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Response to letter from Senator McClure

There is pending in the United States District Court for the District of Columbia a civil forfeiture action, United States v. Seven Miscellaneous Firearms, C.A. 78-1358, involving alleged automatic weapons seized by the Bureau of Alcohol, Tobacco and Firearms (BATF) from a museum at the headquarters of the National Rifle Association (NRA). Trial has been completed, post-trial briefs submitted, and the case is before the court (Gasch J.) for decision. During discovery, the NRA sought documents pertaining to a 1975 BATF internal study of the National Firearms Registration and Transfer Record.<sup>1/</sup> These documents cite a number of problems and inaccuracies in the record system. BATF initially resisted release of the documents claiming executive privilege and then relented, releasing all of the requested documents in their entirety. They formed the basis of an NRA argument that the firearms record is so rife with inaccuracies that the Government could not meet its burden in proving that the seized firearms were not properly registered as required by the National Firearms Act (Title II of the Gun Control Act of 1968, 26 U.S.C. 5801-5872).

Senator McClure is a vocal opponent of gun control who has introduced legislation to repeal the Gun Control Act of 1968. Additionally, he is a member of the Subcommittee on Treasury, Postal Service and General Government which has oversight responsibility over BATF. In hearings held on July 11 and 12 of this year into alleged law enforcement abuses by BATF, he expressed his belief that the failure to reveal the inaccuracies in the firearms record system as stated in the 1975 memoranda requires the reversal of all convictions heretofore obtained under the National Firearms Act. It should also be noted that Senator Birch Bayh in his capacity as Chairman of the Subcommittee on the Constitution has written to BATF

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<sup>1/</sup> James Featherstone, present General Counsel for the NRA was formerly Deputy Assistant Secretary of the Treasury for Enforcement. Presumably, he gained knowledge of the study in his former position.

expressing concern that these documents should have been disclosed in criminal cases under the doctrine of Brady v. Maryland, 373 U.S. 83 (1963).

## II The 1975 Study

Section 5841(a) of Title 26, United States Code, establishes a central registry of firearms known as the National Firearms Registration and Transfer Record which shall include identification of the firearm, date of registration, and the identification and address of the person entitled to possess the firearm.<sup>2/</sup> The act does not establish or prescribe the manner in which the registry is to be maintained.

Since 1968 the record system has been composed of two basic elements: (1) a transaction record file containing original making, registration, and transfer forms arranged in alphabetical order by the name of the registrant and (2) a "back up" index card file arranged by firearm serial number containing descriptive information about the firearm and the names of all persons to whom the firearm has been registered. The transaction record file is the official National Firearms Registration and Transfer Record. The index card file was created by BATF for convenience to permit cross-referencing and to assist in the location of the official record where only the serial number and a description of the firearm are available. Both files are examined for purposes of certifying the absence of a registration record.<sup>3/</sup>

We have thoroughly examined the BATF internal memoranda provided by Senator McClure<sup>4/</sup> and through interviews of BATF personnel have established the following chronology and context for them. Title II of the Gun Control Act, in addition to

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<sup>2/</sup> The predecessor statute, enacted in 1934, also required the registration of certain firearms. Both the old and the new acts apply to machine guns, destructive devices and other "gangster" weapons.

<sup>3/</sup> Evidence of lack of a record of registration normally takes the form of a certificate by the record custodian admissible under Rule 27 F.R.Crim.P. incorporating Rule 44 F.R.Civ.P.

<sup>4/</sup> We had received these and other similar documents from BATE a few weeks before we received the Senator's letter. Prior to that we had no knowledge of the 1975 study or any of the matters relating to it.

creating the Registration and Transfer Record, established an amnesty period of 30 days from the effective date of the act during which time weapons could be registered with no questions asked. (See section 7273, P.L. 90-618). The amnesty period spawned a massive volume of registrations, transfers and correspondence which the clerical staff was ill-equipped to handle. As a result, some weapons which did not require registration were registered, some were mistakenly registered by part number rather than serial number, and some documents were misfiled. The staff responsible for the system was aware of these problems.

In 1971 a program to microfilm the entire record was undertaken in order to increase the efficiency of record searches and to safeguard the original documents. It should be noted that the record is primarily used for recording the making of weapons and the transfer of them. Searches for evidentiary purposes are but a part of the overall usage of the record. Thus by microfilming the record, it was believed, the security and integrity of the official file could be better maintained by limiting its usage to evidentiary and other high priority purposes. Unfortunately, the microfilming effort failed because of the limited capabilities of the equipment.

In April 1975, the Chief of the NFA Branch requested funds to duplicate the entire record (Tab 1). He noted the failure of the microfilming and the inefficiency of the existing mechanical file that could be used by only one person at a time. Further, he stated, "We continuously discover discrepancies and inaccuracies in the registration file which, if discovered during a trial, would destroy the future credibility of [certification or testimony of the nonexistence of a registration record]." In an attachment he cited an instance where they would have certified a weapon was registered when in fact it was not, instances where forms should have been sent to a taxpayer but were not, a mis-filing of a transfer form with a letter where the form should have been in the record, and instances arising from the amnesty period where weapons that were not required to be registered probably should have been and many dual registrations of the same firearm by two or more persons. Importantly, he did not suggest that any certifications were erroneous. The request for funds "to duplicate a record which is admittedly inaccurate" was denied by the Director of BATF on May 30, 1975. At the same time he commissioned a study group to review the record "and make recommendations to insure its accuracy and completeness" (Tab 2).

An initial memorandum dated May 22, 1975, identifying the problems to be addressed by the study group and recommending the composition of the group and its framework for analysis is attached at Tab 3. The final report of the study group dated

July 1, 1975, is attached at Tab 4. The report identifies seventeen 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.<sup>5/</sup> Indeed, none of the BATF personnel we interviewed were aware of any case where this happened. Most of the other problems identified by the group were raised in the April 3, 1975 memorandum. The report concludes by recommending that the entire firearms record be computerized.

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As best we can determine the Director of BATF took no official action on the study group's recommendations. The report remained in his safe until the discovery request was made in the civil case described supra. Strangely, the General Counsel's office at BATF was not made aware of the existence of these memoranda until the discovery request despite the fears expressed by their authors that the record was inaccurate and held the potential for agency embarrassment. In connection with the civil case on August 20, 1979, the Assistant Director for Technical and Scientific Services prepared a memorandum rebutting the findings of the study group and setting forth the changes made in the record system since 1975 (Tab 5). The changes consist primarily of a reorganization of the files and the employment of a different file storage system. As part of the file reorganization unnecessary paper was purged and the charge out system changed. Prior to the change when index cards were removed from the file for examination or other purpose, a charge out card containing some of the information from the document and the initials of the person removing the document would be inserted in the file. The study group criticized this practice as leading to loss of index cards and increasing the potential for misfiling. Now, index cards removed from the file are photocopied and replaced.<sup>6/</sup>

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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.

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6/ It should be kept in mind that the index card system is the "unofficial" back-up file created by BATF. The charge out practice did not affect the "official" registration documents.

### III The Brady Issue

Senator McClure states that the memoranda are "clearly material the Government is required to release to a defendant under Brady v. Maryland, 373 U.S. 83 (1963)," and suggests that the Department disclose the memoranda to all persons convicted under the National Firearms Act as well as defendants in all future cases. This sweeping conclusion misapprehends the scope of Brady and its progeny. Brady involved the failure by the prosecutor, in the face of a specific request, to disclose a confession by a co-defendant which was exculpatory of the accused. The Court held that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment." Id. 373 U.S. at 87. The Brady rule has been extended to cover material that directly impeaches a key Government witness whose reliability may be determinative of guilt or innocence. See, e.g., Giglio v. United States, 405 U.S. 150 (1972) (perjured testimony regarding promises of leniency); United States v. McCrane, 547 F.2d 204 (3d Cir. 1976) (letters to state agencies on witness's behalf), Boone v. Paderik, 541 F.2d 447 (4th Cir. 1976) (promises of leniency by police).

Brady pertains to information known to the prosecutor but unknown to the defense. United States v. Agurs, 427 U.S. 97 (1976). The possessor of a firearm within the ambit of the National Firearms Act knows whether the weapon is registered to him or not. Indeed, persons lawfully possessing such weapons are required under the Act to "retain proof of registration which shall be made available to the Secretary upon request." 26 U.S.C. 5841(c). Thus the BATF memoranda are clearly not exculpatory.

To the extent that the memoranda may be useful for impeachment, their disclosure is not constitutionally mandated, for "the mere possibility that an item of undisclosed information might have helped the defense, or might have affected the outcome of the trial, does not establish materiality in the constitutional sense." Agurs at 109, 110. Where no Brady request or only a general request is made, undisclosed information will be held material only if "the omitted evidence creates a reasonable doubt that did not otherwise exist." Id. at 112. It is also clear that "[t]here are situations in which evidence is obviously of such substantial value to the defense that elementary fairness requires it to be disclosed even without a specific request." Id. at 110. The memoranda do not rise to this level. They are most properly viewed as a critique of the record system drafted in an effort to determine how the system could be made more efficient and insulated from the possibility of error. The expressions of concern that the integrity of the system is threatened because of discrepancies and inaccuracies are

overstatements having little foundation in the actual findings of the study. None of the memoranda suggest that any erroneous certifications have been made. No one we interviewed had ever heard of any case in which a certification had been made and the defendant produced evidence of registration. In the civil case the Government adduced unrebutted testimony from veteran BATF employees that at least since 1958 no person had produced a registration form or testified in court that he had registered a particular weapon after BATF had certified that that person was not the registered possessor of a particular weapon. 7

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/ BATF issues an average of 2,000 certifications annually. Additionally, there are approximately 2,500-3,000 "look-ups" each year for investigative purposes. In light of this volume of record searches, the absence of any known errors underscores the integrity of the record system.