors in the NFRTR was made public, I believed there was no way to determine the truth or falsity of the allegations of firearms being "added" to the NFRTR. I then re-thought the situation and inspected and analyzed the data on firearm transactions as reported from the NFRTR data base, which BATF has publicly released since approximately 1989. I examined the records of Form 1 registrations from 1934 to 1971, and all Form 4467 (Amnesty Period) registrations, to see if the number of registrations changed over time. In

theory, the original date of a firearm registration should not change, but I found otherwise; specifically, the number of original registrations showed apparent *increases* over time. This was consistent with the allegations I'd heard that BATF had added firearms to the NFRTR data base. It also appeared that BATF had illegally registered NFA firearms on Form 4467 (nearly 2,500) after December 1, 1968, when the Amnesty Period expired.

At the time, in the spring of 1996, I was preparing to testify before the House Subcommittee on Treasury, Postal Service and General Government Appropriations, which as you know funds BATF. I wanted to address this issue of "lost-then-found" registrations, and post-December 1, 1968, Form 4467 registrations, and wondered what I could do to independently confirm whether firearms were, indeed, being added to the NFRTR, so I called Mr. Gary N. Schaible, because I recognized how serious this issue is. For me to testify about matters involving possible misconduct or criminal wrongdoing by a federal law enforcement agency is something I regarded as a grave matter. Specifically, given the nature of my employment, it would be professionally ruinous for me to give such testimony without providing significant and credible, documented evidence.

In an April 1996 telephone interview, I asked Mr. Schaible if, in fact, BATF had ever added firearms to the NFRTR because lawful owners produced valid registrations, yet there was no record of the firearm in the NFRTR. Mr. Schaible answered: "Yes. I assume that's happened." I asked Mr. Schaible this question several times, and each time the answer was the same; I definitely did not misunderstand him. Mr. Schaible also stated that BATF had registered NFA firearms on Form 4467 after December 1, 1968, but could not explain those apparently registered in 1972 and later (such registrations were prohibited by an April 5, 1971, U.S. Supreme Court decision). My account of talking with Mr. Schaible appears on pages 88 to 96 of my 1996 testimony (see official printed hearing record).

In my 1997 testimony, I simply carried my 1996 findings forward one year and dealt with this issue in considerably more detail. Specifically, I determined that BATF may have added 119 or more firearms to the NFRTR during 1992 to 1996 (the most recent year for which data were then available) after being confronted with a valid registration (see pages 51 to 67 of my 1997 testimony, in the official printed hearing record). In a previous letter, NFA Branch Chief Nereida W. Levine stated that adjustments to data (to correct errors may cause changes in the statistics, and that if a firearm was lawfully registered but not in the NFRTR data base, it would be added.

In my May 10, 1997, complaint to the Treasury Department Inspector General, I stated, in part:

In analyses of data made public by ATF, I found that during 1992 to 1996, ATF may have added 119 or more firearms to the NFRTR which were originally registered on Form 1 or Form 4467 during 1934 to 1971, for which ATF lost or deliberately destroyed the original records.

The implication of such registrations "lost or deliberately destroyed" by BATF is that if the lawful owner loses his or her copy as well, the firearm is instantly transformed into unlawful contraband that nobody can own. The proven fact of such loss by BATF would require that another amnesty period



be established to correct the NFRTR, so the stakes in this matter are quite high. In a "Response to letter from Senator [James A.] McClure" by Philip B. Heymann and Lawrence Lippe of the Department of Justice dated November 29, 1979, bearing symbols LL JJD:ajw, stated that if a lawful owner presented a valid registration for which no record in the NFRTR existed, "the only solution would be to declare another amnesty period. The Secretary (of the Treasury) is empowered to do this under existing legislation."

BATF's internal investigation into this matter is unsatisfactory, because it leaves the question of "lost-then-found" registrations unanswered. Specifically, the BATF report states:

Depending on the year in question, if there was an increase in any National Firearms Act (NFA) firearm registrations, as alleged, this may have been an adjustment as a result of a different form number or registration date for the particular firearm.

This response to my allegation is unsatisfactory because the increases I documented certainly "may have been" the result of any number of things, and because the response is not legally definitive, indeed, BATF has cited no empirical, documented evidence backing up its response.

In contrast, I suggested at least one method in my testimony that could establish with definitive legal certainty whether the increases in NFA firearm registrations that I detected are, in fact, the result of BATF adding firearms to the NFRTR after being presented with valid registrations by the firearms' lawful owners. The following method, in fact, is summarized from pages 74 to 77 of my 1997 testimony (again, see the official printed hearing record). In brief, the method involves comparing the "docket number" in the NFRTR for specific firearms with the original registration dates of these firearms. In approximately 1976, BATF began assigning unique "docket numbers" to paperwork (such as NFA firearm registration and transfer forms) that came in for processing. As we have seen, I have alleged that 119 or more firearms may have been added to the NFRTR during 1992 to 1996, for original years of registration from 1934 to 1971; and note that NFA Branch Chief Levine stated to me in a letter dated January 9, 1996, that a firearm "would be added to the National Firearms Registration and Transfer Record if the information was not already in the Record."

Director Magaw, a simple computer run that compared original years of registration of NFA firearms from 1934 to 1971 with "docket numbers" might well conclusively establish whether or not BATF lost or destroyed original registrations and was forced to add them back when confronted with valid registrations by the firearms' owners. If a firearm originally registered in 1936 or 1968 or 1954 or 1962 or 1945 had a "docket number," that would be pretty conclusive evidence that the firearm had been "added" in the NFRTR as the result of a lost registration. Such a computer run could be done in as little as 10 to 20 minutes; it is not complicated.

Of course, independent manual verification and inspection of any paperwork/documents identified in such a search would have to be done. It would also have to be determined if there were any suspicious "breaks" in the "docket number" sequence that would indicate tampering with records, such as to try and cover up whether firearms had been added.

The astonishing thing is that nobody at BATF apparently tried to match "docket number" with year of original firearm registration, but it is not astonishing if you consider that BATF management may have specifically prohibited doing this check of the records. After all, proof that BATF lost or destroyed records, in the opinion of the Department of Justice, requires that another amnesty period be established. In addition to the adverse publicity that would result, such dereliction of duty would seriously call into question the competence of BATF to administer this Nation's firearms control laws.

In the past, BATF has covered up wrongdoing of this type. In the Bussey case, I invite your attentions to Mr. Bussey's remarks on October 18, 1995. He said, in part:

I am to say that when we testify in court, we testify that the data base is 100 percent accurate. That's what we testify to, and we will always testify to that. As you probably well know, that may not be 100 percent true . . . we're hoping [that numerous cross-checks using multiple identifiers] eliminates the possibility that anything goes out erroneous because we know you're basing your warrants on it, you're basing your entries on it, and you certainly don't want a Form 4 waved in your face when you go in there to show that the guy does have a legally-registered Title 2 weapon. I've heard that's happened. I'm not sure . . . when I first came in a year ago, our error rate was between 49 and 50 percent, so you can imagine what the accuracy of the [NFRTR] could be, if you're error rate's 49 to 50 percent.

BATF's internal investigation of Mr. Bussey's remarks does not inspire confidence. Consider the sole statement of Special Agent Joseph E. Dugan, who was assigned to the case:

On November 30, 1995, I interviewed BUSEY under oath. The scope of this interview was limited in accordance with the discussion I had with Mr. [Associate Chief Counsel (Firearms and Explosives) Jack B.] Patterson. BUSEY related the following in an affidavit, which is attached hereto:

When he said that members of his staff testify that the NFRTR database is 100% accurate although they know otherwise, he made a misstatement of the facts. What he meant to convey was the fact that the database contains certain inaccuracies which can be attributed to human error. His personnel testify only to the accuracy and diligence of their search and make no comment, either in court or on any official document, concerning the accuracy of the database. If he were asked about the accuracy of the database under either direct or cross examination, he would reply that the database contains evidence of human error. He would then explain how a search is performed.

You will note that Mr. Dugan avoided asking Mr. Bussey about "a Form 4 waved in your face when you go in there to show that the guy does have a legally-registered Title 2 weapon. I've heard that's happened." Well, I checked the Form 4 data, and found that a BATF agent could have had a legal form 4 "waved in" his or her face at least 625 times during 1992 to 1996 (see pages 68 to 72 of my 1997 testimony). Moreover, BATF has officially identified "Approved form never updated in NFRTR" as a significant problem (see pages 100 to 106 of my 1997 testimony). Finally, the indented

statement in Mr. Dugan's report, which implies quoted material, isn't actually an "affidavit" from Mr. Busey. The statement is simply what Mr. Dugan says that Mr. Busey would say, and is hardly a direct legal statement. In my judgement, Mr. Dugan didn't ask Mr. Busey about Form 4 and other NFRTR problems because he was specifically directed not to.

The preceding discussion suggests why I had so little faith in BATF's internal review process, that I contacted the House Committee on Government Reform and Oversight to try and prevent what surely would have been just another coverup. As you know, the Committee has requested the Treasury Department Inspector General to: (1) conduct an independent audit of BATF's firearm registration practices; and (2) evaluate the BATF's internal report. The latter has been completed, and the former is apparently still ongoing.

I believe that the Government employs competent criminal investigators, but will their political masters in the Executive Branch allow them to go where the evidence leads? What for me began as a simple concern about lawful heirs who have inherited certain rare, collector's-item firearms being unjustly deprived of these firearms, has evolved into a more lengthy analysis of how BATF has administered the National Firearms Act and obviously serious problems with the NFRTR database.

Director Magaw, you are in a position to require BATF personnel to answer the questions that I have asked truthfully, directly, and completely. So far, BATF has responded with hypothetical or misleading answers that simply are not legally sufficient, and do not cite any definitive, empirical evidence as normally would be required in an audit or investigation. Where are the work papers? BATF's reply to me is that none can be identified. Similarly, a list of witnesses "never materialized."

Today is February 8, 1998. I am sure you will receive this letter within a few days. There is roughly a 2-month period between now and when BATF's Appropriations hearings will be held. I am providing Chairman Kolbe with a copy of this letter at the same time I have sent it to you, and I sincerely hope that he considers asking you to respond to this letter for the record.

Very truly yours,

*(signed—Eric M. Larson)*

Eric M. Larson  
P.O. Box 5497  
Takoma Park, Maryland 20913

cc: Ms. Carol Bergen, Office of the Inspector General, Department of the Treasury  
The Honorable Jim Kolbe, Chairman  
Subcommittee on Treasury, Postal Service and General Government  
The Honorable Dan Burton, Chairman  
House Committee on Government Reform and Oversight  
The Honorable Orrin G. Hatch, Chairman  
Senate Committee on the Judiciary

NIGHT CITY

THURSDAY, JANUARY 22, 1998 A13

# Federal Workers Must Tell Truth, Court Says

## Separate Charges Can Be Brought for Lying About Misconduct

By Juan Bialagovic  
Washington Post Staff Writer

The Supreme Court ruled unanimously yesterday that federal workers who deny a job-related misconduct charge can be separately charged and disciplined for lying.

The justices rejected a claim that the practice violates a person's right to due process of law and means that any time a worker must respond to an allegation during an agency investigation, he or she risks a separate false-statement charge if the whole truth is not told. Chief Justice William H. Rehnquist wrote for the court that workers "cannot with impunity knowingly and willfully answer with a falsehood."

Separately, the justices ruled by a 6 to 3 vote in a Virginia capital case that a judge need not instruct a jury about mitigating evidence that might persuade it to give a defendant life in prison rather than death. The justices, also ruling 6 to 3, struck down a New York law that allows in-state residents to deduct alimony payments but denies the deduction to nonresidents filing New York returns.

The federal employees' case was brought by six workers who were disciplined for misconduct and subject to extra sanctions for making false statements, including the lead challenger in the case, Lester E. Erickson, a police officer at the Bureau of Engraving and Printing. During an investigation into "mad laughter" harassing telephone calls at the agency, Erickson said he did not know who was making the calls. Eventually, it was discovered that Erickson had encouraged someone to make a call. The bureau wanted to fire him for his part in the incident and for lying about it, but the federal Merit

Systems Protection Board shielded the double punishment and reduced his sanction of firing to a 15-day suspension.

When the government appealed, the U.S. Court of Appeals for the Federal Circuit said an employee cannot be charged for making a false statement when it involves the denial of another charge. The appeals court reasoned that under the constitutional guarantee of due process, an accused person is entitled to a meaningful opportunity to be heard and that "employees might be reluctant to deny charges for fear that their denials would be construed as 'decisions of fact,' subjecting them to additional charges."

But the high court said the opportunity to be heard does not include the opportunity to lie and noted that a criminal defendant's right to testify does not include the right to commit perjury. Lawyers who represent federal workers said yesterday the ruling is *Lockner v. Erickson* will put new pressure on public employees. They noted that unlike in criminal trials in which defendants need not testify, federal employees have an obligation to answer questions and agencies can draw negative inferences when people refuse to respond.

A related pending case tests whether a denial of wrongdoing during an agency investigation may subject the person to prosecution under a statute making it a felony to lie with respect to any matter within the jurisdiction of a federal agency. A ruling in *Brinson v. United States* is likely before the justices review this summer.

In the Virginia case, Douglas M. Buchanan was convicted and sentenced to die for the 1987 murders of his father, stepmother and two young

stepbrothers. During his sentencing hearing, testimony over two days detailed Buchanan's troubled family background and mental and emotional problems. Buchanan wanted the judge, who specifically instructed the jury on the aggravating circumstances of the crime, to specifically instruct the jury about mitigating circumstances, including his troubled background. The judge refused, and an appeals court upheld the death sentence.

In affirming the sentence in *Buchanan v. Angelone*, Rehnquist wrote for the majority that although a defendant must be able to present relevant mitigating evidence, the court has never required states to structure in a particular way how juries consider the evidence.

He said it was enough for the judge to tell the jury to base its decision on "all the evidence." Justices Stephen G. Breyer, John Paul Stevens and Ruth Bader Ginsburg dissented. In a statement by Breyer, they said ambiguous instructions "risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty."

In the New York case, the court said the state lacked sufficient justification for treating residents and nonresidents differently on the alimony tax deduction, violating the Constitution's mandate that states give nonresidents all the "privileges and immunities" given its own people.

### FOR MORE AUTHORITY

For a list of upcoming cases in the Supreme Court docket, click on the above symbol on the front page of The Post's Web site at [www.washingtonpost.com](http://www.washingtonpost.com)

COMMITTEE ON THE JUDICIARY  
WASHINGTON, DC 20540-6775

Exhibit A, Pg. 541

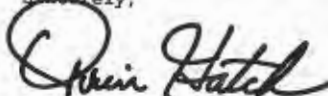
144

October 27, 1997  
Page 2

Ultimately, I will do everything I can to maintain the balance between effective law enforcement and protected civil rights.

Again, thank you for writing to me on this important issue.

Sincerely,

A handwritten signature in black ink, appearing to read "Orrin Hatch". The signature is written in a cursive style with a large, circular initial "O".

Orrin G. Hatch  
Chairman

OGH:jgg

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ORRIN G. HATCH, UTAH CHAIRMAN

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## United States Senate

COMMITTEE ON THE JUDICIARY

WASHINGTON, DC 20510-6775

MEL A. COHEN, Chief Counsel and Staff Director

DANIEL A. COHEN, Deputy Chief Counsel

March 11, 1998

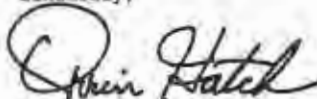
Mr. Eric M. Larson  
P.O. Box 5497  
Takoma Park, MD 20913

Dear Mr. Larson:

Thank you for your letters regarding the BATT in which you included testimony given before the House of Representatives' Appropriations Committee. I appreciate the information you provided because it is essential to the oversight role of the Judiciary Committee. Your concerns, combined with the concerns of others like you, provide insight that would be difficult for me to obtain in any other way. I will certainly keep your information in mind when considering future legislation dealing with the BATT.

Once again, thank you for taking the time to write to me on this important issue.

Sincerely,



Orrin G. Hatch  
Chairman

OGH:jgc

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JOHN D. LEASURE  
5007C VICTORY BLVD., BOX 360  
YORKTOWN, VIRGINIA 23693  
TEL: 757-874-7717

MARCH 31, 1978

THE HONORABLE JIM KOLBE, CHAIRMAN  
SUBCOMMITTEE ON TREASURY, POSTAL SERVICE AND GENERAL  
GOVERNMENT,  
HOUSE OF REPRESENTATIVES  
B 307 RAYBURN HOUSE OFFICE BLDG.  
WASHINGTON, D.C. 20515-6026  
TEL: 202-225-5834

DEAR CHAIRMAN KOLBE,

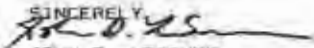
I AM ENCLOSING THE FOLLOWING MATERIAL THAT REFER TO EFFORTS  
BY THE BUREAU OF ALCOHOL, TOBACCO AND FIREARMS TO COVER UP  
ERRORS IN THE NATIONAL FIREARMS REGISTRATION AND TRANSFER  
RECORD, AND TO ILLEGALLY WITHHOLD EXCULPATORY EVIDENCE IN  
CRIMINAL PROSECUTIONS.

I WOULD RESPECTFULLY ASK THAT MY TESTIMONY BE MADE PART OF  
THE WRITTEN RECORD.

CHAIRMAN KOLBE, I WOULD ALSO ASK THAT YOU SUPPORT CHAIRMAN  
DAN BURTON IN REQUIRING THE TREASURY DEPARTMENT INSPECTOR  
GENERAL TO DO A CREDIBLE INVESTIGATION INTO THE B.A.T.F. AND  
THE NATIONAL FIREARM REGISTRATION AND TRANSFER RECORD,  
AND TO ALSO SUPPORT REMOVING THE N.F.R.T.R. FROM B.A.T.F. AND  
TRANSFERRING IT PERMANENTLY TO THE DEPARTMENT OF JUSTICE.

THANK YOU.

SINCERELY,

  
JOHN D. LEASURE



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Testimony

Statement on

Efforts by the Bureau of Alcohol, Tobacco and Firearms to  
Cover Up Errors in the National Firearms Registration and  
Transfer Record and to Illegally Withhold Exculpatory Evidence  
in Criminal Prosecutions

by

John D. Leasure  
5007C Victory Blvd., Box 360  
Yorktown, Virginia 23693

Tel: 757-874-7717

Presented

before the

Subcommittee on Treasury, Postal Service and General Government  
of the  
Committee on Appropriations  
House of Representatives

8307 Rayburn House Office Building  
Washington, D.C.

April 3, 1998

Testimony

Mr. Chairman and Members of the Subcommittee:

My name is John D. Leasure. I have prepared this testimony because I have an important story to tell about how part of the legal system in this country is broken. I say "part of the legal system," because certainly all of it is not broken. In addition to having 5 felony convictions reversed because the Bureau of Alcohol, Tobacco and Firearms (BATF) withheld exculpatory evidence, having the opportunity to personally bring this matter to your attention by myself, in my own words, means a great deal to me. There is still a cloud over my name right now, but it is my hope that the Federal Court system will clear me.

I prepared this testimony for three basic reasons.

First, I want to document for the Congress how BATF illegally withheld exculpatory evidence in the course of charging me with and prosecuting me for so-called "crimes" that were artificially created only by flawed firearm registration records.

Second, and perhaps most importantly, I want to place in the formal record of this hearing evidence that the BATF is continuing to try and cover up its misdeeds, and is thus continuing to try to illegally prosecute some people on the basis of firearm registration records that BATF knows good and well are not reliable.

Third, I hope that by bringing this information to your attention, the Subcommittee can help keep what unjustly happened to me from ever happening again to somebody else.

All of the laws that I have been accused of violating are part of the National Firearms Act (NFA) of 1934. The NFA regulates the manufacture, sales or distribution, and possession of machineguns, barookas, anti-tank rifles, land mines, hand grenades, sawed-off shotguns, firearm silencers, rockets, and similar implements of war. In addition to law enforcement reasons, there are many legitimate activities involved with these items.

Museums have them, people study them for research and development purposes, other people collect them as historical artifacts, and they are regularly used in movies. I will not try and address all of these uses here, and instead will begin by explaining how I got where I am today from my perspective.

PERSONAL BACKGROUND

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Testimony

I am an inventor of firearm silencers, which are sometimes called "suppressors," because they reduce or eliminate the sound of a firearm being discharged. I hold a patent on my silencer invention, which was patented in 1992, and which is considered among the best in the industry.

While I have sold perhaps a handful of these items to certain qualified individuals, virtually all of my clientele has been the U.S. Government, its foreign-government allies, and law enforcement agencies. In other words, my business is not with the civilian market. As a federally licensed manufacturer under the NFA, I was legally qualified to manufacture silencers as well as any other NFA firearm or device.

I also make a good product. You may not have heard of me before today, but I'm sure you all have heard of Tom Clancey, the author of Without Remorse.

Well, the technical information in that book regarding firearm silencers came from me.

My legal problems with BATF forced me to close my first company, Precision Arms International, which was located in Saluda, Virginia. As a convicted felon, I cannot possess any firearm, nor hold a federal manufacturer's license. At the moment, I am a consultant to SIGOPT.

HOW MY LEGAL PROBLEMS STARTED

In February 1994, I was contacted by BATF for a compliance inspection. When Inspector Charles Turner arrived at my place of business, we tried to retrieve my records via the computer. I had problems with the computer, so he left and returned two days later with a computer printout of my supposed inventory provided by the NFA branch in Washington, D.C. When our records didn't match, Inspector Turner said he would return in a few days. Three days later he returned, along with three other BATF Agents, with a search warrant. I offered the hard copies of my records to Special Agent Karen Dutton, but she said they were not interested in the hard copies. They seized approximately 60 items, saying they would be in touch with me. (Trial Jan. 18, 1996, Page 96, Lines 1-25.)

Throughout I called the Norfolk BATF office numerous times inquiring as to the status of my inventory and trying to find out exactly what was going on. I was told, "It is still pending." In late 1994 I was forced to close up my company, Precision Arms International, due to poor business. I was told by a good customer that word had gotten around that I was having problems with BATF.

I re-opened my business in Newport News, Virginia under the name of Silent Options. In November 1995 I was contacted by Special Agent Karen Dutton and told the grand jury had returned a true bill on my indictment.

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## Testimony

and I had better get a lawyer. When my lawyer, David N. Montague of Hampton, Virginia, called on November 16, 1995 to the U.S. Federal Eastern District Court, he spoke with Arenda Wright-Allen, Assistant U.S. Attorney. She told Mr. Montague I had NOT been indicted, but my case was still under investigation. Three days later, and two days before Thanksgiving, I received my indictment, delivered by a U.S. Marshal. The grand jury had met on November 14, 1995 and returned a true bill.

We obtained a copy of Special Agent Karen Dutton's testimony of the grand jury hearing. In her testimony, she testified I had in my possession three unregistered functioning machine guns. These "machine guns" were small replacement parts I was licensed to possess. This tainted the testimony to the grand jury. As a matter of fact, these were replacement parts of a United States military project. Even though during my trial Judge MacKenzie questioned why I was even charged with this count, it still was an issue we had to spend time and money fighting and proving my innocence. Furthermore, this prevented the negotiation of reducing my charge to a misdemeanor, and points were added to my sentencing guidelines for this count, even though I was found not guilty. (Grand jury hearing, 11-14-95, Page 10, Line 16.)

In December 1995 David N. Montague, my attorney, asked Arenda Wright-Allen if there was any way this could be reduced to a misdemeanor and was told absolutely not. On January 18 and 19, 1996, my trial was held in the U.S. District Court, Eastern Division, Newport News, Virginia, before the Honorable John A. MacKenzie. During the trial, Gary Schable, who is in charge of record certification for the NFA branch in Washington, D.C., testified their records were 100 percent accurate, and that he had made only one mistake in his 20 years of service. Judge MacKenzie took the case under advisement. (Page 107, Line 23).

In February 1996 I was found guilty on four of the six counts.

In March 1996, through a Freedom of Information Act Request by attorney James H. Jeffries, III, we obtained a transcript of a roll call training session conducted by Tom Busey, Chief of the NFA branch of the BATF. Mr. Busey, in this October 1995 training session, admitted their records were at best 50% accurate. Mr. Busey also stated when testifying in court cases, agents testify the records are 100% correct. Gary Schable was present at this meeting. (BATF Roll Call Training Session NFA Branch, October 1995, Page 9, Line 7)

"Let me say that when we testify in court, we testify that the data base is 100% accurate. That's what we testify to, and we will always testify to that. As you probably well know, that may not be 100% true. (BATF Roll Call Training Session NFA Branch, October 1995, Page 19, Line 4)

"This quality review team, when I first came in a year ago, our error rate was between 49% and 50%, so you can imagine what the accuracy of the National Firearms Registration and Transfer Record could be, if your error rate is 49% to 50%" (Please refer to the enclosed roll call

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## Testimony

training session tape.)

On March 29, 1996, David Montague wrote a letter to Judge MacKenzie requesting the case be dismissed based on the roll call training session, and regarding Count 1, Mr. Montague wrote, "Count 1 would have been fatally tainted by the multiple acts of misconduct by the Government." (Letter to Judge MacKenzie, 3-29-96).

In April 1996, my attorney filed the roll call training transcript with the court for a motions hearing. It was mailed certified return receipt. The very next day, Mr. Montague received this same transcript from Arenda Wright-Allen, which she filed with the court; only her copy left out seven consecutive pages. It's interesting to note those seven pages contained all the information about the BATF admitting their records were at best 50% accurate.

On May 21, 1996, in a hearing before the Honorable John A. MacKenzie, all counts but one were thrown out due to Gary Schaible's new testimony wherein he perjured himself, and he stated there were examiners at the BATF NFA branch in Washington, D.C. who shredded registration and transfer documents. Furthermore, this was exculpatory material withheld by the prosecution. (Court hearing, 5-21-96, Page 42, Line 19 to Page 44.)

The sentence given was 12 months, but I was let out on bond pending appeal. One interesting point, in my sentencing guidelines prepared by probation officer Sharon Thayer, she included counts of which I was found not guilty. This upped the sentencing range dramatically. (Court hearing 5-21-96, Page 70, Line 5.) U.S. attorney Arenda Wright Allen appealed my sentence.

In June 1996, Stephen Halbrook became attorney of record and noted our appeal based on the ambiguity of the law.

In May 1997, the Court of Appeals, Fourth Circuit, upheld the conviction and refused to hear oral argument on the appeal. The Fourth Circuit remanded my sentence back to Judge MacKenzie to comply with the rules of United States versus Koon. In August 1997, David Montague returned as the attorney of record and noted my appeal to the United States Supreme Court. In October 1997, the Supreme Court refused to hear the case.

David Montague has two motions to file. One is to dismiss stating BATF obtained a search warrant based on the accuracy of their records knowing full well their records were at best 50% accurate. In addition, if this transcript had been turned over before trial, which it should have been, it would have left Count 1, the count on which I was convicted. Even though I was licensed by the BATF to manufacture silencers, I was still convicted for possessing them. However, that count by itself could have been reduced to a misdemeanor under the Tax Code, and as I stated earlier, we tried to get this reduced but were told absolutely not.

## Testimony

However, I must state I feel Count 1 should have been thrown out due to the ambiguity of the law. Federal Register, Vol. 53, No. 62, Rules and Regulations, Section 179.102. This is also stated in "Your Guide to Federal Firearms Regulation, 1988-89," Department of the Treasury, Bureau of Alcohol, Tobacco and Firearms. Please see excerpts from Jan. 18 & 19, 1996 trial, Page xx, Line, Page xx, Line xx, Page xx, Line xx.

## A MISCARRIAGE OF JUSTICE

Why was Gary Schailba able to perjure himself on the stand with no repercussions? If the normal citizen were to perjure himself, they would be tried and most probably convicted. In the roll call training session tape, Tom Busey states there are over 800 cases they are trying based on the accuracy of their records. How many other people are in jail or have felony convictions on their records because of the BATF's lying about the accuracy of their records?

Why weren't Inspector Turner and Special Agent Karen Dutton interested in the hard copies of my records?

Why was Karen Dutton able to testify incorrectly to the grand jury thereby obtaining an erroneous charge against me, and in essence, extra points added to my sentencing guidelines?

Why was Brady material withheld?

Why did Brenda Wright-Alien leave out seven consecutive pages from the roll call training session transcript, which in these seven pages, it's clear Gary Schailba perjured himself? The Department of Justice stated they sent the complete transcript out to all U.S. attorneys.

Why was I "given time" in my sentencing guidelines for charges I was found not guilty? How can a person be given sentencing enhancements/points for counts he was found not guilty? If this is correct law, why have trials?

Why would the Court of Appeals, Fourth Circuit, not even hear oral argument on my case?

Why did the U.S. attorney, Brenda Wright-Alien, tell my attorney, David Montague, that I had not been indicted, yet she was the U.S. attorney who presented my case to the grand jury two days prior? She told Mr. Montague I was under investigation. The grand jury met on November 14, 1995 and Mr. Montague spoke with Ms. Wright-Alien two days later on November 16, 1995.

How can someone who truly believes they are complying with the laws be sent to jail for 12 months? (With the distinct possibility of receiving 51 months.)

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## Testimony

Please read David Montague's letter, June 4, 1996, to Michael T. Shabawn, Junior, Director, Office of Professional Responsibility, U.S. Justice Department, regarding the removal of seven pages from the roll call training session transcript; obstruction of justice/tampering with evidence.

I had just re-opened my business in June of 1995 and things were going great. I felt I had recovered my reputation BATF's raid on my prior business. I had pending orders in excess of \$500,000. News in the gun/defense industry travels fast, and by the beginning of December 1995, I was being told by customers, "We'll get back to you."

Additionally, I have spent the majority of my life in the defense industry and I was now left with no current job skills to find a new career. Needless to say, this was a severe financial strain on my family.

TESTIMONY AND RESEARCH  
OF ERIC M. LARSON

In January 1998--less than 3 months ago--I became aware that Eric M. Larson had testified before this Subcommittee about errors in the National Firearms Registration and Transfer Record, or NFRTR. Mr. Larson became interested in these errors from a completely different perspective, that of hearing about collectors who had firearms confiscated by BATF even though the firearms were legally registered to them. I would like to briefly say that the relatively small number of firearms that Mr. Larson is concerned about (he estimates there are roughly 17,000 of them) are, indeed, in my professional opinion, firearms that are only of interest to collectors. They came under the NFA for mainly technical reasons, and we in the business often encounter them. In a significant number of cases, people simply don't recognize them as NFA firearms--because they look like what they are, obsolete firearms that obviously were manufactured many years ago. I believe that what Mr. Larson has suggested is reasonable, which is to either allow people to voluntarily re-register these guns, or to simply remove them from the NFA as collector's items. I hope you will consider doing this, based on his research and testimony.

Having said that, I am mainly interested in Mr. Larson's work for two very different reasons. First, he independently confirmed what I experienced, and what those of us in the NFA business have recognized for many years. Namely, that the NFRTR records are a mess. They are not totally a mess, of course, but they are enough of a mess to cause unjust prosecutions, for a Federal Judge to deem them unreliable enough to support convictions, and for the BATF not to appeal those dismissals of charges. That's pretty unreliable.

Second, Mr. Larson followed up his testimony with a complaint to the Treasury Department Office of Inspector General, which ultimately turned

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## Testimony

into written proof of an attempt by the BATF to still try and cover up errors in the NFRTR. Briefly, Inspector General refused to investigate Mr. Larson's complaint, and instead turned it over to the BATF. The BATF then did an internal investigation, completely exonerated itself, and then refused to release the report for a long time. The report was completed in September 1997, but Mr. Larson was unable to obtain a copy until late January 1998. He kindly shared this report with us.

I will not go into Mr. Larson's complaint here, except to say that one specific complaint he made was about the deliberate destruction of registration documents by BATF employees. As we have seen, this is what Mr. Schaible testified to at my trial, and it is one of the reasons that Judge MacKenzie dismissed 5 of my convictions. Yet, the BATF told a completely different story than the one Mr. Schaible related under oath in federal court in response to Mr. Larson's complaint. Specifically, the BATF stated in its internal report that the documents were thought to have been destroyed some eight years ago by contract employees; however, at my trial, Mr. Schaible did not state this. Instead, Mr. Schaible acknowledged, under direct examination, that registration forms belonging to Mr. LesSure could, in fact, have been destroyed by BATF employees. (May 21, 1996, transcript, Page 42, Line 19 through Page 43.)

Also (incredibly, in my opinion), the BATF is continuing to try and withhold the Bussey Tape, which is clearly Brady Material. In a letter dated March 19, 1998, less than 3 weeks ago, the BATF denied a Freedom of Information Act request by Mr. Larson for a copy of the videotape. BATF gave as the reason, and I quote: "Your request is denied pursuant to Title 5, U.S.C. 552(b)(6) as release of this video tape would constitute an invasion of Mr. Bussey's privacy."

Mr. Chairman, not only is BATF's refusal to release this information an outrage, what Mr. Bussey states on the tape is an outrage; namely, that he knew good and well how messed up the records were. Listen to what Mr. Bussey states toward the end of the videotape, and I quote:

"What we're going to do is we're going to go back, starting with the latest entry and working back to the oldest entry and review every hard copy of every document with its entry into the data base to see if it's correct. I think originally we figured this would take 781 man days to do this with five people sitting at a computer eight hours a day."

"But it's the only way that we can feel that we can ever get it completely accurate. It was fine to begin putting everything in accurate a year ago or at least be guaranteed a year ago it was correct, but what are you going to do with the entries that go back to the early '80s and the '70s and the '60s?"

PROPOSED REMOVAL OF THE NFRTR FROM BATF  
AND RELOCATING IT TO THE DEPARTMENT OF JUSTICE



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## Testimony

I learned about 3 weeks ago that Mr. Larson was planning to recommend that this Subcommittee consider removing the NFRTR from the custody of the BATF, and relocate it within the Department of Justice.

I believe this is a reasonable and necessary action, for several reasons. First, the Department of Justice is the organization that does all of the background checks anyway. Second, the Department of Justice has the capability to professionally manage these records, as it has done do with fingerprint records for many, many years. The BATF has proven, by its actions, that it is incapable of managing these records, but more importantly that it is continuing to try and cover up errors in the NFRTR and thus continue to try and prosecute innocent people. Third, the BATF (or indeed, whatever government agency has the responsibility for enforcing federal gun control laws) would still have access to these records, and have the ability to use them for legitimate law enforcement purposes.

Fourth, and perhaps most importantly, moving the NFRTR to the Department of Justice would provide an objective, legal interface between these records and the BATF. In other words, the BATF could not manipulate these records or misuse them, because they would be in the custody of a disinterested federal agency that has an incentive to maintain their integrity.

Mr. Chairman, I don't know the political and practical details of how you do these things, but I strongly support Mr. Larson's suggestion that the NFRTR be completely removed from the BATF, and turned over to the Department of Justice.

#### EFFECTS OF BATF'S PROSECUTION ON MY PERSONAL LIFE

I don't know that I can adequately express how it feels to be wrongly accused of, tried and convicted for crimes that I did not commit. I can tell you that it takes over your life from then on. I think about it every day, and worry about what is going to happen to me and to my family.

In May of 1995 I married the love of my life, and with her I also enjoyed becoming a father to her five year old son. As you know, six months later I was served with the indictment. It is almost impossible, and I have said, to put into words the stress that befall our home life, for the fear of having my son lose his new father would have been devastating to him, not to mention my sorrow as well. My wife and I have both gone through depression, mental anguish, and our son's school performance has suffered.

My wife was a court stenographer who enjoyed going to court for the state felony dockets. After seeing such a gross miscarriage of justice, she was mentally no longer able to perform her duties in court hearings. She

## Testimony

lost all faith in the justice system.

We feared for our safety due to retaliation by the BATF, echoes of Waco, Ruby Ridge, and John Lawmaster went through our minds constantly. Even today, we fear that writing to you will prompt retaliation by the BATF.

People who I thought were my friends would no longer talk to me. A close friend finally told me others were afraid if they were associated with me, there would be retaliation by the BATF towards them. This friend also told me that's why no one would testify on my behalf. Furthermore, the night before my trial, a very close friend who wasn't afraid to testify, received an anonymous call stating he better not show up at trial. During this time I received numerous prank calls, some using foul language, and constant hang-ups. I never even bothered asking anybody in the WFA manufacturer or dealer industry to testify on my behalf about the same kinds of errors in the NFPA they have experienced. The BATF scares them, because the BATF can put you out of business. Knowing what it has done to me, I could never criticize anybody for putting their wife, family and business interests first. I am proof that nobody will step forward and help.

These are just a few examples of the hell we went through and are still continuing to experience, for peace of mind and reputation are not acquired overnight.

In legal fees, our bill with David Montague is \$26,300, and the clock is still ticking. We had previously paid him \$7,000. (This is not included in the \$26,300.) Stephen Holbrook's bill was \$24,500. We still owe \$18,000. This does not include the countless hours spent worrying about the case; time working on the case; time it has taken away from my family and business life; and time trying to keep it all together financially and emotionally.

## CONCLUSION

Mr. Chairman, on March 25, 1997, my attorney filed a Writ of Habeas Corpus on my single remaining conviction. As I write these words, I don't know what is going to happen, but I feel like we have a sound case that is based on valid and reliable evidence. It is possible that by the time you read these words, I will be a totally free man, but I don't want this to stop here.

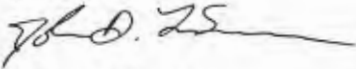
I came forward with this story mainly because I don't want any other person to ever experience what I went through, because of messed-up records and an effort by the BATF to lie about and cover up exculpatory evidence. This is the part of the legal system that is broken, and I sincerely hope that you and other Members of the Subcommittee will use your authority to support reforms that prevent any of this from ever happening again.

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Testimony

Thank you for the opportunity to have shared this information with you. I will be glad to try and assist you and anybody else in the task of fixing this very serious problem.

Sincerely,

A handwritten signature in dark ink, appearing to read "J.D. Leasure", with a long horizontal flourish extending to the right.

John D. Leasure

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DAVID N. MONTAGUE  
ATTORNEY AND COUNSELOR AT LAW

1 EAST QUEEN'S WAY  
SECOND FLOOR  
HAMPTON, VIRGINIA 23669

TELEPHONE: (804) 722-7441

FACSIMILE: (804) 722-8180

March 29, 1996

The Honorable John A. MacKenzie  
Senior United States District Judge  
Eastern District of Virginia  
Walter E. Hoffman U. S. Courthouse  
600 Granby Street  
Norfolk, Virginia 23510

Re: United States v. John David Leasure, Criminal No. 4-95-54

Dear Judge MacKenzie:

On yesterday, I received a letter with multiple enclosures from Assistant U. S. Attorney Arenda Wright Allen, Esq. It appears that Mrs. Allen also sent a copy of this letter, with the enclosures, to you.

The letter is quite extraordinary for several reasons, and I believe it is appropriate for me to bring these to your attention. I am, of course, sending Mrs. Allen a copy of this letter.

In the first place, this case was tried before you in Newport News more than two months ago, and resulted in the conviction of Mr. Leasure on 4 of the 6 counts in his indictment. Mrs. Allen's letter of March 26, 1996, states that the accompanying information is sent "to avoid any suggestion that the [Justice] Department has not provided all relevant material in this matter."

My understanding of the Brady rule is that the potentially exculpatory disclosure is to be made to the defense before the trial. It doesn't do much good two months later.

Secondly, on March 25, 1996, we sent to Mrs. Allen by Certified Mail, Return Receipt Requested, a supplement to our motion for new trial with various materials attached, including a copy of the transcript of the departmental briefing given to the Bureau of Alcohol Tobacco and Firearms (BATF) by then NFA Branch Chief Thomas Bussey, in October, 1995, and the Return Receipt shows that it was received by Mrs. Allen on March 26--the same day as her letter to me.

Third, she includes as the first item among her enclosures the same transcript of Mr. Bussey, except her copy of the transcript omits the last six pages which contained, we thought, the admissions most damaging to the Government's case. Her version of the transcript ends with page 15, but page 16, (we filed the whole thing) has Bussey saying: "we maintain these [NFRTR search] files for future reference in case one or the other of us has to CF& for one reason or another."

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The Honorable John A. MacKenzie  
March 29, 1996  
Page Two

And on page 19 he says: "when I first came in a year ago, our error rate was between 49 and 50 percent."

Another interesting item is in the portion of the transcript submitted by Mrs. Allen, and appears at page 9:

"Let me say that when we testify in court, we testify that the data base is 100 percent accurate. That's what we testify to, and we will always testify to that. As you probably know, that may not be 100 percent true."

In Mrs. Allen's next exhibit, a handwritten affidavit by Mr. Bussey, he finds it necessary to assert that: "Neither I nor any staff have never [sic] perjured themselves regarding this accuracy. . ."

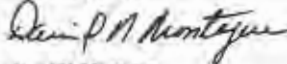
Assuming this means that they have not committed perjury, it is shocking that he would feel it necessary to issue such a disclaimer.

This casual and flippant attitude on the part of a senior BATF official is unbecoming, unprofessional and inappropriate, but far more importantly, the *sine qua non* of the Government's case on Counts 2, 3 and 6 of the indictment was the testimony and certification of Gary Schaible of the BATF that the weapons in question were test registered to Mr. LexSure. The fact that this assertion was based on data that at that time (February, 1994) suffered from a "49 or 50 percent" error rate is absolutely appalling. Had we known these facts, I believe the entire case would have been dismissed because: (a) Counts 2-6 would have been subject to reasonable doubt as a matter of law, and (b) Count 1 would have been fatally tainted by the multiple acts of misconduct by the Government.

I would request that you convene a hearing to consider the Defendant's Motion for New Trial and for such other relief as the Court might find appropriate.

With kind regards

Yours very truly,



David N. Montague

cc: Arenda Wright Allen, Esquire  
Mr. John D. LexSure

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DAVID N. MONTAGUE  
ATTORNEY AND COUNSELOR AT LAW

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TELEPHONE: (804) 722-7441

FACSIMILE: (804) 722-8187

May 24, 1996

MAILED & FAXED (804) 441-6689

Arenda Wright Allen, Esquire  
Assistant U.S. Attorney  
World Trade Center, Suite 8000  
101 West Main Street  
Norfolk, VA 23510

Re: U.S. vs LeaSure  
Criminal Number 4 95cr54

Dear Mrs. Allen:

On yesterday I received a call from an out-of-state lawyer who specializes in the defense of NFA cases.

He informed me that he had just received in one of his cases a letter similar to the one you wrote to me in this case on March 26, 1996, with, apparently, most of the same exhibits.

A significant difference, however, was the fact that he received the entire Husey transcript, and not just the first fifteen (15) pages, as I did.

You will recall that I raised that question in my letter to Judge MacKenzie of March 29 and again in remarks to the Court on May 21 in Newport News. On neither occasion did you offer any explanation, nor did your witness, Gary Schaible of the BATF, have any explanation for the missing seven (7) pages, in which most of the damaging admissions occur.

At this point, it is obvious that someone removed those critical pages from your exhibit. While I do not suggest that that person was you, I do need an explanation, and if you cannot provide it, I shall plan to write next week to the Director of the Office of Professional Responsibility at the Justice Department.

Please advise me as to what you know about the following:

- (1) Was your letter to me of March 26 unique to the LeaSure case, or was it part of a nationwide notification to defense lawyers involved in similar cases?
- (2) Was the substance of the letter your work, or was it suggested by anyone else?

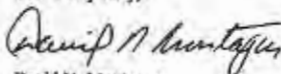
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(3) From whence did you receive the exhibits which accompanied that letter?

(4) If the answer to question three (3) is: The Justice Department, did you send out the exhibits exactly as received, or did you or anyone you know of make any changes to them?

I realize that next week is a short week, but I shall hope to hear from you by Thursday, May 30.

Yours very truly,

A handwritten signature in dark ink, appearing to read "David N. Montague". The signature is fluid and cursive, with the first name "David" being more prominent.

David N. Montague

cc: Mr. John Leasure  
/slb

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U.S. Department of Justice

United States Attorney  
Eastern District of Virginia

2000 World Trade Center  
181 West Main Street  
Norfolk, VA 23510-1634

AD0041-0311

May 29, 1996

David N. Montague, Esq.  
1 East Queens Way, Second Floor  
Hampton, Virginia 23669

Re: United States v. John Daniel Lessure  
Criminal No. 4:95cr54


Dear Mr. Montague:

Please be advised that the entire packet which I mailed to you on March 26, 1996, was xeroxed in total from the original packet sent to my office from the U.S. Department of Justice, Criminal Division.

Sincerely,

BELEN F. FAHEY  
UNITED STATES ATTORNEY

By:

  
Arénda L. Wright Allen  
Assistant United States Attorney



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DAVID N. MONTAGUE  
ATTORNEY AND COUNSELOR AT LAW

1 EAST QUEEN'S WAY  
SECOND FLOOR  
HAMPTON, VIRGINIA 23665

TELEPHONE: (804) 722-71

FACSIMILE: (804) 722-81

June 4, 1996

Michael E. Shaheen, Jr., Esquire  
Director, Office of Professional Responsibility  
U.S. Justice Department  
Room 4304  
Main Justice Building  
10th Street and Pennsylvania Avenue, N.W.  
Washington, D.C. 20530

Dear Mr. Shaheen:

I write to bring to your attention a matter which has been of great concern to me in recent weeks.

I have been involved as defense counsel in a case brought under 26 USC Section 5861(d)(6) in the Eastern District of Virginia, styled U.S.A. v. John Daniel Leasure, Criminal Number 4:95cr54.

Briefly, the case involved a prosecution of Mr. Leasure, a federally licensed Class 2 Manufacturer specializing in research and development of firearm suppressors, or "silencers", and the holder of a patent for what is probably the best silencer in the world. The offenses charged in a 6-Count indictment came before the Honorable John A. MacKenzie for a two-day bench trial on January 18 and 19, 1996, for a variety of record-keeping violations, but no substantive violations.

Initially, by Order entered February 1, 1996, Judge MacKenzie found Leasure guilty of 4 of the 6 counts of the indictment, all of which involved the record-keeping functions of the NFA Branch of the Bureau of Alcohol, Tobacco and Firearms (BATF) except Count 1, which was for possessing unsuccessful experimental silencers without serial numbers.

At the sentencing hearing on May 21, 1996, the Judge was given access to additional information which had become available after the trial, consisting principally of a transcript of a training presentation made to the BATF in October, 1995, by Thomas Bussey, then Chief, National Firearms Act Branch, BATF.

Page 2

This transcript was hushed up by BATF after it was made because extremely damaging admissions about a "49-50 percent" error rate in the NFRTR (National Firearms Registration and Transfer Record). Mr. Bussey stated that great strides had been made since he had been on the job (from October, 1994).

This, of course, cast great doubt on all cases antedating Bussey's tenure, including this one, which had arisen in February of 1994.

Within a month, Bussey had been reassigned to the tobacco section of BATF, and his transcript remained secret until it was produced pursuant to a FOIA request made by James H. Jeffries, III, Esquire, of Greensboro, North Carolina, on November 7, 1995.

Actual production was made to Mr. Jeffries on or about March 1, 1996, about 1 1/2 months after Mr. LesSure's case had been tried, and he sent a copy of the 22-page transcript.

I assembled several exhibits, including the Bussey transcript and sent to the Court with a copy to Assistant U.S. District Attorney, Arenda Wright Allen, Esquire, the attorney in charge of the Government's case.

On the same day that the Return Receipt indicates Mrs. Allen got my correspondence (March 26, 1996), a letter was sent to me by Mrs. Allen with the same Bussey transcript, except that the last 7 pages had been removed, these being where virtually all of the damaging material appeared.

I have asked Mrs. Allen to explain this, and I finally heard from her on May 29, 1996, stating that she had sent me everything she had gotten from the Justice Department.

As a result of the foregoing disclosures, together with the testimony of Gary Schabale of the BATF that the agency was having a problem with NFRTR clerks destroying registration files, Judge MacKenzie threw out all of the convictions except Count 1, and on it is substantially reduced the Guideline indicated penalty. This conviction is being appealed.

At this point, I am seeking as full an explanation as possible of what appears to be government misconduct at fairly high levels involving obvious violations of the Brady rule, coverups by the police (BATF), and tampering with evidence by the Department of Justice.

The situation was brought more forcefully to my attention when I received a photo call from Mr. Jeffries on Friday, May 24, 1996, advising that he had just received a letter from ti Assistant U.S. District Attorney on a case he had with a number of attachments. Knowing that had received a generally similar letter from Mrs. Allen, he wanted to compare them.

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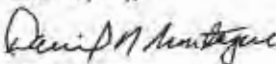
The letters and the attachments turned out to be identical, suggesting that it was a mass mailing from the Justice Department (through local AUSDAAs) to perhaps hundreds of NFA Branch (Section 5861) cases across the country affected by Bussey's statements.

Page 3

In addition, Mr. Jeffrey's version of the Bussey transcript was complete, making it obvious that someone had removed the pages from my version of the transcript.

Please let me know if I may provide you with any further information about this. I shall await your response.

Yours very truly,



David N. Montague

cc: John Leasure  
Arenda Wright Allen, Esquire

Attachments:

1. March 26, 1996, letter from Arenda Allen, Esquire, forwarding Bussey transcript and other exhibits.
2. My March 29, 1996, letter to Judge MacKenzie.
3. Mrs. Allen's letter to me of May 29, 1996.

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U. S. Department of Justice  
Office of Professional Responsibility

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Washington, D.C. 20530

OCT 3 1996

David N. Montague, Esq.  
1 East Queen's Way  
Second Floor  
Hampton, VA 23669

Dear Mr. Montague:

Thank you for your letter and the material you sent to us on June 4, 1996. We have opened an investigation into the matter.

If you have any questions about this, please contact me or Assistant Counsel George Ellard on (202) 514 - 3365.

Sincerely,

A handwritten signature in dark ink, appearing to read "Michael E. Shaheen Jr.".

Michael E. Shaheen Jr.  
Counsel

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U. S. Department of Justice

Office of Professional Responsibility

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Washington, D. C. 20530

HW 21 1996

David N. Montague, Esq.  
1 East Queen's Way  
Second Floor  
Hampton, VA 23665

Dear Mr. Montague:

In a letter dated June 4, 1996, you brought to our attention the fact that Assistant U.S. Attorney Arenda Allen had sent you an incomplete transcript of certain remarks made by an agent with the Bureau of Alcohol, Tobacco, and Firearms.

Ms. Allen has affirmed to us that which she told you: she forwarded to you in its entirety the material sent to her by the Criminal Division at Main Justice. We have told that component that some of the material it sent to U.S. Attorneys Offices appears to have been incomplete.

Thank you for bringing this matter to our attention.

Sincerely,

*George Ellard*  
George Ellard  
Assistant Counsel

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DAVID N. MONTAGUE  
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November 27, 1996

George Ellard, Esquire  
Assistant Counsel  
U.S. Justice Department  
Room 4304  
Main Justice Building  
10th Street and Pennsylvania Avenue, N.W.  
Washington, D.C. 20530

Dear Mr. Ellard:

I have your letter of November 21, 1996, for reply. You certainly appear to have missed most of the point of my earlier correspondence.

In the first place Thomas Busey should not be referred to as an "agent" of BATF. In fact, he was the Chief of the National Firearms Act Branch for that agency, and his "certain remarks" came from a lengthy training session for all BATF weapons agents.

What Mr. Busey stated was an appalling truth: that when he joined the Bureau the error rate for their records for firearms registrations was 50%, meaning agents' testimony in registration cases was worthless and that perhaps hundreds of gun dealers and manufacturers (including my client, almost) were in prison with felony convictions that should have been acquittals.

To make matters worse, Mr. Busey was summarily fired and the transcript of his remarks hushed up. Busey's career now languishes in the Tobacco Division. His remarks did not become known to the world until obtained on an FOIA request from gun attorney, James H. Jeffries, III, of Greensboro, N.C., who in turn, had heard by the grapevine that such a transcript existed.

After Mr. Jeffries got the transcript, BATF realized the jig was up and immediately sent it to the Justice Department who in turn transmitted it to Assistant U.S. Attorneys handling cases of this type.

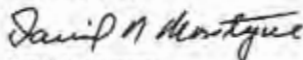
My question was, had BATF defected the crucial last seven (7) pages of the transcript and thereby almost all of the damaging admissions? Apparently you have not even looked into this

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The more serious possibility was and is that a very scary conspiracy existed between the Justice Department and BATF to conceal all of these improper convictions even though the price was an unknown number of innocent men and women who had had their lives and reputations ruined.

Your off-handed treatment of the situation suggests an indifference to a matter going to the essence of the administration of justice and due process.

Yours very truly,

A handwritten signature in dark ink, appearing to read "David N. Montague". The signature is fluid and cursive, with the first name "David" being more prominent.

David N. Montague

cc: Mr. John D. Leasure  
/slb

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DEPARTMENT OF THE TREASURY  
BUREAU OF ALCOHOL, TOBACCO AND FIREARMS  
WASHINGTON, DC 20226

March 18, 1998

REFER TO: L:D:MRL  
98-514

Mr. Eric M. Larson  
P.O. Box 5497  
Takoma Park, MD 20913

Dear Mr. Larson:

This is in response to your Freedom of Information Act request dated January 3, 1998, for information maintained by the Bureau of Alcohol, Tobacco and Firearms.

You have requested "a complete and unredacted copy of the videotape created by the Bureau of Alcohol, Tobacco and Firearms which pictures Mr. Thomas Busey, Chief, National Firearms Act Branch, during a "Roll Call Training Session, or about October 18, 1995". Your request is denied pursuant to Title 5, U.S.C. 552 (b)(6) as release of this video tape would constitute an invasion of Mr. Busey's privacy.

Insofar that your request has been denied, you have the right to request an administrative appeal. Such appeal must be addressed to the Assistant Director, Liaison and Public Information, at the above address and be received within 35 days of the date appearing on this letter. Your letter should state any arguments in support of your request.

Sincerely yours,

A handwritten signature in dark ink, appearing to read "Marilyn R. LaBrie", is written over a horizontal line.

Marilyn R. LaBrie  
Disclosure Specialist



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QUESTIONS AND ANSWERS CONCERNING THE REGULATION  
OF MACHINEGUNS AND SILENCERS UNDER THE  
NATIONAL FIREARMS ACT AND THE GUN CONTROL ACT,  
AS AMENDED BY PUB. L. NO. 99-308

SILENCERS

QUESTION: What controls are placed on silencer kits, partial silencer kits and an individual silencer part by Pub. L. No. 99-308?

ANSWER: The Gun Control Act and the National Firearms Act regulate firearms, including silencers, as defined by those Acts. The term silencer is defined in 18 U.S.C. § 921(a)(24) and 26 U.S.C. § 5845(a)(7) to mean any device for silencing, muffling, or diminishing the report of a portable firearm, including any combination of parts, designed or redesigned, and intended for use in assembling or fabricating a firearm silencer or muffler, and any part intended only for use in such assembly or fabrication. Thus, a silencer kit, whether partial or complete, and any individual silencer part is subject to all controls placed on firearms by the GCA and the NFA. NFA controls include, e.g., the registration and marking requirements. A manufacturer and distributor of silencer kits may place the serial number and other required markings on a single component of the kit, provided that the markings are conspicuous and not susceptible of being readily obliterated as required by regulations. (A manufacturer distributing a single part which meets the silencer definition must place all requisite markings on that part.) Under the GCA, a manufacturer or dealer in silencers as defined must be licensed.

QUESTION: Can the owner of a registered silencer have the silencer repaired without the transaction incurring further registration or payment of additional transfer taxes?

ANSWER: The registered owner may deliver his registered silencer to a qualified manufacturer for purposes of repair, including necessary replacement of component parts, and receive the repaired silencer without the transactions necessitating further registration or payment of transfer taxes. For the protection of the parties involved, Forms 5 should be filed by the transferors with ATF prior to the delivery and return. On the other hand, the transfer of silencer kits or parts by a qualified



ORIGINAL

ROLL CALL TRAINING

10-95

TOM BUSEY

PROCEEDINGS

MR. BUSEY: Good morning, my name is Tom Busey. I'm chief of the NFA branch, National Firearms Act Branch.

A lot of the information that Larry gave you relative to chain of command organization, that applies to us too. What I thought I'd get into this morning is the probably three major things that the branch does.

Our first and main responsibility is to make accurate entries and to maintain accuracy of the NFRTR, the National Firearms Registry and Transfer Record.

Our second main responsibility is to go look up for agents in the field who need to find out if an individual has Title 2 weapon.

Our third major responsibility, and not quite co-equal, because the sensitivity and criticalness of it is not there, but we also do record inventories for inspectors who are inspecting various firearms dealers. We verify the inventory that we have. We send it to them. They double check

(P)

1 it, and we try to get it straight.

2 I thought I'd start off by showing you some  
3 figures because, like imports branch, we also process  
4 multitudes of paper. My staffing is very similar to  
5 Larry's, although you can double the examiners. I  
6 have 12 examiners, imports has 6, and that's  
7 basically because of the volume.

8 The first chart you see up there is the  
9 amount of Title 2 weapons that are registered right  
10 now. There's approximately 728,000 Title 2 weapons.  
11 This first graph shows it by state. As you can see,  
12 the largest state for Title 2 weapons is California,  
13 and then you move right on down to, I believe that's  
14 Vermont, isn't it? Yes.

15 VOICE: Virgin Islands.

16 MR. BUSEY: Virgin Islands. I'm sorry.  
17 Virgin Islands, 25.

18 Of that 728,000, we estimate, because we  
19 don't have the time nor the inclination to do it on a  
20 monthly basis, anywhere between 150 to 155,000 is the  
21 flash grenades. They come in and out of the  
22 inventory so quickly, and probably the accuracy of

4.  
1 those is not very good, basically because when police  
2 departments and other law enforcement agencies use  
3 these flash grenades, they're supposed to report to  
4 us. We remove them from the inventory. But it's  
5 such a continual turnover. The Kansas City Police  
6 Department may report to us accurately, but the  
7 Sheriff's Department up in Utah, we may not hear from  
8 them.

9           Some day when we have the manpower and we  
10 have the time, we need to go through and separate  
11 these out.

12           In fact, we've discussed within the branch  
13 setting up possibly two different registries, just so  
14 the system doesn't become overburdened to separate  
15 these out into an equal category but a separate  
16 category.

17           The second graph shows the amount of  
18 processing that we do on a fiscal year basis for both  
19 '94 and '95. '95, there was a slight decrease  
20 between the Form 1a, Form 2a, all the way up to the  
21 Form 10a that we process. We processed 214,000  
22 pieces of paper in fiscal year '95 on the

(2)

1 registration of manufactured weapons and transferred  
2 weapons.

3 The second graph breaks this down into the  
4 type of weapon that we have in the registry for both  
5 '94 and '95.

6 Destructive devices, the second category,  
7 is the largest. Machine guns, silencers, any other  
8 weapon, short-barrel shotguns, sawed-off shotguns and  
9 short-barrel rifles.

10 I hope that page isn't for a critical  
11 lookup.

12 The next graph is the record searches that  
13 were completed in 1955. As you can see, our total  
14 record searches by our specialists, of which there  
15 are six, was 5,368. Of that, 78.5 percent were  
16 record searches for special agents in the field who  
17 needed either urgent information or routine, and I'll  
18 get into that.

19 We did 880 court certifications for trials  
20 that came after the work cases, and we did 586  
21 inventories for our inspectors in the field and  
22 verifying dealers inventories

1           The next graph, it probably wouldn't  
2 interest you too much. It gets into the special  
3 occupational tax and the population of special  
4 occupational taxpayers, the number of manufacturers,  
5 importers, and Class III dealers that are out there  
6 because we also are, obviously, concerned about this  
7 data base also.

8           What I thought I'd move into right away is,  
9 like I say, probably either first or second, because  
10 they're both probably co-equal, is the search that our  
11 specialists do, our look-up specialists do, of the  
12 NFETR for special agents when they're working a case,  
13 when they're trying to find out if an individual who  
14 they had information on has a Title 2 weapon, do we  
15 have that Title 2 weapon registered in our data base.

16           These procedures are in effect right now.  
17 There's some changes in here that you probably  
18 already have heard about relative to the involvement  
19 of management and overseeing the results that  
20 specialists come up with when they do a record  
21 search.

22           The record search can be made either by a

(3)



1 call in by special agents with a dedicated number.  
2 We just recently have constructed in our work area a  
3 separate four-walled office that has the two look-up  
4 specialists in it. They're isolated from the other  
5 activity of the branch and the division, and their  
6 only responsibilities are to take these phone calls  
7 from special agents who are doing either weapons  
8 searches or individual searches.

9 They can either do that by the telephone  
10 number by telephone or by fax machine, which we've  
11 recently had installed a separate fax machine,  
12 separate from the rest of the division, in that room  
13 by itself. That takes nothing but look ups. The  
14 search can be requested by name, by the firearms  
15 serial number, or both.

16 The specialist that's sitting in there that  
17 takes the request enters the information on the NPA  
18 record search form, and there's a lot of information  
19 that we put on there relative to the name of the  
20 agent, the badge number, the address/telephone  
21 number, and of course all of the information that we  
22 can possibly get from the agent.

(9)

1           The more information that we receive,  
2 relative to the individual that they're doing the  
3 search on, the better. If we have a birth date,  
4 current address, anything. And of course, a lot of  
5 times we don't. All we get is just a first and last  
6 name. Middle initials even help us.

7           Because as we go through the search, the  
8 further we have to go to make sure it's right, all  
9 the way back to the actual microfilm records and the  
10 actual hard copy of the transfer registration  
11 document, even middle initials can help us eliminate  
12 erroneous individuals.

13           For a name search, the specialist will  
14 search the data base, using the first three letters  
15 of the last name. The example given here is Smith,  
16 S-M-I. What happens is, they run the S-M-I. They'll  
17 get, let's say, 10,000 hits on S-M-I. Then they'll  
18 run the state and the S-M-I, and maybe they'll get  
19 400. In this case, they probably would. With some  
20 more uncommon names, you may only get 3 or 15 or 20  
21 names.

22           Then they'll run the fourth letter, to even

(1/1)

9  
1 break it down further. It's S-M-I, and then it'll be  
2 T.

3 Let me say that when we testify in court,  
4 we testify that the data base is 100 percent  
5 accurate. That's what we testify to, and we will  
6 always testify to that. As you probably well know,  
7 that may not be 100 percent true. If our data base  
8 was absolutely error free, we could simply run the  
9 name of the individual and his first name, and if it  
10 didn't come up, we could guarantee everyone that that  
11 individual doesn't have a Title 2 weapon registered  
12 to him.

13 But since sometimes in the entry part of  
14 this game people invert letters and vowels, you could  
15 put the name in, it won't come up that way.

16 So we run multiple methods of running it.  
17 If the last name and first name, if the guy's first  
18 name or the lady's first name, looks like a last  
19 name, we'll run that first. We'll invert it, just to  
20 see what we come up with.

21 So this way, we try to eliminate the  
22 possibility of have somebody in there who has a Title

(//

1 2 that we come up with a report that says they do  
2 not. We are going to a new data base whose  
3 capabilities will allow us to do more varied kind of  
4 queries and hopefully better queries, phonetics,  
5 Sound, Soundex (ph). Soundex will help us.

6 For a serial number, we'll just search the  
7 exact serial number. We have come up with a couple  
8 of incidences, and this shows the skill of the  
9 specialists that are in there, where a Z has looked  
10 like a 2 and a 2 has looked like a Z. If you run the  
11 wrong one, you come up with no registration. If you  
12 run them both, you find out that it is registered  
13 that way. There was a mistake in the printing on the  
14 form, or it was a mistake in the call in.

15 So we do the exact serial numbers, but we  
16 do look for idiosyncracies in the serial number that  
17 might make it more apt that some kind of inversion  
18 could have taken place.

19 The specialists will analyze the results of  
20 the search. Like I say, since the serial number is  
21 exact, the only records where the serial number is  
22 identified, will be provided

(12)

1 The specialists will eliminate records  
2 based on the type and description of the firearm.  
3 For the name search, we do the name, we run the FFL,  
4 the licensee data base, and the SOT data base with  
5 the name to see if there's any trade names.

6 If there's any trade names, then we go back  
7 to the registry to run the trade name to see if that  
8 trade name has any Title 2 weapons registered to it,  
9 because in many cases the agents call in with a name.  
10 That individual turns out to be a licensee, turns out  
11 to be a special occupational taxpayer.

12 Although there was nothing registered under  
13 his name, there were weapons registered under his  
14 trade name, his company name. In many cases, they  
15 may have two or three different trade names.

16 Again, as I emphasized a minute ago, to  
17 ensure the thoroughness of the search, the requesting  
18 agent should supply as much information as he  
19 possibly can. A lot of times that information is  
20 only first name/last name, and that's all he has,  
21 based on an informant or tip or whatever, and that's  
22 what we run with, is that

1 I mentioned before we'll run the SOT data  
2 base and we'll run the FFL data base, license data  
3 base, to see if we come up with anything there, and  
4 then we'll go back to the NFRTR to find out if they  
5 have any weapons registered to them.

6 Depending on what we come up with, when we  
7 come up with similar names, and we don't have a date  
8 of birth, if we come up with Allison Stevens or Tom  
9 Buesey, and we come up he's in a different state,  
10 we'll get the hard copy or the microfilm copy of the  
11 actual transfer record to see if the date of birth is  
12 the same as the agent has.

13 Depending on the volume that we're dealing  
14 with, a lot of times what we're doing now is we are  
15 sending -- I have been there a year now, and before I  
16 got there, we were sending basically either hit or no  
17 hit, and we'd send the hit. We would send possibles  
18 if they were real close, but due to some difficulties  
19 that we've had and to make sure that we don't -- we  
20 try not to send the wrong information, we have been  
21 sending probably more information than the agent  
22 needs.

(17)

1 If we come up with, if there's 22  
2 Tom Smiths in the State of Arkansas that have  
3 registered weapons, we send all 22 Tom Smiths, even  
4 if the date of birth is different, just to give the  
5 agent the opportunity to do the investigative work,  
6 rather than just telling, here's the one that we  
7 think might be it, the other 19 we don't think are  
8 it. We'll let the agent decide whether that other 19  
9 might possibly be the individual they're looking for.

10 That's why we can go all the way back to  
11 the hard copy. We can go all the way back to the  
12 microfilm to really pin down if the individual we  
13 have is the one you're looking for.

14 What we've started, since there was a  
15 problem in Baltimore with a look up and there was a  
16 problem up in Minnesota, I think it was, about six  
17 months ago, from now on, before negative information  
18 is sent to an agent -- if the agent indicates that  
19 it's a routine, he's not in a big rush for it, we  
20 used to get it back to him on the same business day.  
21 Now if an agent says it's routine, he may not get it  
22 back until the next business day. If it's an urgent,

(15)

1 he will get it back that day.

2 We'll call the information back to him and  
3 the hard copy of the information will be mailed to  
4 him. If he needs it real fast, we FedEx it.

5 The reason why the routine may not get back  
6 the same day anymore is all the negative  
7 information -- by negative, I mean, if the specialist  
8 does a look up on a name and comes up with zero,  
9 can't find that name anywhere, before that  
10 information goes back to the field agent, it comes to  
11 the branch chief's office. The branch chief sits  
12 down and basically doesn't do anymore than what the  
13 specialist did in the look up, but goes over all the  
14 information on the printouts to see if all the  
15 procedures have been followed right to the very end.

16 Did they look at the FFL data base. Did  
17 they look at the SOT data base. Did they have names  
18 that were similar to the name that was requested.  
19 Did they check out the actual hard copy of the  
20 microfilm to see if this was the individual and  
21 someone had just misspelled it when it went into the  
22 data base

(16)



1           Once the branch chief reviews this  
2 completely, then he'll return the information to the  
3 look-up specialist, who will communicate, transmit  
4 this information to the field agent.

5           What we're doing is, we're hoping that by  
6 this second level of review, and it really doesn't  
7 say anything negative about the look-up specialist at  
8 all, because the people we have right now have been  
9 doing it for a long time and they're excellent in  
10 their searches; but you do these searches and you run  
11 these printoffs on the screen and you track down  
12 these printoffs hour after hour for a full day.

13           I remember during the Oklahoma City bombing  
14 we were running it 24 hours a day. I think we ran it  
15 for about two weeks straight. Sometimes things are  
16 missed because there's only so many minutes in an  
17 hour and so many hours in a day. So this gives the  
18 branch chief time to just sit there and say, geez, I  
19 wonder if this Ivan Smith might be the Evan Smith  
20 that the agent wants. It's the same state. Then we  
21 check to see maybe if it's in the same city that the  
22 agent's looking for this guy at.

(17)

1 So it gives a little more opportunity to  
2 scope out different possibilities. The specialists  
3 are, like I say, they're turning these things out all  
4 day long for eight hours.

5 So we're hoping that eliminates the  
6 possibility that anything goes out erroneous because  
7 we know you're basing your warrants on it, you're  
8 basing your entries on it, and you certainly don't  
9 want a Form 4 waved in your face when you go in there  
10 to show that the guy does have a legally-registered  
11 Title 2 weapon. I've heard that's happened. I'm not  
12 sure.

13 Like I say, we'll give the information back  
14 by telephone and then we'll send hard copies back to  
15 you.

16 At that point, the log entry is closed out,  
17 and we maintain these files for future reference in  
18 case one or the other of us has to CYA for one reason  
19 or another.

20 The important factors, again, are: if it's  
21 communicated to the field agents, and I believe that  
22 my boss, Terry Cates, who's down -- well, he's back

(18)

1 now, but he was down at the conference in South  
2 Florida with the district directors and SACs -- one  
3 of the topics he was talking about, again, is look  
4 up, the look ups that we do for agents.

5 The more information that we can get over  
6 the phone on the individual that you're looking for,  
7 the better it is for us and the better the  
8 information comes back.

9 I mean, if you have a middle initial, give  
10 it to us. If he has a "junior" or a "senior" on the  
11 end, give it to us.

12 The second part of the information, the  
13 routine and urgent, we've already gone over.

14 So, again, I kind of consider this probably  
15 the most important support function that we have.  
16 Equal to it, of course, is maintaining the accuracy  
17 of the data base to begin with.

18 If the information that's in the data base  
19 is not accurate, it doesn't make any difference how  
20 good of a search we do, it'll come out wrong.

21 So the information on the 720,000 weapons  
22 that are in the data base has to be 100 percent

(19)

1 accurate. Like I told you before, we testify in  
2 court and, of course, our certifications testify to  
3 that, too, when we're not physically there to  
4 testify, that we are 100 percent accurate.

5 But we have found instances in our records  
6 where names have been misspelled, they've been  
7 inverted; vowels i-e have been changed; and, of  
8 course, computer programs only pull up what you put  
9 in.

10 We've made monumental strides in correcting  
11 this. A major correction event took place in 1986.  
12 About a year ago, we instituted a quality review team  
13 in the division. That's three individuals who review  
14 every transfer record that goes through an examiner  
15 to register a Title 1 weapon, or to transfer a Title  
16 2 weapon.

17 Before it actually gets entered into the  
18 data base and stays there permanently, it goes from  
19 that examiner to a specialist, who reviews it and the  
20 screen to see if the name was spelled correctly when  
21 it was put in, because obviously that's the most  
22 important thing, is the name and the spelling and the

FRIEDMAN ROBERT L. 10/18/18

1 order that it's put in. And, of course, the serial  
2 number of the weapon, type of weapons and the  
3 description of the weapon.

4 This quality review team, when I first came  
5 in a year ago, our error rate was between 49 and 50  
6 percent, so you can imagine what the accuracy of the  
7 NFRTR could be, if your error rate's 49 to 50  
8 percent. The error rate now is down to below 8  
9 percent, and that's total. That's common errors and  
10 critical errors.

11 We do a little finagling upstairs on  
12 what -- you know, we consider a common error is an  
13 error in the data base entry, but it doesn't affect a  
14 look up. It wouldn't hurt an agent who doesn't  
15 really have any damage.

16 A critical error is one where the  
17 gentleman's name is spelled wrong. Those error rates  
18 are probably below 3 percent. The total error rate's  
19 about 8 percent.

20 We hope the QRT team has made sure that,  
21 since a year ago, all the entries that go in are  
22 absolutely 100 percent accurate.

(21)

1           The only way we can go back, we have a  
2 project -- we established a project, we established a  
3 task force. We haven't begun yet because we haven't  
4 converted to the new data base. As soon as the new  
5 data base comes into effect, we'll begin the task  
6 force assignment.

7           What we're going to do is we're going to go  
8 back, starting with the latest entry and working back  
9 to the oldest entry and review every hard copy of  
10 every document with its entry into the data base to  
11 see if it's correct. I think originally we figured  
12 this would take 751 man days to do this with five  
13 people sitting at a computer eight hours a day.

14           But it's the only way that we can feel that  
15 we can ever get it completely accurate. It was fine  
16 to begin putting everything in accurate a year ago or  
17 at least be guaranteed a year ago it was accurate.  
18 but what are you going to do with the entries that go  
19 back to the early '80s and the '70s and the '60s?

20           This is the only way we feel we could  
21 correct it. No one in ISD or no one that I've known  
22 has come up with a program that we can use. This new

FRIED

1 data base will help us. And the reason why we're  
2 waiting is because the new data base will put fields  
3 and menus in there. I believe it comes from  
4 Ed Owens' shop, or maybe it's Jerry out at Tracing  
5 Center, has ownership of the data base dealing with  
6 the weapons data base.

7           Once that goes in, if we have an MP5 in  
8 there that's listed as an MPS, this will correct that  
9 to bring it -- to correct it as an MP5. But you  
10 can't do anything -- there's no data base, that I  
11 know of, or no program, to correct misspellings of  
12 names.

13           We will have an address. We were supposed  
14 to have an address correction, zip code in the data  
15 base, but we'll see when it finally gets converted  
16 over. I'm not sure.

17           And the third thing we do is for field  
18 inspectors who do regulatory compliance inspections,  
19 They call into us to get an inventory from us of  
20 Title 2 weapons. We send the inventory out. They do  
21 the physical inventory, and we make adjustments to  
22 settle any problems between the physical inventory

FRIEDMAN 2011

1 and the written inventory.

2 That's really the end of my presentation.

3 I wanted to concentrate on those three areas. I  
4 wanted to leave time for Q and A, because I figured  
5 there might be some Q and A on the look up.

6 (Pause.)

7 No questions. Okay. Thank you very much.

8 (End of requested excerpt.)  
9  
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FRIEDLY 5201-10

(24)



1 UNITED STATES DISTRICT COURT  
2 EASTERN DISTRICT OF VIRGINIA  
3 NEWPORT NEWS DIVISION  
4 -----

5 UNITED STATES OF AMERICA : Criminal No. 4:95cr54  
6 VS. : Newport News, Virginia  
7 JOHN DANIEL LEASURE, : May 21, 1996  
8 -----

9 TRANSCRIPT OF PROCEEDINGS  
10 BEFORE THE HONORABLE JOHN A. MACKENZIE  
11 UNITED STATES DISTRICT JUDGE  
12

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Proceedings recorded by mechanical stenography,  
transcript produced by computer.

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I N D E X

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1 THE COURT: All right.

2 MADAM CLERK: Criminal Number 95-54-NN United  
3 States of America versus John Daniel Leasure.

4 Is the government ready to proceed, Ms. Allen?

5 MS. ALLEN: Yes, Your Honor.

6 MADAM CLERK: Defense ready, Mr. Montague?

7 MR. MONTAGUE: Yes, ma'am.

8 THE COURT: Let me make some notes and I'll be  
9 right with you. Let the record reflect that the  
10 defendant, John Daniel Leasure, is present in person and  
11 with his attorney, Mr. David Montague. And the file  
12 would reflect that pursuant to an indictment returned in  
13 the fall of 1995, this matter came on early in January,  
14 as I recall, for trial on the defendant's pleas of not  
15 guilty.

16 He was arraigned on January the 18th and, let me  
17 get the date straight, he was indicted on November the  
18 14th. It came on for trial on the 18th and 19th of  
19 January, and on January the 19th, the Court found --  
20 continued the matter to look over the record, and on  
21 February the 6th, the Court announced it's verdict that  
22 he was guilty of Count 1, Count 2, Count 3, Count 6 and  
23 not guilty of Counts 4 and 5.

24 Thereafter, Mr. Leasure through his attorney filed  
25 several motions. The matter was then continued for

1 sentencing and for the receipt of a presentence report.  
2 In the meantime the defendant has filed a motion for a  
3 new trial and the matter is here on that motion as  
4 supplemented and also for a review of the presentence  
5 report at the sentencing. I haven't really set motions  
6 as to the proceeding but, Mr. Montague, I assume that  
7 your motion for a new trial would be foremost, and I'll  
8 be glad to hear you with regard to that. Of course, I  
9 have your brief and matters filed in connection with  
10 that and have reviewed them in detail.

11 MR. MONTAGUE: I'm not going to read them to you,  
12 Your Honor. I'm sure that you're well familiar with  
13 them. One of the fundamental requirements on the  
14 Government in any criminal prosecution is to make known  
15 any exculpatory evidence of which the Government  
16 reasonably knows.

17 In this case -- let me go back to the beginning.  
18 The thing that has troubled me about this case all along  
19 is that this is in that set of Federal statutes - and I  
20 say Federal because I don't know of any state statutes  
21 like this - where there is no requirement of scienter or  
22 mens rea or moral turpitude in order to hold a person  
23 guilty of a felony even though he be an honorable and  
24 law abiding citizen like this defendant simply making  
25 good faith mistakes that the law requires or having rule

1 changes that he doesn't know about convert him --  
2 criminalize what is otherwise innocuous and nondangerous  
3 conduct, serious criminal acts.

4 These felonies all carry ten-year sentences  
5 potentially and \$250,000 fines. The Court relied in its  
6 conviction on the case of U.S. v. Freed, which is at 401  
7 U.S. 601, a 1971 case but the holding of that case that  
8 no specific intent need be proved has been called into  
9 very serious question and I think overruled by the case  
10 of Staples against U.S. and that was decided by the  
11 Supreme Court in 1994 in a decision by Justice Thomas.  
12 We've recited that decision to Your Honor in our  
13 materials that we filed.

14 Freed involved a gentleman who was in possession of  
15 hand grenades, and his defense essentially was that he  
16 didn't know that there was anything wrong with that.  
17 And the Court believed that inherently there was  
18 something wrong with that and that there was no way he  
19 would have been surprised if he had learned that, in  
20 fact, a private citizen is not supposed to possess hand  
21 grenades.

22 The Staples case involved a man who owned an AK-15  
23 which is a gun that can be converted. It is normally a  
24 semi-automatic weapon that requires the pull of a  
25 trigger to fire each round but can be converted into an

1 automatic firearm and, hence, be a machine-gun within  
2 the meaning of the WFA. And he contended that he did  
3 not know that was a capability of the weapon.

4 The Court refused to so instruct the jury that he  
5 didn't -- that they could consider that and so the  
6 Supreme Court reversed and did so specifically saying  
7 that the reasoning U.S. v. Freed provided little support  
8 for dispensing with mens rea in this case, that case  
9 involving the gentleman with the AE-15.

10 This case is not like that. In this case we have a  
11 highly sophisticated gun person, a federal licensee  
12 licensed as a manufacturer who, as the Court knows from  
13 material previously submitted, is highly regarded in his  
14 field, holds one of the top patents in the development  
15 of silencer or suppressor technology. Early on at the  
16 arraignment, which I think the Court didn't mention the  
17 date, I believe it was January the 5th -- I think it was  
18 in December actually. Yes, it was December 5th.

19 THE COURT: My records indicate it was --

20 MS. ALLEN: It was December 1st.

21 THE COURT: December 1st, okay.

22 MR. MONTAGUE: This defendant was arraigned before  
23 Judge Bradberry, and at that time Miss Allen was not  
24 available but there was somebody there from the BATF and  
25 there was somebody there from the U.S. Attorney's

1 Office. I turned over to them copies of all of the  
2 documents that became the evidence in this case of  
3 Mr. Leasure's attempts to reverse certain transfers of  
4 the weapons for which he was indicted.

5 And I, frankly, thought that that was going to be  
6 the end of the case. And I think Miss Allen thought it  
7 might be as well but she said that -- she said when I  
8 talked to her on the phone she said she sent everything  
9 up to Washington to be analyzed and she'd let me know.  
10 So not too long before Christmas she called me and said  
11 that, in fact, the ATF decided they still had a case. I  
12 asked her what it could possibly be but she said, well,  
13 she wasn't going to tell me or she said she wasn't going  
14 to discuss her case over the phone. There was no  
15 invitation to come and discuss it in person either.

16 What she knew and what the ATF knew was that -- as  
17 we did not learn until we heard it on the stand -- was  
18 that Mr. Schaible of the ATF would inform us that they  
19 had changed their rules on how one went about reversing  
20 a transfer or voiding under the commission of the NFA  
21 and that the procedure followed by Mr. Leasure was the  
22 procedure that had existed as far as he knew forever.  
23 And Mr. Schaible said that had they gotten the transfer  
24 request or the voiding request from him. The new  
25 procedure involved sending back a form which he had to

1 fill out and it had to go back to Washington to be  
2 approved.

3 And Mr. Schaible also said there's no way that  
4 Mr. Leasure could have known that because they didn't  
5 notify anybody in the field, it was just something to be  
6 learned on a case by case basis as you tried the old  
7 technique, I suppose, they would tell you what the new  
8 procedure was.

9 Well, not knowing that, we were not prepared to  
10 prove to the Court that, in fact, all of these transfer  
11 voidings had been faxed to the Government in the usual  
12 manner. We would have and have subsequently found all  
13 of the forgotten phone records that show without a doubt  
14 that for 24 minutes on the 16th day of March,  
15 Mr. Leasure faxed from his fax machine in Saluda to the  
16 fax machine of the ATF at their weapons registry 24  
17 minutes worth of documents that were these very  
18 transfers submitted in court.

19 It wouldn't show up on the phone bill if they had  
20 not actually been received just like an incomplete phone  
21 call doesn't show up on a phone bill, so there's no  
22 question that he sent them. There's no question that  
23 they got them. We don't know what they did with them  
24 after they got them if they put them in the shredder or  
25 in the trash can or if the building burned down.



1 We don't know what happened but all we do know is  
2 that when Mr. Schaible showed up here to testify, he  
3 said we have no record of having received them, which is  
4 not the equivalent of not having received them just that  
5 he was unable to tell us what had happened. We  
6 certainly did our part or at least what Mr. Leasure  
7 thought was his part in following what he then knew to  
8 be the procedure.

9 The Court's decision turned not only on the Freed  
10 case but also on the exhibits put in evidence by the  
11 Government, these things in blue bags with the little  
12 ribbons on them that said that the weapons in the  
13 various counts of the indictment were not properly  
14 registered with the NFA. The Court treated that as  
15 true, as anybody would a government agent's testimony  
16 and exhibits, obviously, is going to be taken as true  
17 without some kind of very powerful evidence to the  
18 contrary.

19 But what the ATF also then knew and didn't tell  
20 anybody was that at the time in question of this case,  
21 which is February of '94, the Court will recall that  
22 this -- the actual bust of Mr. Leasure's place of  
23 business and trial were about two years apart and in  
24 that two-year period, the firearms registry was taken  
25 over by a gentleman by the name of Thomas Busey or Busey

1 - I'm not sure how you pronounce his name - and  
2 Mr. Busey held a briefing in October of '95 saying that  
3 when he took over a year before, which would have been  
4 October of '94 and times prior to that, the agency was  
5 suffering from a 50 percent error rate in its  
6 determination of what firearms were registered properly.

7 He said on Page 19 of the transcript that we gave  
8 the Court, "When I first came in a year ago, our error  
9 rate was between 49 and 50 percent." This particular  
10 briefing was conducted on a tape and the gentleman who  
11 I've become acquainted with since the trial through the  
12 Freedom of Information Act has also tried to get the  
13 tape, so far has not been able to do that. But in any  
14 event, at the very time when these undoubtable documents  
15 were being produced in February '94, they were subject  
16 to a 50 percent error rate.

17 Now, I don't know when knowledge like that becomes  
18 reasonable doubt as a matter of law, but it seems to me  
19 that with 50 percent, you've got an equal chance of the  
20 Government being wrong. I would think you're there at  
21 an error rate of 50 percent.

22 Again, we were not told that. As a matter of fact,  
23 I'm informed that the ATF tried to suppress that  
24 particular briefing, tried to have the transcript and  
25 the tape destroyed. It was not until March that they

1 were produced under the Freedom of Information Act. Of  
2 course, our trial was long over by the time that  
3 information would have done us any good.

4 It certainly seems to me something for the Court to  
5 consider in deciding whether or not this case needs to  
6 be retried, that kind of what I would consider dynamite  
7 evidence should have been made available to us.  
8 Certainly, the ATF knew about it and whether Miss Allen  
9 did or not I don't know.

10 But when I filed my letter -- when I supplemented  
11 my pleadings in the new trial part of this case on March  
12 the 25th, we sent that to Miss Allen by certified mail.  
13 She received it on the 26th, and on the 26th she filed  
14 part of the same transcript by Mr. Busey but her filing  
15 left off the important pages for some reason. Whether  
16 she knew that or whether that's what the ATF gave her, I  
17 don't know but I believe her transmission quit on Page  
18 15 and all of the important stuff is after that.

19 And her pleadings says that we're not conceding  
20 that we had to give that to us but they did anyway. So  
21 I'm not going to say there's anything monstrous or  
22 wicked going on here but it certainly appears to me that  
23 this defendant was entitled to better treatment by his  
24 Government than he has gotten in the prosecution of this  
25 case. Essentially, I believe that covers it. Your

1 Honor.

2 THE COURT: All right, sir.

3 MS. ALLEN: Your Honor, if I can I'd like to go in  
4 the order that the motions are filed just for the record  
5 since I suspect this will go for appeal. The first  
6 motion that the defendant filed was a motion for a new  
7 trial, and he filed that motion right after the Court  
8 found his client guilty. I would just like to argue in  
9 the first motion, Your Honor, that counsel is correct  
10 that on the day of the arraignment, the Jencks material  
11 and the discovery materials were provided to the  
12 defendant on December 1st of 1995. The discovery  
13 materials included Government Exhibits 7-1 through 7-5.

14 Now, those are all the certified copies of  
15 nonregistration. And the Court will recall 7-1 went to  
16 Count 2 of the indictment; 7-2 went to Count 3 of the  
17 indictment; 7-3 went to Count 4 of the indictment; 7-4  
18 went to Count 5 of the indictment; 7-5 went to Count 6  
19 of the indictment.

20 I was not present at that arraignment. Bob  
21 Bradenham was present with ATF Agent Joe Perkins. The  
22 evidence was turned over by the Government. It is true  
23 that I did subsequently receive a packet from  
24 Mr. Leasure's attorney regarding documentation.

25 I had previously spoken to Mr. Montague prior to

1 the December 1st arraignment. Once the indictment had  
2 been filed by the Grand Jury, Mr. Montague did tell me  
3 that he had paperwork that would cause the Government to  
4 dismiss its case. I told Mr. Montague that I would not  
5 be present at the December 1st arraignment but that I  
6 would have all of the evidence there for him. I asked  
7 him to bring the documentation to the arraignment, that  
8 I was unfamiliar with the documents that he was  
9 describing to me over the telephone but that I would  
10 take it and send it to my expert in D.C. and get back to  
11 him on that.

12 The documentation that I did receive after the  
13 December 1st, 1995, arraignment was, in fact, what is  
14 now Defense Exhibit 1-8 through Defense Exhibit -- I  
15 mean, Defense Exhibit 1-8 through Defense Exhibit 10-18.  
16 I received those materials probably in mid December  
17 right before Christmas.

18 I forwarded those materials to Mr. Schaible. I  
19 asked him to review those materials in their entirety  
20 and compare it with all of the certificates that he had  
21 previously provided as listed in 7-1 through 7-5 and to  
22 let me know if that changed his opinion.

23 It was in early January right after New Years that  
24 I spoke with Mr. Schaible and my question to him was  
25 solely, does this change your opinion. His response to

1 me was no. I said thank you very much, called  
2 Mr. Montague and told Mr. Montague that it did not  
3 change the opinion of our expert and we were not  
4 dismissing the indictment, but I did say I was not  
5 trying the case on file. I had no further discussions  
6 with Mr. Schaible regarding why it did not change his  
7 opinion.

8 If we look at -- if the Court looks at the  
9 defendant's first motion for a new trial, I think the  
10 case law that they've cited and the case law that the  
11 Government's filed shows that on the first motion alone,  
12 which the defendant has titled motion for a new trial,  
13 should be denied.

14 The Court is well aware that the defendant has to  
15 show that the evidence that he is seeking is favorable  
16 to him, that it's material, and that the prosecution  
17 failed to disclose that. Based on the evidence  
18 presented before the Court right now, all that the Court  
19 has is the fact that documents were exchanged by the  
20 parties and the Government decided based upon  
21 Mr. Schaible's opinion that the indictment would not be  
22 dismissed.

23 The case law that the Government is relying upon,  
24 number one, is that the Government feels that the  
25 defendant can't meet its burden and is relying on the

1 first motion to show that the evidence was favorable.  
2 There's been no evidence presented by the defendant that  
3 shows there was any discussion by Mr. Schaible or myself  
4 regarding any favorable evidence that the defendant had  
5 requested.

6 As I'm proffering to the Court as an officer of  
7 this Court, my contact with Mr. Schaible was very short.  
8 I wanted to know if it changed his opinion. He's the  
9 expert. He said no. I didn't need to know at that time  
10 why it didn't change his opinion.

11 Additionally, the defendant must show that its  
12 material, that being the evidence that he's requested.  
13 And the Fourth Circuit has defined material as being a  
14 reasonable probability that had the evidence been  
15 disclosed to the defense, the result of the proceeding  
16 would be different. That's a Kelly decision, Fourth  
17 Circuit 1994 decision, which is at 35 F.3d 929.

18 Additionally, Your Honor, the defendant not only  
19 has to show that its material but that it's related to  
20 guilt or innocence, and I don't think that the defendant  
21 has done that. There's three cases that the Government  
22 cited in its brief all of which deal with exculpatory  
23 matters versus inculpatory matters.

24 To be quite candid with you, I thought that the  
25 documents were a forgery or false. Mr. Schaible did not

1 tell me that. I asked someone who's been with the ATF  
2 for 25 years who's in a high leadership position within  
3 the ATF and very well respected within the bureau, he  
4 told me it didn't change his opinion. That's all I  
5 needed to know. I cited the Adverse case --

6 THE COURT: Well, tell me -- I don't have the  
7 exhibits right here before me. What was it that  
8 Mr. Montague produced that you sent to Mr. Schaible,  
9 just so I won't be off on the wrong fork in the road?

10 MS. ALLEN: It was Defense Exhibit 1 -- Defense  
11 Exhibit 1-8 --

12 - THE COURT: Young lady, do you have the exhibits?

13 MADAM CLERK: No, sir. Did they not go with you to  
14 the file? I'll get them.

15 THE COURT: We didn't have any exhibits, did we?

16 LAW CLERK: We did at one point. I don't know.

17 THE COURT: Well, tell me was it Exhibit 18, is  
18 that --

19 MS. ALLEN: There's a whole bunch of exhibits and  
20 they're listed Defense Exhibit 1, Defense Exhibit 2,  
21 Defense Exhibit 3, Defense Exhibit 4, Defense Exhibit 5,  
22 Defense Exhibit 6, Defense Exhibit 7, Defense Exhibit 8,  
23 and then the additional documents were Defense Exhibits  
24 10 through 18.

25 MADAM CLERK: I have the clerk checking on it,



1 Judge.

2 MS. ALLEN: Some of those documents have void  
3 written on them. Some of them are --

4 THE COURT: I remember now what you're talking  
5 about.

6 MS. ALLEN: Not all of them had void written on  
7 them. Some of them had void written on them, some of  
8 them Agent -- I mean, Mr. Schaible testified that --

9 THE COURT: These were all of the transfers to  
10 Mr. O'Quinn then it became unnecessary for Mr. Leasure's  
11 purposes and were marked void across the front and the  
12 question is whether these were ever sent, one, whether  
13 they were marked void, two, and, three, did they ever  
14 arrive at the -- were they ever received by ATF.

15 MS. ALLEN: That's correct, Your Honor.

16 THE COURT: What else?

17 MS. ALLEN: That's all that I forwarded to  
18 Mr. Schaible.

19 THE COURT: All right. Go ahead.

20 MS. ALLEN: And what the Court also needs to know  
21 is that all of those documents dealt with all of the  
22 counts other than Count 1 of the indictment. Your  
23 Honor, the Government's position is still that all of  
24 those exhibits, Defense Exhibits 1 through 8 and Defense  
25 Exhibits 10 through 18 are not exculpatory matters. I

1 think it was an attempt to perpetrate a fraud on the  
2 Court, to be quite candid with you.

3 And in the three cases that I cited in my brief,  
4 the Adverse case, the Jones v. Washington case and the  
5 Barker case tells the Court that the Government is under  
6 no duty to either disclose all they know about their  
7 case or disclose the police investigation that's been  
8 done on the case or to disclose anything that's not  
9 exculpatory and that's what we did.

10 There was one case of Jones v. Washington case a  
11 Seventh Circuit case that dealt with firearms and the  
12 cite for that is 15 F.3d, 671. It was denied at 114  
13 Supreme Court 2751 and the Court said that there was no  
14 great violation in failing to disclose the firearms work  
15 sheet because the evidence wasn't exculpatory.

16 That's one of the only three cases that deal with  
17 firearms but, again, we didn't think the evidence that  
18 the defense was providing to us was truthful evidence;  
19 we thought it was an attempt to perpetrate a fraud on  
20 the Court. For that reason on the first defendant's  
21 motion for a new trial, we'd ask the Court to deny that  
22 motion.

23 The defendant then filed a second motion to dismiss  
24 only Count 6 of the indictment, and in that case, Your  
25 Honor, the defendant's alleging basically that since the

1 word "firearm" was not used in the count as opposed to  
2 "weapon" that that count should be dismissed. The  
3 Government's relying on Federal Rule of Criminal  
4 Procedure 7-C-1 that tells us what the indictment shall  
5 state.

6 The Fourth Circuit law tells us that you're to look  
7 at the elements of the offense as it's listed in the  
8 statute. The Court is to look to see whether or not the  
9 defendant can prepare a defense to the charge and  
10 whether or not that defendant is protected against  
11 double jeopardy if, in fact, that same defendant is  
12 subsequently charged and that's the Daniels case, Fourth  
13 Circuit 1992 case.

14 If you look at Count 6 of the indictment, it  
15 charges that the defendant knowingly and unlawfully  
16 possessed a weapon, number one, and, number two, that it  
17 was not registered. Title 26 United States Code Section  
18 5845-B defines weapon and Title 18 USC Code Section  
19 92183 defines firearms. And if you look at both of  
20 those definitions, definition number one is listed in  
21 Count 6 and number two very similar. In Title 26 United  
22 States Code 5861-D makes it unlawful to possess a  
23 firearm which is not registered.

24 If you pulled the elements out of Count 6 and if  
25 you look at the statute, the penal statute not the

1 definitional statute but the penal statute for which  
2 he's charged, you will see that Count 6 is in compliance  
3 with the penal statute in the Freed case, which lists  
4 the three elements that the Government has to prove  
5 beyond a reasonable doubt and, that is, possession, that  
6 they are firearms, and that they were not registered.

7 The defendant also says that Count 6 does not use  
8 the word "firearm" but instead uses the word "weapon."  
9 The Government's position would be weapon and firearm  
10 are words of similar import. Weapon is specific enough  
11 in the count to allow the defendant to know what  
12 specific firearm he was charged with possessing and not  
13 having properly registered to him, that Count 6 allows  
14 him to contest that charge properly, and that Count 6  
15 will prevent him from being charged with possessing and  
16 not having registered that same weapon that's charged in  
17 Count 6 thereby protecting him from double jeopardy.

18 In Count 6 the Government refers to the definition  
19 of both "weapon" and "firearm." Again, I said the  
20 definitions are basically the same and then the  
21 Government found some case law -- Supreme Court case law  
22 and Fourth Circuit case law that says, plus, if the  
23 defendant raises the issue to dismiss the count at the  
24 return of the verdict that this Court as well as the  
25 Fourth Circuit will look at the challenge to the count

1 under a more liberal standard, and that's the Fogle  
2 decision which is at 901, F.2d 23, 1990 decision where a  
3 cert was denied and the Court found the objection was  
4 made at the return of the verdict. Any review for  
5 alleged defect was to be reviewed if at all under a  
6 liberal standard and there's the Sutton case and the  
7 Hooker case here.

8 In conclusion, Your Honor, it's very clear that  
9 Count 6 described a very specific weapon whether it's a  
10 weapon or a firearm, I think that's immaterial. They're  
11 words that are very similar as to import as the Court  
12 said. The weapon in Count 6 was seized pursuant to a  
13 lawful search warrant and that was Government Exhibit  
14 6-1 during the trial, the actual weapon. Government  
15 Exhibit 9-1 was the actual search warrant.

16 And Mr. Schaible testified that the weapon was not  
17 properly registered to the defendant on February 8th,  
18 1995, which was done by the certificate 7-4 and then in  
19 Government Exhibit 8-1 which was the ATF report that we  
20 introduced saying that the weapon functioned as  
21 designed, and it's a firearm and a weapon, so we would  
22 ask the Court to deny the defendant's motion to dismiss  
23 Count 6 of the indictment for the reasons I've just  
24 stated and the law.

25 THE COURT: Thank you, Miss Allen.

1 Mr. Montague, do you want to --

2 MS. ALLEN: And then, Your Honor, I'd like to  
3 address the Brady issue based on --

4 THE COURT: What?

5 MS. ALLEN: I have one more issue I'd like to  
6 address.

7 THE COURT: Now?

8 MS. ALLEN: Yes, sir. The last motion that  
9 Mr. Montague filed was his supplemental motion for a new  
10 trial. What I'd like to do for that, Your Honor, is to  
11 put on evidence regarding that for the record to protect  
12 the record and for that I'll be relying on Special Agent  
13 Schaible. And the issue will be whether or not the  
14 packet of material which I sent to the Court and sent to  
15 Mr. Montague as soon as our office received it is, in  
16 fact, Brady material and whether or not --

17 THE COURT: Well, that's a choice for me to make.

18 MS. ALLEN: That's a choice for you to make, Your  
19 Honor, but I would like -- I know the Court's gone  
20 through it but I don't think the record is clear as to  
21 what the documents are and what impact, if any, it would  
22 have had on Mr. Schaible's testimony regarding the  
23 weapons that were before the Court.

24 THE COURT: Well, bring him on.

25 MS. ALLEN: Okay. Thank you, Your Honor.

1        GARY SCHAIBLE, a Witness, called on behalf of the  
2        Government, having been first duly sworn, was examined  
3        and testified as follows:

4                                DIRECT EXAMINATION

5        BY MS. ALLEN:

6                Q.    Please state your full name for the record.

7                A.    Gary Schaible.

8                Q.    And are you the same Gary Schaible that  
9        testified before Judge MacKenzie during Mr. Leasure's  
10       trial?

11              A.    Yes, I am.

12              THE COURT:    How do you spell Schaible, I don't have  
13       it right here in front of me?

14              THE WITNESS:    S-c-h-a-i-b-l-e.

15              THE COURT:    Go ahead.

16        BY MS. ALLEN:

17              Q.    And, Mr. Schaible, I'm going to ask the court  
18       security officer to give you what I've marked as  
19       Government Exhibit 10-1 through 10-8 and also a copy for  
20       the Court and a copy of these documents have already  
21       been provided to Mr. Montague for Mr. Leasure's benefit.

22              Mr. Schaible, if you would, I'd ask you to first  
23       look at Government Exhibit 10-1 and I believe that's  
24       entitled The Role Call Training. Do you have that  
25       document there?

1 A. Yes, I do.

2 Q. Okay. And are you familiar with that document?

3 A. Yes, I am.

4 Q. And have you seen it before?

5 A. Yes, I have.

6 Q. And have you read it from top to bottom?

7 A. Yes, I have.

8 Q. And if you could now look at Government Exhibit

9 10-2 and I believe that's entitled --

10 THE COURT: Well, let's label that. Is 10-1 the  
11 Busey --

12 MS. ALLEN: That's correct, the Role Call Training  
13 of Mr. Busey.

14 THE COURT: Busey's statement. All right. Go  
15 ahead. 10 dash what?

16 MS. ALLEN: That was 10-1, Your Honor, the next one  
17 is Government Exhibit --

18 THE COURT: All right. We've got that. Next.  
19 BY MS. ALLEN:

20 Q. 10-2. And, Mr. Schaible, I believe that is  
21 entitled Memorandum, Dated December 1st, 1995.

22 A. 10-2 is the statement.

23 Q. Oh, I'm sorry. 10-2 -- you're right. 10-2 is  
24 the handwritten sworn statement of Tom Busey dated  
25 November 30th, 1995; is that correct?



1 A. Yes, it is.

2 Q. Okay. And if you could look at Government  
3 Exhibit 10-3.

4 A. I have it.

5 Q. And I believe that you have there a memorandum  
6 dated December 1st, 1995, and a memorandum dated  
7 December 11th, 1995, and an incident report concerning  
8 the ATF internal investigation of Mr. Busey's statement;  
9 is that correct?

10 A. Yes, it is.

11 Q. And if you can look at Government Exhibit 10-4,  
12 I believe that those are minutes of a meeting held on  
13 November 9 through 10, 1994, to address firearms and  
14 explosives date of integration; is that correct?

15 A. Yes.

16 Q. And if you could look at Government Exhibit  
17 10-5, I believe that's a memo dated February 9th, 1996,  
18 and supporting material constituting the report of the  
19 recent audit of the NFA data base; is that correct?

20 A. Yes, it is.

21 Q. And if you can look at Government Exhibit 10-6,  
22 I believe that's a memo dated April 30th, 1991,  
23 concerning the accuracy of the NFRTR; is that correct?

24 A. Yes, it is.

25 Q. And Government Exhibit 10-7 is a memo -- a

1 correspondence, excuse me, between Senators McClure,  
2 M-c-C-l-u-r-e, and Senator Bayh, B-a-y-h dated from  
3 December 1979 through January 1980 relative to the  
4 accuracy of the NFRTR, correct?

5 A. Okay. The first letter is October 15th, 1979,  
6 actually.

7 Q. Okay.

8 A. And there's -- I can't read the date on the  
9 last one, it says January 1980 but I can't read the  
10 actual date.

11 Q. Okay. And then Government Exhibit 10-8, the  
12 last exhibit that's there, it's a two-page affidavit of  
13 Gary Schaible dated February 13th, 1996.

14 A. Correct, yes.

15 Q. And, Mr. Schaible, is it fair that you have  
16 familiarized yourself with the total contents of  
17 Government Exhibits 10-1 through 10-8?

18 A. Yes.

19 Q. The first question I have for you, sir, is this  
20 the first time in preparation for this hearing today  
21 that you have reviewed those materials that are before  
22 you?

23 A. No.

24 Q. When did you first review that packet that's in  
25 total there before you, what month and year?

1 A. It was in late February 1996 for the total  
2 packet.

3 Q. And do you know the facts and circumstances as  
4 to how you got possession of that packet generally?

5 A. Yes, I received a copy of what the U.S.  
6 Attorneys's Office sent out, I mean, Justice sent out to  
7 the U.S. Attorney's Office.

8 Q. Okay. And is it fair to say that that packet  
9 of information specifically Government Exhibit 10-2  
10 through 10-8, was the result of an internal audit that  
11 was done after Mr. Busey made his statements which are  
12 in Government Exhibit 10-1?

13 A. Yes.

14 Q. Is it also fair to say, sir, based upon your  
15 knowledge of the exhibits here that Government Exhibit  
16 10-1 through 10-8 once they were compiled by the  
17 internal audit were subsequently sent by DOJ to the  
18 respective U.S. Attorney's Offices across the country?

19 A. Yes.

20 Q. And is it also fair to say, sir, that in late  
21 February or early March once I received this packet, I  
22 called you and asked you if you knew about the packet?

23 A. Yes, you did.

24 THE COURT: Well, whether you knew about it or not,  
25 obviously, the Department of Justice knew about all of

1 this material, Mr. Schaible.

2 THE WITNESS: At what time, sir?

3 THE COURT: Well, from -- the letter of the Role  
4 Call Training Statement was 10-2 was a statement gotten  
5 from Mr. Busey on December the 1st, 1995, so they knew  
6 about it at that time, the problem had arisen by virtue  
7 of his statement.

8 THE WITNESS: Yes.

9 THE COURT: All right.

10 BY MS. ALLEN:

11 Q: Agent Schaible, you are a part of this packet  
12 that's been sent out across the country in Government  
13 Exhibit 10-8. Why were you asked to submit that  
14 affidavit and what, in essence, was the gist of your  
15 affidavit?

16 A: I was asked to submit it because I was  
17 basically the senior person in the NFA Branch, had been  
18 around the longest, and was more familiar with the  
19 procedures and operations of the branch. The gist of it  
20 was that what Mr. Busey had said was, you know,  
21 exaggerating the situation, you know, that the problems  
22 that he said were there weren't there.

23 Q: And who was it that asked you to review these  
24 materials and submit your affidavit?

25 A: Our office of chief counsel.

1 Q. So would it be your testimony that that packet  
2 as has been provided to the Court and to Mr. Montague  
3 was not in existence when you testified during  
4 Mr. Leasure's trial?

5 A. No, it wasn't.

6 THE COURT: Say that again. Did you say that this  
7 material wasn't available before Mr. Leasure's trial  
8 which was in --

9 MS. ALLEN: January.

10 THE COURT: January 18th and 19th but the  
11 Department of Justice had it, Mr. Schaible?

12 THE WITNESS: Well, yeah. The packet -- the total  
13 packet wasn't in existence. There were bits and pieces,  
14 yes, but it hadn't been put together. They were still  
15 looking at -- seeing what exactly the import of this  
16 was.

17 BY MS. ALLEN:

18 Q. Now, when you testified during the trial, your  
19 testimony dealt with Counts 2 through 6 of the  
20 indictment, is that true?

21 A. Yes.

22 Q. And when you testified regarding Count 2 of the  
23 indictment, you also testified regarding Government  
24 Exhibit 7-1 which is the certificate of nonregistration  
25 regarding the weapons, is that true?

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1 A. Yes.

2 Q. Is there anything based on your review of the  
3 evidence that's in Government Exhibit 10-1 through 10-8  
4 that would cause you to change your testimony regarding  
5 the fact that the silencers listed in Count 2 were not  
6 properly registered to Mr. Leasure?

7 A. No, it wouldn't change my opinion.

8 Q. Is there any -- I believe during the trial you  
9 also testified regarding Count 3 of the indictment in  
10 Government Exhibit 7-2 the certificate that goes with  
11 that; is that correct?

12 A. Yes.

13 Q. Is there anything in your review of Government  
14 Exhibit 10-1 through 10-8 that would cause you to change  
15 anything that you testified to during Mr. Leasure's  
16 trial regarding Count 3 in Government Exhibit 7-2?

17 A. No.

18 Q. And, lastly, Count 6 of the indictment and the  
19 corresponding Government Exhibit 7-5, is there anything  
20 in your review of the exhibits in the 10 series that  
21 would change your testimony regarding Count 6 of  
22 Government Exhibit 7-5?

23 A. No.

24 Q. Is there anything that you have seen either in  
25 Mr. Busey's statements or in Government Exhibit 10-1 --

1 MR. MONTAGUE: That's leading, Your Honor, I  
2 object.

3 THE COURT: Go on and ask the questions proper.  
4 BY MS. ALLEN:

5 Q. Mr. Schaible, is there anything in the  
6 Government's 10-1 through 10-8 series that you would  
7 consider material, important information that you needed  
8 in order to do your certificates that were in the  
9 Government 7 series?

10 A. No.

11 Q. All right. Mr. Schaible, I'm now going to ask  
12 you to look at Government Exhibit 11-1 which I'm handing  
13 to the court security officer.

14 THE COURT: What is 11-1 in view of the fact that I  
15 must have left that packet on my desk?

16 BY MS. ALLEN:

17 Q. Is that entitled telephone records of  
18 Mr. Leasure, Sprint Services Account regarding activity  
19 taking place on March 16, 1993?

20 A. Yes, well, it says DIW Advantage Quality  
21 Account, which I guess is what I think you're saying  
22 there.

23 Q. Okay. And have you seen that document before?

24 A. Yes, I have.

25 Q. And I believe that counsel referred to the fact

1 that that document shows that on March 16, 1993,  
2 there are two faxed times totaling 24 minutes where  
3 documents were sent to the BATF; is that correct?

4 A. Yes, it is.

5 Q. Okay. And based on that document there, is  
6 there anything that that document tells you that would  
7 cause you to change any of your testimony regarding  
8 Counts 2, 3, or 6 of the indictment?

9 A. No.

10 Q. Does that document there tell you what  
11 documents were faxed if at all to the BATF?

12 A. No, it doesn't.

13 MS. ALLEN: Your Honor, I'd move for the admission  
14 of Government Exhibits 10-1 through 10-8 and Government  
15 Exhibit 11-1.

16 THE COURT: To be received.

17 MS. ALLEN: Your Honor, that's all the questions I  
18 have regarding this issue.

19 THE COURT: Cross-examine.

20 CROSS-EXAMINATION

21 BY MR. MONTAGUE:

22 Q. I said Busey, how does the man pronounce his  
23 name? I hate people who mispronounce names. I've had  
24 mine mispronounced all my life, you probably have too.

25 A. Yes. It's Busey.



1 Q. Busey with a long U, all right, thank you.  
2 Now, at the time of this extraordinary Role Call  
3 Statement by Mr. Busey, he was then the chief of the NFA  
4 Branch?

5 A. Yes, he was.

6 Q. He was the top man in that part of your  
7 organization?

8 A. Yes.

9 THE COURT: Chief of what, you say?

10 THE WITNESS: The NFA Branch, National Firearms  
11 Branch.

12 THE COURT: The National -- NAF --

13 THE WITNESS: NFA.

14 THE COURT: Excuse me, National Firearms Branch,  
15 what is that?

16 THE WITNESS: We're the ones who maintain the  
17 registration records and transfers.

18 THE COURT: He was the chief of the National  
19 Firearms --

20 THE WITNESS: Branch, yes, sir.

21 THE COURT: Registration branch.

22 THE WITNESS: Yes.

23 THE COURT: Go ahead.

24 BY MR. MONTAGUE:

25 Q. And after he made that statement, what happened

1 to Mr. Bussey? Did he get fired or transferred?

2 A. He requested reassignment to another position  
3 in January.

4 Q. Was that a coerced request as far as you know,  
5 Mr. Schaible?

6 A. No, he went down and asked for it or I should  
7 say up.

8 Q. Well, there was considerable hullabaloo around  
9 the agency, was there not --

10 A. Yes.

11 Q. -- having the chief in charge of the  
12 registration of firearms saying there was a 50 percent  
13 error?

14 A. Yes.

15 Q. You say that that testimony is not correct?

16 A. Well, the 50 percent error rate I said that we  
17 have no idea how it was determined.

18 Q. Weren't you working on it?

19 A. No.

20 Q. You were the senior man in the branch and you  
21 weren't working on it?

22 A. No, I didn't.

23 Q. Did you check on how it was arrived at? Did  
24 you talk to the people who were involved?

25 A. It was done at the request of our former

1 division chief. He said that he did not know exactly  
2 what was done to come up with this although he had the  
3 figures himself.

4 Q. But whether it was right or wrong, you  
5 instituted a number of changes in the way you did that  
6 part of your business, didn't you?

7 A. Yes.

8 Q. That also appears in your affidavit.

9 A. Yes.

10 Q. Now, when Ms. Allen sent me her copy of  
11 Mr. Busey's statement, the Role Call transcript, do you  
12 have any idea why she only sent the first 15 pages  
13 instead of the whole 22 pages?

14 A. No, I don't.

15 Q. Did you have anything to do with furnishing her  
16 with that transcript?

17 A. No, sir, I didn't.

18 Q. Do you know who did?

19 A. Came out of main Justice, that's my  
20 understanding.

21 Q. Came out of the justice department?

22 A. Yes.

23 Q. I'm not sure about the organic structure; do  
24 you have people in the Justice Department assigned to  
25 the ATF as your lawyers or do you have your own lawyers?

1 A. We have our own lawyers.

2 Q. But they interact with the Justice Department?

3 A. Yes, sir.

4 Q. Now, all of these -- when was Mr. Busey's  
5 transfer?

6 A. January of '96.

7 Q. And he had made this statement somewhere around  
8 the end of October of '95, something like that, middle  
9 of October?

10 A. I believe it was -- I think, October 18th, I'm  
11 not quite sure of the exact date, certainly would have  
12 been October.

13 Q. Where did he go?

14 A. He is a specialist in the Wine and Beer Branch  
15 of ATF.

16 THE COURT: It says that the Role Call Training  
17 Sessions were conducted by Busey, Chief of the National  
18 Firearms Act Branch in the period between October 3, '95  
19 to October 10, '95 at BATF headquarters and recorded and  
20 transmitted through headquarters on closed circuit  
21 television. That letter is correct, isn't it,  
22 Mr. Schaible?

23 THE WITNESS: That's correct. There was only one  
24 session.

25 THE COURT: Well, sometime between October 3 And

1 October 10 there was one session. It doesn't -- well,  
2 go ahead.

3 BY MR. MONTAGUE:

4 Q. Was any intermediate administrative action  
5 taken with regard to was Mr. Busey put on administrative  
6 leave or anything like that?

7 A. No, sir, not that I know of.

8 Q. And the closed circuit television the Judge  
9 referred to, did that result in a VCR tape of the  
10 affair, Mr. Busey's statement?

11 A. The tape was being done irregardless of its  
12 transmission throughout the building.

13 Q. That there was a tape?

14 A. Yes.

15 Q. But also a closed circuit transmission within  
16 your offices?

17 A. Yes.

18 Q. Okay. And then were you aware of -- well,  
19 excuse me. Let me ask a different question. After  
20 Mr. Busey left, was he replaced? Is there now a new  
21 chief of the NFA Division?

22 A. Yes, there is.

23 Q. NFA Branch.

24 THE COURT: That's you, isn't it?

25 THE WITNESS: No.

1 BY MR. MONTAGUE:

2 Q. Who is it?

3 A. A lady named Nerida Levine.

4 Q. Is she someone who has been with the ATF for a  
5 long time?

6 A. I believe she started in '85 -- '86 somewhere  
7 around there.

8 Q. Okay. Now, your testimony in response to Miss  
9 Allen just now was that these exhibits 10-1 through 10-8  
10 didn't exist at the time of this trial?

11 A. No, it was that the packet -- the entire packet

12 --  
13 Q. What entire packet?

14 MS. ALLEN: Your Honor, I think counsel is  
15 misstating the evidence. I asked him whether or not the  
16 packet of material existed at the time of trial since  
17 there's been an allegation that the Government and  
18 Mr. Schaible knew about all of this during the trial.

19 THE COURT: The statement Mr. Busey made on  
20 December 1st, 1995, that was certainly in existence.

21 MS. ALLEN: In existence, Your Honor, but I think  
22 the allegation was that we knew that it was there during  
23 the trial and we withheld favorable evidence and that  
24 was not done.

25 MR. MONTAGUE: I didn't make that allegation

1 because I have no way of knowing.

2 THE COURT: You would want me to assume that,  
3 wouldn't you, Mr. Montague?

4 MR. MONTAGUE: Well, I certainly believe it's  
5 within the breast of the Government and I realize that's  
6 a very large breast but it's the Justice Department and  
7 the --

8 THE COURT: Well, let's move on.

9 BY MR. MONTAGUE:

10 Q. Now in fact, Mr. Schaible, there was a strong  
11 effort within the ATF to cover up this whole affair, was  
12 there not?

13 A. No.

14 Q. There was no effort to cover up this affair?

15 A. No.

16 Q. When was the statement by Mr. Bussey made  
17 public?

18 A. I believe in February.

19 Q. End of February or early March, right?

20 A. Not quite sure on that.

21 Q. But five months after the event?

22 A. Uh-huh.

23 Q. If that was not the result of a cover up, what  
24 was it a result of?

25 A. Freedom of Information Act request.

1 Q. Okay. So the agency did nothing to put this  
2 thing out voluntarily; it had to be taken away from you  
3 by an FOI request?

4 A. Yes.

5 Q. And then all of this other stuff, your  
6 affidavit, and all of these things about the changes  
7 that have been made since then were done after that,  
8 were they not?

9 A. Yes.

10 Q. So in answer to the Judge's question, did this  
11 stuff exist at the time of trial, obviously it  
12 potentially all existed?

13 A. Some of it.

14 Q. But simply was not being put together because  
15 you, for whatever reason, had not put Mr. Bussey's words  
16 out publicly.

17 A. Certainly, some of it existed.

18 Q. What is the policy of the ATF regarding  
19 statements by the top officials?

20 MS. ALLEN: Your Honor, I'm going to object based  
21 on relevance. I think the focus of this hearing should  
22 be whether or not there's any Brady material that if  
23 released during the trial would tend to establish that  
24 Mr. Leasure is guilty or innocent and now we're putting  
25 BATF on trial.



1 THE COURT: I think it goes further than that, not  
2 whether he would be found guilty or innocent but whether  
3 there's an obligation for that material to have been  
4 available to defense counsel to try to convince me that  
5 BATF were rotten recordkeepers; I think that's the issue  
6 not his guilt. Anyway, your objection is overruled.  
7 Your exception is in the record. Let's move on.

8 BY MR. MONTAGUE:

9 Q. Let's drop down to the Exhibit that I  
10 submitted. I think it's Government 11-1 which is the  
11 telephone record of Mr. Leasure's Saluda office. The  
12 record itself shows that the phone number used for his  
13 fax machine obviously is the phone number of his fax  
14 machine. Is the phone number for your fax machine  
15 correct?

16 A. Yes.

17 Q. 202 number?

18 A. (Witness nods head.)

19 Q. Okay. So would you agree with me that when a  
20 phone bill is produced that shows a completed fax  
21 transmission, that faxes actually have arrived at their  
22 destination?

23 A. I would certainly agree, yes.

24 Q. So the faxes got to your office and no one  
25 knows what happened after that?

1 A. I wouldn't say that. Certainly faxes were  
2 sent, what they were I can't know.

3 Q. Well, we can't prove what they were either but  
4 it stands to reason they're what we said they were. But  
5 whether they were or not, they disappeared into the 50  
6 percent error plague of BATF's recordkeeping at that  
7 time. And the 50 percent Mr. Busey was talking about  
8 would have been in existence in February of 1994, would  
9 it not?

10 A. I don't know what he based the 50 percent on.

11 Q. Mr. Schaible, there was a serious problem,  
12 wasn't there, whether it was 50 percent or 35 percent or  
13 80 percent, you-all took substantial action to correct  
14 the serious defect in your recordkeeping system, didn't  
15 you?

16 A. I believe that any problem is serious, yes.

17 Q. Yes, sir, particularly in a field like this.

18 A. Yes.

19 Q. Do you have -- have you had occasions that  
20 you're aware of in the NEA branch of clerks throwing  
21 away transmissions because they don't want to fool with  
22 them?

23 A. Yes.

24 Q. And so that's one of the things that could  
25 happen to you?

1 A. Certainly.

2 Q. A bunch of transmissions come through from  
3 Saluda, Virginia, and the clerk says, this is going in  
4 File 13?

5 A. Yes.

6 Q. And that has happened?

7 A. Yes.

8 Q. And people have been transferred and fired as a  
9 result of that, haven't they?

10 A. No.

11 Q. No, which? I asked two questions. Have they  
12 been transferred out of that work?

13 A. The only situation I can remember is, no, that  
14 they weren't transferred. No, they weren't fired. They  
15 eventually quit, yes, but, no, nothing like transferred  
16 or fired.

17 Q. Did you ever continue anybody in that  
18 particular job after you knew they threw something away,  
19 threw an important transmission away or destroyed it or  
20 put it in the shredder or whatever they did?

21 A. And when you say "you," you mean, the branch?

22 Q. I mean you the agency, I'm sorry.

23 A. Yes.

24 Q. You continued them doing that kind of work?

25 A. With monitoring, yes.

1 Q. Okay.

2 MR. MONTAGUE: I believe that's all I have, Your  
3 Honor.

4 THE COURT: Anything further, Ms. Allen?

5 MS. ALLEN: No thank you, Your Honor.

6 THE COURT: All right. Step down, Mr. Schaible.

7 MS. ALLEN: Your Honor, that's all the evidence I  
8 have to that last motion.

9 THE COURT: All right. All right. The evidence --  
10 that record has been made. Anything you want to --

11 MR. MONTAGUE: I just have a couple of comments  
12 with regard to the first part of Ms. Allen's comments.  
13 In the first place, I don't know what the implication  
14 was about fraud on the Court and fraudulent material but  
15 I don't practice that kind of law and the documents were  
16 genuine as far as I know and I have every reason to  
17 think they were. I also think we have every reason to  
18 think they were received by the ATF based on the  
19 testimony we've just had.

20 THE COURT: I don't think there's any evidence of  
21 that, Mr. Montague, that these particular things marked  
22 void or received are because you point out Carl O'Quinn  
23 or Mr. Leasure called this telephone number on a certain  
24 date. But I don't think it's going to make any  
25 difference in this case.

1 I'm going to throw out the convictions that have to  
2 do with registrations. I'm going to throw out Count 2,  
3 3, and 6 so that the only count left is Count 1, that's  
4 the one I want to hear addressed at this time. That's  
5 got nothing to do with registrations, we're talking  
6 about silencers.

7 MR. MONTAGUE: Yes, sir. All right, thank you for  
8 that.

9 THE COURT: The motion for a new trial is denied  
10 because it was addressed only to Counts 2, 3, and 6.  
11 I have thrown out Count 2, 3, and 6, so the motion for a  
12 new trial is denied. We're here for sentencing as to  
13 Count 1. And now, if you want to sit down and talk to  
14 your client about how you want to proceed on Count 1 and  
15 I'll take a five-minute recess.

16 MR. MONTAGUE: Thank you, Your Honor.

17 THE COURT: Ms. Allen, this isn't to impune  
18 anything dishonest from you. I think you sent to them  
19 whatever you've received, but Mr. Schaible has testified  
20 that they knew all about Mr. Busey's statement in the  
21 National Firearms people. It's on television all over  
22 the building, it was in the files of the Department of  
23 Justice, and it throws a disagreeable proposition on my  
24 finding somebody guilty on records when their chief man  
25 says they were 49 percent wrong. That's not your fault.

1 Five minutes and we'll take up sentencing on Count  
2 1. And I'll have something more to say for the record  
3 so you-all can have it for appellate purposes but fight  
4 now that's where we are.

5 (Recess.)

6 THE COURT: Hold up a minute. Let me make some  
7 notes. It seems to me that the Court having thrown out  
8 Counts 2, 3, 4, 5 and 6 the only thing left is Count 1  
9 of which I found that's the silencers count which has  
10 nothing to do with registration. In fact, it's  
11 nonregistration that's the essence of the case. There  
12 was no motion, I don't believe, made with reference to  
13 Count 1, Mr. Montague, but in the wealth of paper  
14 you-all have provided me with I may have overlooked  
15 something. We're here only on sentencing of Count 1 at  
16 this point; is that correct?

17 MR. MONTAGUE: Well, I intended to include -- it's  
18 certainly an entirely different animal.

19 THE COURT: All right. We're here for sentencing  
20 now. Bring Mr. Leasure up to the lectern with you.

21 MR. MONTAGUE: All right, sir.

22 THE COURT: Mr. Leasure, the matter ended in a  
23 conviction of you on Count 1 on, I think it was January  
24 the 19th, but so that the record won't have any errors  
25 in it, let me be sure. On January the 19th the matter

1 was taken under advisement.

2 On February 6th an order was entered in which I  
3 brought all parties back to court and filed a written  
4 order of the Court finding you guilty as to Count 1 and  
5 as to some other counts which are now made moot by  
6 virtue of the rulings of the Court. I at that time  
7 ordered a presentence report and ordered you to return  
8 here for sentencing for 9:30 on May 21, which is today.

9 I have a presentence report prepared by my  
10 probation officer Miss Thayer over here and I ask you  
11 first, Mr. Montague, have you been over this report in  
12 detail with your client, Mr. John Leasure?

13 MR. MONTAGUE: Yes, sir, I have.

14 THE COURT: And, Mr. Leasure, have you been over  
15 this report in detail with your attorney, Mr. Montague?

16 THE DEFENDANT: Yes, sir, I have.

17 THE COURT: And we're here only on Count 1.  
18 Mr. Montague, is there any evidence you want to present  
19 with reference to this count?

20 MR. MONTAGUE: Not with reference to the count as  
21 such but I'd like to put on some character evidence, if  
22 I may.

23 THE COURT: All right, sir. Have a seat.

24 I'll be glad to hear the first witness, if you'll  
25 call your first witness.

1 MR. MONTAGUE: I'm going to call Sheriff Lewis  
2 Jones.

3 THE COURT: Have a seat. All right, sir, go right  
4 ahead.

5 LEWIS JONES, III, a Witness, called on behalf of  
6 the Defendant, having been first duly sworn, was  
7 examined and testified as follows:

8 DIRECT EXAMINATION

9 BY MR. MONTAGUE:

10 Q. Would you state your -- let me let you get  
11 seated. Will you state your full name, please.

12 A. Lewis Jones, III.

13 THE COURT: Lewis spelled L-e- or L-o-?

14 THE WITNESS: L-e-.

15 THE COURT: L-e-w-i-s Jones, III. Go ahead,  
16 Mr. Montague.

17 BY MR. MONTAGUE:

18 Q. How are you currently employed, Mr. Jones?

19 A. I'm the sheriff of Middlesex County, Virginia.

20 Q. How long have you held that office?

21 A. I'm in my ninth year.

22 Q. And prior to being -- that's an elective  
23 office, is it not?

24 A. Yes, sir, it is.

25 Q. Prior to being elected sheriff of Middlesex,



1 did you have any other background in law enforcement?

2 A. Yes, sir. I was a Virginia state trooper for  
3 six and a half years and also with the City of  
4 Charlottesville, Virginia Police Department  
5 three-and-a-half years.

6 Q. During your time as a state trooper, were you  
7 stationed in the Middlesex County area?

8 A. Yes, sir, I was stationed there in December of  
9 1980.

10 Q. All right, sir. Now, would it be fair to  
11 describe your position of sheriff of Middlesex as the  
12 chief local law enforcement officer in that area?

13 A. Yes, sir, that's correct, I am.

14 Q. Would it be fair to say that as sheriff -- as  
15 the chief local law enforcement officer, it's important  
16 for you to know -- to be blunt -- who the good guys and  
17 the bad guys are that frequent your county?

18 THE COURT: Mr. Montague, you've practiced law as  
19 long as I have and we're talking about character  
20 evidence; we're not talking about anything else. So  
21 let's get into it; let's don't get into anything else.

22 MR. MONTAGUE: All right, sir.

23 BY MR. MONTAGUE:

24 Q. But it is necessary for you to evaluate people  
25 that may run afoul of the law?

1 A. Yes, sir.

2 Q. And in your office as sheriff, did you become  
3 acquainted with a gentleman named, John Leasure?

4 A. Yes, sir, I did.

5 Q. And is he in the courtroom today?

6 A. Yes, sir, he is.

7 Q. Would you point him out?

8 A. (Indicating.)

9 Q. You're indicating Mr. Leasure at the Defense  
10 table. And what was Mr. Leasure's business in Middlesex  
11 County?

12 A. My first encounter with him in a business was  
13 with a parts store with his brother and then later as a  
14 retail gun dealer and then with his current business  
15 status.

16 Q. Did he operate a business called John's Gun  
17 Shop in Saluda?

18 A. Yes, sir, he did.

19 Q. All right. Did you come to develop a  
20 relationship or friendship with Mr. Leasure?

21 A. Yes, sir, I did.

22 THE COURT: What we're interested in, Mr. Jones, is  
23 do you know his reputation for truth and veracity in the  
24 community?

25 THE WITNESS: Yes, sir, I do.

1 THE COURT: And what is it?

2 THE WITNESS: John enjoys a very good character and  
3 standing in the community.

4 THE COURT: All right. That's about as far as you  
5 can go, Mr. Montague.

6 MR. MONTAGUE: Well, let me try one other step,  
7 Your Honor.

8 THE COURT: I'll be glad to stop you if you're  
9 wrong. Let's go.

10 MR. MONTAGUE: I know that.

11 BY MR. MONTAGUE:

12 Q. In connection with that reputation, did you  
13 have occasion to appoint him as anything in your  
14 department?

15 A. Yes, sir. February of 1988 I appointed  
16 Mr. Leasure a deputy sheriff of Middlesex County  
17 Sheriff's Office.

18 Q. And what were his duties, if any, with your  
19 department?

20 THE COURT: That's of no importance to me. He said  
21 he has a good reputation for truth and veracity and I  
22 let you show that he appointed him as deputy sheriff in  
23 1988. How long did he act?

24 THE WITNESS: Through March of 1990.

25 THE COURT: For a couple of years?

1 THE WITNESS: Yes, sir.

2 THE COURT: A year and a half?

3 THE WITNESS: Yes, sir.

4 THE COURT: All right now.

5 BY MR. MONTAGUE:

6 Q. Sheriff Jones, you're here by your own  
7 volition, you're not here by reason of a subpoena; is  
8 that correct?

9 A. That is correct.

10 MR. MONTAGUE: Answer Miss Allen.

11 THE COURT: Any questions, Ms. Allen?

12 MS. ALLEN: No questions, Your Honor.

13 THE COURT: Thank you, Sheriff, step down. Any  
14 reason why Sheriff Jones can't be excused?

15 MR. MONTAGUE: He can return to his duties as far  
16 as we're concerned with our thanks.

17 THE COURT: Call your next witness.

18 MR. MONTAGUE: I'm going to call Mr. Leasure.

19 THE COURT: Mr. Leasure.

20 MR. MONTAGUE: He's not been sworn yet.

21 THE COURT: Go ahead, sir.

22 JOHN D. LEASURE, the Defendant, called on behalf of  
23 the Defense, having been first duly sworn, was examined  
24 and testified as follows:

25 DIRECT EXAMINATION

1 BY MR. MONTAGUE:

2 Q. State your name please, sir.

3 A. John Daniel Leasure.

4 Q. And you are the defendant in this case?

5 A. Yes.

6 Q. Mr. Leasure, during your trial in this case, I  
7 showed one of the Government witnesses, I think it was  
8 Mr. Scheible, a copy of this book. It's a red cover  
9 entitled Federal Firearms Regulation 1988-89. My  
10 question, sir, is, was this book provided to you by the  
11 ATF as your guide to the law affecting your work as a  
12 firearms manufacturer?

13 A. Yes, it was.

14 Q. And the answer given to me by whoever it was  
15 that testified from the ATF was that you were told that  
16 by following this book you would stay out of trouble,  
17 this was your bible, what you had to do as a firearms --  
18 in relation to federal firearms purchases?

19 A. (Witness nods head.)

20 Q. Now, in connection with that, did you have an  
21 understanding as to what your obligation based on the  
22 material appearing in this manual -- what your  
23 obligation was with regard to placing serial numbers and  
24 manufacturer's names on silencers?

25 A. Yes, I did.

1 MS. ALLEN: Your Honor, I'm going to object. We  
2 went through --

3 THE COURT: It's already in the record one time and  
4 that's all.

5 MR. MONTAGUE: Count 1 involves 19 unserialized  
6 silencers.

7 THE COURT: Was one withdrawn? Are there 18 or 19?

8 MS. ALLEN: There are 19, Your Honor, one was  
9 withdrawn from Count 2.

10 THE COURT: 19, all right.

11 MR. MONTAGUE: I think 19 is correct.

12 BY MR. MONTAGUE:

13 Q. Of the 19 none had a serial number on it nor  
14 the identification of your manufacturing name which was  
15 Precision Arms International or PAI?

16 A. That's correct.

17 Q. And each of those being unmarked, did that  
18 result from the same misconception of the law by you?

19 MS. ALLEN: Your Honor, I have a continuing  
20 objection to this whole --

21 THE COURT: All right. I'll let him testify one  
22 time. He's already testified to this.

23 THE WITNESS: Yes, it did.

24 BY MR. MONTAGUE:

25 Q. Not only based upon the regulations but was

1 that misconception also based upon industry practices as  
2 you understood them?

3 A. Yes, it is.

4 Q. And is it fair to say, sir, that your intention  
5 at all times with regard to these silencers as well as  
6 all other armaments and weapons within your shop and  
7 within your control was to attempt to obey the law?

8 A. Yes, it is.

9 Q. Mr. Leasure, as based upon the Court's action  
10 this morning, you stand convicted of one felony count.  
11 And what do you understand will be the impact, leaving  
12 aside the question of whether you go to jail or not --  
13 what do you understand the impact of that conviction to  
14 be upon your life as it's been lived up to now?

15 A. Well, it -- from then on I'll be treated as a  
16 second class citizen I feel like. It is what I feel  
17 like about the worst thing that could happen to me.

18 But I will state and I don't know whether I can do  
19 this now or not but I will say sitting here today right  
20 here and right now, if I still had -- if I was still  
21 asked whether or not I would plead guilty or not to  
22 Count 1, I would still plead not guilty. I read and  
23 understood the law. I tried to interpret from the law  
24 what I understood to be the law, and I've given you the  
25 code section and I still feel it's very vague. I still

1 feel it's very vague. In one sentence it says by the  
2 ATF's own admission that any firearm silencer part is a  
3 silencer, even a rubber disk that goes in the end of it.

4 Q. Even a Coke bottle?

5 A. Yeah, absolutely. So I don't understand how I  
6 can manufacture, own, and I'm the one who assigns the  
7 serial number but under the Code Section 179.102 that I  
8 provided you out of that book that you have, not out of  
9 the new book that was published in October of 1995 it's  
10 much more explicit, it's very clear, out of the old book  
11 it's not.

12 Q. Let me ask you one question about that if we  
13 may, Your Honor. The new book, which I think has a  
14 yellow cover, came out in, what, November of '95?

15 A. Yes.

16 Q. And what is different bearing on this  
17 particular point between that book and the one that you  
18 had to go by?

19 A. It says in the yellow book under that code  
20 section that the form has to be done by closing the next  
21 business day, the Form 2.

22 Q. That does not appear in the red book?

23 A. Not under that code section marked 179.102  
24 Identification of Firearms.

25 Q. So it is your testimony that nowhere in the red



1 book are you told when you're supposed to mark these  
2 silencers?

3 A. Not that I could find, no. Under 179.102 it  
4 states that it is to be marked when it is sold,  
5 transferred, or otherwise disposed of and that's what I  
6 got from it.

7 Q. These particular silencers were never going to  
8 be sold or transferred, were they?

9 A. They were totally separate, separate from  
10 everything else in a locked cabinet, and at various  
11 times I would cannibalize them and get parts off of  
12 them. I had enough parts in my shop to assemble five  
13 hundred silencers.

14 Q. And, as a matter of fact, you had hundreds of  
15 parts, tubes, and the like that were intended to be used  
16 as parts of silencers?

17 A. Hundred and hundreds and hundreds.

18 Q. And the way the law is written you could have  
19 been charged on all of them, you could have a thousand  
20 counts or a thousand items under the count?

21 A. I guess so.

22 Q. And I guess they'd want to electrocute you at  
23 that point, I don't know.

24 THE COURT: I'm the only one entitled to humor in  
25 this courtroom.

1 MR. MONTAGUE: I withdraw the attempt at humor.  
2 Your Honor. There isn't anything funny about this  
3 situation.

4 BY MR. MONTAGUE:

5 Q. Is there anything else you'd like to tell us,  
6 Mr. Leasure?

7 A. Just that I feel like I have tried to -- it has  
8 been my intention to abide by the law. I had no  
9 intention of breaking the law. I -- certainly from the  
10 time the ATF came into the raid, I had three days. They  
11 left their own printout there. They'd never even been  
12 in the back and seen my inventory. I could have taken  
13 that inventory and made sure everything matched and then  
14 I probably wouldn't be sitting here, but I wanted -- I  
15 wanted to get it straight. If there was a problem, I  
16 wanted it to be straight. And, I'm sorry, I still  
17 wouldn't do it any differently.

18 Q. And you didn't attempt to hide anything, you  
19 cooperated fully in that investigation?

20 A. Absolutely.

21 Q. Because you didn't think you'd done anything  
22 wrong; is that correct?

23 A. No, I did not.

24 MR. MONTAGUE: Answer Miss Allen.

25 THE COURT: Cross, Ms. Allen?

1 MS. ALLEN: No questions, Your Honor.

2 THE COURT: Step down. Thank you, Mr. Leasure.

3 Any other witness, Mr. Montague?

4 MR. MONTAGUE. Yes, sir. I'd like to call  
5 Mrs. Leasure.

6 THE COURT: All right.

7 CHERYL LEASURE, a Witness, called on behalf of the  
8 Defendant, having been first duly sworn, was examined  
9 and testified as follows:

10 DIRECT EXAMINATION

11 BY MR. MONTAGUE:

12 Q. Would state your name, please, ma'am.

13 A. Cheryl Leasure.

14 Q. Would you spell Cheryl for the Court.

15 A. C-h-e-r-y-l.

16 THE COURT: C-h-e-r-y-l, go ahead.

17 BY MR. MONTAGUE:

18 Q. And you're married to Mr. Leasure?

19 A. That's correct.

20 Q. How long have you-all been married?

21 A. We have been married almost a year.

22 Q. And you're -- actually, your first anniversary  
23 is going to be next week; isn't it?

24 A. That's right, Monday.

25 Q. Okay. And do you have any children by a prior

1 marriage?

2 A. Yes, I do.

3 Q. And describe the child.

4 A. He's six years old. His name is Drew.

5 Q. And has Drew in your observation as his mother  
6 formed a relationship with Mr. Leasure?

7 A. Yes, sir, a very close one.

8 Q. Would it be fair to say that you think  
9 Mr. Leasure has become a father figure to your son?

10 A. Very much so, more than his own father; I  
11 should say biological father.

12 Q. And how do you regard your husband in terms of  
13 hard workingness, good citizenship, and that sort of  
14 thing?

15 A. He's very hardworking, he's very honest. I've  
16 never seen anything where he's tried to hide or do  
17 anything wrong.

18 Q. And you're involved -- have been involved in  
19 the business at the gun shop, have you not?

20 A. Right, I've come up there and helped out a  
21 little bit there.

22 Q. Have you helped improve the recordkeeping?

23 A. Yes.

24 MR. MONTAGUE: I think that's all.

25 THE COURT: Any questions?

1 MS. ALLEN: No, thank you, Your Honor.

2 THE COURT: Thank you, Ms. Leasure. Step down.

3 Call your next witness.

4 MR. MONTAGUE: That's all, Your Honor.

5 THE COURT: All right. I'll be glad to hear from  
6 you, Mr. Montague, and at the proper time I'll ask  
7 Mr. Leasure if there's anything further he wants to say.

8 MR. MONTAGUE: All right. Excuse me one second,  
9 Your Honor.

10 THE COURT: Surely.

11 (Pause.)

12 THE COURT: Hold up for just a minute.

13 MR. MONTAGUE: Yes, sir.

14 THE COURT: Mr. Montague, there were objections and  
15 I overlooked these beginning on Page 16, 17, and 18 and  
16 they looked like you objected to paragraph 16. You  
17 object to the finding made by Miss Thayer that  
18 Mr. Leasure was not entitled to any acceptance of  
19 responsibility under the law. Because of his pleas of  
20 not guilty in the defense of the case, he isn't entitled  
21 to any so if you have any objection to his not getting  
22 the three points, that objection is overruled.

23 MR. MONTAGUE: Well --

24 THE COURT: Now, to Paragraph 19 an objection is  
25 raised. The probation officer's report that defendant

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1 failed to pay fines and court costs for a reckless  
2 driving conviction and that would have no effect on any  
3 penalty that I would be involved with to start with, so  
4 that objection is irrelevant so far as I'm concerned.

5 MS. ALLEN: And, Your Honor, just for the record,  
6 the probation officer informed me this morning that upon  
7 further investigation she found out on February 10th,  
8 1987, that Mr. Leasure had, in fact, paid those court  
9 costs, and we would withdraw that and note that for the  
10 record.

11 THE COURT: The fine has been paid?

12 MS. ALLEN: February 10th, 1987, that's correct,  
13 Your Honor.

14 MR. MONTAGUE: The only reason I made that  
15 objection, Your Honor, is because it created a sort of  
16 scuff or a different type of appearance and I didn't  
17 think that was deserving.

18 THE COURT: Paragraph 20 reflects the date of the  
19 arrest. The probation officer relies on a copy of the  
20 warrant executed June 1, 1993. I find that to be of no  
21 consequence to this.

22 MS. ALLEN: Just for the record, Your Honor, we  
23 have a certified copy of the paperwork the probation  
24 officer was relying upon which is marked as Government's  
25 Exhibit 12-1 which we'd offer to the Court.

1 THE COURT: All right. Show it to Mr. Montague.  
2 Put it with the papers in the suit.

3 Paragraph 47 an objection is raised that the  
4 probation officer reported the defendant didn't file  
5 Federal taxes for the years '90, '91, '92, and '93  
6 according to the Internal Revenue Service's Taxpayer  
7 Services Division; they have no record of a return being  
8 filed for those four years and, therefore, no change was  
9 made to that. Do you have any response to that?

10 MS. ALLEN: Your Honor, we have a certified copy of  
11 the probation officer's request for the information as  
12 well as the IRS's response that reflects that Government  
13 Exhibit 12-2 has also been shown to Mr. Montague.

14 THE COURT: Mr. Montague, apparently he hadn't  
15 filed a return at least according to the evidence  
16 available to me. I don't know that it's going to make a  
17 lot of difference but do you have anything to the  
18 contrary?

19 MR. MONTAGUE: The only thing I have is that  
20 Mr. Leasure has assured me that he has filed all the  
21 returns and has paid all of the taxes. He is constantly  
22 in this case a victim of Government records that don't  
23 exist.

24 THE COURT: Well, wait a minute. We're not going  
25 to start with that. Are you going to indict the

1 Internal Revenue Service for reporting that he didn't  
2 file any taxes for those years?

3 MR. MONTAGUE: No, sir. I'm sure they --

4 THE COURT: Turn to your client, I'm not going to  
5 take that as a charge against the Government. Talk to  
6 your client. Ask him has he got any evidence that he  
7 paid taxes, filed returns for those years when they say  
8 he did not.

9 MR. MONTAGUE: I don't need to ask him that, Your  
10 Honor, he would have given it to me if he had. No, he  
11 does not, and I'm sure the IRS is acting in good faith.  
12 I don't question that.

13 The only thing I do know and will add this to the  
14 Court if I may is that after the demise of his company,  
15 Precision Arms International, there were some unpaid  
16 payroll taxes and the IRS procedure in that case is to  
17 impose a hundred percent penalty on the person in charge  
18 of the company that's gone belly up. In the case of  
19 Mr. Leasure, they imposed that penalty and then after  
20 meeting with him, they waived it because of his  
21 financial condition and the only thing that happened was  
22 they did take an assignment on all of the guns that the  
23 government now holds. They're supposed to get those  
24 when they're turned loose.

25 THE COURT: The last objection is the computations



1 based on the number of weapons and that's an amount that  
2 we'll have to discuss after your argument, so now go on  
3 with the argument.

4 MR. MONTAGUE: All right, sir. I'm getting a  
5 little discombobulated here, Your Honor. I think that  
6 -- let me see if I can find the language. This language  
7 came up, the language of the regulations under 179 of  
8 the regs. affecting firearm manufacturers, registration,  
9 identification of firearms.

10 Mr. Lesaure has testified that the regulation has  
11 been amended at a time after this case was already in  
12 process to require anyone manufacturing silencers as he  
13 did to mark them with a serial number which he makes up  
14 and puts on himself and the name showing the  
15 manufacturer's identification. It says that that must  
16 be done in accordance with these regulations and the  
17 only positive time that it gives him to do it is where  
18 the silencer is not an integral part of a complete  
19 firearm. It must be done at the time of sale or of  
20 transfer.

21 THE COURT: I've ruled on that and ruled against  
22 you. You take that up with the Fourth Circuit.

23 MR. MONTAGUE: Well, the issue today I think is of  
24 the element of time. I think that is important and  
25 should be important to the Court. I understand what the

1 Court's ruling was and I think the interpretation  
2 probably is wrong but on the other hand nowhere in the  
3 regulation does it tell him when he is to do it other  
4 than when he sells it.

5 THE COURT: I've already ruled on that,  
6 Mr. Montague. I've found him guilty. I don't have any  
7 problem with that. If you've got anything to add to  
8 that, you'll get your opportunity in Richmond.

9 MR. MONTAGUE: I have already flagged for the Court  
10 the case of Staples against the United States. It's  
11 important in this case because it does involve a mental  
12 element in what appeared in the way Congress drew these  
13 laws to be an absolute offense, a strict liability type  
14 of offense. These are what have been called public  
15 welfare crimes. They're instrumentalities that are so  
16 inherently dangerous such as drugs, high explosives,  
17 things of that nature that a person would be deemed to  
18 know that there must be some regulation whether he says  
19 with all the innocence of a lamb that he did not know,  
20 there's many reasons he should know whatever it may be,  
21 a nuclear device or hand grenade or something of that  
22 kind.

23 The Staples opinion was passed after -- long after  
24 the Freed opinion on which this court relied and decided  
25 in 1994. Justice Thomas wrote the opinion for the

majority and he discussed it at great length. The tradition of Anglo-Saxon courtroom jurisprudence requires that there be some knowledge of evil in conduct that a person elects to pursue. He says it is as universal and persistent in mature systems of law as belief in the freedom of the human will and, consequently, the ability and duty of a normal individual to choose between good and evil.

This case at least the last time I looked had not come out of the U.S. Reports but it's in the 128 Lawyer's Edition, 2nd, beginning at Page 608. In that edition he says on Page 616 that the Government seeks support for its position which was basically a no-intent position from our decision in U.S. v. Freed, 401, U.S. and so forth, 1971, A case involving unregistered hand grenades. That's the case the Court relied on in making it's ruling in this case.

That reasoning provides little support for dispensing with mens rea in this case. In this case what I think has happened is the defendant has made a conclusive showing of a lack of anything other than a law abiding spirit. He's an honorable man; his record supports that. He didn't mean to break the law, and I do not think that the instrumentalities, these locked up silencers that didn't work properly --

1 THE COURT: There was no showing that these  
2 silencers didn't work properly. He fired every one,  
3 kept a minute record of the decibels. They were  
4 completely done, Mr. Montague, so don't put anything  
5 false in the record.

6 MR. MONTAGUE: I'm not putting anything false in  
7 the record, Your Honor. That was a mistake in  
8 recollection that the Court drew from the testimony of  
9 one of the BATF agents.

10 THE COURT: I'll live with it.

11 MR. MONTAGUE: Well, it was the BATF agent that  
12 fired the silencers. I'm sure Mr. Leasure had fired  
13 them at some time too but he didn't -- the record of  
14 decibel reduction was done by --

15 THE COURT: He testified, Mr. Montague, that many  
16 of these silencers the reason they were in the cabinet  
17 was because they didn't meet -- when he tested them,  
18 they didn't meet the reduction in decibels that he would  
19 require of an instrument. You can argue with me but  
20 that as a fine workman he found something wrong with  
21 them, but he tested them and found that they didn't suit  
22 what he wanted. He knew that they would work. Don't  
23 tell me otherwise.

24 MR. MONTAGUE: I'm not telling you otherwise. I'm  
25 saying your finding in your order in this case that

1 somebody fired them and kept a record was the Government  
2 agent not Mr. Leasure.

3 THE COURT: We can check the record but I'm going  
4 on what he testified.

5 MR. MONTAGUE: Yes, there's no question that he  
6 knew that they did not meet his standards, and he was  
7 not going to sell them for that reason, and he kept them  
8 for parts.

9 THE COURT: That's your argument and that's the one  
10 you ought to make but don't tell me that they were not  
11 fireable or couldn't be used, that's not in the record.

12 MR. MONTAGUE: I didn't tell you that, and I'm not  
13 trying to mislead the Court in any way. I think I've  
14 been very open in all aspects of this thing.

15 Certainly, he isn't going to throw away the  
16 silencer but he wasn't going to market it because it  
17 didn't work right, didn't meet his higher standards and  
18 he saw nothing wrong in the way he understood the  
19 regulation and the industry practices to keep them  
20 simply as a source of spare parts. The metals involved  
21 in those devices are very expensive and why throw them  
22 away.

23 Based upon everything that's before the Court, I  
24 would ask the Court to take into account this man's  
25 lifelong good record and the fact that this particular

1 case, the incidents that arose to bring this case into  
2 this court were the product of a completely innocent  
3 mind, a man who is a lifelong law abiding citizen.

4 THE COURT: Thank you. Miss Allen.

5 MS. ALLEN: Your Honor, I believe that the  
6 presentence report shows the base offense level to be 18  
7 plus a 6 for 60 weapons, which the probation officer  
8 relies upon Paragraph 11 of the presentence report. The  
9 probation officer's calculations are in accordance with  
10 the Fourth Circuit law, particularly, the Bowman case  
11 which was 926 F.2d, 380, 1991 Fourth Circuit decision  
12 approving the Court's sentence based upon the convicted  
13 counts and uncharged counts.

14 I think the probation officer has figured 60  
15 firearms based on the guns that were in the indictment  
16 as well as other guns that were seized with the search  
17 warrant. If her calculations are right, the guidelines  
18 would be 51 to 63 months. If the Court decides not to  
19 consider 60 --

20 THE COURT: I'm not going to count any of the guns  
21 that have been thrown out because of the registration  
22 period, so it will reach nowhere near 20. It will be 19  
23 at the most.

24 MS. ALLEN: Based on the Court's statement there,  
25 the Government sees the base level of 18 plus 4 since

1 the guns in Count 1 are 19 and the 4 point enhancement  
2 is for 13 to 24 firearms and if that's true, the total  
3 for that level will be 22 giving the Court a guideline  
4 range of 41 to 51 months. If that's what the Court  
5 finds, the Government has no further argument other than  
6 that.

7 THE COURT: All right. Mr. Montague, you have a  
8 right to answer that. She says that the unlawful  
9 possession of firearms in Level 18 -- this doesn't state  
10 what I'm going to do but that number of firearms are  
11 more than 12 and less than 25, add 4 and you come up  
12 with 22 and the incarceration period is 31 to some other  
13 months so you better answer that, and I'll make my  
14 findings in the matter.

15 MR. MONTAGUE: My answer to it would be this, Your  
16 Honor, would be the retention of the unmarked silencers  
17 -- the 19 unmarked silencers -- resulted from a single  
18 misinterpretation of law and should be treated as one.  
19 Mr. Leasure testified it could have been 500 or 1,000  
20 devices under the same category entirely innocently  
21 retained as were the hundreds that he was not charged  
22 under. Why he wasn't I don't know but the retention of  
23 the firearms, of these silencers, these non-properly  
24 working silencers should be treated as one weapon and  
25 there be no enhancement.

1 And, of course, I think beyond that, the Court  
2 should exercise its discretion. I suggested in one of  
3 my pleadings that the Court consider a lesser included  
4 offense which is failure to properly record firearms,  
5 which is under 18 USC 912M, which is a misdemeanor at  
6 offense Level 6 which is much more appropriate to this  
7 case. I'm not going to say there was nothing wrong  
8 here. I do think the Government has a right to regulate  
9 these things; they are dangerous.

10 Certainly, we associate silencers with many  
11 criminal activities, assassinations and things of that  
12 kind that this Government certainly has a right to  
13 control but here the appearance of heavy evil is just  
14 not there.

15 THE COURT: I'm not going to file a written order  
16 in the matter, so I will record for the record my  
17 findings as they apply to this case. Upon the  
18 conclusion of the evidence and the information set forth  
19 in the trial order the Court dated something like  
20 February 6th, the Court found the defendant guilty then  
21 as to Count 1 which was the silencer count, 19 silencers  
22 that were not registered at all and not in compliance  
23 with the statute which requires them to be registered  
24 with the firearms people by the close of business of the  
25 second day after their manufacture. That's perfectly



1 clear to me. And while I understand Mr. Leasure may  
2 have some trouble with that, I don't. He's found guilty  
3 of a violation of Count 1.

4 I also had some -- as to Counts 2 and 3, the deal  
5 with registration and the debate that surfaced between  
6 Mr. Leasure and the firearms people as to whether or not  
7 he was using a method of cancelling certain transfers  
8 that he made to his accountant apparently over some  
9 bankruptcy difficulty that he -- but that's -- they were  
10 transferred to somebody named O'Quinn and when the --  
11 whatever the problem -- the matter that had prompted  
12 that transfer seemed not to have transpired, then the  
13 effort was made to cancel those transfers by writing  
14 void across the front of the transfer agreement that had  
15 been acceded to by the firearms people.

16 And then the same thing would apply to Count 3 and  
17 to the registration of a 22 pen pistol gun which is set  
18 forth in Count 6. The argument made in Count 6 that the  
19 pistol was not called a firearm it was called a weapon  
20 is of no importance to me and I think that's a facetious  
21 argument and I would overrule it on that basis.

22 But having heard the indictment of the  
23 recordkeeping of the National Firearm Services that was  
24 expressed in February of 1993 and having heard something  
25 that was not brought up at trial that the head of the

1 registration division made a speech to all of his people  
2 and said that the recordkeeping was 49 to 50 percent in  
3 error and feeling as I do that from the testimony of  
4 Mr. Schaible today that that information was fully  
5 knowledgeable within the National Firearms Bureau at the  
6 time it was made - it seems it was on closed circuit  
7 television and then a transcription was made - and  
8 hearing from him that at the time, whether it was in  
9 October or November 1994, that this raised such a furor  
10 within the bureau that Mr. Busey if was not fired but  
11 that he "voluntarily" retired from his position so that  
12 statement -- which nobody seems to know where he got his  
13 figures from -- but that was not furnished to the  
14 defendants in this case. And they would have had a  
15 right to have brought that up to me as showing the  
16 correctness of the firearms registration for their being  
17 questioned by the top men in the registration bureau.

18 I don't say this to Miss Allen. I've known her for  
19 a long time and she's said in court and it's in the  
20 record that she knew nothing about this until she  
21 received a packet from some place from the Department of  
22 Justice, I believe, which indicated Busey's statement,  
23 then an investigation was immediately ordered, and the  
24 consequences of it. That statement and the question of  
25 whether or not Mr. Busey's information was correct or

1 not should have been furnished to the defendant's  
2 counsel, and its not being furnished seems to me to have  
3 violated a precept under which we proceed.

4 For that reason I've thrown out all of those counts  
5 of the indictment which deal in any manner upon the  
6 active and registered numbers assigned to weapons and  
7 that leaves us with the silencers. I have absolutely no  
8 problem with the law in the case that when you make a  
9 silencer, you've got to register it by five o'clock on  
10 the end of the day following its manufacture. And so  
11 the matter is before me for sentencing now on only Count  
12 1 of the indictment that affects Mr. Leasure.

13 Mr. Montague, have Mr. Leasure step with you to the  
14 lectern.

15 Mr. Leasure, the law requires that a judge of this  
16 court give you an opportunity to make any statements  
17 you'd like to make before I proceed to sentencing. It  
18 does not require that you say anything. You have, in  
19 fact, already testified both at the trial in chief and  
20 at this sentencing hearing, but if there's anything  
21 further you want to say, I'll be glad to hear from you.  
22 Anything further?

23 THE DEFENDANT: I would like to say something, Your  
24 Honor, and not take up too much of the Court's time. I  
25 have it over here.

1 THE COURT: Go ahead. I'm not tired, Mr. Leasure.  
2 To give you full benefit of the law, you have a right to  
3 make any statement you'd like to make.

4 THE DEFENDANT: Thank you, sir.

5 MR. LEASURE: Your Honor, I had no criminal intent.  
6 If I had, when the ATF came to my shop three days prior  
7 to the raid and left the National Firearms printout of  
8 the weapons that were supposed to be in my inventory, I  
9 would have made up paperwork or whatever to get my  
10 inventory to match theirs. But I knew that I had  
11 completed my paperwork properly, and I knew in my heart  
12 I had committed no crime. I felt any discrepancies with  
13 BATF could be worked out.

14 I cooperated fully. I left everything just the way  
15 it was even though they had never stepped foot in the  
16 manufacturing portion of my shop at that point in time.  
17 I contacted them on two separate occasions to find out  
18 what the status was on the case and on the things that  
19 they seized from me. I was told they were waiting on  
20 word from Washington, and during that time frame, I  
21 basically went out of business.

22 As to Count 1, I truly interpreted the ATF  
23 regulations book - the only book that I had in my  
24 possession of 1980 and 1989 - to mean a serial number  
25 was not required until it was sold, shipped, or

1 otherwise disposed of. This was the only regulation  
2 book in print and the only one that I had in my  
3 possession.

4 I, of course, now know it crystal clear that that's  
5 not the way that it is and that I'm supposed to do it by  
6 closing of the next business day. The next update that  
7 was printed by ATF was in October of 1995. I was never  
8 furnished with one of these updates. I had to receive  
9 one from someone else; a friend of mine gave me one.

10 The Code Section 179.102 is what is practiced in  
11 the industry, although no one was willing to testify to  
12 that fact for fear of retaliation and prosecution. In  
13 regard to the -- briefly, just the transfers to Carl  
14 O'Quinn. There were transfers that were done to Carl  
15 O'Quinn, who was my accountant at that time and the  
16 person that I transferred these things to that were  
17 voided and approved, that I was not indicted on that  
18 were done in exactly the same way the others that I  
19 furnished to the Court were done.

20 In closing, Your Honor, whenever I thought of  
21 someone who was a convicted felon, I thought of a person  
22 who committed a terrible crime, certainly not one that I  
23 considered to be paperwork and a misinterpretation of  
24 the law. I did not and have not knowingly committed a  
25 crime and I did not have any criminal intent, and that's

1 all I have to say.

2 THE COURT: All right. Thank you, Mr. Leasure.  
3 Normally, going strictly by the guidelines in the case  
4 we would come up with the possession of silencers and it  
5 being a violation of the statute would come into the  
6 guidelines with a basic 18 points under 2K2.1(a)(5).  
7 The unlawful possession of a firearm has a entry level  
8 of 18.

9 And if I took into account the whole 19 of the  
10 silencers, there would be added at least -- we would be  
11 between 13 and 24 and you would add 4 points and that  
12 would come up with a total of 22 for which the guideline  
13 sentencing table would reach 41 to 51 months. But I'm  
14 satisfied in the case not that there hasn't been a  
15 violation, there has been so far as I'm concerned  
16 clearly shown, but that the impact of the bundle of  
17 silencers which were introduced as evidence in this  
18 court range from little small implements to something of  
19 considerable size and the finding of those in a cabinet,  
20 as Mr. Leasure suggests, in a locked cabinet, and, of  
21 course, at that point the violation had already  
22 occurred.

23 But it seems to me that this matter falls under 5K2  
24 of the guidelines and I quote it. It says that the  
25 judge may depart from the guidelines and impose a

1 sentence outside of the guidelines, "if there exists an  
2 aggravating or mitigating circumstance of a kind or to a  
3 degree not adequately taken into consideration by the  
4 sentencing commission in formulating the guidelines,  
5 that should result in a sentence different from that  
6 described." I think that's the case here.

7 I'd add one thing further in Mr. Leasure's favor,  
8 the record wasn't written up totally in the case but as  
9 I recall it, the sales that had been made by him had  
10 been made to other Governments under prohibitions  
11 granted by the United States or to the agencies of the  
12 United States so that generally speaking there was a  
13 great deal of scrutiny being applied to silencers and  
14 their manufacture as indeed there should be because it's  
15 certainly an implement that is used in covertness of the  
16 most advanced sort. I, therefore, will depart down by 5  
17 points and come to -- well, depart by 9 points, that  
18 comes to 13 which carries under the Sentencing Tables of  
19 Criminal History Category 1, 12 to 18 months and  
20 sentence him at the bottom of that to 12 months, \$50 for  
21 the conviction of a felony, waive fine, three years  
22 supervised release.

23 So to review that that would be that pursuant to  
24 this order of the Court, John Daniel Leasure is hereby  
25 committed to the custody of the United States Bureau of

1 Prison to be by them incarcerated for a period of 12  
2 months. That he shall serve a term of supervised  
3 release of three years upon his release from  
4 incarceration. That if requested by the probation  
5 people upon his release on supervised release, he would  
6 take such tests for the use of any controlled substance  
7 within a reasonable time period thereafter that should  
8 be required of him.

9 You have a right of appeal, Mr. Leasure. If you  
10 wish to appeal, you must notify the clerk of this court  
11 in writing within ten days. If you do not have the  
12 money to hire an attorney to prosecute an appeal and if  
13 you fall within the statutes being provided, an attorney  
14 would be appointed by the United States and paid by the  
15 United States.

16 If you don't have the money to pay the cost of such  
17 an appeal and if you fall within the statute they've  
18 provided, that cost will be paid by the United States.  
19 Where you would be incarcerated for this period of 12  
20 months would be a matter that would have to be  
21 determined by the Marshall's office, and I'll leave you  
22 free on bond under the present orders of the Court to  
23 report before 2 p.m. on June the 21st. I don't have a  
24 calendar. Is that not on a Friday, Saturday, or Sunday?

25 MS. ALLEN: That's on a Friday, Your Honor.



1 MADAM CLERK: It is a Friday, Judge.

2 THE COURT: All right. The 20th, Thursday, to the  
3 U.S. Marshall at Norfolk by two o'clock, June 20, 1996.  
4 If a point of designation has been indicated by the  
5 Department of Prisons and Bureau of Prisons at that  
6 time, you would report to the warden of the prison so  
7 designated before two o'clock of June 20th, 1996.

8 Now, I assume if he appeals -- I assume he's going  
9 to appeal. What sort of bond is he presently on,  
10 Mr. Montague?

11 MR. MONTAGUE: It is a monetary amount, Your Honor.  
12 I don't recall.

13 THE COURT: Well, let me look. I'll find it.

14 MR. MONTAGUE: It's not a surety bond.

15 THE COURT: He's on an unsecured appearance bond in  
16 the amount of \$10,000. If he appeals, I would require  
17 that he have a secured bond for the \$10,000, but I would  
18 leave him on bond pending that appeal, but I won't leave  
19 him on a \$10,000 personal recognizance bond. He'll have  
20 to come up with security if he wants to take advantage  
21 of that.

22 MR. MONTAGUE: Understood.

23 THE COURT: All right. Have a seat. Hand this to  
24 the probation officer. Miss Clerk, let me give you  
25 these papers.

1 MS. ALLEN: Your Honor, just for the record, the  
2 Government needs to object to the Court's ruling  
3 regarding the downward departure.

4 THE COURT: I couldn't hear you.

5 MS. ALLEN: Just for the record, we're going to  
6 object to your downward departure with respect to the --

7 THE COURT: Be my guest.

8 MS. ALLEN: Thank you.

9 THE COURT: This goes back. All right, Miss  
10 Clerk, recess the court.

11  
12 CERTIFICATION

13 I certify that the foregoing is a correct  
14 transcript from the record of proceedings in the above-  
15 entitled matter.

16 Diane Poulin  
17 Diane Poulin, Court Reporter

18 6-29-96  
19 Date  
20  
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22  
23  
24  
25