

# FROM THE PRESIDENT

STEVEN D. BENJAMIN

## Be Proud and Be Loud

Criminal defense lawyers protect freedom in many ways. The Constitution of the United States and the ethics and standards of our profession require the zealous representation of every person accused of a crime irrespective of their guilt or innocence. When we accept this responsibility, we assume a legal obligation to challenge unlawful process and to question deficient proof.

This representation of the individual against the power of the government is the most important way we protect freedom. We do this work through objection, motion, trial, and appeal. Fundamental questions of law are answered by the holding of an appellate court of last resort. This process is essential for the law to grow, for the law to remain relevant, and for the law to protect our basic rights and freedoms. Reliance on precedent is insufficient. The law must constantly be interpreted in light of new technology or circumstances. Whether the use of a GPS device is a search for Fourth Amendment purposes was an unimagined question when “search” was defined by case law, or when the Fourth Amendment was drafted by the framers of the Constitution.

The right of appeal, however, is under attack. Last year,

Fourth Amendment jurisprudence was wounded grievously by *United States v. Davis*.<sup>1</sup> *Davis* held that when a search is permitted by precedent, the exclusionary rule does not apply even if that precedent is overturned before that case becomes final. This holding eliminates individual incentive to challenge adverse case law, because the defendant who challenges a search successfully is nevertheless denied a remedy. Permitting the government the benefit of unconstitutional conduct reduces enforceable rights to meaningless ideals, and this trend must stop. NACDL is developing public advocacy and a litigation strategy to address the persistent erosion of Fourth Amendment protections, and to preserve suppression as a remedy for unlawful searches.

Another diminution of the ability of the law to advance through case-by-case adjudication is the growth of appellate and other waivers in standard plea agreements. Traditionally, an accused could plead guilty and reserve the right to challenge an adverse trial court decision of a pretrial motion. This process permits unlawful practices to be identified and corrected; it enables appellate courts to resolve novel questions and thereby provide guidance in future cases. The system properly relies on plea agreements in which an accused acknowledges guilt and accepts responsibility and sanction. But when the system requires the abandonment of legitimate appeals, at best it dooms the law to stagnation; at worst, it sweeps corruption, illegality, and injustice under the rug. This trend must stop.

On October 27, 2012, NACDL responded to multiple requests for an ethics opinion regarding federal plea agreements that bar collateral attacks on convictions under 28 U.S.C. § 2255. After full and vigorous discussion, the Board of Directors adopted Formal Opinion 12-02, determining that it is not ethical for a criminal defense lawyer to participate in a plea agreement that bars collateral attacks in the absence of an express exclusion for prospective claims based on ineffective assistance of counsel.<sup>2</sup> The opinion further states that prosecutors may not ethically propose or require such a waiver. The opinion describes an attorney’s duty when the government attempts to extract such a waiver. NACDL answered the call for help, and provided an invaluable tool for excising these unconscionable provisions.

The erosion of the right to privacy and the increase in waivers of procedural rights that benefit law and society are just two of many issues of prime concern to NACDL. This



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year NACDL is also tackling such fundamental issues as racial disparity in the criminal justice system, systemic government misconduct, and the denial of resources for indigent defense. These issues plague the criminal justice system, yet they elude adjudication through case-by-case review.

This then is a second way for criminal defense lawyers to protect freedom. By joining NACDL, you join us in standing up together to these and other injustices. Your membership gives depth to our voice, strength to our ranks, and dues to fund our work. The passion you bring to bear in what you do individually as a criminal defense lawyer is vital to our country; through membership in NACDL, your resolve is strengthened by ten thousand.

A third way we protect freedom is by leading. The 46 lawyers on the NACDL Board of Directors are among the best criminal defense lawyers in the world. They each stepped up to the front line of the battle against tyranny and injustice. They did this because they could not sit still, they could not rest except in certainty that their voice would be heard on the most important issues and threats to freedom and the Constitution. They did this because they cared.

I encourage each of you to take that next step. I encourage you to be a leader in support of the function and role of the defense. Become active, join a committee, seek a position on the best Board of Directors ever assembled. You do this by expressing and demonstrating your interest. We want to meet you at the receptions during our CLEs. We want to see you in the audience at our open quarterly board meetings. And we want to hear from you on the substantive issues of policy and law that we will debate. My goal for each Board meeting is to engage everyone, to ensure that everyone will be heard.

We did not become lawyers to be silent. We did not become lawyers to lie down. We became lawyers because of who we are, and because we understand a moral obligation to stand up for freedom and to speak against injustice. Our sacrifices are many, but together our voices are loud. Join us.

## Notes

1. *United States v. Davis*, 131 S. Ct. 2419 (2011).

2. Visit <http://www.nacdl.org>. Click the Resource Center tab, and then select Ethics Opinions. ■



# AFFILIATE NEWS

WWW.NACDL.ORG/AFFILIATES

## 2012-2013 NACDL & AFFILIATE CLE CALENDAR

- |                       |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                          |
|-----------------------|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| <b>December 14</b>    | <p><b>New Mexico: NMCDLA's End-of-Year Trial Skills Seminar</b><br/> <b>Las Cruces, New Mexico</b><br/>           Contact: NMCDLA Executive Director Cathy Ansheles<br/>           at 505-992-0050 or email <a href="mailto:cathy@nmccla.org">cathy@nmccla.org</a></p>                                                                                                                                                                                                                                   |
| <b>December 14</b>    | <p><b>Tennessee: TACDL's Year-End 'Search, Seizure &amp; Ethics' Seminar</b><br/> <b>Nashville, Tennessee</b><br/>           Contact: TACDL Executive Director Suanne Bone<br/>           at 615-329-1338 or email <a href="mailto:suannebone@tacdl.com">suannebone@tacdl.com</a></p>                                                                                                                                                                                                                    |
| <b>December 14</b>    | <p><b>Ohio: OACDL's 'Sentencing and Collateral Issues' Seminar</b><br/> <b>Columbus, Ohio</b><br/>           Contact: OACDL's Executive Director Susan Carr<br/>           at 614-418-1824 or email <a href="mailto:susan@oacdl.org">susan@oacdl.org</a></p>                                                                                                                                                                                                                                             |
| <b>December 15</b>    | <p><b>California: CACJ's 2012 Annual Fall Criminal Defense Seminar</b><br/> <b>Hotel Nikko, San Francisco, California</b><br/>           Contact: CACJ's Administrative Director Gail Jones<br/>           at 916-643-1800 or email <a href="mailto:gjones@cacj.org">gjones@cacj.org</a></p>                                                                                                                                                                                                             |
| <b>January 9-13</b>   | <p><b>Texas: Psychodrama Program</b><br/> <b>Round Top Festival Institute, Round Top, Texas</b><br/>           Contact: TCDLA Executive Director Joseph Martinez<br/>           at 512-478-2514 or email <a href="mailto:jmartinez@tcdla.com">jmartinez@tcdla.com</a></p>                                                                                                                                                                                                                                |
| <b>January 11-12</b>  | <p><b>Arizona: AACJ's Winter Seminar</b><br/> <b>Wilde Horse Pass Hotel &amp; Casino, Chandler, Arizona</b><br/>           Contact: AACJ Executive Director Ellen Salvesen<br/>           at 480-812-1700 or email <a href="mailto:defense@aacj.org">defense@aacj.org</a></p>                                                                                                                                                                                                                            |
| <b>January 13-18</b>  | <p><b>NACDL's Advanced Criminal Law Seminar</b><br/> <b>St. Regis Hotel, Aspen, Colorado</b><br/>           Contact: NACDL's Education Assistant Akvile Athanason<br/>           at 202-465-7630 or email <a href="mailto:aathanason@nacdl.org">aathanason@nacdl.org</a>. For more details, visit our meetings website at <a href="http://www.nacdl.org/meetings">www.nacdl.org/meetings</a></p>                                                                                                         |
| <b>February 20-23</b> | <p><b>NACDL's Midwinter Meeting &amp; Seminar</b><br/> <b>'Reasonable Doubt &amp; Actual Innocence: Winning Your Case with Cutting-Edge Science'</b><br/> <b>Omni Shoreham Hotel, Washington, DC</b><br/>           Contact: NACDL's Education Assistant Akvile Athanason<br/>           at 202-465-7630 or email <a href="mailto:aathanason@nacdl.org">aathanason@nacdl.org</a>. For more details, visit our meetings website at <a href="http://www.nacdl.org/meetings">www.nacdl.org/meetings</a></p> |
| <b>April 5-6</b>      | <p><b>NACDL &amp; CACJ's 6th Annual 'Making Sense of Science: Forensic Science &amp; the Law' Seminar</b><br/> <b>The Cosmopolitan Hotel, Las Vegas, Nevada</b><br/>           Contact: NACDL's Education Assistant Akvile Athanason<br/>           at 202-465-7630 or email <a href="mailto:aathanason@nacdl.org">aathanason@nacdl.org</a>. For more details, visit our meetings website at <a href="http://www.nacdl.org/meetings">www.nacdl.org/meetings</a></p>                                      |