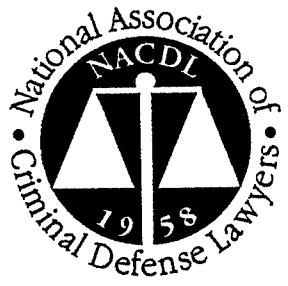

WRITTEN STATEMENT FOR THE RECORD
REGARDING THE APRIL 6, 1995 HEARING ON
INTERNATIONAL TERRORISM BEFORE THE
JUDICIARY COMMITTEE OF THE UNITED STATES HOUSE OF REPRESENTATIVES

By Gerald H. Goldstein,
on behalf of the National Association of Criminal Defense Lawyers

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Mr. Chairman and Members of the Committee:

On behalf of the National Association of Criminal Defense Lawyers (NACDL), I want to thank the Committee for this opportunity to offer the following brief written statement for the official record -- regarding the Committee's April 6, 1995 hearing on international terrorism. NACDL commends the Committee for promptly convening such a hearing. However, NACDL also respectfully urges the Committee to hold additional, necessary hearings as soon as possible *concerned with H.R. 896 in particular.*

Further, NACDL respectfully requests permission to offer both oral and written testimony at such an additional, necessary hearing on H.R. 896. NACDL submits that the views of its members, who have devoted their lives to representing the persons in this country who are accused of committing a crime (that is, the type persons who will stand accused in a Star Chamber, McCarthyistic, and *Korematsu*[1] manner, should this bill pass into law), are imperative to gaining a true understanding of the dangers to the Republic inhering in this proposed legislation.

The members of NACDL are front-line defenders of the People's rights and liberties. NACDL represents the Nation's criminal defense lawyers, and in turn: People accused of having committed a crime; and our constitutional democracy itself. NACDL's 8,700 direct members and over 20,000 affiliated members of 70 State and local affiliates include private criminal defense lawyers, public defenders, and law professors who have devoted their lives to ensuring that others do not wrongfully lose theirs. NACDL members are the legal advisors and advocates who represent the people whose rights and liberties will be trampled by enactment of H.R. 896 or any similar terrorism bill. NACDL respectfully submits that its members' experienced insights are critically important to full understanding of H.R. 896 or similar proposals -- and that these insights cannot be gleaned from full-time academics, agency representatives, or others who might also testify about such proposals.

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[1] Korematsu v. United States, 323 U.S. 214 (1944).

I.

"Tough on Terrorism"

> Being tough on terrorism is not exactly a difficult stance for a politician. * * * But precisely because the label [of "terrorist"] is so powerful, it invites overreaction: Just as the Communist threat led to the blacklisting, imprisonment, and deportation of countless innocent persons for their lawful political activities during the Cold War, so [the Clinton administration's] recent measures against terrorism threaten to throw innocent citizens in jail and innocent immigrants out of the country simply for their political associations.[2]

NACDL would also remind the Committee of the similarities between this bill and the infamous Japanese-American internment horror of *Korematsu* (which most Americans recall now with shame, but at least a rather satisfying assumption that we have learned our lesson -- that such a lapse in our Nation's constitutional character could not happen again);[3] and the Star Chamber so anathema to our

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[2] Professor (and Chair, NACDL Supreme Court Argument Preparation Committee) David Cole, "The Omnibus Counter-Civil Liberties Act," Legal Times, March 13, 1995, at 31. NACDL commends Professor Cole's entire article to this Committee's attention.

[3] Korematsu v. United States, 323 U.S. 214 (1944). But note, even in the now-infamous *Korematsu* set of cases, the government's placement of Japanese-Americans in concentration camps, based on their ancestry, and solely because of their ancestry, without evidence or inquiry concerning the individuals' loyalty and good disposition towards the United States, was even then upheld by the Court only *because of* wartime, "military necessity" (notwithstanding the actual lack of a martial law declaration). No such wartime, "military necessity" even arguably exists relative to H.R. 896. Certainly any such "analogous" claim must be deemed to be as dubious as the government's claims in *Korematsu* were later revealed to have been. *See e.g.*, Korematsu v. United States, 584 F. Supp. 1406 (N.D. Cal. 1984) (federal district court grant of writ of *coram nobis*, based on findings that the government deliberately omitted relevant information and provided misleading information in papers submitted to the Supreme Court of the United States concerning whether military orders at issue were reasonably related to the security and defense of the nation and to the prosecution of the war); Hohri v. United States, 782 F.2d 227 (D.C. Cir. 1986) (federal appeals court holding that the government's fraudulent concealment of facts undermining its claims of military necessity tolled the applicable statute of limitations on at least certain claims by a group of Japanese-American victims of the evacuation in their suit to recover damages for injuries arising out of their wartime internment), *vacated on other (Federal Circuit appellate jurisdiction) grounds*, 482 U.S. 64 (1987). *See*

Founders.[4]

Moreover, NACDL fully agrees with the oral and written testimony before the Committee of Gregory T. Nojeim, on behalf of the American Civil Liberties Union (ACLU). Both H.R. 896 and S.3[illegible]0 represent massive assaults on our Bill of Rights, and indeed, would inflict more damage on constitutionally protected rights and liberties than any legislation in recent memory. These bills trash such cherished individual rights and liberties as the presumption of innocence, freedom of lawful speech and association, equal protection of the laws, the right to reasonable bail, the right to confront the "evidence" against you, and the right to be free from unreasonable searches and seizures.

For example, these bills propose that mere suspicion of involvement with even the lawful activities of an organization that has members who resort to terrorism (e.g., South Africa's African National Congress of just a few years ago; or Ireland's Sinn Fein) would be sufficient to allow the executive branch of government to jail an alien with no right to bail. (Permanent resident aliens would get the chance to get out of jail on bail, but they would have to contend with the burden of proof being shifted to their shoulders -- they would have to prove their innocence, rather than have the government prove their guilt or even probable guilt).

Too, these bills would go well beyond even H.R. 666 (a bill *opposed* by H.R. 896's chief sponsor, Mr. Schumer, for example) -- permitting the FBI to conduct criminal investigations into "material support" to alleged terrorists with no requirement for

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generally Professors Peter M. Shane & Harold H. Bruff, The Law of Presidential Power 694-697 (1988).

[4] The Star Chamber:

> [t]hat curious institution, which flourished in the late 16th and 17th centuries, was of mixed executive and judicial character, and characteristically departed from common-law traditions. For those reasons, and because it specialized in trying "political" defenses, the Star Chamber has for centuries symbolized disregard of basic individual rights.

Faretta v. California, 422 U.S. 806, 821 (1975) (Stewart, J.). *See also* Professor Lawrence Friedman, A History of American Law 23 (1973):

> The court of star chamber was an efficient, somewhat arbitrary arm of royal power. It was at the height of its career in the days of the Tudor and Stuart kings. Star chamber stood for swiftness and power; it was not a competitor of the common law so much as a limitation on it -- a reminder that high state policy could not safely be entrusted to a system so chancy as English law. . . .

See generally 5 W. Holdsworth, A History of English Law 155-214 (1927).

even reasonable suspicion that the target of such an investigation knowingly had or would violate any federal criminal law. Anyone who reads books should be familiar with the history of FBI practices of the past, for example and at least, and should certainly know better.[5]

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[5] *See e.g.*, Anthony Summers, Official and Confidential: The Secret Life of J. Edgar Hoover 112-116 (1993):

> In May 1940, [President Franklin D.] Roosevelt gave the go-ahead for use of that vital tool of any secret police, the telephone tap. On its face, Edgar's track record on wiretapping was entirely respectable. The Bureau's first manual, issued in 1928, said flatly that tapping was "improper, illegal . . . unethical" and would not be tolerated. Edgar had assured Congress that any agent caught wiretapping would be fired.
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> Though some sought to find loopholes in it, the Federal Communications Act of 1934 had seemed to outlaw wiretapping altogether. And, in spite of an Attorney General's ruling that allowed some tapping with prior approval, Edgar continued to say that he was against it except in life-or-death circumstances, such as kidnappings. The testimony of his own men, however, makes it clear that was not true.
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> According to . . . agents, Edgar had on occasion used bugging to further his own private interests. There had been the time, years earlier, when he ordered taps on the telephones of Roosevelt's Postmaster General James Farley, who wanted him replaced as FBI Director. * * *
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> "Perhaps only Mr. Hoover himself," Federal Communications Chairman James Fly was to write, "can tell exactly how many times he has instructed his men to break the law that his Bureau was supposed to enforce; but he has chosen not to discuss such details." In 1940, when Edgar was quietly lobbying for looser wiretapping laws, it was Fly's congressional testimony that ensured the legislation was rejected. Edgar detested the FCC Chairman from then on, so much so that -- even two decades later in retirement -- Fly insisted on meeting a reporter out of doors, for fear his home was bugged by the FBI.
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> In spring of 1940, convinced that wiretapping was vital to national security, President Roosevelt overrode the law. He authorized the Attorney General to permit eavesdropping on "persons suspected of subversive activities against the United States, including suspected spies. . . . ". This order, [Roosevelt Attorney General] Francis Biddle pointed out long afterward, "opened the door pretty wide to wiretapping of anyone *suspected of subversive activities* [Biddle's emphasis]." It was to remain Edgar's basic authority for telephone tapping for a quarter of a century.

The bills also seek to do away with confidentiality protections certain special agricultural workers and amnestied illegal aliens were assured under previously-enacted law -- with respect to personal information they gave the government in seeking lawful immigration status.

Finally, the "fig leaf" of the Act's envisioned Chief Justice appointment mechanism notwithstanding, the Nation's courts are effectively taken out of the picture by these bills. The bills propose to create in the stead of the presumably chancy, pesky and unwieldy third branch of government, a "special" five-judge secret court -- with the "power" to deport immigrants for "supporting" "terrorist organizations" without the government ever having to actually reveal its "evidence" against the accused individual. This is nothing less than the Star Chamber revived.[6]

Of course, as the ACLU has well noted, a great, overarching danger inhering in these anti-constitutional, bill characteristics is that the vague and sweeping powers ushered in by such legislation would be wielded only "selectively," which is to say,

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> * * * During the run-up to the 1944 election, [Edgar] would reportedly supply the White House with the results of wiretaps on Republican politicians -- an alleged Watergate three decades before the scandal that would topple Richard Nixon.
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> According to Nixon, Edgar told him "every president since Roosevelt" had given him bugging assignments. As the Senate Intelligence Committee would discover in 1975, Presidents Truman, Eisenhower, Kennedy, Johnson -- and Nixon -- all used the Bureau to conduct wiretaps and surveillance for purposes that had nothing to do with national security or crime, and which can only be described as political. By ignoring ethics, and on occasion the law, and by using the FBI to do it, they all made themselves beholden to Edgar.
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> Against that background, it is hardly surprising that Edgar would feel free to deceive Congress on the subject. * * *
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> [In addition,] [w]e shall probably never know how much wiretapping was done solely on the authority of senior FBI officials, without the approval of attorneys general. * * *
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> The FBI's surveillance index, started in 1941, contains 13,500 entries. While the identity of the individuals tapped is withheld on privacy grounds, the index establishes that Edgar's FBI tapped or bugged thirteen labor unions, eighty-five radical political groups and twenty-two civil rights organizations.

[6] *See supra* note 4.

at the disproportionate or exclusive expense of the "politically unpopular" groups and individuals among us. Indeed, H.R. 896 represents a bald attempt at the "legalization of racism."[7]

While NACDL is very concerned about the above-referenced, individual rights and liberties-crippling aspects of H.R. 896 and its ilk, NACDL thinks it also especially important to focus on the systemic and institutional chaos, or crisis, that would be unleashed upon the Republic by enactment of such legislation. In addition to the concerns addressed in the ACLU's testimony before this Committee and referenced above, NACDL would like to emphasize the following, additional points.

II.

The Unchecked, Unsafe, Would-Be "New" Weaponry Sought by H.R. 896 and its Kin is an Unnecessary "Red Herring"

First, it must be understood that the United States government already has the power (and the budget) under current law to attack the problems of terrorism purportedly driving H.R. 896 and similar proposals (e.g., S. 390). The only "inadequacy" that could possibly be seen to exist regarding these current terrorism-fighting powers is that they must take place within the bounds of the constitutionally-mandated Rule of Law, within our system of separation of powers and checks and balances and respect for fundamental individual rights and liberties.

Existing law is up to the challenge of the government's legitimate terrorism-fighting responsibilities. NACDL submits that if the government agencies charged with fighting terrorism would simply concentrate on using the weapons they now have, which exist within the bounds of the law, instead of trying to shift attention to the red herring of their professed need for more powerful statutory weaponry, we would all be better served and our tax dollars better spent.

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[7] Korematsu v. United States, 323 U.S. 214 (1944), dissent of Justice Murphy; *see also id.* at n.1 ("That this forced exclusion was the result in good measure of th[e] erroneous assumption of racial guilt rather than bona fide military necessity is evidenced by the Commanding General's Final Report on the evacuation from the Pacific Coast area."); *id.* at n. 15 ("The Final Report, p.34, makes the amazing statement that as of February 14, 1942, 'The very fact that no sabotage has taken place to date is a disturbing and confirming indication that such action will be taken.' Apparently, in the minds of the military leaders, there was no way that the Japanese Americans could escape the suspicion of sabotage."). *See also generally supra* note 5 (regarding example entities on the FBI's surveillance index).

III.

This Unchecked, Unsafe, Would-Be "New" Weaponry Would Violate Our Governmental System of Check and Balances and Separation of Powers, at the Expense of the Nation's Independent Judicial Branch as Well as Individual Rights and Liberties

NACDL thinks it imperative to recognize the mockery H.R. 896 would make of the third, Judicial branch of our government -- the ultimate guarantor of the Constitution.[8] The "fig leaf" of Chief Justice appointment "power" notwithstanding: the bill would do away with our constitutional system of checks and balances and separation of powers, replacing our venerable court system with a Star Chamber system, as described above. NACDL respectfully submits this Committee should heed the warning of Justice Jackson, the Nuremburg War Trials' prosecutor -- *especially* in the obviously non-wartime, non-"military necessity" application context contemplated by H.R. 896:

> I should hold that a civil court cannot be made to enforce an order which violates constitutional limitations *even if* it is a reasonable exercise of military authority. The courts can exercise only the judicial power, can apply only law, and must abide by the Constitution, or they cease to be civil courts and become instruments of military policy.
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> Of course the existence of a military power resting on force, so vagrant, so centralized, so necessarily heedless of the individual, is an inherent threat to liberty. But I would not lead people to rely on this Court for a review that seems to be wholly delusive. The military reasonableness of these orders can only be determined by military superiors. If the people ever let command of the war power fall into irresponsible and unscrupulous hands, the courts wield no power equal to its restraint. * * *
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> * * * I do not think [the courts] may be asked to execute a military expedient that has no place in law

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[8] *See e.g.*, Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803). *See also* The Federalist No. 78 (Hamilton) ("No legislative act . . . contrary to the constitution can be valid. To deny this, would be to affirm . . . that the representatives of the people are superior to the people themselves; that men acting by virtue of powers, may do not only what powers do not authorize, but what they forbid."); *id.* ("If it be said that the legislative body are themselves the constitutional judges of their own powers . . . . It is far more rational to suppose, that the courts were designed to be an intermediate body between the people and the legislature, in order, among other things, to keep the latter within the limits assigned to its authority").

under the Constitution.[9]

It is especially important to recognize as well, or in particular, that: United States courts have consistently held that lawful activities are constitutionally protected. But "terrorist support" is so broadly defined in H.R 896 and its fellow proposals that the term specifically covers lawful activities. Courts have also rejected, on due process grounds, the "secret evidence" procedures championed by H.R. 896.[10] Then again, under H.R. 896, the role of the court system is effectively thwarted. As one recent common-sensical, outside the beltway editorial (from Oregon) put it: "The president alone would decide which groups are terrorists threatening the national interests, foreign policy or economy of the United States. No court could second-guess him; no checks, no balances."[11]

IV.

Conclusion: The Committee Should Reject This Legal Pretender Now, or at Least, Convene Additional Hearings, Concentrating on H.R. 896 and its Bill of Rights and System-Wrecking Qualities, in Particular

Passage of H.R. 896 would represent an abdication of congressmembers' constitutional responsibility and would create a constitutional crisis -- and this in a day of macroeconomic budgetary and federal court caseload concerns. As the independent Judiciary has consistently held: the due process clause "is a restraint on the legislative as well as the executive and judicial powers of the government and cannot be so construed as to leave Congress free to make any process 'due process of law,' by its mere will."[12]

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[9] Korematsu v. United States, 323 U.S. 214 (1944), dissent of Justice Jackson (emphasis added).

[10] *See, e.g.*, Rafeedie v. INS, 880 F.2d 506 (D.C. Cir. 1989) (D.H. Ginsburg, J.). *Id.* at 516:

> Rafeedie -- like Joseph K. in *The Trial* -- can prevail before the [INS] Regional Commissioner only if he can rebut the undisclosed evidence against him, *i.e.*, prove that he is not a terrorist regardless of what might be implied by the Government's confidential information. It is difficult to imagine how even someone innocent of all wrongdoing could meet such a burden.

[11] Editorial, "Mugging the Bill of Rights," The Oregonian, April 1, 1995.

[12] Murray's Lessee v. Hoboken Land and Improvement Co., 18 How. 272, 276, 15 L.Ed. 372 (1855).

Substituting a Star Chamber "court system" for the independent Judiciary envisioned by the Founders, by which our great Nation has proudly prevailed for more than 200 years, will not turn H.R. 896's lack of due process into due process. Nor will it turn H.R. 896's other constitutional infirmities into provisions passing constitutional muster.

NACDL urges the Committee to unabashedly heed history and the Constitution, and to accordingly quickly reject the Orwellian and Kafkaesque H.R. 896 -- putting this legal pretender out of its misery and the People out from under the risks posed by H.R. 896. In the alternative, at minimum, NACDL submits that the Committee needs to convene hearings devoted exclusively to consideration of H.R. 896. The matters at stake are too important to not receive careful, full consideration by Congress. NACDL respectfully submits as well that it should be afforded the opportunity to offer oral and written testimony -- as the organization whose members have devoted their lives to representing persons wrongfully targeted, accused and prosecuted by government, and those additional persons who will be so officially victimized should the government be given this "new," high-powered, Constitution-crippling weapon it so covets.

Gerald H. Goldstein
President, NACDL

NACDL is a specialized bar association representing the nation's criminal defense lawyers. Its 8,700 direct members and 70 state and local affiliates include private criminal defense lawyers, public defenders, and law professors. The 36-year old association is devoted to ensuring justice and due process for persons accused of crime; fostering the integrity, independence, and expertise of the criminal defense profession; and promoting the proper and fair administration of criminal justice.