



GEORGETOWN LAW

# 2009-2010 Annual Report

INSTITUTE  
FOR  
PUBLIC REPRESENTATION

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**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 issues of broad public importance. IPR's work currently focuses on first amendment and media law, environmental law and civil rights and 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 also serve a 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 such as interactive television 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. Although 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 first amendment and media law 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.

The students also must consider questions of strategy, client autonomy, and 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 oral communication skills and to work with community groups, other public interest organizations, and expert witnesses. Like other clinics at Georgetown, students 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 have their work critiqued, 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. 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 interviewing, complaint drafting, 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 represent clients in hearings before federal and state courts and local and federal administrative bodies.

Although 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.

## FACULTY

Angela J. Campbell, Co-Director  
Hope M. Babcock, Co-Director  
Brian Wolfman, Co-Director

## GRADUATE FELLOWS

**Adrienne Biddings** received her JD, *cum laude*, from the University Of Florida College Of Law with a joint M.A. degree in Mass Communications. She obtained her undergraduate degree in Communications from the University of Miami. During law school, she was executive research editor for the Florida Entertainment Law Review and a research assistant for the Center for the Study of Race and Race Relations. She also taught Telecommunication Law and Regulation at the University of Florida. In summer 2008, she worked as a law clerk in Comcast's legal & regulatory department in Washington, DC. Prior to attending law school, Adrienne worked as a promotions producer for an ABC affiliate in Miami, FL and technical director for a public access channel in Wilmington, NC.

**Leah M. Nicholls** received her B.A. in History and Philosophy, *summa cum laude*, and her M.A. in History from Boston University in 2004. She earned a J.D., Order of the Coif, and an L.L.M in International and Comparative Law in 2007 from Duke University School of Law, where she was the Editor-in-Chief of the Duke Journal of Comparative and International Law and the recipient of the David H. Siegel Memorial Scholarship and the Justin Miller Citizenship Award. During law school, Leah worked at civil rights

organizations, including Carolina Legal Services, the Arizona Center for Disability Law, and the Washington Lawyers' Committee for Civil Rights and Urban Affairs and worked as a student attorney in Duke's Guantánamo Defense, Children's Education, and Poverty Law clinics. After graduation, Leah clerked for the Honorable Harriet O'Neill of the Supreme Court of Texas. Prior to joining IPR, Leah served as the Supreme Court Assistance Project Fellow at Public Citizen Litigation Group. She is the author of the article "The Humanitarian Monarchy Legislates: The International Committee of the Red Cross and Its 161 Rules of Customary International Humanitarian Law," published in the Duke Journal of Comparative & International Law.

**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.

**Guilherme Roschke** has a BA from the University of Pennsylvania and a JD from The George Washington University Law School. Following law school, Guilherme was awarded a Skadden Fellowship at the Electronic Privacy Information Center in Washington DC. His fellowship focused on protecting the privacy of victims of domestic violence, and included individual representation, technical assistance and policy work. Following his fellowship, Guilherme was a staff attorney at the American Bar Association Commission on Domestic Violence, where he provided technical advice and developed trainings for lawyers representing victims of domestic violence. Prior to law school, Guilherme was a computer programmer with experience in corporate, non-profit and scientific environments. He often volunteered his technical and organizing skills for media activism projects. Guilherme is a member of the District of Columbia and New York bars.

**Margie Sollinger** comes to IPR after working as a staff attorney at Bread for the City, as social services organization in the District of Columbia where she provided direct representation to low-and no-income individuals. She received her B.A. in biology and environmental studies from Carleton College and her J.D. from the University of Minnesota Law School, where she was an editor for the Journal of Law and Inequality. Her work experience during school included positions at the Center for Biological Diversity and Pine Tree Legal

Assistance. Following law school she clerked for the Honorable Warren M. Silver on the Maine Supreme Court.

## LAW STUDENTS

### FALL 2009

#### *Civil Rights & Public Interest Law*

Jordyne Blaise  
Andrew Deeringer  
Lori Leibowitz  
Sarah Liebschutz  
Lakeiya Maxwell  
Jeremiah Nelson

#### *First Amendment & Media Law*

Andrew Lewis  
Joe O'Connor  
Charles Rosson  
Mike Scurato  
Kate Wilcox

#### *Environmental Law*

Kate DeWitt  
Amanda Fuller  
Anne Michelle Harvey  
Damien Leonard  
Cristina Stella  
Tamara Zakim

### SPRING 2010

#### *Civil Rights & Public Interest Law*

Laura Brookover  
Tatyana Delgado  
Steven Giballa  
Hasa Kingo  
Westra Miller  
Kristapor Vartanian

#### *First Amendment & Media Law*

Frank Balsamello  
Raquel Kellert  
Robert Lapore  
Andrew Lichtenberg  
Ari Meltzer  
Matthew Korn  
Erika Stallings

#### *Environmental Law*

Kimberley Hunter  
Russell Husen  
Sumona Majumdar  
Joseph Matthews  
James Parra  
Wei Xiang

## **CIVIL RIGHTS AND PUBLIC INTEREST LAW**

### **A. Employment Discrimination**

#### **1. Cook v. Billington (Nix/Davis)**

IPR represented 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. In 1995, the class action settled, providing a range of monetary and other relief to the class members. The court-approved settlement included a clause prohibiting retaliation against class members for participating in the class action. In July 1997, Mr. Nix and Ms. Davis moved to enforce the settlement, claiming that they had been retaliated against by, among other things, being transferred to dead-end jobs and being assigned degrading work and working conditions. The government argued that the district court no longer had jurisdiction over the retaliation claims, but in May 2006 the D.C. Circuit ruled that the district court had jurisdiction to hear Mr. Nix's and Ms. Davis's claims.

IPR represented Mr. Nix and Ms. Davis on remand. In early 2007, the Library filed a motion for summary judgment, which the district court denied in the fall of 2009. It then ordered additional briefing on whether the plaintiffs were entitled to a jury trial and a Tucker Act jurisdiction question, and ultimately permitted the case to proceed to trial, scheduled for

February 1, 2010. IPR students furiously prepared for trial, and just before it was to begin, the Library settled the claims favorably to Mr. Nix and Ms. Davis.

#### **2. Hairston v. Tapella**

IPR represents Kevin Hairston, an African-American employee who has worked for the Government Printing Office (GPO) for decades but has repeatedly been denied promotions on the basis of race. Mr. Hairston joined GPO in 1987, and, after scoring 3<sup>rd</sup> out of 134 on GPO's Offset Press Assistant Training Program examination, 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 has not been able to advance any further.

In August 2006, Mr. Hairston applied for a promotion to the position of Second Offset Pressperson. GPO notified him that he was qualified, and internal documents obtained during the investigation reveal that the selecting and approving officials chose him for the position. Yet, without explanation, a Production Manager ordered that the selection be canceled, and the position was closed without it being offered to anyone. The position was later re-posted after management claimed that no qualified applicants had applied for the opening the first time. A white man was hired for the position. Mr. Hairston filed a complaint with the Equal Employment Office (EEO) at the GPO, and he was retaliated against by his supervisors for doing so.

In September 2008, IPR filed suit on Mr. Hairston's behalf. GPO responded with a motion to dismiss, claiming that Mr. Hairston failed to exhaust his administrative remedies prior to filing the federal lawsuit. IPR opposed this motion, and, in the fall of 2009, the district court denied the motion as to the discrimination claim and granted the motion as to the retaliation claim.

In the meantime, Mr. Hairston suffered additional retaliation at GPO, and he filed additional EEO complaints after he was denied overtime and training opportunities. IPR amended his federal complaint to include the denial of training claim in the spring of 2010, and the parties are currently in the midst of discovery, which is scheduled to be completed in September 2010.

### **3. Eley v. Tapella**

IPR represents Melvin Eley, an African-American who has worked for the Government Printing Office (GPO) for decades but has repeatedly been denied promotions on the basis of race and retaliation. After Mr. Eley was denied a promotion in 2001, he filed an EEO complaint, and IPR represented him. The GPO settled that matter favorably to Mr. Eley in 2003, but the GPO continues to deny Mr. Eley promotions for which he is qualified.

Since the 2003 settlement, Mr. Eley has been denied at least four promotions, one of which was canceled without explanation. Most recently, in 2008, Mr. Eley applied for the Operations Director position, a Senior Level Service (SLS) position in the Information Technology and Systems

Department. Mr. Eley was deemed qualified, but a white man was hired instead. At the time, there were no African-American men among the approximately 30 SLS positions at GPO.

Mr. Eley filed a complaint at GPO's Equal Employment Opportunity Office, and after that process provided Mr. Eley no relief, IPR filed a Title VII complaint on his behalf in district court in November 2009. The parties are currently in the midst of discovery, which is scheduled to be completed in September 2010.

## **B. Open Government**

### **1. McBurney v. Cuccinelli**

IPR represents 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 public records under the Virginia Freedom of Information Act (VFOIA), but each request was denied because VFOIA only grants the right to access Virginia public records to citizens of Virginia. Mr. McBurney, who had been a citizen of Virginia for 13 years, sought records from the Virginia Department of Child Support and Enforcement 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. Ms. Stewart, a professor of journalism at West Virginia University, sought information from Virginia public universities as part of a journalism course she teaches.

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

The complaint alleges that the citizens-only provision of Virginia's FOIA violates the Privileges and Immunities Clause of Article IV and the Dormant Commerce Clause of the U.S. Constitution. After a hearing, the district court granted the defendants' motion to dismiss, finding that the Attorney General, the only defendant sued by Professor Stewart, was not a proper party and that Mr. McBurney and Mr. Hurlbert lacked standing to bring their claims and opining that the plaintiffs would have lost on the merits anyway.

IPR appealed the decision to the U.S. Court of Appeals for the Fourth Circuit, and, in July 2010, after oral argument, the Fourth Circuit affirmed the district court's decision to dismiss the Attorney General and Professor Stewart; reversed the decision as to Mr. McBurney's and Mr. Hurlbert's standing; and remanded Mr.

McBurney's and Mr. Hurlbert's claims to the district court for consideration on the merits.

## **2. Bloche v. Department of Defense**

IPR represents two prominent experts of bioethics, M. Gregg Bloche, M.D., a Georgetown law professor, and Jonathan Marks, a bioethics professor at Penn State, in a Freedom of Information Act (FOIA) case against various agencies of the Department of Defense and the Central Intelligence Agency. The plaintiffs seek information concerning the participation of government and civilian medical personnel in the design and implementation of 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 ordered the government defendants to turn over relevant documents in several stages, the releases concluded in spring 2010, and final indices of the withholdings from the CIA are due in fall 2010. The agencies are still withholding many documents, citing various FOIA exemptions. The plaintiffs, in conjunction with IPR, are determining which of the remaining withholdings should be challenged.

## **3. Public Citizen v. U.S. Office of Special Counsel**

Public Citizen filed a Freedom of Information Act (FOIA) request with

the Office of Special Counsel seeking documents concerning whether the government funded Karl Rove's political activities while he also served as an advisor in the Bush White House. The Office of Special Counsel did not respond to the request, and, in October 2009, IPR filed a complaint on behalf of Public Citizen in district court. The Office of Special Counsel released some materials but initially refused to release memos that went from the White House to the Office of Special Counsel. After negotiation, most of those materials were released, and the case was voluntarily dismissed in the spring of 2010.

#### **4. Benavides v. Bureau of Prisons**

Eduardo Benavides, a federal prisoner, filed a Freedom of Information Act (FOIA) request with the Bureau of Prisons (BOP) seeking audio recordings made by BOP of conversations between him and his attorney. After BOP denied his request, Mr. Benavides filed a *pro se* complaint in federal district court. After BOP moved for summary judgment, claiming that the recordings are exempt from disclosure because of the attorney's alleged personal privacy interest in the recordings, IPR agreed to represent Mr. Benavides.

In May 2010, IPR filed an opposition to BOP's motion for summary judgment and a cross-motion for summary judgment. IPR primarily argued that an attorney has no personal privacy interest in attorney-client conversations during which only the client's case was discussed. The court

has not ruled on the parties' motions for summary judgment.

#### **5. Southern Migrant Legal Services v. Education & Workforce Development Cabinet for the Commonwealth of Kentucky**

Southern Migrant Legal Services (SMLS) is a legal services organization that provides free legal services to indigent migrant agricultural workers in six southern states. To assist it in its advocacy, SMLS frequently files state and federal freedom of information requests seeking documents about the employers of migrant workers. The migrant worker program (the H-2A program) is a heavily regulated joint federal-state program under which employers are required to submit many documents and materials to the government. The federal government regularly releases H-2A documents in response to federal Freedom of Information Act requests.

The Kentucky Education & Workforce Development Cabinet (the Cabinet), which oversees the H-2A program in Kentucky, recently promulgated regulations classifying most H-2A documents as confidential and prohibiting their release under Kentucky's Open Records Act. Kentucky's Open Records Act, however, requires state agencies to release documents that may be released under federal law.

SMLS requested H-2A records under the Open Records Act from the Cabinet several times, and the Cabinet

denied each request, citing the new regulations. On behalf of SMLS, IPR filed a complaint in Kentucky state court in March 2010. IPR then filed a motion for summary judgment, arguing that because the federal government has a policy of releasing H-2A records, the Kentucky Open Records Act requires the state to release the same records. The court conducted a summary judgment hearing in late July 2010 and we are awaiting the court's decision.

#### **6. Southern Migrant Legal Services v. Range**

IPR also represents Southern Migrant Legal Services (SMLS) in a similar action involving Mississippi's failure to disclose H-2A records. In 2007, the Mississippi legislature amended its labor laws and classified H-2A documents as confidential, permitting the documents to be withheld under the Mississippi Public Records Act. SMLS has requested H-2A records under the Public Records Act from the Mississippi Department of Employment Security (MDES) several times, and MDES denied each request, citing the new law.

In July 2010, IPR filed a complaint in U.S. district court in Mississippi on behalf of SMLS. The complaint alleges that MDES's withholding of H-2A records violates federal law because a federal regulation requires states to release H-2A documents.

### **C. Class Actions**

#### **1. Hayden v. Atochem North America**

In 1992, residents of Bryan, Texas filed a class action against Atochem in federal district court in Houston, alleging that the chemical manufacturer's local pesticide plant spewed arsenic and other carcinogens, causing widespread medical problems and property damage throughout the area. The case settled favorably to the plaintiffs in 2000. Today, approximately \$1 million remains in unclaimed settlement funds, and the district court sought proposals for distributing the remaining funds. The defendant proposed that the funds be either given back to it or given to specific local charities having nothing to do with the subject matter of the class action.

In March 2010, IPR, on behalf of class member Ralph Klier, submitted a competing proposal, arguing that the law required the court to make an additional *pro rata* distribution of funds to the most seriously injured class members. Alternatively, IPR argued that the funds should be distributed to a charitable cause with a strong nexus to the issues in the class action, such as Texas A&M's School of Rural Public Health, which researches the carcinogenic effects of pesticides on humans in Texas.

The court decided to use the funds to make *cy pres* awards to several local charities unconnected to the subject matter of the class action, such as the Children's Museum of the Brazos Valley. IPR sought a stay of the

distribution, which was granted, and appealed the award to the Fifth Circuit. No briefing schedule or oral argument date has been set.

## **2. Briggs v. United States**

This nationwide class action was brought by military personnel, veterans, and their families who had held credit cards issued by the U.S. government. The government had collected credit card debts from the plaintiff class after the statute of limitations had expired. The parties settled in December 2009, and the government agreed to repay each class member 100% of the debt it had illegally collected.

Through two extensive memoranda, IPR advised class counsel on the applicable legal principles and possible appropriate charitable recipients in the event a *pro rata* redistribution of remaining funds is not feasible after an extensive search for all class members. In the memo concerning potential charitable recipients, IPR's research focused on locating reputable organizations that provide financial or debt relief assistance to veterans and their families.

## **D. Arbitration**

### **1. Dickerson v. Heritage Care**

Carter Bradley was only a resident of Heritage Care's nursing home a few months when he died of bedsores. Carman Dickerson, the personal representative of Mr. Bradley's

estate, filed a medical malpractice action in Maryland state court against the nursing home and its doctors. The nursing home sought to compel arbitration, relying on an arbitration agreement that had been signed by Ms. Dickerson, allegedly on Mr. Bradley's behalf, at the time of Mr. Bradley's admission to the nursing home. The trial court granted Heritage Care's petition to compel arbitration.

A successful cert petition brought the case to the Maryland Court of Appeals, Maryland's highest court, where IPR represented Ms. Dickerson. IPR argued that because Ms. Dickerson was not Mr. Bradley's general agent or power of attorney at the time of the nursing-home admission, she lacked authority to bind Mr. Bradley to an arbitration agreement. After hearing oral argument in February 2010, the court agreed, and Ms. Dickerson may now pursue a medical malpractice claim in court.

### **2. Rent-A-Center, West v. Jackson**

The issue in this U.S. Supreme Court case was whether, under the Federal Arbitration Act, a court must decide whether an arbitration agreement is unconscionable or whether parties can agree, in the arbitration agreement, that an arbitrator will decide the issue of unconscionability. Antonio Jackson was an African-American employee of Rent-A-Center and claims that he was repeatedly passed up for promotions in favor of less-experienced non-African-Americans. Mr. Jackson complained and

was eventually promoted, but was fired without cause shortly thereafter.

When Mr. Jackson tried to bring a Title VII claim alleging race discrimination and retaliation in district court, Rent-A-Center sought to compel arbitration, and Mr. Jackson argued that the arbitration agreement was unconscionable. The district court held that because the agreement stipulated that the arbitrator would decide unconscionability issues, arbitration was appropriate. The Ninth Circuit reversed, and the Supreme Court granted review.

IPR assisted counsel for the Professional Arbitrators and Arbitration Scholars in preparing an *amicus* brief in favor of Mr. Jackson. Among other things, the brief argued that preserving the role of courts in deciding gateway issues of unconscionability is good for arbitration because it enhances public confidence in arbitration, it ensures that only those who actually agree to arbitrate must do so, and it establishes precedent to help make the arbitration process more fair, consistent, and predictable. In a 5-4 decision issued in June 2010, the Court held that the question of unconscionability was for the arbitrator to decide when the agreement delegates that determination to the arbitrator; an unconscionability challenge, however, to the delegation provision would be a question for the district court.

## **E. Other Matters**

### **1. Milan de Vries**

Milan de Vries is a scientist who specializes in cancer research and healthcare policy. Mr. de Vries was selected to work closely with the director of the National Institutes of Health (NIH) and became a United States Citizen to be eligible to do so. Mr. de Vries was born in the Netherlands as a Dutch citizen, moved to the United States with his family at age 11, went to college in Israel at 16, and then returned to the United States at 21 to begin graduate school.

Mr. de Vries is unable to begin his prestigious position at NIH because he never registered with the Selective Service. Until Mr. de Vries recently applied for U.S. citizenship, he was unaware that, as a non-citizen, he was required to register. Mr. de Vries turned 18 while living abroad and went to college abroad, missing the events and rites of passage through which young American men often learn they must register for the draft. Absent a waiver, non-registrants generally may not work for the federal government.

IPR assisted Mr. de Vries in drafting and assembling an application for a waiver of the rule with the Office of Personnel Management. Mr. de Vries has not yet heard whether his waiver has been granted.

## **2. Southern Migrant Legal Services**

Southern Migrant Legal Services (SMLS) is a legal services organization that provides free legal services to indigent migrant agricultural workers in six southern states. To assist it in its advocacy, SMLS frequently files state and federal freedom of information requests seeking documents about the employers of migrant workers. The migrant worker program (the H-2A program) is a heavily regulated joint federal-state program under which employers are required to submit many documents and materials to the government. The federal government regularly releases H-2A documents in response to federal Freedom of Information Act requests. In addition, a few states have passed laws prohibiting the release of H-2A documents.

In the fall of 2009, the Department of Labor (DOL) promulgated proposed H-2A regulations. Among many other things, the proposed regulations required DOL to create a publicly accessible database of some H-2A documents. On behalf of SMLS, IPR submitted comments on the proposed rules, praising the new database, but explaining that the database did not go far enough. In light of the new state laws prohibiting the release of H-2A documents, IPR urged DOL to also adopt a rule clarifying that states must release H-2A documents.

DOL issued the final H-2A rules in February 2010. The final rules include the creation of an H-2A database, but DOL declined to adopt IPR's suggested additional rule.

## **3. Hardt v. Reliance Standard Life Insurance**

The issue in this U.S. Supreme Court case was whether, in Employment Retirement Income Security Act (ERISA) cases, a party must be a "prevailing party" to be awarded attorney's fees, or whether the district court has discretion to award fees in other situations. In 2003, Bridget Hardt was no longer able to work, and she sought disability benefits from the ERISA plan she had through her employer. The plan denied her benefits, Ms. Hardt's condition deteriorated, and, after more back-and-forth, she filed an ERISA action in federal district court. After submission of briefs, the district court instructed the plan to properly assess all Ms. Hardt's disabilities within 30 days and warned that absent prompt action by the plan, it would enter judgment in favor of Ms. Hardt. The plan complied with the court's instructions, found that Ms. Hardt was entitled to disability benefits, and paid her back benefits. The district court awarded Ms. Hardt attorney's fees. The Fourth Circuit reversed, finding that because there was (supposedly) no judgment in her favor, Ms. Hardt was not a "prevailing party" and could not be awarded attorney's fees.

The Supreme Court granted cert, and IPR assisted Ms. Hardt's counsel in preparing the briefs on the merits. The briefs argued that because the ERISA fee-shifting statute, unlike other fee-shifting statutes, does not require a party to have "prevailed," a district court may award attorney's fees in ERISA cases even to a party that has not "prevailed" through a litigated judgment if that party has succeeded in

obtaining ERISA benefits or otherwise achieved some success in the case. In a decision issued in late May 2010, the Supreme Court ruled 9-0 in favor of Ms. Hardt.

## **FIRST AMENDMENT AND MEDIA LAW**

Over the past year, students participating in IPR's First Amendment and Media Law section worked on a variety of new and continuing cases before the FCC, the FTC and the federal courts.

### **A. Challenge to Unlawful Transfer of Honolulu Television Station**

In fall 2009, IPR took a new case on behalf of the Media Council Hawai'i. Media Council Hawai'i is a non-profit organization that seeks to improve public access to information, strengthen public support for First Amendment freedoms, broaden public understanding of the media, and promote accurate and fair journalism. Its members were concerned that Raycom, a broadcasting company that already owned two television stations in Honolulu, planned to acquire the assets of a third television station in Honolulu and to merge the news operations of all three stations. Not only would this plan lead to the loss of an important independent source of local news, but also a large number of employees who would lose their jobs.

Raycom's outright purchase of a third station would not be permitted under FCC rules designed to promote diversity and competition. But Raycom contended that FCC approval was not required because even though it would

operate the three stations, another company would hold the FCC license. After researching various options, IPR filed a complaint and request for emergency relief with the FCC. The complaint argued that the agreements between the stations amounted to a de facto transfer of control in violation of the Communications Act requirement that all license transfers be approved in advance. The comments also argued that the transaction violated the FCC's local television rule which prohibits common control over three stations serving the same area.

Although the FCC did not stop the transaction from moving forward, it did require the companies to provide copies of the sharing agreements. In filing these contracts, the companies redacted key information and requested confidential treatment. IPR opposed confidential treatment on the grounds that the information was not protected under the Freedom of Information Act and was important for determining whether the arrangement was in the public interest. The FCC agreed and IPR was able to obtain and analyze the agreements. As a result, IPR amended the complaint and is waiting for the FCC to make a decision.

### **B. Media Ownership Rules**

By law, the FCC must review all of its broadcast ownership limits every four years to determine whether they continue to serve the public interest. This year, the FCC's decision coming from the 2006 Quadrennial Review is being reviewed by the US Court of Appeals for the Third Circuit at the same time the FCC has begun its 2010 Quadrennial Review. IPR has been

active in both proceedings on behalf of multiple clients including the Office of Communication of the United Church of Christ, Inc., Media Alliance, National Organization for Women, Common Cause, Prometheus Radio Project, and Free Press.

### **1. Appeal of the 2006 Quadrennial Review**

IPR has previously been before the Third Circuit challenging the FCC's media ownership rules. In 2003, IPR represented many of the same clients challenging the FCC's relaxation of local ownership rules in an order from the 2002 Biennial Review. The Court agreed that the FCC's new rules were not justified on the record, remanded for further proceedings, and stayed the rules. *Prometheus Radio Project v. FCC*, 373 F.2d 372 (2004). The FCC combined the remand with its 2006 Quadrennial Review and adopted a different set of rules in early 2008. Although the 2008 rules represented an improvement over the ones adopted in 2003, IPR's clients were concerned that they included so many exceptions. Thus, IPR again sought judicial review, and so did the media companies who opposed any rules limiting their ownership. The court proceeding were held in abeyance, however, to allow the FCC to act on a petition for reconsideration.

In early 2009, the Court issued an order to show cause why it should not lift the stay and allow the new rules to take effect. IPR argued for continuing the stay on the grounds that the FCC was likely to modify the rules on reconsideration. In June, the Court decided to keep the stay in effect, but asked for status reports to be filed in

October. In the fall, IPR again urged the Court to retain the stay, but since the FCC indicated it had no plans to act on the reconsideration in the near future, the Court lifted the stay and set a briefing schedule.

In May 2010, IPR (and co-counsel) filed an opening brief in the court. The brief argued that the Commission acted arbitrarily and capriciously by creating a newspaper-broadcast cross-ownership rule that was vague and full of loopholes and by failing to assess the impact of digital television when promulgating its local television duopoly rule. It also argued that the FCC had failed to comply with the Court's instruction on remand to consider the impact of any rule changes on opportunities for minorities and women to own broadcast stations. At the same time, various media companies also filed briefs generally opposing any limits on media ownership. IPR is currently drafting a reply brief that responds to arguments of both the media companies and the FCC.

### **2. FCC's 2010 Quadrennial Review**

The FCC began the 2010 Quadrennial Review in late 2009 by seeking comments on how to conduct the review. In November, IPR filed comments pointing out that highly relevant data on how television stations were meeting community needs would be available in the in Standardized Television Disclosure Form 355, which the FCC adopted two years ago, but for the fact that this rule has never taken effect because the FCC failed to seek approval from the Office of Management

and the Budget as required by the Paperwork Reduction Act. The November comments urged the FCC to take prompt action to obtain OMB approval. They also urged the FCC to collect data about the extent to which local broadcast stations have entered into agreements to share local news gathering, programming, personnel, and other operations, such as the stations in Honolulu.

The FCC subsequently held a series of public workshops on media ownership. In January 2010, IPR Director Angela Campbell made a presentation at an FCC forum on “Constitutional Issues in Advancing Minority Ownership Through the FCC’s Media Ownership Rules.” She argued that the FCC should assess the effectiveness of its existing race-neutral policies to begin building a record needed to justify the adoption of meaningful race-based measures.

In May, the FCC issued a Notice of Inquiry. IPR filed comments in June asking the Commission to promote the public interest in diversity, competition and localism by tightening up the current ownership limits. IPR urged the FCC to examine the impact of its rules on the ownership of broadcast stations by minorities and women and to simultaneously complete related proceedings concerning public interest obligations of digital television stations, enhanced disclosure, and localism. IPR also asked the Commission to eliminate the UHF Discount, which discounts the audience reach of UHF television stations by 50% for purposes of determining the national audience limit, because it was obsolete and could result in increased national consolidation contrary to Congressional intent.

### **C. Challenges to Tribune’s Transfer of Cross-Owned Stations**

In June, IPR also filed a formal objection, known as a petition to deny, to Tribune’s application to assign the licenses of its television stations to a new entity controlled by Tribune’s creditors. The petition was filed on behalf of Free Press, Media Alliance, NABET/CWA, National Hispanic Media Coalition, Office of Communication of the United Church of Christ, Inc., and Charles Benton. IPR represented some of these organizations previously in opposing an earlier FCC decision granting waivers to allow Sam Zell to take over the Tribune Co. and take it private. Under Zell’s control, the company went bankrupt. Tribune is now emerging from bankruptcy and is seeking to transfer its licenses to its creditors while keeping these cross-ownerships intact in Chicago, Los Angeles, New York, Miami and Hartford.

The cross-ownership rule requires that the common ownership of newspapers and broadcast stations in the same community be terminated upon the sale of the broadcast properties to a new owner. But instead of splitting up the existing cross-ownerships, Tribune’s applications ask for waivers of the rule. The petition to deny opposes Tribune’s request for waivers in Chicago and Hartford because these combination do not meet the criteria for waivers established by the FCC in the 2008 rules. This case is important because it provides the FCC with the first opportunity to apply the new waiver criteria. IPR filed its reply

to Tribune's Opposition in July and is awaiting a decision from the FCC.

#### **D. Minority & Female Ownership**

Working with organizations such as UCC, NOW, and the National Hispanic Media Coalition, IPR has finally been successful in getting the FCC to improve how it tracks broadcast station ownership by minorities and women.

Broadcast stations have been required to file ownership reports, including race and gender, since 1998. However, in the course of conducting research on minority and female ownership for comments filed in the 2006 Quadrennial Review, IPR found out the manner in which the FCC collected the information was so haphazard as to render the data unreliable. IPR filed numerous comments urging the FCC to improve its data collection. Finally, in May 2009, the FCC issued an order declaring that it would update its data collection and record keeping practices with a new ownership form and database. The FCC asked all attributable broadcast station owners to submit their ownership information, including race and gender, in a new form that would be aggregated and searchable in a database for FCC and public inspection. It set November 1, 2009, as the filing deadline.

Before the new form could be used, however, the FCC needed approval from the Office of Management and the Budget. IPR filed comments with the OMB and at the FCC stressing the importance of this new form and database, but many broadcasters

complained that the system devised by the FCC was too burdensome, did not work properly, and/or raised privacy concerns. One law firm even filed a motion, opposed by IPR, to stay implementation of the rules altogether.

The FCC suspended the November filing date. However, eventually the FCC was able to address the industry concerns and establish a new deadline of July 8, 2010. The information is being filed in a manner that should provide easy access to the public and be in a form that facilitates analysis. With this information, the public and the Commission will be better able to determine the actual state of minority and female ownership and to assess the effectiveness of FCC policies designed to promote ownership by these underrepresented groups.

#### **E. Future of Media Inquiry**

The FCC launched the Future of Media Inquiry to examine of the future of media and the information needs of communities in a digital age. The objective of the Inquiry is to assess whether all Americans have access to vibrant, diverse sources of news and information that will enable them to enrich their lives, their communities and our democracy.

In May 2010, IPR filed comments for two different groups of clients. Comments filed on behalf of the Communications Workers of America and Media Council Hawai'i informed the Commission about the increasing use of "shared services agreements" and "local news services" to limit the sources of local news and circumvent the local

television ownership limits. The comments urged the Commission to tighten up the rules for attributing local marketing agreements and joint service agreements, which both are critical subcomponents of SSAs. In addition, they urged the Commission to vigorously enforce its existing ownership limits.

IPR also filed comments on behalf of the Public Interest Public Airwaves Coalition, a non-partisan coalition of non-profit organizations including the Campaign Legal Center, New America Foundation, and US Catholic Bishops. These comments urged the FCC to promptly seek OMB approval so that some already adopted improvements can take effect. In its Enhanced Disclosure proceeding, the FCC adopted a new, standardized form for television stations to report the amount of on various types of public interest programming they aired such as local news, electoral coverage, and public service announcements. Further, television stations would need to make this form, as well as most of the other material that is presently maintained in stations' public inspection files available to the public online. The comments argued that this information was needed to better assess what was happening to journalism and local media service.

#### **F. Children's Media Notice of Inquiry**

Under its new Chairman, the FCC has launched a broad examination of children's media issues. The Notice of Inquiry, "Empowering Parents and Protecting Children in an Evolving Media Landscape," asks broad questions

about children's use of electronic media and the associated benefits and risks to children. Among other things, the Notice sought comment on the risks from commercial content, including the marketing of junk food and data collection, and violent content. IPR and its clients have been working on these issues for years. The Notice cited the work done by the Campaign for Commercial-Free Childhood (CCFC) on the marketing of violent PG-13 movies. It also sought to update the record on two pending proceedings in which IPR filed comments – interactive advertising to children and embedded advertisement (also called product placements).

IPR filed comments in this review for two different clients. The comments filed for CCFC addressed three main issues. First, the comments alerted the FCC to the growing market for media aimed at infants, often based on misleading claims about the educational value of infant media. Infant media companies make unsubstantiated claims that their baby oriented videos have educational value, when studies show that these videos offer no benefit and may in fact be developmentally harmful. IPR counseled the FCC to ensure that parents are aware of the risks and that companies stop making deceptive claims. Second, IPR's comments addressed the risk of exposure to violent movie marketing. IPR cited two recent FTC studies confirming CCFC's findings that violent PG-13 movies are marketed during children's television programming, sometimes with fast-food tie-ins. Since industry self-regulatory efforts have failed to curb this marketing. IPR proposed that the FCC adopt rules limiting the advertising of PG-13 movies

to general audiences. Finally, the comments warned the FCC that some online parental control tools promoted as safety measures pose risks to children's privacy and expose them to highly-commercialized environments.

IPR also filed comments for the Children's Media Policy Coalition, which includes Children Now, the American Academy of Pediatrics, and other organizations. These comments, which focused on the growing market for interactive television technologies, were also filed in the FCC's docket on the Children's Television Obligations of Digital Television Broadcasters. In an order issued in that docket in 2004, the Commission tentatively concluded that interactive commercials targeted to children would be contrary to the public interest. The comments, which described how interactive technologies are being used and are poised to expand, requested that the FCC finalize this conclusion and prohibit commercial interactivity on children's television.

## **G. Child Online Privacy Protection Act (COPPA)**

### **1. Review of FTC Rules**

The FTC, which also is under new leadership, is conducting a review to determine whether the Children's Online Privacy Protection Act (COPPA) needs to be revised to protect children's privacy given recent developments in technology and marketing. COPPA generally prohibits the operator of a website or online service directed to children, or any operator that has actual knowledge that it is collecting information from a child, from collecting

personal information without (1) providing notice of what information is being collected, how the operators uses such information, and what the operator's disclosure practices are, and (2) obtaining verifiable parent consent for the collection, use or disclosure of the personal information.

When Congress passed COPPA in 1998, computers provided the only means of accessing websites and online services. Today, adults and children have many other ways to access the Internet and online services including mobile phones, gaming consoles, and interactive television. In addition, marketers have developed very sophisticated methods of collecting data and are using that data to target individuals with personalized marketing messages. These developments have increased the risks to children's privacy.

IPR students conducted legal research on COPPA and factual research on the new technologies and marketing techniques. Working closely with the Center for Digital Democracy, they developed a set of proposals that were presented in comments filed in June. The comments were joined by sixteen public interest organizations including the American Academy of Pediatrics, Center for Science in the Public Interest, Children Now, Consumers Union, U.S. PIRG, and the World Privacy Forum.

The comments suggested several ways in the FTC's rules implementing COPPA could be clarified or amended. First, they asked that the Commission update the definition of "personal information" to reflect the evolving world in which persistent cookies, IP

addresses, geolocation data, and even seemingly anonymous combinations of data such as age, zip code, and gender can be collected and used to track individuals and to target personalized market messages to them. Second, they asked the FTC to clarify that COPPA covers a broad range of digital threats to children's privacy regardless of the device used to access a website on the Internet (e.g. mobile device, game console, interactive television set). Third, the comments urged that the standards for when COPPA applies – when websites are "directed at children" or they have "actual knowledge" of a child be updated to reflect contemporary data collection and use practices. For example, IPR requested that the FTC clarify that advertisements targeted to children based on behavioral indicators meet COPPA's "directed to children" standard, and that when a website or online service operator, including advertising networks or data exchanges, claims that it can deliver an advertisement to a child in a specific age group, it has actual knowledge that it is collecting or using information from a child. IPR also asked that the Commission develop a set of separate privacy protections for teenagers.

In addition to filing written comments, IPR Director Angela Campbell and Staff Attorney Guilherme Roschke both spoke on panels at an FTC roundtable on COPPA in June.

## **2. Comment on COPPA Safe Harbor Application**

COPPA contains a provision intended to encourage industry self-regulation by allowing the use of "safe

harbors." Organizations that serve as safe harbors must develop plans and procedures for ensuring COPPA compliance and apply to the FTC for approval. If, after seeking public comment, the FTC approves the application, any website or online service operator that meets the safe harbor criteria is deemed to be in compliance with COPPA.

In the COPPA review comments discussed above, IPR made a number of proposals for improving the safe harbor program. Earlier in spring semester, an IPR student reviewed a safe harbor application filed by I-Safe and drafted comments filed with the FTC on behalf of the Center for Digital Democracy. The comments highlighted how I-Safe's proposal provided less protection to children than the rule required. IPR also noted that I-Safe's monitoring was unsatisfactory, and that its consumer complaint procedures provided several hurdles to consumers seeking to protect their privacy. Later in the year, the FTC rejected the application, citing several of the factors that IPR noted in its comment.

## **ENVIRONMENTAL LAW**

### **A. 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 reservoir project threatened 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 have resulted 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 would have been 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 was located in the middle of prime shad spawning grounds.

The Tribe challenged the reservoir project on many fronts, one of which included a lawsuit in the U.S. District Court for the District of Columbia challenging the Clean Water Act permit for the project. In late March 2009, the District Court found that the Corps and EPA acted arbitrarily and capriciously in issuing the Clean Water Act permit. As a result, the U.S. Army Corps of Engineers suspended the permit, pending review of the record. The Corps later clarified that it would not decide whether to reinstate, modify, or revoke the Reservoir project permit until it had reevaluated the project under the National Environmental Policy Act; a process that the Corps acknowledged could take years.

In the middle of the Tribe's legal success came a fortuitous shift in the political leadership of the City of Newport News. Two of the reservoir project's staunchest supporters left

office: the Mayor decided not to seek reelection and the City Council voted to fire the City Manager. Not long after, in October 2009, the City passed a resolution to discontinue the reservoir project, and directed the acting City Administrator to terminate work on the project and surrender all previously obtained permits. In support of this decision, the City cited the District Court decision and the government's decision not to appeal.

In November 2009, the Corps officially revoked the Clean Water Act permit, signaling the end of the reservoir project.

Once the federal litigation ended, IPR petitioned for attorneys' fees and costs in the District Court. The government opposed the petition, and an IPR student drafted a reply brief. In December and January, IPR filed and briefed a supplemental fee petition. In February 2010, the parties received notice that the fee matter had been assigned to a magistrate judge. IPR is currently awaiting the magistrate's recommendation.

## **2. Watershed Total Maximum Daily Loads**

In December of 2008, the Potomac Riverkeeper asked IPR to draft a letter commenting on the U.S. Environmental Protection Agency's draft Handbook for Developing Watershed TMDLs. The Riverkeeper opposes the Handbook's policy that encourages states to develop Total Maximum Daily Loads ("TMDLs") for pollutants on a watershed scale, rather than develop TMDLs for each and every

impaired Water Quality-Limited Segment (“WQLS”). PRK is a non-profit organization that seeks to improve and restore the water quality of the Potomac River and its tributaries. IPR has previously represented the Potomac Riverkeeper in numerous legal matters.

During January and early February of 2009, IPR researched EPA’s TMDL program, including the relevant statutes, regulations and legislative history. In addition, IPR reviewed the Handbook and identified potential legal and implementation problems with EPA’s guidance. IPR drafted the comment letter to EPA expressing concerns that a watershed TMDL contradicts statutory and regulatory requirements.

IPR submitted the letter to EPA on February 17, 2009. In June, the EPA contacted IPR to set up a meeting to discuss the Potomac Riverkeeper’s concerns about the Handbook. The meeting was held on August 4, 2009. At the meeting, IPR summarized the Riverkeeper’s concerns, and offered suggestions to EPA so as to avoid the Handbook being read as allowing more lenient TMDL procedures. EPA indicated that the final version of the Handbook would probably not have a public comment period, but that EPA might seek additional feedback from the meeting attendees before finalizing the Handbook.

In the fall of 2009, an IPR student researched the viability of a potential challenge to the final version of the Handbook. However, on October 29, 2009, the EPA informed IPR that it had no current plans to finalize the Handbook. This matter is now closed.

## **B. National Environmental Policy Act**

### **1. Fort Dupont Park Transfer**

IPR began working with the Maryland Native Plant Society in spring 2008 to challenge a proposed transfer of jurisdiction. The purpose of the transfer was to facilitate the expansion the Fort Dupont Ice Arena and to build a youth Baseball Academy. The initial plans for expanding the ice arena would have destroyed an acre of globally rare terrace gravel forest. IPR submitted 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 several environmental groups, including the Maryland Native Plant Society.

As a result of these comments, the National Park Service and the District changed the location of the ice arena expansion, locating the new building on an existing parking lot rather than destroying the unique terrace gravel forest. Despite this success, the plans for the Baseball Academy still threatened the health of the forest by locating parking lots and baseball fields immediately adjacent to the forest, a potential impact that the National Park Service did not analyze in its environmental assessment. On behalf of the MNPS, David Culp, and the Virginia Native Plant Society, IPR filed a Complaint challenging the National Park Service’s environmental

assessment and finding of no significant impact. The government responded with a motion to dismiss, which is currently pending before Judge Friedman.

In the meantime, the District and the National Park Service re-initiated negotiations on the terms of the covenants that would govern the proposed transfer. IPR wrote letters to the National Park Service and to the National Capital Planning Commission on behalf of the Maryland Native Plant Society et al., expressing concern their concern that the transfer would limit public access to the park and harm the health of the forest. On June 1, 2010, IPR received a copy of the new Covenants and was pleased to see that they contained provisions guaranteeing public access as well as commitments to protect the health of the adjacent forest. With new Covenants in place, the proposed transfer went before the National Capital Planning Commission. The staff report from the National Capital Planning Commission included several of the concerns raised our written comments and required further environmental review of both the baseball academy and the ice arena before construction begins. This additional level of review, in addition to the improved Covenants, provided additional security to the Maryland Native Plant Society et al. Therefore, when IPR fellow, Jamie Pleune, testified orally before the Commission, she expressed concern about the transfer, but acknowledged the improvements in the Covenants, and did not formally oppose the transfer and Maryland Native Plant Society et al., voluntarily dismissed their lawsuit. This case is now closed.

## **2. Fort Ritchie**

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 new redevelopment plan. Plaintiffs brought suit, claiming that the Army violated the National Environmental Policy Act (NEPA). 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.

In November 2009, the District Court largely sided with the plaintiffs and enjoined any redevelopment activities until the Army's analysis of the increase in development intensity and the impact of the redevelopment plan on the historic properties complied with NEPA and the court's order. The District Court found against the plaintiffs on whether the environmental and socioeconomic impacts of the transfer of Ft. Ritchie's water system to a private entity needed to be analyzed. The District Court also found unripe for review the issues of whether the Army needed to analyze the environmental impacts of the region's failure to meet national air quality standards for particulate matter and the increase in impervious surfaces under the new redevelopment plan. The Army appealed the court's decision, and the plaintiffs cross-appealed.

During spring 2010, IPR students researched and drafted an opening brief for submission to the United States Court of Appeals for the District of Columbia Circuit. Before the Court of Appeals entered a briefing schedule, the Army voluntarily withdrew its appeal. The parties attempted to negotiate a settlement to resolve the remaining issues on appeal, but were not able to reach an agreement. IPR filed the plaintiffs' opening brief on June 30, 2010. The government's opposition brief is due on July 30, 2010, and the plaintiffs' reply is due on August 16, 2010.

The Army's opposition brief was slated to be filed by August 30, 2010; however, on August 13, 2010, the Court granted the parties' joint motion to vacate briefing and oral argument and

hold the case in abeyance, in light of the Army's issuance of a new draft analysis. Released on August 9, 2010, the draft document responds to the District Court's order, expressly addresses some of plaintiffs' contentions, and analyzes the redevelopment of Ft. Ritchie based on a revamped development plan issued in June 2010. Among other things, the 2010 plan proposes to eliminate any building construction on the historic parade grounds and addresses storm water runoff from impervious surfaces by proposing to "daylight" a stream running through Ft. Ritchie and creating on-site impoundment.

The Army is currently accepting comments from the public on the draft document, and will continue to do so through mid-September. All parties suspect that the Army's issuance of a final document will moot the issues on appeal.

### **3. Monsanto Co. et al. v. Geertson Seed Farms**

In January 2010, the Supreme Court granted a petition for certiorari filed by Monsanto Company. Monsanto was challenging an injunction, issued by a California district court that prohibited the Animal and Plant Health Inspection Service (APHIS) from deregulating Monsanto's latest genetically modified crop, Roundup Ready Alfalfa. Roundup Ready Alfalfa is the first genetically modified crop for which APHIS has acknowledged a risk of cross-pollination with conventional crops. Before deregulating any genetically modified crop, APHIS must analyze and disclose the environmental impacts of deregulation under the

National Environmental Policy Act (NEPA). Even though APHIS's environmental assessment disclosing the impacts of deregulation was legally inadequate, Monsanto desired permission to continue selling and planting Roundup Ready Alfalfa while APHIS remedied its environmental assessment. A group of conventional and organic seed farmers, Geertson Seed Farms et al., opposed Monsanto's petition because they were concerned that without an injunction, their alfalfa could become genetically contaminated and unmarketable.

IPR wrote an amicus brief on behalf of preeminent environmental law scholars, including Robert Glicksman, Oliver Houck, Daniel Mandelker, Thomas McGarity, Robert Percival, Zygmunt Plater, and Nicholas Robinson, as well as two former General Counsels for the Council on Environmental Quality, Dinah Bear and Gary Widman. The brief argued that the district court's injunction respected the will of Congress by requiring a proper NEPA analysis to be conducted *before* Roundup Ready Alfalfa was released into the environment. IPR students and fellows researched, drafted, and submitted the brief.

Prior to oral argument, counsel for Geertson Seed Farms et al., participated in a moot argument through Georgetown's Supreme Court Institute. IPR fellow Jamie Pleune sat on the panel of judges. IPR students attended the moot, and were able to meet and talk with the attorneys in the case about their amicus brief and their impression of the moot argument after the argument. The night before oral argument at the Supreme Court, the

IPR students who helped write the amicus brief camped out in front of the Supreme Court in order to be sure that they would get tickets to see the argument. They did indeed get tickets, and they were able to see the argument, a highlight of their experience at IPR!

In June, the Supreme Court ruled 7:1 in favor of Monsanto; however, the opinion was narrow, avoiding many of Monsanto's arguments that would have significantly weakened NEPA. This case is now closed.

#### **4. National Trust for Historic Preservation v. U.S. Dept. of Veterans Affairs**

In late spring of 2009, IPR began representing the National Trust for Historic Preservation in a case involving the destruction of a historic neighborhood in downtown New Orleans. The U.S. Department of Veterans Affairs ("VA") and the Louisiana State University, with funds from the Federal Emergency Management Agency ("FEMA") plan to construct two new hospitals in Lower Mid-City, instead of re-using the land where the hospitals currently stand empty. Locating the hospitals in Lower Mid-City will destroy 165 historic homes, many of which were reconstructed after Hurricane Katrina. The project will relocate over 600 residents and 63 businesses.

The VA and FEMA prepared a joint environmental assessment that analyzed the first phase of the project—site selection and demolition of the existing buildings on the site. The environmental assessment did not

consider or disclose impacts caused by later phases of the project, such as building or operating the new hospitals and abandoning the old hospitals. Both agencies concluded that the first phase would cause no significant environmental impacts.

IPR assisted in drafting and filing a complaint 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, as well as the agencies' 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. On July 27, 2009, the district court granted the federal agencies' motion to transfer the case to the Eastern District of Louisiana, where the district court granted the motions to intervene submitted by the City of New Orleans ("the City") and the Louisiana Division of Administration, Office of Facility Planning and Control ("the State").

In the fall, IPR students drafted a motion for summary judgment, which was filed on November 25, 2009. Shortly thereafter, Oliver Houck, a professor of law at Tulane University wrote a powerful amicus brief supporting the National Trust's arguments. The brief was written on behalf of four former leaders of the President's Council on Environmental Quality (CEQ): J. Gustave Speth, former Chairman and Member of the CEQ, Dinah Bear, former CEQ General

Council, Gary Widman, former General Council, and Ray Clark, former CEQ Associate Director of NEPA oversight.

Because plans for demolishing the historic buildings on site were imminent, the federal defendants agreed to an expedited briefing schedule. IPR received the Administrative Record on December 31, 2009. The spring semester students were welcomed into clinic by the arrival of three cross motions for summary judgment filed by the City, the State, and the federal defendants, respectively. The students helped draft an Opposition to the Cross Motions for Summary Judgment, which was due two weeks later. On February 9, 2010, IPR fellow Jamie Pleune, accompanied by three IPR students slipped out of Washington D.C. between the two epic snow storms and flew down to New Orleans for an oral argument. While the Court was deliberating, the City and the State began acquiring houses and office buildings on the site through expropriation. IPR students helped draft and file a Motion for Preliminary Injunction to maintain the status quo until the Court issued its decision. Unfortunately, the Court issued a decision denying the National Trust's Motion for Summary Judgment and the Motion for a Preliminary Injunction shortly after we filed the preliminary injunction motion.

After closely analyzing the district court's decision, IPR students helped draft a motion for reconsideration based on legal and factual errors in the district court's opinion. The City, State, and federal defendants opposed the motion for reconsideration. Although we did not

receive the opposition briefs until after the clinic semester had ended, one IPR student returned to help draft and finalize the reply. Unsurprisingly, the district court denied the motion for reconsideration. However, the National Trust's on-the-ground advocacy may still produce some results. Recently, the Mayor of New Orleans ordered demolition on the site to stop for forty-five days while the design for the hospitals was reconsidered and while the City explored additional ways to move the historic houses to abandoned lots elsewhere in the City. The National Trust is still considering its options going forward.

## **C. Land Use**

### **1. Digital Billboards**

IPR represents Scenic America, a national organization dedicated to preserving and enhancing the visual character of America's communities and countryside. Scenic America opposes a guidance memo issued by the Federal Highway Administration (FHWA), which interprets federal-state agreements under the Highway Beautification Act (HBA) that prohibit placing billboards with flashing, blinking, or moving lights near federal highways to allow digital billboards. The practical effect of the guidance memo was to eliminate federal oversight of the placement of digital billboards near federally funded highways.

During the fall 2009 semester, an IPR student researched and drafted a petition for rulemaking to submit to the

FHWA. The petition asked for an immediate moratorium on construction of new digital billboards, and asked for a regulation that defines "flashing, intermittent, and moving light or lights" in a way that includes digital billboards. The petition argued that digital billboards are illegal under the plain language of federal regulations and federal-state agreements; that the FHWA promulgated the guidance memo in violation of the APA; and that digital billboards undermine the highway safety and scenic beauty imperatives of the HBA.

On February 23, 2010, IPR submitted the finalized petition to the FHWA. Around the same time, a New York Times reporter working on a piece about the dangers of digital billboards interviewed IPR and Scenic America. On March 1, 2010, the New York Times published the article as part of its series on distracted driving, and included mention of the rulemaking petition filed with the FHWA.

On April 8, 2010, IPR received a letter from the FHWA stating that a final response to the rulemaking request "will take some time." Without giving any reasons, the FHWA stated that it did not find a moratorium to be "warranted" at this time. Currently, IPR is monitoring the status of the petition.

At Scenic America's annual gathering this past spring, an IPR student received an award for her work on the rulemaking petition.

## **2. St. Elizabeths and Shepherd Parkway**

St. Elizabeths, a National Historic Landmark (“NHL”), is a mental health facility that sits on bluffs overlooking the Potomac and Anacostia Rivers in southeast Washington, D.C. IPR’s previous work involving St. Elizabeths included an effort to close an ash dump located on the East Campus. The project was resolved with the D.C. government installing a higher fence around the dump in order to keep children from playing in the toxic ash.

In early 2009, IPR began representing the National Trust for Historic Preservation and the Maryland Native Plant Society in their opposition to the proposed consolidation of the Department of Homeland Security (“DHS”) at St. Elizabeths Hospital and the related construction of an access road through Shepherd Parkway. The DHS consolidation project primarily affects the West Campus. The consolidation 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 limit public access.

To accommodate the projected motor vehicle traffic associated with the consolidated headquarters, DHS proposed constructing an access road through Shepherd Parkway, which abuts St. Elizabeths West Campus. Shepherd Parkway is a Forts Circle Parks connector. As a connector, it serves the important function of providing corridors that link to large

fort sites. Such corridors facilitate wildlife movement, which furthers genetic and biological viability of plants and animals and contributes to the “critical mass” of the ecosystem. Shepherd Parkway also has significant ecological value in its own right: It is an example of an ecosystem known as the Mesic Eastern Deciduous Forest, which is rare in the District. Shepherd Parkway also contains plants, plant associations, and indigenous ecosystems that are of extraordinarily high quality, especially when one considers their location in a densely populated urban area. In fact, four species of plants found in Shepherd Parkway are not found anywhere else in the District of Columbia.

In December 2008, the FHWA released a Department of Transportation Act Section 4(f) evaluation that proposed approving construction of an access road through Shepherd Parkway. A 4(f) evaluation and decision are required for the access road because Shepherd Parkway and St. Elizabeths are public lands. On January 23, 2009, IPR submitted comments on this 4(f) Evaluation on behalf of the Maryland Native Plant Society. The comments stated that the 4(f) Evaluation was inadequate because FHWA had failed to consider hybrid alternatives, the use of transit and the intrinsic ecological value of Shepherd Parkway.

During the fall 2009 semester, an IPR student reviewed a supplemental 4(f) evaluation released by FHWA in late July and began preparing comments in anticipation of the final 4(f) release. The complete 4(f) documents were released for comment

on November 22, 2009. On December 25, 2009, IPR filed comments on behalf of the National Trust and the Maryland Native Plant Society outlining concerns regarding the continuing inadequacies of the 4(f) alternatives and mitigation analysis.

To date, FHWA has taken no further action. This matter is now closed.

## **D. Open Government**

### **1. 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.

In February 2009, an IPR student submitted District of Columbia 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. With the exception of the Deputy Mayor’s Office, IPR received adequate responses to the FOIA requests. The Deputy Mayor’s Office refused to disclose an indefinite number of emails between it and the private developer for McMillan Park, citing the inter/intra-agency exemption under FOIA.

In fall 2009, IPR students researched the viability of challenging the non-disclosure, and drafted an administrative appeal and complaint. In the spring 2010 semester, IPR filed the administrative appeal. The Deputy Mayor’s Office failed to respond within the statutory period, and IPR filed a complaint for declaratory and injunctive relief in D.C. Superior Court. The Deputy Mayor’s Office filed a motion to dismiss the complaint, arguing that it was not a suable entity. IPR amended the complaint to add the District of Columbia as a defendant, and opposed the motion to dismiss, arguing that FOIA expressly provides for suit against government agencies like the Deputy Mayor’s Office. The court agreed with the Deputy Mayor’s Office and dismissed it from the case. The case will continue against the District of

Columbia, and a scheduling conference is set for September 24, 2010.

## **E. Air Quality**

### **1. North Carolina v. Tennessee Valley Authority**

In January 2006, North Carolina filed a complaint against Tennessee Valley Authority (TVA), alleging that TVA's coal-fired power plants were a public nuisance. In January 2009, the federal district court for the Western District of North Carolina agreed. In a detailed opinion, the district court made factual findings that the pollution from four of TVA's power plants acidified the soil thereby harming local vegetation; marred scenic vistas, such as the Great Smoky Mountains; and caused adverse health effects including premature mortality, exacerbated asthma symptoms, and irreversible scarring on lungs. Due to these very negative effects on the environment, visibility, and human health, the district court concluded that TVA's emissions were a public nuisance under both Alabama and Tennessee law (the states where TVA's four power plants were located) and issued an injunction requiring that additional emission control technology be installed. TVA appealed to the Fourth Circuit.

Over the summer, IPR fellows wrote an amicus brief on behalf of American Lung Association and American Thoracic Society. The brief confirmed that the district court's factual findings regarding the health impacts of ozone and other pollutants were widely accepted in the scientific

community and further supported by recently released studies.

In the fall, IPR students helped draft another amicus brief, co-authored with the Southern Environmental Law Center, and submitted on behalf of the National Parks Conservation Association, Natural Resources Defense Council, and the Sierra Club. The brief reviewed legislative history and the text of the Clean Air Act to argue that it preserved, rather than preempted, North Carolina's public nuisance claim as a mechanism to abate air pollution. IPR students helped research, draft, and proof the brief before submission.

In preparation for oral argument, North Carolina's State Attorney General scheduled a moot argument at Georgetown, enlisting the help of IPR fellows and directors as well as local practitioners. IPR students who had worked on the brief in the fall returned to attend the moot argument. The Fourth Circuit heard oral argument in the beginning of May. The Fourth Circuit ruled against North Carolina in July, reasoning that the injunction interfered with the Clean Air Act.