EXTENSIONS OF REMARKS

INSTITUTIONAL PERJURY

HON. DAVID FUNDERBURK
OF NORTH CAROLINA
IN THE HOUSE OF REPRESENTATIVES

Friday, August 2, 1996

Mr. FUNDERBURK. Mr. Speaker, on October 18, 1995, Thomas A. Busey, then Chief of the National Firearms Act Branch of the Bureau of Alcohol, Tobacco and Firearms—hereafter BATF—made a videotaped training presentation to BATF headquarters personnel during a rollcall training session. Rollcall training is weekly or periodic in-house training for BATF officials—a routine show and tell whereby bureaucrats learn about each other's duties and functions.

Busey's National Firearms Act Branch administers the National Firearms Act of 1934,* the taxation and regulatory scheme governing machineguns, silencers, short-barreled rifles and shotguns, destructive devices, and so forth. In his capacity of NFA Branch, Chief Busey was the official custodian of the National Firearms Registration and Transfer Record—hereafter NFR&TR—mandated by 26 U.S.C. § 5841.

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

Every prosecution and forfeiture action brought by the United States and involving an allegedly unregistered NFA firearm requires testimony under oath by a duly authorized custodian of the NFR&TR that after a diligent search of the official records of which he/she is custodian, no record of the registration of the firearm in question was found—or was found but showed a different registrant than the person being prosecuted.[2] An alternative method of proving the same facts is by admission into evidence of a certified copy under official Treasury Department seal of a similar written declaration by the custodian.[3] This is a critical element of the Government's proof, and, according to Busey, occurred 880 times in 1995 alone, presumably fiscal year 1995.

Busey began his rollcall presentation by acknowledging that ''Our first and main responsibility is to make accurate entries and to maintain accuracy of the NFRTR.'' Moments later Busey makes the astonishing statement that ''when we testify in court, we testify that the data base is 100 percent accurate. That's what we testify to, and we will always testify to that. As you probably well know, that may not be 100 percent true.''

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

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

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

> When I first came in a year ago, our error rate was between 49 and 50 percent, so you can imagine what the accuracy of the NFRTR could be, if your error rate's 49 to 50 percent.

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

Consider this matter in its starkest terms: a senior BATF official lecturing other senior BATF officials at BATF national headquarters in Washington, 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?

All this was too brazen for even some BATF officials to stomach. Acting on tips from several BATF officials—there are honest men and women in government, even in BATF—I promptly filed a Freedom of Information Act[4] demand precisely describing the Busey tape. The first reaction was predictable. After reviewing the incriminating tape, BATF officials discussed whether they could get away with destroying it. Wiser heads prevailed; obviously any outsider who knew of the tape probably would learn of its destruction—and I would have. Or perhaps all the official shredders were on the loan to the White House.

After much tooing and froing with a dismayed Department of Justice a transcript of the Busey tape was sent to me in February 1996. The Department of Justice was dismayed because the Busey tape was clearly Brady material. Every defense lawyer knows that under the Supreme Court's 1963 decision in *Brady* v. *Maryland*, 373 U.S. 83, the government is required in all criminal prosecutions to provide the defense, in advance of trial, with any evidence tending to show the defendant's innocence. Failure to do so can result in dismissal of an indictment, reversal of a conviction, or other sanctions. Willful failure to produce Brady material can constitute contempt of court, professional misconduct or even a crime.

The Busey tape was clearly exculpatory and clearly implicated every National Firearms Act prosecution and forfeiture in living memory. Worse yet, Busey was only the tip of the iceberg. When the fog had cleared Justice learned that the NFR&TR inaccuracy problem had been the subject of internal BATF 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.[5]

Justice has now commenced the painful chore of advising every NFA defendant in the country of the situation. It did this with a recent mass mailing by U.S. attorneys to defense lawyers and defendants of relevant BATF documents, including the Busey transcript.

The direct consequences of this institutional perjury are just now beginning to occur. In Newport News, VA, on May 21, 1996, U.S. District Judge John A. MacKenzie, after reviewing the Busey transcript, promptly dismissed five counts of an indictment charging John D. LeaSure with possession of machineguns not registered to him.[6] LeaSure, a Class II NFA manufacturer, had received BATF transfer approval for the five guns, but then decided to void the transfers and keep the guns, as he was legally permitted to do. He promptly faxed the voided forms 3 to NFA Branch.[8]

BATF subsequently raided LeaSure and charged him with illegally possessing the five NFA firearms which, according to the NFR&TR, were registered to someone else. The Government ignored the fact that on the date LeaSure said he voided the transfers there was a 21-minute call on his toll records from his fax number to NFA Branch's fax number—at a time when he could have had no idea he would one day be prosecuted for continuing to possess the guns. Rather, the prosecution produced NFA Branch firearms specialist Gary Schaible to testify as custodian of the NFR&TR that the Government's official records did not show any voided transfers and therefore LeaSure was in illegal possession of the guns.[9]

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

The Government's case was not aided when Schaible was forced to admit on cross-examination that two NFA Branch examiners were recently transferred because they had been caught shredding NFA registration documents in order to avoid having to work on them.[10] Note that they were transferred. Not disciplined. Not fired. Not prosecuted. Not destroyed in place. Transferred. Just who is the criminal in these cases?

It is too early to predict how many new trials, appeals and habeas corpus actions will result from this affair. Also of importance is the number of convicted felons presently suffering legal disabilities[11] from flawed firearms convictions and what effect the Busey disclosures will have on their situation.

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

* Footnotes at end of article.

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?

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

[The author is a retired U.S. Department of Justice lawyer and a retired colonel in the marine Corps Reserve practicing firearms law in Greensboro, NC. He is a 1959 graduate of the University of Kentucky and a 1962 graduate of the UK College of Law, where he was note editor of the Kentucky Law Journal. He is a life member of the NRA and holds BATF in minimum high regard.]

FOOTNOTES

[1] Public Law No. 474, ch. 757, 48 Stat. 1236–1240 (Act of June 26, 1934), 26 U.S.C. §§1132–1132q; as amended by Act of April 10, 1936, ch. 169, 49 Stat. 1192; as codified by chap. 736, Act of August 16, 1954 (Internal Revenue Code of 1954), 68A Stat. 721–729; as amended by Public Law No. 85–859, Title II, §203, 72 Stat. 1427, 1428 (Act of September 2, 1958); as amended by Public Law No. 86–478, §§1–3, 74 Stat. 149 (Act of June 1, 1960); as amended by Public Law No. 90–618, Title II, §201, 82 Stat. 1227–1235 (Act of October 22, 1968); as amended by Public Law No. 94–455, 90 Stat. 1834 (Act of October 4, 1976); as amended by Public Law No. 99–308, §109, 100 Stat. 449, 460 (Act of May 19, 1986); and as amended by Public Law No. 100–203, 101 Stat. 1330 (Act of December 22, 1987); Internal Revenue Code of 1986, Title 26 United States Code, ch. 53, 26 U.S.C. §§5801–5872 Title II of the Gun Control Act of 1968).

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

[3] Ibid.

[4] 5 U.S.C. §552.

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

[6] *United States* v. *LeaSure,* Criminal No. 4:95CR54 (E.D. Va. Newport News Div.).

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

[8] BATF forms 3 are used to authorize tax-exempt dealer-to-dealer transfers are to reregister the firearm(s) involved to the transferee. There are numerous other transfer and registration forms used depending upon the nature of the transaction, the status of the parties involved, and the type of firearm and its origin.

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

[10] We are left to conjecture where the NFA Branch shredder is located in relation to its fax machine.

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

GOOD HUNTING, TIM PIFHER

HON. JAMES A. BARCIA

OF MICHIGAN

IN THE HOUSE OF REPRESENTATIVES

Friday, August 2, 1996

Mr. BARCIA. Mr. Speaker, many people fail to appreciate the true therapeutic value of hunting. It sharpens the senses. It challenges the mind. It hones skills. For many people, hunting is the best activity that there can be. Tim Pifher, who has served for 2 years as the president of the Flint regional chapter of Safari Club International is such an individual.

What is particularly special about Tim Pifher's devout interest in hunting and the activities of Safari Club International is that he is thought to be physically challenged. Tim has never stricken me as limited in any way. He makes the most of each day and each activity. And he consistently obtains recognition for his accomplishments.

Tim has been named the ''Special Hunter of the Year'' by the Detroit chapter of the club. He has also been named ''Special Hunter of the Year'' by Safari Club International. This honor is given only to those individuals who have out-of-the-ordinary achievement in the sport of trophy hunting, including those individuals who have persevered against physical limitations despite overwhelming odds.

Many of us here know Safari Club International because of its efforts to conserve wildlife, protect hunters, and educate people. These national and international goals are achieved only through the dedicated local efforts of individuals like Tim Pifher who take their membership in the club seriously.

An avid sportsman, Tim has served as a speaker for many outdoor clubs and disability groups. He has testified at State Senate hearings for crossbows for the disabled. He has served as an archery and airgun instructor for various Cub Scout camps, and been involved with the Tall Pine Council of the Boy Scouts of America. He also is a past vice president of Outdoors Forever's Outdoor Disability Awareness effort.

Tim, his wife Sandy, and his son Matt, all deserve recognition for setting the example that the only limit which matters is that which we place upon ourselves. If we act unlimited, we are unlimited. Mr. Speaker, I urge you and all of our colleagues to join me in congratulating Tim Pifher on his accomplishments, and wishing him the very best for the year to come.

SUB-ACUTE CARE AT NURSING HOMES

HON. ELIOT L. ENGEL

OF NEW YORK

IN THE HOUSE OF REPRESENTATIVES

Friday, August 2, 1996

Mr. ENGEL. Mr. Speaker, with more people living longer in our country, the care of the elderly ill is a growing concern. A new type of care among nursing homes and health care providers is called sub-acute care and is for otherwise seriously ill people needing such treatments as ventilator support, respiratory care, complex IV therapy, peritoneal dialysis, and pain management.

For relatively brief stays, these patients can be given constant and detailed attention in a nursing home to curtail overcrowding at hospitals.

The Split Rock Nursing Home and the Eastchester Park Nursing Home, both in the Bronx, are initiating this type of care, a first in the New York City area. Both facilities, which have 440 beds and are owned by the Zelmanowicz family, have been operating for 25 years and 30 years respectively.

They can provide this care for less than the cost in hospitals, saving money and other resources for the more gravely ill. It also makes life and treatment easier for these patients and their families to have this type of treatment in the usually friendlier confines of a nursing home.

The Split Rock and the Eastchester Nursing Homes are accredited and progressive long-term care facilities serving the diverse communities of the northeastern Bronx.

I want to use this opportunity to congratulate Naomi Zelmanowicz, M.D., Abe Zelmanowicz, and Rebecca Rich for the years they have spent making life more worth living for the elderly in the Bronx.

SALUTING RECENT GRADUATES OF GENERAL EDUCATION DEGREE PROGRAM

HON. LOUIS STOKES

OF OHIO

IN THE HOUSE OF REPRESENTATIVES

Friday, August 2, 1996

Mr. STOKES. Mr. Speaker, I rise today to salute the men and women in Ohio's 11th Congressional District who have recently completed their General Education Degrees [GED]. This honor confers on them the equivalence of a high school diploma, which is an important stepping stone to future success. This degree will enjoin them with the hundreds of thousands of GED recipients who have completed this program over its 54-year existence.

These students of the Cleveland Heights-University Heights school district have a wide range of ages and future plans. Many of them are pursuing further education at the college or vocational school level. Several may now pursue opportunities in the working world with their new degrees. Others will continue their lives with the satisfaction of fulfilling the standards of our rigorous school system.

These GED's represent the culmination of many hours of hard work, commitment, and motivation. I am also proud to note the continued support of the adult basic literary education teachers, staff, and volunteers throughout the community who gave their time and talents to prepare students for the demanding GED course.

Mr. Speaker, the GED program continues to bring pride and self-esteem to young adults and older students. These students have invested valuable time to obtain a crucial level of education that can help open doors to opportunity. I extend my warmest wishes to these determined men and women, and ask my colleagues to join me in wishing them all the best in their future endeavors. I ask that