



GEORGETOWN LAW
INSTITUTE FOR PUBLIC REPRESENTATION

2008 – 2009 ANNUAL REPORT

TABLE OF CONTENTS

| | |
|---|----|
| OVERVIEW | 1 |
| STAFF..... | 3 |
| GRADUATE FELLOWS – 2008-2009 | 3 |
| LAW STUDENTS | 5 |
| I. CIVIL RIGHTS AND PUBLIC INTEREST LAW | 6 |
| A. Employment Discrimination | 6 |
| 1. <i>Warner v. GPO</i> | 6 |
| 2. <i>Hyatte v. Mukasey</i> | 6 |
| 3. <i>James Nix and Yvonne Davis v. Library of Congress</i> | 7 |
| 4. <i>Hairston v. Tapella</i> | 7 |
| B. Federal Preemption | 8 |
| 1. <i>Altria v. Good</i> | 8 |
| 2. <i>Warner-Lambert v. Kent</i> | 8 |
| 3. <i>Wyeth v. Levine</i> | 9 |
| C. Open Government and Government Accountability..... | 9 |
| 1. <i>Bloche v. DoD</i> | 9 |
| 2. <i>Consumer Federation of America v. U.S. Department of Agriculture</i> | 10 |
| 3. <i>NRDC v. Department of Defense</i> | 10 |
| 4. <i>In re. Petition of Nat’l Sec. Archive et al</i> | 11 |
| 5. <i>Wilner v. NSA</i> | 12 |
| 6. <i>McBurney v. Mims</i> | 12 |
| D. Other Matters | 13 |
| 1. <i>United States of America v. Philip Morris</i> | 13 |
| 2. <i>Coeur Alaska, Inc. v. Southeast Alaska Conservation Council, Inc.</i> | 14 |
| II. FIRST AMENDMENT AND MEDIA | 15 |
| A. Hate Speech Petition for Inquiry..... | 15 |
| B. Children and Media..... | 15 |
| 1. FCC Comments on Embedded Advertising..... | 16 |
| 2. FCC Comments on the Child Safe Viewing Act of 2008..... | 16 |
| C. Media Ownership | 17 |
| 1. Ownership Limits..... | 17 |
| 2. Minority and Female Ownership | 18 |

| | |
|---|----|
| III. ENVIRONMENTAL LAW | 19 |
| A. Air Quality | 19 |
| 1. California’s Clean Air Act Waiver | 19 |
| B. Water Quality | 19 |
| 1. Mattaponi Tribe – King William Reservoir..... | 19 |
| C. National Environmental Policy Act and Land Use | 20 |
| 1. Digital Billboards..... | 20 |
| 2. Fort Dupont Park Transfer | 21 |
| 3. <i>Lemon et al. v. Green</i> | 21 |
| 4. McMillan Park Redevelopment | 22 |
| 5. <i>Nat’l Trust for Historic Preservation v. U.S. Dept. of Veterans Affairs, et al.</i> ... | 22 |
| 6. Rock Creek Park Wireless Telecommunication Plan | 23 |
| 7. Second Century Commission..... | 24 |
| 8. St. Elizabeths Hospital..... | 24 |
| D. Solid Waste and Toxics..... | 24 |
| 1. Poplar Point..... | 24 |
| 2. Potomac Riverkeeper – Gun Club | 25 |

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 or administrative history materials in areas such as communications or 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
Coriell Wright, Senior Counsel and Adjunct Professor
Vicky Phillips, Visiting Professor (Fall 2008)
Deborah G. Bays, Office Manager

GRADUATE FELLOWS – 2008-2009

Melanie Kleiss Boerger graduated from the University of Minnesota Law School with a joint M.S. degree in Science, Technology and Environmental Policy. During law school, Melanie worked as a research assistant for Professors Jim Chen and Jamie Grodsky, served on the Minnesota Law Review, won awards in the National Environmental Law Moot Court Competition, and studied comparative law for a semester in Berlin. Her work experience during law school included positions at the Minnesota Center for Environmental Advocacy, Earthjustice, and Faegre & Benson LLP as a Sierra Club fellow. After law school, Melanie clerked for the Honorable David S. Doty of the District of Minnesota and the Honorable Robert R. Beezer of the Ninth Circuit Court of Appeals. She also taught legal writing at the University of Minnesota. Melanie has published articles on the National Environmental Policy Act and salmon hatchery policy.

Jessica Gonzalez graduated from Southwestern Law School in 2007 and was recognized for academic excellence in Legal Research and Writing, Civil Procedure, and Interviewing, Counseling and Negotiation. In 2002, she obtained her undergraduate degree in Communication Studies and Spanish from Loyola Marymount University. While in law school, she researched for a Media and Telecommunications professor, and the director of the Legal Research and Writing program. She served as an editor for the Journal of International Media and Entertainment Law, and a staff member on the Journal of International Law and Trade in the Americas. At Southwestern, she was President of the Media Law Forum, and a member of the Curriculum Committee. In the summer of 2005, she studied International Media Law in London. The following summer she received a Telecommunications Fellowship to work for the Media Access Project. Before attending law school, she taught high school English and Spanish in Los Angeles, California.

Jamie Pleune received her B.A. *magna cum laude* from Colorado College in 2000, and graduated from the S.J. Quinney College of Law at the University of Utah in 2007, where she was a Note and Comment Editor for the Utah Law Review, a recipient of the Stephen Traynor Legal Writing Award, and a recipient of the Khazeni Memorial Fellowship and the Robert W. Swenson Fellowship. Her work experience during law school included positions at the Sierra Club and Parsons, Behle & Latimer. She also

published articles on standing and on the Clean Air Act. Jamie clerked for the Honorable Justice Jill N. Parrish on the Utah Supreme Court following graduation. Prior to attending law school, she worked as a ballot drive initiative coordinator for the Nature Conservancy in Utah, as a backcountry guide for adjudicated youth in Montana, an AmeriCorps volunteer in Montana, and as a deckhand in the Virgin Islands.

Kathryn Sabbeth received her B.A. in Sociology, *Phi Beta Kappa*, from the University of Michigan in 1998, and graduated in 2003 from New York University School of Law, where she was an Arthur Garfield Hays Civil Liberties Fellow, an editor for the Review of Law and Social Change, and the recipient of the Arthur Jarecki Memorial Prize for outstanding work in NYU's clinical program. During law school, Kathryn worked at civil rights organizations including the NAACP Legal Defense and Educational Fund, Inc., the New York Civil Liberties Union, the ACLU of Alabama, and the labor and employment firm of Vladeck, Waldman, Elias & Engelhard, P.C. After graduation, Kathryn spent two years as a staff attorney at South Brooklyn Legal Services, where she represented low-income tenants in housing litigation. Prior to joining IPR, Kathryn clerked for the Honorable Warren J. Ferguson of the United States Court of Appeals for the Ninth Circuit, and the Honorable James C. Francis IV, United States Magistrate Judge in the Southern District of New York.

Coriell Wright graduated cum laude from the Washington College of Law at American University in 2006 and was awarded particular distinction for her studies in administrative law in 2005. In 2002 she received her undergraduate degree in political science with honors from the University of Michigan. While at American University, she worked as a student attorney in the Glushko-Samuels Intellectual Property Clinic and as a research fellow for professors prominent in copyright and constitutional law. She was also the Founder and President of the first Communications Law Society at her law school and was American University's 2006 nominee for the American Bar Association's Jan Jancin Award for Intellectual Property. During law school she clerked for FCC Commissioner Jonathan Adelstein and in the FCC's Media Bureau. She also worked as an intern for the Media Access Project. Prior to attending law school, she worked as a reporter for a National Public Radio affiliate in Ann Arbor, Michigan.

LAW STUDENTS

FALL 2008

Melissa Birchard
Chris Difo
Kim Duplechain
Erika Kranz
Erin McAlister
Jeff McCourt
Owen Kopon
Melissa Ku
Claire Magee
Philip McCarthy
Deanna Pisoni
Rania Rampersad
Whitney Roland
Jessica Sackin
Liddy Serio
Bryan Stockton
Richard Trumka
Nick Wittich

SPRING 2009

Marisa Armanino
Elizabeth Banaszak
William Dalton
Tamica Daniel
Pedro De Oliveira
Geoffrey Goode
Alisa Goodwin
Christopher Groboske
Adam Herron
Jordan Hicks
Lindsay Hogan
Sparsh Khandeshi
Rebecca Koford
Danielle Owens
Matthew Scurati
Alexandra Spear
Adam Taylor
Sarah Tran
Michelle Yu

ANNUAL REPORT

I. CIVIL RIGHTS AND PUBLIC INTEREST LAW

A. Employment Discrimination

1. *Warner v. GPO*

IPR has a long history of representing employees at the United States Government Printing Office (GPO) in employment discrimination cases. IPR represented Kimberly Warner who currently manages the GPO's Digital Print Center. When her former supervisor was promoted, Ms. Warner assumed his responsibilities, but was not promoted into his vacant position. Despite her increased duties, Ms. Warner had not been recognized or compensated appropriately, while many of her male colleagues and supervisors were promoted repeatedly.

Ms. Warner filed an administrative complaint with the Equal Employment Opportunity Commission (EEOC) *pro se*, alleging violations of the Equal Pay Act and Title VII of the Civil Rights Act of 1964. After filing her complaint, Ms. Warner contacted IPR for assistance. After conducting discovery and preparing for a hearing before an EEOC Administrative Judge, IPR successfully negotiated a settlement on Ms. Warner's behalf.

IPR is still actively engaged in representing Ms. Warner in matters relating to the implementation of the settlement.

2. *Hyatte v. Mukasey*

IPR has been representing Joi Hyatte, an African-American woman who has been employed in the Civil Rights Division of the United States Department of Justice (DOJ) since 1995. Ms. Hyatte worked as an Equal Opportunity Assistant in DOJ's Voting Rights Section, where her supervisors assigned her the work of a Civil Rights Analyst (CRA) and consistently rated her performance on these jobs "outstanding," but DOJ repeatedly overlooked Ms. Hyatte for promotions to a CRA position. Ms. Hyatte alleged that this was just one example of a widespread pattern of keeping African-American employees of DOJ from competing for promotions to vacant positions, while actively recruiting Caucasian and Latino candidates from outside the government.

Ms. Hyatte also alleged that managers of the Voting Rights Section fostered a racially hostile environment for African-Americans, pushing out many with decades of experience in government service. Another African-American employee stated that one of the managers "talked to us as if we were illiterate cotton-pickers." A Caucasian employee who has since left the Department has said about the same manager, "[She] was overly suspicious and scrutinizing

of African-Americans. [She] asked white and Latino employees to be her ‘eyes and ears’ keeping watch over the black employees.”

Ms. Hyatte filed a *pro se* administrative complaint with DOJ’s Equal Employment Opportunity Office, alleging race discrimination under Title VII of the Civil Rights Act of 1964. She then contacted IPR for assistance, and IPR filed a federal lawsuit on Ms. Hyatte’s behalf in the United States District Court for the District of Columbia.

On September 22, 2008, IPR obtained a favorable settlement on Ms. Hyatte’s behalf. Pursuant to the settlement, Ms. Hyatte was promoted to the position of a Civil Rights Analyst at GS Level 11, Step 3, and received a retroactive salary increase going back to January 2007. Ms. Hyatte has since held the title of Civil Rights Analyst and has been excelling in her new position.

3. *James Nix and Yvonne Davis v. Library of Congress*

IPR represents James Nix and Yvonne Davis, two retired Library of Congress employees who participated in a 1982 class action, which alleged race discrimination in violation of Title VII of the Civil Rights Act of 1964. The underlying case was settled in September 1995, through a court-approved agreement that included a non-retaliation clause. In July 1997, the plaintiffs’ class filed a motion to enforce the settlement, which included claims that Mr. Nix and Ms. Davis had been retaliated against in contravention of the settlement agreement. The government argued that the United States District Court for the District of Columbia had not retained jurisdiction over the retaliation claims, but in May 2006 the D.C. Circuit ruled that the district court had retained such jurisdiction.

IPR agreed to represent Mr. Nix and Ms. Davis on remand. In early 2007, the Library filed a motion for summary judgment, which IPR then opposed. In February 2008, IPR filed a Notice of Supplemental Authority, and IPR is currently awaiting the Court’s ruling on the Library’s summary judgment motion.

4. *Hairston v. Tapella*

IPR represents Kevin Hairston, an employee who has worked for the Government Printing Office for decades but repeatedly has been denied promotions on the basis of race. Mr. Hairston joined GPO in 1987, and, after scoring 3rd out of 134, he was invited to participate in GPO’s Press Training Program Apprenticeship. After completing the program, Mr. Hairston, continued to work his way up from a Printing Plant Worker to an Offset Pressman, but that’s where he hit a ceiling and his promotions ended. Like many other African Americans at GPO, Mr. Hairston was allowed to progress only so far.

In August 2006, Mr. Hairston applied for a promotion to the position of a Second Offset Pressperson. GPO sent him notification that he was qualified. The selecting official even told him that he would be awarded the position. As internal documents later revealed after investigation, the superintendent approved Mr. Hairston for the position, and a Selection Acknowledgement form was prepared for his signature.

Yet, without explanation, a Production Manager ordered that the selection be cancelled, and the position was closed without offering it to anyone. The position was later re-posted based on the allegation of “no qualified applications” earlier. The re-posted position was awarded to a Caucasian.

Mr. Hairston filed an informal complaint with the Equal Employment Opportunity Office of GPO, alleging violations of Title VII of the Civil Rights Act of 1964. Once he filed his administrative complaint, Mr. Hairston was subjected to retaliatory treatment by his direct supervisor.

In September 2008, IPR filed a lawsuit on Mr. Hairston’s behalf in the United States District Court for the District of Columbia. GPO responded with a motion to dismiss, claiming that Mr. Hairston failed to exhaust his administrative remedies prior to initiating the federal lawsuit. IPR opposed this motion on both legal and factual grounds. The motion was fully submitted in March 2009, and the parties are currently awaiting the Court’s ruling.

B. Federal Preemption

1. *Altria v. Good*

This action was initiated by long-term smokers of Marlboro Light cigarettes who alleged that Philip Morris had engaged in unfair and deceptive practices in its design and marketing of Marlboro Lights. Plaintiffs claimed that Philip Morris promoted these cigarettes as “light” and “low tar and nicotine” to convince the public that they were less dangerous than normal cigarettes, despite the company’s knowledge that its product was no less dangerous to consumers’ health. Plaintiffs alleged that the company’s misrepresentations violated Maine’s Unfair Trade Practices Act. The district court ruled that such claims were preempted by the Federal Cigarette Labeling and Advertising Act, and dismissed the action. The First Circuit reversed, and defendants filed a petition for certiorari, which was granted in January 2008. In June 2008, IPR filed an amicus curie brief on behalf of the Tobacco Control Legal Consortium, AARP, and Public Justice arguing that the action is not preempted by federal law and should be permitted to proceed to the merits. In December 2008, the Supreme Court ruled that that the state law action was not preempted.

2. *Warner-Lambert v. Kent*

This case began as a class action by Michigan citizens injured by the prescription drug Rezulin, marketed and sold by Warner-Lambert. Initially approved by the Food and Drug Administration (FDA) for treatment of diabetes, Rezulin caused at least 94 cases of liver failure, including 66 deaths, and the FDA eventually requested that the drug be removed from the market. Plaintiffs alleged that Warner-Lambert knowingly concealed material facts about the safety of Rezulin from the FDA, and that, had those facts been disclosed, the FDA would not have been approved the drug or would have removed it from the market sooner. The district court granted Warner-Lambert’s motion for a

judgment on the pleadings, on the basis that the plaintiffs' state law claims were preempted by federal law. The Second Circuit reversed, and Warner-Lambert filed a petition for certiorari, which was granted by the Supreme Court. The primary questions on appeal concern the relationship between "fraud-on-the-FDA" claims and the traditional tort claims contemplated by the relevant Michigan statute. In January 2008, IPR submitted an amicus curiae brief to the Supreme Court on behalf of AARP. In March 2008, the Court affirmed by an equally divided Court the Second Circuit's decision that the plaintiffs' claims were not preempted by federal law.

3. *Wyeth v. Levine*

Diana Levine suffered severe injury and the amputation of her arm as a result of an injection with the drug Phenergan, an anti-nausea medication manufactured and sold by drug company Wyeth. Ms. Levine brought a tort action in Vermont State court, alleging that Wyeth knew of and was negligent in failing to provide adequate warnings of the dangers of injecting such a drug directly into patients' veins. The jury found for Ms. Levine, but Wyeth claimed that the trial judge should never have allowed the jury to consider plaintiff's claims, because they conflict with federal regulation of prescription drug labels. Wyeth asserted, at both the trial and appellate level, that Ms. Levine's failure-to-warn claim was preempted by the FDA's approval of Phenergan's label and "rejection" of proposed revisions to that label. The trial and appellate courts rejected Wyeth's argument, and the company then sought Supreme Court review. The Court granted certiorari in January 2008, and IPR filed an amicus curie brief arguing against Wyeth's pro-preemption position by former Commissioners of the Food and Drug Administration. On March 4, 2009, in an opinion specifically citing the amicus curie brief prepared by IPR, the Court ruled in favor of Ms. Levine.

C. Open Government and Government Accountability

1. *Bloche v. DoD*

IPR represents two prominent experts of bioethics, Jonathan Marks, a professor of bioethics at Pennsylvania State University, and M. Gregg Bloche, M.D., a professor of law at Georgetown, in a Freedom of Information Act (FOIA) matter against the Department of Defense and other federal agencies. Our clients seek access to information concerning the participation of government and civilian medical personnel in the design and implementation of potentially abusive torture techniques.

After filing FOIA requests with the relevant agencies in 2006 and 2007, and receiving no documents in response, IPR filed a FOIA lawsuit on behalf of the experts in November 2007. The Court has ordered the government defendants to turn over relevant documents by the end of July 2008. Hundreds of pages have now been released, but there is still a great deal the government is withholding based on allegations that the documents are exempt from FOIA. Additionally, based in part on President Obama's recent declassification and public acknowledgement of records relevant to the underlying

FOIA requests, the CIA is now re-processing materials it might otherwise have refused to release.

2. *Consumer Federation of America v. U.S. Department of Agriculture*

The Consumer Federation of America (CFA) is a nonprofit research, education, and advocacy organization that, in August 2004, filed a FOIA request with the United States Department of Agriculture (USDA), seeking copies of calendar records memorializing *ex parte* meetings between USDA officials and industry representatives. After the USDA denied CFA's FOIA request, IPR filed suit on CFA's behalf in the United States District Court for the District of Columbia.

The parties cross-moved for summary judgment and, in July 2005, the court dismissed the case on the grounds that the calendars were not "agency records" under FOIA. CFA appealed to the United States Court of Appeals for the D.C. Circuit. In June 2006, the D.C. Circuit reversed. *Consumer Federation of America v. Dep't of Agriculture*, 455 F.3d 283 (D.C. Cir. 2006), *reversing* 383 F. Supp. 2d 1 (D.D.C. 2005).

On remand, instead of releasing all records covered by the decision of the D.C. Circuit, the USDA revealed that it had failed to search for, segregate, and preserve many of the calendar records, despite the ongoing litigation, and that hundreds of calendar days were now missing. In March 2007, the parties again cross-moved for summary judgment, and this time CFA asked the court to sanction the USDA or order it to take steps to ensure that such behavior would not be repeated. In March 2008, the Court denied CFA's motion for summary judgment but ordered USDA to submit to the Court a detailed procedure for preserving documents in the future.

In part as a result of the litigation, the USDA issued a new departmental regulation, DR 3090-001, describing the agency's litigation retention policy for documentary materials including electronically stored information, as well as a new set of FOIA guidelines describing search and preservation obligations and procedures under FOIA. IPR is awaiting the court's final ruling. In the meantime, IPR and the government have agreed to settle IPR's fee request.

3. *NRDC v. Department of Defense*

This is a FOIA action that IPR is handling on behalf of the Natural Resources Defense Council, a national environmental organization. The case was filed in March 2004 in the United States District Court for the Central District of California. It seeks to compel the EPA, the Defense Department, and the Office of Management and Budget to disclose information about the extent of perchlorate contamination in certain areas of the country, any assessments of the health risks posed by the contamination, and any records relating to measures being implemented by the government to eliminate or mitigate the contamination.

In 2005, the government moved for summary judgment with respect to the EPA and Department of Defense, and the Court, in a lengthy opinion that is quite favorable to our position, denied that motion. *NRDC v. Dep't of Defense*, 388 F. Supp. 2d 1086 (C.D. Cal. 2005). In 2006, the Court issued another lengthy opinion again denying the government's motion for summary judgment and ordering the defendants to turn over significant numbers of records to the NRDC. *NRDC v. Dep't of Defense*, 442 F. Supp. 2d 857 (C.D. Cal. 2006). After extensive discovery proceedings that revealed gaping holes in their searches, the defendants agreed to turn over numerous additional documents. Thereafter, there was a third round of summary judgment briefing, resulting in yet another complete win for NRDC. As a result, the agencies have released thousands of pages of additional records and the NRDC has determined that it has received all of the information on perchlorate that it needs. In April 2009, the government agreed to pay attorneys' fees to IPR and NRDC, and the case was finally closed.

4. *In re. Petition of Nat'l Sec. Archive et al.*

In the 1950s, Julius and Ethel Rosenberg were indicted, convicted, and executed for conspiracy to commit espionage by providing the Soviet Union with the secret of the atomic bomb. These events were arguably the defining moments in the early Cold War. The convictions convinced many Americans that Soviet infiltration of American society was pervasive, while proving to others that the United States government was overreacting, becoming increasingly oppressive, and engaging in prosecutorial misconduct.

Scholars and other members of the public remain fascinated by the *Rosenberg* case, and numerous questions remain unanswered. We represent historians who seek the unsealing of the records of the grand jury proceeding that led to the Rosenbergs' indictment.

IPR filed a petition for the unsealing of the records in January 2008. Oral argument on the petition was held on July 22, 2008. The next day, the court ordered the release of the testimony of a number of most of the witnesses and scheduled a conference for August 26, 2008 to address the remainder. In subsequent proceedings, the Court ordered the disclosure of all of the Rosenberg grand jury records --- with the exception of the testimony of two witnesses who are still alive and who object to disclosure --- as well as the grand jury testimony in a separate proceeding that involved many of the same witnesses. The government decided not to appeal the court's rulings and the records were released. The release of the records sparked a lively debate over the Rosenberg prosecution. The Rosenbergs' co-defendant, Morton Sobell, who had always insisted that he was innocent of the charges despite his conviction, publicly acknowledged that he had, in fact, spied for the Soviets. The Rosenbergs' children acknowledged, for the first time, that their father, Julius Rosenberg, had likely served as a Soviet spy. But the grand jury records also strongly suggested that the key evidence against Ethel Rosenberg was tainted, triggering calls for a reexamination of the case against her. All told, the released records add considerably to the historical record of the Rosenberg prosecution.

5. *Wilner v. NSA*

Thomas B. Wilner, a partner at Shearman and Sterling LLC, along with twenty-three other lawyers representing individuals detained at the Guantánamo Bay Naval Station in Cuba, have reason to believe that, pursuant to the warrantless wiretapping program authorized by President Bush shortly after September 11, 2001, the National Security Agency has intercepted their electronic communications with clients, witnesses, and others with whom they must communicate in the course of their work. Represented by the Center for Constitutional Rights and Butler, Rubin, Saltarelli & Boyd LLP, the Guantánamo lawyers filed a FOIA request with the National Security Agency and DOJ, seeking records of government interception of their communications. The government responded to a portion of the request by claiming it could neither confirm nor deny the existence of any such records.

IPR was asked to step in, and a FOIA suit was filed in the Southern District of New York, seeking to compel the government to turn over the records. The government filed a motion for summary judgment, raising what is commonly known as a “Glomar” defense, alleging that the government agencies cannot even confirm or deny the existence of any relevant records without compromising national security. Plaintiffs responded that disclosure of the requested information would not compromise any lawful national security objective, as any warrantless wiretapping of plaintiffs in the course of representation would be unconstitutional. Since *Glomar* protects legitimate government interests and does not provide a basis for hiding records of unlawful government activity, the government failed to meet its burden.

On June 25, 2008, the district court granted the government’s motion in relevant part. Plaintiffs then moved for entry of a final judgment. The court granted plaintiffs’ motion and, on July 31, 2008, certified the *Glomar* claim for appeal. Plaintiffs appealed to the United States Court of Appeals for the Second Circuit.

Appellants’ opening brief was filed in December 2008, and briefing was completed in February 2009. The parties awaiting for the Court’s scheduling of oral argument.

6. *McBurney v. Mims*

Mark McBurney, a citizen of Rhode Island, Roger Hurlbert, a citizen of California, and Bonnie Stewart, a citizen of West Virginia, each filed requests for Virginia public records under the Commonwealth’s Freedom of Information Act. But because Virginia’s Freedom of Information Act (VFOIA) discriminates against non-citizens, their requests were not processed. Mr. McBurney, formerly a citizen of Virginia for 13 years, sought records from Virginia Department of Child Support and Enforcement (“DCSE”) regarding child support for his son. Mr. Hurlbert, who runs a business that collects and provides real estate information, sought records from the Henrico County Tax Assessors Office (“Henrico County”). Professor Stewart, a professor of journalism at West Virginia University, sought information from Virginia public universities.

Mr. McBurney contacted IPR for assistance, knowing that IPR had previously handled a similar case, *Lee v. Minner*, against the state of Delaware, and had won a favorable ruling from the Third Circuit. Mr. Hurlbert contacted our office soon after, and in January 2009, IPR filed a federal complaint against the Attorney General of Virginia, the Virginia Department of Child Support and Enforcement, and the Henrico County Tax Assessors Office on behalf of Mr. McBurney and Mr. Hurlbert in the Eastern District of Virginia. In February 2009, Professor Stewart contacted IPR regarding her own experience with the discriminatory provision of Virginia's FOIA, so the complaint was amended to add Professor Stewart.

The complaint alleges that the discriminatory provision of Virginia's FOIA violates the Privileges and Immunities Clause of Article IV, and the Dormant Commerce Clause, of the U.S. Constitution. Defendants moved to dismiss, and plaintiffs cross-moved for a preliminary injunction. Oral argument was held in April, and on April 29, 2009, the Court granted the defendants' motions to dismiss on jurisdictional grounds, and denied plaintiffs' cross-motion. Plaintiffs appealed to the U.S. Court of Appeals for the Fourth Circuit.

IPR is currently engaged in preparing the appellate brief.

D. Other Matters

1. *United States of America v. Philip Morris*

IPR has long been involved in tobacco control litigation, and IPR was asked by the Tobacco Control Legal Consortium to file an amicus brief on its behalf before the United States Court of Appeals for the District of Columbia Circuit in the government's civil RICO (Racketeer Influenced and Corrupt Organizations Act) action against the tobacco industry. This is a massive case that took nearly a year to try and resulted in the publication of an opinion spanning nearly 1,700 pages in Federal Supplement. IPR was asked to file a brief that concentrated on two issues: first, whether the district court's order requiring the tobacco companies to refrain from certain advertising and promotion practices violated the First Amendment, and second, whether the tobacco industry's advertising practices were protected by the *Noerr-Pennington* doctrine, a doctrine that protects collective action to influence government policy. IPR's brief argued that the district court's order is fully compatible with the First Amendment and that *Noerr-Pennington* provides no immunity for false or fraudulent statements. The brief points out that the district court had found, as a matter of fact, that the statements and practices subject to its order were in fraudulent. Argument in the case was scheduled for October 14, 2008.

On May 22, 2009, the D.C. Circuit issued a lengthy opinion affirming in virtually all respects the district court's ruling in favor of the government. The Court addressed extensively and rejected the industry's First Amendment and *Noerr-Pennington* claims, following the arguments laid out in IPR's amicus brief and in the government's merits

briefs. The ruling is a big win for tobacco-control advocates, though there remains the possibility that the tobacco industry will seek Supreme Court review.

2. Coeur Alaska, Inc. v. Southeast Alaska Conservation Council, Inc.

IPR has long been involved in environmental litigation, and here IPR was asked by a group of twelve Members of Congress, each of whom serve on committees with jurisdiction on environmental matters, to file a an amicus brief on their behalf is the first case testing the authority of the Army Corps of Engineers to authorize the dumping of mining wastes into the navigable waters of the United States. In this case, a mining company wanted to dump tons of polluting mining waste into a pristine lake in the Tongass National Forest, which would render the lake a “dead zone” and pollute neighboring wetlands. The Corps of Engineers had ruled that the mining waste could be characterized as “fill material” which could legally be dumped into the lake. The lower courts had rejected the Corps’ argument, but the Supreme Court had granted review. IPR filed a brief arguing that the Corps of Engineers had no authority to issue such a permit because Congress, when it enacted the Clean Water Act, had transferred that authority to the Environmental Protection Agency, and that any dumping activity that threaten to pollute a navigable water had to be issued by the EPA and not the Corps. Under existing EPA rules, no permit could be issued authorizing this kind of dumping. Unfortunately, the Court ruled that the Clean Water Act does not deprive the Army Corps of Engineers the authority to issue permits like this one, notwithstanding the evident environmental degradation. Our clients have already introduced legislation to overturn the Court’s ruling.

II. FIRST AMENDMENT AND MEDIA

IPR seeks to limit excessive concentrations of power, to foster a multiplicity of information sources, and to represent segments of the public, such as children, the poor, people of color, women, and people with disabilities, which have traditionally been underserved or may require special protection. During the 2008-2009 academic year, IPR's First Amendment and Media Project focused on harnessing new technologies to advance the public good, as well as promoting the public interest in the "traditional" media, such as television and radio, that continue to play a fundamental role in our society.

A. Hate Speech Petition for Inquiry

In the summer of 2008, IPR agreed to represent the National Hispanic Media Coalition (NHMC) to counteract the negative impacts of hate speech in the media. According to FBI statistics, hate crimes against Latinos have increased by 40% in just the past four years. At the same time, hate speech in media has become pervasive. The NHMC believes that the crimes often result from the speech, and has sought a constitutional way to address this problem.

In Fall 2008, students interviewed representatives from the NHMC to assess their goals. The students conducted legal and factual research and wrote a memorandum proposing several options. The NHMC decided to ask the FCC to initiate an inquiry on hate speech in media and the students began drafting the petition.

In Spring 2009, we finalized the petition and filed it with the FCC in late January. The petition gave many examples of hate speech in the media and described how it harmed the public. It requested that the Commission invite public comment on hate speech in the media, inquire into the extent and nature of hate speech, examine the effects of hate speech, including the relationship between hate speech in the media and hate crimes, and explore options for counteracting or reducing the negative effects of such speech. IPR also sent a copy of the petition to the National Telecommunications and Information Agency and asked it to update an earlier report that it had done on hate speech.

IPR Fellow Jessica Gonzalez spoke at the Press Conference at the National Press Club to publicize the filing of the petition. IPR students and staff also accompanied the clients to meetings with FCC Commissioners and staff to encourage them to initiate the requested inquiry.

B. Children and Media

IPR works with organizations concerned about the effect of media on the health and well-being of children. IPR's advocacy has focused on the provision of quality

children's educational programming, preventing unfair marketing to children, and examining the effect of food marketing on childhood obesity.

1. FCC Comments on Embedded Advertising

In Fall 2008, IPR students drafted and filed comments and replies in the FCC's "embedded advertising" proceeding on behalf of two sets of clients, the Children's Media Policy Coalition (CMPC) and Campaign for a Commercial Free Childhood (CCFC). Embedded advertising is a form of covert marketing which incorporates commercial or branded content into the scenes and plotlines of television programming. IPR students provided extensive analysis of social science research into the psychological effects of covert advertising on children, as well as the effect of prevailing First Amendment jurisprudence on the government's ability to regulate such practices across television platforms. The comments on behalf of CMPC noted that embedded advertising and the use of interactive links to commercial advertising on children's programs violated these longstanding policies designed to prevent manipulative advertising and over-commercialism in children's programming. Thus, CMPC urged the FCC to expressly prohibit these practices in all children's programming. CCFC's comments were similar, but in addition, requested that the FCC explicitly prohibit embedded advertisements in all primetime broadcast programming when children are likely to be in the audience as well as programming designed for children. This proceeding is still pending at the FCC.

2. FCC Comments on the Child Safe Viewing Act of 2008

In Spring 2009, IPR students drafted and filed comments on behalf of the Children's Media Policy Coalition (CMPC) and the National Hispanic Media Coalition (NHMC) regarding parents' ability to utilize technological controls, such as the "V-chip," to limit their children's exposure to content that some families might find objectionable. The FCC proceeding was initiated pursuant to the Child Safe Viewing Act of 2008, which directed the Commission to compile a report on the availability of advanced blocking technologies, including the "V-Chip."

IPR students researched the effectiveness of the V-Chip and ratings systems and drafted comments. The comments filed on behalf of CMPC recommended that: (1) the FCC should ensure that the V-Chip be able to function with multiple independent ratings systems so that parents can use ones that they believe to be most reliable and most consistent with their values; (2) television commercials that are inappropriate for children and programs with embedded advertising be rated so that parents can choose to block such content using the V-Chip; (3) the Oversight Monitoring Board should be made more transparent and accessible to the public so that parents understand the Board's role and can more effectively participate in the oversight process, and (4) a content descriptor for children's programming designated as Educational/Informational should be added so that parents can use the V-Chip not only to block objectionable content, but also to affirmatively channel desirable content into their homes. The comments filed on behalf of the NHMC addressed the need for more data regarding the use of the V-Chip and ratings in the ever-growing Latino community, and urged the Commission to

translate the current ratings system into Spanish. The FCC's report to Congress is due at the end of August 2009.

C. Media Ownership

Over the past decade, IPR has been involved in many FCC and court proceedings with the goal of increasing the diversity of broadcast stations owners. Over the past year, our efforts focused on judicial review of the FCC's newest ownership limits and ways to increase opportunities for minorities and women to own broadcast stations.

1. Ownership Limits

In 2004, IPR successfully argued to the Third Circuit Court of Appeals on behalf of a coalition of public interest organizations including Prometheus Radio, Media Alliance, and Office of Communication of the United Church of Christ, Inc., that the FCC's decision to substantially relax its media ownership rules was arbitrary and capricious. The court directed the Commission to either adopt new rules or provide better justifications for its rules on remand. In addition, the court directed that the prior limits stay in effect pending its review of the Commission's action on remand.

In February 2008, the Commission completed the remand. The Commission decided to retain the former limits on the number of television stations serving the same area that could be commonly owned. This represented an improvement over the rule adopted in 2003, which would have allowed a handful of companies to dominate local media.

The Commission also modified its newspaper-broadcast cross-ownership rule, which had prohibited common ownership of a daily newspaper and a broadcast station serving the same community, to allow for waivers in certain circumstances. Although this modification represented an improvement over the 2003 rule, which would have permitted cross-ownership in most communities, IPR's clients remained concerned that many loopholes remained. Thus, IPR petitioned for review of this 2008 Order.

The broadcast and newspaper industries, however, thought that the FCC should have eliminated the rules all together. They too petitioned for review, but in a different court of appeals. The Ninth Circuit, where IPR's client Media Alliance had filed, won the lottery and all of the cases were consolidated in that court. However, the industry parties filed motions seeking to send the case to the D.C. Circuit, while IPR argued that the cases should return to the Third Circuit, which had retained jurisdiction over the remand proceedings.

During both semesters, students participated in strategy meetings with co-counsel at the Media Access Project, and prepared various motions, oppositions and replies. Ultimately, the Ninth Circuit granted IPR's motion to transfer the case to the Third Circuit where it was docketed as *Prometheus Radio Project v. FCC*, 3d Cir. No. 08-3078 *et al.*

After the election, it seemed likely that a newly constituted FCC would want to re-examine its ownership decision. Thus, IPR filed a motion to hold the appeals case in abeyance pending FCC reconsideration. The court granted this motion and asked for briefing on whether it should continue the stay in effect. IPR students drafted a briefing arguing that the stay should remain in effect. The Court agreed and ordered that the stay be maintained. Students in the spring semester also drafted an opposition to a motion to transfer a portion of the case to the D.C. Circuit, and a reply in support of IPR's motion to dismiss certain challenges that had been improperly filed. These matters remain pending before the Third Circuit, and will likely not be addressed until after the FCC acts on reconsideration.

2. Minority and Female Ownership

In July and August 2008, IPR filed comments and replies on behalf of the Office of Communication of the United Church of Christ, Inc., the National Organization for Women Foundation ("NOW") and others in response to an FCC Further Notice of Proposed Rulemaking on broadcast ownership diversity. The comments argued that facilitating broadcast ownership by underrepresented groups benefits the public by increasing the diversity of programming, breaking down racial and gender stereotypes, providing better service to underserved segments of the population, and remedying past discrimination against women and minorities.

The comments urged the Commission to develop rules specifically designed to enhance opportunities for broadcast ownership by minorities and women. The comments also urged the FCC to revise its reporting and recordkeeping requirements to ensure that both the FCC and the public could accurately and efficiently track and analyze ownership by minorities and women.

In May 2008, the Commission issued an order adopting many of the reporting and record keeping proposals that were made in the comments filed by IPR. The Commission also sought comment on whether, and how, to require reporting of race and gender information by non-commercial educational broadcasters and low power FM broadcasters. The comments argued that all broadcast radio and television station licensees should report this data to ensure that both the public and the Commission would have an accurate and comprehensive picture of the state of broadcast media diversity. Moreover, because non-commercial and low power stations often provide entry points for minorities and women, collecting this information was particularly important. The comments also made several recommendations designed to provide the Commission and the public with necessary data on ownership diversity while minimizing the onus on those broadcasters who are typically constrained by limited resources and staff.

III. ENVIRONMENTAL LAW

A. Air Quality

1. California's Clean Air Act Waiver

In Spring 2008, IPR prepared amicus briefs on behalf of the National Association of Clean Air Agencies (“NACAA”) and the Monterey Bay Aquarium. IPR intended to file the briefs in the U.S. Ninth Circuit Court of Appeals in support of the State of California’s petition to review the U.S. Environmental Protection Agency’s (“EPA’s”) denial of California’s request for a Clean Air Act waiver to enforce greenhouse gas standards for cars and light-duty trucks. Under the Clean Air Act, California is the only state that may regulate mobile source emissions, and the remaining states may enforce either California’s or federal standards. EPA’s decision left cars and trucks unregulated for the emission of greenhouse gases because no federal standards exist. IPR prepared a brief on behalf of the Monterey Bay Aquarium to discuss greenhouse gas and climate change impacts on California’s coast and ocean. The brief prepared for NACAA addresses the interests of states and localities in having the ability to abate greenhouse gas emissions in light of the public health and welfare. The Ninth Circuit transferred the case to the D.C. Circuit, and an IPR student worked with counsel for additional amicus parties, including climate scientists, Jewish organizations, and government interests, to prepare and file joint briefs with our clients in November 2008.

Since February 2009, the D.C. Circuit has held the case in abeyance while EPA reconsiders its decision not to grant California a waiver. IPR submitted comments to EPA on behalf of the Monterey Bay Aquarium, urging EPA to grant the waiver and allow California to enforce its mobile source greenhouse gas regulations. On June 30, 2009, EPA granted the waiver.

B. Water Quality

1. Mattaponi Tribe – King William Reservoir

Since 1996, IPR has represented the Mattaponi Indian Tribe in its opposition to the construction of a large-scale reservoir located near its reservation in southeastern Virginia. The project would threaten more than two hundred and fifty Indian archeological sites, many of which are eligible for inclusion in the National Register of Historic Places, and would result in the largest destruction of wetlands in Virginia since the passage of the Clean Water Act. The Tribe’s reservation is on the banks of the Mattaponi River, three miles downstream from where water will be withdrawn to fill the proposed reservoir. 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 prime 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.

The City of Newport News (“City”) had obtained all state and federal permits necessary for the project. For many years, the Tribe challenged one of the state permits in the Virginia state courts. IPR students drafted complaints, prepared motion briefs, worked on discovery, prepared for trial, and helped prepare IPR staff attorneys for oral arguments. Ultimately, IPR achieved a favorable settlement for the Tribe that preserved the right to continue its lawsuit in federal court challenging the Clean Water Act permit, to speak publicly about its opposition to the project, to participate in administrative hearings related to the project, and to pursue litigation in state court if the reservoir project changes significantly from the current proposal.

In 2006, the Tribe brought claims against the Environmental Protection Agency (“EPA”) and the Army Corps of Engineers (“the Corps”) in the United States District Court for the District of Columbia, challenging the issuance of the King William Reservoir’s federal Clean Water Act permit. Along with three environmental groups, the Tribe alleged that the federal permit violates the Clean Water Act and the National Environmental Policy Act. Although the Corps produced a large administrative record relating to its decision to grant the permit, EPA refused to produce any documents to support its decision not to exercise its authority to “veto” the permit. In August 2007, IPR filed a motion on behalf of the Tribe to compel EPA’s production of a record. An IPR student drafted the reply brief. The magistrate judge granted the motion and ordered EPA to produce an administrative record.

From September 2007 to May 2008, three IPR students drafted the majority of a summary judgment motion on behalf of the Tribe. In Fall 2008, two IPR students helped draft a brief in opposition to the defendants’ motion for summary judgment, and a reply brief. The Court did not hold oral argument. On March 31, 2009, the Court granted in part the Tribe’s and plaintiffs’ motions for summary judgment, holding that the Corps violated the Clean Water Act by granting the permit, and that EPA violated the Clean Water Act by considering the wrong factors in deciding not to withdraw the permit. However, the Court also held that the Corps did not violate the National Environmental Policy Act. The Corps and EPA appealed the decision, and the Tribe and plaintiffs cross-appealed, but the appeals were dismissed by joint motion on July 1, 2009. IPR has filed a motion for attorneys’ fees and costs in the District Court while simultaneously attempting to negotiate the fee issue with the government. An IPR student will help with briefing and negotiations this fall.

C. National Environmental Policy Act and Land Use

1. Digital Billboards

On behalf of Scenic America, IPR researched the viability of a suit challenging a guidance memo issued by the Federal Highway Administration in September 2007. The guidance memo liberally interpreted federal-state agreements under the Highway Beautification Act that prohibit placing billboards with flashing, blinking, or moving lights near federal highways. The new interpretation allows digital billboards, which are bright LED displays with advertisements that change approximately every six seconds.

The practical effect of the guidance memo was to eliminate federal oversight of the placement of digital billboards near federally funded highways. Scenic America believes billboards, and particularly digital billboards, undermine the aesthetic beauty of the nation's highways, distract drivers, and reduce highway safety. After thorough research, IPR and Scenic America concluded that litigation was an unwieldy tool for addressing their concerns. The matter is now closed.

2. Fort Dupont Park Transfer

In spring 2009, IPR students filed a complaint on behalf of the Maryland Native Plant Society (MNPS), the Virginia Native Plant Society, and David Culp, a concerned citizen who walks in Fort Dupont weekly. The complaint challenges the National Park Service's Finding of No Significant Impact for a proposed transfer of jurisdiction over fifteen acres of Fort Dupont Park. The jurisdictional transfer would allow the expansion of an ice rink and the development of a baseball academy immediately adjacent to a globally rare forest community known as a terrace gravel forest. Construction of the recreational facilities would expose the forest to invasive species and degradation.

IPR began working with Maryland Native Plant Society in spring 2008 to challenge the proposed transfer. In addition to information requests to federal and District agencies regarding the proposed transfer, IPR students also submitted scoping comments on the National Park Service's initial plan and substantive comments on the National Park Service's Environmental Assessment on behalf of MNPS, the Audubon Naturalist Society, and the D.C. Chapter of the Sierra Club. The comments expressed concern about the ecological consequences of a recreational development immediately adjacent to the forest. Following the National Park Service's conclusion that the transfer would not have a significant effect on the environment, IPR, MNPS, David Culp, and the Sierra Club met with D.C. officials and members of the National Capital Planning Commission expressing concern about the transfer, and testified at a hearing before the National Capital Planning Commission opposing the transfer. When it became apparent that these persuasive measures were not working, MNPS, the Virginia Native Plant Society, and David Culp decided to legally challenge the National Park Service's environmental assessment and finding of no significant impact. The government's answer is due on August 24.

3. *Lemon et al. v. Green*

In the fall of 2008, IPR prepared and filed summary judgment briefs for two individual plaintiffs who had brought suit in the U.S. District Court for the District of Columbia against the Secretary of the Army. The lawsuit concerned the proposed redevelopment of Fort Ritchie, a former Army base in northern Maryland that contains numerous historic properties and expansive green spaces. In preparation for transferring the Fort to the local redevelopment authority, the Army had analyzed in 1997 the environmental impacts of the authority's redevelopment plan. However, the developer chosen to ultimately receive the property created a new redevelopment plan in 2004 that

significantly increased the amount of land developed, including construction on the Fort's historic parade grounds.

The Army refused plaintiffs' request to reanalyze the environmental impacts from the amended redevelopment plan. Plaintiffs brought suit, claiming that the Army violated the National Environmental Policy Act by failing to analyze new significant environmental impacts. IPR argued in the summary judgment briefing that the Army must analyze impacts in connection with the greater development intensity, increased impervious surfaces, construction on the historic parade grounds, transfer of the water system to a private entity, and the county's recent failure to meet national air quality standards for particulate matter. An IPR student helped draft the briefs. The court has not yet issued a ruling.

4. McMillan Park Redevelopment

In spring of 2009, IPR began assisting the McMillan Park Committee ("MPC") with its efforts to protect the historic resources and open green space of McMillan Park. The District of Columbia owns the McMillan Park sand filtration site, which is 26 acres of open space fenced off from public use and contains unique brick tower-like structures built in 1906 for the purpose of water filtration. The District plans to transfer the property to a private developer who proposes to remove most of the historic structures and construct apartments, condominiums, and retail facilities, leaving approximately 3–4 acres of contiguous open space for public use. This proposal differs greatly from the District's earlier proposed redevelopment, which included at least 50% open space, a community center, and other community amenities. Many community members and groups in addition to MPC are concerned about the intensity of the proposed development, lack of usable public space, and failure to protect more of the unique historic resources in McMillan Park.

During the spring semester, a clinic student submitted Freedom of Information Act ("FOIA") requests to gather information about the new redevelopment proposal and its environmental and historic resource impacts. The student also sent a letter to the mayor of D.C., urging him to conduct an environmental analysis before transferring the property to the developer. IPR has received adequate responses from almost all FOIA requests, but still waits for production of emails from the Deputy Mayor's Office. The property transfer and development proposal are currently stalled because public financing is uncertain.

5. *Nat'l Trust for Historic Preservation v. U.S. Dept. of Veterans Affairs, et al.*

In late spring of 2009, IPR began representing the National Trust for Historic Preservation in a second legal matter involving redevelopment and the destruction of historic properties (the first involves the proposed redevelopment of St. Elizabeths Hospital, as described in section 8 below). The U.S. Department of Veterans Affairs ("VA") plans to construct a new hospital in a historic district of New Orleans. Immediately adjacent, and in the same historic district, Louisiana intends to build a new

hospital using in part funds from the Federal Emergency Management Agency (“FEMA”). Construction of the hospitals would require the destruction of more than 160 historic houses and buildings, and the relocation of over 600 residents. The VA and FEMA prepared a joint environmental assessment that analyzes the first phase of the project—selecting the proposed sites and demolishing the existing buildings. Both agencies concluded that the first phase would cause no significant environmental impacts. The agencies plan to analyze impacts from construction and operation in a later environmental review document.

IPR filed a lawsuit on the National Trust’s behalf in the U.S. District Court in the District of Columbia, challenging the VA’s and FEMA’s decision to segment the environmental analysis into separate phases rather than preparing a single, comprehensive environmental analysis of the entire project, failure to consider indirect and cumulative impacts from construction and operation of the hospitals, and failure to recognize the significant impacts on socioeconomic and historic resources.. IPR students assisted in drafting the complaint. IPR also opposed a motion by the agencies to transfer the case to Louisiana, and motions by the City of New Orleans and a Louisiana agency to intervene in the case. On July 27, the court granted the agencies’ motion to transfer the case to the Eastern District of Louisiana.

6. Rock Creek Park Wireless Telecommunication Plan

In Spring 2008, an IPR student and fellow submitted comments on the National Park Service’s proposed Wireless Telecommunication Plan for Rock Creek Park on behalf of Audubon Naturalist Society of the Central-Atlantic States, Inc., Audubon Society of the District of Columbia, Crestwood Neighborhood League, DC Environmental Network, Friends of the Earth, Friends of Rock Creek Environment, Maryland Native Plant Society, Maryland Ornithological Society, Montgomery Bird Club, National Parks Conservation Association, and the Sierra Club (D.C. Chapter). The comments identified that the environmental assessment relied on by the National Park Service to authorize wireless telecommunications facilities in Rock Creek Park incorporated a flawed legal analysis, failed to demonstrate a need for additional facilities in the Park, improperly dismissed or failed to consider other reasonable alternatives, and failed to consider a variety of impacts from the proposed plan, all contrary to the requirements of the National Environmental Policy Act. In January, the National Park Service issued a Finding of No Significant Impact that selected an improved plan for managing cell towers in the park. The plan requires a site-specific NEPA analysis before siting any tower, and only allows forty-foot monopole towers, which are much safer for birds and can be installed without much ground disturbance. IPR notified its clients, who were pleased with the result and plan to monitor applications for siting cell towers to make sure that they are not located in sensitive areas. IPR’s work on this project is finished.

7. Second Century Commission

The Second Century Commission, made up of several national leaders, experts and thinkers from a broad range of backgrounds, was convened to gather comments on the vision of the National Park Service as it nears its Centennial celebration. Funded by a grant from the National Park Conservation Association, the Second Century Commission held one of several public meetings soliciting public input in Washington D.C. An IPR student prepared written comments and testified at the public meeting regarding the importance of urban parks to the National Park Service's mission. IPR does not anticipate any further work on this project

8. St. Elizabeths Hospital

In spring of 2009, IPR began representing the National Trust for Historic Preservation ("National Trust") in its opposition to the proposed consolidation of the Department of Homeland Security ("DHS") at the historic St. Elizabeths Hospital in Washington, D.C. St. Elizabeths, a National Historic Landmark ("NHL"), was founded in 1852 and was previously the nation's premiere public health facility. Consolidation of DHS headquarters at St. Elizabeths would require destruction of numerous historic buildings and significant new construction that would likely cause the property to be delisted as a NHL. DHS would also construct a massive perimeter wall that would further destroy the historic quality of St. Elizabeths and restrict public access to the site.

IPR researched potential legal claims that the National Trust could bring, if DHS goes forward with the proposed consolidation and does not adequately mitigate the impacts. IPR students attended meetings of the consulting parties, which included the National Trust, DHS, the National Park Service, the General Services Administration, architects, and other historic preservation agencies and organizations. The Federal Highway Administration will soon release its final decision regarding the access road for the development, which should include further environmental analysis.

D. Solid Waste and Toxics

1. Poplar Point

In the spring of 2008, IPR began working with a coalition of environmental groups on issues related to the proposed development at Poplar Point. Poplar Point is a 110-acre federal parkland located on the east bank of the Anacostia River, bounded by I-295 and the Frederick Douglass Memorial Bridge. Although the National Park Service technically manages Poplar Point as part of Anacostia National Park, the site has been neglected for decades.

In late 2006, Congress authorized the transfer of ownership of Poplar Point from the federal government to the District of Columbia. The legislation authorizing transfer requires the Department of Interior to certify a land use plan for the site that preserves at least 70 acres for "park purposes" prior to transfer. In June 2008, the National Park

Service, acting as a joint lead agency with the District of Columbia, began conducting public meetings in order to develop a land use plan through the National Environmental Policy Act (NEPA) process. IPR students attended each of the public community meetings and helped other interested public interest groups, including the Anacostia Riverkeeper, the DC Chapter of the Sierra Club, Friends of the Earth, and Casey Trees, prepare talking points for the public meetings. IPR students also submitted comments to the National Park Service on behalf of the Anacostia Riverkeeper and the D.C. Sierra Club expressing concern about protecting important ecological features of the land and advocating for a natural design for that part of the site reserved for “park purposes.” In January, the master developer for the development project, Clark Realty, withdrew from the project. Since November, the community meetings for the NEPA process have been suspended.

Poplar Point is also highly contaminated with arsenic, polyaromatic hydrocarbons, polychlorinated biphenyls, pesticides, metals, and other pollutants from prior activities of the United States Army Corps of Engineers, Department of the Navy, Architect of the Capitol, National Park Service, and the District of Columbia. Given the present threats to human health and the environment from the contamination of the site, an IPR student drafted a notice of intent to sue those federal and district entities under the Resource Conservation and Recovery Act (RCRA) on behalf of Anacostia Riverkeeper, Earth Conservation Corps, DC Acorn, Friends of the Earth, Potomac Riverkeeper, and the Sierra Club (D.C. Chapter). The notice of intent, which was sent out in June 2008, informed the federal and district entities that the coalition would sue after ninety days, if they had not abated the imminent and substantial endangerment to human health and the environment presented by the contamination on the site by that time.

In response to the letter, the District of Columbia and the National Park Service notified IPR that it had entered into a settlement agreement under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). Under the settlement, the District agreed to conduct a remedial investigation and feasibility study of the entire site. On behalf of the coalition, IPR students attended a meeting with the federal government to discuss the extent of the settlement agreement in more detail. In spring of 2009, on behalf of the coalition, IPR students submitted information requests to the District and the National Park Service to evaluate whether the parties were diligently pursuing remediation. The information received indicated that the government is proceeding with plans for remediation, making litigation unnecessary at this point. IPR informed the clients of its findings and recommended that they continue to monitor the site should development activities start up again. IPR’s work on this project is now completed.

2. Potomac Riverkeeper – Gun Club

Since the summer of 2003, IPR represented Potomac Riverkeeper, Inc. (“PRK”) in a dispute surrounding the operation of a skeet and trap shooting facility operated by the National Capital Skeet and Trap Club (the “Club”) and located in Seneca Creek State Park, near a tributary of the Potomac River. Lead shot from the facility collected for

more than fifty years in the tributary, in an adjacent wetland, and in the floodplain. IPR's actions on behalf of PRK resulted in the facility ceasing operations, but the lead contamination still remained. From July 2004 to January 2005, IPR negotiated with Maryland Department of Natural Resources ("MDNR") and the Club regarding appropriate remediation measures. Because a satisfactory agreement could not be reached, in February 2005 IPR commenced a civil action against the Club and MDNR's Executive Secretary in the U.S. District Court for the District of Maryland, alleging violations of the Clean Water Act and the Resource Conservation and Recovery Act ("RCRA").

Following cross-motions for summary judgment and the survival of PRK's RCRA claim, the parties agreed to a settlement in principle in September 2006. MDNR agreed to remediate the site to levels of 5 mg/L or less lead when tested using the Toxicity Characteristic Leaching Procedure. (5 mg/L is the EPA standard for what constitutes non-hazardous waste.) In April 2007, PRK and MDNR disagreed about the size and location of "the site" to be remediated. PRK believed that MDNR should test to determine the extent of contamination, but MDNR agreed instead to remediate 10 acres, an increase from its originally proposed 7.6 acres. MDNR likely spent over \$1 million to remediate, which was completed in June 2008. In the fall of 2008, IPR negotiated with MDNR to require future groundwater and remediation monitoring, and further soil testing outside the remediation boundaries, which will ensure that the remediation included all lead contamination of concerns and remains stabilized. MDNR also agreed to pay attorney fees. An IPR student assisted in preparing for the negotiations, and attended the settlement conference before the Magistrate Judge. This past spring, IPR received its attorneys fees and costs. The case is now closed, although IPR will continue to review MDNR's monitoring and testing to ensure they comply with the settlement agreement.