

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,)	
)	
)	
Plaintiff,)	
vs.)	Case No. CR-08-041-L
)	
)	
LARRY DOUGLAS FRIESEN,)	
)	
)	
Defendant.)	

**DEFENDANT'S MOTION IN LIMINE TO PROHIBIT GOVERNMENT'S
INTRODUCTION OR REFERENCE TO RECORDS MAINTAINED IN THE
NATIONAL FIREARMS REGISTRATION AND TRANSFER RECORD**

COMES NOW the Defendant, Doug Friesen, and moves this Honorable Court to prohibit the Government from introducing, mentioning, or otherwise allude or refer to any records from the National Firearms Registration and Transfer Record (NFRTR). In support of said Motion, Defendant Friesen submits the following, to-wit:

The NFRTR is a data base administered by the Bureau of Alcohol, Tobacco, Firearms and Explosives¹ (ATF) to track legally owned machine guns and other "firearms"² required to be

¹ The Bureau of Alcohol, Tobacco and Firearms was renamed the Bureau of Alcohol, Tobacco, Firearms and Explosives under legislation which transferred it from the Department of the Treasury to the Department of Justice, and its law enforcement and administrative functions from the Secretary of the Treasury to the Attorney General, on January 24, 2003. 6 U.S.C. § 531; 116 Stat. 2135 (2003).

² Under the NFA a "firearm" is a term of art, and means "(1) a shotgun having a barrel or barrels of less than 18 inches in length; (2) a weapon made from a shotgun if such weapon as modified has an overall length of less than 26 inches or a barrel or barrels of less than 18 inches in length; (3) a rifle having a barrel or barrels of less than 16 inches in length; (4) a weapon made from a rifle if such weapon as modified has an overall length of less than 26 inches or a barrel or barrels of less than 16 inches in length; (5) any other weapon, as defined in subsection (e); (6) a machinegun; (7) any silencer . . . and (8) a destructive device. The term 'firearm' shall not include an antique

registered under the National Firearms Act of 1934³ (NFA). Said database is inaccurate and incomplete; its error rate is currently unknown; and that unless it can be independently and reliably validated, NFRTR data should be excluded as evidence in a criminal trial.

ATF routinely uses NFRTR data to justify seizing and forfeiting firearms it deems to be unregistered or illegally possessed, issuing search and/or arrest warrants, producing Certificates of Nonexistence of a Record (CNR) for NFA firearms at criminal trials which attest that no record of registration for particular firearms can be located in the NFRTR; determining that a specific firearm is not registered to a specific person; and for other law enforcement activities such as approving or disapproving applications to transfer ownership of NFA firearms.

There are no known data that reliably establish the current accuracy and completeness of the NFRTR. The last audit of the NFRTR according to Generally Accepted Government Auditing Standards (GAGAS), by the Treasury Department Inspector General (Treasury IG) in 1998, raises more questions than it answers. The reasons are that the audit (1) disclosed “critical error” rates of 4.3 percent and 18.4 percent for one category of NFRTR transactions, and (2) was limited in scope.⁴ The bad news was reliably documented April 23, 1998, when Treasury IG auditor Gary Wilk reported in a Work Paper:

firearm or any device (other than a machinegun or destructive device) which, although designed as a weapon, the Secretary finds by reason of the date of its manufacture, value, design, and other characteristics is primarily a collector's item and is not likely to be used as a weapon.” 26 U.S.C. § 5845(a).

³ 26 U.S.C. § 5801 *et seq.*

⁴ These errors apply to Form 4467 data, which may be more inaccurate than the 4.3% critical error rate which can be calculated from data the Treasury IG disclosed in its December 1998 audit report. Office of Inspector General, U.S. Department of Treasury, *Audit Report on Allegations Concerning the Bureau of Alcohol, Tobacco, and Firearms' Administration of the National Firearms Registration and Transfer Record*, OIG-99-018, Dec. 18, 1998 at 12, available at <http://www.nfaa.org/documents/TreasuryOIG-99-018-1998.pdf>. (Hereafter December 1998 Treasury IG Report.) Treasury IG auditor Carol Borgan stated that “error definitions for critical data fields during sampling” include weapon serial number and registrant’s last name (each must “be 100% correct”), and “weapon description”). Work Paper F-25, Feb. 29, 1998, available at http://www.nfaa.org/documents/Work_Papers_F.pdf. Treasury IG auditor Gary Wilk determined “our Discovery sample indicated a 18.4 percent error rate, one error per error Form

- **Form 4467 was a critical indicator for our audit. We determined, based on our discovery sample, that the combined error rate for original documentation and the computer database was 18.4 percent.**
- **We were able to determine that the error rate was in excess, with 95 percent confidence, +/- 7 percent, of the NFA Branch specified error rate limit of (+/-) 5 percent. Based on our Discovery error estimate we did not implement the full statistical sampling plan.**

Conclusion:

The NFA database - National firearms Registration and Firearms Record (NFRTR) does not contain less than the 5 percent error rate limit for Critical data established by the Chief, Firearms and Explosives Division, ATF.

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During a June 17, 1998, meeting at Treasury Department Office of Inspector General Headquarters to discuss the foregoing audit findings, an NFA Branch representative

4467 in a 'Critical' field." Work Paper H-1 + Attachments H1-H143, April 6, 1998, available at http://www.nfaa.org/documents/Work_Papers_H.pdf.

Form 4467 ("Registration of Certain Firearms During November 1968") was used to register unregistered NFA firearms during an amnesty period from November 2, 1968, to December 1, 1968, established by the Gun Control Act of 1968 (P.L. 90-618; Stat. 1235, § 207(b)). The 1998 Treasury IG audit was limited to three categories of NFA transactions (approximately 3.3 percent of the total 2,571,766 transactions "for the years 1934 through July 31, 1998" (December 1998 report, id. at 2); none included Form 1, Form 2, Form 3, Form 4 and Form 5 categories, which account for 2,184,454 transactions (85 percent of total transactions). These forms differ according to whether the applicant is a private citizen, government agency, or Special Occupational Taxpayer (SOT) licensed to manufacture and/or deal in or import NFA firearms.

⁵ Work Paper H-0, April 23, 1998 at 2, reviewed May 7, 1998, by Audit Manager Robert K. Bronstrup. In "Discovery" sampling, the auditor draws a random sample, typically 60 to 70 records or more, to determine the presence or absence of irregularities and the need for a full audit. If no irregularities are found, the data base is presumed to be error-free and a full audit is not conducted. If even 1 irregularity is found, the data base cannot be assumed to be error-free; the audit must be extended; and a larger sample drawn to reliably estimate the error rate for the data base. Herbert Arkin, *Handbook of Sampling for Auditing and Accounting*. New York: McGraw-Hill Book Company, 1984 at 132-140.

Treasury IG auditor Gary Wilk reported that after reviewing "528 records and documents" in Discovery sampling:

- **We discovered a total of 395 errors or omissions of which 176 were Critical to the NFA mission and the remaining 219 were Administrative.**

Work Paper H-0, April 23, 1998 at 1.

██████████ asked for an explanation of the analysis results obtained by the OIG audit of the physical and electronic records maintained by ATF and known as the NFRTR. ██████████ further, added that ██████████ reason for asking was that the results obtained by the OIG audit were disappointing at best and could have serious consequences for the ATF firearms registry mission.

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After Treasury IG auditor Gary Wilk “offered that perhaps ATF would prefer to identify a term other than ‘critical’ as the identifier for the errors identified by this audit report,”⁷ one or more NFA Branch representatives asked the Treasury IG auditors to change the definition of “critical error” to obtain a lower rate, and the auditors did so. The Treasury IG did not mention or publish the 18.4 percent rate (or any other error rate) in its December 1998 report or its October 1998 report; whether “critical errors” were present in other major NFRTR categories was not addressed.

The limited audit findings the Treasury IG published regarding errors in the NFRTR as shown in the table below, copied from the December 1998 Treasury IG report, are misleading. In part the reasons are that, as will be documented in this motion, the Treasury IG auditors did violated GAGAS under at least two major standards: (1) failing to extend the audit to determine the impact of the large number of “critical errors” disclosed as the result of Discovery sampling analysis, which required them to report their effects upon the audit results, in view of the auditors’ failure to fully disclose the results of their Discovery sampling analyses , and (2) failing to be organizationally independent. This motion will later discuss the implications of violating GAGAS.

⁶ Work Paper F-37, June 30, 1998 at 1, available at http://www.nfaoa.org/documents/Work_Papers_F.pdf. In this Work Paper, Treasury IG auditor Gary Wilk “explained that our definition [of “critical error”] had come from our understanding” of definitions provided earlier by NFA Branch representatives, who now “appeared to obtain an improved appreciation of the specific requirements that determined the outcome of the audit.”

⁷ Id. at 1.

SUMMARY OF SAMPLE DISCREPANCIES

	FORM 4467	LETTER	OTHER	TOTAL
Sample Size	141	179	223	543
Discrepancies on Registry Database Reports				
Name:				
Missing	2	1	0	3
Incorrect	0	0	0	0
Serial Number:				
Missing	0	0	0	0
Incorrect	1	0	0	1
Computer Records Not Found	0	10	0	10
Original Records Not Found				
	0	4	16	20
Miscellaneous²	3	0	0	3
TOTALS	6	15	16	37

Source: Database analysis results are dependent on the retrieval methods used. The results shown above are based on a combination of data retrieval methods.

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Sworn testimony in *Freisen* by NFRTR custodian Denise Brown in this Court on September 17, 2008, about the current accuracy of the NFRTR was not informative or encouraging. When asked by defense counsel “how accurate are the NFRTR records?” Custodian Brown replied: “I don’t have a number.” When asked to confirm whether “there are inaccuracies in them [NFRTR data], are there not, ma’am?,” she answered “Yes, there are.”⁹

ATF officials have willfully failed to disclose that ATF has (1) lost or destroyed firearm registration documents, (2) added registration documents provided by firearms owners to replace those which ATF lost, destroyed, or could not locate, (3) knowledge that the NFRTR contains

⁸ December 1998 Treasury IG Report at 12, available at <http://www.nfaa.org/documents/TreasuryOIG-99-018-1998.pdf>.

⁹ *United States of America vs. Larry Douglas Friesen*, Case No. CR-08-41L, United States District Court for the Western District of Oklahoma, Transcript of Jury Trial, Vols. I-VIII, Sept. 17-Oct. 1, 2008, before the Honorable Tim Leonard, U.S. District Judge at 75-76. (Hereafter *United States of America vs. Larry Douglas Friesen* (2008).)

serious material errors that affect the reliability of its certifications in federal court that a particular firearm is not registered to a defendant, and (4) from time to time, depending on the circumstances, inconsistently applied various definitions of “critical error” in characterizing errors in the NFRTR, as this motion will document. Their actions, reported in documents created and published by the Government since 1979, particularly during the 1990s and continuing to present, violate due process, and obstruct justice.¹⁰ There is evidence, discussed throughout this motion, that ATF has been withholding *Brady* material¹¹ by failing to disclose potentially exculpatory evidence at criminal trials. Both the Attorney General and his predecessor (Secretary of the Treasury) have failed to establish a new amnesty period to correct errors in the NFRTR because firearm registration documents are missing, as will be shown is required by the Criminal Division of the Department of Justice. Consequently, ATF’s use of NFRTR data whose validity and reliability has not been independently established does not represent an acceptable standard for federal law enforcement in criminal prosecutions.

The Congress heard testimony in 1979 that ATF alleged J. Curtis Earl, a federally licensed NFA dealer, illegally possessed 475 unregistered firearms.¹² More than two decades later, the attorney who represented Mr. Earl informed a Subcommittee Chairman during a 2001 Congressional hearing about continuing inaccuracies in NFRTR records, 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 onto his

¹⁰ There are no published law review articles on the NFRTR, and little pertinent case law. The most comprehensive legal review of NFRTR issues to date is in an unpublished article. Joshua Prince, “Violating Due Process: Convictions Based on the National Firearms Registration and Transfer Record when its ‘Files are Missing’” (2008), available at http://www.nfaoa.org/documents/Violating_Due_Process20Aug2008.pdf

¹¹ *Brady vs. Maryland*, 373 U.S. 83 (1963).

¹² Congressional Hearing, Committee on Appropriations, United States Senate, *Oversight Hearings on Bureau of Alcohol, Tobacco and Firearms*, 96th Cong., 1st Sess. at 39 (1979), available at http://www.nfaoa.org/documents/1979_Hearing_Excerpts.pdf.

racks. At the end, he could show that he had registered every single one of these 475 firearms. ATF's records were grossly incorrect.¹³

In November 1979, in response to a request by then-Senator James A. McClure, the Criminal Division of the Department of Justice stated if ATF determines that "a particular individual or weapon is registered" and ATF finds that its "files are missing," then "the only solution would be to declare another amnesty period."¹⁴ Sections of this Memorandum that include the preceding quoted phrases are reproduced below.

No amnesty period was established as the result of Mr. Earl's case.

soventeen problem areas in the record system (see pp. 3-4). The most significant of these in terms of its effect on the validity of a certification is where both the index card and the registration record are missing. It must be explained, however, that the only way to determine whether this situation exists is by first knowing that a specific individual or weapon is registered and the finding that both files are missing. Obviously, if the individual has never registered a firearm or if the firearm has never been registered by anyone, no record whatsoever will exist. The report does not suggest that this problem actually existed and it cites no examples where both records were determined to be missing.5/ Indeed, none of the ATF personnel we interviewed were aware of any case where this happened. Most of

5/ If this problem actually existed, the only solution would be to declare another amnesty period. The Secretary is empowered to do this under existing legislation.

¹⁵

¹³ Letter to Ernest S. Istook, Jr., Chairman, Subcommittee on Treasury, Postal Service and General Government dated April 10, 2001, from David T. Hardy, Esq., available at <http://www.nfaa.org/documents/BardHard.pdf>.

¹⁴ 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>.

Under § 207(d) of the Gun Control Act of 1968, the Secretary of the Treasury (now the Attorney General) is empowered to administratively establish unlimited numbers of amnesty periods lasting up to 90 days per amnesty period, with immunity from prosecution, "as the Secretary determines will contribute" to purposes of the NFA, upon publication in the *Federal Register* of his intention to do.

¹⁵ Id. at 4.

In 1997, as the result of allegations by Eric M. Larson, a private citizen,¹⁶ the Chairman, House Committee on Government Reform and Oversight, directed the Treasury IG to audit the NFRTR.¹⁷ One of the audit reports, published in 1998, describes the use and results of Discovery sampling to establish there were “discrepancies” in three categories of NFRTR data, including missing or incorrect name; missing or incorrect serial number; computer records not found; and original records not found.¹⁸ The Treasury IG failed to investigate a credible allegation that “ATF had registered firearms for which the agency had no documentation, but their owners did,”¹⁹ and “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 NFRTR.²⁰

Continuing efforts by citizens, federally licensed firearms dealers and gun collectors, and testimonies and statements from 1996 to 2001 at Congressional hearings involving the accuracy

¹⁶ Eric M. Larson has been a Senior Analyst, U.S. Government Accountability Office (GAO), since 1987. Mr. Larson’s research, Congressional testimonies from 1996 to 2001, and continuing work involving the NFRTR has been and continues to be done in his personal capacity as a private citizen, and does not represent the policy or position of GAO.

¹⁷ Letter from Dan Burton, Chairman, Committee on Government Reform and Oversight, House of Representatives dated June 25, 1997, to the Honorable Valerie Lau, Inspector General, Department of the Treasury. Work Paper D-4, October 14, 1997, by Diane Kentner at 5, *available at* http://www.nfaoa.org/documents/Work_Papers_D.pdf. Chairman Burton’s letter states: “From the correspondence and testimony I received . . . it appears that the concerns raised by Mr. Larson may be valid and legitimate. Consequently, I believe an investigation by the OIG into [his] allegations would be appropriate to reveal any possible improprieties or mismanagement at the ATF, and to recommend solutions that would improve and strengthen ATF’s registration and record-keeping of firearms.”

¹⁸ December 1998 Treasury IG Report at 12, *available at* <http://www.nfaoa.org/documents/TreasuryOIG-99-018-1998.pdf>. The 1998 Treasury IG reports do not use the term “critical error,” and instead refer to them as “discrepancies.”

¹⁹ 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 12, *available at* <http://www.nfaoa.org/documents/CRSmemoNFRTR0001.pdf>. The memorandum also states: “While the OIG found discrepancies in the sampled records . . . the critical error rates were not given in the text of the audit report. Nevertheless, based on its own findings and ATF efforts to improve the NFRTR, the Treasury OIG chose not to perform a full sampling and audit of the NFRTR.” *Id.* at 14.

²⁰ *Id.* at 12.

and completeness of the NFRTR resulted in another Government examination of the NFRTR. In the June 2007 report of its “review” of the NFRTR, the Department of Justice Inspector General (Justice IG) stated:

We reviewed ATF processes related to requesting records checks from the NFRTR and determined that when an error is detected, the NFA Branch staff thoroughly research the NFRTR and the imaging database to find out if a weapon is actually registered. Additionally, the NFA requires owners to retain the approved NFA weapons application 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.**²¹ [emphasis added]

The Justice IG’s finding that “ATF assumes the error is in the NFRTR and fixes it in the database” when firearms owners produce copies of their registration documents leaves unanswered questions. Commenting on the foregoing determination, Stephen P. Halbrook, a nationally and internationally recognized authority on U.S. firearms law, observed:

. . . if 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. On such issues the report is not sufficiently informative.²²

The loss or destruction of an NFA firearm registration document by anyone is not a trivial matter because all violations of the NFA are serious felony offenses, and the penalties are substantial.²³ Persons who are convicted of illegal possession of a machine gun are singled out for particularly harsh treatment. The reason is that under Title 18 § 922(o), the Government is

²¹ 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, June 2007 at 31, available at <http://www.nfaog.org/documents/DOJ-OIG2007NFRTRreport.pdf>. Hereafter June 2007 Justice IG Report.

²² Stephen P. Halbrook. *Firearms Law Deskbook: Federal and State Criminal Practice*. 2008-2009 Edition. Thomson West Publishing, 2008 at 575.

²³ Violators may be fined not more than \$250,000, and imprisoned not more than 10 years, or both. In addition, any vessel, vehicle or aircraft used to transport, conceal or possess an unregistered NFA firearm is subject to seizure and forfeiture, as is the weapon itself. 49 U.S.C § 781-788, 26 U.S.C. § 5861 and § 5872.

not required to prove that a machine gun is not registered to convict a defendant of Possession of Unregistered Firearm.

The 2007 determination appears to meet the standard the Criminal Division of the Department of Justice established in 1979 for a new amnesty period as “the only solution” when ATF’s “files are missing.”

When Eric M. Larson filed a FOIA request to the Justice IG to obtain copies of the Work Papers created during its review of the NFRTR, to further clarify its determination, the Justice IG responded by sending them to ATF’s Disclosure Division for processing.²⁴

It is unusual for an Inspector General to send Work Papers to an agency over which it has oversight responsibility for FOIA processing, because of the potential for conflict of interest it represents for both the agency and the Inspector General. Despite Mr. Larson’s repeated efforts to obtain them, ATF has thus far not provided copies of the requested Work Papers. A copy of the July 25, 2008, letter ATF sent to Mr. Larson after receiving the Work Papers from the Justice Department IG, appears on the next page.

²⁴ Letter from Marilyn R. LaBrie, Disclosure Specialist, ATF dated July 25, 2008, to Eric M. Larson, bearing identifier REFER TO: 08-726.



U.S. Department of Justice

Bureau of Alcohol, Tobacco,
Firearms and Explosives

JUL 25 2008

Washington, DC 20226

www.atf.gov

REFER TO: 08-726

Mr. Eric Larson
P.O. Box 5497
Takoma Park, MD 20913

Re: Work Papers – Report Number 1-2007-006

Dear Mr. Larson:

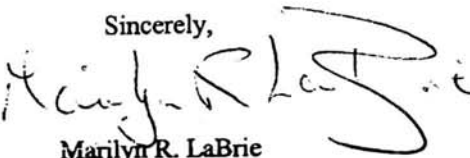
This is in reference to your Freedom of Information Act request, that you submitted to the Department of Justice. Your request was forwarded to this Agency together with a large volume of records.

It is our intent to grant your request in part. We are sorry that our processing has been delayed but we will endeavor to provide a response as soon as possible.

We are processing your request as an "all others requestor" therefore you are entitled to 100 free copies and 2 free hours of search. We will inform you if we anticipate any costs for copies that are not covered by the foregoing.

We regret the delay and will do all we can to provide a response.

Sincerely,


Marilyn R. LaBrie
Team Leader, Disclosure Division

The Government still declines to establish an amnesty period to correct errors in the NFRTR. For example, in a January 14, 2009, letter, the Department of Justice Deputy Inspector General Paul K. Martin told Senator Barbara Mikulski, Chairman, Subcommittee on Commerce, Justice, Science and Related Agencies, Committee on Appropriations, the following:



U.S. Department of Justice

Office of the Inspector General

January 14, 2009

The Honorable Barbara A. Mikulski
United States Senate
Hart Senate Office Building
Suite 503
Washington, D.C. 20510-2003

Attention: Benson Erwin

Dear Senator Mikulski:

We received your correspondence of October 28, 2008, forwarding a letter from Mr. Eric Larson regarding the Office of the Inspector General's (OIG) review of the Bureau of Alcohol, Tobacco, Firearms and Explosives' (ATF) management of the National Firearms Registration and Transfer Record (NFRTR) database and Mr. Larson's Freedom of Information Act (FOIA) request to the OIG. We will first address the concern with the OIG's review of the NFRTR and, second, with Mr. Larson's FOIA request.

Mr. Larson stated in his letter that he was concerned that the OIG did not review the "material inaccuracies" in the NFRTR and these errors "expose innocent firearms owners to legal jeopardy." Mr. Larson also asks the OIG to issue an opinion on the need for an amnesty period to register National Firearms Act (NFA) weapons. We are aware of Mr. Larson's concern about errors in the NFRTR and his desire for a new amnesty period for the registration of additional NFA weapons. However, our review focused on ATF's management of the NFRTR and the processing of NFA weapons' forms and did not address the issue of an amnesty period. The OIG has no opinion on the establishment of a new amnesty period in which to register NFA weapons. While our review found that there are some technical and programming issues that could cause administrative errors in records, we also found that ATF is taking the appropriate actions to correct these issues and is proactively correcting any errors found in individual records. Moreover, we found no instance in which errors in the NFRTR resulted in inappropriate criminal charges against individuals or federal firearms licensees.

Regarding Mr. Larson's FOIA request, the OIG received a FOIA request from Mr. Larson on July 26, 2007, seeking information pertaining to our review, including the work papers associated with the review. We have fully processed this request.

On August 16, 2007, we provided Mr. Larson with a copy of the report relating to our review. By letter dated September 18, 2007, we informed Mr. Larson that the work papers contained three categories of material: (1) documents that originated with other offices/agencies; (2) public source documents; and (3) documents generated by the OIG that contain information originating from other offices/agencies. We asked Mr. Larson whether he wanted copies of the public source material and whether he wished us to refer the material originating with the other offices/agencies to those entities. We also informed him that we would process the documents generated by the OIG after consultation with the other offices/agencies.

By letter dated September 27, 2007, Mr. Larson responded that he wanted copies of the public source documents and that we should make the referrals to the other entities. We thereafter referred to the Department of the Treasury and the ATF documents that originated with their offices. We informed Mr. Larson of these referrals, telling him that the Department of the Treasury and ATF would respond directly to him regarding the referred documents. We also sent Mr. Larson copies of the public source material.

After consulting with ATF regarding the OIG-generated material, we informed Mr. Larson on December 5, 2008, that these documents were exempt from disclosure pursuant to 5 U.S.C. §552(b)(5). We also informed Mr. Larson regarding his right to appeal our determination.

We are forwarding a copy of this letter to Mr. Larson.

Please feel free to contact us if you have additional questions about the work of the OIG.

Sincerely,

A handwritten signature in black ink, appearing to read "PKM", is written over a horizontal line.

Paul K. Martin
Deputy Inspector General

cc: Mr. Eric Larson

While Deputy Inspector General Martin correctly states "[w]e have fully processed" Mr. Larson's FOIA request, his statement is misleading because the Justice IG transferred the documents Mr. Larson requested to ATF for FOIA processing. The Justice IG's action is reminiscent of how the Government long avoided disclosing documents pertinent to Waco in

response to a FOIA request by shifting the paperwork and related responsibilities between the Department of Justice, ATF, and the Texas Rangers, before a Federal District Judge ordered a halt to such evasions and ordered that the documents be produced for his Court, and they were.²⁵

“Institutional Perjury”: The Busey Videotape and *LeaSure*

The most recent efforts to persuade ATF to render the NFRTR accurate and complete originated from statements about its inaccuracy during an October 1995 “ROLL CALL TRAINING” session at ATF headquarters that was also videotaped.²⁶ During the session, which was broadcast throughout ATF, then-NFA Branch Chief Thomas Busey stated “ . . . **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.**”²⁷ (Emphasis added). Asserting the error rate in the NFRTR was recently reduced as the result of activities of a “quality review team,” Mr. Busey stated:

. . . 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 your error rate’s 49 to 50 percent. The error rate now is down to below 8 percent, and that’s total. That’s common errors and critical errors.²⁸

²⁵ David T. Hardy, *This Is Not An Assault: Penetrating the We of Official Lies Regarding the Waco Incident*. Xlibris Corporation, 2001 at 91-108.

²⁶ A certified copy of the session is transcribed under the title “ROLL CALL TRAINING, 10-95, TOM BUSEY.” *Treasury, Postal Service, and General Government Appropriations for Fiscal Year 1997*. Hearings Before a Subcommittee of the Committee on Appropriations, House of Representatives. 104th Cong., 2d Sess., Part 5 at 182-205, available at <http://www.nfaoa.org/documents/1996testimony.pdf>. (Hereafter Congressional Hearing, House of Representatives, *Treasury, Postal Service, and General Government Appropriations for Fiscal Year 1997*.)

²⁷ *Id.* at 192.

²⁸ *Id.* at 202. Mr. Busey was apparently referring to an internal ATF “Quality Review” initiative that “commenced operations on July 25, 1994,” according to a “productivity report” prepared February 9, 1996. *Treasury, Postal Service, and General Government Appropriations for Fiscal Year 1998*. Hearings Before a Subcommittee of the Committee on Appropriations, House of Representatives. 105th Cong., 1st Sess., Part 5 at 102, available at <http://www.nfaoa.org/documents/1997testimony.pdf>. (Hereafter Congressional Hearing, House of Representatives, *Treasury, Postal Service, and General Government Appropriations for Fiscal Year 1998*.)

In response to Mr. Larson’s FOIA request for information about the quality review initiative Mr. Busey described, ATF sent approximately 100 loose pages consisting of weekly reports and other documents. The result of the

Mr. Busey's statements that ATF personnel "always testify" in court that the NFRTR "is 100 percent accurate," and "[a]s you probably well know, that may not be 100 percent true," were termed "institutional perjury" by an attorney who learned of the videotape, obtained a transcript of Mr. Busey's statements by filing a FOIA request, and published an article about the incident.²⁹ During the session Mr. Busey also said the error rate in the NFRTR was between 49 percent and 50 percent in the year before he arrived, and "we know you're basing your warrants on it, you're basing your entries on it, and you certainly don't want a Form 4³⁰ waved in your face when you go in there to show that the guy does have a legally-registered [NFA firearm]. I've heard that's happened. I'm not sure."³¹

The videotape of Mr. Busey's remarks, now available on the Internet, has more impact than his published words. The reasons are that Mr. Busey's statements were not spontaneous remarks; Mr. Busey prepared his statements in advance, can be seen reading them, and smirks while saying: "I've heard that's happened. I'm not sure." In response to Mr. Larson's FOIA request for a copy of the Busey videotape, ATF responded:

initiative is unclear because it is not apparent whether there was a final report, and there are no separate explanations or summaries of the weekly reports.

²⁹ "Institutional Perjury," by James H. Jeffries III. *Voice for the Defense*, Vol. 25, No. 8, October 1996 at 28-30; available at <http://www.nfaoa.org/documents/Jeffriesarticle.pdf>, reprinted in the *Congressional Record* (Extensions of Remarks), Vol. 142, August 2, 1996 at E1461-E1462, available at <http://www.nfaoa.org/documents/JeffriesCongRec.pdf>.

³⁰ ATF Form 4, currently titled "Application for Tax Paid Transfer and Registration of Firearm," is prepared in duplicate original and used to transfer the ownership of registered NFA firearms. After ATF approves the Form 4 application, ATF (1) keeps one approved copy for entry into the NFRTR, and (2) sends the other approved copy to the firearm owner (transferor), who must subsequently transfer the firearm (and the other approved copy) to the new owner (transferee) within a reasonable time or cancel the transfer. The NFA prohibits the physical transfer of the firearm by the transferor to the transferee before ATF approves the transfer.

³¹ Congressional Hearing, House of Representatives, *Treasury, Postal Service, and General Government Appropriations for Fiscal Year 1997*, available at <http://www.nfaoa.org/documents/1996testimony.pdf>.

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.

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The Busey videotape was used, in part, to overturn five convictions of John D. LeaSure for possession of unregistered firearms in a May 1996 bench trial, during which ATF Specialist Gary Schaible testified he was aware of "occasions . . . in the NFA Branch of clerks throwing away transmissions because they don't want to fool with them" rather than process them (Mr. LeaSure testified he FAXed registration documents to ATF in 1994, and ATF claimed it was unable to find a record of them).³³ Under cross-examination, when asked "that's one of the things [NFA Branch clerks throwing away documents] that could happen to you?," Mr. Schaible replied "Certainly."³⁴

Citing Mr. Schaible's testimony (in which he also confirmed the Busey video had been broadcast throughout and was common knowledge within ATF Headquarters), the presiding Judge ruled " . . . it throws a disagreeable proposition on my finding somebody guilty on records when their chief man [Mr. Busey] says they were 49 percent wrong," and dismissed five

³² Letter from Marilyn R. LaBrie, Disclosure Specialist, ATF, to Eric M. Larson dated March 18, 1998, bearing symbols L:D:MRL 98-514. *Treasury, Postal Service, and General Government Appropriations for Fiscal Year 1999*. Hearings Before a Subcommittee of the Committee on Appropriations, House of Representatives. 105th Cong., 2d Sess., Part 5 at 170, available at <http://www.nfaoa.org/documents/1998testimony.pdf>. Hereafter Congressional Hearing, House of Representatives, *Treasury, Postal Service, and General Government Appropriations for Fiscal Year 1999*.

A videotape of the training session was obtained by an attorney who subpoenaed it for trial and made a copy when the U.S. Attorney that prosecuted the case failed to submit a timely order to the court to prohibit its public disclosure, available at http://www.nfaoa.org/documents/rollcall_highlights.mp4.

³³ *United States of America vs. John Daniel LeaSure*, Crim. No. 4:95cr54, E.D. Va.—Newport News Div., Transcript of Proceedings before the Honorable John A. MacKenzie (May 21, 1996) at 42-43, available at <http://www.nfaoa.org/documents/LeaSureTrial.pdf>. (Hereafter *United States of America vs. John Daniel LeaSure* (1996).)

³⁴ *Id.* at 42-43.

convictions under the NFA for possession of unregistered firearms.³⁵ The *LeaSure* transcript states that Mr. Schiabile was a witness “called on behalf of the Government, having been first duly sworn, was examined and testified” to the above facts.³⁶ ATF did not appeal the verdict.

ATF acted to contain the damage resulting from Mr. Busey’s statements by (1) adding “corrections” by Mr. Schaible to transcribed copies of the videotape of Mr. Busey’s remarks disclosed by ATF in response to FOIA requests, and (2) requesting the Audit Services Division of the Department of the Treasury to audit the NFRTR. On February 13, 1996, Mr. Schaible stated under penalty of perjury that, to the best of his knowledge, no NFA Branch personnel have ever testified that the NFRTR is 100 percent accurate, and “the reference to an error rate of 49-50 percent is based on an informal, undocumented estimate by personnel from the Firearms and Explosives Regulatory Division.”³⁷

In *Rith*, a 1999 court case that included a challenge to the accuracy and completeness of the NFRTR arising from the Busey videotape, after hearing opposing evidence the Court ruled “[t]he record establishes that the NFRTR database has sufficient guarantees of trustworthiness to satisfy the Sixth Amendment.”³⁸ The Court based its opinion on (1) statements by Mr. Busey that “a quality review team . . . instituted in 1994” had reduced “the critical-error rate to below three percent,” and (2) “a copy of an audit performed February 7, 1996, by the Audit Services Division of the Department of the Treasury” showing a 1.5 percent “critical-error” rate.³⁹ The

³⁵ Id. at 45.

³⁶ Id. at 23.

³⁷ Congressional Hearing, House of Representatives, *Treasury, Postal Service, and General Government Appropriations for Fiscal Year 1997*, available at <http://www.nfaoa.org/documents/1996testimony.pdf>.

³⁸ *United States of America vs. Rith*, 164 F.3d 1323 at 1336, 51 Fed. R. Evid. Serv. 197 (10th Cir. 1999). Hereafter *United States of America vs. Rith* (1999).

³⁹ Id. at 1336.

Court added: “the accuracy of the registration check is buttressed by a second level review by a branch chief.”⁴⁰ It is unclear whether the Audit Services Division of the Department of the Treasury published a formal report of its 1996 audit of the NFRTR; the audit processes it followed are unknown and may not have been fully disclosed to the Court.

ATF and the Audit Services Division may have perpetrated a fraud upon the Court in *Rith*. The reasons are that (1) Mr. Busey’s statements about improvements in the “critical-error” may have been self-serving, (2) there is no evidence that a final report on the “quality review team” accomplishments was rendered, or that the results of the “accomplishments” and reduction of the “critical-error” rate were independently validated, (3) it is unclear whether the 1996 audit was conducted according to GAGAS, and (4) the Audit Services Division auditors may have been improperly influenced by NFA Branch representatives to manipulate the outcome of the audit.

The Audit Services Division is a sister component of ATF; has no oversight authority over ATF; and the purpose of the audit was to establish that the NFRTR was accurate enough to justify criminal prosecutions. It is improbable that one component of a federal law enforcement agency would engage in conduct that would reflect badly upon another component, or the agency itself; and questioning the legal basis for a federal law enforcement activity would be sensitive because of potential legal liabilities, such as overturning convictions and payments to citizens for damages for wrongful convictions.

There are reasons to doubt the independence of Treasury Department and other Government officials regarding their characterization of “errors” in the NFRTR. There are also reasons to question the validity and reliability of Mr. Busey’s characterization of what he termed

⁴⁰ Id. at 1336.

“common errors” and “critical errors” and “error rate” in the October 1995 “ROLL CALL TRAINING” session because (1) these terms do not correspond to terms used by the quality control team, and (2) inspection of “Weekly — Quality Review Report” documents disclose that the quality review team manipulated the NFRTR error rate by changing the definition of “Significant Error” by renaming it “Error.”⁴¹ Error and error rate reports created by the quality review team, obtained via a FOIA request by Mr. Larson, are not straightforward and their meaning is difficult to interpret; for example, one weekly report states:

Since 6/30/94 reviewed 25611 Errors 1567 Significant errors 373
Common Error rate .01% Significant error rate .01%⁴²

No valid and reliable overall error rate of any type could be identified from any of the documents because numbers of “Errors” and “Significant errors” were different among nearly 100 different weekly reports ATF disclosed in responding Mr. Larson’s FOIA request.

⁴¹ ATF’s “Quality Review” team manipulated the definition of “error” as follows. One document states: “On approximately October 3, 1994, we began defining and separating the significant errors from the common errors,” and this document defined “Significant Errors” as shown below:

Significant Errors:

1. Misspelled and/or Incomplete names.
2. Voided application--didn't indicate current firearm possessor.
3. \$200/\$5 remittance not posted.
4. Never mailed approved form to transferor
5. Approved wrong firearm to transferee.
6. Approved form never updated in NFRTR.

Congressional Hearing, House of Representatives, *Treasury, Postal Service, and General Government Appropriations for Fiscal Year 1998* at 103, available at <http://www.nfaaa.org/documents/1997testimony.pdf>.

Another weekly report reclassified “Significant Errors” as “Errors” except for slightly changing one type of error, namely, “2. Voided application - - didn’t indicate previous owner,” as shown below:

Errors:

1. Misspelled and/or Incomplete names.
2. Voided application--didn't indicate previous owner.
3. \$200/\$5 remittance not posted.
4. Never mailed approved form to transferor
5. Approved wrong firearm to transferee.
6. Approved form never updated in NFRTR.

Id. at 104.

⁴² Id. at 103.

NFRTR Data Inaccuracies: Early Statistical Evidence, 1992 to 1996

Because of Mr. Busey's statements that records of Forms 4 could not be located in the NFRTR, Mr. Larson sought to determine if there was any independent statistical evidence that ATF had lost or destroyed NFA registration documents by analyzing publicly available NFRTR data on "NFA registration activity" from 1992 to 1996. Mr. Schaible's testimony *LeaSure* indicated that ATF may have added registration documents obtained from firearms owners to the NFRTR after discovering that NFA Branch clerks had thrown documents away rather than work on them.

Under a FOIA request, Mr. Larson obtained copies of reports of annual "NFA registration activity" from 1992 to 1996 from the NFA Branch, which list 11 categories of firearms registration activity represented in the NFRTR.⁴³ Inspection of the data indicates that some data lack face validity; that is, does not measure what it purports to measure. The reason is that there are records of NFA registration activity during and prior to the 1920s, a logical impossibility because the NFA was not enacted until 1934. Just as when a clock incorrectly strikes 13 on the hour, causing one to question what hour it really is and raising doubts about

⁴³ The NFRTR data Mr. Larson obtained are available in 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*. Prepared for the Honorable Pete Sessions, House of Representatives, Washington, D.C., April 2, 1999 (unpublished), inserted at 5-6, available at <http://www.nfaoa.org/documents/Critiqueof1998IGreports.pdf>.

The NFRTR data categories are: Form 1, Form 3, Form 4, Form 5, Form 6, Form 9, Form 10, and Form 4467, and differ according to whether the applicant is a private citizen, government agency, or Special Occupational Taxpayer (SOT) licensed to manufacture, import, and/or deal in NFA firearms, and whether the transfer is tax paid or tax exempt. Form 2, currently titled "Notice of Firearms Manufactured or Imported," is a record of notice to ATF used exclusively by and sent to ATF by SOTs, not an application form. The "Letter" category has been used to register or transfer NFA firearms when ATF forms have not been available, but these transactions are uncommon.

Treasury IG auditors reported that ATF has not formally defined the "Other" category, and stated it included "a procedure where movie industry supply houses and movie industry property masters filed applications by telegraph in lieu of filing a Form 3 in order to expedite processing by ATF." October 1998 Treasury IG Report at 18, available at <http://www.nfaoa.org/documents/TreasuryOIG-99-009-1998.pdf>.

what hour it really was during all the other times the clock was supposed to be striking correctly on the hour during previous strikes, records of NFA registration activity before 1934 raise doubts about the accuracy of records of NFA registration activity for other years.

These data tables of NFA registration activity during 1992 to 1996 are reproduced below in the same form ATF sent them to Mr. Larson.

BUREAU OF ALCOHOL, TOBACCO AND FIREARMS											RUN: 2/01/93 13:31	
NFA REGISTRATION ACTIVITY - ANNUAL COMPARISON												
YEAR	F1	F2	F3	F4	F5	F6	F9	F10	LTR	4467	OTHER	TOTAL
1992	357	71296	26652	6527	46462	2	20385	289	40		30	172040
1991	224	78062	20914	5390	42117	1	36848	258			35	183849
1990	692	88893	22823	6807	56015	4	27877	289	43		134	203577
1989	271	69932	23605	8165	31198	12	18133	281	51		106	151754
1988	342	24860	39747	7699	8319	2	1473	403	66		450	83361
1987	409	17427	34492	8311	9388	2	745	324	144	1	717	71960
1986	935	69957	22944	5158	4888		528	381	181	3	749	105724
1985	645	14666	15512	3524	6245	1	1306	334	45	1	726	43005
1984	534	14846	14720	3911	5437	1	1506	294	3	3	335	41590
1983	458	11143	11132	5203	3072	27	248	367	4	1	29	29684
1982	324	7720	11417	2770	2671	9	1	481	2	3	37	25435
1981	270	7101	8148	3734	2718	24	1	341	10	1	18	22366
1980	163	3072	6830	3040	1634	6	1	329	7	4	23	15109
1979	108	3284	6988	2150	1513	13	6	353	5	1	20	14441
1978	80	1430	5498	1879	1257	7	1	729	5	6	17	10909
1977	77	1988	6006	1535	1737	2	1	590	14	1	22	11973
1976	30	878	10943	979	1754	20	5	457	3	39	26	15134
1975	78	1399	3279	567	1830	18	3	613	10		49	7846
1974	29	1017	2961	579	1688	9	3	507	15	5	8	6821
1973	16	1351	2033	353	1782	5	7	513	8	17	16	6101
1972	30	4017	1963	261	1511	14	9	639	33	84	19	8580
1971	24	2241	209	36	251	10		311	1959	26	19	5086
1970	38	191	19	10	24	16		1	1563	272	34	2168
1969	36	760	41	13	41	8	1		1148	2006	19	4865
1968	1510	1277	366	192	935	7		4	29	54487	37	58844
1967	909	1144	306	181	844	2			5	64	10	3465
1966	908	1293	435	136	1062	2				8	20	3856
1965	841	1246	428	142	1047	7		1	1	2	21	3736
1964	744	937	275	139	699	6		1		3	4	2808
1963	709	720	291	126	808	3	4			1	2	2672
1962	734	1111	272	204	789	3			1	14	7	3135
1961	809	1466	548	152	1330	5		1	4	2	4	4321
1960	790	657	314	148	654	20			2	6	1	2592
1950 TO 1959	6629	5955	2165	1150	2917	861	16	2	6	23	47	19771
1940 TO 1949	6574	7231	4704	361	4905	8455	5	2	4	9	57	32307
1930 TO 1939	11422	191	548	15	706	22	1	14	26	25	1280	14250
1920 TO 1929	12	4	12	2	7	1				6	9	53
PRIOR TO 1920	1	36	21	2	37	1	2	1	1	4	15	121
UNKNOWN	12	304	32	22	170	6	24		6	58	3513	4147
TOTAL	58766	521183	309593	79573	250462	9614	109140	9110	5437	57187	8671	1398656

DATA THROUGH 12/31/93

BUREAU OF ALCOHOL, TOBACCO AND FIREARMS
NFA REGISTRATION ACTIVITY - ANNUAL COMPARISON

RUN: 1/04/94 7:11

YEAR	F1	F2	F3	F4	F5	F6	F9	F10	LTR	4467	OTHER	TOTAL
1993	299	107362	27228	7749	67625		27905	405	11		25	238609
1992	357	75754	26834	6556	46561	2	20391	289	40		25	176809
1991	226	78157	20983	5400	42124	1	36834	258			33	184016
1990	692	89697	22858	6821	56084	4	27827	289	44		132	204448
1989	271	69927	23728	8176	31210	12	18133	281	51		104	151893
1988	342	24851	39767	7703	8370	2	1473	403	66		450	83427
1987	409	17491	34519	8318	9421	2	745	324	143	1	714	72087
1986	936	70211	22959	5162	4903		528	381	181	3	744	106008
1985	645	14728	15520	3526	6280	1	1306	334	45	1	725	43111
1984	534	14849	14725	3913	5437	1	1506	294	3	3	336	41601
1983	458	11142	11144	3204	3078	27	248	367	4	1	29	29702
1982	325	7728	11420	2771	2674	9	1	481	2	3	37	25451
1981	270	7108	8148	3735	2720	23	1	341	10	1	18	22375
1980	162	3073	6830	3040	1637	6	1	329	7	4	22	15111
1979	108	3285	6990	2150	1513	13	6	354	5	1	19	14444
1978	80	1430	5497	1878	1257	7	1	729	4	6	17	10906
1977	77	1987	6009	1535	1737	2	1	590	14	1	22	11975
1976	30	879	10945	979	1754	19	5	459	3	39	26	15138
1975	78	1399	3280	567	1831	18	3	613	10		49	7848
1974	29	1017	2961	579	1689	9	3	507	15	5	8	6822
1973	16	1351	2030	353	1783	5	7	513	8	17	15	6098
1972	30	4028	1963	261	1511	14	11	638	33	84	19	8584
1971	24	2242	209	36	251	10		311	1959	26	19	5087
1970	38	192	18	10	23	16		1	1566	272	32	2168
1969	36	760	43	13	42	8	1		1140	2010	18	4071
1968	1509	1278	368	193	935	7		4	29	54485	37	58845
1967	909	1143	306	181	844	2			5	64	10	3464
1966	908	1293	435	136	1062	2				8	20	3856
1965	841	1246	428	142	1047	7		1	2	2	21	3737
1964	744	937	275	139	699	6		1		3	4	2888
1963	709	720	291	126	808	3	4		1	2	8	2672
1962	734	1111	272	205	789	3			1	14	7	3136
1961	810	1466	548	152	1330	5		1	4	2	4	4322
1960	791	657	314	148	655	20			2	6	1	2594
1950 TO 1959	6629	5956	2164	1151	2915	860	16	2	6	23	47	19769
1940 TO 1949	6572	7230	4703	363	4908	8456	5	2	4	9	57	32309
1930 TO 1939	11422	191	548	15	706	22	1	14	26	25	1280	14250
1920 TO 1929	12	4	12	2	7	1				6	10	54
PRIOR TO 1920	1	36	21	2	37	1	2	1	1	4	15	121
UNKNOWN	12	320	32	23	263	6	24		6	58	3749	4493
TOTAL	39067	634228	337325	87413	318520	9612	136989	9517	5451	57189	8908	1644219

DATA THROUGH 12/31/94

BUREAU OF ALCOHOL, TOBACCO AND FIREARMS
NFA REGISTRATION ACTIVITY - ANNUAL COMPARISON

RUN: 1/26/95 10:03

YEAR	F1	F2	F3	F4	F5	F6	F9	F10	LTR	4467	OTHER	TOTAL
1994	1270	100130	22490	7838	62258		35392	2857	2		1	232246
1993	300	108830	27638	7819	67739		28118	407	11		19	240881
1992	358	76161	26878	6568	46587	2	20366	290	40		21	177271
1991	225	78280	21018	5411	42243	1	36814	261			29	184282
1990	691	89287	22888	6830	56066	4	27504	289	44		130	203733
1989	271	69582	23755	8176	31138	12	18132	281	51		96	151494
1988	341	25164	39769	7707	8386	2	1473	403	66	1	448	83760
1987	412	17100	34536	8321	9441	2	745	320	144	1	708	71730
1986	938	70278	22970	5172	4905		527	381	181	3	737	106092
1985	645	14742	15534	3529	6281	1	1306	334	45	1	722	43140
1984	535	14848	14730	3915	5437	1	1506	294	3	3	536	41608
1983	454	11137	11145	3207	3078	27	248	367	4	1	26	29694
1982	325	7724	11414	2770	2674	9	1	481	2	3	37	25440
1981	270	7127	8152	3737	2720	23	1	342	10	1	18	22401
1980	162	3073	6829	3044	1637	6	1	329	7	4	22	15114
1979	108	3285	6988	2151	1515	13	6	354	5	1	18	14444
1978	80	1430	5497	1879	1257	7	1	730	4	6	16	10907
1977	77	1987	6010	1537	1737	2	1	590	14	1	22	11978
1976	30	879	10947	983	1756	19	5	458	3	39	26	15145
1975	79	1401	3280	567	1831	18	3	614	10		48	7851
1974	29	1018	2961	579	1690	9	3	507	15	5	8	6824
1973	16	1353	2032	353	1783	5	7	513	8	18	14	6102
1972	30	4020	1963	261	1511	14	11	638	33	84	19	8584
1971	24	2241	209	36	250	10		311	1960	26	19	5086
1970	38	192	18	10	23	16		1	1567	271	32	2168
1969	36	760	43	13	42	8	1		1140	2016	18	4077
1968	1510	1277	368	193	935	7		4	29	54485	36	58844
1967	909	1141	306	181	844	2			5	64	9	3461
1966	902	1293	436	136	1059	2				8	20	3856
1965	841	1246	429	142	1047	7		1	2	2	20	3737
1964	744	934	276	139	698	6		1		3	4	2805
1963	709	720	291	126	808	3	4		1	2	8	2672
1962	734	1115	277	205	787	3			1	14	7	3143
1961	810	1463	548	153	1329	5		1	4	2	4	4319
1960	792	657	314	148	655	20			2	6	1	2595
1950 TO 1959	6631	5952	2164	1152	2915	859	16	2	6	23	46	19766
1940 TO 1949	6571	7230	4695	363	4914	8452	5	2	4	9	56	32301
1930 TO 1939	11422	196	548	17	708	22	1	14	26	26	1268	14248
1920 TO 1929	12	4	12	2	8	1				6	9	54
PRIOR TO 1920	1	36	22	2	37	1	2	1	1	4	15	122
UNKNOWN	30	329	33	26	273	6	24	1	6	57	3159	3944
TOTAL	40362	735622	360421	95398	381002	9607	172224	12379	5456	57196	8252	1877919

DATA THROUGH 12/31/95

BUREAU OF ALCOHOL, TOBACCO AND FIREARMS
NFA REGISTRATION ACTIVITY - ANNUAL COMPARISON

RUN: 1/02/96 11:20

YEAR	F1	F2	F3	F4	F5	F6	F9	F10	LTR	4467	OTHER	TOTAL
1995	1124	95645	17277	8059	66367	2	31503	1492	19			221488
1994	1272	104601	22794	7070	62350		35304	2045	2			237130
1993	300	108202	27694	7037	67741		20117	406	11		18	240406
1992	358	76134	26003	6573	46593	2	20364	290	40		21	177250
1991	225	70255	21020	5420	42244	1	36804	262			25	104266
1990	691	89266	22922	4035	56070	4	27497	289	44		130	203720
1989	271	69540	23761	8101	31130	12	10120	201	51		94	151405
1988	341	25129	39790	7712	0300	2	1473	403	66	1	445	03750
1987	412	17101	34546	0330	9441	2	745	320	144	1	707	71749
1986	939	70501	22974	5174	4909		527	301	103	3	735	106320
1985	645	14750	15540	3532	6293	1	1304	334	45	1	720	43167
1984	535	14050	14737	3916	5437	1	1506	294	3	3	336	41610
1983	455	11136	11150	3207	3007	27	240	347	4	1	25	29707
1982	326	7751	11421	2770	2674	9	1	401	2	3	35	25473
1981	270	7132	0157	3741	2721	23	1	342	10	1	18	22416
1980	162	3076	0027	3046	1630	4	1	330	7	4	20	15117
1979	100	3205	6900	2151	1516	13	6	354	5	1	18	14445
1978	00	1430	5490	1070	1250	7	1	730	4	6	16	10900
1977	77	1907	6010	1537	1737	2	1	590	14	1	22	11970
1976	30	000	10940	903	1757	19	5	450	3	39	26	15140
1975	79	1402	3200	560	1035	10	3	614	10		40	7057
1974	29	1010	2962	579	1690	9	3	507	15	5	7	4024
1973	16	1353	2033	353	1701	5	7	513	9	10	13	6101
1972	30	4021	1964	262	1511	14	11	630	33	04	19	0507
1971	24	2242	209	36	251	10		311	1945	20	10	5092
1970	30	192	10	10	23	16		1	1567	271	32	2160
1969	36	761	43	13	42	0	1		1141	2017	17	4079
1968	1510	1292	360	194	935	7		4	29	54503	35	50077
1967	909	1141	306	101	044	2			5	44	9	3461
1966	902	1293	437	136	1059	2				0	20	3057
1965	063	1246	429	142	1047	7		1	2	2	20	5739
1964	744	934	274	139	690	6		1		3	4	2005
1963	709	720	291	124	000	3	4		1	2	0	2672
1962	734	1115	277	205	707	3			1	14	7	3143
1961	011	1463	540	153	1329	5		1	4	2	4	4320
1960	792	657	314	140	656	20			2	6	1	2596
1950 TO 1959	6633	5961	2160	1152	2916	059	16	2	6	23	45	19770
1940 TO 1949	6574	7231	4095	363	4917	0452	5	2	4	9	55	32307
1930 TO 1939	11427	190	547	17	710	22	1	14	26	27	1263	14252
1920 TO 1929	12	4	12	2	0	1				4	9	54
PRIOR TO 1920	1	36	21	2	30	1	2	1	1	4	13	120
UNKNOWN	60	349	32	25	334	6	24	1	9	57	3377	4274
TOTAL	41534	035300	370162	103550	447500	9609	203695	13000	5407	57214	0435	2106544

BUREAU OF ALCOHOL, TOBACCO AND FIREARMS											RUN: 1/06/97 8:32	
NFA REGISTRATION ACTIVITY - ANNUAL COMPARISON												
YEAR	F1	F2	F3	F4	F5	F6	F9	F10	LTR	4467	OTHER	TOTAL
1996	1253	96677	17197	6367	67769	1	60223	1282	21			238718
1995	1125	99075	17329	8086	66522	2	57332	1487	20			225978
1994	1273	104543	22796	7887	62351		55300	2860	2			237092
1993	301	100226	27716	7850	67752		28116	406	11		14	240392
1992	358	76127	26096	6577	46597	2	20363	290	40		19	177269
1991	224	70229	21030	5423	42275	1	56783	262			22	184257
1990	691	89257	22916	6841	54081	4	27496	289	46		129	203748
1989	271	69559	23769	8106	31143	12	18128	281	49		94	151492
1988	341	25123	39803	7714	8389	2	1473	403	66		445	83759
1987	414	17183	34557	8331	9445	2	745	320	142		706	71765
1986	939	70656	22908	5174	4946		527	381	178	1	731	106521
1985	645	14832	15539	3537	6375	1	1306	333	45		718	43331
1984	535	14852	14739	3919	5438	1	1507	294	3		336	41624
1983	455	11137	11149	3208	3089	27	248	367	4		25	29709
1982	326	7759	11424	2771	2676	9	1	481	2		34	25483
1981	271	7131	8162	3741	2722	23	1	342	10		18	22421
1980	162	3877	6826	3046	1638	6	1	338	7		20	15113
1979	108	3285	6987	2151	1516	13	6	354	5		18	14443
1978	80	1430	5501	1878	1250	7	1	730	4		15	18904
1977	77	1988	6814	1538	1740	2	1	591	14	1	19	11985
1976	30	888	10944	983	1758	19	5	458	3	36	26	15144
1975	79	1402	3288	569	1835	18	3	613	10		48	7857
1974	29	1818	2963	579	1690	9	3	509	15	5	7	6827
1973	16	1354	2033	354	1708	5	7	513	9	18	12	6181
1972	38	4821	1964	262	1513	14	11	639	33	85	18	8590
1971	24	2243	209	36	252	18		312	1965	26	18	5095
1970	39	192	18	10	23	16			1567	271	31	2167
1969	36	761	43	13	62	8	1		1148	2053	17	4114
1968	1511	1320	368	194	935	7			29	54585	35	58984
1967	909	1141	306	181	844	2			5	64	9	3461
1966	902	1293	437	136	1048	2				8	20	3858
1965	863	1246	429	142	1048	7			2	2	28	3739
1964	744	934	276	139	698	6				3	4	2884
1963	789	728	291	126	808	3	4		1	2	8	2672
1962	734	1115	277	205	787	3			1	14	7	3143
1961	512	1464	548	154	1338	5			4	2	4	4323
1960	792	657	314	148	656	20			2	6	1	2596
1958 TO 1959	6638	5961	2145	1152	2917	859	16	2	6	23	45	19784
1948 TO 1949	6575	7232	4697	364	4919	8456	4	2	4	18	54	32317
1938 TO 1939	11449	199	546	17	718	22	1	14	27	27	1247	14259
1928 TO 1929		4	6		1					3	5	19
PRIOR TO 1920		11	8		4						5	28
UNKNOWN	68	353	32	25	339	6	26	1	10	58	3872	4788
TOTAL	42818	935587	395582	118814	515671	9612	244717	15866	5588	57223	8876	2348578

Mr. Larson arranged the Form 4 data from 1992 to 1996 by and across single years to determine if the number of registrations changed over time. As shown in the following table, the total number of Form 4 registrations increased by 625 during 1992 to 1996, for registrations that occurred since 1934 by single years through 1996 and during unknown years (registrations for

years in and before 1968 have been combined). Mr. Larson reported these results in 1997 in Congressional testimony, as shown below.

Table 4

Form 4 (Tax-Paid) Transfers from 1934 to 1996, and During Unknown Years, as Reported by ATF During 1992 to 1996 in the National Firearms Registration and Transfer Record: Calculations Showing Results of Annual and Overall Changes Have Been Added

Year	1992	1993	Change	1994	Change	1995	Change	1996	Change	Change,
	(1)	(2)	(2)-(1)=	(4)	(4)-(2)=	(6)	(6)-(4)=	(8)	(8)-(6)=	1992-96
			(3)	(4)	(5)	(6)	(7)	(8)	(9)	
1996								6,367	0	0
1995						8,059	0	8,086	+27	+27
1994				7,838	0	7,870	+32	7,887	+17	+49
1993		7,749	0	7,819	+70	7,837	+18	7,850	+13	+101
1992	6,527	6,556	+29	6,568	+12	6,573	+5	6,577	+4	+60
1991	5,390	5,400	+10	5,411	+11	5,420	+9	5,423	+3	+33
1990	6,807	6,821	+14	6,830	+9	6,835	+5	6,841	+6	+34
1989	8,165	8,176	+11	8,176	0	8,181	+5	8,186	+5	+21
1988	7,699	7,703	+4	7,707	+4	7,712	+5	7,714	+2	+15
1987	8,311	8,318	+7	8,321	+3	8,330	+9	8,331	+1	+20
1986	5,158	5,162	+4	5,172	+10	5,174	+2	5,174	0	+16
1985	3,524	3,526	+2	3,529	+3	3,532	+3	3,537	+5	+13
1984	3,911	3,913	+2	3,915	+2	3,916	+1	3,919	+3	+8
1983	3,203	3,204	+1	3,207	+3	3,207	0	3,208	+1	+5
1982	2,770	2,771	+1	2,770	-1	2,770	0	2,771	+1	+1
1981	3,734	3,735	+1	3,737	+2	3,741	+4	3,741	0	+7
1980	3,040	3,040	0	3,044	+4	3,046	+2	3,046	0	+6
1979	2,150	2,150	0	2,151	+1	2,151	0	2,151	0	+1
1978	1,879	1,878	-1	1,879	+1	1,878	-1	1,878	0	-1
1977	1,535	1,535	0	1,537	+2	1,537	0	1,538	+1	+3
1976	979	979	0	983	+4	983	0	983	0	+4
1975	567	567	0	567	0	568	+1	569	+1	+2
1974	579	579	0	579	0	579	0	579	0	0
1973	353	353	0	353	0	353	0	354	+1	+1
1972	261	261	0	261	0	262	+1	262	0	+1
1971	36	36	0	36	0	36	0	36	0	0
1970	10	10	0	10	0	10	0	10	0	0
1969	13	13	0	13	0	13	0	13	0	0
1968	192	193	+1	193	0	194	+1	194	0	+2
< 1968	2,780	2,785	+5	2,792	+7	2,791	-1	2,983	+192	+203
Unknown	22	23	+1	26	+3	25	-1	25	0	+3
CHANGE			+92		+150		+100		+283	+625
Totals		79,573	87,413		95,338		103,558		110,014	

Data source: Bureau of Alcohol, Tobacco and Firearms. All numbers shown in boldface type were calculated by Eric M. Larson.

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Mr. Larson's analysis used arithmetic calculations to determine if there are changes in NFRTR data, which could mean that registrations were being added after the fact, years after

⁴⁴ Congressional Hearing, House of Representatives, *Treasury, Postal Service, and General Government Appropriations for Fiscal Year 1998* at 71, available at <http://www.nfaa.org/documents/1997testimony.pdf>. Mr. Larson found similar patterns of apparent additions of registrations for Forms 1, 2, 3, 5, 4467, and "Letter" and "Other" categories.

ATF approved the original registration and concluded NFRTR reporting for a given year. For example, the number of registrations for 1992 changed from 6,527 to 6,556 in 1993, a difference of 29; similarly, the number of registrations for 1992 changed from 6,568 in 1994 to 6,573 in 1995, an increase of 12. Inspection of these Form 4 data disclose that the number of registrations in 1992 (6,527) increased to 6,577 in 1996. Put another way, ATF added 50 registrations during 1992 to 1996, for the year 1992, which gives the appearance that ATF could have added 50 Forms 4 to the NFRTR during that period. Using the same arithmetic calculations to analyze total Form 4 registrations for all years from 1992 to 1996, Mr. Larson determined that total registrations increased by 625; again, the implication is that ATF may have added 625 Forms 4 to the NFRTR after being unable to locate them in the NFRTR, and NFA firearms owners provided ATF with copies of their approved Forms 4. Note that 203 registrations were added for years in or before 1968.

In an effort to determine whether he may have made any errors of fact or omission, Mr. Larson asked NFA Branch officials if the increases in registrations resulted from ATF added copies of lost or destroyed NFA registrations back into the NFRTR, after obtaining them from firearms owners, or if there was another explanation. NFA Specialist Gary N. Schaible told Mr. Larson if an error was detected on a form and the form was misclassified, it would be reclassified as a Form 4, a Form 4467 or whatever form was correct, and that it would be re-entered in the NFRTR in the year that the registration occurred.⁴⁵ Mr. Schaible also stated "I assume that's happened," in response to Mr. Larson's question: "Has ATF ever added a firearm to the NFRTR, after a lawful owner produced a valid registration, because ATF had no record of the firearm in

⁴⁵ Id. at 95.

the NFRTR?”⁴⁶ In addition to Mr. Schaible’s comments, NFA Branch Chief Nereida W. Levine told Mr. Larson in a January 7, 1997, letter that correcting errors in entering data according to Form number or year of registration “may result in an adjustment to previously generated statistics.”⁴⁷ NFA Branch Chief Levine concluded:

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. 48

If no registrations were added to the NFRTR, explanations by NFA Branch representatives that changes in annual “NFA registration activity” could result from correcting errors in Form number and/or year of registration means such changes would be a “zero-sum” game, and represent classification errors. In other words, if the annual changes resulted from reclassified data, total registrations from all categories would not change.

To determine if the number of total registrations did not change, Mr. Larson analyzed total registrations (for all categories) for each year from 1992 to 1996 using the same arithmetic calculations he used to analyze Form 4 data. He found that total registrations increased each year and totaled 18,869 for the period from 1992 to 1996, and that registrations had been added to all NFRTR data categories for each year.

Mr. Larson concluded the discrepancies he observed in NFA registration activity, and statements by ATF representatives, required additional evidence to reliably determine the reason(s) for the increased number of reported registrations. While ATF personnel adding

⁴⁶ Id. at 97. This question was asked and answered twice.

⁴⁷ Letter from Nereida W. Levine, Chief, NFA Branch, Bureau of Alcohol, Tobacco and Firearms, dated Jan. 7, 1997, to Eric M. Larson, bearing symbols E:RE:FN:GS. Congressional Hearing, House of Representatives, *Treasury, Postal Service, and General Government Appropriations for Fiscal Year 1999* at 110-111, available at <http://www.nfaoa.org/documents/1998testimony.pdf>.

⁴⁸ Id. at 41.

registrations was one possible explanation, there was insufficient statistical and evidence upon which to reliably base such a conclusion. For example, there also could have been flaws in computer software, problems with reporting functions resulting from editing, inadequate internal quality controls or checks, and so forth, so Mr. Larson concluded that a formal investigation was needed, and did not present his findings as definitive. Because he was unable to conduct additional research according to standard social sciences practices, Mr. Larson asked appropriate Government officials to determine if ATF was adding registrations to the NFRTR.⁴⁹

Coverups in an internal ATF investigation, and audit of the NFRTR by the Treasury IG

ATF and the Treasury IG conducted separate investigations in 1997 and 1998, respectively, of allegations by Mr. Larson that ATF had mismanaged the NFRTR, and there is valid and reliable evidence that each entity avoided determining whether ATF had added registrations. Each covered up facts and failed to diligently investigate Mr. Larson's complaint. All of Mr. Larson's allegations will not be reviewed in this motion, but it is instructive to note that the Treasury IG censored his most serious allegation. Although an audit Work Paper dated October 10, 1997, prepared Treasury IG auditor Diane Kentner, states the following:

⁴⁹ Because NFRTR data are protected from disclosure under the NFA (26 U.S.C.A. § 5848) and considered "tax return" information prohibited from disclosure under the tax code (26 U.S.C.A. § 6103), it was not legally possible for Mr. Larson to visit the NFA Branch to inspect NFRTR data or observe procedures involving NFA registration activities conducted by NFA Branch personnel.

Because the names and addresses of individual NFA firearms owners and SOTs are also protected from disclosure, it was not possible for Mr. Larson to conduct ordinary social science research, such as drawing representative random samples to try and contact or survey them to investigate what their experiences may have been regarding NFA paperwork for guns in their inventory for which they had valid registration documents, but for which ATF could find no record in the NFRTR. Similarly, Mr. Larson was legally prohibited from accessing the computerized NFRTR data base, and thus was unable to inspect these data, run tabulations and cross-tabulations, or conduct other analyses.

(OIG Follow Up)

- Did ATF add additional firearms to the NFRTR that were originally registered on Form 1 or 4467 during 1934 to 1971, for which ATF lost or destroyed original records.

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there is no evidence in either of its 1998 reports on the NFRTR, or in the 1998 audit Work Papers, that the Treasury IG fully investigated Mr. Larson's allegation.

Mr. Larson's original allegation, reproduced below, states:

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.⁵⁰ 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.⁵¹

The Treasury IG censored Mr. Larson's allegation in its October 1998 audit report, and is reproduced on the following page.

⁵⁰ Work Paper D-5, October 10, 1997 at 1, available at http://www.nfaoa.org/documents/Work_Papers_D.pdf.

⁵¹ Letter to Valerie Lau, Inspector General, Office of Inspector General, Department of the Treasury, dated May 10, 1997, from Eric M. Larson. Congressional Hearing, House of Representatives, *Treasury, Postal Service, and General Government Appropriations for Fiscal Year 1999* at 99, available at <http://www.nfaoa.org/documents/1998testimony.pdf>.

Form 1 ("Registration of Firearms") was used from 1934 to 1968 to register unregistered NFA firearms; after 1968 it was titled "Application to Make and Register a Firearm" because the Gun Control Act of 1968 prohibited the registration of unregistered NFA firearms after the 1968 amnesty period expired (a citizen can "make" and register an NFA firearm by paying a \$200 tax and first obtaining ATF's approval to do so). ATF created Form 4467 "Registration of Certain Firearms in November 1968") under § 207(b) of the 1968 Act to accept registrations of unregistered firearms, with immunity from prosecution, during the amnesty period from November 2, 1968, to December 1, 1968.

The year 1971 specified in Mr. Larson's complaint relates to a different allegation that ATF had improperly registered unregistered NFA firearms after the 1968 amnesty period expired. Such registrations would violate the NFA, because "[n]o firearm may be registered by a person unlawfully in possession of the firearm after December 1, 1968, except that the Director, after publication in the FEDERAL REGISTER of his intention to do so, may establish periods of amnesty, not to exceed ninety (90) days in the case of a single period with such immunity from prosecution as the Director determines will contribute to the purposes of " the NFA, as stated ATF's published regulations in the *Code of Federal Regulations*, 1969 edition at 93. See 26 C.F.R. 179.120(a)(3)(b), available at <http://blog.princelaw.com/assets/2008/7/7/1969-CFR-ATF-amnesty-regs.pdf>.

Allegation 1. Destruction of Documents

“ATF employees have deliberately destroyed original firearms registration documents that they are required by law to maintain, as noted in sworn testimony in 1996 by [an ATF Specialist].”

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In the internal 1997 ATF investigation, which was completed before the Treasury IG started audit work to investigate Mr. Larson’s allegations, Mr. Schaible contradicted his testimony in *LeaSure* about NFA Branch employees destroying NFA documents in 1994 by stating under oath to ATF Special Agent and internal investigator Jeff Groh:

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 NFRTR. 53

The October 1998 Treasury IG report stated that Mr. Schaible

. . . was referring to an incident in 1988 when NFA Branch management suspected that two contract employees were disposing of documents. These contract employees were

⁵² October 1998 Treasury IG Report, at 7, available at <http://www.nfaoa.org/documents/TreasuryOIG-99-009-1998.pdf>.

⁵³ “[REDACTED], et al.” Report of Investigation, by [REDACTED], Bureau of Alcohol, Tobacco and Firearms, September 8, 1997 at 90. Congressional Hearing, House of Representatives, *Treasury, Postal Service, and General Government Appropriations for Fiscal Year 1999* at 102-103, available at <http://www.nfaoa.org/documents/1998testimony.pdf>.

Mr. Schaible’s reference to “Title II firearms” refers to Title II of the Gun Control Act of 1968 (Title II is also, but less commonly, known as the National Firearms Act of 1968); consequently, NFA firearms are also referred to as Title II firearms. Special Agent Groh, representing ATF Internal Investigations, contacted Mr. Larson and advised that he had been assigned to investigate his allegations, is the author of the foregoing Report of Investigation.

immediately removed from their assignment to the NFA Branch. The employees could not be hired or fired since they were employed by a contractor.⁵⁴

In *LeaSure*, Mr. Schaible testified under oath he was aware of “occasions . . . in the NFA Branch of clerks throwing away transmissions because they don’t want to fool with them” rather than process them (Mr. LeaSure testified he FAXed registration documents to ATF in 1994, and ATF claimed it was unable to find a record of them).⁵⁵ Under cross-examination, asked “that’s one of the things [NFA Branch clerks throwing away documents] that could happen to you?,” Mr. Schaible replied “Certainly.”⁵⁶ In response to a question whether “people have been transferred and fired as a result of that, haven’t they,” Mr. Schaible answered: “The only situation I can remember is, no, they weren’t transferred. No, they weren’t fired. They eventually quit, yes, but, no, nothing like transferred or fired.” When asked “Did [ATF] ever continue anybody in that particular job after they threw something away, threw an important transmission away or destroyed it or put it in the shredder or whatever they did? [ATF] continued them doing that kind of work?” Mr. Schaible said “With monitoring, yes.”⁵⁷

Regarding Mr. Schaible’s contradictory statements, made under oath, the October 1998 Treasury IG audit report concluded:

⁵⁴ October 1998 Treasury IG Report at 7, available at <http://www.nfaoa.org/documents/TreasuryOIG-99-009-1998.pdf>.

⁵⁵ *United States of America vs. John Daniel LeaSure* (1996) at 42-43, available at <http://www.nfaoa.org/documents/LeaSureTrial.pdf>.

⁵⁶ *Id.* at 42-43.

⁵⁷ *Id.* at 43.

Our review of the allegations showed that:

- 1. 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.**

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The limited scope of the Treasury IG audit is troubling because Discovery sampling analysis disclosed a large number (176) of “critical errors”⁵⁹ which the Treasury IG failed to mention or publish in either of its 1998 audit reports, compared with 37 “discrepancies” it identified in its December 1998 report;⁶⁰ and despite finding large numbers of “critical errors,” there was no effort to reliably estimate the accuracy and completeness of the NFRTR.

The 1998 Treasury IG audit also raises reasonable doubt about the validity of Certificates of Nonexistence of a Record (CNR) that ATF provides to courts to certify that no record of registration for particular firearms can be located in the NFRTR. The reason is that the Treasury IG auditors formally declined to evaluate the accuracy of procedures ATF uses to search the NFRTR to legally justify issuing CNRs, which are also issued to attest that specific firearms are not registered to specific persons. NFRTR data are also routinely used for other law enforcement activities, including legal justifications for issuing search warrants.

⁵⁸ October 1998 Treasury IG Report at 1, *available at* <http://www.nfaa.org/documents/TreasuryOIG-99-009-1998.pdf>.

⁵⁹ Work Paper H-0, April 23, 1998, at 1.

⁶⁰ December 1998 Treasury IG Report, at 12, *available at* <http://www.nfaa.org/documents/TreasuryOIG-99-018-1998.pdf>. The “discrepancies” identified in the December 1998 Treasury IG Report are identified as “critical errors” in audit Work Papers.

The “Objectives, Scope and Methodology” section of the December 1998 Treasury IG report states:

Our 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.

Audit work was performed from October 1997 through May 1998. Our review generally covered ATF’s administration of the registry for the period October 1, 1996 through March 31, 1998.

Our work was conducted in accordance with Government Auditing Standards issued by the Comptroller of the United States, and included such audit tests as we determined necessary.

According to the edition of *Government Auditing Standards* the Treasury IG used in its audit of the NFRTR, the Treasury IG auditors failed to comply with an applicable audit standard, “abuse,” as stated below:

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 far 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 [emphasis added].**⁶²

⁶¹ Id. at 4.

⁶² See Chapter 6, “Field Work Standards for Performance Audits.” *Government Auditing Standards*, by the Comptroller General of the United States. 1994 Revision. Washington, D.C.: U.S. Government Printing Office, 1994 at 75.

There is no statement in the 1998 Treasury IG reports that the auditors (1) considered whether decreasing the “critical error” rate at the request of the audited party at interest (NFA Branch representatives) to achieve a desired result “could significantly affect the audit results,” or (2) attempted “to determine its effect on the audit results.” In a Work Paper documenting the 1998 audit procedures and activities, the Audit Manager attested that “abuse” was not an issue:

	Ref.	Initials	N/A	Remarks
2.12 Auditors have been alert to situations or transactions that could be indicative of illegal acts or abuse, and have extended audit steps as necessary (GAS 6.26, 6.32, 6.35). (Support is statement in audit guidelines to be alert to these situations or transactions, and any related work performed.)	A-1	RKB		Report deals with allegations of ATF mismanagement of its registry

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The conduct of the Treasury IG auditors, who under *Government Auditing Standards* are required to be “independent,”⁶⁴ clearly “falls far short of societal expectations for prudent behavior.” The reasons are that the Treasury IG auditors (1) manipulated audit procedures at the request of NFA Branch representatives for the purpose of deliberately decreasing the “critical error” rate of the NFRTR because the 18.4 percent “critical error” rate the Treasury IG auditors found was “disappointing at best and could have serious consequences for ATF’s firearm

⁶³ Work Paper Bundle A, page 5. The initials RKB are those of Treasury IG auditor Robert K. Bronstrup, identified in Work Paper A-1 as the “Lead Auditor”; and as “Audit Manager” in the October 1998 Treasury IG report at 27, and December 1998 Treasury IG report at 49.

⁶⁴ *Government Auditing Standards*, by the Comptroller General of the United States. 1994 Revision. Washington, D.C.: U.S. Government Printing Office, 1994 at 22. See Chapter 3, “General Standards,” which states: “In all matters relating to the audit work, the audit organization and the individual auditors, whether government or public, should be free from personal and external impairments to independence, should be organizationally independent, and should maintain an independent attitude and appearance.”

registry mission,” (2) left unanswered whether “critical errors” exist in other NFRTR categories, (3) failed to reliably estimate the “critical error” rate of the NFRTR, as required by Discovery sampling rules and procedures, by increasing the size of the sample and conducting additional analysis, (4) chose to avoid resolving reasonable doubts (created by their audit findings) about the accuracy and completeness of the NFRTR, and by extension the validity and reliability of ATF’s Certifications of Nonexistence of a Record (CNRs) that “provide an assurance to the court that no such registration [for an NFA firearm] exists in specific instances.”

Congressional Hearings on the NFRTR from 1996 to 2001, and related issues

Each year from 1996 to 2001, Mr. Larson and other concerned citizens provided testimony or statements to the Congress about the accuracy and completeness of the NFRTR.⁶⁵ The most important outcomes of these testimonies and statements were (1) the 1998 Treasury Department Inspector General audit of the NFRTR, and (2) appropriations language that allocated \$1 million to ATF, with instructions to use it to render the NFRTR accurate and complete. There is no evidence, however, that either of the foregoing outcomes rendered the NFRTR accurate and complete, or resulted in a valid and reliable estimate of the NFRTR error rate. Consequently, the accuracy of the NFRTR is still currently unknown.

The Treasury IG auditors did not follow GAGAS to reliably estimate the “critical error” rate of the NFRTR database, in part, because NFA Branch representatives inappropriately requested them to manipulate the definition of “critical error” to achieve a lower rate, but that is not the whole story. The reason is that the Treasury IG auditors requested an Assistant Director at the U.S. Government Accountability Office to advise them how to conduct Discovery

⁶⁵ These Congressional testimonies and statements are listed in Mr. Larson’s VITA, which has been separately submitted to this Court, and include a variety of issues not relevant to *Friesen*; they are not listed or reviewed in this motion.

sampling in its 1998 audit,⁶⁶ and with knowledge of correct procedures for doing so declined to follow his advice. Consequently, the “critical error” rate for the NFRTR database was not estimated in the 1998 audit.

Mr. Larson’s requests to top Government officials with oversight responsibility over ATF to conduct meaningful oversight, particularly over ATF’s continuing mismanagement of the NFRTR, failed. For example, when Mr. Larson expressed concerns to Treasury Department Inspector General David C. Williams about the integrity of the 1998 audit based on the Treasury IG censoring his most serious allegation against ATF, and that the audit was conducted during a period that included the regime of the his corrupt predecessor (who resigned in 1998 following Senate hearings documenting her misconduct), Dennis S. Schindel, Assistant Inspector General for Audit, responded in a January 7, 1999, letter:

⁶⁶ The Treasury IG auditors informally requested Barry Seltser, Assistant Director and Manager, Design, Methodology and Technical Assistance Group, U.S. Government Accountability Office (GAO), for advice in conducting sampling procedures and data analysis in its 1998 audit of the NFRTR. At a January 20, 1998, meeting at GAO Headquarters, which included Sidney Schwartz, Mathematical Statistician, GAO; Carol Burgan, Auditor [DELETED], Robert Bronstrup, Audit Manager, and Gary Wilk, Auditor:

Mr. Seltser suggested that we use “discovery” sampling for the top three Forms that we were concerned about (Form 4467, Other, and Letter categories). In discovery sampling, about 60-70 items are selected from each category and tested for “critical” and “non-critical” errors. If no errors are found in this discovery sample, then we could make a statement about the category. If errors are found, then we must expand our sample based on a mathematical formula.

Work Paper F-19, prepared by Carol Burgan, January 24, 1998 at 1.

The Treasury IG auditors did not follow Mr. Seltser’s recommendation to “expand our sample based on a mathematical formula” after discovering “critical errors” in the Discovery samples. Mr. Seltser’s advice was informal; representative of the kind of informal advice GAO typically and often renders to Executive Branch agencies upon request; and GAO was not involved in the Treasury IG’s 1998 audit of the NFRTR.

Dear Mr. Larson:

Mr. Williams has asked me to respond to your letter of November 5, 1998. In that letter you expressed concern that the previous Inspector General, Valerie Lau and others may have tried to compromise a congressionally directed audit of the firearm registration practices of the Bureau of Alcohol, Tobacco and Firearms (ATF). Since my office oversaw the work, I assured Mr. Williams and wish to assure you that no effort to influence the audit occurred.

⁶⁷

In March 1999, Mr. Schindel told Mr. Larson the 1998 audit "determined there were errors in the [NFRTR] based on statistically valid sampling methodologies." He added that ATF "is operationally responsible for correcting the errors in the [NFRTR] data base," and it is "ATF's management responsibility to identify and correct all of the records that may be in error in the registry."⁶⁸

Similarly, Mr. Larson expressed concerns to then-ATF Director John W. Magaw, who answered them in a November 19, 1999, letter:

Your allegations concerning my staff are totally without foundation. I have been advised of all your allegations concerning the Bureau of Alcohol, Tobacco and Firearms' (ATF) administration of the National Firearms Act (NFA), beginning with your attempts in 1987 to have certain firearms removed from the statute up through the recent issuance of the Office of the Inspector General (OIG) reports. I have reviewed the OIG reports and agree with my staff that most of your allegations are without merit.

⁶⁷ 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*. Prepared for the Honorable Pete Sessions, House of Representatives, Washington, D.C., April 2, 1999 (unpublished), inserted at 36-37, available at <http://www.nfaoa.org/documents/Critiqueof1998IGreports.pdf>.

⁶⁸ Letter from Dennis S. Schindel, Assistant Inspector General for Audit, Office of Inspector General, Office of Inspector General, Department of the Treasury dated March 25, 1999, to Eric M. Larson.

We have carefully considered the recommendations made by the OIG and are working to ensure that the NFRTR continues to be an accurate and reliable database of firearms transactions.

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The foregoing statements by Assistant Inspector General for Audit Schindel and ATF Director Magaw, each of whom were key Government officials who had major and significant federal law enforcement responsibilities in 1999, are not worthy of belief.

Congress appropriated \$500,000 for fiscal year 2002 for ATF to use “with the aim of reducing processing times and ensuring the completeness and accuracy of the NFRTR.”⁷⁰ The appropriations hearing records included questions by the Subcommittee on Treasury, Postal Service and General Government about the NFRTR, including the need for “[a]n independent, annual audit of the [NFRTR] database covering registration to retrieval,” and when it would be “possible to confirm the completeness and accuracy of the NFRTR.”⁷¹ Congress again appropriated \$500,000 for fiscal year 2003 for improving ATF’s licensing and regulatory operations, “including making significant progress in correcting remaining inaccuracies within the NFRTR database.”⁷²

⁶⁹ Letter from John W. Magaw, Director, Bureau of Alcohol, Tobacco and Firearms dated November 19, 1999, to Eric M. Larson at 1 and 3, available at <http://www.nfaoa.org/documents/MagawLetter1999toLarson.pdf>.

⁷⁰ Report No. 107-152, to accompany H.R. 2590, Treasury, Postal Service, and General Government Appropriations Bill, 2002. 107th Cong., 1st Sess., House of Representatives (2001) at 20. These funds were approved in The Treasury and General Government Appropriations Act, 2002, P.L. 107-67, 115 Stat. 514 (2001).

⁷¹ “Regulatory Processes and Resources,” *Treasury, Postal Service, and General Government Appropriations for Fiscal Year 2002*. Hearings before a Subcommittee of the Committee on Appropriations, House of Representatives, 107th Congress, 1st Sess., Part 1 at 476-479.

⁷² Report No. 107-575, to accompany H.R. 5120, Treasury, Postal Service and General Government Appropriations Bill, 2003. 107th Cong., 2d Sess., House of Representatives at 19 (2001). These funds were approved in Report No. 108-10, Conference Report to accompany H.J. Res. 2, 108th Cong., 1st Sess. at 1324-1325 (2003).

The Subcommittee was influenced by an independent statistical expert, Dr. Fritz J. Scheuren, who advised them in response to its request for his review of responses ATF provided to three questions asked by the Subcommittee.⁷³ Dr. Scheuren stated, in part:

Technology question. My 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. I was greatly troubled, therefore, by ATF's comment that it "... found nothing in the OIG report to justify a statutory or administrative change...." The automation

Conclusions. 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 clearly lack thoroughness and probably lack timeliness as well.

Recommendations. Let me offer three recommendations to the Committee for its consideration: (1) ATF should be asked to engage an outside audit organization to give a more complete assessment of the weaknesses in their existing firearms system. The scope of the OIG audit was too narrow. These audits should be annual, including a full test of the system from registration to retrieval. The Post Office has such audit practices and offers a model of the completeness needed. (2) ATF should be asked to conduct a thorough benchmarking effort looking at recordkeeping practices and how they are changing both within government and in organizations like insurance companies that have to keep files for long periods. This benchmarking will require another (separate) outside contractor experienced in conducting such studies. (3) The use of record linkage technologies to test and update the ATF firearms system to reduce its isolation are worth study. A match with the SSA decedent file is an example, but there are other government systems that might be looked at too. Possibly legislation would be needed but before seeking legislation ATF should engage one or more experts in record linkage techniques as consultants on the present "matchability" of the system and needs for its future "matchability."

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Dr. Scheuren's influence is evident in the following exchange between the Subcommittee and ATF, which subsequently occurred during ATF's appropriations hearing:

Question: An independent, annual audit of the database covering registration to retrieval?

Answer: 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.

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⁷³ *Treasury, Postal Service, and General Government Appropriations for Fiscal Year 2002*. Hearings Before a Subcommittee of the Committee on Appropriations, House of Representatives. 107th Cong., 1st Sess., Part 3 at 23-25, available at <http://www.nfaoa.org/documents/2001statement.pdf>. (Hereafter Congressional Hearings, House of Representatives, *Treasury, Postal Service, and General Government Appropriations for Fiscal Year 2002*.) Fritz J. Scheuren, Ph.D., a past elected President of the American Statistical Association, is currently Vice President, Statistics, National Opinion Research Center (NORC), University of Chicago.

⁷⁴ Letter from Fritz J. Scheuren dated May 23, 2000, to the Honorable Jim Kolbe, Chairman, Subcommittee on Treasury, Postal Service, and General Government. *Id.* at 24-25.

There is currently no evidence that ATF has satisfactorily complied with Congressional instructions to render the NFRTR accurate and complete. The Treasury IG terminated another NFRTR audit in 2002 before it was completed, and a former staff member stated: “We found there were still serious problems with the NFRTR data that, to the best of my knowledge, are still uncorrected.”⁷⁶

In 2007, seven years after his Congressional statement, because private citizens expressed concerns to him about the accuracy and completeness of the NFRTR, Dr. Scheuren reanalyzed the NFRTR database situation. In a December 11, 2007, letter, to the Congress, Dr. Scheuren reiterated and expanded his concerns about the consequences of “serious material errors” in the NFRTR that ATF “has yet to acknowledge,” and added: “In my considered professional judgment, these errors render the NFRTR questionable as a source of evidence in federal law enforcement.”⁷⁷

In or about 2006, possibly in response to the Justice IG’s “review” of the NFRTR, ATF created a new form entitled “Firearms Inspection Worknote: NFA Inventory Discrepancies,” a

⁷⁵ Congressional Hearing, House of Representatives, *Treasury, Postal Service, and General Government Appropriations for Fiscal Year 2002*. Hearings Before a Subcommittee of the Committee on Appropriations, House of Representatives. 107th Cong., 1st Sess., Part 1 at 479, available at <http://www.nfaoa.org/documents/NFRTRdocpack.pdf>, at Tab 4.

In October 2008, Mr. Larson filed a FOIA request to ATF for (1) documents pertinent to this “imaging system” and how it may help render the NFRTR accurate and complete by “imaging and indexing the documents,” including any evaluation of the accuracy and completeness of the “imaging system”; that is, whether complete documentation is available for firearms for original registration and each subsequent transfer; (2) documents that describe the search procedures ATF uses to provide assurances to the Court that no record of a firearm registration can be located in the NFRTR, and (3) a copy of the current NFRTR procedures manual. ATF has not provided any documents in response to any of the foregoing FOIA requests to date.

⁷⁶ For additional information, see Stephen P. Halbrook, *Firearms Law Deskbook: Federal and State Criminal Practice*. 2008-2009 Edition. Thomson West Publishing, 2008 at 572-573.

⁷⁷ Letter to the Honorable Alan B. Mollohan, Chairman, Subcommittee on Commerce, Justice, Science, and Related Agencies, Committee on Appropriations, House of Representatives dated December 11, 2007, by Fritz J. Scheuren, Vice President, Statistics, National Opinion Research Center, University of Chicago, at 1, available at http://www.nfaoa.org/documents/Scheuren_Committee_Chair_Letter.pdf.

copy of which Mr. Larson obtained by a FOIA request.⁷⁸ A copy of this form is reproduced as received by Mr. Larson from ATF on the following page.

⁷⁸ Letter to Averill P. Graham, Chief, Disclosure Division, Bureau of Alcohol, Tobacco, Firearms and Explosives dated January 24, 2007, by Eric M. Larson, *available at* <http://www.nfaa.org/documents/FOIA-FRTRJan2007.pdf>.

In his January 2007 FOIA request, Mr. Larson also requested ATF to provide

- 2) Written or audio instructions to ATF personnel which provide guidance and/or definitions of what constitutes an “error” or “discrepancy” in the NFRTR. These would include classroom training materials, flash cards, a manual or similar guide, instructions imparted via DVD, videotape or similar mediums of communication. These instructions would most likely be given to ATF Inspectors, but may also be given to Legal Document Examiners, ATF Special Agents, and others.**

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ATF stated that a search failed to locate such documents responsive to Mr. Larson’s FOIA request, and he appealed. In a letter dated October 2, 2007, Janice Galli McLeod, Associate Director, Office of Information and Privacy, Department of Justice, stated:

After carefully considering your appeal, I am affirming ATF's action on your request. ATF conducted a search for records responsive to your request and was unable to locate any records pertaining to the National Firearms Registration and Transfer Record documentation you referred to in your request. I have determined ATF's response was correct.⁸⁰

Associate Director McLeod’s statement may be valid and reliable evidence that ATF and the Department of Justice have improperly denied a FOIA request. It is hard to believe that a form ATF inspectors are supposed use to record “discrepancies” in the NFRTR database after encountering them during compliance inspections of SOTs would not have been given instructions regarding and procedures to follow in to reliably identify and report suspected “discrepancies,” when the stated “purpose” of the form is to “reconcile discrepancies” in the NFRTR. It is not reasonable to believe ATF has not defined the term “discrepancy,” because otherwise there would be no reason for the new form to exist.

⁷⁹ Id. at 1.

⁸⁰ Letter to Eric M. Larson from Janice Gail McLeod, Associate Director, Office of Information and Policy, U.S. Department of Justice dated October 2, 2007, bearing identifiers RE: Appeal No. 07-1961, Request No. 07-458, BE:REG, available at <http://www.nfaa.org/documents/McLeodDOJletter2007.pdf>.

According to SOTs who have been inspected in or after 2006, ATF personnel who encounter a discrepancy in NFRTR data are required to assign each discrepancy a “control number” and forward the information to the National Firearms Act Branch for resolution. Are there not tabulations, analyses, and other performance measures used to evaluate the accuracy and completeness of the NFRTR? Are there no records of the type and number of discrepancies? Associate Director McLeod’s statement that no documents responsive to Mr. Larson’s FOIA request can be found at National Firearms Act Branch is unworthy of belief.

Giambro: A 2007 federal court case involving the NFRTR

In 2008, the United States Court of Appeals for the First Circuit upheld the validity of NFRTR data, including its use in twice creating a Certificate of Nonexistence of a Record, in affirming a conviction for Possession of Unregistered Firearm.⁸¹ The Court of Appeals based its decision mainly on *Rith*, testimony on the NFRTR’s reliability by ATF Specialist Gary N. Schaible, and stated “[a]lthough both the *Rith* court and the district court here acknowledged past

⁸¹ *United States of America vs. Dario Giambro*, United States Court of Appeals for the First Circuit, No. 08-1044, October 2, 2008, available at <http://www.ca1.uscourts.gov/cgi-bin/getopn.pl?OPINION=08-1044P.01A>. Hereafter Court of Appeals, *United States of America vs. Dario Giambro* (2008).

The Court of Appeals decision was based on *United States vs. Dario Giambro*, United States District Court, District of Maine, Criminal Action, Docket No. 07-14-P-S. Transcript of Proceedings, before the Honorable George Singal, U.S. District Judge, Sept. 25, 2007, available at <http://www.nfaa.org/documents/GiambroTrial1.pdf>; rest of transcript continued at <http://www.nfaa.org/documents/GiambroTrial2.pdf>. Hereafter *United States of America vs. Dario Giambro* (2007).

The firearm, a Model 1908 Marble’s Game Getter Gun, is a low-powered small-game over-and-under combination gun (has .22 long rifle/.44 Game Getter barrels 12” in length) with a folding shoulder stock, and was designed mainly for trappers, hunters and outdoorsmen. The Model 1908 Game Getter is classified as “Any Other Weapon” under the NFA (26 U.S.C. § 5845(a)(5)), was last manufactured in 1914. In excellent condition, accompanied by the original box, a 12” barrel Model 1908 Game Getter is valued at \$2,500 or more. Ned Schwing, “Marble’s Game Getter Gun NFA, Curio or Relic,” *2005 Standard Catalog of Firearms: The Collector’s Price & Reference Guide*. 15th Edition. Iola, Wisconsin: KP Books, 2004 at 728.

problems with the NFRTR, both emphasized that the ATF has addressed problems with the database and improved its reliability.”

The Court of Appeals did not state that it specifically reviewed either of the 1998 Treasury IG audit reports, or the 2007 Justice IG report (all were introduced in *Giambro*), in its opinion and went on at length to affirm the District Court decision to exclude Mr. Larson as an Expert Witness. In particular, the Court of Appeals cited the District Court finding that Mr. Larson’s motion in limine testimony⁸² was not “based upon sufficient facts or data,” not “the product of reliable principles and methods,” and that Mr. Larson had not “applied the principles and methods reliably to the facts of the case.”⁸³ The Court of Appeals stated that “suppositions . . . and conjecture abound[ed]” in Mr. Larson’s testimony, and the District Court “was well within its discretion” to “conclude that . . . the data on which Larson based his analysis was ‘purely anecdotal.’”⁸⁴

The Court of Appeals decision was criticized the same day it was published.⁸⁵

⁸² *United States of America vs. Dario Giambro*, United States District Court, District of Maine, Criminal Action, Docket No. 07-14-P-S. Transcript of Proceedings before the Honorable George Z. Singal, United States District Judge, Sept. 24, 2007, available at <http://www.nfaoa.org/documents/GiambroMotionInLimine-LarsonTestimony.pdf>. Hereafter Larson testimony, *United States of America vs. Dario Giambro* (2007).

An enhanced version of Mr. Larson’s testimony, with insertions of the Exhibits to which he referred has been created for ease of reference to said Exhibits, is available at <http://www.nfaoa.org/documents/GiambroLarsonMotionInLimineTestimonyWithExhibits.pdf>.

⁸³ Court of Appeals, *United States of America vs. Dario Giambro* (2008).

⁸⁴ *Id.*

⁸⁵ See “CA1: First Bends to Help Government Prove Negative in Antique Gun Registration Case,” Oct. 2, 2008. The critique states: “*US v. Giambro*, No. 08-1044 affirms a conviction for possessing an antique gun. (He was acquitted of a number of state charges.) The least interesting issue is under 26 U.S.C. 5861(d), where the court holds that the defendant need not have specific knowledge of the registration requirement, but just knowledge of the statutory elements of the guns subject to the registration requirements. More interesting is the admission of the ATF’s ‘Certificates of Nonexistence’ of a registration record. The maker of the certificate testified. The First’s analysis isn’t that satisfactory. It basically says ‘other circuits have upheld their use’ even though there used to be problems. Finally, and without much analysis, the First says that it was fine for the District Court to exclude the testimony of an expert witness that had done some statistical analysis on the reliability of the ATF’s system of gun registration. Because the First speaks in broad, general terms (and throws around words like ‘Daubert’), it doesn’t

Mr. Larson's motion in limine testimony was based upon, and is not materially different from, most of the evidence presented in this motion. It was not until his motion in limine testimony in *Giambro* that Mr. Larson concluded ATF had been adding firearm registrations to the NFRTR after being confronted with NFA firearms owners with their copies of the registrations, based on the 2007 Justice IG report, and that is what he stated.⁸⁶ For more than a decade, Mr. Larson qualified his concerns that, e.g., ATF "may have" added registrations to the NFRTR after losing their copies or records of them, because Mr. Larson did not believe the evidence he cited was sufficiently conclusive.⁸⁷ It was only after the Justice IG report reported in 2007 that ATF had added registration documents to the NFRTR that he concluded otherwise (the Treasury IG confirmed his allegation that "National Firearms Act (NFA) documents had been destroyed").⁸⁸

Giambro differs from *Friesen* because (1) Mr. Giambro never contended the NFRTR was inaccurate with respect to him, and told one of his attorneys he had not registered the firearm,⁸⁹

seem like it was taking this issue seriously." Available at <http://appellate.typepad.com/appellate/2008/10/ca1-first-bends.html>.

⁸⁶ Larson testimony, *United States of America vs. Dario Giambro* (2007) at 67-68.

⁸⁷ It would have been inappropriate for Mr. Larson to attempt to estimate or publish (such as in a professional, refereed journal) a "critical error" rate of, e.g., ATF adding firearm registrations it had lost or destroyed to the NFRTR, because any such estimate would not have been based on valid and reliable evidence.

Results of Discovery sampling analysis by Treasury IG auditors in 1998 provided valid and reliable evidence of "critical errors" in the NFRTR database, but the auditors failed to extend the audit as GAGAS required and estimate the "critical error" rate, or explain the effect of these "critical errors" upon the audit. Because the NFA (26 U.S.C.A. § 5848) and the tax code (26 U.S.C. § 6103) each prohibit Mr. Larson from accessing these data, he was unable to estimate the "critical error" rate for NFRTR data.

⁸⁸ October 1998 Treasury IG Report at 1, available at <http://www.nfaog.org/documents/TreasuryOIG-99-009-1998.pdf>.

⁸⁹ An unexplored aspect of *Giambro* is whether his late father — from whom Mr. Giambro inherited the Game Getter and 203 other firearms, and who instructed him to always keep an accompanying "certificate" in the original wooden box provided by the manufacturer along with the gun — had registered the Game Getter or acquired it through a lawful transfer approved by ATF, and ATF withheld the registration record to enable a prosecution after Mr. Giambro was acquitted in state court of an unrelated firearm wounding charge on grounds of self-defense. This

(2) that attorney misunderstood the NFA and attempted to register the firearm on Mr. Giambro's behalf, and (3) both attorneys petitioned the District Judge to exclude Mr. Giambro's statements and the attempt by one attorney to register the firearm, because the NFA prohibits using information resulting from an attempt to register an NFA firearm in criminal prosecutions,⁹⁰ which could have predisposed the District Judge to fail to adequately consider evidence at trial that the NFRTR is inaccurate and incomplete.

In Friesen, this Court questioned the reliability of NFRTR data

On September 17, 2008, this Court expressed concerns about the validity and reliability of NFRTR data in *Friesen*, in part because the "government has relied almost exclusively" upon NFRTR data in "many of its exhibits."⁹¹ In further explaining the reasons that "persuade[d] me to allow the testimony [of Dr. Scheuren] and overrule the motion" by the Government to exclude him as an Expert Witness, the Court stated:

One is, of course, the duplicate records of Exhibit 100, and then the government's record of the same firearms, which both appear — I've never heard satisfactorily explained why there were two of those records. Secondly, the other relationship to the issue over the accountability of the other guns that are on the government's chart. And thirdly, the issue,

unexplored aspect is significant because (1) there are no independent checks on whether ATF personnel are truthful about their inability to locate a registration document, (2) as the evidence in this motion has reliably documented and contends, there is reasonable doubt regarding ATF's integrity in characterizing the accuracy and completeness of NFRTR data, (3) there has been no publicly known independent evaluation of the adequacy of the search procedures ATF uses to certify to a court that a particular firearm is not registered, and (4) it is not uncommon for persons who inherit registered NFA firearms to be unaware of the need to apply to have ownership of the firearm transferred to them. In such cases, as long as the firearm remains in the chain of inheritance, ATF does not typically initiate criminal action and allows a reasonable time for the firearm to be transferred to the lawful heir. Based on Mr. Giambro's statement, he did not register the Game Getter. It is unclear whether (1) the Game Getter was registered to Mr. Giambro's father (ATF attested that it was not), and (2) Mr. Giambro was aware of the legal requirement for a registered NFA firearm to be transferred to a lawful heir after the death of the registered owner. Because Mr. Giambro may have been suffering from mental illness to some extent, which could have further complicated his legal situation, he did not fully participate in his own defense. Mr. Giambro, whose assets include a \$3.5 million passbook savings account, chose to remain in jail for 5 months until trial because he believed the Government would make corrupt use of the bail money he would have had to post to be released.

⁹⁰ *United States of America vs. Dario Giambro*, United States District Court, District of Maine, Criminal Action, Docket No. 07-14-P-S. Motion in Limine re: Evidence of Disclosure of Information During Compliance Attempt (26 U.S.C. 5989), July 24, 2007, available at <http://www.nfaa.org/documents/GiambroPart6.pdf>.

⁹¹ *United States of America vs. Larry Douglas Friesen* (2008), Vol. VI at 1012.

the fact that the government has relied almost exclusively on many of its exhibits which are records from the [NFRTR].⁹²

Regarding this Court's first concern, NFRTR Custodian Denise Brown's failure to satisfactorily explain the existence in NFRTR records why there are two approved Forms 2 bearing different dates and the same serial number (E683) as that of the STEN machine gun that ATF acknowledges it lawfully transferred to Mr. Friesen in 1996, indicates a lack of knowledge of the NFRTR database and, possibly, of procedures NFA Branch personnel use to file or retrieve firearm registration documents (or records of them).⁹³

Relevant to this Court's second concern was "the other relationship to the issue over the accountability of the other guns" the Government introduced into evidence to try and explain the characteristics of the STEN machine gun at issue in *Friesen*. ATF's characterization of "weapon description" of the STEN machine gun as a Mark II,⁹⁴ a point this motion will further

⁹² Id., Vol. VI at 1011-1012.

⁹³ Defense counsel asked NFRTR Custodian Denise Brown to explain the significance of a Form 2 dated April 20, 1986, entered as Defense Exhibit 100, bearing serial number E683, provided to the defense under Discovery. The Government said the NFRTR contains a record that a STEN machine gun bearing serial number E683 is registered to Mr. Friesen (Vol. 1, Id. at 15). Custodian Brown testified that the firearm ATF approved for transfer to Mr. Friesen was "E683, STEN Mark II . . . approved February 22, 1996" (Id. at 48-49), and that the "birthing document" for that E683 STEN Mark II is a certified Form 2 dated May 14, 1986, submitted to ATF by manufacturer Charles Erb (Id. at 68).

⁹⁴ At issue in *Friesen* is whether the STEN machine gun bearing serial number E683 manufactured by Mr. Erb is the same one he manufactured, or if another STEN machine gun bearing serial number E683 was substituted in its place. Consequently, also at issue is the accuracy of the STEN "weapon description" based on (1) data from the NFRTR, and documentation in the custody of ATF, and (2) examinations of the STEN seized by ATF, by ATF officials, by Mr. Erb, by transferees who previously owned the STEN, and by a defense Expert Witness. The Government contends the STEN that ATF lawfully transferred to Mr. Friesen is a Mark II, based on the description on the Form 2 submitted by Mr. Erb (Id. at 15) and by previous transferees who were available to testify, all of whom denied that the STEN in *Friesen* was the STEN they had previously owned, and by others as described below. Because one previous transferee is deceased (Vol. IV at 674-675), descriptions by other previous transferees are not described in this motion.

After examining the firearm at trial in *Friesen*, Mr. Erb testified it was not the gun he manufactured "as E683" (Vol. IV at 590); was "made to resemble a STEN Mark III" (Id. at 574); and that the gun "is a MARK III" (Id. at 579). Len Savage, an Expert Witness for the defense who examined the STEN testified: "It appears to be a Sten Mark II-S tube that was completed with Sten Mark III components." Vol. VII at 1349. Mr. Erb testified: "The barrel is the same on a Mark III and a Mark II. They are the same length." Vol. IV at 589.

develop, is relevant to the Court's second concern. Defense counsel agrees that ATF approved the lawful transfer of a STEN machine gun bearing serial number E683 to Doug Friesen in 1996, and disagrees with the Government's characterization of that STEN as a Mark II. Defense counsel notes that to validate the its description of the STEN machine gun bearing serial number E683 as a Mark II, the Government sought "confirmatory" information that the Mark II description was valid and reliable. The Government sought this "confirmatory" information because Dr. Scheuren testified: "I find the existing [NFRTR] records are quite useful in an exploratory setting, but they are not accurate enough by themselves to be used in a confirmatory way," including "for purposes of prosecution."⁹⁵

The Government asked Dr. Scheuren if NFRTR data could be reliably verified each time the firearm was transferred by independently obtaining such data from each transferee, he would consider the NFRTR data to be accurate for that firearm. Dr. Scheuren replied in the affirmative. On redirect, defense counsel asked " . . . although you didn't come here to testify about this, if there is a break in the link, for example, one of these witnesses didn't testify, would that cause you a concern?" Dr. Scheuren answered: "[I]f there was gap in the evidence, yes. If there was a chain of custody break, yes." The significance of Dr. Scheuren's answer is that "one of these witnesses" is a deceased transferee,⁹⁶ which breaks the chain of evidence.

Also at issue is whether the STEN machine gun manufactured by Mr. Erb was (1) an unfinished tube, not a finished receiver, (2) finished by Mr. Erb as a STEN Mark II, (3) finished by someone other than Mr. Erb in as a STEN Mark II, Mark II-3, or Mark III, or (4) whether Mr. Erb registered air on one or both of the Forms 2 he submitted to ATF; that is, that Mr. Erb had not physically manufactured a STEN Mark II or a finished or unfinished receiver.

The issue of who manufactured or finished the STEN machine gun in *Friesen* has not been resolved.

⁹⁵ Id., Vol. VI at 1024.

⁹⁶ Id., Vol. IV at 674-675.

This Court's third concern about *Friesen* — “the fact that the government has relied almost exclusively on many of its exhibits which are records from the [NFRTR]”⁹⁷ — is justified for three major reasons.

First, the “critical error” rate of the NFRTR is currently unknown, and efforts to discern or estimate it even informally are compromised because (1) ATF officials changed the definition of a “Significant Error” in 1995 by renaming it an “Error,” and (2) Treasury IG auditors manipulated the definitions of “critical error” in 1998 at the request of NFA Branch representatives, to subjectively lower the “critical error” rate of the NFRTR. Dr. Scheuren testified that “in fact, their reworking of the original 1998 data is data fishing. And you cannot make a statement about the reliability, the probability of your being right with that data fishing, that exercise. So they should have done another audit sample.”⁹⁸

Second, relevant to *Friesen*, there is no law or regulation that requires ATF to physically inspect an NFA firearm at the time of its original manufacture (or as a condition of or during any subsequent transfer), and ATF has not presented any evidence that it has done so. Because one transferee who possessed the STEN machine gun bearing serial number E683 is deceased, the chain of evidence has been broken and it is not possible to reliably confirm even by sworn statements of all living previous transferees that ATF's contention that STEN is a Mark II is correct. Even if all living transferees so testified, there is no logical reason for any of them to testify to a “weapon description” with which the Government disagrees, because doing so would put the onus of alleged illegal manufacture of the STEN upon that previous transferee and subject him to the hazards of prosecution.

⁹⁷ Id., Vol. VI at 1012.

⁹⁸ Id., Vol. VI at 1030.

Third, although ATF has identified “weapon description” as a “critical” data field,⁹⁹ that is not the most critical problem with the NFRTR data ATF uses and the concern stated by this Court in *Friesen* about “the issue, the fact that the government has relied almost exclusively on many of its exhibits which are records from the [NFRTR].”¹⁰⁰ The reason is that based on ATF’s inability to physically locate original documents that literally are NFRTR data, there is reasonable doubt whether Exhibits based on NFRTR data that the Government entered into evidence in *Friesen* are based on valid and reliable evidence. During the 1998 audit ATF was unable to provide original documentation to validate computerized data routinely generated by the NFRTR. ATF’s inability to locate original documents to reliably validate computerized NFRTR data is an audit finding in the December 1998 Treasury IG report as follows:

ATF provided copies of other records to clarify the [37] discrepancies [reported in our audit results]. These other records, for example, included microfiche records and other registry database reports. We examined these records but we could not fully determine if the records sufficiently resolved the discrepancies.¹⁰¹

ATF’s inability to locate original documents, and the Treasury IG auditors’ inability to reliably validate computerized NFRTR data, is further discussed in an audit Work Paper that was not reviewed and signed by Audit Manager Robert K. Bronstrop until December 18, 1998, the

⁹⁹ Treasury IG auditor Carol Burgan stated that “error definitions for critical data fields” include “weapon description.” Work Paper F-25, Feb. 19, 1998, at 1. During a January 21, 1998, meeting at ATF Headquarters that included ATF participants (“[redacted], Chief, Firearms and Explosives Division,” and [redacted]), Carol Burgan, Auditor [redacted], and Gary Wilk, Auditor, agreed that

Critical errors would include: serial number of the weapon, name of weapon owner, address of owner, date of application (if applicable), date of birth, and weapon description. Address of owner is important however, owners do not have to report intrastate moves (only interstate).

Work Paper F-22, January 26, 1998, prepared by Carol Burgan, at 1. Both Work Papers in this footnote *available at* http://www.nfaa.org/documents/Work_Papers_F.pdf.

¹⁰⁰ *United States of America vs. Larry Douglas Friesen* (2008), Vol. VI, at 1012.

¹⁰¹ December 1998 Treasury IG Report, at 12, *available at* <http://www.nfaa.org/documents/TreasuryOIG-99-018-1998.pdf>.

same day the December 1998 Treasury IG report was published, suggesting there was the most extreme of concerns about this audit finding. In fact, less than 3 weeks before the report was issued, Treasury IG auditor Gary Wilk determined and stated the following conclusion:

Conclusion: Examination of the ATF of the photo copied records did not permit this auditor to fully determine whether the discrepancies continued to exist within the computerized NFRTR database. The materials did not clearly demonstrate that the computer system, typically in use, provides reliable and valid data 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.

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At the outset of *Friesen* on Sept. 17, 2008, this Court stated: “the evidence that I exclude . . . is [if] it’s not relevant to this case, or secondly, it’s not reliable evidence.”¹⁰³ The conclusion of Treasury IG auditor Gary Wilk constitutes reasonable doubt that computerized NFRTR data are valid and reliable. To the extent any Exhibits introduced by the Government in *Friesen* are based upon computerized NFRTR data, such exhibits may not be “reliable evidence” and should be excluded by this Court as evidence in a criminal trial unless the validity and reliability of the NFRTR data upon which such Exhibits are based can be independently and reliably validated.

In addition to other evidence presented in this motion that NFRTR data are inaccurate, incomplete and, therefore unreliable, there is also valid and reliable evidence that statements by ATF inspectors (including statements of ATF inspectors involved in *Friesen*), which are based on NFRTR data may not be reliable. The reason is that the 2007 “review” of the NFRTR by the Justice IG concluded:

. . . continuing management and technical deficiencies contribute to inaccuracies in the NFRTR database. For example, NFA Branch staff do not process applications or enter

¹⁰² Work Paper F-52, November 30, 1998, prepared by Gary Wilk, at 1, available at http://www.nfaoa.org/documents/Work_Papers_F.pdf.

¹⁰³ *United States of America vs. Douglas Larry Friesen* (2008), Vol. I, at 5.

data into the NFRTR in a consistent manner, which leads to errors in records and inconsistent decisions on NFA weapons applications. In addition, the NFA Branch has a backlog of record discrepancies between the NFRTR and inventories of federal firearms licensees that were identified during ATF compliance inspections. Further, the NFRTR's software programming is flawed and causes technical problems for those working in the database. **The lack of consistency in procedures and the backlog in reconciling discrepancies, combined with the technical issues, result in errors in the records, reports, and queries produced from the NFRTR. These errors affect the NFRTR's reliability as a regulatory tool when it is used during compliance inspections of federal firearms licensees.**¹⁰⁴ [emphasis added]

The Justice IG evaluators did not define the terms "error" or "discrepancy" in the 2007 report, and their "review" did not include determining the extent to which NFRTR data are accurate and complete. The 2007 Justice IG report acknowledges lack of an NFRTR procedures manual and inadequate training of staff.¹⁰⁵ "Supervisors' inadequate training led to variations in their direction and inconsistent decisions about approving or disapproving NFA weapons registration and transfer applications."¹⁰⁶

NFRTR data that cannot be independently and reliably validated should be excluded from a criminal trial

The totality of evidence presented and documented in this motion establishes that federal law enforcement officials, and representatives of the Treasury Department, have willfully engaged in systematic efforts to cover up the fact that the NFRTR contains serious material errors, and that its error rate is currently unknown, among other issues relevant to *Friesen*. The Treasury Department's successor, the Department of Justice, has also declined to consider valid and reliable evidence that the NFRTR is inaccurate, incomplete and, therefore, unreliable.

¹⁰⁴ June 2007 Justice IG Report at iii, available at <http://www.nfaoa.org/documents/DOJ-OIG2007NFRTRreport.pdf>.

¹⁰⁵ "The NFA Branch does not provide staff with a comprehensive standard operating procedures manual," and NFA Branch staff stated that they did not have adequate written direction on how to enter data such as abbreviations in the NFRTR . . . and who has responsibility for correcting errors in the NFRTR." *Id.* at v.

¹⁰⁶ *Id.* at v-vi.

Attestations or testimonies about NFRTR data by ATF and other Government officials are, as demonstrated in this motion, not worthy of belief.

The totality of the breadth, depth and diversity of reliably documented evidence presented in this motion justifies this Court prohibiting the Government from using any NFRTR data that cannot be independently and reliably validated in prosecuting Doug Friesen in a criminal trial.

Reasonable doubt about the accuracy and completeness of the NFRTR has been reliably established by a variety of documented evidence published by a diverse array of Government entities that include (1) the Executive Branch (Justice IG, Treasury IG, ATF, Audit Services Division of the Treasury Department); (2) the Legislative Branch (Congressional Research Service, the Congress in the *Congressional Record*, Congressional Hearings in 1979 and during 1996 to 2001; and “report language” in reports on appropriations bills; and (3) the Judicial Branch (the sworn testimony of and official documents presented by ATF officials in *Friesen*).

Also regarding the Judicial Branch, in 2007 the Government implied Mr. Larson’s research was not customary or diligent when he was asked by an Assistant United States Attorney during a federal court hearing to confirm that he “. . . never had personal or direct access to any ATF documents internally? And you’ve never had personal or direct access to the NFRTR?”¹⁰⁷ Because NFRTR data are protected from disclosure under the NFA (26 U.S.C.A. § 5848), and are also considered “tax return” information prohibited from disclosure under the tax code (26 U.S.C.A. § 6103), it was not legally possible for Mr. Larson to obtain “personal or direct access” to the NFRTR and related documents under the NFA; moreover, neither could any other person, with the limited exception discussed below.

¹⁰⁷ Larson Testimony, *United States of America vs. Dario Giambro* (2007) at 79, available at <http://www.nfaoa.org/documents/GiambroMotionInLimine-LarsonTestimony.pdf>.

To any extent ATF may claim that NFRTR documents, data or records of them are protected “tax return” information that cannot be disclosed and decline to provide that information to defense counsel under any Discovery motion, ATF cannot decline to disclose that information to this Court. The reason is that after reviewing pertinent statutes, ATF determined in 1978:

the return submitted by the transferor. Except for section 6103(o)(1) which authorizes the disclosure of subtitle E (i.e., Chapters 51-53) tax information to Federal employees whose official duties require such information, the only disclosure subsection regarding Chapter 53 returns and return information is section 6103(d) governing disclosure to State tax officials. That section does not authorize disclosure to

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Since this Court is constituted by a Federal employee “whose official duties require such information,” there is no legal basis for ATF to refuse to disclose “tax return” information if it is relevant and required, including potentially exculpatory evidence under *Brady*. Accordingly, to the extent this Court believes it could be better informed about the accuracy and completeness, and validity and reliability, of NFRTR data by obtaining documents or information that may constitute “tax return” information, Doug Friesen respectfully requests this Court to consider compelling ATF to disclose such information for review by this Court for these proceedings.

Conclusion

For the reasons set forth above, Defendant requests this Honorable Court grant a hearing on this motion and, thereafter to exclude, under F.R.E. 803(10), any evidence

¹⁰⁸ Memorandum to Director, ATF, from ATF Chief Counsel regarding Freedom of Information Act Appeal of [redacted] dated August 18, 1980, bearing symbols CC-18,778 RMT, at 14, available at <http://www.nfaa.org/documents/ATFmemoTaxInfo6103.pdf>.

derived from a search of the NFRTR that has not been independently and reliably validated.

Respectfully Submitted.

S/ *Kendall A. Sykes*

Mack K. Martin, OB. # 5738

Kendall A. Sykes, OB.#21837

125 Park Avenue, Fifth Floor

Oklahoma City, Oklahoma 73102

Telephone (405) 236-8888

Facsimile (405) 236-8844

Email: Mack@Martinlawoffice.net

Kendall@Martinlawoffice.net

Attorneys for Defendant

Larry Douglas Friesen

CERTIFICATE OF SERVICE

I hereby certify that on Thursday, March 19, 2009, I electronically transmitted the attached document to the Clerk of the Court using the ECF System for filing and transmittal of a Notice of Electronic Filing to the following ECF registrants: Mr. Edward J. Kumiega, Assistant United States Attorney.

S/ *Kendall A. Sykes*