

**RESOLUTION OF THE BOARD OF DIRECTORS
OPPOSING CONGRESSIONAL ATTACKS ON JUDICIAL INDEPENDENCE**

WHEREAS the Hon. James M. Rosenbaum is the chief judge of the United States District Court for the District of Minnesota; and

WHEREAS Chief Judge Rosenbaum, a former United States Attorney, was appointed to the federal bench by President Reagan and a Republican-controlled Senate in 1985, and since that time has made a distinguished record as a jurist; and

WHEREAS, in May of 2002, Chief Judge Rosenbaum voluntarily appeared before a subcommittee of the House Committee on the Judiciary to testify in support of the position of the United States Sentencing Commission against H.R. 4689, a bill that would have reinstated longer sentences for less culpable drug offenders; and

WHEREAS, the House Committee on the Judiciary voted to approve H.R. 4689, despite very frank and insightful testimony by Chief Judge Rosenbaum regarding inequities in the present system of sentencing under the guidelines; and

WHEREAS, the House Committee on the Judiciary subsequently issued a statement brutally maligning Chief Judge Rosenbaum, accusing him repeatedly of mendacity, concealment, and deceit in his testimony; and

WHEREAS, there is no basis in fact for the Committee having condemned Chief Judge Rosenbaum's testimony; and

WHEREAS, the gratuitous disparagement of a prominent jurist by the legislature is utterly inconsistent with the respect due to the members of a coequal branch of government; and

WHEREAS, a subcommittee of the House Committee on the Judiciary has, in February of this year, demanded that Chief Judge Rosenbaum and his colleagues on the federal court for the District of Minnesota produce files, records, and other documents to the General Accounting Office so that that congressional entity can investigate and criticize sentencing decisions made according to law by the federal judges of the District of Minnesota; and

WHEREAS, the House Judiciary Committee is at this moment considering a resolution that will authorize it to issue a subpoena to Chief Judge Rosenbaum to oblige him to produce all his notes and records in connection with every drug case in which he found a basis for downward departure since January 1, 1999; and

WHEREAS, the use of the legislative subpoena power against a sitting judge in such a fashion is unprecedented in our nation's history, and entirely at odds with the fundamental constitutional doctrine of separation of powers;¹ and

¹ See, e.g., James Madison, The Federalist No. 47 ("The accumulation of all powers, legislative, executive, and judiciary, in the same hands ... may justly be pronounced the very definition of tyranny."); James Madison, The Federalist No. 48 (none of the three departments of government "ought to possess, directly or indirectly, an overruling influence over the others, in the administration of their respective powers."); Alexander Hamilton or

WHEREAS, the National Association of Criminal Defense Lawyers and its members and affiliates firmly support the independence and neutrality of the judiciary from intermeddling of any kind by the other departments of government; and

WHEREAS the Sentencing Reform Act of 1984, which created the Sentencing Commission and authorized the promulgation of federal sentencing guidelines, “preserves for the judge the discretion to depart from the guideline applicable to a particular case if the judge finds an aggravating or mitigating factor present that the Commission did not adequately consider when formulating guidelines”²; and

WHEREAS, the constitutionally proper method of review of a sentence imposed pursuant to the federal sentencing guidelines is by appeal to a United States court of appeals, and not by Congressional intervention;

THEREFORE BE IT RESOLVED, that the National Association of Criminal Defense Lawyers urges the House Committee on the Judiciary to refrain from issuing its subpoena to Chief Judge Rosenbaum, and to recant and apologize for the abuse it has heaped on him, on the grounds that both are inconsistent with a proper respect for the doctrine of separation of powers;

BE IT FURTHER RESOLVED, that the National Association of Criminal Defense Lawyers opposes, and urges Congress to reject, presently pending amendments to 18 U.S.C. § 3742 which would arrogate to the legislature a review power over the Department of Justice’s decisions whether to appeal departure sentences entered by federal district judges,³ on the grounds that such a review power is inconsistent with a proper respect for the doctrine of separation of powers.

APPROVED this 24th day of March, 2003.

James Madison, The Federalist No. 51 (insisting upon “that separate and distinct exercise of the different powers of government, which ... is admitted on all hands to be essential to the preservation of liberty”). *Cf. Morrison v. Olson*, 487 U.S. 654 (1988).

² *Mistretta v. United States*, 488 U.S. 361, 367 (1989).

³ Section 3742 would be amended to include the following language:

(1) Not later than 15 days after a district court’s grant of a downward departure in any case ... the Attorney General shall report to the House and Senate Committees on the Judiciary, setting forth the case, the facts involved, the identity of the district court judge, the district court’s stated reasons [for downward departure] ... and whether or not the United States has filed, or intends to file, a notice of appeal of the departure

(2) In any such case, the Attorney General shall thereafter report to the House and Senate Committees on the Judiciary not later than 5 days after a decision by the Solicitor General whether or not to authorize an appeal of the departure, informing the committees of the decision and the basis for it.