

How Secrecy Corrodes Democracy

Exclusive: The Obama administration is under fire for its secret policy of using drone strikes to kill alleged al-Qaeda terrorists, including Americans. But the public suspicion is heightened by frustration over decades of excessive government secrecy and deception, says Robert Parry.

By Robert Parry

The United States is a nation foundering in a vast sea of secrets, with government officials showing little regard for the damage that is done to a democratic Republic by withholding millions upon millions of documents from the people.

Some of these excessive secrets relate to current events, such as the unwillingness of the Obama administration to explain its legal reasoning for drone strikes against suspected al-Qaeda terrorists. While there may be some legitimate operational secrets involved, great harm is inflicted on the public trust from refusing to release the parameters and rationale for the program.

The not-unreasonable assumption among many Americans is simply that there is no legal coherence to the policy, at least not one that can be defended in the court of public opinion. Many Americans thus conclude that the government is arrogant, a judgment that runs parallel to an opinion held by many people in Yemen and other countries where drone strikes have occurred.

This image of a hubristic United States has its own negative consequences. It feeds not only anti-Americanism abroad but a sense of alienation at home. Many Americans see democracy as not only short-circuited by all the manipulative political techniques bought by billionaires but by an intentional starving of an informed electorate denied factual sustenance by the government.

This alienation, in turn, is feeding the heated controversy that has played out this week over NBC's disclosure of the Obama administration's white paper, which was provided to Congress summarizing what is contained in a longer classified version of the legal arguments that justify the killing of al-Qaeda suspects, including Americans.

The Justice Department's white paper said it is lawful for "an informed, high-level official" of the U.S. government to authorize the killing of an American if the target is a ranking figure in al-Qaeda who poses "an imminent threat of violent attack against the United States" and if capture isn't feasible.

The disclosure of the white paper has heated up the debate inside the United

States about how such “targeted killings” are done and why the Obama administration has resisted a full discussion of the practice and any legal safeguards that might be applied, such as requiring review by a special court or at least treating such extraordinary overseas slayings with a review similar to what police face when they use deadly force.

A History of Doubt

This debate also is occurring amid a growing popular distrust toward an overly secretive government. The American people intuitively understand that they are being kept in the dark about some of the most vital decisions that a country must undertake, including issues of war and peace. At high levels of government – among both Republicans and Democrats – there exists the benighted view that sharing information with the public is a messy business that is most easily resolved by simply keeping as many secrets as possible.

Sometimes, the motivation is sinister, such as when governments want to lead the American people into warfare and do so by inundating them with propaganda. A decade ago, President George W. Bush applied that strategy to get his war of choice in Iraq. Other times, the secrecy is more the result of timidity or bureaucratic inertia. It is much safer, career-wise, to withhold information than to release it.

Remarkably, despite the many deceptions surrounding the wars in Iraq and Afghanistan, the most severe punishments have been meted out to Americans who have exposed the truth, not those who have hidden it. For instance, Pvt. Bradley Manning is likely to spend much of his young life in prison for releasing government information to WikiLeaks, while senior Bush administration officials who helped spin a giant web of lies have escaped any meaningful accountability.

But the secrecy problem is deeper than these more recent events. On Tuesday, I spent a day at Ronald Reagan’s presidential library in Simi Valley, California, poring through files that date back three decades. I discovered that Freedom of Information Act requests that I filed years ago have failed to gain the release of thousands of pages of documents, which probably never should have been secret in the 1980s, let alone in the second decade of the 21st Century.

Ironically, some of my FOIAs related to Reagan’s aggressive use of propaganda and disinformation to herd the American public behind his policies in Central America and the Near East. Since Reagan’s techniques were sometimes hatched inside the CIA and the national security establishment, each of those agencies gets a chance to object to the release, meaning that the process for declassification can go on for many years.

So, the American people are even denied the facts about how they were manipulated 30 years ago. And this hidden history is not irrelevant to the present. Not only were Reagan's state-of-the-art techniques for controlling public opinion passed on to subsequent administrations but some of the false narratives that Reagan's spin-masters twirled continue to misinform public policy to this day, such as misleading perceptions of how the conflict in Afghanistan originated.

The interminable delays in releasing the true historical record also means that some of this history will be lost forever. Many documents, even when they are finally released, do not clear up all the mysteries. Often, you have to track down the officials involved. But if they are no longer alive, serious gaps will remain.

Plus, the notion that some brilliant historian will someday review the fuller record and grasp all its nuances is largely a myth. Many crucial details only make sense to people who were close to the actual events, whether policymakers or journalists. Once that knowledge is lost, it can't be recreated.

Yet, disclosure of secrets whether past or present remains a low government priority. Indeed, when President Barack Obama began his administration by releasing some secret Justice Department rationalizations for torture, he came under intense criticism from Republicans and their right-wing media allies. The experience seems to have chastened him. It certainly has not been a "mistake" that he has repeated often.

There are always plenty of "tough-guy" reasons why releasing information is tantamount to helping the "enemy." But the long-term consequence of this incessant secrecy is to undermine public trust in government and thus to endanger the future of democracy. Plus, excessive secrecy breeds so much suspicion that it erodes acceptance of secrecy in those moments when it is truly necessary.

Investigative reporter Robert Parry broke many of the Iran-Contra stories for The Associated Press and Newsweek in the 1980s. You can buy his new book, *America's Stolen Narrative*, either in [print here](#) or as an e-book (from [Amazon](#) and [barnesandnoble.com](#)).

Requiem for Cambodia's Crafty King

Exclusive: In an elaborate cremation ceremony, Cambodians bade farewell to their

dead king, Norodom Sihanouk, the crafty leader who for decades tried to maneuver the small country around the interests of great powers, with mixed and sometimes disastrous results, reports Don North from Phnom Penh.

By Don North

Few monarchs have embraced the life and times of their country more dramatically than did King Norodom Sihanouk of Cambodia, whose earthly remains were cremated Monday while over a million of his former subjects watched in awe and devotion.

As fireworks lit the evening sky over Phnom Penh and an artillery salute echoed through the streets, the King's son Sihamoni and the Queen mother Monineath lit the gas jets whose fire would consume the bier of the deceased monarch.

Sihanouk died of a heart attack three months ago in Beijing after a long illness just two weeks before his 90th birthday. He held so many positions of power in his lifetime that the Guinness Book of World Records identifies him as the politician who has served the world's greatest variety of offices.

He served as King twice, Prince twice, once as President, twice as Prime Minister, leader of various governments-in-exile and head of state for the Khmer Rouge. Politically, he also served or opposed the various foreign and internal forces that controlled or sought to control Cambodia since the days of World War II,

Sihanouk began his government career in 1941 at age 18 as the puppet king chosen by the French colonial masters. But he showed his guile and nationalist fervor by outfoxing the French and leading Cambodia to independence without a military bloodbath as was experienced by neighboring Laos and Vietnam.

"The French chose me because they thought I was a lamb," Sihanouk wrote. "But they found out I was a tiger."

When the Vietnam War threatened to become a regional conflict Sihanouk tried to achieve neutrality, but he made choices and alliances that ultimately embroiled Cambodia in the war. He let the North Vietnamese establish bases along the border with South Vietnam, leading to massive American bombing, the destabilization of Cambodia and the eventual takeover by the radical Khmer Rouge whose brutality was blamed for the deaths of an estimated 1.7 million Cambodians.

How much responsibility did Sihanouk have for the disasters that struck Cambodia during his reign and for the imposition of the current repressive regime of Hun Sen today?

It's a question being asked around the world, but not by many Cambodians as they bid farewell with great affection to Norodom Sihanouk whom many consider the last descendant of the God-Kings of Angkor.

Filming the Prince

I first met the then Prince Sihanouk in 1964 when I was assigned to direct a documentary on him by NDR German Television News. My TV crew and I followed him around Cambodia for a month much to his delight. Sihanouk always enjoyed the company of journalists and being interviewed.

A film producer himself Sihanouk often tried to advise me how to produce the documentary about him. He once showed me a film he produced and starred in as the intrepid detective Charlie Chan.

The last day of our tour with him was in Kampong Cham where he was to present medals to local officials. He found himself with several medals left over and said, "Mr. Don, here's a medal for you too, for friendship to my country."

The Prince loved to entertain his subjects when on tour and would play and sing songs that he had composed in Khmer, French and English. He had a passion for cinema, art, theatre and dance.

Sihanouk reportedly had several wives and concubines, producing at least 14 children. Five of his children were killed by the Khmer Rouge. His oldest surviving son, Norodom Sihamoni, 59, has now inherited his father's title as King. His mother is Monique Izzi, the child of a French father and Cambodian mother.

Sihanouk married her in 1955 after awarding her a prize at a beauty contest. She was his constant companion and adviser ever since and is now referred to as the Queen Mother Monineath.

With carefully coiffed gray hair, she bears an amazing resemblance to Queen Elizabeth of England. Her only surviving son is King Norodom Sihamoni, his father's choice to succeed him.

Sihamoni is a tall gentle man who studied ballet in Prague for 25 years and speaks fluent Czech. He is unmarried and is believed by many to be gay. By most accounts, he ascended the throne reluctantly and does not appear to have inherited his father's political skills needed in the deadly political climate of Cambodia.

Several years ago, Sihanouk spoke out for the rights of gays and lesbians in a country little known for civil rights. "I am not gay, but I respect the rights

of gays and lesbians," he said. "It's not their fault if God makes them born that way."

Legislation is pending in Cambodia to legalize same-sex marriage. To date, Sihamoni has shown little desire to expand his role staying in the background while his father was alive. Hun Sen has effectively silenced the new King by forbidding him to do interviews or make foreign trips. An invitation to visit the Smithsonian Institution in Washington D.C. was recently not accepted.

King Sihamoni and the widow Queen mother Monineath have led the mourning for Sihanouk visiting his cremation site regularly as Cambodian TV broadcasts followed their every move. They are tragic figures often seen weeping and comforting each other.

Cambodians are asking if Sihamoni with his mother's support might now begin to act like a king following his father's cremation. Hun Sen is said to have sworn a sacred oath before Sihanouk's corpse to protect the monarchy, but there is little evidence that he will relinquish any of the power he has gained over 28 years since defecting from the Khmer Rouge and becoming leader of the ruling Cambodian Peoples Party (CCP), the former communist party.

The leader of the opposition party Sam Rainsy, now in exile, would face jail if he tried to return to Cambodia. Hun Sen is said to be grooming his three sons for power, which is already shared with his family. Hun Sen's eldest son is a two-star general, his brother a provincial governor, a nephew the national police chief and his family, relatives and friends controlling vast real estate and business enterprises.

Bridges, schools and roads across the country bear Hun Sen's name or that of his powerful wife Bun Rany.

Hun Sen's Kleptocracy

Cambodians whom I have met during the days of funeral ceremonies express little respect for Hun Sen's power or the "kleptocracy" Cambodia has become under his rule and the clique of former communist Khmer Rouge apparatchiks.

I have always found the taxi drive from an airport a good place to get the latest news on which way the wind is blowing with the common man and that old journalistic truism remains in force.

"Hun Sen is selling Phnom Penh real estate and even people's farm land to Korean, Russian and Chinese millionaires and pocketing most of the money," my youthful taxi driver told me in perfect English that he had learned from tourists.

“While they get rich and drive big cars, we have to pay bribes for a doctor’s care and even our children must bring bribes to the teacher every morning. Whatever else he did, nobody ever accused our father-king Sihanouk of corruption.”

Sihanouk’s funeral comes at a time of relative stability in Cambodia and rising prosperity in the capital, Phnom Penh. It’s a city with skyscrapers popping up, glitzy shopping malls and restaurants replacing the French colonial architecture and tree-shaded streets.

But economic growth has passed by the countryside, where the majority of the 13 million people live. Only a quarter of Cambodians have access to electricity and about a third of homes have no running water.

Last Thursday, four days of funeral ceremony began with an exotic procession of marching groups, chanting Buddhist monks, military formations and gamelon orchestras. An estimated one million citizens lined the streets to pay their respects as an elaborate chariot carried the body of the dead King along the six-kilometer route from the Royal Palace to an elaborate pagoda built to facilitate the cremation.

For four days Cambodians in long lines filed past the King’s body lying in state. They burned joss sticks and candles in front of the Royal Palace.

Monday afternoon, a dozen heads of state, including the Prime Minister of Thailand and French Prime Minister, assembled for the King’s cremation. The United States was represented by Ambassador William E. Todd. Many Cambodians were reported upset when US President Barack Obama was one of the only leaders attending a regional meeting here last November who did not pay his respects before Sihanouk’s remains.

Sihanouk’s Legacy

My friend Jim Pringle, who for most of his life covered the war in Vietnam and Cambodia for Reuters, has probably interviewed Sihanouk more times than any other foreign journalist. In his last interview, Sihanouk told Pringle, “ I have no remorse. I always did everything in the highest interest of my nation, my conscience is clear.”

Jim Pringle, who has lived in Phnom Penh for the last several years, says he believes history will judge Sihanouk favorably. “I’m sure to his allies Sihanouk was exasperating and no doubt he has been an autocratic ruler. But I’ve known Cambodia under several regimes and the Khmer Rouge: there’s no doubt his time in power was a golden age for Cambodia.

“How can you look at the mystic insanity of Lon Nol [the U.S.-backed leader who replaced Sihanouk], or crimes against humanity of the vicious Khmer Rouge [who replaced Lon Nol] or the bullying and land grabbing of the current bunch and say otherwise.

“Sihanouk’s time was the best for Cambodia in recent history. He brought the country to peaceful independence and kept it out of the bloody conflict in Vietnam as long as he could. There will never be another Sihanouk. He was an original.”

The outpouring of grief and displays of devotion by many Cambodians since the death of Norodom Sihanouk has seemed to connect them with a better past and, they hope, a bridge to a better future. With the cremation ceremony over with some of the King’s ashes cast into the confluence of the Mekong and Tonle Sap rivers and others preserved in a golden urn to be stored in the Royal Palace Cambodians will turn to upcoming national elections, which Hun Sen is certain to win again.

Don North has been a war correspondent since covering Vietnam beginning in 1965.

Guardrail Design Raises Concerns

Update: In recent years, highways have been made safer by guardrail end units that absorb the impact of collisions and redistribute the energy to protect drivers and passengers. But one popular system is now generating concerns over a slight design change, reports Daniel J. Goldstein, with new company comment.

Editor’s Note: More than two weeks after this story was originally published, and 25 days after journalist Daniel J. Goldstein asked Trinity for comment, Trinity’s representative David Margulies raised several objections to the story in an e-mailed letter. The story has been updated to reflect those comments and his letter is printed in its entirety at the end of this revised story.

By Daniel J. Goldstein

In May 2010, Ervin Pinckney Sr. was driving his Ford F-150 pickup on Route 50 near Bowie, Maryland when he lost control and hit the end of a highway guardrail, head-on. What happened next shocked the 77-year-old retired window washer.

"The guardrail came up through the floor of the truck," said Pinckney, who lives in Odenton, Maryland. "It nearly cut my head off," he said in an interview.

Indeed, the guardrail went completely through the floor, the passenger cab, and even the bed of the truck before exiting out the lift gate. A tow-truck driver who responded to the crash marveled at the damage and sent a camera-phone video for the local TV station to air.

But what happened to Pinckney, who was billed more than \$6,000 by the state of Maryland to repair the damaged guardrail that sliced through his truck and he says nearly killed him, may not have been a freak accident worth just a few seconds on local TV news.

The same thing happened to the now 24-year-old Charles Pike in Lake County, Florida, in October that same year, although he wasn't as lucky. When the truck he was traveling in swerved to avoid an animal, but instead hit a guardrail end unit head-on, the guardrail entered through the right front fender of the pickup truck, severing his left leg below the knee. Doctors were unable to reattach it.

And Sebrena Carrier, a 38-year-old woman in Bristol, Tennessee, who blacked out at the wheel of her 2006 Honda Ridgeline, may be another victim, when her vehicle struck an end unit of a guardrail on Dec. 17, 2008. The guardrail entered the passenger compartment and Carrier suffered multiple fractures and damage to internal organs. She died five hours after the crash at Wellmont-Bristol Regional Hospital, according to court documents filed in September 2012 in Circuit Court for Sullivan County in Bristol, Tennessee.

The catastrophic results of these head-on accidents involving guardrail end units may not be coincidences. According to evidence, in the form of a recently-unsealed federal whistleblower lawsuit and other court documents, e-mails between federal and state highway officials, and interviews with independent traffic safety experts and industry insiders, appear to show that the accidents may have resulted from a design defect of a guardrail end unit.

The manufacturer is **Trinity Highway Products**, a unit of Trinity Industries of Dallas, Texas. The unit in question is known as the ET-Plus, sold in all 50 states and exported to 60 countries. While the ET-Plus was originally approved by the Federal Highway Administration (FHWA) back in 2000, the version in question was approved in 2005. The clearance by the Federal Highway Administration is critical as it allows state agencies to be reimbursed by the U.S. taxpayer when they install federally-approved safety devices like the ET-Plus.

So just what is the ET-Plus? The ET-Plus is a structural-steel cap assembly

weighing approximately 170 pounds, which sits on the end of many guardrails on the shoulder and medians of many highways and roads around the country. It is described by Trinity as a “cost-effective, energy-absorbing end unit.”

It was an evolution of the long-used and well-regarded ET-2000, created by the dean of traffic safety devices, Dean Sicking, a professor emeritus of civil engineering at the University of Nebraska, Lincoln. Sicking, now at the University of Alabama designing safer football helmets, declined to be interviewed on the record for this story, saying he had once been sued by Trinity Industries over patent design of a similar guardrail unit and didn't want to reopen old wounds.

Still, Sicking's device, which was first approved in 1991, was the model for many guardrail end units, including the ET-Plus. While all the devices have limitations based on vehicle weight, speed and angle of impact, the physics of how they were supposed to perform in a head-on crash were simple: Transfer the kinetic energy from the impacting vehicle to the guardrail by having the W-shaped beam, which makes up the majority of guardrail systems, extrude through the head while the head's breaker bars used the energy of the impacting vehicle to shear off the posts that hold the beam about 31 inches off the ground.

The crash appears violent, but just like a Formula One race-car shattering into hundreds of pieces on impact, while transferring the energy away from the driver. This video from Texas A&M Transportation Institute at Texas A&M University, where Trinity tests its traffic safety equipment, shows exactly how it should work.

The head stays in place while the W-beam extrudes through the head – flattening out to form a candy-like ribbon of steel. The kinetic energy of the vehicle striking the post is then transferred to flattening out the W-beam, bringing the vehicle safely to a halt as it rides down the beam and the energy is dissipated. Highway crews can just remove the ribboned-out steel and bolt a new head onto the post and the device can often be back in service the same day.

In fact, more than a half-a-million ET-2000 units, costing \$2,800 each, were installed in the United States and around the world, according to the University of Nebraska's Web site. But back in 1999, Trinity and TTI began working on a less-costly version of the ET-2000, which they hoped could work just as well.

The first version of the ET-Plus, made from 1999 to 2004 did just that. A 2008 study by the University of Wisconsin for the state's Department of Transportation showed that the ET-2000 was involved in just one fatal accident statewide over a three-year period between 2003 and 2005 and the initial version of the ET-Plus had none.

But according to court documents, Trinity, at the suggestion of the Texas Transportation Institute changed some of the internal and external ET-Plus dimensions beginning in 2005, slimming down the width of the extruder head from five inches wide to four inches and narrowing the internal dimensions in which the W-beam would have to pass through when the device was hit head on in a collision with a car or truck.

The changes, which Trinity's representative David Margulies said were successfully crash tested, helped reduce the cost of the device, from \$2,800 in the ET-2000 model to just \$1,200 a unit for the ET-Plus while also reducing the weight by nearly 100 pounds (Trinity says the weight savings was 87 pounds). Margulies said the slimming of the guide channels was "immaterial" to the overall cost of the ET-Plus.

Trinity officials such as Brian Smith, the company's vice president of sales, in depositions last summer in a related patent suit called the changes "cosmetic" and added that "we're talking about three quarters of an inch here, an eighth of an inch here" and not material to the safety of the design. But the allegations in the federal lawsuit, other court documents and interviews with some safety experts make a different claim.

According to these critics, when cars hit the ET-Plus manufactured after 2005, instead of the device "ribboning-out" as it was engineered to do, the W-beam had a tougher task of extruding due to the increased friction of the narrower head and "locked-up." It then bent back on itself, forming a spear that was capable of slicing through an engine block and impaling drivers and passengers, court documents claim.

"When the current production of the ET-Plus system throat-locks it is incapable of absorbing an impact," says Ted Leopold, the attorney representing Charles Pike and Sabrena Carrier.

Byron Bloch, an independent auto safety expert in Potomac, Maryland, who has consulted for the National Highway Traffic Safety Administration (NHTSA) as well as ABC News and CBS News, said while the design changes for safety devices like the Trinity ET-Plus are common, the evidence emerging should prompt at least a review by the Federal Highway Administration.

"Changing a proven design is often the one catalyst that leads to unnecessary death and injury and I see the same pattern here," said Bloch, who has spent more than 30 years in the auto safety business. "This type of spearing should never occur. Any time a guardrail spears and penetrates its interior, that tells you that the guardrail design is faulty."

Trinity officials who say on their Web site that their products “have been tested, approved and accepted as meeting established federal and state safety guidelines” deny this is the fault of the ET-Plus. Calls for comment to the Dallas-based company were referred to David Margulies of the Margulies Communications Group, a hired spokesman for Trinity who according to his Web site, specializes in “crisis prevention management” for corporations.

Margulies referred this reporter to the company’s own court documents, where they have blamed incorrect installation of their device by, in some cases, prison work crews with no technical training as well as drivers striking the device at speeds higher than the safety device can compensate for.

The company has also claimed that spearing incidents involving their end units may have been the result of not having damaged ones replaced by state highway crews after they had been hit. Trinity also said that state crews were to blame in the case of Charles Pike for using mismatched parts from various end-unit systems that were never designed to work together. ([See Video](#))

But a video from a 2005 test by Texas Transportation Institute, which patented the ET-Plus and licensed it to Trinity, showed that even with a properly-installed four-inch ET Plus device even if it didn’t lock up, it would redirect the vehicle back into traffic, rather than safely down the guardrail beam. TTI’s own documents show that this particular test using a 1997 Geo Metro was considered a failure.

According to the “Vehicle Trajectory” criteria section of the test, known as the NCHRP 350, “after collision, it is preferable that the vehicle’s trajectory not intrude into adjacent traffic lanes.” But in this case, “the small car intruded 8.5 meters into traffic lanes. (FAIL).”

Over the past 20 years, Trinity has paid TTI more than \$30 million in license fees for the right to manufacture safety devices like the ET-Plus, according to court documents, including more than \$1 million to the head of TTI, Roger Bligh, a former protégé of Dean Sicking. A TTI representative did not return e-mails and phone calls seeking comment from Bligh.

Enter Joshua Harman, a burly, mustachioed 43-year-old maker of highway safety products in Bristol, Virginia. In 2009, he tried to manufacture his own version of the Trinity ET-Plus end unit system when he believed that the patents had expired. His company, SPIG Industry LLC, reverse-engineered the 4-inch unit. That’s where he found himself in trouble. It turned out that the patents had not expired on the particular model he tried to duplicate and Harman wound up in a patent suit with the giant manufacturer.

At the patent trial in September 2011 in U.S. District Court in Virginia, Trinity claimed that Harman's product, which they called "knockoffs," compromised the safety of the design. But Harman's design used the original internal specifications – not the newer ones currently on the roads whose safety has been questioned.

"We looked at the design that was on the road, we knew it wouldn't work with the internal dimensions we saw, so we went back to the original specifications. We got it right, Trinity was the one that got it wrong," Harman said in an interview.

Trinity's management vigorously disputes that, saying that Harman did no testing of his design as required. Trinity also tried to blame many of the accidents involving the ET-Plus on Harman's design, according to trial documents. But Harman's lawyer, Walter Kelley of Jones Day says Harman's company made only 292 units, and only 244 were installed in Virginia between 2009 and 2011, and all were withdrawn from service as part of the settlement of the patent suit.

Harman's devices were involved in five accidents, but he said that because they stuck to the original design they performed "flawlessly," Harman noted with grim irony. Still, he said, it begs a bigger question. "If my design was at fault, why are these accidents still occurring after all my manufactured units are off the road in states where I never installed any?" Harman asked.

The Federal Highway Administration admits it has no cumulative data compiled state-by-state to answer Harman's question. In a statement, the FHWA said that the ET-Plus guardrail "was tested in 2005, the end terminal with the four-inch feeder channels met all crash test standards, and FHWA has received no complaints from states over the past seven years during which the guardrail has been used nationwide."

But Harman and others have raised several questions on just how the Federal Highway Administration approved the ET-Plus in the first place in 2005. For one, the Sept. 5, 2005 approval letter from the FHWA allowing the ET-Plus to be used by the 50 state highway agencies and be reimbursed by the U.S. taxpayer for installing them, there were no schematics of the approved and tested design of the extruder head end unit attached to the letter. That's something required in all federal approval letters, known as a CC-94.

"Drawings showing details that are key to understanding the performance of the hardware should also be submitted to facilitate review," the FHWA says on its Web site, part of a guide towards helping companies gain approval for their safety devices.

Harman claimed that meant that state agencies couldn't compare the actual dimensions of the product that was tested and what was actually being installed on the nation's roads. "You can't have these devices on the roads without those schematics," said Harman.

Documents also emerged during the patent trial between Trinity and SPIG that while Trinity had indeed shrunk the size of the heads *after* the 2005 approval, it didn't tell the Federal Highway Administration as required by law, whenever a change in design is made.

In fact, documents showed that Trinity admitted only on Feb. 14, 2012, more than seven years after the device was in service, that several changed measurements of the ET-Plus "was a design detail omitted from the documentation submitted to the agency," the company said in a letter to FHWA, which was also sent to state highway agencies as well.

Even if it was an inadvertent omission, the Federal Highway Administration has rules for that. The agency says on its Web site that traffic safety devices, when "any structural change to eligible hardware where the effect on the crash test performance of the hardware is uncertain should undergo, at minimum, a finite element analysis."

David Margulies, in a Feb. 21 letter, said that "improvements to welding and dimensional measurements are not required to be submitted and approved by the FHWA so long as the inventors at TTI determined (using good engineering judgment) they were certain the improvements would not adversely impact product performance. That is exactly the case in this instance."

But that still doesn't clear up why some ET-Plus units were involved in collisions in which the device has speared into vehicles and how aware the Federal Highway Administration is of the issue. The patent trial last summer revealed that a key Federal Highway Administration official, Nicholas Artimovich, a highway engineer in the Office of Safety Design, was told not to answer, when he was asked whether the four-inch ET-Plus head design by Trinity, on the road today, was even safe.

"Is it an acceptable design?" Walter Kelley, an attorney representing SPIG Industry, asked Artimovich, the agency's chief traffic safety device expert, in a July 26, 2012 deposition, at the Department of Transportation's headquarters in Washington D.C.

"I instruct him not to answer that," objected Wynne Kelly, a lawyer for the United States Attorney's Office. The FHWA declined to make Artimovich available to comment for this article.

But perhaps most interesting, during the trial, a draft letter composed by the Federal Highway Administration, addressed to the aforementioned Brian Smith, Trinity's vice president of international sales, surfaced by accident. The one-page, undated draft letter, which was authenticated by the FHWA showed that the federal agency indeed had concerns about the ET-Plus several months earlier, in April or May of 2012.

The letter said not only did Trinity "make no mention of some of the visible differences" between the extruder heads and what was on file with the federal agency but that "W-beam guardrail terminals using the ET-Plus head may not be performing as intended." The letter also said "the number of highway crashes with fatal injuries involving the ET-Plus do not match the excellent history of the original ET-2000 terminal."

The FHWA didn't say why the draft letter, written by Nicholas Artimovich's superior, Michael Griffith, the director of the Office of Safety Technologies, was never sent to Trinity. The FHWA also declined to make Griffith available for an interview.

And despite Harmon being the defendant in the trial, Trinity dropped the patent suit against Harman's SPIG Industry in October 2012. Harman said the Dallas company made him a confidential settlement that allowed both parties to walk away from the patent lawsuit. Trinity says it got what it wanted in the settlement, namely the removal of the SPIG-produced ET-Plus off the road.

Moreover, according to court documents, and contrary to the FHWA's assertion that they had "received no complaints from the states," some state officials were already beginning to question the safety record of the ET-Plus. Keith Cota of the New Hampshire Department of Transportation wrote to FHWA's Nick Artimovich in October 2012 after learning of the legal dispute between Trinity and SPIG, Harman's company.

"We have many, many of these terminal units on our high speed facilities and this certainly causes me some strong concern for crash worthiness of the ET-Plus and ET-2000 that we have and are installing each year," Cota wrote in a Oct. 9, 2012 email to the FHWA. "Should I be worried? Or worst yet, should I brief my chief engineer? I don't like the box this puts me in!"

The subject line of the e-mail? "Complaint on failing heads for terminal (sic) unit" Cota did not respond to voice-mail and e-mail requests for comment.

Still, no states have conducted any independent analysis of the ET-Plus post-2005, according to Erik Emerson of the Wisconsin Department of Transportation, whose agency had commissioned the earlier University of

Wisconsin study looking at the performance of various end-units between 2003 and 2005.

"In the future we may look to do another report, but that would be a number of years from now," Emerson said in an e-mail.

Meanwhile, SPIG Industry and Trinity have been going in opposite directions, financially. Trinity, according to government filings, had a net profit of \$142 million in 2011, on revenue of \$3.1 billion, helped in part due to increasing road construction from the Obama administration's stimulus plan as well as soaring demand for railroad tank cars amid the country's shale oil boom.

The company's highway products division is one of its best performers financially, with profit margins on products like the ET-Plus at 25 percent, court documents claim. The highway products division had sales of \$377 million in 2011, up more than 20 percent from a year before when it had \$313 million in sales, a jump in itself of more than 31 percent from 2009, according to government filings.

Trinity also spent \$235,000 lobbying the federal government between 2010 and 2012, just when the dispute over the ET-Plus' safety emerged, according to the Center for Responsive Politics, which tracks lobbying and corporate political donations. Still, it isn't clear what Trinity lobbied the federal government for.

Harman said his business has suffered as he claimed Trinity conducted a whisper campaign against his company, telling various state highway agencies not to buy his company's product. He said he had to lay off most of his 115-plus employees at his fabrication plant in Bristol; he's now just down to eight.

But accidents involving the ET-Plus continue to occur, some with serious injuries. As a result, Harman himself kept a log of the accidents, even creating a Web site in January 2012 documenting what he says are more than 200 accidents involving the ET-Plus at www.failingheads.com.

Harman also was allowed to go forward with a federal whistleblower complaint, which was filed last March and was unsealed this month by U.S. District Court judge Rodney Gilstrap in Texas. The suit, under the False Claims Act of 2010, calls for the federal government to investigate what Harman cites as fraud on the part of Trinity in saying its ET-Plus has passed the necessary safety tests to be on the road and that states can get federal reimbursement when they install it.

During the nine months when the complaint was under seal, the federal government declined to take over the investigation as the False Claims Act permits, but it

didn't throw out the case for lack of merit and allowed Harman's suit to remain in the public domain, according to Josh Maness, the attorney who filed the suit on behalf of Harman.

Still, Trinity Highway Products president Gregg Mitchell called the claims on Harman's Web site "false and defamatory" and his company has sued Harman in a separate lawsuit in Georgia demanding that he remove the Web site.

Trinity also claims that Harman is trying to profit from the dispute by encouraging trial lawyers and journalists to investigate the ET-Plus. Harman denies that profit is his motive for his Web site, saying he won't pull it down until Trinity or the FHWA remove the ET-Plus terminals from the road.

Harman, a construction worker by trade, says he shares a special bond with the victims of these accidents, having lost his left leg in a construction accident in 1991 when he was 21 years old. "I know what they're going through, I've been there myself," he said.

Still, he refused any further offers from Trinity, saying they're trying to buy his silence. "Unless their settlement offer includes a full product recall, I'm not stopping," Harman said.

"I have two daughters, ages 9 and 12 who will be getting their drivers licenses soon. I won't let them drive with these guardrails still out there," he said. "It might not be my daughter, but it could be somebody else's and I can't let that happen."

Daniel J. Goldstein is a veteran financial journalist. This story first appeared at his Web site, <http://www.dangoldsteinreporting.com>. Reprinted with permission.

(David Margulies of the Margulies Communications Group responded to the article on Feb. 21, 2013, with this letter in full)

Dear Mr. Goldstein:

On February 5, you posted an article to your website entitled, "Suspect Guardrail End Unit Raises Questions of Design and Regulation." That story is misleading, and contains a significant number of inaccuracies leading your readers to the conclusion that they should question whether the ET-Plus® System is safe on the U.S. Highway System.

In fact, the ET-Plus® System remains, as it has for more than 12 years, accepted by the Federal Highway Administration (FHWA) for use on the National Highway System. The FHWA accepted the ET-Plus® System originally in 2000, pursuant to

compliance with NCHRP Report 350 test criteria, and reiterated this acceptance again in 2012.

Specifically, your story contains a number of inaccurate statements, and although this letter does not address all of them, we would like to be on the record as correcting, at minimum, the following:

- Your story states that the ET-Plus® System, “was originally approved by the Federal Highway Administration back in 2005”. **That is not correct.** The ET-Plus® System was originally accepted for use on the National Highway system in 2000, with the FHWA reiterating this acceptance again in 2012.
- You state that that the ET-2000â„¢ was “designed to work on all makes and models of cars and trucks at nearly all speeds.” **That is not true.** The ET-2000â„¢ (as with the ET-Plus® System) is tested pursuant to specific NCHRP Report 350 criteria. That criteria define a narrow range of performance based on vehicle weight, speed and angles of impact, not “all makes, models and speeds.”
- You indicate that the ET-2000â„¢ is a freestanding device. **It is not.** The ET-2000â„¢ (as with the ET-Plus® System) is attached and integral to a post-driven, cable-anchored system.
- Later in the story, you state “Trinity changed the internal and external ET-Plus dimensions slimming down the extruder head .and narrowed the internal dimensions in which the W-beam would have to pass through when the device was hit” **That is not accurate.** Texas A&M Transportation Institute (“TTI”), the inventor of the ET-Plus® System, suggested an improvement of the extruder head by reducing the guide channels attached to the head. Trinity responded by integrating these suggested improvements into their manufacturing process, after successful crash test performance of the ET-Plus® System incorporating the TTI suggested improvements, and after TTI’s approval of the same.
- You state that “the changes helped reduce the cost of the device, from \$2,800 to just \$1,200 a unit, while also reducing the weight by nearly 100 pounds,” leading readers to inaccurate conclusions. **Your facts are not correct.** The difference between the ET-2000â„¢ and the ET-Plus® System, two separate systems, is 87 pounds. Your article infers a \$1,600 cost savings which is not true: 1) You are comparing two different and separate systems. 2) Any costs savings on the ET-Plus® System as a result of the guide channel reduction were immaterial to the total unit cost.
- You say, “A video from a 2005 test by TTI. Showed that even with a properly installed four-inch ET-Plus device it would re-direct the vehicle back into traffic, rather than safely down the guardrail beam.” **That is misleading.** The ET-Plus® System is not designed to “redirect a vehicle safely down the guardrail beam.” It was designed by TTI to dissipate energy

from an impacting vehicle and to extrude guardrail. The video from the 2005 crash test demonstrates that the ET-Plus® System performed properly by extruding the rail. The video also shows that the vehicle yawed away from the guardrail as is expected in such a quarter offset, head-on impact.

- Just after you state, “TTI’s own documents show that this particular test was considered a failure.” **This is not accurate.** Indeed, TTI compiled the crash test report in July 2005 and both TTI and FHWA agreed that the ET-Plus® System performed pursuant to the NCHRP Report 350 criteria.

[Dan Goldstein notes: In the document

<http://www.failingheads.com/docs/cc94test.pdf> on page 36 Section K of the NCHRP report 350 criteria known as “Vehicle Trajectory” – “after collision it is preferable that the vehicle’s trajectory not intrude into adjacent traffic lanes.” The report CLEARLY STATES. “The small car intruded into traffic lanes 8.5 meters (FAIL)”

- In discussing the product Mr. Harman produced, you say that “Joshua Harman reverse-engineered the [ET-Plus] using the original interior dimensions.” **That is not accurate.** Harman copied the ET-Plus® System head with the 4-inch guide channel, not the original 5-inch channel, as he claims. Measurements of the samples provided by Harman to Trinity in the patent litigation confirm this fact.
- You state, “The Federal Highway Administration admits it has no data to confirm whether the ET-Plus is performing properly as Trinity claims.” You do not quote a source with the FHWA or indicate to whom that inflammatory remark should be attributed, **and nothing could be further than the truth.** The FHWA has video, data and photographs from 2005 and 2010 testing and have used that information to confirm acceptance of use of the ET-Plus® System, as late as October 2012.
- Your story says, “Documents also emerged during the patent trial that while Trinity had indeed shrunk the size of the heads *after* it had been approved in 2005, it didn’t tell the Federal Highway Administration as required by law, whenever a change in design was made.” **That is not true.** Texas A&M/TTI (the engineer and designer of the product) recommended and Trinity manufactured the ET-Plus® System pursuant to the sound engineering judgment of the inventors at TTI. Improvements to welding and dimensional measurements are not required to be submitted and approved by the FHWA so long as the inventors at TTI determined (using good engineering judgment) they were certain that the improvements would not adversely impact product performance under the NCHRP 350 criteria. That is exactly the case in this instance. Moreover, improvements to the ET-Plus® System have been tested and deemed to have met NCHRP Report 350 in 2005 and again in 2010.
- Your story reports that “Trinity mysteriously dropped the patent suit in

October 2012” **This is inaccurate and misleading.** As with many disputes in litigation, the parties participated in a settlement conference in the weeks before the trial. Trinity settled that lawsuit with Mr. Harman on terms that were satisfactory to Trinity. In the course of this Virginia litigation, Mr. Harman’s untested and unaccepted product was removed off the roads in Virginia, and Mr. Harman ceased manufacturing or selling his copy of Trinity’s ET-Plus® System.

- Finally, you note that “Harman was allowed to go forward with a federal whistleblower complaint” and that “the federal government didn’t throw out the case for lack of merit and allowed Harman’s suit to remain in the public domain” **In fact, the U.S. Government declined to intervene in the complaint.** Trinity’s deadline for responding to the claims case has not passed yet, but we intend to respond forcefully to Harman’s false and defamatory accusations, which do not have any basis in fact or law. The U.S. District Court assigned to Harman’s False Claims act will rule upon the “merit”.

In summary, we believe your story has been written with a reckless disregard for the truth and is based on the allegations of an individual who has been involved in protracted litigation with Trinity. We stand by our product and will continue to aggressively protect the intellectual property and the outstanding reputation of the ET-Plus® System.

We appreciate your attention to this matter and look forward to your response.

Sincerely,

David S. Margulies
