

# FROM THE PRESIDENT

JOHN WESLEY HALL

## We Are Enforcers of the Constitution

This year we held our Annual Meeting in Milwaukee, just 90 miles from where we started in Chicago on August 11, 1958. NACDL started with a handful of lawyers who were seeking to improve the image and expertise of criminal defense lawyers. In fact, our second president, the legendary Sam Dash, wrote in 2003 that they didn't like the phrase "criminal defense lawyer" back then because it was pejorative.

Too often, even today, criminal defense lawyers seem to get little respect from other lawyers. We are often considered "the other guys" by the rest of the bar because we undertook a different mission in the practice of law, a mission they don't truly understand. Those who became lawyers for the money have no clue what we do, and, thus, no true respect for our calling.

*And it is a calling.* We undertake to do what other lawyers refuse to do, or don't have the stomach for. We get our hands dirty with humankind's mistakes, misjudgments, moral failings, and mental infirmities.

We became criminal defense lawyers because of our shared ideal: the Constitution and the Bill of Rights must always mean something in an American courtroom. Keeping our government honest and assuring that the innocent are not convicted are important goals of criminal defense practice. That is a result of every case, whether we win or lose.

The government enforces the law, often at the expense of the Constitution and Bill of Rights. We ensure the government complies with the law. We, too, are enforcers of the Constitution.

The government seeks to take our clients' liberty, to house them in a cage or a concrete box, and sometimes

even take their lives. It is more convenient for government to dispense with some procedural niceties, as it is wont to do, but a trial and criminal justice were never meant to be convenient.

The criminal courts are where the Constitution is tested and protected by people like us — every day, in every case. That is why I became a criminal defense lawyer. All of us view being a criminal defense lawyer as an honorable profession *within* the legal profession.

NACDL is my bar association, where I came to find like-minded protectors and enforcers of the Constitution. I come to this position now, 35 years a lawyer, as a humble steward for the interest of the members of this organization who have entrusted it to the care of the officers and Board of Directors. I also come here without any fixed personal agenda other than one thing: continuing the work of all those going before, and protecting the interests of our clients and the Constitution through the zeal and quality of our representation in courtrooms and legislatures.

We have come far. Yet, we will always have far to go because our work will never be done.

- ❖ Public defenders and appointed lawyers are overworked and underpaid with increasing caseloads. Now we see pay and hiring freezes and even layoffs. We always will support public defenders in their efforts to challenge budget cuts as well as seek systemic reforms.
- ❖ Problem-solving courts are literally popping up all over the country, and they are tailored to virtually every category of offense and offender. Our *Task Force on Problem-Solving Courts* has been working and holding hearings for nearly two years. It will soon issue a report on best and worst practices as well as the broader implications for our adversarial system.
- ❖ We see the reality of *Operation Streamline's* herding defendants to mass guilty pleas, often without any meaningful opportunity to talk to a criminal defense lawyer. This is inherently wrong in American justice. This year, hundreds of people were arrested in Iowa and literally herded into cow pens before they were Streamlined. Such an ugly image. In America, no less?
- ❖ There are misdemeanor courts with a "meet 'em and plead 'em" agenda, like the case of the first-year public defender we defended last year who was held in contempt for refusing to go to trial just one hour after meeting the client — because it was convenient for the court. In the upcoming year, we will also issue a report on the state of misdemeanor defense in America.

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SEARCH AND SEIZURE (3d ed. 2000; 4th ed. forthcoming) published by Lexis Law Publishing. Hall is listed in Best Lawyers in America in criminal defense. He writes daily on the law of search and seizure at [www.FourthAmendment.com](http://www.FourthAmendment.com). He is also

the author of PROFESSIONAL RESPONSIBILITY IN CRIMINAL DEFENSE PRACTICE (3d ed. 2005) published by Thomson West.

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- ❖ The grand jury room still is characterized by lawlessness and abuse. NACDL will redouble its efforts to reform this institution, something we started 10 years ago. NACDL issued a report in 2000. This year we will issue a report on those states that have adopted our proposals regarding grand jury reform.
- ❖ Under the *carte blanche* claim of “National Security,” outside the PATRIOT Act, the government launched sweeping surveillance and prosecutorial programs that threaten fundamental liberties, including rights to privacy and expression that are the hallmark of this free society. NACDL will marshal and commit the necessary resources to meet this threat — both systemically and case-by-case. We will bridge the gap between theory and practice to prevent usurpation of liberty in the name of national security. Liberty does not threaten our national security; it preserves it. It is why this country exists.

Over all these years, we collectively and individually have proved to the judges and prosecutors of this country that criminal defense lawyers can be far better than they may have ever expected in our knowledge, skill, loyalty, and honesty. But, we expect the same of them.

- ❖ The Department of Justice gave the United States the USA PATRIOT Act, which is so inimical to the core values of the rule of law and the Bill of Rights that its very name is a lie. What happened to “support and defend the Constitution of the United States against all enemies, foreign *and domestic*”?
- ❖ The Department of Justice had a tradition of having backbone, prior to 2001. Then, its leadership became populated with sycophants. Alberto Gonzales did more damage to the “rule of law” in two and a half years as Attorney General than any predecessor.
  1. Torture memos were created to justify and immunize official lawlessness in obtaining confessions by torture.<sup>1</sup> It is perfectly Kafkaesque that a confession obtained by torture is admissible in a military commission, particularly since the U.S. Supreme Court held that unconstitutional 72

years ago in *Brown v. Mississippi*.<sup>2</sup> But is not the very point of a military commission to circumvent the Constitution? Isn't that what we've been litigating?

2. In December 2006, seven U.S. Attorneys were fired for completely political reasons.

3. When Congress asked about it, we saw the stunning, pathetic, and even comical performance of Alberto Gonzales testifying before Congress to his lack of memory about the firings. I had a flashback to H.R. Haldeman in the Watergate Hearings.

4. Most recently there were political hiring decisions and the revelation of the DOJ “Dis-Honors” Program, a place where mediocre conservative lawyers were injected into DOJ policy positions solely for their views.<sup>3</sup> Career prosecutors tell me they are sickened by this.

Come this January, will our Attorney General be a lawyer of vision and intellectual integrity, truly believing in equal justice for all, or will he or she be another political hack who considers the rule of law and Bill of Rights historically “obsolete” or “quaint,” like the Geneva Convention *the United States primarily drafted* as an impediment to the War on Terror?<sup>4</sup> Will the rule of law and Bill of Rights continue to remain a victim of the War on Terror?

When I earlier referred to an American courtroom, I meant no disrespect to our members from other nations who labor for justice in courtrooms from Vancouver to Montreal to London to seemingly never-ending trials at the ICTY in The Hague. Indeed, a lawyer from Toronto was at our organizational meeting 50 years ago.

But I'm also speaking of an American courtroom in the American prison camp at Guantanamo Bay, where the Constitution at least partly applies because NACDL stood up to say, “In an American courtroom, these men, accused of even the most heinous of crimes against humanity, have a right to the protections of the Constitution of the United States.”

The ideal of American democracy, government, and the rule of law requires no less. Since our government will not say it, NACDL, “Liberty's Last Champion,” will, and did.

For five years we have been litigat-

ing the rights of accused war criminals, taking the government to task every time it seeks to turn some important value of American constitutional law into an “inconvenience” in the name of the War on Terror. *Criminal justice was never meant to be convenient*, not when liberty and life, and even our constitutional heritage, are all at stake. The War on Terror can no longer be a war on the Constitution where our values fall victim. This work is far from over, as our John Adams Project with the ACLU attests.<sup>5</sup>

As “Liberty's Last Champion,” NACDL has always stood up. Our reputation is that of the voice of reason in the criminal justice system. Our opinions are sought by courts and legislatures as the pre-eminent voice of the criminal defense bar, nearly 13,000 strong. We file amicus briefs in every criminal case in the Supreme Court to be sure that the Court gets the true defense perspective.

The Supreme Court, in the last two days of its most recent term, cited our amicus briefs in two cases. We have been cited 22 times in 19 years. In 2007's *Roper v. Weaver*,<sup>6</sup> our brief was the one that led to the writ of certiorari being dismissed as improvidently granted, which was good because bad law would have been made.

NACDL has been here for 50 years, and we will be here as long as there are criminal defense lawyers. There will always be a need and a voice for “Liberty's Last Champion.”

*We few, we happy few,*

*we band of brothers;*

*For he to-day that*

*sheds his blood with me*

*Shall be my brother.*<sup>7</sup>

This is our calling. This is our life. We are NACDL.

## Notes

1. [http://www.aclu.org/pdfs/safe-free/yoo\\_army\\_torture\\_memo.pdf](http://www.aclu.org/pdfs/safe-free/yoo_army_torture_memo.pdf).

2. 297 U.S. 278 (1936).

3. Lara Jakes Jordan, *DOJ: Former Aide Broke Law in Hiring Scandal*, AP (July 28, 2008).

4. See note 1, *supra*.

5. <http://www.aclu.org/johnadams>.

6. 127 S. Ct. 2022 (2007).

7. Shakespeare, *Henry V*, Act. IV, sc. 3, St. Crispin's Day Speech (1599). ■