



# NACDL Testimony

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**For More Information:**

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 See also the attached [follow-up letter](#) to Sen. Sessions dated October 16, 1997.

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**Statement of Gerald B. Lefcourt**

**on behalf of**

**National Association of Criminal Defense Lawyers**

**before**

**Senate Judiciary Subcommittee on Administrative Oversight and the Courts**

**Regarding Problems with the FBI Lab**

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**Mr. Chairman and Other Distinguished Members of the United States Senate Judiciary Committee:**

Thank you for affording me this opportunity to speak on behalf of the National Association of Criminal Defense Lawyers (NACDL), a non-profit, non-partisan, professional bar association with 9,200 direct members nationwide, and 80 state and local affiliates with another 28,000 members, including private criminal defense lawyers, public defenders, judges and law professors committed to preserving fairness within America's criminal justice system.

We commend you, Mr. Chairman, for convening these important oversight hearings into recent revelations about liberty, and even life-threatening misconduct and mishaps of the special agents working in the forensic laboratory of the Federal Bureau of Investigation (FBI). The Inspector General (IG) Michael Bromwich's report about his investigation into *just three* of the *30-plus* FBI lab units unfortunately glosses over the true significance of some of his findings --i.e., false reports and possible obstruction of justice by lab examiners. But it is nonetheless refreshing in its

revelations. *The FBI Laboratory: An Investigation into Laboratory Practices and Alleged Misconduct in Explosives-Related and Other Cases* (DOJ April 1997) ("*Lab Report*").

I appear before you today to speak from an entirely *non-governmental* perspective about the *systemic* importance of the mishaps and misconduct infecting the FBI lab. And I believe it is the criminal defense lawyer, secured for the citizenry by the founders through the sacred Sixth Amendment to the Constitution, who can best give this Committee the broad perspective it needs to fully appreciate the imperative of Congress taking *real action* to restore integrity to, and citizen confidence in forensic science. Expanding the Inspector General's jurisdiction, as called for by the bi-partisan bill in the House introduced by Representatives Robert Wexler (D-FL), Barney Frank (D-MA) and Howard Coble (R-NC), among others, is *one step in the right direction*. See H.R. 2182. But that effort, by itself, will not ensure the restoration of integrity to our nation's criminal justice system. It will not *protect* Americans from abuses by the lab, no matter the IG's expanded jurisdictional reach, because by definition the IG's role is but *reactive*. In death penalty cases, in particular, such reaction might well come too late to save the innocent victim of lab misconduct.

The National Association of Criminal Defense Lawyers is interested in America having a rational and fair criminal justice policy. Our goal in this particular instance is to establish a reliable federal center for forensic excellence, in all labs and on both the state and federal levels, and thereby restore integrity to the criminal justice process itself, through which American lives and liberty are today at risk.

We want to help restore integrity to the forensic evidence in the courtroom. That is why we filed a lawsuit in February to overcome the institutional reluctance on the part of the Department of Justice to release to the American people the IG report.<sup>(1)</sup> And we pledge our ongoing assistance to this Committee and to others in Congress trying to restore this much-needed integrity to the FBI lab and the American criminal justice system.

I will speak in particular about two specific, modest-but-imperative *reforms* this Committee must seriously consider in light of its review during these initial oversight hearings:

► **A more open discovery rule for citizens who are accused of wrongdoing, akin to that secured in many state systems.**

Under such a procedure, the defendant is at least ensured the right to take the deposition of the crime lab technician involved in analyzing the evidence which purportedly justifies prosecuting the case. Many biases, misstatements, and other misconduct -- or plain flawed analysis -- could thus be flushed out early in the pre-trial process. This would avert waste in tax dollar-financed prosecution, court time, and often, court-appointed counsel time for the indigent accused. Even more important, the lives and liberties of American citizens otherwise wrongfully convicted would not be jeopardized, as they are now.

► **A targeted, DNA (and other forensic science) evidence exception to the otherwise unduly rigid "new evidence" restrictions and time-tables of the recent federal *habeas corpus* reform, enacted prematurely and without sufficient consideration of its consequences, as part of the "Effective Death Penalty and Anti-Terrorism Act of 1996."**

This is similar to the recently enacted Illinois fairness exception, signed into law by Governor Jim Edgar just last July.

## **I. Introduction: Clear Need for Expansion of Congressional Oversight and for Corrective Legislation to *Prevent Wrongful Convictions***

Whether you like him or not, whether you believe everything he says or not, one thing is undeniable: were it not for the courage and determination of a "good cop" -- FBI Supervisory Special Agent Frederic Whitehurst, Ph.D., the public never would have become aware of the ongoing, systemic wrongdoing infecting the FBI lab. But for his perseverance, no DOJ Inspector General would ever have been assigned, and no investigation and no report would have been undertaken.<sup>(2)</sup> The report documents an absence of integrity within the lab -- an integrity upon which many American lives depend.<sup>(3)</sup>

Keep in mind, the IG's inquiry, by his own admission, was a very limited one. ***In fact, only three lab units out of over 30 were investigated.*** His report raises this obvious question: if so much is wrong with the few units dealing with primarily high-profile cases, how much more is awry with the rest of the lab. Documents we have obtained from the IG indicate problems in other units also, including the world-famous forensic DNA lab. We think it is clear that much must be awry with the other lab units as well.

We are only now beginning to get some of the underlying materials, through the Freedom of Information Act (FOIA) lawsuit we brought on behalf of the American people.<sup>(4)</sup> What patterns of prejudgment, lack of scientific method, and outright bias might *these* underlying materials show? We are already finding disturbing new revelations not adequately addressed by the Inspector General's "cleansed" report.

The public has a right to know this information. If the IG's report tells us anything, though, it teaches that we simply cannot let the government *police itself*, nor keep to itself this critical information about the citizen lives and liberty it has wrongfully taken through vice of FBI lab misconduct.

At the core, what is involved here is governmental misconduct that has undoubtedly resulted in some number of innocent Americans being unjustly convicted and losing their lives or liberty. Conversely, of course, this also means some number of guilty, criminal actors are being left to freely roam America's streets as a result of the lab's faulty analyses pointing the government's finger of guilt at the *wrong* people.<sup>(5)</sup> There is an overriding public interest in this Committee undertaking not just this worthy hearing but even more, committing itself to continued and expanded oversight hearings into *all* of the units of the FBI lab, and to appropriate *systematic remedial legislative action*.

The FBI lab has long been regarded as one of the most prestigious forensic science laboratories in the world. That is no longer the case. The public needs to know what is wrong in the FBI lab and also, which corrective measures are being taken, and, which *need* to be taken.

Moreover, what's going on in the labs of the Drug Enforcement Agency (DEA), Bureau of Customs, the Immigration and Naturalization Service (INS), and the Bureau of Alcohol, Tobacco and Firearms (BATF)? We urge you to not only persist in these oversight hearings into the other areas of the FBI lab left unexamined by the IG, but also, to expand your oversight hearings into the similar work affecting so many American lives and citizen liberties conducted each and every day by the numerous other federal law enforcement agencies.

## **II. Restoring Rationality and Factual Integrity to America's Criminal Justice System**

NACDL is more than willing to participate in your efforts, because we know very well how injustice can be wreaked by a run-amok, "conviction at any cost" mentality among government actors. This is especially true when the mentality infects the forensic scientists who are supposed to give us "just the facts" -- *just science* -- and not dangerous predisposition, bias, or embellishment.<sup>(6)</sup> We are more than willing to help because we are interested in a rational criminal justice system for America -- one that Americans deserve and the one envisioned by the Founders of our great nation.

A rational and humane criminal justice policy promotes fairness for all; due process for even the least among us who may be accused of wrongdoing, compassion for witnesses and victims of crime, and just punishment for the guilty. Such a policy respects cherished civil rights and liberties so fundamental to our democracy.

Whatever the disagreements among policymakers about the *precise* contours of a rational and humane criminal justice policy relative to any particular issue, this much is axiomatic: there can be no rational criminal justice policy when the scientific and forensic "facts" upon which the government's criminal cases are based are themselves irrationally derived, *or even contrived*. Science must be neutral and detached. Bad science by the FBI lab strikes at the very heart of our society's highest aspirations for fairness within America's criminal justice system.

We believe that if the FBI lab is again to become the center for excellence in forensic science that it once had the reputation for being, vigilant, external oversight is necessary. Forensic science is neither pro-prosecution nor pro-defense. It is a search for *facts* -- facts which will help a judge or jury determine the *truth*. When institutional pressures or bias drive forensic examiners to produce only reports which corroborate the prosecution's "theory of the case," the whole of America's criminal justice process is undermined.

## **III. What the Inspector General's Report Says and Does Not Say**

For too long, the FBI laboratory has operated beyond oversight and beyond any meaningful external review and accountability. The recent IG report just scratches the surface, yet demonstrably and saliently points up the need for real reform. Although the IG was quite limited in the areas he was allowed to investigate and he rejected some of Dr. Whitehurst's assertions, he still calls his findings "deeply troubl[ing]."<sup>(7)</sup>

As United States District Court Judge Gladys Kessler has found, misconduct and mishaps in the FBI lab "call into question the scientific integrity of the FBI crime lab and the thousands of prosecutions that rely on evidence it has processed."<sup>(8)</sup> Out of these thousands of cases, some unknown number of defendants have been certainly been victimized by unfair trials tainted by shoddy lab work and by the exaggerated and biased, even blatantly falsified testimony by FBI lab examiners. While the IG's report cites many instances of blatant and outrageous misconduct by government lab agents, he somehow manages to stop short of "concluding" that the FBI lab and other agents' lying under oath and in official documents relied upon by the courts in criminal prosecutions amounts to the perjury that it is.<sup>(9)</sup> We have found other slips between cup and lip, between the IG's underlying factual documentation and his "cleansed," public report conclusions. This inability of the IG to close the loop between his own factual discoveries and his conclusions, is highly disturbing.

There is a substantial probability that many of the lab's investigatory target subjects are actually innocent of the crimes for which they were convicted. Beyond the unconscionable unfairness of innocent people suffering behind bars, or even on death row, is the obvious corollary that this means there are *guilty people* being left un-apprehended, and walking free among us. This double injustice simply cannot be tolerated and fosters a crisis of confidence in the government.

Public confidence in the lab is at an ebb. Newspapers and broadcast media of all political stripes across the country have commented on the need to impose uncompromising, external oversight over the lab.

For example, *The New York Times* has called the Inspector General's report a "damning indictment" which "essentially vindicates long-ignored complaints by Frederic Whitehurst."<sup>(10)</sup> *The Washington Post* says the lab's myriad troubles "are the kinds of problems that won't be corrected by an administrative reorganization. They go to the culture of the institution, the . . . bias of the examiners toward the prosecution and the disinclination of supervisors to hold personnel to a high, truly scientific standard."<sup>(11)</sup> *The Arizona Republic* suggests: "Perhaps the ultimate solution is the transfer of the laboratory to an independent agency, one that can objectively administer the science and even serve as an educational base for state police crime labs."<sup>(12)</sup> And, calling the lab's bias toward the prosecution "outrageous," *USA Today* condemned the lab, noting that the Inspector General's praise for FBI's meager efforts to improve the laboratory is "like praising the Good Humor man for selling ice cream." The paper went on to remind its readers that "[t]he job of the lab isn't to pursue convictions but to find the truth. And it fell down on that job."<sup>(13)</sup>

While the IG stresses that he only looked at three out of the lab's 30-plus lab units, the *types* of problems he found suggest a rampant "culture" of substandard work and deliberate deception, where poorly-trained FBI agents routinely testify wrapped in a cloak of presumed infallibility. Among the IG's most troubling findings are the following types of arrogance and outright wrongdoing:<sup>(14)</sup>

### **Scientifically flawed and inaccurate testimony.**

Testimony beyond the examiner's expertise.

## **Outright fabrication of test results.**

Tampering with lab reports.

**Inadequate or nonexistent record-keeping and test result documentation.** Unqualified examiners, with little training and little or no formal education in

their assigned areas of expertise.

## **Failure by management to resolve serious and credible allegations of incompetence.**

Already, we know that FBI Lab incompetence, bias and fabrication have forced prosecutors to forgo use of what could have been important evidence in a number of high-profile cases. For example, Robert Cleary, the lead prosecutor in *United States v. Kaczynski*, the so-called "Unabomb case," has been forced to repudiate work done by the lab in that case and has asked for new explosive experts from outside the FBI to re-examine the evidence.<sup>(15)</sup> What has been identified as incredibly shoddy work performed by FBI examiner David R. Williams and his supervisor J. Thomas Thurman has forced prosecutors in the Oklahoma City cases to do the same.<sup>(16)</sup>

More disturbing still, the IG's investigation indicates that misconduct and incompetent testimony occurs *not just in high-profile cases*, where there is bound to be the most pressure from prosecutors to obtain a conviction through lab "science." The lab's culture of deception is apparently so pervasive that even the "little cases" are corrupted, involving the far greater number of ordinary Americans.

For example, FBI examiner Roger Martz, of the FBI's Chemistry and Toxicology Unit, testified under oath in *State v. Trepal* that Coca Cola found in the murder victim's home had been laced with the rat poison thallium nitrate, and that a quantity of thallium nitrate had been found in defendant George Trepal's garage. But the IG's investigation proved that Martz did not perform the tests needed to conclude the soft drink contained thallium nitrate.<sup>(17)</sup> Such misconduct in a *state prosecution*, where there is no arguable federal interest, raises a number of red flags indicating that the lab needs vigilant congressional or other significant and neutral oversight, as well as *overhauling* from top to bottom.

Following are still more, specific *known examples* documented by the IG himself of the systematic damage wreaked by the lab over the years --

### ***Carelessness in Scientific Investigation***

In 1992 and 1995, Materials Analysis Unit Chief James Corby was directed to review

all cases in which Terry Rudolph, Frederic Whitehurst's predecessor, worked as an examiner. The first review covered approximately 200 cases and found significant flaws, such as Rudolph's failing to follow his own explosives residue protocol, to form conclusions from valid scientific bases, and to conduct necessary tests. In 1995, Corby found that nearly one-quarter of Rudolph's

files did not meet the administrative or technical guidelines *at the time the cases were worked*. It took FBI management nearly six years to perform the type of comprehensive review that should have occurred in 1989 after Rudolph's performance in the *Psinakis* case was sharply criticized by the very same Assistant United States Attorney who handled that case.

Chemistry-Toxicology Unit Chief Roger Martz failed to conduct certain tests that were appropriate under the circumstances of the *Florida v. George Trepal* case, in which the defendant was accused of adding the poison thallium nitrate to bottles of Coca Cola. Martz' negligent conduct resulted in the death penalty for Trepal.

### ***Inaccurate/Incomplete Testimony***

In the Oklahoma City bombing case, Explosives Unit Examiner David Williams

claimed the velocity of detonation indicated that the main explosive charge was ammonium nitrate fuel oil (ANFO). His categorical identification of the main charge as ANFO was inappropriately based on the evidence available to him. He did not draw a valid scientific conclusion, but rather, *speculated* from the fact that one of the defendants purchased ANFO components. His estimate of the weight of the main charge was too specific, and again was based in part on the improper, non-scientific ground of what a defendant had allegedly purchased. According to the IG report, "In other respects as well, [Williams'] work was flawed and lacked a scientific foundation. The errors he made were all *tilted* in such a way as to incriminate defendants. We conclude that Williams failed to present an objective, unbiased, and competent report." (emphasis added)

In the *Salameh* World Trade Center bombing case, Explosives Unit examiner David Williams opined 1) that the defendants had the capacity to manufacture approximately 1200 pounds of urea nitrate, an explosive rarely used for criminal purposes, and 2) that the main explosive used in the bombing consisted of about the same amount (1200 pounds) of the urea nitrate. The FBI chemists specializing in the examination of explosive residue, however, did not find any residue identifying the explosive at the World Trade Center. To quote the IG report: "[Williams'] opinions about the explosive used in the bombing were based on *invalid inference* concerning the velocity of detonation (VOD) of the main charge, an *incomplete* statement of the VOD of urea nitrate, *invalid* and *misleading* statements about the type of explosive used, and *speculation* beyond his scientific expertise *that appeared to be tailored to the most incriminating result*." (emphasis added)

The *Avianca* case involved the midair explosion aboard Avianca Airlines Flight 203 shortly after its takeoff from Bogota, Colombia, on November 27, 1989. Everyone aboard, including two Americans, were killed in the crash. Agent Richard Hahn collected evidence at the crime scene, examined evidence, and prepared a final report which resulted in the 1994 conviction of Dandeny Munoz-Mosquera (*Munoz*). However, Hahn's correlation of fuselage indentations to a

high-velocity explosive within a narrow range of velocity of detonation was, according to the Bromwich report, *scientifically unsound* and *not justified* by his experience. Moreover, in light of scientific literature Frederic Whitehurst submitted to Hahn before the *Munoz* trial, Hahn erred by not inquiring about the validity of the theory upon which he based his testimony concerning the fuselage indentations. Finally, Hahn supported a theory claiming that a fuel-air explosion followed the initial blast and that certain passengers' injuries were indicative of such an explosion. That testimony was *flawed* and *exceeded Hahn's expertise*, the IG found.

Mail bombs in Alabama killed U.S. Eleventh Circuit Court Judge Robert Vance and a civil rights attorney in 1989. A massive investigation ensued, ultimately leading to the indictment and conviction in 1991 of Walter Leroy Moody, Jr. The conclusions of Materials Analysis Unit examiner Robert Webb were crucial to the conviction. The recent IG investigation charitably found that some of Webb's conclusions were *stronger than warranted* by the results of his examinations.

During Former U.S. District Court Judge (now U.S. Congressman) Alcee Hastings' 1985 impeachment hearing before a judicial committee of the Judicial Council of the Eleventh Circuit, the IG report notes that former Hairs and Fibers Unit examiner Michael Malone *falsely* testified that he had performed a tensile test. Malone compounded that mistake by testifying beyond his area of expertise. Hastings was impeached as a result of that testimony.

### ***Managerial Failures***

Upon request of the Assistant United States Attorney in the 1989 *Psinakis* case, Chemistry-Toxicology Unit Chief Roger Martz was assigned to review the files of agent Terry Rudolph, Frederic Whitehurst's predecessor. Martz reviewed 95 files, concluded that Rudolph's analyses supported his results, and reported finding no technical errors. The recent IG investigation showed that Martz's review was seriously deficient, that he failed to engage in the type of technical review that would actually have assessed the competence and sufficiency of the work purportedly performed by Rudolph, and that Martz's written reporting led Laboratory managers to believe that there were no problems with Rudolph's work or his files.

J. Thomas Thurman, supervisor of Explosives Unit examiner David Williams of the Oklahoma City bombing case, did not properly review Williams' report, the IG report notes. Thurman allowed certain conclusions to stand even though he now does not agree with them and cannot justify them.

The Avianca Airlines midair explosion produced two trials, the first a mistrial, the second the *Munoz* trial. On the day investigating agent Richard Hahn testified in the first trial, Frederic Whitehurst wrote a memorandum advancing theories that Hahn had not considered. Scientific Analysis Section Chief James Kearny contributed to agent Richard Hahn's incomplete testimony



in the *Munoz* case by not resolving the issues raised earlier in Whitehurst's memorandum.

Explosives Unit supervisor J. Thomas Thurman and Explosives Unit examiner

Wallace Higgins changed Frederic Whitehurst's reports in numerous instances, according to the IG report. Some of those changes resulted in inaccuracies and unsubstantiated conclusions. Both the Thurman and Higgins alterations underscore the need for lab personnel to follow clear-cut policy to ensure that reports of analytical work prepared by scientists are not substantively altered unless agreement is reached on the changes.

These cases confirm that the FBI lab needs ongoing and expanded, neutral oversight and overhaul. They demonstrate what an unstinting effort it will take to discover and undo the long-lasting damage brought on by the lab's culture of dishonesty and sloppiness. While the precise magnitude of remedying the problem is unknown, there could well be thousands of cases which need revisiting. For instance, *just one* of the agents criticized in the report reportedly worked on *4,000 cases*, and another faulted for sloppy work was intricately involved in 600 cases.<sup>(18)</sup> Systematic reforms of federal criminal procedure are needed to protect against the continued or future creation of such chaos.

#### **IV. Conclusion:**

##### ***Legislative Reforms are Needed to Guarantee the Protection of the American People***

We are forming a Task Force of volunteer forensic scientists and attorneys to sort through any agency records released, in order to identify cases in which defendants have been wrongfully convicted. We respectfully offer the following suggestions for the Committee to consider as it continues its arduous efforts to help restore integrity to the FBI lab, and other federal law enforcement agencies:

***Expand your oversight activities begun by this hearing.*** Congress must expand its probe into *all aspects* of the FBI lab, and the labs of the numerous other federal law enforcement agencies, as well.

***Consider whether the forensic lab now housed within the FBI should in fact be made an independent agency, separate from, and free from inherent conflicts of interest with, the FBI/DOJ.*** Congress should seriously consider whether an independent, national crime lab should be created, perhaps under the auspices of the Administrative Office of the U.S. Courts, and governed by an independent board of judges and lawyers free from conflicts of interest in "making" cases against accused persons.

***Ensure Independent Expert Review/Accountability of Any Continued FBI Lab Function.***

Currently, the FBI lab does not even submit itself to the independent review of the very minimal industry standards of the independent American Society of Crime Laboratory Directors/Laboratory Accreditation Board (ASCLD/LAB). At the very least, if Congress decides not to remove the crime lab from the FBI, it should ensure that the FBI laboratory *at least* meet these minimum industry standards of ASCLD/LAB. This, lab personnel must be properly trained and must hold at least a Bachelor's degree in their field of expertise or related field. Protocols must be established in order to assure high levels of accuracy. Management must be held accountable for fostering the necessary environment, in which the search for the truth -- and not "convictions at any cost" -- is paramount and where scientists are permitted to be scientists. And we certainly would urge that Congress ensure all other labs operating within the culture of federal law enforcement agencies be required to *at least* meet these minimum standards of the industry. Yet, we think that if the FBI lab's integrity is truly to be restored to the preeminent place it has historically held, Congress must ensure that its standards are above and beyond these bare minimum, industry standards.

***Legislate Criminal Justice Procedural Reforms to Ensure the System Remains Open and Uncorrupted in Every American's Case.*** We think it is now unmistakably clear that Congress should amend Rule 16 of the Federal Rules of Criminal Procedure and the federal "Jencks Act," 18 U.S.C. sec. 3500, to ensure a more open discovery process for federal criminal cases. The measures should specifically ensure the citizen accused at least has the right to take the deposition, pre-trial, of the key lab scientists performing the tests and drawing conclusions from them, which are claimed to implicate the accused. It should allow for depositions of other key government witnesses as well. The measure should also require that all reports generated by the FBI lab for use in criminal prosecutions, or any type submission before a court must include certain basic information, and should be disclosed pre-trial to the accused: *e.g.*, what tests were run?; which procedures used?; what do the FBI lab's studies show as to the reliability of the test in question?

In this way, *and only in this way*, can lab errors or outright misconduct can be uncovered much earlier, and more often. This is important not only to the citizen wrongfully accused, but also is conserving of scarce taxpayer dollars, which would otherwise be wasted on a flawed or wrongful prosecution. Court time, prosecutors' time and often, the time of court-appointed defense counsel for accused indigents, are all paid for by the taxpaying public. Such sunshine, and its disinfectant effect, also increases the faith all Americans can have in their criminal justice system.

More open criminal discovery procedures such as those we are advocating are statutorily required in many states.<sup>(19)</sup> They are also required by pattern and practice, through local court rule and order in many federal districts (including, *e.g.*, the Eastern District of Virginia). And yet, they would remain less open than the discovery procedures available to civil litigants, were life and liberty are not even at stake, but only the almighty dollar.

***Enact a fundamental fairness measure like that introduced by Representative Joseph McDade (R-PA), to hold government lawyers ethically accountable.*** Congressman McDade has introduced an excellent bill that would make it plain that lawyers who work for the federal government -- be they DOJ prosecutors or FBI agents working in or out of the lab -- are not allowed to operate "above the law," and according only to the special, self-policing set of ethics rules created by their own boss, the Attorney General. Rather, they should be required by Congress to abide by the same basic rules of legal ethics as those which govern all other lawyers and their clients, including their adversaries, counsel for the citizen accused. *See e.g.*, H.R. 232 (105<sup>th</sup> Congress) ("Ethical Standards for Federal Prosecutors Act"). *See also* Hearing on H.R. 3386 (104<sup>th</sup> Congress), before the Subcommittee on Courts and Intellectual Property of U.S. House Judiciary Committee, September 12, 1996. This fundamental legal ethics reform to rein in government lawyers has been endorsed by everyone from the American Corporate Counsel Association, to the National Rifle Association and the American Bar Association.

This should ensure a systematic ongoing, neutral oversight not only for those agents working in the lab who are also licensed lawyers. It should also serve to deter FBI case agents who are lawyers, and federal case prosecutors, from encouraging or suborning lab misconduct (forcing the "cart" of conviction to be placed by the lab before the "horse" of science). It would certainly discourage federal prosecutors from seeking to improperly influence FBI agents and scientists to falsify or hide evidence in the lab. It clarifies the principle that neutral and detached, external state bar licensing, ethics commissions could hold accountable the lawyers they license -- even if these lawyers work for the federal law enforcement community -- should they remain undeterred and act "above the law."

***Ensure America's "Fail-Safe" Mechanisms are Indeed Fail-Safe.*** Congress should heed the dire consequences of what it now knows about the FBI lab in terms of compromised prosecutions and convictions. It should follow the example of the State of Illinois, and amend the recently re-written laws of *habeas corpus*, to ensure that DNA and other scientific "new evidence" is excepted from the otherwise unfairly arbitrary and rigid *habeas* rules.<sup>(20)</sup>

The lab's misconduct certainly renders even more compelling the numerous recent revelations about a criminal justice system all too fraught with error, especially troubling and exacerbated in the State's ultimate cases -- those calling for the execution of an all-too-likely *wrongfully* convicted accused.<sup>(21)</sup> A copy of the model Illinois statute which the national Congress should follow in enacting federal legislation, is attached to this testimony, as Attachment B.

Again, I thank you Mr. Chairman and other distinguished members of this Committee, for considering my testimony. We appreciate your careful consideration of our specific, modest-but-essential suggestions about how Congress can *take action* to really ensure for the American People that the FBI lab is a reliable center for forensic excellence, and that the criminal justice system is one in which we can all have renewed faith, confidence and pride -- *in every case*. We look forward to assisting you in your important oversight and legislative reform efforts in any way we can.

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**The only client Mr. Lefcourt represents at this hearing is the National Association of Criminal Defense Lawyers (NACDL). Neither he nor NACDL has received any federal grant or contract in the past two years.**

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**Footnotes:**

1. *NACDL, et al v. U.S. Department of Justice*, D.D.C., Civil No. 97-372 (GK), filed 2/25/97, amended 3/3/97. While successful in disgoring for the public from the DOJ the Inspector General's conclusory report, we are only slowly receiving the 60,000 pages of interviews, etc.

2. Dr. Whitehurst has been calling attention to shoddy FBI lab practices since 1986. Three previous internal "investigations" of his allegations, conducted by FBI officials, concluded there were no problems.

3. One need only look at the U.S. Department of Justice, OJP-NIJ's own work, the Research Report of June 1996, *Convicted by Juries, Exonerated by Science: Case Studies in the Use of DNA Evidence to Establish Innocence After Trial*, for proof of the importance of scientific analysis in criminal cases [hereinafter referenced as *Convicted by Juries, Exonerated by Science*]. ***We have submitted copies of this revealing government report to Committee staff, and request that it be made a part of the record of this hearing.*** [It is also available online, at [www.ncjrs.org/txtfiles/dnaevid.txt](http://www.ncjrs.org/txtfiles/dnaevid.txt)]

4. This, despite the fact that what the government has, *per judicial force*, given us is a veritable mountain of papers -- all shuffled out of order, which obviously makes our independent re-organization, re-cataloging and independent analysis an extremely time and labor-intensive endeavor.

5. *See e.g., id*; Laurie Kellman, "Jewell: FBI 'Knew I Didn't Do It.," *Wash. Times*, July 31, 1997, at A3 (The FBI "pointed the federal government's finger of guilt at the wrong man, and they knew it within days", Richard Jewell testified before the U.S. House Judiciary Subcommittee on Crime); Jerry Seper, "Reno 'Very Sorry' for Leaks in Jewell Case," *Wash. Post*, August 1, 1997, at A3 ("I regret very much what happened to Mr. Jewell. And I don't think any apology is sufficient when somebody has gone through what Mr. Jewell has gone through.").

6. *See e.g.,* Paul Craig Roberts, "Whatever Happened to Justice?," *Washington Times*, May 7, 1997, at A13, wherein he observes: "Getting convictions has become more important than getting the right person. A recent 517-page report by the inspector general of the Justice Department shows what has happened. \* \* \* [For instance,] [t]he report concludes that the FBI's explosives expert and key witness in the World Trade Center trial 'worked backward.' Instead of objectively examining the evidence, the agent 'first determined the result he wanted and then tailored his testimony to reach that result.' The inspector general is 'deeply troubled that his [the agent's] testimony on direct examination may have misled the court.'" In the Oklahoma City case, the report concludes that the FBI 'repeatedly reached conclusions that incriminated the

defendants without a scientific basis.' When the FBI ceases to give suspects the benefit of the doubt and, instead, tailors evidence to obtain their conviction, justice is dead."

7. *See e.g., Roberts, id.*

8. *Whitehurst v. Federal Bureau of Investigation*, No. 96-572 (GK), slip op. (D.D.C. Feb. 4, 1997) (Kessler, J.), at 2.

9. IG Bromwich has continued to defend the agent's lying under oath and in key documents relied upon by courts, and even did so under oath in his responses to the well-documented, focused questioning by Congressman Wexler and others during the U.S. House Judiciary Crime Subcommittee's oversight hearings on May 13, 1997.

10. "The Unscientific F.B.I. Lab" (editorial), *New York Times*, April 17, 1997, at A34.

11. "Lab Report" (editorial), *Washington Post*, April 19, 1997, at A20.

12. "FBI Needs Repair:" (editorial), *Arizona Republic*, April 18, 1997.

13. "Poor Lab Work Gives Both FBI, Justice a Black Eye" (editorial), *USA Today*, April 17, 1997, at A14.

14. *Lab Report*, at 2-3.

15. *See* Steven A. Caps, "FBI lab probe hits UNABOM case," *Washington Times*, April 17, 1997, at A3.

16. *See* Jo Thomas, "A Tarnished Case: Flaws at F.B.I. Lab Offer Latest Setback to Prosecutors in Oklahoma City Bombing," *New York Times*, April 17, 1997, at A1.

17. *See FBI Lab Report* at 392-399, 446. *See also* Mireya Navarro, "Doubts About F.B.I. Lab Raise Hopes for Convict, On Death Row, but Seeking New Trial," *New York Times*, April 22, 1997, at A10.

18. *See e.g.,* Michael J. Sniffen, AP Wire Story, April 16, 1997.

19. A copy of one such state statute, from Florida, is attached to this testimony, for your convenience. *See* Attachment A.

20. HB 2138, Section 5, *signed into law* by Governor Jim Edgar on July 23, 1997.

21. *See e.g.,* *Convicted by Juries, Exonerated by Science*, *supra* note 3; Report, "Capital Punishment on the 25<sup>th</sup> Anniversary of *Furman v. Georgia*" (Southern Center for Human Rights, June 26, 1997); Report, "Innocence and the Death Penalty: The Increasing Danger of Executing the Innocent" (Death Penalty Information Center, July 1997); International Commission of Jurists, *Administration of the Death Penalty in the United States* (June 1996); "Report in Support

of American Bar Association Resolution Calling for a Moratorium on Executions" (Section on Individual Rights and Responsibilities (1997)), *adopted by* ABA House of Delegates, February 3, 1997.

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