FROM THE PRESIDENT

MARTIN S. PINALES

Looking Back, Moving Ahead

Time passes quickly. Serving as NACDL's president for the past year has been a wonderful experience, but it is already time to move on. My successor, Carmen Hernandez, is a great leader and motivator, and I am sure you will give her the same support you gave me. I thank my family and law partners for their understanding and patience while I worked with my other "family" and other full-time job at NACDL.

Let's take a moment to reflect on the events that transpired during the past 12 months and look at the challenges that lie ahead.

My year started with the search for a new executive director. With Norman L. Reimer at the helm, NACDL will go to levels it has never reached. His coming on board was the biggest and best thing that happened during my term.

One of the most important issues we addressed this year was the need to reform traditional police eyewitness identification procedures. Traditional lineups, in which all suspects stand in one room, are resulting in mistaken eyewitness identifications and wrongful convictions all across the country. NACDL filed a Freedom of Information Act lawsuit in February against Illinois police departments that participated in a study finding that eyewitnesses are less likely to falsely identify an innocent suspect when traditional lineups are employed. The findings of the Illinois study stand in stark contrast to all the prior research finding that false identifications are substantially reduced when eyewitnesses view suspects one at a time. The Illinois police departments refused to provide the underlying data and protocols supporting their publicly funded study. By filing the lawsuit, we hope to get our hands on the data so that experts in research design can conduct a review.

For nearly 20 years, NACDL and other organizations have urged an end to the unfair disparity between the sentences handed down for possession of crack cocaine and those imposed for possession of powder cocaine. Carmen Hernandez testified before the U.S. Sentencing Commission last fall. She noted that the current sentencing guidelines — requiring the same prison sentence for one gram of cocaine base or 100 grams of powder cocaine — have resulted in prisons overflowing with low-level drug dealers and addicts who would be better off in treatment programs. The commission recently sent proposed amendments to Congress that would ease crack sentences. If Congress takes no action on the proposed amendments, they will become effective on Nov. 1. The revised guidelines will be a sensible first step toward ending the outrageous disparity in cocaine sentencing.

There was a major breakthrough in Virginia's indigent defense system. In April, the Virginia Legislature passed a bill making court-appointed counsel fee caps waivable upon a showing of good cause. Prior to this new legislation, the state operated under a hard cap system, i.e., the maximum amount an attorney could be paid was strictly limited and could not be exceeded. For example, $445 was the maximum payment for a felony charge carrying a sentence of up to 20 years in prison. This new legislation means that Virginia has turned an important corner, but we know that our work is not done. NACDL and its partners in this endeavor will continue to fight, making sure waivers are fully funded and other needed reforms are put in place to create a balanced and effective criminal justice system.

In Louisiana, NACDL's many years of effort have also borne fruit. Comprehensive reform of the indigent defense system passed both houses of the State Legislature by extraordinary numbers. The legislation will go into force in the coming year. There is no doubt that the NACDL-supported litigation was instrumental in bringing about this result.

One of NACDL's strengths is its ability to join forces with individuals and advocacy groups to bring about change. On the white collar crime front, NACDL joined the ABA, ACLU, Association of Corporate Counsel, and the U.S. Chamber of Commerce in arguing that corporations should not be compelled to disclose privileged information to the government after conducting internal investigations. In the past, when deciding if they would file charges against a corporation, federal prosecutors considered whether the corporation would agree to waive the attorney-client privilege and refrain from paying the legal fees for its employees. We were pleased when Sen. Arlen Specter (R-Pa.) introduced the Attorney-Client Privilege Protection Act of 2007, which would prevent federal prosecutors from requesting or conditioning treatment on a corporation's disclosure of any communication protected by the attorney-client privilege or work product protection. The legislation would also change the government's policy on using the payment of attorney's fees as a consideration in making a charging decision, which has basically meant that corporations have

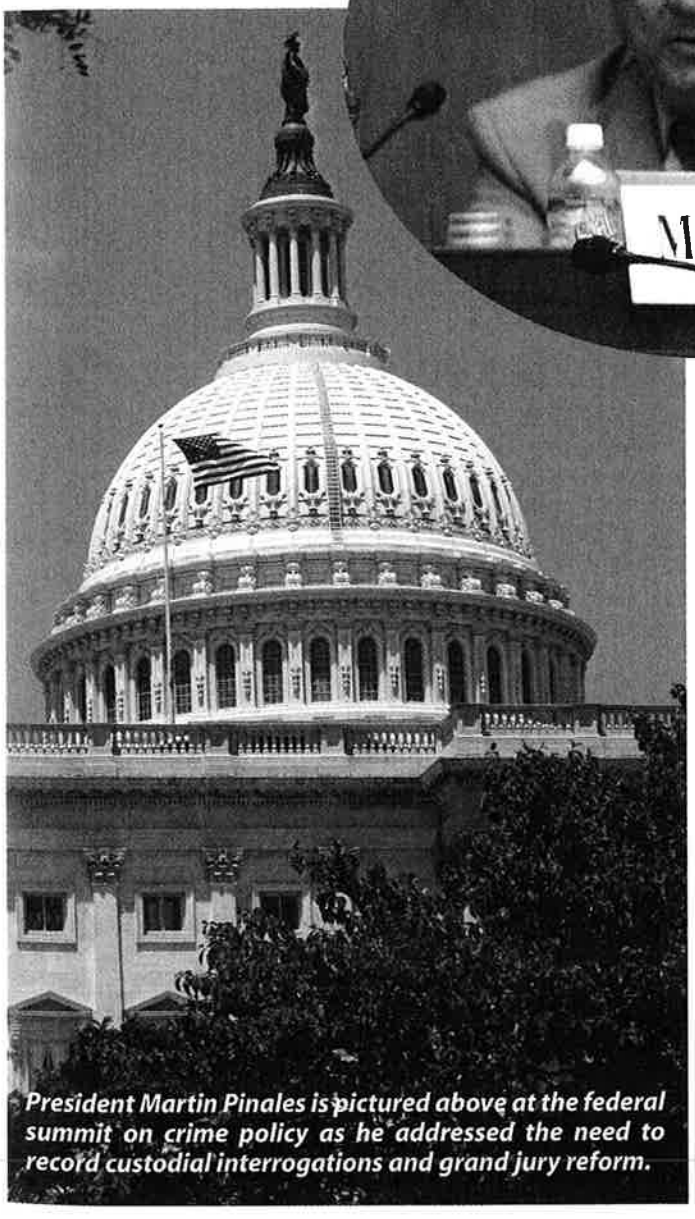
Martin S. Pinales is the 48th President of NACDL and a founding partner in the firm of Sirkin Pinales & Schwartz LLP in Cincinnati, Ohio. He was admitted to the bar in 1968 and limits his practice to criminal law. He teaches at the National Criminal Defense College and lectures at various bar associations around the country.

MARTIN S. PINALES
Sirkin Pinales & Schwartz LLP
105 W. 4th Street
Suite 920
Cincinnati, OH 45202-2726
513-721-4876
Fax 513-721-0876
E-MAIL mpinales@cinci.rr.com

stopped paying attorney's fees when an employee is under investigation or subject to prosecution. NACDL was honored when Sen. Specter first announced this legislation in September at our 2006 White Collar Crime Conference.

It was a pleasure to join Karen J. Mathis, president of the ABA, and Mathias H. Heck Jr., president of the National District Attorneys Association, in supporting the John R. Justice Prosecutors and Defenders Incentive Act of 2007. If passed by Congress, this legislation will establish a program of student loan repayment assistance for law school graduates who agree to remain employed for at least three years as state or local criminal prosecutors or as state, local, or federal public defenders. Jurisdictions across the country will be able to attract and retain qualified lawyers who, due to huge education loans, are not willing to consider public service positions.

Another highlight of my presidency was traveling to the nation's capital to participate in the federal summit on crime policy that was sponsored by the House Judiciary Committee's Subcommittee on Crime, Terrorism, and Homeland Security. The topics addressed included taped interrogations and grand jury reform. It was an honor to appear on behalf of NACDL, and personally, it was just awesome.



President Martin Pinales is pictured above at the federal summit on crime policy as he addressed the need to record custodial interrogations and grand jury reform.

Some of this year's developments have been troubling. Pursuant to civil commitment statutes, states are confining sex offenders for periods that exceed their prison terms. Twenty states, with New York joining the ranks in March, hold sex offenders indefinitely in treatment centers that may or may not provide effective treatment. Civil commitment can cost four times as much as prison, and the claim of a reduction in recidivism is already being questioned.

Are you concerned about your privacy? You should be. We now know that the FBI has been abusing the new powers it obtained under the Patriot Act. Through the use and documented misuse of national security letters, the FBI can request phone records, Internet activity, and e-mails of people suspected (or not) of terrorism. The request for records is not reviewed in advance by a judge. Are these requests even reviewed after-the-fact? According to the *Washington Post*, an internal government audit concerning the national security letters found the FBI used the letters improperly or illegally over 1,000 times. We must continue to insist that government officials respect the rule of law. Any type of unchecked power might lead to even more abuse.

NACDL is moving forcefully in other areas of emerging concern. The proliferation of sex offender registration requirements, residency restrictions, and civil commitment provisions poses grave dangers for many who present no reasonable threat to society. NACDL's Sex Offender Policy Task Force is an effective vehicle to redress these excesses. The emergence of problem-solving courts, especially drug courts, offers valuable opportunities for treatment rather than punishment, but the move away from the traditional adversarial model must be approached with due regard for fundamental liberties. NACDL's Task Force on Problem-Solving Courts is poised to investigate and report on recent developments in this area. In addition, new technologies are vastly altering the discovery process. The newly formed Task Force on Electronic Discovery will study and report on these important developments. I am confident that through each of these initiatives NACDL will continue to discharge its national mission to secure due process for all.

Finally, *habeas corpus* remains in danger. We must make sure that it is available to all, including the detainees at Guantanamo Bay. The concept of *habeas corpus,* in existence for 1,000 years, says individuals cannot be arrested and held without being brought before a judge and charged with a crime. Twenty years from now, I hope we're not sitting around saying, "Remember *habeas corpus*? Man, those were the good old days."

If *habeas* is still around in 20 years, it will have survived because members of NACDL were willing to fight for it with unrelenting effort. Whenever our freedoms are threatened, I am confident NACDL will meet each challenge head on, and we will be successful in making our country better and insuring that it lives up to the guarantees in the Constitution.

NACDL NEWS

NACDL Files Suit Over Illinois 'Lineup' Report

By Jack King, NACDL Director of Public Affairs & Communications

President Martin S. Pinales, second from left, with three exonerees who appeared at Chicago press conference announcing NACDL FOIA lawsuit. Each of them was erroneously convicted in part based upon faulty identification evidence. They are, from left, Michael Evans (27 years for murder), Alejandro Dominguez (12 years for rape) and Marlon Pendleton (14 years for murder).

Citing wrongful convictions due to mistaken eyewitness identification and the urgent need to reform traditional police eyewitness identification procedures, the National Association of Criminal Defense Lawyers (NACDL), in conjunction with the MacArthur Justice Center of the Bluhm Legal Clinic at Northwestern University School of Law, filed a Freedom of Information Act suit on Feb. 8 against the Illinois police departments that participated in a controversial study of eyewitnesses and police lineups.

The police departments named in the suit refused FOIA requests to provide the underlying data and protocols supporting the report's controversial conclusion that eyewitnesses are less likely to falsely identify an innocent suspect in traditional simultaneous, non-blind lineups — where suspects all stand in one room — than in lineups in which the witnesses view the suspects one at a time and the administrator does not know which person might be the real suspect.

"It does not serve the public interest to conceal data that was gathered at the taxpayers' expense," NACDL President Martin S. Pinales said, recognizing the gravity of the litigation. "It only creates doubt and suspicion. If the data support the report's conclusions, then the police and authors of the report should have nothing to hide. But considering that this report contradicts all of the previous social science research on eyewitness identification, we have reason to believe that the information we are seeking will show that the research was deeply flawed and may have resulted in mistaken identifications."

The problem of mistaken eyewitness identification is endemic in the nation's criminal justice system. The purpose of the lawsuit is to force the defendants to do what they should have done on their own — provide their underlying data in order to have it reviewed by experts in research design and psychology.

NACDL 'Lawyers-Up'

Northwestern Law School's MacArthur Justice Center, a Chicago-based public interest law firm, filed the suit on behalf of NACDL. "Wrongful convictions happen too frequently to ignore, and many of them are the direct result of erroneous eyewitness identification," said Locke Bowman, legal director of the MacArthur Justice Center and attorney for NACDL. "The fact that the Chicago and Illinois Police Departments are not curious as to why their research goes against so many other legal experts' scientific research and professional opinions is deeply concerning. Our client, NACDL, has a right to see the data behind a taxpayer-funded study, and we're asking the court to direct these police departments to turn the information over immediately."

In conjunction with the filing of the lawsuit, the Center on Wrongful Convictions, also based at Northwestern Law School and dedicated to researching and overturning wrongful convictions in Illinois, released an analysis of wrongful convictions and found that in Illinois alone, 54 known innocent people had spent a total of 601 years behind bars as a result of erroneous eyewitness identification.

"Our analysis shows that there is something wrong with Illinois' current eyewitness identification system," said Rob Warden, executive director, Center on Wrongful Convictions. The Center has represented a number of people who have been wrongfully convicted. "The Chicago research flies in the face of multitudes of research on this topic and we want to know why. These procedures have the potential to impact hundreds of lives, and we should be exploring all avenues to ensure that people who are actually guilty of crimes are the ones who go to prison."

Among the reform measures provided by the Illinois General Assembly in the aftermath of the Illinois death penalty moratorium was a requirement that the Illinois State Police conduct a year-long pilot program to test the effectiveness of the traditional lineup procedure with a newer method, in which persons or pictures are presented to the eyewitness sequentially instead of all at once. The newer method — called "sequential double-blind" — also recommends that the lineup administrator be unaware who the actual suspect is in order to avoid unintentionally cueing the witness.

Report Cited to Block Reforms

The report to the legislature, released last March, was controversial. Although academic research has consistently found that sequential, double-blind identification procedures substantially reduce false identifications, the report claimed that in "real life" lineups, the traditional method was more reliable. The Chicago, Evanston and Joliet police departments participated in the study with the Illinois State Police.

Psychologists, social scientists, and defense lawyers have sharply questioned the study's conclusions and asked to see the supporting protocols to determine the validity and accuracy of the report. Informal requests were rebuffed, and NACDL and MacArthur filed a formal request for the data under Illinois' Freedom of Information Act. The defendants formally denied public release of the protocols and other information sought, and NACDL had no choice but to file the lawsuit.

"Clearly traditional lineups are creating mistaken eyewitness identifications and wrongful convictions, and it's a national problem," Pinales said. "Whatever is wrong needs fixing, but this Illinois report is now being used as an excuse to stop the implementation of lineup procedures based on scientific research."

The plaintiffs point to a study conducted by The Innocence Project of its first 130 DNA exonerations showing that more than three-quarters — 101 cases — involved mistaken eyewitness identification.

(Continued on page 8)

Pentagon Official Resigns

Under pressure from legal and human rights groups, particularly NACDL, the defense department's top military commission lawyer resigned Feb. 1.

Deputy Assistant Secretary of Defense for Detainee Affairs Charles D. "Cully" Stimson, himself a Navy Reserve JAG officer, resigned three weeks to the day after his interview on "Federal News Radio," an AM talk and news station serving the Washington, D.C., area. The interview was conducted on the fifth anniversary of the first Guantanamo detentions. Probably much to Stimson's surprise, it was an interview shortly heard 'round the world.

Stimson interrupted his own interview to make a point the two radio hosts had not even raised. "Actually you know I think the news story that you're really going to start seeing in the next couple of weeks is this: As a result of a FOIA [Freedom of Information Act] request through a major news organization, somebody asked, 'Who are the lawyers around this country representing detainees down there,' and you know what, it's shocking," he said.

He then went on to name some of the most respected corporate firms in the country and observed, "I think, quite honestly, when corporate CEOs see that those firms are representing the very terrorists who hit their bottom line back in 2001, those CEOs are going to make those law firms choose between representing terrorists or representing reputable firms, and I think that is going to have major play in the next few weeks. And we want to watch that play out."

Stimson was half right. The next day, a *Washington Post* editorial ripped Stimson for his remarks. Late that same day, a Navy spokesman disavowed the deputy assistant secretary's remarks. And the story did get a lot of 'play' for a few weeks.

But the clients of the maligned law firms did not make the law firms choose between representing the corporations or the detainees. Many, in fact, issued statements of support for their outside counsel's pro bono work.

Human rights and lawyers' groups condemned Stimson's remarks, as did newspaper editors.

NACDL President Martin S. Pinales faxed a letter on the Martin Luther King holiday to Defense Secretary Robert Gates calling for Stimson's dismissal (see sidebar). Pinales wrote that "Mr. Stimson's remarks constitute a violation of numerous ethical standards governing the legal profession and run counter to the core democratic principles for which American soldiers are fighting and dying."

Noting that Stimson's attempt to undermine the representation of the detainees is prejudicial to the administration of justice, Pinales rejected the Navy spokesman's disavowal of Stimson as a "wholly inadequate response."

"The Department of Defense should not tolerate such behavior by any of its personnel, let alone a high ranking official with responsibility for the Guantanamo detainees," Pinales wrote in his letter.

The *Miami Herald* reported the story and reproduced Pinales' letter on its Web site the next day. Stimson apologized, but few accepted it (the *New York Times* ran an editorial titled "Apology Not Accepted"). Pinales also received a letter from Stimson dated Jan. 22 directing Pinales' attention to Stimson's letter to the *Post*, and stating that the Secretary of Defense had asked him to respond.

About this same time, the *Herald* and other newspapers also began calling for Stimson to resign or be terminated. Rep. Jan Schakowsky (D-Ill.) wrote President Bush, asking that Stimson be fired.

Several weeks later, as this issue went to press, the story was still getting a lot of "play," just as Stimson said it would. On January 27, the *Herald* reported that the board of directors of the San Francisco Bar has asked the California Bar to investigate whether Stimson had violated the state's code of professional conduct, and called for discipline "up to and including disbarment" if he were found guilty. Less than a week later, Stimson tendered his resignation.

January 15, 2007

Secretary Robert Gates

Dear Secretary Gates:

I write to you on behalf of the more than 12,000 members of the National Association of Criminal Defense Lawyers to urge you to immediately repudiate the recent comments of Deputy Assistant Secretary of Defense for Detainee Affairs Charles D."Cully" Stimson and to urge his dismissal. The generic statement issued by a Pentagon spokesman that Mr. Stimson was not speaking for the administration is a wholly inadequate response given Mr. Stimson's position and portfolio.

Mr. Stimson's widely reported characterization of the noble pro bono efforts of countless law firms and individuals to provide legal assistance to the detainees as "shocking" and his suggestion that corporate CEOs "are going to make those law firms choose between representing terrorists and representing reputable firms" is disgraceful and brings disrepute upon the Department of Defense and the country. Mr. Stimson's remarks constitute a violation of numerous ethical standards governing the legal profession and run counter to the core democratic principles for which America's soldiers are fighting and dying. It is particularly offensive that he should label all the detainees "terrorists" before any adjudicatory proceeding and under procedures that thus far have been one-sided and secretive. One cannot escape the sense that Mr. Stimson's disdain for the lawyers who have undertaken to represent the detainees reflects fear that a capable defense will expose the detentions as unwarranted and abusive.

The law firms and individual lawyers who have volunteered to represent Guantanamo detainees, including not just the large firms that were singled out for excoriation by Mr. Stimson, but also public defenders and small firm and solo practitioners, deserve the thanks of the nation. They are upholding the highest standards of the legal profession and give meaning to the rule of law and the fundamental constitutional rights that are the bulwark of democracy. At its core, Mr. Stimson's diatribe is a thinly veiled effort to intimidate the legal profession into shirking its solemn responsibility to ensure that every accused person has access to effective representation. This effort must be viewed in the context of the professional standards governing the American legal profession.

The Model Rules of Profession Conduct obligate lawyers to render pro bono service and also make clear that the mere representation of a client does not constitute endorsement of the client's political, economic, social or moral views or activities. Hence, providing voluntary counsel for unrepresented individuals who have been incarcerated for years without the filing of formal charges is a commendable fulfillment of professional responsibility, implying no endorsement of any individual's beliefs or misdeeds.

Furthermore, Mr. Stimson's attempt to undermine that representation is prejudicial to the administration of justice and thereby constitutes professional misconduct in violation of the rules governing the conduct of civilian and government lawyers. The Department of Defense should not tolerate such behavior by any of its personnel, let alone a high ranking official with responsibility for the Guantanamo detainees.

Thank you for your attention and consideration. We look forward to your response.

Sincerely,
Martin S. Pinales