TESTIMONY OF GERALD H. GOLDSTEIN

on behalf of the

NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

before the

U.S. HOUSE GOVERNMENT REFORM AND OVERSIGHT SUBCOMMITTEE ON CRIMINAL JUSTICE
and the
U.S. HOUSE JUDICIARY SUBCOMMITTEE ON CRIME

JOINT HEARINGS INTO EXECUTIVE BRANCH CONDUCT IN THE MATTER OF THE BRANCH DAVIDIANS

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1627 K Street NW, Suite 1200, Washington DC 20006 • Tel: 202-872-8688 • Fax: 202-331-8269

Gerald H. Goldstein is a native of San Antonio, Texas. He graduated from Tulane University in 1965, and then attended the University of Texas School of Law. Since graduating in 1968 from law school, he has devoted his practice to the representation of those accused of having committed a crime. He is admitted to practice law before the state courts of Texas and numerous federal district courts, United States courts of appeal, and the United States Supreme Court. He is certified as a specialist in criminal law by the State Bar of Texas Board of Legal Specialization.

His law firm, Goldstein, Goldstein and Hilley, devotes approximately 15-20 % of its time to *pro bono* work. In addition to his practice, he has served as adjunct professor of advanced criminal law at the University of Texas School of Law since 1982. He lectures frequently on both substantive criminal law and criminal procedure at continuing legal education seminars throughout the United States. He has served as counsel of record for the National Association of Criminal Defense Lawyers as *amicus curiae* in several important controversies before the United States Supreme Court.

Mr. Goldstein serves as the President of the National Association of Criminal Defense Lawyers. He has also served as the President of the Texas Association of Criminal Defense Lawyers, and is a Fellow in the American College of Trial Lawyers..

Chairmen and members of the Subcommittee:

Thank you for providing me this opportunity to testify on behalf of the members of the National Association of Criminal Defense Lawyers (NACDL) regarding our Fourth Amendment privacy concerns and the lessons that can be learned from the Waco tragedy.

The almost 30,000 affiliated members of the National Association of Criminal Defense Lawyers consist of private defense attorneys, public defenders and law professors, who have devoted their professional lives to representing citizens accused of crime, preserving the Bill of Rights, and insuring fairness within the criminal justice system. NACDL has a particular interest in, and special qualifications to address the privacy concerns and Fourth Amendment issues raised by the February 28, 1993 raid on the Mount Carmel Center outside Waco, Texas.

PURPOSE OF FOURTH AMENDMENT PROTECTIONS
THE RIGHT TO BE LEFT ALONE

Any evaluation of the events that led up to the failed attempt to execute a warrant for the search of the 77-acre "Branch Davidian" compound and arrest of group leader David Koresh should begin with an understanding of the Fourth Amendment safeguards designed to protect the privacy of all citizens.

The most important limitation upon the government's power to intrude upon its citizens' privacy is the Fourth Amendment to the Constitution of the United States. The

text of the Fourth Amendment provides that:

> **"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."[1]**

The substance and import of this restriction on governmental authority goes well beyond the security of one's personal effects.

Its scope may have been best described by Justice Brandeis in his now famous, eloquent and oft-quoted dissent in *Olmstead v. United States*, 277 U.S. 438, 478 (1928):

> **"The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the Government, the right to be left alone--the most comprehensive of rights and the right most valued by civilized men. To protect that right, every unjustifiable intrusion by the Government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the Fourth Amendment."**

The Fourth Amendment protection of a citizen's privacy against his or her

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[1]U.S. Constitution, Amendment IV.

government's intrusion is the linchpin upon which all other civil liberties hinge. Freedom of speech, religion, and association – so essential to a free society -- would mean little if the citizens' activities and communications were not protected against government interference and interception.

NEW DANGER FROM WITHIN

Even as these Subcommittees begin to review the tragic debacle at Waco, ironically both Houses of Congress are considering measures to expand still further the powers of the very federal agencies responsible for that and other disasters. Those measures would bring about dramatic increases in the unchecked power, authority, and role of federal officials in everyday American life. They are inconsistent with the concept of *limiting* the power of federal government otherwise advanced by these same political leaders and are contrary to the principles of *limited* government upon which this nation was founded.

Members of the National Association of Criminal Defense Lawyers are intimately familiar with the growing aggressive, paramilitarization of federal law enforcement in recent years. As NACDL's president, I feel a responsibility to alert you to the additional threats posed under these circumstances by measures now under consideration here on Capitol Hill. This is *not* the time to loosen the constitutional reins on federal law enforcement or scale back protection of citizens' individual and property rights.

The Nuremberg prosecutor, Justice Robert Jackson, warned us well:

> "[Fourth Amendment rights] ... are not mere second-class rights but belong in the catalog of indispensable freedoms. Among deprivations of rights, none is so effective in cowing a population, crushing the spirit of the individual and putting terror in every heart. Uncontrolled search and seizure is one of the first and most effective weapons in the arsenal of every arbitrary government....
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> But the right to be secure against searches and seizures is one of the most difficult to protect. Since the officers are themselves the chief invaders, there is no enforcement outside the court."[2]

Some of those who today express concern about federal law enforcement tactics in Waco are the very sponsors and supporters of pending proposals to emasculate and even eliminate the very safeguards which provide our citizenry protection against such governmental abuses.

Election-day rhetoric has given many citizens the misconception that "liberal courts" using "technicalities" regularly loose criminals to prey upon innocent citizens. It is rarely mentioned that among these "technicalities" are the first ten amendments to our constitutional bulwark that separates us from those totalitarian states we so regularly denounce.

For almost one hundred years[3] the Supreme Court of the United States has precluded federal courts from using illegally seized evidence obtained in violation of the Supreme Law of the Land. The Court does so with the practical knowledge and judicial experience that excluding the ill-gotten gains of police illegality is the only effective way to

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[2]**Brinegar v. United States**, 338 U.S. 160, 180-181 (1949).

[3]See: ***Weeks v. United States***, 232 U.S. 383 (1914).

deter such misconduct. The Court also does so in its inherent power as the supreme guardian of the Constitution under our system of separation of powers and checks and balances[4] -- to insure against the sullying of our criminal justice system by allowing those entrusted to *enforce* our laws to exploit their own illegality (that is, to guard against this sure-fire demolition of the Rule of Law and obliteration of citizen confidence in government institutions). As Justice Antonin Scalia more recently put it:

> **"[I]t is...immaterial that the intrusion was in aid of law enforcement. Experience should teach us to be most on our guard to protect liberty when the Government's purposes are beneficent. Men born to freedom are naturally alert to repel invasion of their liberty by evil-minded rulers. The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well meaning but without understanding...**
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> **Those who lose because of the lack of understanding that begot the present exercise in symbolism are not just the Customs Service employees, whose dignity is thus offended, but all of us -- who suffer a coarsening of our national manners that ultimately give the Fourth Amendment its content, and who become subject to the administration of federal officials whose respect for our privacy can hardly be greater than the small respect they have been taught to have for their own."[5]**

Now, through the so-called "Exclusionary Rule Reform Act" (H.R. 666), Congress seeks to engraft a "good faith" exception to warrantless searches:

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[4]See: *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803). See also: The Federalist No. 78 (Hamilton).

[5]*National Treasury Employees Union v. Van Raab*, 489 U.S. 656 (1989) (Scalia, J., dissenting).

> **"Evidence which is obtained as a result of a search or seizure shall not be excluded in a proceeding in a court of the United States on the ground that the search or seizure was in violation of the fourth amendment to the Constitution of the United States, if the search or seizure was carried out in circumstances justifying an objectively reasonable belief that it was in conformity with the fourth amendment."**

This, despite the fact that the Supreme Court created the "good faith" exception in an effort to encourage police to seek search warrants and thereby interpose a neutral and detached judicial official between those engaged "in the often competitive enterprise of ferreting out crime"[6] and the citizen's right to privacy.[7]

The Senate version of this invitation to law enforcement abuse (S.3) is even more dangerous, ***proposing to do away with the federal exclusionary rule altogether***, allowing the wholesale admission of illegally seizures into evidence in federal criminal trials:

> **"Evidence obtained as a result of a search or seizure...shall not be excluded in a proceeding in a court of the United States on the ground that the search or seizure was in violation of the fourth amendment to the Constitution."**

With all the clamoring to reduce prisoner suits that crowd our court dockets, Senate Bill 3, nonetheless, proposes to give every inmate a $30,000 lawsuit to enforce his or her right to privacy. So much for tort reform.

The problem is, we really do not have a problem in need of a "cure". Despite all the

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[6] *Johnson v. United States*, 333 U.S. 10 (1948).

[7] See: *United States v. Leon*, 468 U.S. 897 (1984).

hysteria that the exclusionary rule regularly releases dangerous offenders onto our streets when evidence is suppressed, a 1979 study by the U.S. Comptroller General found that suppression motions were granted in barely one per cent of federal prosecutions, and more recent studies indicate that suppression motions result in dismissal of federal criminal charges in only one-half of one per cent of all cases filed.[8] Given the small number of defendants who actually benefit from the federal "exclusionary rule" (and some of them I remind you may actually be ***innocent***), it is foolish (and dangerous) to devote this kind of overkill to diluting our good citizens' privacy rights to cure an ill that does not exist.

More importantly, throwing our Constitutional rights at every perceived fear from drug abuse to violence in our schools and on our streets will not solve these complex social issues. Another reminder from Justice Scalia is worth repeating:

> **"[T]here is nothing new in the realization that the Constitution sometimes insulates the criminality of a few in order to protect the privacy of us all."[9]**

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[8]See: Thomas Y. Davies, ***A Hard Look at What we Know (and Still Need to Learn) About the "Costs" of the Exclusionary Rule***, 1983 Am.B.Found. Res.J. 611. See also: Office of Legal Policy, Report of the Attorney General on the Search and Seizure Exclusionary Rule (Feb. 26, 1986), *published in* 22 Mich.J.L. Ref. 600, 609, n.95 (1989).

[9]***Arizona v. Hicks***, 480 U.S. 421, 329 (1986).

WACO: THE CRITICS' COMPLAINTS

Now, let us look at Waco.

Critics of the handling of the attempted search and subsequent siege at Mount Carmel complain with some justification of:

- Unnecessary use of paramilitary and "strike force" units and military hardware;
- Staging of "publicity raids" in an effort to improve tarnished public image and/or influence Congressional appropriation hearings;
- Abusive use of "no knock" and "dynamic entrance" into residences without justification, risking the lives of innocent citizens;[10]
- Improper use of deadly force;
- Use of unreliable "informants" without sufficient verification of their allegations, including the use of excessive and even "contingency" payments to informants (such payments give "informants" a perverse incentive to fabricate information, since payments are often contingent upon the government obtaining a conviction);
- The affidavit in support of the search warrant arguably omitted exculpatory information and misstated certain facts;
- The affidavit contained certain inflammatory and questionable assertions (e.g. child sexual abuse) over which federal agencies had no jurisdiction;
- Much of the probable cause offered in support of the search warrant was "stale" -- months, even years old when the application for warrant was filed;
- There was an apparent failure to explore less violent alternatives.

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[10] See: ***Wilson v. Arkansas***, __ U.S. __ (1995), a very recent unanimous opinion authored by Justice Thomas, holding that the common law "knock and announce" requirement is embodied in the Fourth Amendment prohibition against unreasonable searches.

Why then were these issues not raised and preserved in the trial of the Branch Davidians? The truth is that contrary to popular belief, motions to suppress evidence on the grounds that such was illegally seized are very rarely granted, and would not likely have been granted in this case at the time of the "Branch Davidians'" trial. Under current federal law, not all policy mistakes, abuses, or even regulatory, statutory or Constitutional violations will warrant suppression.

For example:

* Federal Courts will place their imprimatur upon a warrant search even though the warrant affidavit lacks "probable cause". ***United States v. Leon***, 468 U.S. 897, 104 S.Ct. 3405, 82 L.Ed.2d 677 (1984) [officers' "good faith" reliance upon warrant issued by a magistrate].

* Federal Courts will not suppress evidence, even though it was illegally seized, where a particular defendant cannot demonstrate that he or she had a reasonable expectation of privacy in the place searched. ***Rakas v. Illinois***, 439 U.S. 128, 99 S.Ct. 421, 58 L.Ed.2d 387 (1978); ***Rawlings v. Kentucky***, 449 U.S. 98, 100 S.Ct. 2556, 65 L.Ed.2d 633 (1980) [standing].

* Federal Courts will also not suppress illegally seized evidence where that evidence may have been "inevitably discovered", ***Nix v. Williams***, 467 U.S. 431, 104 S.Ct.2501, 81 L.Ed.2d 377 (1984), or had an "independent source", ***Murray v. United States***, 101 L.Ed.2d 472 (1988).

Critics of these hearings complain, also with some justification, that certain members seek to utilize these proceedings to take political advantage of the Administration, while ignoring more extensive investigation into the activities of private militia groups. Concern with the apparent increase of armed "militia" across this country indeed may be warranted. But the "Waco" experience should demonstrate that giving greater license to federal law enforcement is not the answer.

NACDL has long expressed concern about abusive law enforcement practices -- "Waco" representing but one instance. Our concerns pre-date the current Administration. Over the years, *for example*, NACDL has been at the forefront of calling attention to the following cases of such abusive practices:

* **The Case of Sina Brush.** Just after dawn on **September 5, 1991**, some 60 agents from DEA, the U.S. Forest Service, the BATF, and the National Guard -- complete with painted faces and camouflage and accompanied by another 20 or more National Guard troops with a light armored vehicle -- raided the homes of Sina Brush and two of her neighbors near Montainair, New Mexico. Hearing noises outside, Ms. Brush got up and was only half-way across the room when her door was kicked in by agents. Clad only in their underwear, Ms. Brush and her daughter were handcuffed and forced to kneel in terror in the middle of the room while agents searched the house. No drugs were found. The agents had obtained a warrant using 'information' furnished by an unreliable 'informant' and had entered Ms. Brush's home without even knocking.

* **The Case of Donald Carlson.** On **August 25, 1992**, just after midnight and as California Businessman Donald Carlson was sleeping, a group of DEA agents burst into his house in Poway, California. Thinking they were robbers, Mr. Carlson grabbed his pistol to defend himself. He also dialed 911 for help. The agents shot Mr. Carlson several times in his home (even while he lay wounded on the floor). He spent seven weeks in intensive care fighting for his life. It was later disclosed that the U.S. Customs Service, the DEA and the local U.S. Attorney's office in San Diego involved in the operation had relied on an informant who was notoriously untrustworthy, who had claimed Mr. Carlson's garage contained 2,500 kilograms of cocaine and four armed guards. The agents conducted the raid against Mr. Carlson despite the fact that they could see the informant's claims were false. (When Mr. Carlson returned home that evening, he opened his garage door with a remote control device, simultaneously illuminating the inside of the garage so the DEA agents conducting surveillance nearby could see.) No drugs were found.

* **The Case of Donald Scott.** On **October 2, 1992**, just before 9:00 a.m., 30 local, state and federal agents (including DEA and the Los Angeles Sheriff's Department) staged an assault on 61-year old Donald Scott's home in the

Santa Monica Mountains, near Malibu, California. The agents burst into the Scott home, to serve Mr. Scott with a search warrant enabling them to inspect the 200-acre Scott ranch for suspected cultivation of marijuana. Mr. Scott was shot and killed in front of his wife by a deputy sheriff. Although the agents claimed they were searching for marijuana plants, no such plants were found. The Border Patrol, which had participated in the investigatory work leading up to the raid, later claimed the search was for undocumented aliens. None were found. The Ventura County District Attorney investigated the case and concluded that the affidavits the law enforcement officers gave the judge in support of the warrant request contained misstatements and omissions which made the warrant invalid.

LESSONS FROM WACO: THE NEED FOR GREATER PROTECTION IN AN AGE OF INCREASINGLY SOPHISTICATED LAW ENFORCEMENT TECHNOLOGY

While the Fourth Amendment had its roots in the colonists' fear of physical trespasses of King George's Redcoats, recent advances in the sophistication of electronic hardware pose an even greater need for viable protection of the citizen's privacy today.

There is an inverse relationship between the technology of surveillance and the citizens' right to privacy. As police technology increases, the citizen's reasonable expectation of privacy necessarily decreases. With the use of laser and computer enhanced infra-red technology, soon the authorities will be able to observe your most private activities from a distant location. The technology already exists to allow a listening audience to hear the quarterback's signals above the roar of the stadium crowd. Likewise, the authorities will soon be capable of eavesdropping upon our most private conversations, without the need for any wire intercept.

So in a time of increasingly sophisticated and more intrusive electronic invasions, rather than providing *less* protection for citizen's rights, Congress should be ensuring greater safeguards. Whatever our view of terrorism, the "drug problem", or violence on our streets, stripping the citizenry of two hundred years of civil liberties is not the solution. And beating the public into a frenzy -- willing to toss its own protections aside, poses even greater dangers than the evil they seek to prevent.

What may appear to be innocuous incursions in the face of these perceived fears, have a cumulative impact.

> "It may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way, namely by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy, and leads to gradual depreciation of the right, as if it consisted more in sound than in substance. It is the duty of the Courts to be watchful for the Constitutional rights of the citizen, and to guard against any stealthy encroachments thereon. Their motto should be *obsta principiis*."[11]

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[11] **Boyd v. United States**, 116 U.S. 616, 635 (1886).

A REAL CONCERN TO CONTROL ABUSES BY FEDERAL AUTHORITIES?

In 1989, then-Attorney General Richard Thornburgh issued a Memorandum, suggesting federal prosecutors are not subject to the ethical prohibition against communication with represented persons. This past year Attorney General Janet Reno codified same in the Code of Federal Regulations with the caveat that pursuant to newly created guidelines we could trust prosecutors to regulate themselves. Now Senate Bill 3 proposes to opt federal prosecutors out of ***any and all*** ethical rules of court, allowing them to make up their own rules.

> *"Sec. 502. CONDUCT OF FEDERAL PROSECUTORS.*
>
> Notwithstanding the ethical rules or the rules of the court of any State, Federal rules of conduct ***adopted by the Attorney General shall govern the conduct of prosecutions in the courts of the United States.***" (emphasis supplied)

Certainly, any kid playing in the schoolyard understands that you cannot call a game fair where one side is allowed to unilaterally opt itself out of the rules designed to regulate the conduct of both sides, much less allowing them to make up their own rules as they go. That same Department of Justice advocating this advantage to itself continues to oppose the Federal Judicial Conference's proposed amendments to Rule 16 of the Federal Rules of Criminal Procedure, which would provide for the exchange of witness lists in criminal cases. How can we deign to call a system fair that provides litigants in civil cases with pre-trial depositions, interrogatories, and requests for admissions when all that is a stake is the

almighty dollar, yet when a citizen's liberty or very life is at stake, we subject them to virtual trial by ***ambush***, without even advance notice of the witnesses who will testify against them, much less what they will say?

NACDL CONCERNS

Abolishing or diluting the Fourth Amendment "exclusionary rule" would effectively remove any incentive for governmental agents to obtain warrants from judges before intruding into citizens' privacy or seizing their property.

> **"[T]he relaxation of Fourth Amendment standards seems a tempting, costless means of meeting the public's demand for better law enforcement. In the long run, however, we as a society pay a heavy price for such expediency. Once lost, such rights are difficult to recover."[12]**

Failure to reform the civil asset forfeiture laws allows law enforcement agencies to continue taking from American citizens property that federal agencies allege to be crime-related, without even charging the citizens with a crime, requiring the citizen to bear the burden of proving their property "innocent", and then using the proceeds to amass police and paramilitary hardware. And exempting federal prosecutors from state ethical rules intended to regulate the conduct of all lawyers on both sides of the bar, will only further tilt

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[12] *United States v. Leon*, 468 U.S. 897 (1984).

an already uneven playing field.

Such measures cumulatively would have the effect of bringing about an unprecedented transfer of power from the judiciary to the executive branch of our government, specifically, police and prosecutors. Whatever one may feel about "judicial activism", the framers created the judicial branch as a bulwark against an overreaching executive. Measures that strengthen the hand of government while weakening the branch responsible for regulating that government's raw exercise of power constitute dangerous precedents.

NEEDED REFORMS

NACDL urges Congress to draw from the tragic events surrounding the "Waco" siege the over-arching lesson that there must be rules in a land of laws (and the rules must be fair), even in the war against crime -- that there exists a need for systemic restraint and reforms within federal law enforcement, including the following:

- Establishment of standards to limit the extraordinary use of police force, including use of weapons, armored vehicles, and tactics that are more suited for military or paramilitary operations than civilian law enforcement;
- Establishment of meaningful limits on the use of "no knock" and "dynamic" entries;
- Complete disclosure of the types of military hardware and technology used in civilian law enforcement, and the regulations, safeguards and restrictions that exist with regard to their use;

- Promulgation of standards to prevent indiscriminate "raids", limiting them instead to instances when such measures are absolutely necessary, and then only in a manner minimizing confusion as to the identity of the "raiding" party;

- Implementation of requirements that U.S. Attorneys must review and approve application for warrants, and appropriately and consistently discipline those who file untruthful or unlawful applications;

- Assurance that hearsay is utilized in an affidavit seeking a warrant only if the actual witnesses are unavailable because of death or incapacity;

- Requiring that warrant affiants note all possible exculpatory evidence in their warrant application;

- Assurance that federal prosecutors are held to the same practice standards and rules of ethics as all other attorneys;

- Setting standards for limiting the time for which warrants, affidavits, and related items can be sealed prior to and after service, with limited periodic review if extensions are shown to be necessary;

- Establishment of a very high degree of supervision of "informant" activity, and guidelines for verifying informant claims when agents rely upon such claims for the issuance of warrants or as the basis for other enforcement operations;

- Establishment of an open discovery process unless there is shown to exist a compelling reason in a particular case why such government disclosure to the defense counsel is impossible or too dangerous;

- Opening to the public, government investigatory files and dispositions of citizen complaints against federal law enforcement personnel;

- Assurance that law enforcement officers who lie are appropriately and consistently disciplined.

CONCLUSION

On behalf of the only professional organization whose sole role is to represent lawyers who defend citizens against just this kind of government abuse, I wish to thank the Subcommittees for providing me an opportunity to express the collective concern of the National Association of Criminal Defense Lawyers.

Three active members of our association, who speak with first hand knowledge of this tragedy, are scheduled to appear before the Subcommittees in the coming days. The fact that in the eyes of some vary able defense counsel none of these issues even warranted challenge in Federal Court, gives solemn testament to the fact that we dare not further dilute the citizens' meager safeguards. If anything, the lesson to be learned from the tragic events of Waco is that how we choose to treat the least of us will ultimately determine how we can expect to be treated ourselves.

Gerald H. Goldstein, President

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.

NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS
1627 K STREET NW, SUITE 1200, WASHINGTON DC 20006 • TEL: 202-872-8688 • FAX: 202-331-8269