

WRITTEN STATEMENT OF  
GERALD H. GOLDSTEIN

ON BEHALF OF THE  
NATIONAL ASSOCIATION  
OF CRIMINAL DEFENSE LAWYERS

BEFORE THE  
SENATE JUDICIARY COMMITTEE  
IN OPPOSITION TO  
SECTION 507 OF S. 3,  
"VIOLENT CRIME CONTROL AND  
LAW ENFORCEMENT ACT."

MARCH 10, 1995

The National Association of Criminal Defense Lawyers (NACDL) is a specialized bar association representing the Nation's criminal defense lawyers, and in turn, individuals and corporations accused of crime. Its 8,700 direct members and 70 state and local affiliates include private criminal defense lawyers, public defenders, and law professors. This 36-year old association is devoted to ensuring justice and due process for persons accused of crimes; fostering the integrity, independence, and expertise of the criminal defense professions; and promoting the proper and fair administration of criminal justice.

As President of the NACDL, I hereby offer its written statement for the record relative to the March 7, 1995 hearings before the Judiciary Committee of the United States Senate on S.3's: "The Jury and the Search for Truth."

***National Association of Criminal Defense Lawyers'***  
***Written Testimony in Opposition to Section 507 of S.3, "Violent Crime***  
***Control and Law Enforcement Improvement Act"***

Section 507 of S.3, the "Violent Crime Control and Law Enforcement Improvement Act" (VCCLEIA), is characterized by a lack of respect for constitutional principles and human dignity.

**Involuntary Confessions**

Sir William Blackstone noted the well-founded distrust of out-of-court confessions over two hundred years ago in his Commentaries on the English Common Law: "[T]hey are the weakest and most suspicious of all testimony; ever liable to be obtained by artifice, false hopes, promises of favor, or menaces; seldom remembered accurately, or reported with due precision; and incapable in their nature of being disproved by other negative evidence." 4 W. Blackstone, Commentaries, Chapt. XXVII. By the eighteenth century, English courts excluded confessions that were not "voluntary," including those resulting from actual or threatened physical harm.

In the United States, confessions obtained through torture (still practiced in many parts of the world) or other more subtle forms of coercion violate the Due Process Clause of our Constitution. In Brown v. Mississippi, 297 U.S. 278 (1936), the Supreme Court struck down confessions obtained by brutal beatings. In Rogers v. Richmond, 365 U.S. 534 (1961), a confession was obtained by threatening to arrest the suspect's sick wife. Justice Frankfurter explained that a confession is involuntary and inadmissible if it is "the product of coercion, either physical or psychological."

The Supreme Court has repeatedly held that the burden of proving voluntariness, by a preponderance of the evidence, is on the prosecution. See e.g., Colorado v. Connelly, 479 U.S. 157 (1986); Lego v. Twomey, 404 U.S. 477 (1972).

Section 507(a)(1) of S.3 impermissibly shifts the burden of proof from the government to the accused on the issue of the voluntariness of a confession, creating a presumption of voluntariness and thus, admissibility. Section 507(a)(2) effectively eliminates the rule against prolonged interrogations of individuals. These two proposals eviscerate the presumption of innocence by substituting an inquisitorial system. They attack the very core of constitutional protection from coercive law enforcement practices and eliminate decades of improvement in the professionalism of law enforcement.

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In Watts v. Indiana, 338 U.S. 49 (1949), Justice Frankfurter characterized the nature of our legal system, inherited from the English Common Law, and preserved in our Constitution:

Ours is the accusatorial as opposed to the inquisitorial system. Such has been the characteristic of Anglo-American criminal justice since it freed itself from practices borrowed by the Star Chamber . . . . Under our system, society carries the burden of proving its charge against the accused not out of his own mouth. It must establish its case, not by interrogation of the accused even under judicial safeguards, but by evidence independently secured through skillful investigation.

By breaking time-honored barriers erected to protect individuals from the over-reaching powers of government, Section 507(a)(1)&(2) fundamentally alter our legal system. There is simply no justification for legislation that propels this Nation toward an inquisitorial justice system.

As Justice Jackson, dissenting on other grounds in Ashcraft v. Tennessee, 322 U.S. 143 (1944), pointed out, custodial interrogation for even one hour is "inherently coercive." The Supreme Court law is consistent in its recognition that common sense and experience dictate that the balance of power in any custodial interrogation rests on the side of law enforcement. Shifting the burden of proof to the accused will render it virtually impossible for individuals to challenge unconstitutional police interrogation practices.

The Supreme Court decisions in McNabb v. United States, 318 U.S. 332 (1943) and Mallory v. United States, 354 U.S. 449 (1957), established that individuals arrested by federal agents must be taken before a judicial officer without unnecessary delay. Any confession obtained through prolonged questioning in violation of that requirement is inadmissible.

Rules limiting custodial interrogation have been well-established for decades. Not many law enforcement officers today were even alive when the "rubber hose" was standard procedure. Instead, modern law enforcement agents have grown accustomed to the professional standards produced by respect for the Constitution. Few would disagree

with the Supreme Court's observation in Spano v. New York, 360 U.S. 315 (1959):

The abhorrence of society to the use of involuntary confessions does not turn alone on their inherent untrustworthiness. It also turns on the deep-rooted feeling that the police must obey the law while enforcing the law; that in the end life and liberty can be as much endangered from illegal methods used to convict those thought to be criminals as from the actual criminals themselves.

The rights of the accused to be protected from government inquisition are embedded in our Constitution. By abandoning these protections, Section 507 (a)(1)&(2) take us into an era of dangerous, unrestrained governmental power. Any "gains" are dubious best. Cases are not lost because confessions are suppressed. They are typically lost because there is insufficient evidence of the accused's guilt.

### **Miranda**

The Supreme Court's decision in Miranda v. Arizona, 384 U.S. 436 (1966), contains a thorough discussion of the history of coercive police tactics. The rule in Miranda seldom works to free the guilty. In fact, Ernesto Miranda was convicted on his retrial without the introduction of his improperly obtained confession.

Miranda held that the warnings are required "unless fully effective means are devised to inform accused persons of their right of silence and to assure a continuous opportunity to exercise it . . . ." 384 U.S. at 444. The Miranda advisements provide far greater protection from improper law enforcement tactics to persons in custody than does any other would-be means yet devised.

### **About Videotapes**

Some have suggested that instead of the Judiciary's Miranda insurance against governmental use of unknowing, involuntary and unreliable statements ill-gotten through tricky and/or "thumb screw" interrogation practices, Congress could just mandate that all confessions be videotaped. However, aside from the costs associated with such an assumedly unfunded mandate for state, local and federal law enforcement entities to become video producers, videotaping confessions does nothing to inform persons suspected of crime of their constitutional rights. The videotape may not show the officer behind the camera who told the suspect what to say or threatened her before the taping began. A rule requiring videotaping of all law enforcement questioning sidesteps the real

issue because videotapes do not necessarily tell the whole story, or even a truthful one. Videotaping cannot be considered an effective substitute for the Miranda safeguards.

### **Exclusionary Rule**

There are some people in this Nation who think the Fourth Amendment right to be secure in our homes is some sort of "technicality" that "tricky lawyers" invoke. But that is certainly not what the Founders of this Nation thought when they fought the Revolution to secure this right -- a right earlier denied them by the not-so-great Britain. Madison and Mason exalted this right when they made it integral to our Constitution in the First Congress.<sup>1</sup> This right to be let alone and to retain one's personal privacy free from the government's otherwise enormous intrusion and confiscation abilities is a basic freedom each of us enjoys as an American citizen. It is at the core of American democracy.

To know how important this right remains to us as a free people, you need to only to study law enforcement misbehavior when this right is abridged.

Ask San Diego, California computer industry executive Donald L. Carlson, who on August 25, 1992 was already lying wounded on his bedroom floor due to a bungled and over-zealous, federal/state, multi-agency task force operation (including the DEA and Customs) -- when a participating government agent decided Mr. Carlson deserved to be shot twice more in the back. The agents had the wrong man. "It was the most horrifying night a person could experience. . . . My life will never be the same." Quoted in Mark Curriden, "Informer's Lies Trigger a Tragedy," Nat'l L. J., Mar. 6, 1995, at A1, A25. In

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<sup>1</sup> The principle that a person's home is his (or her) castle existed in England long before the colonies were settled in America. It gave even the poorest peasants the right to exclude the King's forces from their homes. The English Bill of Rights was enacted by Parliament in 1689, but the British nonetheless freely used the abusive "general warrant" in their American colonies. This general warrant was a "blank check" for soldiers to search homes for whatever "evidence" they might find. Many of the original states expressed disapproval of the "general warrant" by including a prohibition against unreasonable searches and seizures in their constitutions.

When the United States Constitution was ratified, it did not contain any mention of the protection against unreasonable searches and seizures now in our Bill of Rights. Many of the States that ratified the Constitution did so only on the condition that additional protections against the power of government be included. The first ten amendments to the Constitution -- the Bill of Rights -- were accordingly promptly added in 1791, only four years after the Constitution was ratified.

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Mr. Carlson's case, although the government agreed to pay him \$2.5 million cash and place \$250,000 in a medical trust on his behalf, the agents involved have received no formal punishment, according to the U.S. Attorney in San Diego. He has taken the inconsistent or unprincipled position that "we believe the agents were also victimized by this out-of-control, rogue informer. . . . [despite the fact that] [the government purports to believe that this officer 'victimization'] does not excuse th[eir] lack of control of the informer." *Id.* at A25. Compare Section 507(b) of S.3, proposed Section 2692 (providing a new cause of action -- after the fact, and requiring separate litigation -- capped at \$30,000, where a search or seizure was conducted in violation of the Fourth Amendment), and proposed Section 2693 (stating that an officer who conducts a search or seizure in violation of the Fourth Amendment shall be subject to "appropriate" discipline in the discretion of the Federal agency employing the officer -- if the agency itself determines the officer lacked a "good faith belief that the search or seizure was constitutional.").

Or ask United States Representatives Patricia Schroeder and Bobby Rush. As Ms. Schroeder stated in the debate over H.R. 666's evisceration of the Fourth Amendment: when she began her first congressional campaign in 1972, "[t]he FBI came trooping through [her] house over and over." She later discovered that the FBI had hired an agent to break into her home. The "incredible revelations" that the agent thereby obtained at taxpayer expense were the facts that Ms. Schroeder belonged to the League of Women Voters and that she had been a girl scout. See Nkechi Taifa, "Tripping Over the Constitution in the Rush to Fight Crime," *Legal Times*, Feb. 27, 1995, at 27, 29. In the same floor debate, Mr. Rush recounted his experience in 1969, when, as part of a particularly outrageous illegal series of searches and seizures conducted by the Chicago Police Department that resulted in the official murder of two members of the Black Panther political party, he as a member of that party had his door shot down and his home raided. The police found a bag of bird seed, which they identified as marijuana. See id. at 29.

The Fourth Amendment right of privacy is no "technicality" to these citizens; nor to all Americans. Its violation by officers acting in "good faith" cost these victims their privacy, dignity, lives and loved ones. Nor are these the only such victims across the country. Unfortunately, there are many more. And all of us are potential victims of this sort of official lawlessness.

If the United States Senate compromises the right to be let alone, as some have proposed, it will not strike some mere "technicality" from the law books. It shall gut one of society's most fundamental freedoms against abusive government -- our freedom from the unchecked, police state power of law enforcement.

### **Judicial Branch Guardianship of the Fourth Amendment Versus Section 507 of S.3**

The United States Supreme Court is the premier guardian of the Constitution. See 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 their authority."). The Supreme Court developed the "exclusionary rule doctrine" specifically, in federal cases, in 1914 -- in order to ensure that the limitations imposed on intrusive government conduct by the Fourth Amendment are meaningful in fact. This rule of constitutional doctrine generally prohibits the use of evidence in criminal prosecutions that represents an ill-gotten governmental gain -- evidence obtained in violation of the Fourth Amendment. See Weeks v. United States, 232 U.S. 383 (1914). The Court extended the rule to State government prosecutions, for the same reason, in Mapp v. Ohio, 367 U.S. 643 (1961).

By threatening exclusion of evidence, the rule has effectively deterred law enforcement agents from overstepping those limitations and has had the effect of enhancing the quality of law enforcement training and professionalism.

Section 507(b) of S.3 seeks to abolish the Judiciary's exclusionary rule protection of the Fourth Amendment in its entirety -- going far beyond any limitation any court has considered applying to the rule, and substituting in its place an ineffective, meager, after-the-fact tort remedy for Fourth Amendment violations. The consensus of studies on this issue is that civil suits and internal police discipline (even when not artificially capped and left to the offending agency's discretion, respectively) are inadequate means to deter law enforcement officers from violating the Fourth Amendment's promised limitations on law enforcement intrusions.<sup>2</sup>

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<sup>2</sup> It is also important to recognize that someone from whom drugs, weapons or other evidence of criminal conduct has been seized in violation of the Fourth Amendment is unlikely to find sympathy and obtain an award of punitive damages that even approaches \$10,000. This is important because one of Section 507's considerations in allowing awards of some punitive damages is the effect that making punitive awards would have in preventing future violations of



Critics of the exclusionary rule trumpet the misperception that it regularly releases dangerous criminals onto our streets when evidence is suppressed. Studies repeatedly confirm that it does not. A 1979 study by the U.S. Comptroller General found that suppression motions were granted in only 1.3 percent of federal prosecutions. A 1988 report by a special ABA committee headed by former Watergate prosecutor Sam Dash concluded, based on extensive interviews of state law enforcement officials, that "constitutional restrictions, such as the exclusionary rule . . . do not significantly handicap police and prosecutors in their efforts to arrest, prosecute, and obtain convictions of criminal defendants for most serious crimes." See also Thomas Y. Davies, A Hard Look at What We Know (and Still Need to Learn) About the "Costs" of the Exclusionary Rule: The NIJ Study and Other Studies of "Lost" Arrests, 1983 Am.B. Found. Res. J. 611; 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).

### **H.R. 666 Is No Savior<sup>3</sup>**

Nor is the House-passed "good faith exception" (H.R.666) for warrantless searches an acceptable truncation of the exclusionary rule. Perversely exempting the federal Bureau of Alcohol, Tobacco and Firearms (ATF) and the Internal Revenue Service (IRS) from its legislative incentive to other federal law enforcement agencies to become as egregious in their conduct as the House perceived these two agencies to be, H.R.666 also goes beyond anything the Judiciary has ever countenanced, and would reduce the Fourth Amendment to a mere "form of words" or an empty promise.

### **Supreme Court Law on the Objectively Reasonable "Good Faith " Exception to the Generally Applicable Exclusionary Rule: Leon; Krull; and Evans**

In United States v. Leon, 468 U.S. 897 (1984), the Supreme Court established a limited exception to the rule for situations in which law enforcement agents seized evidence pursuant to a warrant that was actually invalid, but which they objectively reasonably believed to be valid (the "good faith exception").

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the Fourth Amendment. As reality confirms that very few punitive awards will approach the proposed maximum of \$10,000, the Section 507 punitive damage proposal would fail to deter future violations of the Fourth Amendment.

<sup>3</sup> Compare e.g., Revelations 13:18.

In Illinois v. Krull, 480 U.S. 340 (1987), the Court developed further the concept articulated in Leon of objectively reasonable, "good faith" reliance by an officer on external legal authority to conduct a search or seizure. In Krull, the Court held that the "good faith" exception could extend to a situation where an officer's reliance on the constitutionality of a State statute appeared objectively reasonable, despite the fact that the statute is later declared unconstitutional.

On March 1, 1995, in Arizona v. Evans, 63 U.S.L.W. 4179 (Feb. 28, 1995 (Extra Edition No. 2)), the Court extended the "good faith" exception to a case in which a law enforcement officer acted in objectively reasonable reliance upon a faulty computer entry, based on court clerk records, that an arrest warrant for the defendant existed (the warrant had in fact been quashed). In essence, the Court held that, under the specific facts of that case, the computer record provided an external source of authority sufficient to bring the officer's actions within Leon's "good faith" exception to the exclusionary rule. But even Arizona v. Evans does not countenance the rule envisioned by Section 507(b). And a majority of the Court remains open to the possibility that widespread computer errors could indeed provide a basis for excluding evidence obtained through searches or seizures obtained by law enforcement reliance on such a notoriously flawed computer system -- demonstrating the Court's commitment to the continued general vitality of the exclusionary rule. (See Justice O'Connor's concurring opinion, joined by Justices Souter and Breyer, in which she notes that, because computers facilitate arrests, law enforcement may have a constitutional duty to ensure the reliability of their computerized records. See also the dissenting opinions of Justices Stevens and Ginsburg.)

In short, the Supreme Court has consistently been unwilling to reopen its basic, well-established conclusion that exclusion of information and proposed "evidence" from the prosecution's case-in-chief is necessary to deter most unconstitutional searches and seizures, and is generally necessary to ensure that the Fourth Amendment not be reduced to a mere "form of words," as Justice Oliver Wendell Holmes put it in Silverthorne Lumber Co. v. United States, 251 U.S. 505 (1920). The Court has limited its "good faith" exception to the generally-applicable exclusionary rule to instances in which officers' searches and seizures have been objectively reasonable in their reliance upon an external source of legal authority. See Leon, Krull, and Evans.

### **Section 507(b) of S.3 Subverts the Constitutional Role of the Judiciary**

Section 507(b) is contemptuous of the federal Judiciary's role in our constitutional democracy as the ultimate guardian of the Constitution. More specific, it flagrantly disregards the Supreme Court's clear case law on the external source of authority

touchstone to the "good faith" exception to the exclusionary rule. Indeed, Section 507(b) is just the sort of flagrantly offensive statute condemned by the Krull Court. See also The Federalist No. 78.

The Krull majority was careful to emphasize that under the "with-statute" "good faith" exception it recognized in that case, a statute cannot support an officer's claim of objectively reasonable reliance if, in passing it, the legislature wholly abandoned its responsibility to enact constitutional laws, or if the statutory provisions are such that a reasonable law enforcement officer should have known that the law was unconstitutional. See Krull at II.B. There is good reason for the Krull decision's limitations: statutes authorizing unbridled legal discretion on the part of law enforcement officers at the expense of the People's freedom and privacy were the core concern of the Fourth Amendment's Framers. See e.g., The Federalist No. 78. Even a judicial officer's faulty warrant authorization of an unconstitutional search or seizure affects but one person at a time. A legislature's authorization of such unconstitutional conduct by law enforcement officers -- especially the national legislature's -- can affect the lives of millions. Accordingly, the Founders recognized and made constitutional provision (separation of powers; checks and balances) for the fact that legislators, by virtue of their political role, are more often subjected to political pressures that threaten Fourth Amendment and other constitutional values than are federal judicial officers.

#### **The Proposed Civil Remedial Regime's Effect on the Federal Judiciary: Caseloads, Inefficiency and Branch Conflict**

Section 507(b) appears to embrace a separation of powers conflict in a federal judiciary already burdened with a caseload cost and delay crisis. See generally Civil Justice Reform Act of 1990, 28 U.S.C. secs. 471-482 (Supp. III 1991) (enacted as Title I of the Judicial Improvements Act of 1990, Pub. L. No. 101-650, sec. 103(a), 104 Stat. 5090-96 (1990)); The Proposed Long Range Plan for The Federal Courts (available through the Committee on Long Range Planning, Judicial Conference of the United States); National Association of Criminal Defense Lawyers, Written Comments Regarding the Proposed Long Range Plan for the Federal Courts (Attachment "A" to this Written Statement of NACDL in Opposition to Section 507 of S.3).

The federal courts' civil caseloads are already at levels of cost and delay undermining citizen confidence in the legal system. See e.g., Senator Charles E. Grassley, Remarks Before the Judicial Conference of the United States (Mar. 15, 1994) ("There is frustration and dissatisfaction with our legal system. It costs too much and takes too long -- those are the most common complaints by the users of our courts."). The entirely

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distinct, protracted civil case regime contemplated by Section 507 of S.3 will take up much more of the courts' time (and funding) (not to mention that of the U.S. Attorneys') than do suppression hearings; and it will further crowd the courts' dockets -- to the additional exclusion and dissatisfaction of most would-be civil dispute users of the system, and probable delay of many criminal prosecutions as well!

As Judge Frank M. Coffin has written, in his article, Working With the Congress of the Future, in Federal Judicial Center, The Federal Appellate Judiciary in the 21st Century 201 (Cynthia Harrison & Russell R. Wheeler eds., 1989):

It is safe to say that the happiness, effectiveness, stability, and independence of the federal judiciary depend to a very large extent on Congress. If it is sensitive and responsive to our needs, we shall remain one of the most durable legacies of the founders of this nation. If it is not, long continued suspicion, underfunding, petty harassment, minute oversight, and capricious additions to workload can be the equivalent of a constitutional amendment repealing Article III.

Given the federal case-overload that would be effectuated by the proposed new civil cause of action regime, it is possible that the separation of powers conflict Section 507 would create could result in a Federal Judiciary/Legislature mode of communication regarding federal court jurisdiction characterized by "push-shove," rather than the cooperation that is needed. Presented with the Section 507 civil remedy albatross, the federal courts may decide that their inherent powers to ensure the effective administration of justice must be exercised in a manner flatly rejecting the Section 507 civil regime in favor of suppression hearings. See generally Judge Robert M. Parker & Leslie J. Hagin, Federal Courts at the Crossroads: Adapt or Lose!, 14 Miss. C. L. Rev. 211 (1994). As Justice White explained for the Supreme Court in 1991:

It has long been understood that "[c]ertain implied powers must necessarily result to our Courts of justice from the nature of their institution," powers "which cannot be dispensed with in a Court, because they are necessary to the exercise of all others." . . . These powers are "governed not by rule or statute but by the control necessarily vested in the courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases."

Chambers v. Nasco, Inc., 501 U.S. 32, 43 (1991) (quoting United States v. Hudson, 11 U.S. (7 Cranch) 32, 34 (1812); and Link v. Wabash Ry. Co., 370 U.S. 262, 630-31 (1962)).

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Congress should be at least as circumspect about imposing unfunded or underfunded mandates upon the federal courts as it is with respect to imposing such mandates upon the States.

**Conclusion**

For the foregoing reasons, NACDL opposes Section 507 of S.3 as unconstitutional and unwise, and antithetic to the very cornerstones of freedom and democracy upon which our great Nation was built and has proudly prevailed for more than 200 years.

Gerald H. Goldstein

Gerald Harris Goldstein is a native of San Antonio, Texas. He graduated from Tulane University in 1965 then attended the University of Texas School of Law. He graduated in 1968 and has devoted his practice since that time to the representation of those accused of crime. He is admitted to practice before the state courts of Texas and numerous federal district courts, U.S. Courts of Appeals and the United States Supreme Court. He is certified as a criminal law specialist by the State Bar of Texas Board of Legal Specialization. In addition to his practice he serves as an Adjunct Professor of Law at the University of Texas School of Law and lectures frequently on criminal law and procedure at continuing legal education seminars throughout the United States. He has served as appellate counsel in numerous death penalty cases and has been counsel of record for NACDL as *amicus curiae* in several important controversies before the U.S. Supreme Court. His law firm, Goldstein, Goldstein and Hilley, devotes approximately fifteen percent of its time to *pro bono* work. He is currently the President of NACDL.

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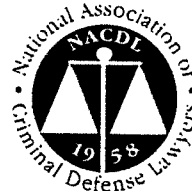
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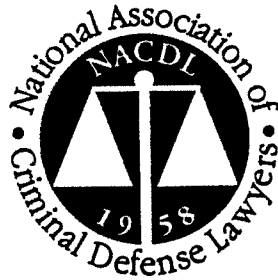
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Attachment A to NACDL Statement Regarding  
Section 507 of S.3, March 10, 1995





**NATIONAL ASSOCIATION OF  
CRIMINAL DEFENSE LAWYERS**

**WRITTEN COMMENTS REGARDING**

**THE PROPOSED LONG RANGE PLAN FOR THE FEDERAL  
COURTS**

**Submitted to the  
Committee on Long Range Planning  
Judicial Conference of the United States**

**DECEMBER 16, 1994**

## **Executive Summary**

- The federal judiciary should act to restore and preserve its "core values" of equal justice, judicial independence, limited federal jurisdiction, judicial excellence, and accountability.
- Federal criminal charges should be filed only in those instances in which state court prosecution is not appropriate—consistent with the core value of limited federal jurisdiction.
- State courts should not have jurisdiction over federal crimes.
- Congress should forego future and repeal current offenses that are inappropriate for federal prosecution—consistent with the core value of limited federal jurisdiction.
- The district courts should decline jurisdiction of criminal cases where state jurisdiction is available and the federal interest is minimal.
- Mandatory minimum sentencing statutes should be repealed and disparity eliminated.
- Congress should fund the costs of federal legislation.
- Criminal Justice Act panel attorneys should be paid the rate increases, including annual cost-of-living increases, required by statute but deferred by the Judicial Conference.
- Training should be made available to panel attorneys, who should be subject to qualification standards.
- A federal defender office should be established in each district.
- Federal defender offices should not represent clients with adverse interests.
- Representation of clients with adverse interests violates the rules of ethics.
- It is essential to maintain substantial involvement of the private bar in the Criminal Justice Act system.

prosecuted by cross-designated Special Assistant U. S. Attorneys, in state court, with convicted defendants sentenced to federal prisons, would certainly result in a geometric increase in federal jurisdiction, in contradiction to the goal of limitation. While the Article III district court bench might expect some relief from ridding itself of the plethora of minor drug cases clogging the dockets, there would certainly be an initial explosion in writ and motion practice; the circuit courts would have to be greatly expanded to cope with the resultant contentions. Moreover, the proposed increase in federal funding of state prosecutions (with or without a leap to concurrent jurisdiction) would represent a massive unfunded federal mandate—unless the right to counsel guarantee of the Sixth amendment, incorporated by the Fourteenth amendment,<sup>3</sup> receives a corollary appropriation. Recommendation 3 should be deleted, and replaced with a stronger Recommendation 4.

Recommendation 4 calls for cooperation between the executive and judicial branches "in developing standards on which the Justice Department will base the promulgation of prosecutorial guidelines." We assume this proposal would not be pursued *ex parte*, but in an open public forum. That assumption should be explicitly incorporated in the Proposed Plan.

Department of Justice standards designed to conserve and limit federal jurisdiction have been published for many years,<sup>4</sup> but have escaped judicial enforcement. While the cooperation recommended may be useful in furthering the goal of limited criminal jurisdiction, the federal judiciary should also re-examine the notion that prosecutorial discretion is virtually unreviewable.<sup>5</sup>

Professor Kenneth Culp Davis, in his exploration of prosecutorial discretion,<sup>6</sup> makes a strong case for reconsideration of the assumption that administrators of criminal justice, unlike all other administrators, are immune from basic, fundamental administrative due process.

Where law ends, discretion begins, and the exercise of discretion may mean either beneficence or tyranny, either justice or injustice, either

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<sup>3</sup> *Gideon v. Wainwright*, 372 U.S. 335 (1963).

<sup>4</sup> See, e.g., *Department of Justice Manual* (Prentice Hall), § 9-101.200 (consider "the district court's backlog of cases" in deciding whether to refer drug cases to local prosecutor); § 9-102.001 (addicts "should receive treatment rather than mere punishment," referencing the dormant Narcotic Rehabilitation Act); Ch. 23A, § 220 (decline prosecution where "[n]o substantial federal interest would be served").

<sup>5</sup> See, e.g., *Newman v. United States*, 382 F.2d 479, 480 (DC Cir. 1976): "Few subjects are less adapted to judicial review than the exercise by the Executive of his discretion in deciding when and whether to institute criminal proceedings, or what precise charge should be made, or whether to dismiss a proceeding once brought."

<sup>6</sup> DISCRETIONARY JUSTICE A PRELIMINARY INQUIRY (1969).

reviews the history of prosecutorial discretion,<sup>11</sup> its internal operation, and recent reforms seeking to "regulate its exercise to maximize benefits and minimize abuse."<sup>12</sup>

The judiciary can review instances of challenged prosecutorial discretion and in case-by-case adjudications, set standards by which a prosecutor's actions may be judged.

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Continued and expanded judicial review will channel the exercise of prosecutorial discretion to prohibit *ad hominem* discrimination and require consistent and evenhanded treatment of individuals.<sup>13</sup>

So long as the political engines that drive the unwarranted expansion of federal criminal jurisdiction go unchecked by the non-political branch, the "nightmare" future scenario described in Chapter 3 of the Proposed Long Range Plan will become reality. The Third Branch should not only define its "core value" jurisdiction, but should protect that jurisdiction by making it clear to the political branches that further disruption and dilution of the judicial function is not acceptable.<sup>14</sup> Accordingly, the "last resort" contingency plan on page 108 should be upgraded to a current Recommendation, and incorporated in Recommendation 4:

Consistent with standards developed by the Judicial Conference, authorize district courts to decline jurisdiction in . . . criminal cases where state [jurisdiction could be invoked] and the federal interest is minimal.

### III. Adjudication

The NACDL strongly supports Recommendations 29 and 30. Mandatory minimum sentencing statutes have radically skewed the work of the Sentencing Commission, resulting in penalties for regulatory offenses (drugs) much stiffer than for property crimes, or even crimes against persons. Moreover, the disparity between federal sentences for some drugs (e.g., "crack" cocaine, marijuana plants) and other drugs indistinguishable in social harm (e.g., powder cocaine, harvested marijuana), and the disparity between state and federal sentencing (possible probation versus decades without parole, and now

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<sup>11</sup> "The precise origin of our reliance on and acceptance of prosecutorial discretion is unknown. . . . Whatever its origin, discretion now pervades all facets of justice administration." 63 Or L Rev, at 248.

<sup>12</sup> *Id.*, at 257.

<sup>13</sup> *Id.*, at 259, 164.

<sup>14</sup> The methodology of the likely confrontation should also be planned, as a necessary contingency. If the judiciary were to give explicit docketing priority to its "core value" jurisdiction, resultant Speedy Trial Act violations would result in dismissal of extraneous cases, 18 U.S.C. § 3162, with ample opportunity for local prosecutors to accept jurisdiction.

a minimum, adequate funding should be *requested* so that the Judicial Conference can adjust compensation rates up to the maximum amount authorized by law." (Recommendation 89d; emphasis added.) The NACDL strongly endorses those Recommendations.

We take exception, however, to Implementation Strategy 88b, calling for "[g]uidelines . . . to enable federal defender organizations to represent more than one defendant in a multi-defendant case," and the assumptions in the accompanying text:

To control the heavy costs of the CJA system, protocols—including judicially approved guidelines—should be developed to enable federal defender organizations to represent more than one defendant in a multi-defendant case.

First, the costs of the CJA system are far from "heavy." In fact, the Defender Services appropriation has been systematically *underfunded* for many years, as acknowledged by the Proposed Plan's recognition that "[i]n many locations, the \$40 or \$60 per hour paid to panel attorneys does not even cover basic overhead costs of a law office, and many lawyers incur financial sacrifice when they accept assignments of cases from the federal courts."<sup>17</sup>

Second, budget breaking multi-defendant mega-trials are generated by the executive branch which "should make a conscientious effort to determine where its case is strongest and focus upon that area, reducing the number of counts and of defendants to manageable proportions."<sup>18</sup> As noted above, the judiciary should require adherence to coherent prosecution policies intended to conserve scarce resources and preserve the federal courts' core jurisdiction.

Third, the notion that federal defender offices can switch to multi-defendant "protocols" fails to consider the collegial, team-work nature of those offices, where concentrated talent and experience provides the maximum return on the budgetary investment, resulting in consistently high quality representation and promoting judicial economy. If those offices represent clients whose interests are adverse, the important practice of case-conferencing (brainstorming; sharing and testing theories and strategies; basic and essential on-the-job training) would abruptly end. Keeping files, attorneys and support staff separate, while running a high-volume and high-stress office would be an administrative nightmare. Judicial efficiency would also likely suffer.<sup>19</sup>

Fourth, the assumption that conflict of interest jurisprudence can be readily

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<sup>17</sup> Proposed Plan, 94.

<sup>18</sup> *United States v. Baker*, 10 F.3d 1374, 1390 (9th Cir. 1993) (citation omitted).

<sup>19</sup> See, e.g., *Burger v. Kemp*, 483 U.S. 776 (1987) ("actual" conflict of interest avoided when defendants, represented by one firm, were tried separately). Such a severance solution would mitigate any contemplated economy.

Federal courts have already declared that a "general trend of the law has been to limit the applicability of the vicarious disqualification rules to private organizations," exempting prosecutors and, arguably, federal defender offices.<sup>24</sup> Further limitation contemplated by the Proposed Plan will likely accelerate the increasing tension between the federal courts and the states' legal ethics systems,<sup>25</sup> while eroding federalism, comity and the policy goals of preserving and protecting the healthy participation of the private bar in the nation's indigent defense system. Unless some overriding policy goal is identified—and potentially saving a few dollars is not sufficient—the recommendation that defender offices represent co-defendants should be rejected.

## **B. The Need for Private Bar Participation**

On November 5, 1994, the NACDL Board of Directors adopted general policies on Assigned Counsel Systems, explicitly endorsing standards promulgated by the American Bar Association, the National Legal Aid & Defender Association, and other groups. One of the policies adopted provides:

Assigned counsel systems must include *substantial participation by the private bar*, in order to assure the continued interest of the bar in the welfare of the criminal justice system.<sup>26</sup>

The goal of ensuring participation of the private bar is intended to provide a permanent broad-based political constituency for improvement of the criminal justice system. The Commentary to ABA Standard 5-2.2 explains:

All lawyers, whether criminal practitioners or not, share in the responsibility of ensuring that the most visible legal institution in the Nation, the criminal justice system, is of the highest attainable quality. Increasingly, however,

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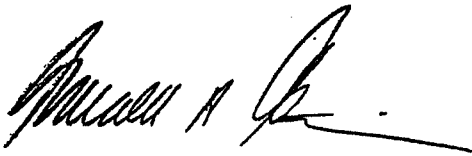
<sup>24</sup> *United States v. Lorenzo*, 995 F.2d 1448, 1453 n. 1 (9th Cir. 1993) (citing *United States v. Judge*, 625 F.Supp. 901, 902 (D.Haw. 1986), *aff'd*, 855 F.2d 863 (9th Cir.), *cert. denied*, 488 U.S. 959 (1988)).

<sup>25</sup> See, e.g., *Baylson v. Disciplinary Bd. of Supreme Court of Pa.*, 975 F.2d 102 (3rd Cir. 1992) (federal court rules for federal prosecutors suing state disciplinary board over rule requiring prior judicial approval for grand jury subpoenas issued to defense attorneys). The federal courts are also embroiled in the government's claim that federal prosecutors are exempt from state ethical rules forbidding contact with represented persons. See, e.g., *United States v. Ferrara*, 847 F.Supp. 964 (D.D.C. 1993) (dismissing government's suit against New Mexico's Disciplinary Counsel); *Matter of Doe*, 801 F.Supp. 478 (D.N.M. 1992) (remanding same disciplinary proceeding to Ferrara). The state courts, however, are beginning to object. See, Mark Curriden, "State Court Chiefs Flex New Muscle," *The National Law Journal*, October 17, 1994 (50 state chief justices unanimously condemn Justice Department position on represented party contact exemption; give Attorney General "an earful").

<sup>26</sup> See ABA STANDARDS FOR CRIMINAL JUSTICE, PROVIDING DEFENSE SERVICES (ABA Standard) 5-1.2 (3rd Ed. 1992) (Systems for legal representation).

Unfortunately, the most basic reforms advocated by the ABA Standards—in discovery, prosecution function, indigent defense, sentencing—have not gained acceptance in federal jurisprudence, despite their demonstrated utility, due to political opposition. Instead of a federal criminal jurisprudence centered on the core values of equal justice, judicial independence, limited jurisdiction, judicial excellence, and accountability, we have seen the "steady accretion of power in the executive, . . . the apparently irreversible alteration of American government toward executive hegemony."<sup>31</sup>

To counter that trend, and protect its core functions, the federal judiciary "must resist even well-intentioned legislation that would chill the capacity of the judge to render impartial justice."<sup>32</sup> The initial draft of the Proposed Long Range Plan for the Federal Courts is an admirable, ambitious beginning down the long road back from the brink of chaos. With the exceptions here noted, the NACDL supports the concept and the direction of the work of the Committee on Long Range Planning.

A handwritten signature in black ink, appearing to read "Gerald H. Goldstein", with a long horizontal line extending from the end of the signature.

Gerald H. Goldstein, NACDL President

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<sup>31</sup> Miller, *Separation of Powers, An Ancient Doctrine Under Modern Challenge*, 28 AD L J 299, 304 (1976).

<sup>32</sup> Kaufman, *The Essence of Judicial Independence*, 80 COL L REV 671, 700 (1980).

Attachment B to NACDL Statement Regarding  
Section 507 of S.3, March 10, 1995



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## APPENDIX A

*Appeals Filed per Authorized Judgeship*

	Total	Criminal	Civil	Prisoner Petitions	Other Civil	Other Appeals
1960	57.3	9.2	34.1	4.5	29.6	14.0
1961	53.9	7.9	32.3	5.2	27.1	13.7
1962	61.8	9.9	35.4	7.0	28.3	16.6
1963	69.7	12.4	39.5	9.2	30.3	17.8
1964	77.2	13.4	46.3	11.3	34.9	17.6
1965	86.7	15.7	52.1	13.2	38.9	19.0
1966	81.6	16.6	47.1	12.6	34.6	17.9
1967	89.8	18.9	50.8	15.2	35.7	20.1
1968	94.0	21.6	52.3	17.9	34.4	20.1
1969	105.6	25.9	62.1	21.6	40.5	17.7
1970	120.2	27.4	72.2	25.4	46.8	20.6
1971	131.8	33.0	78.4	26.1	52.2	20.5
1972	149.8	41.0	86.6	27.0	59.6	22.2
1973	161.1	45.9	91.5	29.2	62.3	23.7
1974	169.4	41.9	97.2	29.1	68.0	30.4
1975	171.7	43.2	97.9	25.1	72.7	30.7
1976	189.8	47.9	107.3	25.2	82.1	34.6
1977	197.1	48.8	113.2	26.1	87.1	35.1
1978	195.0	46.3	115.1	22.9	92.1	33.7
1979	153.2	31.1	92.6	20.9	71.7	29.5
1980	175.8	33.4	112.5	27.9	84.6	29.9
1981	199.7	33.2	128.9	32.7	96.2	37.7
1982	211.7	36.1	142.3	36.6	105.7	33.3
1983	224.5	36.3	153.4	40.4	113.0	34.8
1984	238.6	37.0	164.6	45.2	119.4	37.0
1985	213.8	32.0	151.1	41.9	109.2	30.8
1986	219.8	32.9	155.7	44.8	110.9	31.2
1987	225.5	33.7	163.7	54.4	109.3	28.1
1988	240.5	38.5	171.0	59.3	111.7	31.0
1989	254.7	51.4	172.9	61.3	111.6	30.4
1990	262.2	60.9	173.8	63.7	110.1	27.5
1991	251.7	59.6	164.4	63.3	101.1	27.7
1992	275.6	65.6	179.5	70.5	109.0	30.5
1993	298.0	71.2	190.3	75.0	115.3	36.5

Source: Long Range Planning Office,  
Administrative Office of the United States Courts

## APPENDIX B

*Terminations per Authorized Judgeship*

	Total	Consolidation	Procedural	Merit
1960	57.9	3.3	15.2	39.4
1961	55.2	3.3	15.9	36.0
1962	53.4	3.0	13.3	37.1
1963	64.2	5.1	18.5	40.7
1964	73.1	7.8	19.7	45.5
1965	74.0	7.0	21.5	45.5
1966	74.7	7.2	21.0	46.4
1967	85.5	9.5	25.3	50.8
1968	85.2	9.2	27.9	48.1
1969	92.9	9.4	30.7	52.8
1970	110.3	11.1	35.9	63.3
1971	127.5	14.1	35.0	78.4
1972	142.6	14.2	40.4	88.0
1973	155.8	16.0	40.6	99.2
1974	159.0	20.0	51.9	87.1
1975	164.9	19.8	51.5	93.6
1976	169.3	19.2	53.8	96.4
1977	183.3	23.9	41.9	117.5
1978	182.6	29.6	61.8	91.2
1979	143.1	24.4	48.1	70.9
1980	158.2	20.5	57.4	80.4
1981	189.9	26.8	70.9	92.2
1982	212.0	31.8	83.8	96.4
1983	217.1	31.7	85.3	100.1
1984	236.3	29.9	97.8	108.5
1985	201.2	17.1	79.2	104.9
1986	216.5	18.3	81.6	116.7
1987	220.8	17.2	85.0	118.6
1988	230.1	17.3	89.8	122.9
1989	239.6	18.8	96.9	123.9
1990	246.9	21.2	91.0	134.7
1991	248.0	24.6	87.4	136.0
1992	257.1	23.3	95.1	138.7
1993	284.2	22.2	108.9	153.1

*Source: Long Range Planning Office,  
Administrative Office of the United States Courts*

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