

The Champion

December, 1996

*20 Champion 33*

COLUMN: **LEGISLATION:** 1997 LEGISLATIVE PROGRAM IN PROGRESS

*By Jeralyn E. Merritt*

JERALYN E. MERRITT, *Denver, CO, is Co-Chair of the NACDL Legislative Committee along with John Flannery, Gerald Goldstein and Elisabeth Semel. She is a member of the NACDL Board of Directors and The Champion Advisory Board.*

**[\*33]** The 1997 NACDL Legislative Program is underway. This year we are stressing the importance of grassroots efforts. It is imperative that we mobilize at home in greater numbers than ever before. January brings a new Congress, one that hopefully will not just rubberstamp the ill-advised criminal justice leftovers from the 104th Congress. To have a substantial impact we must show our strength, through the all-important home district (constituent) level, from the beginning of the new Congress. Strength is most often measured by numbers. Contact your local NACDL coordinator to arrange home meetings with your Senators and Representatives over the course of the year.

A look at the congressional agenda should motivate you to join our efforts.

#### **Likely Congressional Agenda**

##### *Draconian Juvenile Justice Laws*

Senate bill S.1854, titled "The Violent and Repeat Juvenile Offender Reform Act," is likely to be re-introduced early in the new Congress. This bill reduces the minimum age requirement for seeking the death penalty from 18 to 16. It would also grant prosecutors "unreviewable discretion," at the expense of the current law's safeguard of independent judicial review, to treat more violent and drug-using juveniles as "adults" in the already over-burdened federal courts.

The leading House bill, H.R. 3565, titled "The Violent Youth Predator Act of 1996," is also likely to be back. It was left hanging in a House Judiciary Committee finalizing ("mark-up") session in the last Congress. It calls for adult prosecution of children as young as 13, again in the "unreviewable discretion" of the federal prosecutor; allows children to be housed with adults; encourages states to hold parents responsible for acts of their children; and opens juvenile arrest records to the public. The Democrat bill, H.R. 3445, is almost as disturbing.

### *Increasing Penalties for Drug and Violent Crimes Involving Firearms*

S. 1854 also proposes to increase the mandatory minimum consecutive penalty under *18 U.S.C. § 924 [c]* for anyone using or carrying a firearm during a drug or violent crime -- from five years to ten -- and expands the prohibited acts of using and carrying to include *simple possession* of a firearm. This increase applies to everyone, not just the juveniles referenced in the bill's title.

### *Good Faith Exception To the Exclusionary Rule For Warrantless Searches and Seizures*

S. 1854 further seeks to radically amend *18 U.S.C. § 3510*, to render admissible items and information seized *with or without a warrant*, in violation of statute or the Fourth Amendment, if the search and seizure was "carried out in circumstances justifying an objectively reasonable belief that it was in conformity with the Fourth Amendment." A warrant constitutes *prima facie* proof of the existence of an objectively reasonable belief. This hidden provision is nothing but the so-called "good faith" search and seizure legislation (H.R. 666) so discredited last Congress.

### *Victim's Rights Constitutional Amendment*

President Clinton and several Republican and Democrat members of Congress support this ill-advised amendment. It would grant "victims" of crime (undefined) new powers to intervene in the criminal justice process *before* an accused has been convicted or found to be the perpetrator of a crime of which one claims to have been a victim. For example, "victims" could oppose bail and plea bargains. The amendment would crush the presumption of innocence which is the very core of our criminal justice system. While NACDL believes that crime victims should be treated with respect and dignity, they must not be allowed to contravene the purpose of the Bill of Rights: to assure due process and justice for all people, even the least popular among us -- those who are accused of committing a crime.

### *Expansion of Wiretap Authority*

Look for the early re-introduction of DOJ and FBI proposals to allow the FBI to wiretap more of us with less judicial scrutiny, to access our records with no judicial oversight, and to seize our assets by classifying us as "terrorists" based upon our supposedly protected personal and political beliefs.

Specifically looming on the horizon is the re-introduction of a bill that would eviscerate the statutory wiretap suppression remedy at *18 U.S.C. § 2515*. The proposal requires a showing of "bad faith" by law enforcement to warrant suppression. If this bill becomes law, watch out for the quick next step: outright elimination of the Fourth Amendment Exclusionary Rule in all circumstances -- if not entirely at first, surely as to warrantless searches and seizures.

## **NACDL Affirmative Legislative Agenda**

While battling against the above, we must continue to push for necessary positive reforms long advocated by NACDL, including:

- *Asset Forfeiture Reform*: We are closer than ever to achieving real relief through reintroduction of a bill like H.R. 1916, introduced last Congress by House Judiciary Committee Chair Henry Hyde (R-IL);

- *Prosecutorial Ethics*: We must work to ensure re-introduction and passage of a measure like H.R. 3386, the Ethical Standards for Federal [\*43] Prosecutors Act of 1996. This would finally forbid DOJ from excluding its own prosecutors from compliance with state and federal court rules of ethical attorney conduct.

- *Mandatory Minimum Sentencing Reform*: We need to find sponsors and supporters for our proposal to re-empower the federal judiciary to depart below mandatory minimum sentences for exceptional circumstances, based upon a motion by a defendant as well as a prosecutor, or upon the court's own motion, for reasons other than providing "substantial assistance" to the prosecution.

- *Crack/Powder Cocaine Sentencing Disparities*: We must continue to urge Congress to adopt the sound 1995 findings of the U.S. Sentencing Commission, and equalize the penalties for crack and powder cocaine offenses. There is no scientific basis for the disparate treatment which routinely discriminates against minorities. There is certainly no rational basis to increase penalties for powder cocaine offenses to crack levels, as some proposed last Congress.

- *Overall Crime Policy*: Generally, we must convince the new Congress to part ways with its predecessors and recognize that the "War on Drugs" is a failure. We need to get the message out: the way to truly reduce crime is *not* to build more prisons. It is to reduce what causes crime: poverty, lack of early childhood education, lack of vocational training, joblessness, homelessness. We have to continue the push to ensure that every child is given an equal chance to succeed.

And we will be striving for the following imperatives:

- *Habeas Corpus* Restoration -- to restore meaningful independent judicial review of wrongful convictions;

- Reform of IRS Form 8300 and Section 6050(I), to preserve the attorney-client privilege;

- Creation of a federal statutory attorney-client retention privilege;

- Adequate indigent defense funding;

- Elimination of racism in the criminal justice system;

- Creation of a federal statute providing for restitution for the wrongfully prosecuted, imprisoned and convicted;

- Systematic elimination of law enforcement abuses, and preservation of safeguards for all citizen rights.

### **A Full Agenda: We Need Your Participation**

Obviously, our plate is full. In the face of the ever-increasing, relentless assault on everyone's constitutional rights by too many Democrats and Republicans, we must increase our numbers, and our actual involvement in the legislative progress. We must increase our consistent presence and strength as a nationally recognized legislative force. Please join us by becoming active in your home state this year. Help us apply nationwide pressure from the constituent level. We can establish a truly compelling and worthy effort by the criminal defense bar this year -- please call your state or circuit legislative coordinator and get *involved*. We will provide the tools -- but we can't do it without you.