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# **INFORMATION ABOUT IPR**

## **OVERVIEW**

IPR is a public interest law firm and clinical education program founded by Georgetown University Law Center in 1971. Attorneys at IPR act as counsel for groups and individuals who are unable to obtain effective legal representation on matters that have a significant impact on issues of broad public importance. IPR's work currently focuses on communications law, environmental law, and general public interest law, including employment discrimination and the rights of persons with disabilities.

This report summarizes IPR's projects over the last year, illustrating the impact of our work on our clients and their communities. However, all of the projects serve not only clients, but also a parallel clinical education function. The IPR program gives students and graduate fellows an opportunity to work on unique, large scale projects raising novel legal issues and requiring extensive research and writing.

These projects involve both challenging issues and challenging legal materials. For example, most of our projects require students to develop and master extensive factual records that often relate to technical issues like telecommunications systems or pollution control. Gathering facts and the creation and use of administrative records is an important part of the experience for many of our students.

We also frequently require students to research regulatory material and administrative law issues. While students are usually familiar with how to find and use case law, they often have had little exposure to municipal law and regulations or to such materials as the Federal Register and the Code of Federal Regulations. Similarly, few students have used legislative history material or the extensive looseleaf services in areas such as environmental law. With the help of IPR attorneys and the professional staff at the Law Center's library, IPR students explore the uses of these tools (often through on-line services).

The students also must consider questions of strategy, issues of client autonomy, problems of professional responsibility, the need for careful preparation and planning, and how to mesh client goals with the applicable law and facts. Students have the opportunity to learn the skills of communicating orally and in working with community groups, other public interest organizations, and expert witnesses. Like other clinics at Georgetown, we place our students in situations where they must assume responsibility for the quality of their own work and for the success of their clients' cases. However, most of the work at IPR is collaborative, with the graduate fellows and faculty working with the students at each step of the case. Students learn from observing the work of experienced attorneys who are practicing law along with them. The students, therefore, not only have the chance to perform and critique their own work, but also to observe and critique the performance of their supervisors.

The day-to-day work on cases is supplemented by weekly seminars and weekly clinic meetings, at which we review cases and current issues. IPR seminars are an integral part of the students' educational experience. The format and subject matter of the seminars vary. Some

require students to formulate positions in small groups before meeting together with the other students, while others involve role-playing or simulation. Many require that students draw on and share their experiences on their project. While most of the seminars are led by IPR faculty and graduate fellows, some may be taught by other professors or visitors. The materials used in the seminars include judicial decisions, pleadings from IPR cases, law review articles, legislative materials, real and hypothetical fact patterns, and excerpts from non-legal literature. In recent terms, seminar topics have included rulemaking, litigation planning, discovery, remedies, appeals, statutory interpretation, working with the press, professional responsibility, and negotiation.

Students at IPR work with three faculty members and five graduate fellows. Selected from a national pool of several hundred applicants, the fellows are an essential part of the IPR program. They are responsible for the day-to-day supervision of the students and spend much of their time guiding students in conducting legal research, reviewing student drafts, and preparing the students for oral presentations. The fellows also work as members of IPR's legal staff, and have represented clients in hearings before federal and state courts and local and federal administrative bodies.

Of course, not all IPR students will go into public interest practice, as traditionally defined. Nevertheless, the work at IPR presents a valuable and perhaps unique setting in which to raise and discuss issues that arise in all sorts of law-related work. While the focus of the seminars is on public interest practice, the issues we deal with are inherent in being a lawyer, regardless of practice context. Our goal is to ask students to think broadly about what it means to be a lawyer, about the implications of their work for others (including, but not limited to, their clients), and about how students can use their skills most effectively to achieve their professional goals.

## **STAFF**

Angela J. Campbell, Director  
Hope M. Babcock, Director  
David C. Vladeck, Director

Martha L. Rodriguez, Office Manager

## **GRADUATE FELLOWS - 2002-2003**

James A. Bachtell received his JD in December 2001 from the University of Iowa. Jamie also holds an M.S. and a B.S. in Journalism and Mass Communication from Iowa State University. While a law student, Jamie was a student intern in the Legal Clinic and a member of the Law Review. He clerked during the summer for Foulson & Siefkin, L.L.P. in Wichita, Kansas. Prior to attending law school, Jamie was the Managing Editor and a Reporter for the Boone News-Republican, in Boone, Iowa. Jamie is a second year communications fellow at IPR.

Michael Beach attended Carleton College, where he majored in political science and played jazz piano. After graduating from Harvard Law School in 1997, Mike clerked for Judge Donald D. Alsop at the federal district court in St. Paul. From 1998 until he joined IPR, Mike was an associate at Faegre and Benson in Minneapolis doing environmental litigation, American Indian law, and civil rights litigation. In law school, Mike worked at the Criminal Justice Institute and Harvard Defenders, performed independent clinical work for the Committee on Public Counsel Services, and was on the Journal on Legislation. In the summer of 1995, he worked in the Cheyenne River Sioux Tribal Attorney General's Office in Eagle Butte, South Dakota.

Sheila Bedi graduated from Washington College of Law at American University after attending Michigan State as an undergraduate. At AU, she was Co-President of the Equal Justice Foundation, was a Marshall-Brennan Constitutional Law Fellow, worked in the Community Economic Development Law Clinic, and was Dean's Fellow for Professor Brenda Smith. She has also worked at Neighborhood Legal Services (where she received the Covington & Burling Summer Westwood Fellowship), the Disability Rights Section in the Civil Rights Division at the Justice Department, and the Whitman-Walker Clinic, and was a member of the East Lansing Human Relations Commission and a Legislative Intern for then-Congresswoman Debbie Stabenow.

Lisa Goldman is a second year fellow working on environmental issues at IPR. She came to IPR after completing a clerkship with Judge Robert J. Timlin of the U.S. District Court, Central District of California. She graduated cum laude and order of the coif from the University of Pennsylvania Law School, where she was also a public interest scholar and senior editor of the Law Review. While at Penn, Lisa served as a legal writing instructor and worked on

political asylum, environmental justice, and human rights issues at several nonprofit organizations. Lisa received her undergraduate degree in human biology from Stanford in 1994. Prior to law school, she spent three years with the Peace Corps in Niger, West Africa, where she helped rural communities with environmental projects.

Amy Wolverton is a 1995 graduate of Georgia State University College of Law, where she was Associate Editor of the Law Review. She attended Indiana University as an undergraduate. After graduation from law school, she worked for four years for Alston & Bird in Atlanta, doing environmental and First Amendment litigation and negotiation. She also worked on a pro bono basis for the ACLU. From 1999 until she joined IPR, Amy worked at Cox Communications doing litigation and negotiation, and counseling senior management on issues relating to access, cable theft, deceptive advertising, and regulatory compliance. Amy has also written articles on both environmental law and telecommunications issues.

### **LAW STUDENTS**

#### **FALL 2002**

Steve Albrecht  
Leslie Alexander  
Sarah E. Barial  
Matt Grazier  
Marc Hertrick  
Andrew Hysell  
Dongho Lee  
Lindy Lucero  
Ted Metzler  
Connie Milonakis  
Amy Pereira  
Melissa Rourke  
Heather Self  
Leslie Slavich  
Vanessa Walts

#### **SPRING 2003**

Alan Arville  
Monica DeLong  
Michael Garcia  
Jette Gebhart  
Clarissa Jones  
Jean Kuei  
Julie Klusas  
Alyssa Lareau  
Katie Lasky  
Thomas Leistner  
Maggie Martel  
Tanya Messado  
Terrance Norflis  
Chris O'Connell  
Betsy Packard  
Petra Smeltzer  
E. Abim Thomas

## ANNUAL REPORT

### I. COMMUNICATIONS LAW

#### A. Digital Television Broadcasters's Obligations to Serve Children

In January 2003, the FCC sought comment on how television broadcasters can best serve the needs of children during and after the transition to digital television, updating the record from similar proceedings in 1999 and 2000. Digital television allows a single television station to simultaneously broadcast up to six different program "streams." It also offers the capability to provide interactive programs and advertisements, enhanced parental controls, monitoring of viewing habits and targeting advertising based on that information

IPR filed comments and reply comments on behalf of the Children's Media Policy Coalition. Specifically, IPR argued that the stations broadcasting multiple program streams should likewise increase the amount of educational and informational programming provided to children. (Under present guidelines, most stations only broadcast about three hours of children's educational programming per week). We argued, further, that cable and satellite operators should be required to carry all of a television station's children's educational programming, including any associated interactive features.

Our comments also urged the FCC to require that digital television's advanced capabilities be used to give parents more useful tools for monitoring and controlling their children's television viewing. In addition, we updated and expanded upon earlier proposals that the FCC should modify children's advertising rules and policies to address unfair practices that arise from the ability of digital broadcasters to offer interactive advertisements and directly sell products by means of the television screen. Finally, we urged the FCC to adopt rules prohibiting digital broadcasters from collecting information about children without parental consent.

This proceeding is still pending before the FCC.

#### B. Equal Employment Opportunities in Broadcasting

IPR has continued its efforts to obtain meaningful and constitutionally sustainable equal employment opportunity (EEO) rules. Over the past year, our efforts have focused in three areas, as described below.

##### *1. FCC Adoption of New EEO Regulations*

In November 2002, the FCC adopted new EEO regulations for broadcast stations after engaging in a rulemaking launched in response to the D.C. Circuit's finding that previous EEO rules were unconstitutional. IPR had filed extensive comments in support of the EEO rules on behalf of the NOW Foundation, the Feminist Majority Foundation and other organizations. The new EEO rules apply to both broadcasters and multichannel video programming distributors ("MVPDs"), which include cable systems and direct broadcast satellite services. The new rules

require that broadcasters and MVPDs (1) disseminate information on full-time vacancies, (2) notify requesting organizations of full-time vacancies, and (3) complete a specified number of community outreach activities selected from a menu of options. The new rules also require recordkeeping and reporting of EEO-related outreach. Broadcasters and MVPDs must submit an EEO public file report containing a list of all vacancies filled during the preceding two years, recruitment sources used to fill each vacancy, referral information on the people interviewed and hired for each vacancy, and a list of the menu options implemented during the preceding two year-period.

Although the FCC did not implement all of our suggestions, the new rules incorporated many of our proposals and foster many positive gains for minorities and women. Specifically, the FCC agreed with our comments that while the Internet is a useful recruitment tool, it cannot be the sole method for disseminating vacancy information to the public, particularly given the low Internet usage rates for job searches. With regard to notification to organizations, the FCC stipulated that it expects broadcasters to make "reasonable efforts to publicize the notification requirements so that qualifying groups are able to learn of this new procedure." Further, in accord with our suggestions, the FCC declined to exempt all employment units with ten or fewer full-time employees from the outreach requirements. Raising the threshold would have exempted approximately half of broadcasters and MVPDs from the EEO rules.

With regard to recordkeeping, the FCC agreed with our proposal that all broadcasters with websites post their current EEO public file reports on their website. Consequently, the public can monitor stations' outreach efforts. Finally, we supported, and the FCC adopted, the use of random audits as a supplemental means of enforcement.

## ***2. Reconsideration of the New EEO Rules***

In February 2003, State Broadcasters Associations and Alaska State Broadcasters *et al.* filed petitions asking the FCC to reconsider the new EEO rules. They asked the FCC to weaken the new EEO requirements by expanding current limited exemptions and eliminating various recordkeeping and reporting requirements. Among other items, State Broadcasters' Associations repeated their demands for an Internet-based vacancy dissemination requirement and elimination of the filing and posting of public file reports.

We filed an opposition in response to their petitions and advocated denial of all requests that would further weaken the EEO requirements. We urged the FCC to reject again the State Broadcasters' Associations' Internet-based plan and refrain from delaying the effective date of the new EEO Rule. Additionally, we asked the FCC to maintain all reporting and recordkeeping requirements, especially the filing and posting of EEO public file reports in order to track and refine recruitment processes and provide the public with important information regarding potential recruitment resources. In addition to filing our formal opposition, we met with all of the FCC commissioners and their staff to emphasize the importance of the EEO rules to women and minorities. At this time, we are still awaiting the FCC's ruling on the petition for reconsideration.

### ***3. Application of EEO Rules to Part-Time Positions***

Along with adoption of the new EEO rules, the FCC initiated a new rulemaking to determine whether the EEO rules should be applied to part-time positions, one of the primary proposals we enthusiastically advanced in our original rulemaking comments. We filed additional comments arguing that application of EEO rules to part-time positions furthers the FCC's goals of broad and inclusive outreach by ensuring that stations fully recruit for a substantial and significant portion of the broadcast industry workforce. We also noted that part-time positions provide a crucial gateway into the broadcast industry. At this time, we are awaiting the FCC's order with respect to the part-time issue.

#### **C. Media Ownership**

In September 2002, the FCC launched a comprehensive review of its broadcast ownership regulations, which generally limit the number of media outlets one entity or person can own. Among the six rules under review were the local television (duopoly rule), which prohibits control of more than one television station in a market unless a minimum number of independently owned and operated stations remains, the newspaper-broadcast cross ownership rule, which prohibits common ownership of broadcast stations and daily newspapers in the same community, and national audience reach limits for television stations.

On behalf of the Office of Communication, Inc. of the United Church of Christ, Black Citizens for a Fair Media, Civil Rights Forum, Philadelphia Lesbian and Gay Task Force, Women's Institute for Freedom of the Press, and the National Organization for Women, we filed lengthy comments in January 2003 urging that the FCC generally retain, with some modification, the existing media ownership limits because they continue to be necessary to ensure that the public has access to a diversity of viewpoints, that broadcasters provide programming that responds to local needs and interests, and that women and minorities have opportunities to own broadcast stations. We filed reply comments in February 2003 highlighting the failings of other commenters' proposals and emphasizing that broadcast media ownership limits do not unconstitutionally restrict an owner from presenting its views, but rather ensure that the public will have access to multiple viewpoints via the scarce, publicly-owned broadcast spectrum. In addition to filing formal written comments, we filed several *ex parte* letters and met with all of the FCC Commissioners to advocate our position.

In June 2003, the FCC voted 3-2 to adopt relaxed ownership rules, with two Commissioners issuing strong dissents. The majority found that most of the current rules were no longer necessary to protect the public interest and replaced them with new rules that will allow significant consolidation of the media. Specifically, the FCC (1) modified the local television rules to allow common ownership of two stations in most markets, and three stations in the largest markets; (2) repealed the newspaper-broadcast cross-ownership rule and radio-television cross-ownership rule and replaced them with a new Cross Media Limit that will allow mergers between newspapers and broadcast stations as well as television stations and radio stations in all but the smallest markets; (3) raised the national television audience reach from

35% to 45%, which will allow the major networks to acquire more local television stations, while retaining the UHF discount (which allows some companies to exceed the even the 45% limit); and (4) modified the application of the local radio limits (which allow ownership of up to 8 per market depending on the total number of stations) in a way permits increased consolidation of the already consolidated radio industry. The FCC also failed to address our concerns regarding the lack of opportunities for minorities and women to own broadcast stations, promising only to address these issues in a Further Notice of Proposed Rulemaking.

Largely due to tremendous public outcry over the relaxation of the ownership rules, Congress is considering legislation that would reinstate many of the ownership rules. Meanwhile, we are currently evaluating other administrative and judicial options for retaining appropriate media ownership limits.

#### **D. Universal Telephone Service**

IPR has been active in efforts to fully implement Section 254 of the Telecommunications Act, which requires that the FCC work to ensure that all Americans have access to telecommunications services. While nearly 96% of all households have telephone service, the percentage of low low-income households with telephones is much lower. To help ensure that low-income households can get telephone service, IPR has focused its advocacy on three distinct areas, as detailed below.

##### ***1. Fair Universal Service Contributions from Low-Income Consumers***

While the goal of universal access to telephone service dates back to the 1934 Communications Act, Congress established the principle in the Telecommunications Act of 1996 that all consumers, including the low-income and those in rural and high cost areas, should have access to telecommunications and information services. The primary means through which the FCC ensures that low-income consumers have access to these services are the Lifeline program, which subsidizes local telephone service, and the Linkup program, which subsidizes telephone hook-ups.

To subsidize universal service, telecommunications carriers contribute to the fund based on the revenues the carriers received from long distance calls. This cost is then typically passed on to consumers as a percentage of their long distance bill. In May 2001, the FCC revisited this method of collecting funds for universal service. Instead of a “revenue-based” system, where carriers and consumers generally pay according to the amount of service they use, the FCC proposed a “connections-based” USF assessment system, where end users would pay a fixed charge for each telephone line. This type of assessment mechanism would disproportionately affect the low-income and elderly people who tend to make fewer long-distance calls than other consumers.

In February 2002, the FCC sought comment on the connections-based proposal, and IPR filed comments and reply comments in the proceeding on behalf of Consumers Union, Consumer Federation of America and a number of other groups opposing the change in USF assessment.

IPR also participated in an FCC universal service public meeting and met with FCC staff members. Because of concerns raised by IPR and others, the FCC declined to adopt the connections-based proposal and instead issued an interim plan in December 2002 that kept a revenue-based approach while addressing some of our other concerns by, for example, prohibiting carriers from “marking up” universal service fees passed on to customers. At the same time, the FCC sought comment on three variations of the original connections-based plan.

In spring 2003, IPR filed comments and reply comments opposing the new connections-based proposals. We also proposed as an alternative an all-revenue contribution system that would assess all telecommunications revenue, including revenue generated from intrastate sources. Basing contributions on total revenue distributes the USF burden over a broader base of revenue, thus keeping overall consumer contributions down, as well as solves many administrative problems. Although the matter is still pending, the FCC seemed receptive to IPR’s all-revenue proposal and said it would begin examining the agency’s ability to assess contributions based on both intrastate and interstate sources and make a recommendation to Congress. Significantly, the Federal-State Joint Board on Universal Service, an advisory body made up of FCC Commissioners, state public utility commissioners, and a consumer representative, reversed course and endorsed the all-revenue proposal after initially backing the connections-based plan.

As a result of our work in this area, the Millennium Group Research Council invited IPR to contribute an essay about our proposal and to participate in a press conference on this issue.

## ***2. Lifeline Eligibility***

In addition to ensuring the Universal Service Fund is adequately and equitably funded, we have sought to expand the eligibility criteria for obtaining financial assistance for telephone service. On October 12, 2001, the federal-state Joint Board issued a Public Notice requesting comment regarding possible revisions to the eligibility requirements for the Lifeline program. IPR filed extensive initial and reply comments on behalf of the United States Conference of Catholic Bishops and a number of other public interest and community groups advocating for expanded access to the Lifeline program. Specifically, IPR advocated the adoption of a national “income-based” eligibility criteria of 150% of the federal poverty guidelines in addition to the current eligibility requirements, which are generally linked to participation in certain federal public assistance programs. IPR also advocated for an expanded list of public assistance agencies that establish eligibility for Lifeline and required outreach measures for carriers.

The Joint Board issued a generally favorable decision on April 2, 2003. Specifically, it recommended adding an income-based federal program eligibility standard set at 135% of the federal poverty guidelines and expanding the program-based default criteria to include two additional public assistance agencies. While not going as far as requiring specific outreach efforts, the Joint Board did recommend specific guidelines for states to follow.

Currently, we are drafting comments and reply comments on the Joint Board’s recommended decision that we will submit to the FCC later this summer. IPR is seeking an

income-based standard set at 150% of the federal poverty guidelines with self-certification for participants, mandatory state outreach efforts, and a policy requiring carriers to accept Lifeline-eligible customers with past-due charges providing they promise to pay off the balance.

### ***3. Expansion of USF-Supported Telecommunications Services***

In addition to expanding eligibility for subsidized telephone service, we have also sought to expand the types of services that can be subsidized by the Universal Service Fund. In August 2001, the Joint Board commenced a proceeding to examine whether the current list of telecommunications services supported by Universal Service Funds (USF) should be revised.

IPR filed extensive initial and reply comments in this proceeding advocating for inclusion of "soft dial tone," which allows emergency telephone calls to be placed even when service has otherwise been discontinued. IPR also sought to have wireless service and voice mail access for homeless and other low-income groups added to the list of USF-supported services. Unfortunately, in July 2002, the Joint Board recommended that no changes be made to the list of USF-supported services. After the FCC sought comment on the Joint Board's recommendations, IPR filed comments in April 2003 arguing that soft dial tone and prepaid phone service should be offered and funded through universal service. These comments elaborated and expanded upon our earlier proposals.

In July 2003, the FCC adopted the Joint Board's recommendation, thus rejecting our proposed changes. We are currently determining how to best proceed.

## **II. ENVIRONMENTAL LAW**

### **A. American Thoracic Society/New Source Review**

In the winter of 2003, Gary Ewart, Director of Government Relations of the American Thoracic Society ("ATS"), asked IPR to assist it in filing an *amicus* brief in support of the state attorneys general challenging EPA's revisions to its regulations implementing the Clean Air Act's New Source Review (NSR) program. ATS, founded in 1905, is an independently incorporated, non-profit, educational and scientific organization of physicians and scientists that focuses on respiratory and critical care medicine. It has approximately 13,500 due-paying members around the world. ATS conducts studies, publishes research, publishes two highly respected academic journals on lung diseases, and publishes medical statements that give expert opinions on how to diagnose and treat lung related diseases -- such as asthma, chronic obstructive pulmonary disease, occupational lung disease, and other lung diseases that are exacerbated by air pollution. IPR agreed to seek leave from the D.C. Circuit to file an *amicus* brief on ATS' behalf.

Shortly before IPR filed its papers with the D.C. Circuit, Gary Ewart indicated that two other organizations were interested in joining as *amici* -- the American College of Chest Physicians (ACCP) and The National Association for the Medical Direction of Respiratory Care (NAMDRC). ACCP, like ATS, is a medical and scientific society of 16,000 physicians,

surgeons, allied health professionals, and individuals with PhD degrees involved in the diagnosis and treatment of chest diseases. ACCP provides postgraduate medical education to promote the prevention and treatment of diseases of the chest, including those diseases exacerbated by air pollution, and publishes various medical journals. NAMDRRC is a national organization of physicians whose mission is to educate its members and address regulatory and legislative issues that relate to patients with respiratory illnesses. IPR agreed to include ACCP and NAMDRRC in its filings with the D.C. Circuit.

The litigation, in which ATS, ACCP, and NAMDRRC seek to participate as *amici*, is a series of consolidated Petitions for Appeal filed by several state attorneys general, environmental organizations, and public health organizations, challenging EPA's December 31, 2002 NSR regulations. The NSR program is designed to ensure agency review and permitting of new pollution from existing sources of air pollution, and the Petitioners allege that EPA's new regulations provide industries with several loopholes that effectively allow increases in emissions without any EPA oversight. ATS, ACPP, and NAMDRRC all have an interest in seeing much stricter enforcement of the NSR program than EPA's new regulations offer.

IPR filed a motion to leave to participate as *amici* on behalf of the three groups on May 2, 2003. An IPR student drafted the motion, working closely with Gary Ewart to document for the Court the interests of the three organizations in the lawsuit. After the May 2 filing, the Clerk's Office informed IPR that the 60 days allowed for motions for leave to participate as *amici* had expired on March 3, 2003, 60 days after December 31, 2002, when New York filed the *first* Petition for Appeal (despite the clerk's previous contrary advice on the due date for our motion, and despite IPR's stated desire to participate in all of the consolidated cases, not simply the New York case). The Clerk's office assured IPR there would be no problem so long as IPR filed a request for leave to seek participation as *amici* out of time, which IPR did on May 5. In mid-July, the Court granted IPR's motion for leave, required intervenors to file a single brief in support of their respective parties, and announced its intent to set a briefing schedule for the case in the near future. The Court, however, did not indicate whether *amici* could file separate briefs.

## **B. Araby Bog**

In June of 2002, IPR was contacted by Pat Stamper, who, both individually and as Chair of a citizen's group known as SAMMS (Save Araby Mattawoman and Mason Springs), was seeking legal help in challenging federal and state approval of a proposed residential development (Hunter's Brooke) in Charles County, Maryland. Hunter's Brooke, by all accounts, is the first phase of a two-phase development in the area. The second phase, which has yet to receive the requisite state and federal approvals, has been dubbed "Falcon Ridge." Both phases include plans to fill wetlands, thus triggering federal and state wetlands laws and regulations. According to Ms. Stamper and several scientists, the Hunter's Brooke development is adjacent to, and threatens, an ecologically rare and unique Magnolia Bog ("Araby Bog") as well as the nearby Araby house and property (a former residence of George Mason) listed in the National Register of Historic Places.

Upon discussions with Ms. Stamper, review of several documents, and research into

Maryland statutes and regulations, IPR concluded that the time had passed to challenge the state wetlands permits issued by the Maryland Department of the Environment (MDE) for Hunter's Brook. Ms. Stamper had sought a contested case hearing challenging the MDE permit in December of 2000, but her request was denied and no appeal to the Maryland courts was filed within the 30-day period permitted for such appeals. When Ms. Stamper first contacted IPR, the Army Corps of Engineers had just released its preliminary approval of the development, having taken additional time to assess the possible effects of the development on the historic Araby house and property pursuant to Section 106 of the National Historic Preservation Act.

On June 20, 2002, the Corps reaffirmed its earlier determination that the Hunter's Brooke development had "no adverse effect" on the Araby house and property, noting, in particular, changes the developer had made to lessen the project's effect on the house. The Corps further responded to concerns raised by Ms. Stamper and other consulting parties during the Section 106 review process, concluding that: (1) the Corps was not required to consider the impacts of the Falcon Ridge development in conjunction with the impacts of the Hunter's Brooke development because the two phases of development have "independent utility;" (2) the Corps was not required to prepare any sort of environmental review document under NEPA because it was allowing the developer to fill wetlands pursuant to the Maryland State Programmatic General Permit (MDSPGP); and (3) that the developer's proposed mitigation would sufficiently minimize any impacts on the Araby Bog.

In August, 2002, IPR commented extensively on the Corps' June 20 letter, expressing its continuing disagreement with the Corps' finding that the development would have "no adverse effect" on historical resources, and incorporating comments made previously by the National Trust for Historic Preservation in June of 2000 to that effect. IPR additionally argued that the Corps erred by concluding that the development could be authorized under the MDSPGP, rather than being required to proceed pursuant to an individual Corps permit (which would, in turn, require the Corps to conduct a NEPA review and an analysis under section 404(b)(1) of the Clean Water Act) because the project had no "independent utility" from the Falcon Ridge development. IPR also argued that the Corps must prepare an environmental review document pursuant to NEPA, irrespective of whether it can properly authorize the development under the MDSPGP because NEPA, particularly its separate mandate that agencies consider alternatives, applies to all Corps decisions, including decisions to allow projects to proceed under the MDSPGP.

In December 2002, IPR wrote a letter to the Secretary of MDE suggesting that new information pertaining to Rare, Threatened, and Endangered Species in Araby Bog and to the Bog's unique hydrology, combined with the fact that the developers have yet to commence construction, warrant a revocation or suspension of the state permit. Alternatively, IPR argued the permit had expired under its own terms, given the developers' failure to commence construction within two years of permit issuance. Although MDE has yet to respond to IPR, it did send a letter to Ms. Stamper suggesting its reluctance to reconsider its earlier permit decision. Since the Secretary has not responded to IPR, we recently sent a FOIA request to MDE to ascertain the status of the state permits at issue. As the Secretary appears ultimately likely to disagree with IPR and Ms. Stamper, it is unlikely that much remains for IPR to do at the

state level. In all of its work at the state level, IPR has been assisted by local counsel.

In January 2003, the Corps issued a letter concluding again that it was appropriate to authorize the Hunter's Brooke project under the Maryland General Permit. Accordingly, IPR sent a 60-day Clean Water Act notice letter to the Corps on May 12, 2003. The Maryland Native Plant Society (MNPS), the Maryland Alliance for Greenway Improvement and Conservation (MAGIC), and various concerned residents have joined Ms. Stamper in the litigation.

### **C. Childhood Lead Poisoning**

Lead poisoning has been declared "the number one environmental threat to the health of children in the United States." The most significant lead hazard for children is lead-based paint, and poor inner city children are especially at risk due to deteriorating housing conditions. This is particularly alarming in the District of Columbia, where one in three children, a majority of whom are African-American, lives in poverty. The D.C. government has estimated that, at minimum, 81,500 housing units in the city are at high risk for lead-based paint hazards.

IPR began working on lead issues in 1993 with the D.C. Coalition to End Lead Poisoning, which includes the Alice Hamilton Occupational Health Center (AHOHC) and the Association of Community Organizations for Reform Now (ACORN). IPR students have worked with the Coalition on legislative initiatives to establish a certification and training program for lead abatement workers and to amend the Lead-Based Paint Poisoning Prevention Act of 1983. IPR students have also testified and submitted draft amendments to the proposed Comprehensive Childhood Lead Poisoning Prevention Act and the Student Health Care Amendment Act. These laws have not yet been permanently enacted, and IPR continues to monitor their status.

In the fall of 2002, an IPR student wrote a chapter on lead-based paint for a handbook presently being compiled by the D.C. Bar Section on Environment, Energy, and Natural Resources. The chapter, entitled Lead-Based Paint in the District of Columbia, is to be included in the forthcoming Citizen's Guide to D.C. Environmental Law, along with chapters on air and water pollution, pesticides, and hazardous waste. The goal of the handbook is to educate and empower communities and local practitioners to address environmental problems in their communities. Once completed, the guide will be posted online at the D.C. Bar's website.

### **D. Duke Energy**

In late 2001, the Audubon Naturalist Society of the Central Atlantic States ("ANS") asked IPR to represent it before the Maryland Public Service Commission ("PSC") in opposing an application by Duke Energy Frederick LLC ("Duke") to construct a power generation facility. Duke proposed to build a 640 MW natural-gas, electrical generating station near Point of Rocks, Maryland, in Frederick County, about one mile from the Potomac River. The facility would use up to 7.5 million gallons per day of water, pumped from the Potomac, for cooling purposes. The case was one of the first applications for a new power plant to be filed since Maryland "deregulated" power generation within the state. Throughout the spring of 2002, IPR engaged in

wide variety of litigation-related tasks, including participating in a formal evidentiary hearing before a PSC hearing examiner in February 2002. IPR students drafted a number of discovery and Freedom of Information Act requests as well as motions to stay the proceeding, compel responses to discovery requests, and compel the production of a witness.

In May 2002, the state agencies charged with submitting testimony to the PSC on the project's environmental impacts requested and received a six-month delay, in order to convene a Cabinet-level task force to re-evaluate the way the state assesses the cumulative environmental impacts of multiple power plant proposals in the new, deregulated market. In the fall of 2002, IPR attended a meeting hosted by the state agencies to discuss proposed changes to the agencies' guidelines. An IPR student made suggestions on how to better structure the guidelines to incorporate cumulative, long-term environmental impacts of multiple proposed power plants. IPR also submitted written comments on the agencies' draft version of their new guidelines.

In December 2002, Duke filed a motion to withdraw its application to build the power plant. Although Duke cited market uncertainties as the reason for its withdrawal, IPR and the other intervenors believe that their prolonged and sustained opposition to the project during the PSC proceedings, as well as their assistance in formulating agency guidelines that accurately reflect the environmental impacts of all proposed and existing power plants, contributed to Duke's decision. The PSC subsequently granted Duke's motion. ANS and the other intervening parties who opposed the application are extremely happy that the plant will not be constructed.

#### **E. Friends of Tilden Park**

In October 1999, Clark Realty Capital, Inc. (Clark) began filing applications with the D.C. Department of Consumer and Regulatory Affairs for the necessary permits to construct a nine story, 168-unit apartment complex at 3883 Connecticut Avenue, N.W. The project site stands next to a designated historic landmark and abuts Rock Creek Park and the Melvin Hazen Trail, both properties of the National Park Service. The site also contained dozens of mature trees and a stream, fed by a ground water seep, running onto federal parklands.

Friends of Tilden Park (FOTP) brought suit to challenge the District's environmental review of Clark's proposed apartment complex under the D.C. Environmental Policy Act (DCEPA). The D.C. Superior Court granted summary judgment to the government and to Clark. In the spring of 2001, IPR agreed to represent FOTP in its appeal of the trial court's decision to the D.C. Court of Appeals. An IPR fellow argued the case before the Court of Appeals in May 2002. In September 2002, the court vacated the summary judgment order and remanded the case to the Superior Court with instructions to dismiss FOTP's complaint for lack of standing, without reaching the merits of the appeal. The court found that FOTP, which had no members, had not demonstrated organizational standing, because it could not point to a concrete injury caused by the District's failure to require an environmental impact statement under DCEPA. IPR conducted additional research on standing in order to decide whether to seek en banc review, but ultimately decided not to seek such relief.

#### **F. Grand Prix Race**

In August 2002, residents from the Kingman Park Citizen's Association ("KPCA") contacted IPR about challenging the Grand Prix race, held on the RFK Stadium parking grounds bordering the Anacostia River. In 2001, the D.C. Sports and Entertainment Commission ("Sports Commission") executed a contract with National Grand Prix Holdings LLC ("NGPH") to hold an annual three-day race for ten years at RFK Stadium, on land owned by the National Park Service ("NPS") and leased to the District. The first year's event took place on July 19-21, 2002 and harmed local residents in numerous ways. The racetrack constructed at the stadium comes to within 50 feet of residents' homes, and the noise from the 25 races held over three days far exceeded the allowable noise limits for residential areas, particularly affecting elderly residents. The races also appear to have contributed to air and water quality problems in the area, made worse by the summer's high temperatures. During the race, concession stands, staging activities, grandstands, and portable toilets were installed on a strip of federal parkland along the Anacostia River, and the area was fenced off from the general public.

In the fall of 2002, an IPR student began to research possible federal claims to use in trying to stop the next Grand Prix race. In December 2002, IPR sent a letter to NPS highlighting the federal laws that may have been violated during the first race, and urging NPS to prohibit any use by the Sports Commission of the federal parkland along the river for future Grand Prix races. NPS forwarded this letter to the Sports Commission, informed the agency that it had used the federal parkland without permission last year, and stated that an Environmental Assessment would be required before the land could be used again.

Building on the prior semester's research into potential federal claims, on March 7, IPR sent 60-day notice letters under the Clean Water Act and the Solid Waste Disposal Act to the Sports Commission and NPS. IPR also sent out Freedom of Information Act (FOIA) requests to NPS, the Sports Commission, and several District agencies involved in the race.

In March 2003, NGPH abruptly cancelled this year's race (originally scheduled for June 27-29, 2003), citing in part NPS's refusal to authorize use of the federal parkland for this year's race, in response to IPR's letter to NPS. The Sports Commission has since cancelled its ten-year contract with NGPH to stage the Grand Prix race. NGPH is currently in bankruptcy proceedings as various parties struggle for control of the corporation. Although the Sports Commission has not committed to reinstating the Grand Prix series, KPCA and IPR expect that it will try to recoup some of its financial losses from the early cancellation of the contract.

This summer, IPR and KPCA met with NPS and the Sports Commission to discuss the ongoing environmental problems (such as trash, noise, and the stormwater drainage system) at the RFK Stadium site and adjacent parkland. Both agencies committed to improving the area, and we are planning to all meet together at the end of the summer to see if any progress has been made.

## **G. Mattaponi Tribe**

Since the fall of 1996, IPR has represented the Mattaponi Indian Tribe in its efforts to stop a proposed 1500-acre drinking water reservoir that would flood over 500 acres of land that rightfully belongs to the Tribe, and withdraw up to 75 million gallons of water per day from the pristine Mattaponi River, potentially interfering with the American shad populations that support the Tribe's subsistence economy. Over time, IPR has expanded its representation of the Tribe to include other projects, such as assisting the Tribe to acquire more land next to its reservation, draft a constitution, and develop procedures for handling internal disputes on the Reservation.

The Mattaponi Tribe is a state-recognized tribe with a small Reservation on the banks of the Mattaponi River in east-central Virginia. The Tribe is one of the few remaining descendant tribes of a paramount chiefdom controlled by the great chief Powhatan, father of Pocahontas. In 1677, representatives of the English Crown signed a peace treaty with the Indian tribes (the "Treaty at Middle Plantation"), which, among other things, created the Mattaponi Indian Reservation by granting the Tribe its "Indian town" and all the land within three miles of the town. Although Virginia purports to recognize the Treaty's continuing validity, steady encroachment over the years has constricted the Tribe to the 150 inner-most acres of its original land-base. The Tribe, however, has always upheld its end of the Treaty, paying an annual tribute of game to the Governor. Today, the Reservation has room for only 65 of the 450 tribal members.

In 1987, a group of cities and counties in Virginia's lower peninsula formed a consortium called the Regional Raw Water Study Group (RRWSG) to plan for the region's water supply needs through the year 2040. The RRWSG settled on plans to build a drinking water reservoir in the Cohoke Mill Creek Valley to be filled with water withdrawn from the nearby Mattaponi River. The project would infringe upon the land reserved to the Mattaponi Tribe by the 1677 Treaty, destroy over 70 Indian archeological sites that are eligible for inclusion in the National Register of Historic Places, and would constitute the largest destruction of wetlands in Virginia since the passage of the Clean Water Act. Furthermore, because the Mattaponi people subsist on an annual shad harvest from the Mattaponi River, and the proposed intake pipe for the reservoir is located in the middle of shad spawning grounds, the Tribe is deeply concerned that the water withdrawal would impair its ability to continue its culturally and economically vital shad fishing.

### *1. State Court*

The RRWSG must obtain both a federal and a state permit for its reservoir project. Despite IPR's comments expressing the Tribe's concerns about the reservoir, the State Water Control Board (SWCB) issued a permit for the reservoir in December 1997. In response, IPR filed a lawsuit on behalf of the Tribe in Virginia state court. In its permit challenge, the Tribe alleged that the SWCB violated the Treaty at Middle Plantation, the federal Indian Non-Intercourse Act, the State Water Control Law, and Title VI of the Civil Rights Act of 1964. The trial judge dismissed the Tribe's action without opinion on jurisdictional grounds, and the Tribe appealed. The Court of Appeals heard oral argument in the fall of 1999 and sustained the lower court's ruling the following spring, holding that the Tribe lacked standing to maintain its claims. The Virginia Supreme Court granted the Tribe's Petition for Appeal in September, 2000, and the following March not only held the Tribe had standing to challenge the state permit, but

unanimously reaffirmed the Tribe's sovereign status. The court remanded the matter to the Circuit Court for a full trial on the merits.

The Tribe filed an Amended Complaint in the spring of 2002, in which it dropped its Non-Intercourse Act claim, explained its treaty claim further, and modified its civil rights claim in light of the United States Supreme Court's *Sandoval* decision. The City filed its answer in mid-July together with new demurrers. The parties exchanged discovery requests over the summer and responses to those requests in mid-September, 2002. The Tribe supplemented its interrogatory responses on November 1, 2002, providing the City and the Commonwealth with significant detail as to the content of the Tribe's expert testimony by Jack Campisi (an ethnohistorian), Edward Cheslak (a fisheries expert) and Linwood Custalow (the Tribe's oral historian). IPR students played a central role in the document review and production associated with the discovery process, and worked closely with the experts in preparation of the supplemental interrogatory responses.

Trial in the case had been originally scheduled for February 3-6, 2003, with the option that the parties could brief and file summary judgment motions in the fall, and give arguments at a hearing on any such motions, as well as on the City's and Commonwealth's demurrers, on November 20, 2002. In keeping with this schedule, on October 30, 2002, the Tribe filed a motion for summary judgment on its Treaty Claim (its First Error Assigned), arguing, based on the Commonwealth's admissions, that the SWCB violated its fiduciary obligations under the Treaty by failing to consider the Tribe's concerns, violated the Tribe's treaty-protected sovereignty over Indian and non-Indian owned land within its original 1677 Reservation, and violated the specific language of Articles IV and VII of the Treaty. IPR students drafted significant portions of this lengthy and complicated brief. On that same date, the Commonwealth and the City filed a host of new demurrers, and the City filed a motion for summary judgment. Shortly thereafter, the Court informed the parties that the November hearing date and the February trial date needed to be moved until late in 2003 (and a new trial date was scheduled for October 2003). The parties (and the court) agreed to move the hearing date on the demurrers and summary judgment motions to February 3, 2003, and further agreed that additional summary judgment motions could be filed prior to the new February 2003 hearing date. The Tribe filed its opposition to the Commonwealth's and the City's demurrers, and to the City's motion for summary judgment in mid-December 2002, and accompanied that opposition brief with a new motion for summary judgment on two of its state claims (its Second and Third Errors Assigned). On the same day, the City and the Commonwealth filed a joint opposition to the Tribe's first summary judgment motion.

The Tribe filed its formal reply to this joint opposition on January 15, 2003, and nine days later, its reply to the opposition to its second summary judgment motion on the second and third errors. Again, IPR students researched and wrote significant portions of the Tribe's legal arguments, including many complex and nuanced Indian law arguments.

Circuit Court Judge Curran held a hearing on the Commonwealth's pending demurrers and the Tribe's and the City's pending motions for summary judgment on February 3, 2003. Local counsel David Bailey, Indian law counsel Curtis Berkey, and IPR fellow Michael Beach,

presented argument for the Tribe. IPR students prepared all three for the hearing, put together case notebooks for the court and counsel, and attended the hearing in Newport News. At the end of the three hour hearing, Judge Curran asked the parties several questions about the 1677 Treaty and for further elaboration on the Indian canons of construction. The Commonwealth and the City submitted a supplemental memorandum answering Judge Curran's questions on February 19. The Tribe submitted its response six days later, in a letter drafted by two IPR students.

On April 1, 2003, Judge Curran issued an order dismissing the Tribe's First Error Assigned -- the Treaty claim -- on the ground that the Tribe had not stated a claim for which relief could be granted, specifically noting that the Treaty was to be interpreted under Virginia law and that the only remedy it provided the Tribe was to seek recourse from the governor, whose decisions the court said it had no jurisdiction to review. The court implied that the SWCB did not share the Commonwealth's treaty obligations. Judge Curran also dismissed the Tribe's Third and Fourth Errors Assigned on Demurrer, finding no errors of law, and part of the Tribe's Second Error, to the extent the Tribe had alleged that the SWCB was statutorily required to consider the 1677 Treaty. As a result of Judge Curran's order, the trial scheduled for October will not occur.

The only claim remaining (the remnants of the Second Error Assigned) in front of Judge Curran was whether the SWCB violated its statutory obligation to consider the Tribe's "cultural and aesthetic values" when issuing the VWPP. So, in response to Judge Curran's order, the Tribe filed a Second Motion for Summary Judgment on the Second Error Assigned (its third motion overall) on April 4. Again, IPR students wrote significant portions of the Brief, and the associated Reply Brief. A hearing on the Second Error was held in Newport News on May 29, 2003, along with a hearing on the environmental groups' challenges to the SWCB decision. Judge Curran dismissed the Tribe's remaining claim (and the environmentalists' claims) on June 28, 2003. IPR will appeal Judge Curran's decision to the Virginia Court of Appeals.

## ***2. Federal Administrative Proceedings***

In July of 1997, IPR submitted comments on the Tribe's behalf to the federal permitting agency, the U.S. Army Corps of Engineers. These comments addressed the inadequacies of the Final Environmental Impact Statement (EIS), which failed to consider the project's impact on the Tribe's culture, treaty rights, and subsistence economy, and requested that a supplemental EIS be prepared to address these significant omissions. In response to IPR's request, Corps officials ordered additional studies and traveled to the Reservation several times to meet with IPR and the Tribe.

In June 1999, the Corps announced a preliminary decision to deny the City's \$404 permit application and suspended further work on the application, including work under the National Historic Preservation Act (NHPA). The Corps based its decision on a draft report from the Corps' Institute for Water Resources that concluded Newport News did not need a new reservoir to satisfy its water demand through the year 2040, the amount of wetlands the project would destroy, and the adverse impacts to a minority population of American Indians. The Corps closed its administrative record in November, 2000. The District Commander released his Draft

Recommended Record of Decision (ROD) for public comment in March, 2001, in which he again recommended denial of the City's permit application. IPR submitted comments on the draft ROD in early May, 2001. The District Commander then sent a final version of his recommended denial to the Corps' North Atlantic Division offices in early July, 2001, which was released to the general public shortly thereafter. IPR submitted additional comments to the Division Commander in mid-October, 2001.

On September 30, 2002, the Division Commander declined to accept the District Engineer's recommended decision and ordered that the permit application proceed, that the City submit a final wetlands mitigation plan and obtain a Coastal Zone Management Act Consistency Certification from the Commonwealth (which includes obtaining the requisite permit from the Virginia Marine Resources Commission), and that the City, the Tribe, and all other consulting parties complete the consultation process required under Section 106 of the NHPA. Despite declining to issue a permit in light of these remaining procedural hurdles, the Division Commander strongly implied that the Corps will issue a federal permit for the project, once these steps have been completed, and effectively overturned the findings of the District Engineer that the project had unacceptable impacts on the Tribe and the environment.

In response to the Division Commander's action, IPR students drafted letters to the U.S. Environmental Protection Agency (EPA), the U.S. Fish and Wildlife Service (FWS), and the National Marine Fisheries Service, urging them to continue their previously documented opposition to the reservoir, and to exercise their right to seek further review from a higher authority within the Corps. In December of 2002, the FWS wrote to IPR expressing its continued opposition to the reservoir project.

### ***3. State Administrative Proceedings***

With the permit process restarted, in April of 2003, the Virginia Marine Resources Commission (VMRC) solicited comments and held a public hearing regarding the City's application for a subaqueous beds permit for the intake structure in the Mattaponi River, the water distribution lines under Cohoke Creek, and the discharge structure in Beaverdam Creek. This permit is required in order for the City to certify its consistency with the Coastal Zone Management Act, and the Division Commander required such certification explicitly. The permit also is independently required as a matter of Virginia law. On April 18, 2003, the Tribe filed written comments voicing the Tribe's opposition to the City's permit application and outlining why VMRC's constitutional, statutory, and regulatory authority mandates permit denial. An IPR student drafted these comments and worked with the Tribe's fisheries expert, who also submitted separate written comments to VMRC. On the same date, the City presented an amended permit application to the VMRC, which proposed a temporary halt to the water withdrawal from the Mattaponi River for a three-month period during the spring, except in times of water emergency. The City submitted this "compromise" in response to VMRC staff's recommended denial of the permit based on a Virginia Institute of Marine Sciences' (VIMS) March 2003 report that raised serious concerns about the intake structure's impact on the river's shad population, especially during the spring spawning season, and the permit's potential impact on American Indians.

On April 22, VMRC held a public hearing in Newport News on the permit application. Assistant Chief Custalow, Todd Custalow (the Tribe's hatchery manager), David Bailey, and an IPR student testified at the hearing and explained the Tribe's opposition to the permit and the "compromise." After nearly eight hours of testimony, VMRC adjourned the hearing and scheduled it to resume on Wednesday, May 14 just for those who were present at the April 22 meeting, but were unable to testify. In the interim, VMRC asked VIMS to comment on the City's amended application and arranged a meeting among VMRC staff, VIMS, and the City, to further discuss the City's "compromise" proposal. At VIMS' request, Carl Custalow submitted written comments on the "compromise" before the meeting. The Tribe's fisheries expert also submitted a brief written analysis of the City's "compromise," further confirming that the City's proposal did not protect shad adequately. At the May 14 hearing, neither VIMS nor VMRC staff changed their prior positions opposing a permit for the intake structure.

At the conclusion of the May 14 hearing, VMRC voted 6-2 to deny the City its requested permit. The City sought reconsideration at a subsequent VMRC public hearing, which was also denied, and then petitioned for a "formal hearing" two weeks later. The Tribe objected to this request in a May 30 letter, which prompted the City to file a memorandum in support of its petition on June 1, detailing several arguments as to why it had a "right" to a formal hearing -- a hearing which would, among other things, provide the City the opportunity to restate its case, cross-examine witnesses, and exclude irrelevant testimony. The Tribe responded in a June 9 letter, explaining that the City's interpretation of the relevant statutes was erroneous and misleading, and that once VMRC provides a thorough, informal, public hearing, it is not legally required to hold a formal hearing. In a June 10 letter, the Attorney General agreed that VMRC was not required to hold such a formal hearing, but, in an unusual step, urged VMRC to exercise its discretion to do so. On June 16, the City filed a Notice of Appeal of the May 16 decision. At its June 24 meeting, upon hearing from the City and David Bailey, VMRC voted 5-3 not to grant the City another hearing. The next day, the City filed its Petition for Appeal from both the May 16 decision to deny the permit, and the June 24 decision not to grant a formal hearing. The Tribe filed a motion to intervene in that appeal, along with a proposed Demurrer/Answer, on July 16.

#### **H. McQueen v. South Carolina Coastal Commission**

During the spring 2002 semester, the South Carolina Department of Health and Environmental Control, Office of Ocean and Coastal Resource Management (the "Department" f/k/a the South Carolina Coastal Council) retained IPR, along with the Georgetown Environmental Law and Policy Institute (GELPI), to represent the Department in the South Carolina Supreme Court, where it has been engaged in a longstanding dispute with a landowner over the extent to which the Fifth Amendment's takings clause requires the Department to compensate him after denying him a permit to bulkhead and backfill his two coastal lots, in 1993.

McQueen appealed the Department's permit denial to the Coastal Zone Management Appellate Panel, which affirmed the Department's action. McQueen then sought judicial review

of the Panel's decision. The Circuit Court concluded, contrary to the Panel's determination, that the denial of the permits amounted to a taking and awarded McQueen \$100,000 in compensation. The Department appealed the ruling to the South Carolina Court of Appeals, which in January, 1998, affirmed the judgment of the Circuit Court, but remanded the issue of the amount of compensation due. The Department filed a *certiorari* petition with the South Carolina Supreme Court, which was granted in March 1999. The Court reversed the judgment of the Court of Appeals, holding McQueen did not suffer a taking because he lacked the requisite investment-backed expectations in his property. McQueen then sought *certiorari* in the United States Supreme Court, which granted the writ on June 29, 2001, vacated the South Carolina Supreme Court's holding, and remanded the case for reconsideration in light of its decision in *Palazzolo v. Rhode Island* (the "GVR Order").

Pursuant to the United States Supreme Court's GVR Order, in January 2002, the South Carolina Supreme Court ordered the parties to brief three questions. Both McQueen and IPR were dissatisfied with the way the South Carolina Supreme Court framed the issues for briefing, and filed motions to amend the questions to include the question of whether investment-backed expectations are relevant in a "total takings" analysis. The Court declined to accept the parties' amendments and re-posed the following three questions: (1) did the Court of Appeals err in finding Coastal Council's regulation deprived McQueen of all economically valuable use of his property; (2) if not, do background principles in South Carolina property or nuisance law absolve the State from compensating McQueen; (3) if not, may a court use investment-backed expectations to determine McQueen's damages?

In our joint brief, which we filed on April 22, 2002, we first argued that McQueen did not demonstrate he was denied all economically viable use of his property and, therefore, failed to establish a taking (the Department briefed this issue). Second, we argued that background principles of property law—specifically the public trust doctrine—barred McQueen's takings claim because a landowner does not have a right to destroy public trust land (IPR wrote this section of the brief). Finally, we argued that a property owner's investment-backed expectations were not relevant in calculating damages. Unlike McQueen, however, our basis for asserting that investment-backed expectations are not relevant in calculating damages was rooted in our argument that such expectations are only relevant in determining liability – *i.e.*, a lack of expectations means that the Department is not liable, and not that damages should be reduced (GELPI had principal responsibility for this section). Two environmental organizations filed *amicus curiae* briefs in support of the Department. McQueen filed his Brief on June 28, 2002. Pacific Legal Foundation and the National Association of Homebuilders filed *amicus* briefs in support of McQueen. After seeking a short extension of time, IPR and GELPI filed its Reply Brief on July 23, 2002, including its response to *amici*.

Oral argument was held on March 18, 2003, and John Echeverria (Executive Director of GELPI) argued on behalf of the Department. On April 28, 2003, the South Carolina Supreme Court ruled in favor of the Department, and overturned the Court of Appeals' decision, as it had before reconsidering its opinion in light of *Palazzolo*. The Court based its decision solely on the public trust doctrine – the issue IPR briefed. It concluded that although it was uncontested McQueen had suffered a total taking, the State had the exclusive right to control land below the

high water mark for the public benefit, and, therefore, McQueen's ownership rights in the lands below the high water mark on his property did not include the right to backfill wetlands. Accordingly, the Court stated McQueen could not be compensated for the denial of a permit to do something he had no right to do. McQueen did not petition for rehearing with the South Carolina Supreme Court, but filed for *certiorari* with the United States Supreme Court on July 28. Our response is due August 29. No students worked on this case after the Spring of 2002.

### **I. Metrobus**

The Washington Metropolitan Area Transit Authority's (WMATA) Northern Bus Garage, located on 14th Street between Buchanan and Decatur Streets in Northwest Washington, has created numerous problems for the surrounding community, including air and noise pollution and heightened crime around the facility. From 1999 - 2001, IPR worked with the Metro Committee of the Carter Barron East Neighborhood Association (CBENA) on issues affecting the operation and maintenance of the garage. IPR helped the committee to collect information on the nature and extent of the problems caused by the facility, obtain the cooperation and/or the assistance of relevant city and federal agencies, and work with the Clean Bus Campaign led by the Sierra Club and the NRDC to encourage WMATA to use cleaner, alternative-fuel buses. Recently, a new neighborhood group called Hands Together has organized around the Metrobus issue in an attempt to resolve the situation. IPR has been speaking informally with members of Hands Together, including a resident who was previously involved in CBENA's Metro Committee, about the status of the garage and the ongoing problems it poses for the community.

### **J. Rock Creek Park**

In November 1999, the National Park Service (NPS) issued a right-of-way permit to Bell Atlantic Mobile (BAM) (now Verizon Wireless) to construct two cellular towers in Rock Creek Park, one at the Tennis Center, and another at a nearby maintenance yard. Rock Creek Park is one of the oldest and largest urban parks in the country, containing a wide variety of plant and wildlife habitat and an important flyway for neotropical migratory songbirds. NPS issued the permits after hurriedly completing an environmental assessment (EA) of the project concluding that the towers posed no significant impacts under the National Environmental Policy Act (NEPA). In January 2000, IPR filed a complaint against NPS in U.S. District Court for the District of Columbia, on behalf of certain residents of the Crestwood community, the Audubon Naturalist Society of the Central Atlantic States, and the Maryland Native Plant Society. The complaint alleged violations under NEPA and the Administrative Procedure Act. BAM subsequently intervened as a defendant in the case. It initiated construction of both towers the day after IPR filed its complaint.

On July 2, 2002, the district court granted Plaintiffs' motion for summary judgment and ordered NPS to complete a new EA by December 15, 2002. The court found that the EA did not adequately assess the towers' impacts on migratory birds, the impacts of tower maintenance on Park resources, or the possibility of using alternative tower sites outside of the Park. BAM appealed the order to the D.C. Circuit and unsuccessfully sought a stay of the decision from both the district court and the D.C. Circuit. NPS tried to appeal the decision one day too late and had

to withdraw its appeal. The district court later granted a motion by NPS to extend the deadline for the new EA to April 2, 2003, with the Notice of Decision due June 20, 2003.

The parties filed their appellate briefs in the spring of 2003. Both sides analyzed, per the D.C. Circuit's instructions, whether the lower court's order was appealable as an injunction under 28 U.S.C. § 1292(a)(1). Oral arguments are currently scheduled for September 12, 2003.

On April 2, 2003, NPS released the revised EA. IPR, along with clients Neal Fitzpatrick and Jim Jones, submitted comments on the EA, which, although examining the towers' impacts in greater detail, still fails to adequately document some of these impacts. NPS issued its Notice of Decision on June 19, concluding that the towers would not have a significant impact on the park's resources and that an Environmental Impact Statement was therefore not warranted. On July 16, the Court of Appeals asked the parties to advise it by motion on what effect, if any, the filing by NPS of a new NOD had on the appeals. IPR filed its response to this order on July 25, in which it argued that the new NOD had no effect because the lower court has still not issued a final order resolving the ultimate issue in the case – the adequacy of NPS's compliance with NEPA. In its response, BAM argued the case was not moot until we informed the Court that IPR was not going to challenge the new EA and NPS said it would not collect EA preparation fees from BAM. NPS, although technically not a party to the appeal, nonetheless responded by saying the case is moot and its mootness is not affected by the possible collection of fees from BAM. Although the district court retained jurisdiction over the case pending completion of the new EA, it is unclear whether the court will take further action before the D.C. Circuit issues its opinion on the appeal.

#### **K. Solid Waste Transfer Facilities**

This year, IPR continued its work on trash transfer facility (TTF) issues in the District through its representation of the Near Northeast Neighborhood Task Force (NNNTF), a community group organized to oppose a TTF in a predominantly minority, residential neighborhood in Northeast D.C. Since 1994, LGI Industries (LGI) had operated a TTF in the Uline Arena, generating odor, noise, dust, and an increase in the number of rats and flies in the area. Beginning in 1996, IPR has pursued legislative and administrative remedies for the NNNTF, and evaluated the possibility of litigation. Students have helped draft changes to local laws to provide better protection for neighborhoods exposed to TTFs, filed an administrative rulemaking petition to correct several flaws in the District's site approval process for TTFs, and testified numerous times before the National Capital Planning Commission and the District of Columbia City Council on the harms caused by these facilities and the need for more stringent regulation.

In July 2001, the Department of Public Works (DPW) informed IPR that the District was planning to negotiate a global settlement with the solid waste industry of all outstanding TTF disputes, which would result in the closure of Uline Arena by the end of August 2002. In the fall of 2001, the D.C. Board of Zoning Adjustment (BZA) resumed a proceeding on the validity of LGI's certificate of occupancy (authorizing the facility to operate pursuant to the District's zoning code), after suspension by the D.C. Court of Appeals. IPR researched and drafted a pre-

hearing brief to the BZA arguing that the zoning code does not permit LGI's operation. The hearing was continually delayed while District officials tried to reach an agreement with LGI to close the facility.

In August-September 2002, IPR wrote several letters to the District's Department of Consumer and Regulatory Affairs (DCRA) and the BZA. The letters described ongoing violations by the Uline facility with regard to operating hours and dust, and urged DCRA to enforce the zoning code against LGI irrespective of the pending closure agreement. In October 2002, the District finally signed the closure agreement with LGI, and the facility closed shortly thereafter. It has since been cleaned up.

Although LGI has been preparing to sell the site for redevelopment, community residents (including within NNNTF) are now divided over whether the Arena should be designated as a historical site and protected from demolition, or whether it should be torn down. A group of residents has filed an application for historic designation. Some residents have indicated they would like to see the site preserved and used as a community center or some other facility that benefits the neighborhood. IPR is trying to determine whether it can work with NNNTF to help resolve the issue.

### III. PUBLIC INTEREST LAW

#### A. Discrimination in Air Travel

##### 1. *Love v. Delta.*

Since the late 1970's, IPR has worked to ensure that persons with disabilities have fair access to commercial air transportation. On behalf of longtime clients, Paralyzed Veterans of America (PVA), IPR attorneys helped craft the Air Carrier's Access Act of 1986. (ACAA). The ACAA prohibits airlines from discriminating against passengers on the basis of disability. Since the ACAA's enactment, IPR has been active in ACAA litigation all over the country.

The text of the ACAA does not explicitly state that the Act can be enforced by an individual bringing suit against an airline. Nor does the statute provide remedies for air travelers who have been discriminated against because of their disability. Therefore, a primary issue in ACAA litigation is whether the statute can in fact be enforced by a private litigant and if so, what remedies are available to plaintiffs.

IPR has been involved in litigation addressing both these issues. In *Love v. Delta Airlines*, the district court held (in our view correctly) that a passenger has a private right of action to enforce the ACAA, but also held (in our view incorrectly) that no compensatory or punitive monetary damages are available in such actions. The plaintiff appealed this ruling to the U.S. Court of Appeals for the Eleventh Circuit.

On behalf of PVA, we filed an *amicus curiae* brief in this case, addressing both the

private right of action and remedies issues. We also assisted plaintiff's counsel in the drafting of her initial and reply briefs. An IPR staff attorney then argued the case before the Eleventh Circuit on behalf of the plaintiff, Ms. Cynthia Love.

The Eleventh Circuit reversed, holding that the ACAA could not be enforced through a private right of action. The Court reasoned that because Congress explicitly created a private right to seek review of DOT enforcement actions in the Courts of Appeal, it did not intend for the ACAA to be enforced privately in federal district court. Shortly after the Eleventh Circuit decided *Love v. Delta*, the D.C. Circuit held in *Caplan v. DOT* that individuals aggrieved under the ACAA lacked standing to seek review of DOT enforcement actions. In a Petition for Panel Rehearing, we brought *Caplan* to the Eleventh Circuit's attention and argued that its decision conflicted with both the DOT's interpretation of its authority to enforce the ACAA and with the recent D.C. Circuit decision.

The Eleventh Circuit denied our rehearing petition. IPR, PVA and Ms. Love's counsel explored the wisdom of filing a petition for certiorari, but we concluded that given the Supreme Court's unwillingness to find implied private rights of action, the Court would be likely to affirm the Eleventh Circuit. IPR is still working with PVA to ensure that the ACAA is enforced. We have filed two administrative complaints with the DOT on behalf of a disabled airline passenger who was denied services because of his disability. IPR will continue to look for appropriate cases to test the vitality of the ACAA.

## **2. *Kothari v. United; Kothari v. DOT.***

After September 11 enhanced security concerns translated into racial profiling for some South Asian and Middle Eastern individuals. IPR represents Mr. Prashant Kothari, who was removed from a United Airlines flight because of his race and ethnicity. Mr. Kothari filed a complaint with the DOT and wrote a letter to United detailing the humiliation he experienced when airline officials escorted him off his flight and had him interrogated by 15 federal and state law enforcement officials. United issued a non-responsive letter failing to address any of his concerns.

IPR represented Mr. Kothari in settlement negotiations with United Airlines. Settlement discussions with United came to a standstill, however, once the DOT began investigating the informal complaint filed by our client. When it became clear that United would await the DOT's action before it would discuss settlement, IPR filed a Freedom of Information Act (FOIA) request with the DOT requesting all documents relevant to the investigation of Mr. Kothari's complaint. After the DOT refused to release any documents, IPR filed a FOIA lawsuit in federal district court which prompted the release of all responsive documents. These documents confirmed that United offered several conflicting stories when explaining to the DOT why Mr. Kothari was removed from his flight. The documents also revealed that the DOT was undertaking a thorough investigation of Mr. Kothari's complaint. Currently, the DOT is contemplating initiating an enforcement action against United. IPR prepared an affidavit on behalf of Mr. Kothari describing his experience with the airline. We are currently awaiting the DOT's decision regarding an enforcement action against United and will continue to represent

Mr. Kothari's interests before the DOT.

Our efforts to pursue a remedy directly against United were stalled after the airline declared bankruptcy in December 2002. However, IPR preserved Mr. Kothari's claims against United by filing a proof of claim in bankruptcy court. This will allow Mr. Kothari to pursue his claims against United either in bankruptcy court or in federal district court.

## **B. Employment discrimination and Sexual Harassment**

### ***1. Melvin Eley v. GPO.***

IPR has fought against race discrimination in employment at the U.S. Government Printing Office (GPO) for over 25 years. Most recently, IPR represented Mr. Melvin Eley a highly trained, 50 year-old African-American GPO employee who, in 2001, applied for the position of Printing Officer, a high level supervisory position. Among other duties, the Printing Officer serves as the GPO's Webmaster and monitors new technologies to ensure that the GPO's printing practices are efficient. The GPO selected a white individual with questionable qualifications to fill this position. After Mr. Eley learned of his non-selection, he left the GPO and accepted a position outside of the federal government. However, Mr. Eley suspected that his race was a factor in his non-selection and he filed a formal race discrimination complaint with the GPO's EEO office.

We advised Mr. Eley to pursue an administrative hearing so that we could further supplement the record and filed extensive discovery on Mr. Eley's behalf. At that point, the GPO initiated settlement discussions. After a series of settlement talks with the GPO, the parties reached an agreement. The GPO created a new position for Mr. Eley with a salary and level of responsibility comparable to that which he would have received had he been selected for the Printing Officer position. All of Mr. Eley's benefits were restored. Mr. Eley began working at the GPO again in May 2003. IPR will continue to monitor the settlement agreement in this matter.

### ***2. Roy Cosbert v. Government Printing Office; John Edwards v. Government Printing Office; Mal Guinn v. Government Printing Office.***

In the Spring semester of 2002, a group of African-American employees came to us with a problem we have seen repeatedly at the GPO: in order to fill vacancies, management hired white individuals from outside the agency rather than train its current, African-American employees, many of whom worked for the GPO for twenty years or more without any opportunity for advancement.

We drafted formal administrative complaints for these clients that were filed with the GPO's Equal Employment Opportunity (EEO) office. We had hoped these complaints would trigger an investigation of the GPO's promotion practices and relief for our clients. We had earlier negotiated a settlement for a different group of similarly situated GPO employees. This agreement required the agency to acknowledge that such practices create the appearance of racial discrimination, to change certain promotion practices, and to pay our clients substantial

damages. While this settlement does not directly affect the rights of our current clients, we hoped that it reflected a change of attitude within the GPO.

However, the GPO's EEO office dismissed the complaints of our current clients, concluding that their complaints were time barred and that our clients lacked standing to protest the outside hires. We represented these clients in an appeal to the Equal Employment Opportunity Commission's (EEOC) Office of Federal Operations. Unfortunately, the EEOC affirmed the GPO's dismissal of our client's claims, finding that our clients should have known that they were being discriminated against 10 years ago and should have complained at that time. We have counseled our clients to apply for all positions the GPO posts in their division so that if they bring a complaint in the future, the standing requirement will be satisfied.

### **3. *Bastien v. Campbell.***

Ms. Rita Bastien brought this age discrimination claim suit against the Office of Senator Ben Nighthorse Campbell under the Congressional Accountability Act (CAA). The CAA provides that all congressional employees, including Members' personal staff, are protected by anti-discrimination and workplace safety laws that have long applied to private and public sector employees, including the Age Discrimination in Employment Act.

Ms. Bastien had worked as an aide in Senator Campbell's office for almost seven years when she was suddenly discharged and replaced by a younger employee. Ms. Bastien filed an age discrimination complaint in federal district court in Colorado. The district court dismissed the complaint, ruling that Senator Campbell's Office is absolutely immune from suit under the Speech or Debate Clause of the United States Constitution. The Speech or Debate clause provide members of Congress absolute immunity from suit for "speech or debate in either house" or any legislative action.

This case was appealed to the U.S. Court of Appeals for the Tenth Circuit. IPR filed an amicus brief supporting Ms. Bastien on behalf of two watchdog organizations -- the Project on Government Oversight and Public Citizen, Inc. IPR argued that the Speech or Debate Clause has long been construed narrowly to apply only to acts taken in furtherance of a Member's *legislative* responsibilities. Personnel decisions, even those relating to key staff, do not fall within the narrow boundaries of the Clause. IPR noted as well that, in passing the CAA, Congress decided to subject itself to the same standards it had imposed on the private sector, and that the Judicial Branch should defer to Congress' judgment that the Act does not encroach on Congress' prerogatives. Finally, we argued that Ms. Bastien's job duties were far removed from the legislative sphere. To allow Senator Blackwell immunity here would mean that *any* staff participation in the legislative process would place a congressional employee outside the protection of the CAA. Such a result would leave virtually all employees of the House or Senate unprotected by the Act. This case is currently awaiting argument.

### **4. Peer-on-Peer Sexual Harassment.**

In early 2003, the mother of a former client (L), who is a minor child, contacted IPR

because L was being sexually harassed at school. L is profoundly deaf and attends a school in the District of Columbia that caters to the special needs of deaf children. L, a middle school student, told her mother that her classmates had been taunting her with sexual comments and several boys in her class repeatedly touched her in an aggressive and inappropriate way. IPR agreed to represent L and her mother.

IPR drafted a series of demand letters to L's school asking that it enforce its own sexual harassment policy and cease violating Title IX of the Civil Rights Act. School officials met with IPR and L's mother to hammer out an action plan to ensure L's safety for the remainder of the school year. IPR has closely monitored the school's compliance with the plan. In the Fall of 2003, L will be attending another school.

Because this matter involved allegations of sexual touching, the D.C. Police became involved and interrogated L and others. IPR lawyers accompanied L to the interrogation. There, it became clear that, although the D.C. police provided sign language interpreters, the interpreters were having difficulty communicating with L. IPR notified a local deaf advocacy group, which has agreed to train the D.C. Police to ensure that deaf crime victims feel safe and understood when communicating with police officers.

## **C. Prisoners' Rights**

### ***1. Donna Zahid v. Chaplain Litchfield et al***

Ms. Donna Zahid has been incarcerated in the Fluvanna Correctional Center for Women in Virginia. Ms. Zahid is an Ethiopian Jew who has been stymied in her efforts to practice her religion. Ms. Zahid repeatedly requested that Fluvanna provide her with kosher meals, access to a Rabbi, religious classes, Jewish texts and opportunities for fellowship with other Jewish inmates. Fluvanna's administration ignored Ms. Zahid's requests. While Christian and Muslim inmates have bi-weekly prayer services, access to Imams and clergy, and libraries full of religious texts, Ms. Zahid and the other Jewish inmates were cut off from their faith.

Ms. Zahid retained IPR in March 2003. An IPR staff attorney and several students spent a day at Fluvanna meeting with Ms. Zahid and several other Jewish inmates. IPR determined that Ms. Zahid's rights under the First Amendment and under the Religious Land Use and Institutionalized Persons Act may have been violated. However, the Prison Litigation Reform Act requires an inmate to first exhaust all administrative remedies before she can sue to challenge her conditions of confinement. The exhaustion requirements at Fluvanna are particularly onerous and unsettled. IPR had to file a FOIA request with the State of Virginia to determine the prison's official exhaustion procedures. IPR then drafted a how-to guide on exhaustion in layperson's terms that has been distributed throughout the inmate population at Fluvanna.

While Ms. Zahid's complaints were going through the administrative process, IPR sent a letter to Fluvanna's warden and the Virginia Department of Corrections (VaDOC) demanding that Fluvanna accommodate Ms. Zahid's religious needs immediately and requesting that the

VaDOC establish a long-term plan for meeting the religious needs of Jewish women incarcerated in Virginia. Since then, IPR has been engaged in extensive negotiations with Fluvanna and the VaDOC to ensure that Ms. Zahid's rights, and the rights of all Jewish inmates, will be respected. As a result, Ms. Zahid now has regular contact with a Rabbi; the library has added several Jewish texts, which Ms. Zahid uses to lead weekly meetings with other Jewish inmates. Fluvanna has agreed to allow Ms. Zahid to observe Jewish holidays—most recently Ms. Zahid and the other Jewish inmates lit candles in acknowledgment of Shavu'ot. IPR is in the process finalizing an agreement with the VaDOC that will ensure that the religious needs of Jewish women inmates are met in the future.

Additionally, IPR's familiarity with Fluvanna's grievance procedures has led to other activities on behalf of Fluvanna inmates. For example, IPR successfully convinced the Fluvanna's Warden to cease housing women in cells adjacent to cells housing guard dogs. At IPR's urging several women have received much needed medical attention. One of these women was housed in Fluvanna, a maximum-security institution, only for medical reasons. Once she received treatment, IPR secured her transfer to a minimum-security facility.

## ***2. Branden v. Hayley et al.***

In the fall of 2002 IPR was asked to assist the Southern Center for Human Rights in filing a class action lawsuit on behalf of HIV positive inmates segregated in an HIV dorm at the Limestone Correctional Facility in Alabama. The plaintiffs were denied access to adequate medical care. Making matters worse, the physical structure in which they are housed is so antiquated and unsanitary it poses a serious risk to their health because of their compromised immune systems. IPR conducted the preliminary legal research and drafted a detailed legal memorandum laying out the bases for the lawsuit.

After the filing of the complaint, IPR remained active in this case by providing the lead lawyers with research memos. When some plaintiffs were retaliated against for participating in this lawsuit, IPR drafted a memo on the elements of a retaliation claim and advised lead counsel about the viability of a retaliation claim. Additionally, IPR drafted several FOIA letters under Alabama's state FOIA statute to gain access to the state's grievance procedure and the state's contract with Naphcare, the private company which provided medical care to the plaintiffs.

This litigation is ongoing. However, Alabama has recently announced that it has cancelled its contract with Naphcare and that it will cease segregating HIV-positive inmates from the rest of the prison population. This will allow inmates living with HIV and AIDS access to rehabilitation services programs that were previously denied to them.

## ***3. Jail Population Cap.***

The D.C. Prisoner's Legal Services Project (DCPLS) is a non-profit public interest law firm that provides civil legal services to people incarcerated in the District of Columbia and District residents incarcerated in federal facilities. DCPLS and IPR have collaborated on several matters concerning conditions of confinement in D.C. correctional facilities. DCPLS has been

monitoring compliance with orders in *Campbell v. McGruder*, and *Inmates of D.C. Jail v. Jackson*, two major pieces of litigation in the D.C. District Court for over twenty-five years. Among other things, the orders in these cases required that the D.C. Jail adhere to a population cap of 1,674 in order to decrease the likelihood that inmates will be housed in unconstitutional conditions. In the summer of 2002 the District of Columbia moved under the Prison Litigation Reform Act (PLRA) to terminate the population cap. The PLRA provides that prospective relief is subject to immediate termination unless the court finds it necessary to correct a current and ongoing violation. The district court found that the D.C. Department of Corrections had been in substantial compliance with the *Campbell* and *Jackson* orders and therefore terminated the population cap. As a result, the population at the jail skyrocketed. In less than a year the jail held over 2,600 inmates.

The D.C. City Council has proposed a piece of legislation that would cap the Jail's population at 1,674. DCPLS was asked to report on current conditions at the Jail and testify at the hearing on this bill. IPR assisted DCPLS investigate current conditions at the Jail. IPR students and a staff attorney interviewed over 80 inmates at the D.C. Jail to gather information about jail conditions. IPR found that the inmates were locked down in their cells for 22 hours a day. Additionally, many inmates are double bunked in cells built for one person. Inmates with mental illness are housed in the general population. Inmates also complained about a lack of clean clothing and bedding. Access to the law library was severely curtailed because so many inmates requested its use. Inmates also reported great delay in access to health and medical services. IPR drafted a report of these findings, which DCPLS presented to the D.C. City Council. The Jail Population Cap bill is still pending before City Council.

## **D. Immigration Law**

### **1. *Pasqual Antonio-Martinez v. INS***

Our client, originally from Guatemala, came to the U.S. in 1982. He sought political asylum on the grounds that he had been a supporter of an anti-government group known as the "Guerrilla Army of the Poor" ("EGP"). At an asylum hearing, the Immigration Judge agreed that Mr. Antonio would be subject to persecution were he to return from Guatemala, but also found that he had participated in persecution by being associated with the EGP, which allegedly extorted food and other support from villagers. Asylum was therefore denied.

IPR represented Mr. Antonio in his appeal before the Board of Immigration Appeals (BIA). The BIA affirmed the decision of the Immigration Judge and we appealed to the U.S. Court of Appeals for the Ninth Circuit in 1990. The case then lay dormant in the Ninth Circuit, which stayed any action on this case, and dozens of others, to let petitioners seek new asylum hearings pursuant to a settlement in a case known as the "ABC Settlement." In the meantime, we lost contact with our client. In filing annual status reports with the Ninth Circuit, we advised the Court that we did not know our client's whereabouts and that neither we nor the INS knew if he had sought a new hearing or any other sort of relief.

In late December, 2001, the Ninth Circuit vacated the stay of proceedings and directed immediate briefing. IPR argued this case in September 2002. In an opinion written by Judge Kozinski, the Ninth Circuit found that our client was a fugitive and could therefore not invoke the jurisdiction of the Court. However, the court did note, that should Mr. Antonio-Martinez ever re-surface, the Ninth Circuit's decision would not prevent him from seeking relief under the ABC settlement.

## **E. Open Government**

### ***1. Morrison v. Department of Justice.***

IPR filed this Freedom of Information Act (FOIA) case in the U.S. District Court for the District of Columbia on behalf of Alan B. Morrison, who was then a Visiting Professor of law at Stanford Law School and is the founding director of Public Citizen Litigation Group. He was writing a review of "The Rehnquist Choice," John Dean's recent book on the appointment of Supreme Court Justice William H. Rehnquist. One of the three vacancies that President Nixon filled (leading, of course, to Rehnquist's appointment) was created by the sudden resignation of Justice Abe Fortas, who left the bench amid questions raised by the SEC about his dealings with financier Louis Wolfson. At the time the Fortas investigation was launched, there were serious questions about the right of the Justice Department and SEC to investigate a sitting Supreme Court Justice. Dean's book reports that Rehnquist, then Assistant Attorney General in charge of the Office of Legal Counsel, was the author of a legal opinion to Attorney General John Mitchell giving his blessing to the investigation. Many of the details about the memorandum were disclosed while Mitchell was Attorney General, but the memorandum itself remained secret.

We filed suit to gain access to the memorandum. Shortly after we filed our complaint, the government released all responsive documents, which were used by Professor Morrison in his review of Dean's book published in the Stanford Law Review.

### ***2. New York Public Interest Research Group v. Environmental Protection Agency and the Office of Management and Budget.***

This is a Freedom of Information Act case pending in the U.S. District Court for the Southern District of New York to compel both the EPA and the OMB to release records exchanged during meetings held between the General Electric Company (GE) and the federal government over the dredging of the Hudson River to remove toxic PCBs from the river floor. IPR's client is the New York Public Interest Research Group (NYPIRG), an environmental activist group in New York which has long advocated the clean up of the Hudson River. The EPA has ordered GE to dredge stretches of the Hudson, although the details of the dredging plan have yet to be finalized. NYPIRG sought the records because EPA and OMB conducted extensive, off-the-records meetings with GE, even though key determinations – who should pay for the cleanup and just how extensive the cleanup should be – are pending and are required by law to be made on a public record.

This case was filed in the summer of 2002 and briefed during the Fall semester. In

March 2003, the district court published a lengthy opinion ruling in NYPIRG's favor, and ordering all of the records exchanged between the parties released. The government then sought a stay to permit it to appeal, and we are awaiting proceedings in the Second Circuit.

### ***3. Joshua Phillips v. Department of Immigration and Customs Enforcement.***

This case also was brought under the Freedom of Information Act in the Southern District of New York. IPR's client, Joshua Phillips, is a noted freelance journalist who writes frequently about Central America. Mr. Phillips requested information on why the United States granted political asylum to two former high-ranking members of the military government in El Salvador, Jose Guillermo Garcia, formerly Minister of Defense, and Eugenio Vides-Casanova, formerly General of the Army. These officials have been implicated in war-time atrocities during the civil war in El Salvador, and, in litigation brought by former residents of El Salvador who now reside in the United States, an American jury has found that they committed acts of terror that violate international law. Mr. Phillips is seeking documents that might explain why the United States granted political asylum to these former military officials. This case is pending.

### ***4. Puerto-Rican American Research Institute v. Department of the Army.***

This Freedom of Information Act case is pending in the United States District Court for the District of Columbia. IPR represents the foremost research institution dedicated to exploring the history of Puerto Rico. It sought IPR's assistance in trying to unravel the Army's treatment of the 65<sup>th</sup> Infantry Regiment – historically an all-Puerto Rican Regiment. The Institute's particular interest is in the Regiment's performance during the Korea War, which has long been the subject of intense controversy. During the War, dozens of Puerto Rican enlisted men were court-martialed at the insistence of their non-Puerto Rican officers for combat-related infractions during battle. Later on, an Army tribunal reversed many, but not all, of the court martial convictions and suggested that the officers, not the enlisted men, were to blame. The Army is in the midst of writing what it claims will be the definitive history of the 65<sup>th</sup> Regiment. Our client has requested all of the background information on the Regiment's performance during the Korean War. At present, IPR has managed to force the Army to release nearly a dozen boxes of records – consisting of over ten thousand records in all. But there are undisclosed records at issue, and this case is still pending.

## **F. Health and Safety Cases**

### ***1. In re Simon II.***

IPR represents a broad coalition of public health groups including the American Cancer Society, the American Heart Association, the American Lung Association, the National Center for Tobacco Free Kids, and former Surgeon General C. Everett Koop in a novel class action case pending before the U.S. Court of Appeals for the Second Circuit. The appeal challenges the certification of perhaps the largest class ever certified in the United States, consisting of everyone who smokes or smoked cigarettes and was diagnosed with a smoking-related disease

after April 1993 through the date notice is given to the class. The defendants are all of the tobacco companies doing business in the United States and their affiliates. Our clients estimate that upwards of eight million people belong to the class. The class was certified as a nationwide, punitive-damages-only, non-opt-out class under Rule 23(b)(1)(B), Fed. R. Civ. P., which permits the certification of a mandatory class where there is a “limited fund.” The certification order, entered by the Hon. Jack B. Weinstein, is based on the theory that the constitutional ceiling on punitive damages that can be imposed on the industry for its conduct to date constitutes a “limited fund” within the meaning of the Rule.

Our clients have mixed feelings about the certification order, which is reflected in the lengthy amicus brief IPR filed on their behalf. The brief argues that the certification order should be set aside, mainly because it infringes on the due process rights on non-class members – including “futures,” smokers who will come down with smoking-related disease but were not diagnosed within the class period; non-smokers who are ill as a result of second-hand smoke; and those claiming economic loss against the industry (such as purchasers of “light” cigarettes who have fraud actions against the industry). But the brief strongly supports the utility of class actions against the tobacco industry, including ones for punitive damages alone, and argues that the certification of such a class would not interfere with the *industry’s* due process rights. This case should be argued in the Fall of 2003.

## ***2. Washington Employers Concerned About Regulating Ergonomics v. Washington Department of Labor and Industries.***

This case pending before the Washington Supreme Court involves an industry challenge to the Washington State “Ergonomics Rule,” an occupational safety rule designed to reduce the number of work-related musculoskeletal disorders. IPR represents a number of law professors who are expert in the field of cost benefit analysis and health and safety regulation. The case has national importance because Washington State is the only state that currently requires a cost benefit determination to accompany significant legislative rules. The industry has challenged the Washington Ergonomics Rule on cost benefit grounds. The brief IPR filed on behalf of the academic amici explains that cost benefit analysis remains controversial because many of the values integral to health and safety regulation (such as the value of a parent being able to play catch with a child) defy precise monetization. Not only that, but many of the determinations that go into a cost benefit analysis – assessments of how many people will be injured, how serious their injuries will be, and how expensive it will be to impose protections – also resist precise calculation. IPR argued that the surgical precision industry claimed was necessary in making a cost benefit determination was unattainable, and that what Washington State Department had done in this case was well within the range of acceptable cost benefit analyses. The case was argued in June 2003, and the Court asked a number of questions to counsel based on our amicus brief.

## ***3. People of the State of California v. R.J. Reynolds Tobacco Company.***

This is a preemption case pending before the California Court of Appeals. IPR represents Public Citizen, a consumer watchdog organization long involved in tobacco control issues. The

question in this case is whether the Federal Cigarette Labeling and Advertising Act (FCLAA), which forbids state regulation of tobacco “advertising and promotion,” preempts a California law forbidding tobacco companies to distribute free samples of their products in public places. R.J. Reynolds has been charged by the California Attorney General with distributing free samples of its cigarettes at automobile races, where minors are present. There are several lower court decisions on this issue that go both ways. IPR argued on behalf of its client that the FCLAA does not preempt California law because there is no indication that Congress, in enacting the FCLAA, intended to displace state law regulating the distribution of tobacco products. The question of the preemptive reach of the FCLAA is the subject of considerable controversy and has twice in the last decade been considered by the U.S. Supreme Court. IPR decided to assist in this case because of the importance of the question presented and the likelihood that the matter would ultimately be presented to the California Supreme Court and maybe the U.S. Supreme Court.