

**Violating Due Process: Convictions Based on the National Firearms Registration
and Transfer Record when its "Files are Missing"**

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I. INTRODUCTION

Our Supreme Court declared, “A fair trial in a fair tribunal is a basic requirement of due process....[O]ur system of law has always endeavored to prevent even the probability of unfairness.”¹ With this in mind, we turn to the current violation of due process: convictions based on the National Firearms Registration and Transfer Record when its “files are missing.”

This Article analyzes the issues surrounding the National Firearms Act [NFA], in particular the National Firearms Registration and Transfer Record [NFRTR], and how law-abiding citizens are being deprived of their Due Process rights, because of the inaccuracy of the NFRTR, while the courts believe the NFRTR to be trustworthy. In point of fact, in June 2007, the Bureau of Alcohol, Tobacco, Firearms, and Explosives [BATFE] had lost all record of a registered firearm, which it had approved in April 2007.² The NFRTR, established by the NFA and administered by the BATFE, has been in disarray since the late 1970’s.³ In 1996, amid numerous complaints of unjust criminal prosecutions by the BATFE, a citizen supplied reliable evidence, that raised doubts about the accuracy and completeness of the NFRTR, to the House Subcommittee on Treasury, Postal Service, and General Government, Committee on Appropriations, and then again

¹ Gutierrez De Martinez v. Lamagno, 515 U.S. 417, 428 (1995) (citing *In re Murchison*, 349 U.S. 133, 136 (1955); *In re Murchison*, 349 U.S. 133, 136 (1955)).

² Letter to Mr. Kenneth E. Houchens, Chief National Firearms Act Branch, *NFA Letter Control Number [redacted]*, Title II Firearms Serial Number [redacted], by Saeid Shafizadeh, (July 11, 2007), available at <http://www.nfaoa.org/documents/ParsLetter2007.pdf>.

³ U.S. Dep’t of Justice, Criminal Div., *Memorandum: Response to letter from Senator McClure*, by Philip B. Heymann and Lawrence Lippe, at 2-3 (Nov. 29, 1979), available at <http://www.nfaoa.org/documents/DOJAmnestyMemo1979.pdf>. 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 on January 24, 2003. 6 U.S.C. § 531; 116 Stat. 2135 (2003).

in 1997, after inaction by Committee, he complained to the House Committee on Government Reform and Oversight, which ordered the Treasury Department Inspector General to audit the NFRTR; resulting in two reports being rendered in 1998.⁴

While the BATFE continues to prosecute and convict individuals based on its contention that their firearm registration records cannot be found within the NFRTR, the BATFE also declared that errors in the NFRTR could result in the improper arrest, prosecution, and conviction of an innocent person, who had simply lost his paperwork, and for whom the agency had no records.⁵ Thus, it is imperative that our Judicial System take action, and find, as a matter of law, that the NFRTR, in its current state, is not sufficient in criminal and civil proceedings. Moreover, the United States Government must take immediate action, in the form of an amnesty, to ensure that law-abiding citizens are not convicted of Possession of Unregistered Firearms because the BATFE lost his/her paperwork, although the individual properly registered the firearm, but through no fault of his/her own, the paperwork was lost or destroyed.

⁴ U.S. Congress, House Committee on Appropriations, Subcommittee on the Treasury, Postal Service, and General Government Appropriations, *Treasury Postal Service, and General Government Appropriations for Fiscal Year 1997, Part 5, Testimony of Member of Congress and Other Interested Individuals and Organizations*, 104th Cong., 2nd Sess., at 37-274 (Washington, GPO, 1996), available at <http://www.nfaoa.org/documents/1996testimony.pdf>; U.S. Department of the Treasury, Office of Inspector General, *Special Report on Allegations Concerning the Bureau of Alcohol, Tobacco, and Firearm's Registration and Recordkeeping of the National Firearms Registration and Transfer Records*, OIG-99-009, at 1 (Washington, Oct. 26, 1998), available at <http://www.nfaoa.org/documents/TreasuryOIG-99-009-1998.pdf>. The second report addressed other weaknesses in the NFRTR; see U.S. Department of the Treasury, Office of Inspector General, *Audit Report on Allegations Concerning the Bureau of Alcohol, Tobacco, and Firearms' Administration of the National Firearms Registration and Transfer Record*, OIG-99-018, (Washington, Dec. 18, 1998) available at <http://www.nfaoa.org/documents/TreasuryOIG-99-018-1998.pdf>.

⁵ NFA Branch Chief memorandum to ATF Assistant Director for Technical and Scientific Services, *Purification and Verification of the National Firearms Registration and Transfer Record*, Apr. 3, 1975, reproduced in *Oversight Hearings on Bureau of Alcohol, Tobacco, and Firearms*, Senate Committee on Appropriations, 96th Cong., 1st Sess., at 42 (Washington, GPO, 1979), available at http://www.nfaoa.org/documents/1979_Hearing_Excerpts.pdf.


A brief introduction is set forth in Section I. Section II is a background of the firearm laws at issue, broken into the following subsections: A. the 1934 NFA; B. BATFE; C. Gun Control Act [GCA] of 1968; D. 1968 Amnesty; E. the 1986 Firearms Owners' Protection Act [FOPA]; and F. NFA Registration Process and Penalties.

Section III explains the NFRTR. The emergence of the inaccuracy of the NFRTR is discussed in Section IV., proceeded by Section V. depicting the numerous Congressional Hearings and cases related thereto, which is broken down into the following subsections: A. 1934-1980; B. 1980-1995; C. 1995-1998; D. 1998; E. 1999-2002; and F. 2003-2008. The absence of paperwork is not a defense is discussed in Section VI. and is broken down into subsections: A. Error Letters; B. the BATFE's Improper Denial of Exculpatory Evidence; C. the Accuracy and Completeness of the NFRTR; and D. Firearm Law Experts on the absence of paperwork as a defense and the status of the NFRTR generally. The intersection of Procedural Due Process violations is discussed in Section VII. and the Federal Rules of Evidence and the NFRTR follows in Section VIII. The issue of the Confrontation Clause and the admission of the NFRTR as evidence is discussed in Section IX. The solution, a new amnesty, is discussed, in depth, in Section X and broken into the subsections of A. Judicial; B. Legislative; C. BATFE Rationale for Refusing an Amnesty, and Rebuttals Thereof; and D. Amnesty. Lastly, Section XI concludes this article.

II. Background

The background of the NFA, BATFE, GCA, 1968 Amnesty, and FOIPA is a complex and interesting situation involving an Administrative Agency, and its power to prosecute violations of the statutes, outlined above, even when that agency acknowledges that innocent individuals may be convicted.⁶

A. The National Firearms Act [NFA] of 1934

In 1933, after the attempted assassination of President-elect Franklin D. Roosevelt and growing fears of organized crime's increased prominence, the Congress sought federal regulations on firearms. roduced as H.R. 9066, the bill, which became the NFA, originally sought to require registration of any "firearm, a term defined to mean a pistol, revolver, shotgun having a barrel less than sixteen inches in length, or any other firearm capable of being concealed on the person, a muffler or silencer therefore, or a machine gun."⁸ The term "machine gun" was defined as any weapon capable of firing twelve or more shots without manual reloading.⁹

The Justice Department, aware of the growing concern over H.R. 9066, submitted a substitute bill, H.R. 9741.¹⁰ H.R. 9741 required existing firearm owners to register their

⁶ *Id.*

⁷ See ROBERT J. SPITZER, *THE POLITICS OF GUN CONTROL* 104 (CQ Press 2d ed. 1998); JOSH SUGARMANN, *NATIONAL RIFLE ASSOCIATION: MONEY, FIREPOWER, AND FEAR* 29 (National Press Books 1992). For an excellent comprehensive history and analysis of the relevant social and legal issues during this period, including an extensive discussion of NFA issues, see Thomas Earl Mahl, *A History of Individual and Group Action in Promoting National Gun Control Legislation During the Interwar Period, 1919-1941*, unpub. Master of Arts thesis, Kent State University, August 1972, available at .

⁸ US Congress, House of Representatives, Committee on Ways and Means, *National Firearms Act: Hearings on H.R. 9066 before the House Comm. on Ways and Means*, 73d Cong., 2d Sess., at 1 (Washington, GPO, 1934) (testimony of Attorney General Homer Cummings), available at <http://www.nfaoa.org/documents/NFA-1934house.pdf>.

⁹ *Id.*

¹⁰ See U.S. Congress, House of Representatives, Committee on Ways and Means, *National Firearms Act: Hearings on H.R. 9066 before the House Comm. on Ways and Means*, 73d Cong., 2d Sess., at 1

arms within sixty days, except for firearm acquired after the effective date of the Act; whereas, H.R. 9066 would have only applied to firearms sold after its enactment.¹¹

Worried that the bill would be found unconstitutional, because it violated the Second Amendment, the Congress redrafted it to conform to the regulatory scheme of the Harrison Anti-Narcotic Act of 1914, which was based on the taxing power and held to be Constitutional.¹² The Congress declared, “[I]t is important to be able to identify arms to see which possessors have paid taxes and which firearms have been taxed and which have not.”¹³

When H.R. 9741 was complete, the definition of “firearm” had drastically changed. First, pistols and revolvers were omitted, thus limiting the Bill to machineguns, sawed-off shotguns and rifles, silencers, and concealable firearms other than pistols and revolvers.¹⁴ Second, the definition of “machinegun” was changed to cover firearms that fired more than once for each single function of the trigger, regardless of munitions capacity.¹⁵ Also, of particular interest, the transfer tax was fixed at two-hundred dollars, which in 1934 was the retail price of a Thompson machinegun.¹⁶ The Congress, satisfied with the enumerated changes, enacted the NFA.¹⁷

(Washington, GPO, 1934) (depicting the Department of Justice’s understanding that H.R. 9066 would not be approved), available at <http://www.nfaoa.org/documents/NFA-1934house.pdf>.

¹¹ *Id.*; H.R. 9066 at 84. While H.R. 9741 eliminated a double registration requirement for those who registered prior to the expiration of the sixty days, the exemption led to the registration requirement being stricken as a violation of the fifth amendment’s self incrimination clause some thirty-four years later. *See Haynes v. United States*, 390 U.S. 85, 100.

¹² H.R. 9066.

¹³ *Id.* at 87 (testimony of Ass’t Att’y Gen. Joseph Keenan).

¹⁴ H.R. Rep. NO. 1780, at 1. “Your committee is of the opinion that limiting the bill to the taxing of sawed-off guns and machineguns is sufficient at this time. It is not thought necessary to go as far as to include pistols and revolvers and sporting arms.” *Id.*

¹⁵ *Id.*

¹⁶ H.R. 9066 at 12.

¹⁷ 26 U.S.C. §§ 5801-5872, 48 Stat, 1236.

Thus, the NFA placed a tax on the manufacture and transfer of all machineguns, short-barreled rifles and shotguns, silencers, and other concealable firearms, excluding handguns, identified as “any other weapon.”¹⁸ For a more comprehensive understanding of what is being controlled, one must consider the definitions:

(a) Firearm. The term 'firearm' 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;¹⁹ (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 length²⁰; (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 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.²¹

(b) Machinegun. The term 'machinegun' means any weapon which shoots, is designed to shoot, or can be readily restored to shoot, automatically more than one shot, without manual reloading, by a single function of the trigger. The term shall also include the frame or receiver of any such weapon, any part designed and intended solely and exclusively, or combination of parts designed and intended, for use in converting a weapon into a machinegun, and any combination of parts from which a machinegun can be assembled if such parts are in the possession or under the control of a person.²²

c) Rifle. The term 'rifle' means a weapon designed or redesigned, made or remade, and intended to be fired from the shoulder and designed or redesigned and made or remade to use the energy of the explosive in a

¹⁸ § 5811

¹⁹ It should be noted that under the original NFA of 1934, the barrel length was 18 inches. In 1936, the NFA was amended by changing the 18” barrel standard to 16” for rifles of .22 caliber or less. 49 Stat. 1192. In 1960, the definition was amended to “a rifle having a barrel or barrels of less than 16 inches in length,” which was no longer caliber specific. 74 Stat. 149. For the hearings related to this amendment, *see* United States Senate, Committee on Finance, *H.R. 4029*, 86th Cong., 2d Sess., (Washington, GPO, 1960), available at <http://www.nfaoa.org/documents/NFAamend1960.pdf>.

²⁰ This was part of the 1960 amendment, 74 Stat. 149, presumably to create an empirical standard for “concealable,” a standard absent from the original NFA. For the hearings related to this amendment, *see* United States Senate, Committee on Finance, *H.R. 4029*, 86th Cong., 2d Sess., (Washington, GPO, 1960), available at <http://www.nfaoa.org/documents/NFAamend1960.pdf>.

²¹ 26 U.S.C. § 5845(a); It should be noted that Destructive Devices were added by the Gun Control Act of 1968, as was the “collector’s item” provision to remove a firearm from the NFA. 82 Stat. 1235, § 921.

²² § 5845(b)

fixed cartridge to fire only a single projectile through a rifled bore for each single pull of the trigger, and shall include any such weapon which may be readily restored to fire a fixed cartridge.²³

(d) Shotgun. The term 'shotgun' means a weapon designed or redesigned, made or remade, and intended to be fired from the shoulder and designed or redesigned and made or remade to use the energy of the explosive in a fixed shotgun shell to fire through a smooth bore either a number of projectiles (ball shot) or a single projectile for each pull of the trigger, and shall include any such weapon which may be readily restored to fire a fixed shotgun shell.²⁴

(e) Any other weapon. The term 'any other weapon' means any weapon or device capable of being concealed on the person from which a shot can be discharged through the energy of an explosive,²⁵ a pistol or revolver having a barrel with a smooth bore designed or redesigned to fire a fixed shotgun shell, weapons with combination shotgun and rifle barrels 12 inches or more, less than 18 inches in length, from which only a single discharge can be made from either barrel without manual reloading, and shall include any such weapon which may be readily restored to fire. Such term shall not include a pistol or a revolver having a rifled bore, or rifled bores, or weapons designed, made, or intended to be fired from the shoulder and not capable of firing fixed ammunition.²⁶

Since the NFA is part of the Internal Revenue Code, it created a regulatory

system, which taxed all aspects of the manufacture, importation, and distribution of the above listed firearms, as well as some additional ones that were added during the 1968 Gun Control Act.²⁷ More importantly, the NFA required the Secretary of the Treasury to create a registry, known as the NFRTR, of all NFA firearms in the United States not under the control of the United States Government.²⁸ The most interesting aspect to enactment of the NFA, pertinent to the NFRTR, is that during the 1934 Congressional Hearings, Karl T. Frederick, then President of the National Rifle Association, declared,

[A]s a matter of human experience, the owner of a gun is going to lose papers, they are going to get mislaid, they are going to get burned up, if he

²³ § 5845(c)

²⁴ § 5845(d)

²⁵ § 5845(e)

²⁶ *Id.* This provision, which was added by the Gun Control Act of 1968, was largely the result of codifying previous rulings and was intended to bring statutory uniformity to the “any other weapon” definition. 82 Stat. 1235, § 921.

²⁷ § 5802

²⁸ § 5841

cannot turn them up when required to do so he is liable to go to jail. I think there ought to be a simple method of obtaining a copy of that paper from the authorities with whom the original was filed If not, in the actual operation, you are going to create criminals.²⁹

B. Bureau of Alcohol, Tobacco, Firearms, and Explosives [BATFE]

The history of the BATFE is traced back to the first federal tax on distilled spirits in 1791.³⁰ Since the NFA is ostensibly a tax provision, it was originally administered by Miscellaneous Tax Unit [MTU] of the Department of the Treasury's Bureau of Internal Revenue [BIR].³¹ In 1942, the MTU's NFA duties were reassigned to the BIR's Alcohol Tax Unit [ATU].³²

Effective 1952, all firearm and tobacco programs were transferred to the Alcohol and Tax Division [ATTD], when BIR was reorganized and renamed the Internal Revenue Service [IRS].³³ In the wake of the 1968 Gun Control Act, the ATTD assumed the responsibility for explosives as well, and as a result, was renamed the Alcohol, Tobacco, and Firearms Division [ATFD]; thereafter in 1972, it became a bureau and was designated the Bureau of Alcohol, Tobacco and Firearms (ATF).³⁴

With the passage of the Homeland Security Act, the Congress transferred the ATF to the Department of Justice and renamed it the Bureau of Alcohol, Tobacco, Firearms and Explosives [BATFE].³⁵ The Secretary of the Treasury was replaced by the Attorney

²⁹ U.S. Congress, House Committee on Ways and Means, *H.R. 9066*, 73rd Cong., 2nd Sess., at 57 (Washington, GPO, 1934), available at <http://www.nfaoa.org/documents/NFA-1934house.pdf>.

³⁰ 26 U.S.C. § 5001; <http://www.atf.gov/about/atfhistory.htm>. See also, 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 3, available at <http://www.nfaoa.org/documents/CRSmemoNFRTR0001.pdf>.

³¹ <http://www.atf.gov/about/atfhistory.htm>.

³² *Id.*

³³ *Id.*

³⁴ *Id.*

³⁵ 6 U.S.C. § 531; 116 Stat. 2135 (2003).

General as the federal official responsible for administering the NFA and maintaining the NFRTR.³⁶

C. The Gun Control Act [GCA] of 1968

Title II of the GCA, also termed the National Firearms Act of 1968, revised and re-codified the NFA, resulting in: 1.) tightened controls on NFA firearms and devices; particularly in the import restrictions for NFA items; 2.) the inclusion of “destructive devices;” 3.) the codification of various rulings into a statutory definition of “any other weapon;” 4.) the inclusion of “frame or receiver” of a firearm under the definition of a machinegun; and 5.) a provision which authorized the administrative removal of any firearm from the NFA, except a machine gun or destructive device, that was determined by the Secretary of the Treasury to be mainly a “collector’s item” and not likely to be used as a weapon.³⁷ The GCA also increased the penalty for possessing an unregistered NFA firearm to two years and/or ten thousand dollars.³⁸ Furthermore, the Congress, aware of the Supreme Court’s decision in *Haynes v. United States*, as well as other cases, resolved the conflict by: (1) prohibiting any information required to comply with the NFA to be used against a registrant or applicant “in a criminal proceeding with respect to

³⁶ *Id.*

³⁷ 26 U.S.C. § 5845. The GCA, in remaining true to the original intent behind the NFA, limited firearms thought to be used mainly by criminals by requiring registration of the firearms and using prohibitive taxes to discourage their manufacture, distribution, and ownership. This was a comprehensive strategy then, and remains so today.

³⁸ S. Rep. NO. 1097, 90th Cong., 2d Sess. 25 (1967). The 2007 DOJ-OIG report declares, “Possessing an unregistered NFA weapon or one that is registered to someone else is punishable by a \$250,000 fine and 10 years imprisonment. The NFA weapon is subject to forfeiture, and if convicted of a criminal violation of the NFA the possessor will be prohibited from receiving or possessing firearms.” U.S. Department of the Justice, Office of Inspector General, *The Bureau of Alcohol, Tobacco, Firearms and Explosives’ National Firearms Registration and Transfer Record*, I-2007-006, at 3-4 (June 2007), available at <http://www.nfaoa.org/documents/DOJ-OIG2007NFRTRreport.pdf>.

a prior or concurrent violation of the law;” (2) establishing an amnesty period, to allow persons to register unregistered NFA firearms with full immunity from prosecution, although such immunity did not apply to making false statements;³⁹ and, (3) prohibiting the release of any information about the registration status or ownership of any NFA firearm.⁴⁰

D. 1968 NFA Amnesty

The GCA required ATF to establish a 30-day amnesty period beginning on the second day of the first month after its enactment on October 22, 1968; consequently, the amnesty was held from November 2, 1968, to December 1, 1968.⁴¹ In 1992, NFRTR statistics obtained by a Freedom of Information Act (FOIA) request disclosed that 57,187 NFA firearms were registered in 1968; however, this number increased to 57,216, in 1995, and to 57,223 by 1996.⁴² This may be due, in part, to the BATFE (1) adding firearms to the NFRTR after being confronted by NFA firearm owners with copies of NFA registration paperwork, (2) adopting a policy to allow some U.S. service personnel to register unregistered NFA firearms from 1969 to 1971, or later, without announcing

³⁹ 82 Stat. 1235, § 207(b), (d); *Haynes v. United States*, 390 U.S. 85 (1968) (holding that the registration of NFA weapons would likely incriminate those individuals registering unregistered NFA); *Grosso v. United States*, 390 U.S. 62 (1968); *Marchetti v. United States*, 390 U.S. 39 (1968).

⁴⁰ The BATFE legal interpretation is that NFA paperwork is “tax return” information. 26 U.S.C. § 6103; Memorandum to ATF Director from Chief Counsel, re: Freedom of Information Act Request, bearing symbols CC-18,778 RMT, (Aug. 18, 1980), *available at* http://www.titleii.com/BardwellOLD/1980_auto_ord_memo.txt

⁴¹ 82 Stat. 1235, § 207(b), (d).

⁴² Eric M. Larson, *Errors in the National Firearms Registration and Transfer Record: A New Amnesty Period May be Required to Correct Them*, prepared for the Subcommittee on Treasury, Postal Services, and General Government of the Committee on Appropriations, Apr. 8, 1997, *available at* http://www.cs.cmu.edu/afs/cs.cmu.edu/user/wbardwel/public/nfalist/rip/larson_study.txt. Mr. Larson is a Senior Analyst with the U.S. Government Accountability Office.

such an amnesty period in the Federal Register, as required by law,⁴³ and/or (3) as stated by a BATFE employee, correctly filing a misfiled form could appear to increase the number of registered firearms in that category, e.g., a Form 4467 registration being misfiled as something else.⁴⁴ An ancillary and troubling issue is the fact that ATF created an unofficial program to allow the registration of thousands of unregistered NFA firearms after the 1968 amnesty expired, in violation of its own published regulations at the time.⁴⁵

There is virtually no legislative history for the amnesty provision under the NFA. With the single exception of a statement that the Congress intended that “every firearm in the United States should be registered to the person possessing the firearm” by December

⁴³ 82 Stat. 1235, § 207(b),(d); U.S. Department of the Treasury, Office of Inspector General, *Special Report on Allegations Concerning the Bureau of Alcohol, Tobacco and Firearm's Registration and Recordkeeping of the National Firearms Registration and Transfer Records*, Report No. OIG-99-009, at 13 (Washington, Oct. 26, 1998) available at <http://www.nfaoa.org/documents/TreasuryOIG-99-009-1998.pdf>; U.S. Department of the Treasury, Bureau of Alcohol Tobacco, and Firearms, *Unpublished Memorandum: Freedom of Information Act regarding United States vs. Eighteen Various Firearms*, by Peter J. Chisholm, Mar. 24, 1998, p. 8, available at <http://www.nfaoa.org/documents/Fassnacht.pdf>. The underlying facts in the court case, *United States v. Eighteen Various Firearms*, 148 F.R.D. 530 (E.D. Pa. 1993), are set forth in this unpublished ATF Memorandum to the File dated January 15, 1993, obtained by the Freedom of Information Act process. In 1969, CIA employee George Fassnacht sought to register unregistered NFA firearms under the 1968 amnesty provision, ATF agreed, then in 1971 refused to allow the registrations after the firearms were seized in a raid that was later found unconstitutional. *Id.* In 1993, ATF dropped its objections and allowed the firearms to be registered after years of litigation. *Id.* "We reached this conclusion," ATF stated, "only after months of researching every possible lead and finding *only evidence* that Mr. Fassnacht had satisfied the requirements for persons seeking to register NFA firearms after the November 1968 amnesty period [emphasis in original document]." *Id.* It should be noted that BATFE should possibly be applauded for this action, since the 30 day registration period may have been too short. Individuals on vacation or otherwise may not have heard of the Amnesty until it was too late.

⁴⁴ U.S. Congress, House Committee on Appropriations, Subcommittee on the Treasury, Postal Service, and General Government Appropriations, *Treasury Postal Service, and General Government Appropriations for Fiscal Year 1997, Part 5, Testimony of Member of Congress and Other Interested Individuals and Organizations*, 104th Cong., 2nd Sess., at 84 (Washington, GPO, 1996), available at <http://www.nfaoa.org/documents/1996testimony.pdf>.

⁴⁵ 26 C.F.R. § 179.120 (1969), available at <http://blog.princelaw.com/assets/2008/1/9/1969-CFR-ATF-amnesty-regs.pdf>; U.S. Senate, Committee on the Judiciary United States Senate, *Hearing on S. 914, A Bill to Protect Owners' Constitutional Rights, Civil Liberties, and Rights to Privacy*, 89th Cong., 1st Sess., at 63 (Washington, GPO, 1984), available at <http://www.nfaoa.org/documents/DolaNFAamend.pdf>.

2, 1968, the day after the 30-day amnesty period expired, there is no other mention of the amnesty period provision except in the statute itself.⁴⁶

BATFE published regulations in 26 C.F.R., Section 179.120, entitled "Registration of Firearms", revised as of January 1, 1969, that described procedures for registering unregistered NFA firearms during the 1968 amnesty period.⁴⁷ The regulation states, in part: "No 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 any single period with such immunity from liability as the Director determines will contribute to the purposes of this part."⁴⁸ Paragraph (e) further stipulates that "A firearm not identified as registered by this part shall not be registered."⁴⁹ Notwithstanding these limitations, in a document entitled "Amnesty

⁴⁶ See U.S. Senate, *Gun Control Act of 1968, Title II-Amendments to the National Firearms Act*, Report No 1501, 90th Cong., 2nd Sess., at 43 (Washington, GPO, 1968), available at <http://www.nfaoa.org/documents/SenateReport1501-GCA1968.pdf>. While not mentioned anywhere in the 1968 Act, of historical interest is a provision discussed during 1965 hearings for a registration period to bring "destructive devices" under the NFA, whereby persons possessing such devices "shall have 30 days from the effective date of this act to register such firearm, and that no liability (criminal or otherwise) shall be incurred in respect to failure to so register under such section prior to the expiration of such 30 days." See U.S. Congress, House of Representatives, Committee on Ways and Means, *Proposed Amendments to the National Firearms Act and the Firearms Act, Part I*, 89th Cong., 1st Sess., at 7 (Washington, GPO, 1965), available at http://www.nfaoa.org/documents/1965_Hearing_Part_I.pdf. The hearing summarizes the need to, "Bring under Federal control interstate shipment and disposition of large caliber weapons such as bazookas and antitank guns, and destructive devices such as grenades, bombs, missiles, and rockets," "curb the flow into the United States of surplus military weapons and other firearms not suitable for sporting purposes," and "increase to twice the present rate of all taxes under the National Firearms Act of 1934," noting that "the principal rates have not been changes since the original enactment of the act in 1934," and that "it is necessary to increase the rates in order to carry out the purposes of the act." (Id. at 3-4).

⁴⁷ 26 C.F.R. § 179.120 (1969), available at <http://blog.princelaw.com/assets/2008/1/9/1969-CFR-ATF-amnesty-regs.pdf>.

⁴⁸ *Id.*

⁴⁹ *Id.*

Guidelines" and dated April 16, 1969, BATFE established a program which allowed the registration of unregistered NFA firearms.⁵⁰

In 1998, the Treasury Department Inspector General investigated these “post-amnesty” registrations and concluded that ATF may not have followed proper procedures, because ATF failed to publish a notice in the Federal Register as required by law, which casts some legal questions upon the legitimacy of the registrations.⁵¹

Moreover, according to Assistant Attorney General, Criminal Division, Philip B. Heymann, the BATFE’s handling of the 1968 Amnesty was a complete disaster:

The amnesty period spawned a massive volume of registrations, transfers and correspondence which the clerical staff was ill-equipped to handle. As a result, some weapons were registered, some were mistakenly registered by part number rather than serial number, and some documents were misfiled. The staff responsible for the system *was aware of these problems.*⁵² [emphasis added].

In *United States v. Freed*, apparently without knowledge of the BATFE’s mismanagement of the registration process and NFRTR after the 1968 amnesty, the Supreme Court held that the amended NFA no longer violated the Fifth Amendment protection against self-incrimination, or violated an individual’s right to due process, as

⁵⁰ A copy of the original document is available at http://www.nfaoa.org/documents/Work_Papers_E.pdf, at 4-5; however, the reproduction is of relatively low quality, and a True Copy was submitted in a 2001 Congressional statement, available at <http://www.nfaoa.org/documents/2001statement.pdf> 19-20, which also includes a True Copy of an ATF memorandum dated March 4, 1975, confirming that the post-amnesty registration program had been implemented but was later discontinued.

⁵¹ U.S. Department of the Treasury, Office of Inspector General, *Special Report on Allegations Concerning the Bureau of Alcohol, Tobacco, and Firearm’s Registration and Recordkeeping of the National Firearms Registration and Transfer Records*, OIG-99-009, at 1, 13 (Washington, Oct. 26, 1998), available at <http://www.nfaoa.org/documents/TreasuryOIG-99-009-1998.pdf>. If the legitimacy of these registrations comes into question, it should be held against the BATFE, not the individual, since the individual followed the procedures established by the BATFE. Furthermore, the loss of such a firearm would be a monumental economic loss to the registrant or individual to whom the firearm has been transferred.

⁵² U.S. Department of Justice, Criminal Division, *Memorandum: Response to letter from Senator McClure*, by Philip B. Heymann and Lawrence Lippe, 2-3 (Nov. 29, 1979), available at <http://www.nfaoa.org/documents/DOJAmnestyMemo1979.pdf>.

Congress had remedied the problem by enacting the 1968 NFA firearms amnesty.⁵³ If the Supreme Court was informed of the problems and mishandlings of the 1968 amnesty, the Court's holding might have been drastically different.

While the 1968 Amnesty was the only amnesty authorized by Congress, the Congress provided, under § 207(d), for future amnesty periods, up to 90 days per period, as needed:

“The Secretary of the Treasury, after publication in the Federal Register of his intention to do so, is authorized to establish such periods of amnesty, not to exceed ninety days in the case of any single period, and immunity from liability during any such period, as the Secretary determines will contribute to the purpose of this title.”⁵⁴

E. The Firearms Owners' Protection Act [FOPA] of 1986

The passage of FOPA prohibited the possession of machineguns that were not legally possessed prior to its enactment on May 19, 1986.⁵⁵ The effect was to freeze the number of machineguns that could be legally owned by private citizens. While previously contending that FOPA nullified the amnesty provision for machineguns, the BATFE has recently changed their position.⁵⁶ Moreover, given that the number of NFA registered

⁵³ *United States v. Freed*, 401 U.S. 601, 605 (1971). The Court stated, “Under the present Act only possessors who lawfully make, manufacture, or import firearms can and must register them; *the transferee does not and cannot register*. It is, however, unlawful for any person to receive or possess a firearm which is not registered to him in the National Firearms Registration and Transfer Record.” [original emphasis]. *Id.* at 604.

⁵⁴ 82 Stat. 1235, § 207(d).

⁵⁵ 100 Stat. 452, § 102(9); codified at 18 U.S.C. § 922(o)(1) (1986).

⁵⁶ U.S. Congress, House Committee on Appropriations, Subcommittee on the Treasury, Postal Service, and General Government Appropriations, *Treasury Postal Service, and General Government Appropriations for Fiscal Year 2002, Part 3, Statements of Members of Congress and Other Interest Individuals and Organizations*, 107th Cong., 1st Sess., at 10 (Washington, GPO, 2002), available at <http://www.nfaoa.org/documents/2001statement.pdf>; The BATFE has now taken the position that they have the power to authorize a new amnesty, but choose not to do so, so as not to “jeopardize pending ATF investigations and prosecutions of NFA violations.” BATFE, *ATF National Firearms Act Handbook*, at 23 (June 2007), available at http://www.atf.gov/firearms/nfa/nfa_handbook/index.htm.

firearms, post-amnesty, has continued to rise, one can only conclude that either the BATFE has continued to allow a BATFE-discretionary amnesty, which is contrary to law,⁵⁷ or, that which is more likely, the BATFE has been adding lost/destroyed firearm registrations back into the NFRTR, because it assumes the NFRTR to be in error.⁵⁸

F. NFA Registration Process and Penalties

The confluence of the NFA, CGA, and FOPA has resulted in a series of procedures to register a NFA weapon, as well as, penalties for the failure to do so. A private citizen, who is not otherwise prohibited by law, may acquire an NFA weapon in several ways: 1.) a registered owner of an NFA firearm may apply for ATF approval to transfer the firearm to another person residing in the same state or to a FFL in another state, or an individual may purchase an NFA firearm from a FFL;⁵⁹ 2.) an individual may apply to the BATFE for approval to make and register an NFA firearm (except machine gun);⁶⁰ or 3.) an individual may inherit a lawfully registered NFA firearm.⁶¹

⁵⁷ 90 P. L. 618; 82 Stat. 1235, § 207(d); Eric Larson, *Errors in the National Firearms Registration and Transfer Record: A New Amnesty Period May be Required to Correct Them*, prepared for the Subcommittee on Treasury, Postal Services, and General Government of the Committee on Appropriations, at 41-139 (Apr. 8, 1997), available at <http://www.nfaoa.org/documents/1997testimony.pdf>. This is supported by the Treasury Department Inspector General's statement that the BATFE, "may have failed to follow procedures by failing to publish [notice of ATF's years-long extension of the 1968 Amnesty] in the Federal Registrar, as required by the Gun Control Act of 1968." U.S. Congress, House Committee on Appropriations, Subcommittee on the Treasury, Postal Service, and General Government Appropriations, *Treasury Postal Service, and General Government Appropriations for Fiscal Year 2002, Part 3, Statements of Members of Congress and Other Interest Individuals and Organizations*, 107th Cong., 1st Sess., at 9 (Washington, GPO, 2002), available at <http://www.nfaoa.org/documents/2001statement.pdf>.

⁵⁸ U.S. Department of the Justice, Office of Inspector General, *The Bureau of Alcohol, Tobacco, Firearms and Explosives' National Firearms Registration and Transfer Record*, I-2007-006, at 31 (June 2007), available at <http://www.nfaoa.org/documents/DOJ-OIG2007NFRTRreport.pdf>. The lack of an official GAGAS audit precludes a definitive determination on this issue; for example, a "lost" registrations could represent a lost transfer document or documents, or a complete loss of the entire record of a registered NFA firearm or device, as occurred in the Napolilli case, discussed later in this article.

⁵⁹ 26 U.S.C. § 5811.

⁶⁰ 26 U.S.C. § 5822.

The process for registering a NFA firearm is as follows: 1.) the applicant must file an application, in duplicate, with the BATFE; 2.) if not a Special Occupational Taxpayer licensed to manufacture NFA firearms or devices, pay the two-hundred dollar tax; 3.) if the transferee is an individual, thus exempting corporations and trusts, he/she must submit fingerprints and photographs; and, 4.) the signature of the chief law enforcement officer or other person of prominence, determined by the BATFE.⁶²

The penalty for violating the NFA, specifically receiving, possessing, or transferring an unregistered NFA firearm, is a fine of up to two-hundred and fifty thousand dollars, imprisonment for up to ten years, and forfeiture of the firearm and any vessel, vehicle, or aircraft used to conceal or convey the firearm.⁶³ Firearms, for which there are no or incomplete records in the NFRTR, are considered contraband by the BATFE and are subject to seizure and forfeiture.⁶⁴

III. The NFRTR

Under the NFA, the Secretary of the Treasury, now the Attorney General, is required to “maintain a central registry of all firearms in the United States which are not in the possession or under the control of the United States. This registry shall be known as the National Firearms Registration and Transfer Record.”⁶⁵ The NFRTR must include

⁶¹ 26 U.S.C. § 5811

⁶² *Id.*; 26 U.S.C. § 5812. The fee for transferring an AOW is \$5. § 5811.

⁶³ 26 U.S.C. §§ 5861(d),(j); 26 U.S.C.S. § 5872; 49 U.S.C. §§ 781-788.

⁶⁴ U.S. Congress, House Committee on Appropriations, Subcommittee on the Treasury, Postal Service, and General Government Appropriations, *Treasury Postal Service, and General Government Appropriations for Fiscal Year 2002, Part 3, Statements of Members of Congress and Other Interest Individuals and Organizations*, 107th Cong., 1st Sess., at 9 (Washington, GPO, 2002), available at <http://www.nfaoa.org/documents/2001statement.pdf>.

⁶⁵ 26 U.S.C. § 5841(a); 6 U.S.C. § 531; 116 Stat. 2135 (2003).

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

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

IV. The Inaccuracy of the NFRTR

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

⁶⁶ § 5841(a)(1)-(3).

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

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

⁶⁹ *Id.*

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

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

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

At the same time, the Congress heard testimony that the BATFE alleged J. Curtis Earl, a federally licensed NFA dealer, illegally possessed 475 unregistered firearms.⁷⁴

While ATF had consulted microfiche copies of NFRTR records, the attorney who represented Mr. Earl noted that Mr. Earl,

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

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

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

⁷² *Id.* at 1.

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

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

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

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

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

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

⁷⁶ 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.nfaoa.org/documents/DOJamnestyMemo1979.pdf>.

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

⁷⁸ NFA Branch Chief memorandum to ATF Assistant Director for Technical and Scientific Services, Purification and Verification of the National Firearms Registration and Transfer Record, Apr. 3, 1975,

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

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

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

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

⁸⁰ BATFE/NFRTR *Roll Call* Training Video, Oct. 1995, available at http://www.nfaoa.org/documents/rollcall_highlights.mp4 or as text <http://www.nfaoa.org/documents/BuseyTranscript.pdf> at 20.

⁸¹ *Id.*

⁸² *Id.*

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

V. Congressional Hearings/OIG Audits

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

⁸³ *Id.*

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

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

A. 1934-1980

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

⁸⁶ *Haynes v. United States*, 390 U.S. 85, 100 (1968).

⁸⁷ U.S. Congress, Senate Committee on the Judiciary, Subcommittee to Investigate Juvenile Delinquency, *Pursuant to S. Res. 240*, 90th Cong., 2nd Sess., (Washington, GPO, 1968), available at http://www.nfaoa.org/documents/IRS_Commissioner_GCA_Hearing.pdf.

⁸⁸ *Id.* at 661.

⁸⁹ *Id.*

B. 1980-1995

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

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

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

⁹¹ *Id.* at 63.

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

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

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

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

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

⁹⁴ *Id.* at 33.

⁹⁵ *Id.*

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

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

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

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

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

C. 1995-1998

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

⁹⁹ *Id.* at 33.

¹⁰⁰ *Id.*

¹⁰¹ U.S. Congress, House Committee on the Judiciary, Department of Justice, *Serial No. 109-137*, 109th Cong., 2nd Sess., at 27 (Washington, GPO, 2006), available at <http://www.nfaoa.org/documents/DOJHearingsserialno109-137.pdf>.

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

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

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

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

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

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

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

Representative Funderburk reiterated Jefferies comment that,

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

Most damaging was Jefferies legal opinion of the incident,

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

In 1996, the BATFE charged John Daniel LeaSure with illegal possession of firearms, in a case where the testimony of Mr. Schaible would later be impeached by an internal BATFE investigation into the destruction of NFA documents by BATFE employees.¹⁰⁸ Mr. Schaible testified, under oath, when asked if he was aware of BATFE employees throwing away NFA documents so they would not have to process them, he answered, “Yes.”¹⁰⁹ When asked if NFA Branch Clerks throwing away such documents could have resulted in the BATFE believing Mr. LeaSure to be in possession of allegedly unregistered firearms, Mr. Schiabile responded, “Certainly.”¹¹⁰ More disconcerting is

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* at E 1461-62.

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

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

¹¹⁰ *Id.* at 237.

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

This admonition in the Congressional Record, however, did not stop Mr. Schiable from changing his story during an internal 1997 BATFE investigation into the destruction of NFA documents by BATFE employees. During the investigation, Mr. Schiable told investigators, under oath, that one may have construed from his testimony, “that ATF employees were destroying documents, but this was not the case.”¹¹⁴ Mr. Schiable’s sworn testimony in the *LeaSure* case clearly and legally establishes that the BATFE destroyed NFA documents; otherwise, the United States would have appealed the decision to dismiss the convictions. To appeal and lose would have resulted in the Court

¹¹¹ *Id.*

¹¹² *Id.* at 239.

¹¹³ 142 Cong. Rec. E 1461 (1996) (statement of Honorable David Funderburk).

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

of Appeals upholding the verdict and writing case law that would have invalidated the NFRTR.

D. 1998

In October 1997, the Department of the Treasury, Office of Inspector General, at the request of Representative Dan Burton, then Chairman of the House Committee on Government Reform and Oversight, began investigating allegations that the NFRTR was inaccurate, incomplete and, therefore, unreliable.¹¹⁵ Chairman Burton requested the investigation in response to five specific allegations by a private citizen, based on statistical and documentary evidence, which “may be valid and legitimate.”¹¹⁶ The Treasury Department Inspector General rendered a report on the citizen’s allegations in October 1998.¹¹⁷

The investigation found, among other things, that “National Firearms Act (NFA) documents had been destroyed about 10 years ago by contract employees. We could not obtain an accurate estimate as to the types and number of records destroyed”¹¹⁸ and “ATF granted amnesty NFA registrations to individuals after December 1, 1968 on a limited

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

¹¹⁶ Treasury Department, Inspector General, *Work Paper Bundle A, 1998 audit of NFRTR*; available at http://www.nfaoa.org/documents/Work_Papers_A.pdf at 53-54.

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

¹¹⁸ *Id.* at 1. This is in direct contradiction to Mr. Schiable’s later testimony.

basis [almost 2,500 registrations] providing certain conditions were met. ATF did not publish its intent to grant an amnesty period as required by the Gun Control Act.”¹¹⁹

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

The Treasury Department Inspector General undertook a separate audit of the NFRTR in addition to the one initiated in response to the citizen complaint, which examined other aspects of the NFRTR. This additional audit of the NFRTR was published in December of 1998.¹²¹ The additional audit revealed that the BATFE allowed unauthorized access to the database by individuals no longer employed by the BATFE, remittance checks were left unsecured, transfers were not processed in a timely manner, and NFA weapons are registered to dead people.¹²² Furthermore, and more disconcerting, the audit found that when the BATFE combined the existing NFRTR database with its new upgraded NFRTR database, “ATF *did not* have adequate assurance that all of the entries had been transferred in order to make *the registry complete for its*

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

¹²⁰ U.S. Department of the Treasury, Office of Inspector General, *Work Papers C*, A-CH-98-001, at C-18, available at http://www.nfaoa.org/documents/Work_Papers_C.pdf at 33-34.

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

¹²² *Id.* at 1-23.

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

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

¹²³ *Id.* at 10.

¹²⁴ *Id.* at 11.

¹²⁵ U.S. Department of the Treasury, Office of Inspector General, *Work Papers C*, A-CH-98-001, at C-37 available at http://www.nfaoa.org/documents/Work_Papers_C.pdf at 65.

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

¹²⁷ *Id.*

various information from various sources but the original documentation remains missing and the accuracy of the documentation provided cannot be assured.”¹²⁸

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

The audit report continued,

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

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

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

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² *Id.* at 12.

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

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

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

¹³³ *Id.* at 13.

¹³⁴ *Id.*

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

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

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

¹³⁸ *Id.* at 23.

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

Of the 528 records and documents reviewed: We discovered a total of 395 errors or omissions of which 176 were Critical to the NFA mission and the remaining 219 were Administrative... We were unable to adequately identify 14,301 Unknown records contained within the category ‘Other.’ These records have subsequently been tentatively identified as 9,621 miscoded Form 6 and 4,680 unknown (database conversion errors).¹³⁹ Hence, the overall error rate, without consideration for the “Other” category, was 74.8%, and Critical error rate was 33.3%. To better understand the distinction between Critical and Administrative errors, “[T]he name of the weapon owner and the weapon serial number were critical,” but “[T]he address, date the document was received, the date of birth of the applicant, and weapon description were [not] critical;” hence, not critical has been termed Administrative.¹⁴⁰ More interesting, to this end, is the fact that “Table 3: Sampling Results: Error Rate Estimates” has been completely redacted.¹⁴¹

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

¹³⁹ U.S. Department of the Treasury, Office of Inspector General, *Work Papers H*, A-CH-98-001, at H-0, available at http://www.nfaoa.org/documents/Work_Papers_H.pdf at 28.

¹⁴⁰ U.S. Department of the Treasury, Office of Inspector General, *Work Papers F*, A-CH-98-001, at F-37 available at http://www.nfaoa.org/documents/Work_Papers_F.pdf at 48.

¹⁴¹ U.S. Department of the Treasury, Office of Inspector General, *Work Papers H*, A-CH-98-001, available at http://www.nfaoa.org/documents/Work_Papers_H.pdf at 35.

¹⁴² *Id.* at H-1, PDF at 32-60.

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

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

Eric M. Larson, a Senior Analyst at the U.S. Government Accountability Office, whose complaint in his capacity as a private citizen to the House Committee on Government Reform and Oversight resulted in the 1998 audits of the NFRTR, agreed that the above are critical errors, “but they represent only the barest minimum guideline standards.”¹⁴⁶ Mr. Larson continued, “To be accurate and reliable, ‘the identification of

¹⁴³ *Id.*

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

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

¹⁴⁶ Letter from Eric M. Larson, Response to Questions asked by Joshua Prince, to Joshua Prince, at 4, dated Jan. 1, 2008, available at

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

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

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

It seems a failure of due diligence for BATFE to fail to determine that the information specified in the 1969 regulations is not “critical” information in audits of the NFRTR, when it specifically interpreted its Congressional mandate to require the Director to

http://blog.princelaw.com/assets/2008/1/5/Eric_Larson_letter_to_Joshua_Prince.pdf. Mr. Larson stated that his comments reflect his personal opinions, and do not represent the policy or position of the U.S. Government Accountability Office (GAO).

¹⁴⁷ *Id.*

¹⁴⁸ *Id.* at 4-5.

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

collect this information on the Form 4467s to implement the 1968 amnesty, which was designed to register unregistered firearms and reliably identify them and their owners.¹⁵⁰

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

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

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

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

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

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

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

E. 1999-2002

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

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

¹⁵³ *Id.*

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

¹⁵⁵ *Id.*

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

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

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

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

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

¹⁵⁸ *Id.* at 24

¹⁵⁹ *Id.*

¹⁶⁰ *Id.* at 25.

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

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

¹⁶¹ *Id.*

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

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

¹⁶⁴ *Id.*

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

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

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

F. 2003-2007

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

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

¹⁶⁷ *Id.*

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

¹⁶⁹ *Id.* at 74.

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

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

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

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

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

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

¹⁷³ *Id.*

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

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

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

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

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

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

¹⁷⁶ *Id.* at viii.

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

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

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

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

Nonetheless, the report concluded,

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

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

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

¹⁷⁸ *Id.* at viii.

¹⁷⁹ *Id.*

¹⁸⁰ *Id.* at x.

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

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

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

¹⁸¹ *Id.* at iii.

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

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

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

¹⁸³ BATFE/NFRTR *Roll Call Training Video*, Oct. 1995, available at http://www.nfaoa.org/documents/rollcall_highlights.mp4 or as text <http://www.nfaoa.org/documents/BuseyTranscript.pdf>.

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

¹⁸⁵ Mark Twain

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

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

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

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

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

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

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

¹⁸⁷ *Id.* at 21.

¹⁸⁸ *Id.* at 21-22.

¹⁸⁹ *Id.* at 22.

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

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

¹⁹⁰ *Id.* at 31.

¹⁹¹ 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.nfaoa.org/documents/DOJAmnestyMemo1979.pdf>.

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

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

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

VI. The Absence of Paperwork is not a Defense

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

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

¹⁹⁴ Letter to Alan B. Mollohan, Chairman, Subcommittee on Commerce, Justice, Science, and Related Agencies, Committee on Appropriations, by Fritz J. Scheuren, VP Statistics NORC, 1 (Dec. 11 2007); available at http://www.nfaoa.org/documents/Scheuren_Committee_Chair_Letter.pdf.

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

¹⁹⁶ *Id.*

¹⁹⁷ 26 U.S.C. § 5841.

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

A. Error Letters

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

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

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

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

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

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

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

²⁰¹ *Id.*

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

²⁰³ Letter to Ms. Alma McCoy, BATFE Disclosure Specialist, *Freedom of Information Act request for Error Letters*, by Joshua Prince, (Nov. 2 2007), available at http://blog.princelaw.com/assets/2007/12/28/Response_to_BATFE_CATEGORY_FOIA_Response.pdf.

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

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

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

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

²⁰⁵ 26 U.S.C. §§ 6103(b)(1)-(2).

²⁰⁶ § 6103(b)(2).

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

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

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

B. The BATFE's Improper Denial of Exculpatory Evidence

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

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

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

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

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

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

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

²¹³ *Id.*

²¹⁴ *Id.*

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

²¹⁶ *Id.*

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

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

When the defense sought to acquire the abovementioned letters, in a motion to compel discovery, the BATFE Chief Counsel argued that for the Honorable Charles N. Clevert to decide the relevance of or exculpatory nature of the documents, Judge Clevert would have to see the document; however, the BATFE “claims it is privileged from disclosing correspondence with persons or companies on guns because it is a tax issue” under 26 U.S.C. 6103.²²¹ More disconcerting, BATFE Chief Counsel declared, through

²¹⁷ *Id.*

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

²¹⁹ Private Correspondence with Len Savage, on file with author.

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

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

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

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

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

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

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

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

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

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

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

C. Accuracy and Completeness of the NFRTR

How accurate is the NFRTR? Nobody outside of the BATFE knows, but a summary table of NFRTR errors compiled from public documents is not encouraging.²²⁸ In 1994, documents released by BATFE in response to a FOIA stated an examination of 25,611 NFRTR records disclosed 1,567 “Errors” (.01%) and 373 “Significant Errors” (.01%) while another 36,903 records had 2,155 “Errors” (6%); however, the BATFE changed the definition of most “Significant Errors” to “Errors,” in an obvious effort to manipulate the statistics.²²⁹ In 1998, the Treasury Department Inspector General used various definitions of “critical” error, which produced different estimates, only some of which are known.²³⁰ The “critical” error rate for a sample of about 140 Forms 4467 was calculated to be 4.3% by one definition (in the published report) and 18.4% by another

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

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

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

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

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

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

²³¹ *Id.*

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

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

²³⁴ *Id.* at 10.

²³⁵ *Id.*

²³⁶ *Id.* at 11.

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

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

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

²³⁷ *Id.*

²³⁸ *Id.* at 11-12.

²³⁹ *Id.* at 82-83.

²⁴⁰ *Id.* at 83-92.

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

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

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

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

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

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

²⁴² *Id.* at 535-36.

²⁴³ *Id.* at 538.

²⁴⁴ *Id.* at 545.

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

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

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

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

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

²⁴⁶ *Id.* at 543 (citing a telephone interview by Eric Larson).

²⁴⁷ *Id.* at 539.

²⁴⁸ *Id.* at 545-46.

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

²⁵⁰ Personal Communication on Dec. 24, 2007, in possession of author.

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

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

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

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

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

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

²⁵³ *Id.* at 4.

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

²⁵⁵ *Id.* at 8.

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

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

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

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

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

²⁵⁶ *Id.*

²⁵⁷ *Id.* at 10.

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

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

²⁶⁰ Letter to Alan B. Mollohan, Chairman, Subcommittee on Commerce, Justice, Science, and Related Agencies, Committee on Appropriations, by Fritz J. Scheuren, Vice President, Statistics, National Opinion Research Center, at 1 (Dec. 11, 2007); available at http://www.nfaoa.org/documents/Scheuren_Chair_Letter.pdf.

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

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

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

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

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

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

²⁶³ *Id.*

about BATFE's contention that it had no record of a firearm that BATFE had approved for transfer to his company, Pars International Corporation, on April 12, 2007.²⁶⁴ Mr. Shafizadeh noted that he had submitted an application to BATFE on June 4, 2007, to transfer the firearm; that BATFE responded by stating "the firearm is not shown registered" to Pars International Corporation, less than two months after ATF registered the firearm to Pars; provided Mr. Houchens with a copy of the approved April 12, 2007, BATFE registration document; and expressed concern over the inaccuracy of the NFRTR.²⁶⁵ He articulated his frustration to Mr. Larson by stating, "Over the past 25 years I have written many letters of that nature to no avail."²⁶⁶

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

We do not believe an independent audit of the database is needed. The ongoing efforts we are making to ensure the completeness and accuracy of the NFRTR by imaging and indexing the documents, performing database verification, and linking the retrieval system with the imaging system will result in strong internal controls for the NFRTR.²⁶⁷ If the BATFE's "ongoing efforts" to improve the NFRTR were successful, the BATFE should not lose an approved transfer application in as little as two months, let alone, ever. There should be sufficient redundancy in the NFRTR system to preclude losing any approved transfer application.

²⁶⁴ *Id.* at 4.

²⁶⁵ *Id.*

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

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

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

Furthermore,

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

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

²⁶⁹ *Id.* at 1-2.

²⁷⁰ *Id.* at 2.

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

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

VII. The Intersection of Procedural Due Process and the NFRTR

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

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

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

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

²⁷³ U.S. CONST. amend. V.

²⁷⁴ *Howard v. Grinage*, 82 F.3d 1343, 1349 (6th Cir. 1996).

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

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

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

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

The standard is “whether the erroneously admitted evidence, viewed objectively in light of the entire record before the jury, was sufficiently material to provide the basis for conviction or to remove a reasonable doubt that would have existed on the record without it. In short it must have been ‘crucial, critical, highly significant.’”²⁷⁹ The Supreme Court similarly held that, “[t]he Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.”²⁸⁰

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

²⁷⁷ *Lassiter v. Dep't of Social Services*, 452 U.S. 18, 33 (U.S. 1981).

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

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

²⁸⁰ *In re Winship*, 397 U.S. 358, 364 (1970).

²⁸¹ Fed. R. Evid. 803(10)

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

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

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

²⁸³ Letter to Alan B. Mollohan, Chairman, Subcommittee on Commerce, Justice, Science, and Related Agencies, Committee on Appropriations, by Fritz J. Scheuren, VP Statistics NORC, 1 (Dec. 11 2007); available at http://www.nfaoa.org/documents/Scheuren_Committee_Chair_Letter.pdf.

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

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

VIII. The Intersection of the Federal Rules of Evidence and the NFRTR²⁸⁶

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

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

While the BATFE is likely to offer two Certificates of Nonexistence of a Record (CNR) to show, under 803(10), that the neither the defendant's name nor the firearm's

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

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

²⁸⁷ Fed. R. Evid. 803(10)

serial number exist in the NFRTR, such certificates are based on a search of the NFRTR but fail to acknowledge the numerous Treasury Department and Justice Department Inspector General reports and Congressional Hearings, which depict the NFRTR as inaccurate.²⁸⁸

The hearsay exception contains the principle that, “Evidence that is otherwise admissible under an exception to the hearsay rule is admissible primarily because evidence of that kind is generally trustworthy, but if, in a particular instance, the circumstances indicate a lack of trustworthiness, the evidence should be excluded.”²⁸⁹ Nonetheless, Chief United States District Judge George Z. Singal, U.S. District Court for the District of Maine, held that defendant Giambro failed to meet this standard because he could not show that the NFRTR was inaccurate as it pertained to him.²⁹⁰ This holding lacks any form of commonsense, since one cannot show an absence of a record, but for the record not existing. While Judge Singal based his decision on *U.S. v. Rith*, which declared that in relation to a Sixth Amendment challenge, the defendant failed to allege any “defect in the NFRTR as it pertain[ed] to him. General claims of unreliability, particularly those that rely upon outdated information, are not sufficient to raise a constitutional deficiency,” he failed to accept the evidence of the inaccuracies in the NFRTR, since the late 1970’s and up until the present time, which depict a consistent trend of audits, Congressional Hearings, and Congressional Actions to rectify the NFRTR.²⁹¹ Furthermore, Judge Singal’s reliance on *U.S. v. Rith* may have been in error

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

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

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

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

given the Supreme Court's decision in *Crawford v. Washington*, which is discussed in the section *The Intersection of Confrontation Clause and the NFRTR*.²⁹²

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

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

That "provision for escape" is contained in the final clause of the Rule: evaluative reports are admissible "unless the sources of information or other circumstances indicate lack of trustworthiness." This trustworthiness inquiry -- and not an arbitrary distinction between "fact" and "opinion" -- was the Committee's primary safeguard against the admission of unreliable evidence, and it is important to note that it applies to all

²⁹² *Crawford v. Washington*, 541 U.S. 36 (2004).

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

²⁹⁴ BATFE/NFRTR *Roll Call Training Video*, Oct. 1995, available at http://www.nfaoa.org/documents/rollcall_highlights.mp4 or as text <http://www.nfaoa.org/documents/BuseyTranscript.pdf>.

²⁹⁵ *Beech Aircraft Corp. v. Rainey*, 488 U.S. 153, 167 (1988).

elements of the report. Thus, a trial judge has the discretion, and indeed the obligation, to exclude an entire report or portions thereof -- whether narrow "factual" statements or broader "conclusions" -- that she determines to be untrust-worthy.²⁹⁶ Furthermore, the Court stated, "[T]he admission of a report containing 'conclusions' is subject to the ultimate safeguard -- the opponent's right to present evidence tending to contradict or diminish the weight of those conclusions."²⁹⁷

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

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

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

²⁹⁷ *Beech Aircraft Corp*, 488 U.S. at 168 (1988).

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

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

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

³⁰¹ *Id.*

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

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

IX. The Intersection of Confrontation Clause and the NFRTR

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

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

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

³⁰⁴ U.S. CONST. amend. VI.

³⁰⁵ *Crawford v. Washington*, 541 U.S. 36, 68 (2004)

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

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

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

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

³⁰⁷ Fed. R. Evid. 801(c).

³⁰⁸ *Crawford*, 541 U.S. at 68.

³⁰⁹ *Id.* at 51.

³¹⁰ *Id.*

³¹¹ *Id.* at 51-51 (quoting *White v. Illinois*, 502 U.S. 346, 365 (1992)).

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

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

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

³¹² *Id.* at 52.

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

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

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

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

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

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

³¹⁶ *Earle*, 488 F.3d at 544.

³¹⁷ *Id.*

³¹⁸ *Id.* at 545.

³¹⁹ *Id.*

³²⁰ *United States v. Nicely*, 922 F.2d 850, 860 (D.C. Cir. 1991).

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

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

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

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

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

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

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

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

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

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

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

³²⁸ U.S. Department of Justice, Criminal Division, *Memorandum: Response to letter from Senator McClure*, by Philip B. Heymann and Lawrence Lippe, at 4 (Nov. 29, 1979), available at <http://www.nfaoa.org/documents/DOJAmnestyMemo1979.pdf>.

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

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

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

A. Judiciary

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

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

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

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

³³¹ *Id.*

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

B. Legislature

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

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

machinegun that was lawfully possessed before the date this subsection takes effect."³³³

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

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

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

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

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

C. BATFE Amnesty Refusal Rationale and Rebuttals Thereof

The most comprehensive list of reasons offered by the BATFE to oppose establishing a new amnesty period were given by the BATFE to the Subcommittee on Treasury, Postal Service and General Government, Committee on Appropriations, in November 1999. The only known formal rebuttals were by Eric M. Larson in his 2000 statement³³⁶ and an analysis by William J. Krouse of the Congressional Research Service in 2005, of both the BATFE's reasons and Mr. Larson's rebuttals.³³⁷

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

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

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

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

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

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

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

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

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

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

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

³⁴¹ *Id.* at 26.

³⁴² *Id.*

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

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

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

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

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

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

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

³⁴⁸ *Id.*

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

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

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

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

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

³⁵¹ *Id.*

³⁵² *Id.*

³⁵³ *Id.*

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

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

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

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

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

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

³⁵⁷ *Id.*

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

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

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

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

³⁵⁹ *Id.*

³⁶⁰ *Id.*

³⁶¹ *Id.*

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

not realize they had an NFA weapon in their possession.”³⁶³ To begin with, an additional amnesty should NOT only be a temporary solution. If the BATFE properly conducts the amnesty and, thereafter, continuously and meticulously checks, maintains, and improves the NFRTR, future GAGAS audits by the GAO should depict the NFRTR as sufficient for criminal proceedings. Moreover, while ignorance of the law is not generally recognized as a legitimate defense, a serious effort by BATFE to continuously publicize the amnesty period at the national, state, and local levels at least 90 days before and continuously during the amnesty, as discussed in the next section, would go a long way towards restoring credibility in the Government and in BATFE³⁶⁴ “In fact an amnesty would strengthen ATF’s legal cases by, among other things, enhancing the accuracy and reliability of ATF’s records.”³⁶⁵ More importantly, and continually overlooked by the BATFE, the purpose of an amnesty in this instance is to ensure that law-abiding citizens are not prosecuted for possession of an unregistered weapon, which was legally registered, but for which the NFRTR is in error and the paperwork has been lost or destroyed, or unjustly deprived of their valuable personal property—possibly a rare firearm that is a family heirloom.

D. Amnesty³⁶⁶

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

³⁶⁴ *Id.*

³⁶⁵ *Id.*

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

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

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

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

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

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

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

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

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

³⁶⁷ Private Communication from Jeffery W. Koch, on file with the author.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The BATFE NFA-Amnesty Division and Firearms Classification Division shall be responsible for instituting a new NFRTR: The new database will allow for the stripping of data from the E-Forms and probabilistic searches. The old database will be

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

³⁷⁵ *Id.*

kept, as a backup, for twenty-five years. This will ensure that all previously registered firearms are registered in the new NFRTR and that an individual is not prosecuted for a firearm, which was registered in the old NFRTR, but not in the new NFRTR.

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

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

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

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

XI. Conclusion

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

How is it possible for a Governmental Agency to knowingly consistently lose and/or destroy paperwork, and yet, rely on the absence of paperwork in criminal prosecutions? This violates our sense of justness and fairness, and must be corrected. As has been depicted by firearm law experts, an internationally recognized expert in

administrative records and statistics, and a senior analyst at the GAO,³⁷⁷ the only way to correct the NFRTR is through an amnesty. While Congressional Hearings on how to implement an amnesty will likely take several months, the Congress must act immediately to stop the prosecutions of individuals, who are unable to show approved paperwork, because of the inaccuracy, completeness, and reliability of the NFRTR, until the NFRTR is adequately corrected. If the Congress is unable or unwilling to ensure that justice prevails, the Judiciary must find, as a matter of law, that the NFRTR is insufficient in criminal prosecutions.

As Mr. Scheuren declared in his letter,

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

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

If the court should discover that our negligence caused an unwarranted arrest and trial, the resultant loss of public trust would be irreparable. Just as serious is the possibility that an innocent man might be convicted if he could not find his registrant form and we certified that he had not registered the firearm when, in fact, we had failed to locate his registration in the Record [NFRTR].³⁷⁹

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

³⁷⁸ Letter to Alan B. Mollohan, Chairman, Subcommittee on Commerce, Justice, Science, and Related Agencies, Committee on Appropriations, by Fritz J. Scheuren, VP Statistics NORC, 2 (Dec. 11 2007); available at http://www.nfaoa.org/documents/Scheuren_Chair_Letter.pdf.

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