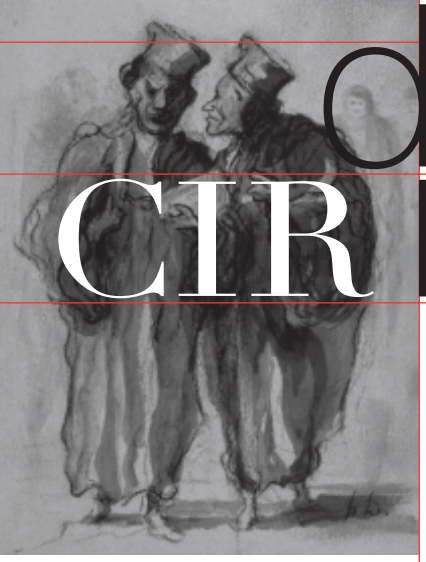

CIR docket report

Fall 2000, Vol. XI, #1

CIR Goes to Trial Against Racial Preferences at UM

CIR's twin cases against racial preferences at the University of Michigan finally will go to trial. Pre-trial hearings in the case against the Undergraduate College of Literature, Sciences, and the Arts will take place November 16, 2000. And the law school trial is scheduled to begin on January 15, 2001.

Either one of these cases could settle once and for all the question of whether state schools can use vastly different admissions criteria for minority applicants in order to procure a particular racial mix of students. Although the pre-trial discovery period was lengthy, from CIR's point of view, it has been time well-spent.

Through court-ordered discovery, CIR has obtained documents and sworn testimony from Michigan officials that prove beyond a doubt that the undergraduate college maintains two separate admissions systems and is thus in clear violation of anti-discrimination provisions in the Constitution. The University now acknowledges, among other things, that it utilizes a separate admissions standard for minority applicants as a group.

Throughout the admissions process, race is used over and over again to insulate minority and non-minority applicants from direct comparison. During the year that CIR client Jennifer Gratz applied, admissions clerks employed different screening criteria for determining which applicants would be passed on for further review. Not infrequently, non-minority applicants were rejected solely on the

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IN THIS ISSUE

Jennifer Gratz appeared recently on CBS News' 60 Minutes to talk about CIR's landmark cases challenging racial preferences in admissions at the University of Michigan.

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CIR Goes to Trial Against Racial Preferences at UM

basis of grades and test scores that, if held by minority applicants, would likely have resulted in acceptance. In other years, the undergraduate college has reserved admission slots exclusively for minority applicants and sent only non-minority applicants to the school's waiting list.

Race plays an equal if not greater role in the law school admissions process. CIR's analysis of the law school admissions data shows that for applicants with similar credentials, members of preferred ethnic groups are, in some cases, 200 times as likely to be admitted.

All of the evidence so far uncovered is uncontested by the University and is devastating to its claim that race is used as only one of many factors in compliance with Justice Powell's opinion in *Bakke*. Yet the truth of the matter is that the University of Michigan could not have designed an admissions system more at odds with Powell's opinion.

In response to its critics, the University maintains that the Constitution permits it to use whatever means necessary to "fine-tune" the kind of racial mix it prefers. While no one questions the educational value of *intellectual* diversity in the broad sense of that term, the University contends that mere racial diversity has educational value. According to this claim, students learn better when they sit next to, study with, and live in the same dorms as students with different skin colors.

But reducing the important idea of diversity to mere skin color is highly dubious. Even assuming the school discerns some benefit to a particular racial mix, it doesn't follow that the Constitution permits it to discriminate against individuals of a certain race in order to achieve those benefits. To justify racially preferential admissions, the University must show that the benefits it cites are compelling, not slight, and that they cannot be achieved in any less onerous manner. This it cannot do.

Faced with the reality that its admissions system is blatantly unconstitutional, the University has mounted an extraordinary public relations campaign designed to delay the case and distract attention from the fact that it routinely admits students on the basis of illegal racial preferences.

CIR got a taste of Michigan's public relations crusade at a routine motions hearing last spring. With the generous help of the University's e-mail system and some approving public comments from the University's Associate Counsel, the minority interveners in the law school case arranged to have hundreds of demonstrators show up outside the courthouse waving placards. After making their point outside the building, the demonstrators proceeded to the courtroom where they filled nearly every available seat, including the jury box

As the trials approach, CIR looks forward to finally sorting through the facts — and fictions — of the University of Michigan's constitutionally inadmissible admissions policies. Stay tuned….

Lawyers for the Plaintiffs—David Herr, Kirk Kolbo, Larry Purdy

When the University of Michigan student paper published a picture last April showing dozens of demonstrators protesting CIR's lawsuits outside the U.S. District Court in Ann Arbor, the attorney walking through the crowd was David Herr, partner at the prestigious Minneapolis firm of Maslon Edelman Borman & Brand, LLP.

By the time CIR's twin cases against the University reach the U.S. Supreme Court, as many expect they will, Herr, lead litigator Kirk Kolbo, and fellow partner Larry Purdy will have worked thousands of hours *pro bono* — a donation of legal services valued in excess of three million dollars.

Since its founding eleven years ago, CIR has endeavored to build a network of private attorneys willing to handle conservative and libertarian cases on a *pro bono* basis. To make it more likely that interested lawyers can get these pro bono projects approved by their law firms, CIR agrees to pay all trial-related expenses including those for transcriptions, expert witnesses, and travel.

By enlisting the assistance of outside counsel, CIR gets the extraordinary benefit of top-flight litigation counsel at a fraction of market rates. But CIR's co-counsel benefit as well: they have the opportunity to participate in fascinating, precedent-setting litigation and can do so without the bloated out-of-pocket expenses and public relations responsibilities typical of such high-profile cases.

For their part, Kolbo, Herr, and Purdy welcome the opportunity to take on the University of Michigan. Says Kolbo, "This is the kind of case most lawyers dream about litigating. If this case goes to the Supreme Court, it will be the next *Bakke.* Truly precedent-setting litigation like this is rare."

The Plaintiffs: Gratz, Hamacher, Grutter

When 19 year-old Jennifer Gratz returned to her home in suburban Detroit the day after *The New York* Times featured her as the lead plaintiff in CIR's lawsuit challenging racial preferences at the University of Michigan, she quickly realized that life now would be different.

Parked in the driveway was a huge satellite television truck, and several TV personalities were waiting to talk to her about the case. Since then, the media furor has died down, but Jennifer and the other named plaintiffs, Patrick Hamacher and Barbara Grutter, have endured countless interviews and depositions that probed every aspect of their lives.

What led these individuals to file such a momentous suit against the University of Michigan? Each has learned first-hand what it is like to have to change life plans and career goals simply because state school officials decided that they have the wrong skin color. And none of them can understand why, year after year, the flagship school of their state could be allowed to flout with impunity nearly every legal restriction on race-based admissions.

It will be years before the cases brought by Jennifer, Patrick, and Barbara are finally decided. But that scarcely matters to them. As Grutter explains, "What would I be saying to my children if I didn't challenge something so clearly wrong?"

Supreme Victory

CIR has achieved an historic victory for individual rights through its successful litigation before the U.S. Supreme Court of the precedent-setting *U.S. v. Morrison.*

The Court ruled in *Morrison* that Congress exceeded its Constitutional authority in enacting a provision of the Violence Against Women Act that created a federal right-to-sue for women who are victims of violence motivated by gender hatred or bias.

Incredibly, CIR's out and out success in *Morrison* followed hard on the heels of its earlier Supreme Court victory in the closely-watched voting rights case *Bossier Parish.* In that decision, the Court agreed with CIR that if proposed districting changes in a jurisdiction do not leave minority voters worse off than before, then the Justice Department cannot force the adoption of gerrymandered districts designed to maximize minority voter strength. Like *Bossier Parish* and another CIR-litigated case *Rosenberger v. University of Virginia*, *U.S. v Morrison* is a highly significant decision that will shape the law for decades to come.

The constitutional significance of *Morrison* lies in its unambiguous reaffirmation of individual rights. As the framers realized, the sensible regulation of purely in-state individual conduct is better left to state and local governments than to an overbearing federal legislature. The framers' conception of a federal legislature of limited, enumerated powers makes all the more sense in an age when numerous and vociferous constituencies use one federal law after another to promote sectarian causes.

In *U.S. v Morrison*, as readers of this publication no doubt are aware, CIR represented Antonio Morrison, one of the defendants. Michael Rosman, CIR's General Counsel, litigated the case through the federal courts and made his first-ever appearance before the Supreme Court to argue the constitutional issues in January.

CIR's ground-up approach to constitutional litigation requires years of focused determination: cases must first be identified, then carried through trial and appellate courts, and finally argued before the Supreme Court. It is through such persistent effort over the long haul that CIR develops facts and frames concepts in a way that forces the Court to grapple with groundbreaking issues.

The *Morrison* ruling reinforces the importance of pursuing the case in yet one more court – the critical arena known as the court of public opinion. Such national opinion outlets as *The New York Times* and *The Washington Post* have been abuzz with commentary about *Morrison's* significance. This kind of activity in the news media is a key factor in making sure that the legal victory in *Morrison* resonates with the public as a legitimate expression of fundamental constitutional principles. *Morrison* is a good example of how the complementary tracks of litigation and public discourse can help to reinforce each other.

As written by Chief Justice Rehnquist, the *Morrison* decision stands as a ringing affirmation of the Court's increasing insistence that Congress hew to the constitutional limits of its power to legislate on matters of local concern. CIR will vigorously pursue one or more follow-up cases to *Morrison* that will give the Court further opportunity to limit federal regulation of purely in-state activity.

CIR General Counsel Michael Rosman argued — and won — his first-ever case before the High Court last January. The Court agreed with Rosman's contention that Congress exceeded its constitutional authority when it created a federal tort remedy for female victims of gender-motivated violence.

Clockwise from top photo: CIR's Michael Rosman looks over a brief with Harvard Law student Dimple Gupta; Northwestern undegraduate Michael Hoes readies CIR's new web page; Koch Foundation Fellow Andrew Cook, University of Maryland undergraduate Ned Cheston and Hoes gather in CIR's conference room.

Summer Clerks

Each summer, CIR's ranks swell with the addition of several law clerks and summer interns. As one of the premier conservative litigation boutiques, CIR offers law students an unparalleled opportunity both to gain valuable hands-on experience with some of the best and most experienced litigators

around and to participate in groundbreaking cases like CIR's twin efforts against the University of Michigan.

This summer for example, Harvard Law School "2L" Dimple Gupta split her time between the Washington, D.C. law firm of Covington & Burling and CIR. While at CIR, she worked closely with CIR's General Counsel Michael Rosman and others on briefs that would soon be filed in CIR's litigation against racial preferences at the University of Michigan. Gupta spent much of her time analyzing Michigan's "expert" reports puporting to document the educational value of racial diversity. She had a direct hand in preparing for a case that could help change the face of American education for years to come. Not many of her classmates could make the same claim about their summer clerkships.

Several enterprising college students also find their ways to CIR's doors each year. This summer Ned Cheston (University of Maryland), Michael Hoes (Northwestern University) and Koch Foundation fellow Andrew Cook (John Marshall Law School) undertook a variety of hands-on tasks including re-doing CIR's web page [see back cover], researching minority enrollment in California and Texas, writing op-ed articles, and assisting with legal research.

Judge to Maryland: "Pervasive" is not Persuasive

CIR's case on behalf of Seventh-day Adventist affiliated Columbia Union College took a huge leap forward in August when Federal District Court Judge Marvin Garbis ruled that CUC is not "pervasively sectarian."

For years, Maryland officials have refused to provide CUC with the state aid for which it qualifies. While such funds routinely flow to the state's many colleges affiliated with the Roman Catholic church, officials claim that funding CUC would violate the Constitution's ban on state established religion because Seventh-day Adventism is, well, *too* religious.

In particular, the state finds it objectionable that Columbia Union requires day-students to attend chapel, imposes a strict student dress code, prefers to hire faculty members who practice Seventh-day Adventism, and seeks, through many of its courses, to integrate faith and learning.

Judge Garbis rejected these objections as a basis for withholding state funds, and we heartily applaud that decision on behalf of First Amendment rights. But we also note that Garbis himself had to delve into every aspect of CUC's operation in order to come to the conclusion that CUC was not "pervasively sectarian." If it is troubling when state bureaucrats seek to determine whether a school is *too* religious to receive state funds, it is no less troubling when such assessments are being made by federal judges.

The Columbia Union case has potentially important implications for school choice. As long as the pervasively sectarian doctrine is good law, it provides a way for teachers unions and their allies to keep school choice programs safely insulated from participation by entities deemed too religious.

Like voucher programs, the Maryland aid program measures state aid to schools by the number of students who attend the institution: the more students who decide to attend a particular school, the bigger a share of state aid that school receives.

Because the amount of aid depends on the *free choices* of individual students to attend the school, state aid cannot reasonably

Seventh-day Adventist Columbia Union College, located in Takoma Park, Maryland, wants to receive the state aid for which it qualifies, but the state says that the school is "pervasivelysectarian," i.e. too religious.

be construed as state endorsement of religion, and the religiosity of the school — "pervasive" or not — should be of no concern to the state.

We believe that the CUC case offers an excellent opportunity for the courts to finally jettison the pervasively sectarian doctrine altogether. For that reason, the return of the case to the Fourth Circuit as a result of Maryland's decision to appeal comes as a welcome development.

If we are successful in getting the Supreme Court to review the pervasively sectarian doctrine, *Columbia Union* could help give school choice and equitable state funding for parochial schools a safe haven on the legal landscape for years to come.

Housing Protestors Un-silenced

One of the most disturbing misuses of federal law in recent years has been the wielding of federal discrimination statutes against those who express so-called "politically incorrect" (read: "conservative") views. Now it is housing advocates (and even private developers!) who are using this insidious tactic to silence or intimidate those who oppose controversial housing proposals by charging that such individuals are guilty of federal discrimination.

It was against just this kind of misuse of law that CIR recently scored a double knock-out. In a landmark decision this September, the U.S. Court of Appeals for the Ninth Circuit upheld an earlier decision holding several federal civil rights officials liable in their *individual* capacities for launching a housing discrimination investigation against three Berkeley, CA residents. The "Berkeley Three," as they came to be known, had simply protested a planned homeless shelter in their neighborhood.

In a second case, U.S. Federal District Judge Oliver Wanger dismissed all eleven claims of discrimination against CIR client Travis Compton. Compton had been appointed by the Fresno (California) City Council and Mayor to serve on a community advisory committee. When he and the committee ended up recommending against proposed public bond financing of multi-millionaire real estate developer Peter Herzog's plans for low-income housing, Herzog retaliated by suing Compton and numerous other individuals for discrimination. According to information developed during discovery, Herzog included Compton in the suit because he had said some "mean" things at a public meeting.

The Berkeley and Compton cases illustrate what can happen when the state gets into the business of punishing speech deemed "discriminatory" to one or another favored constituency. Ordinary speech becomes suspect. Federal bureaucrats can move, under cover of law, to suppress common, garden-variety objections to burdensome government policies. And suddenly ordinary citizens must prove the absence of discriminatory intent or face crippling fines.

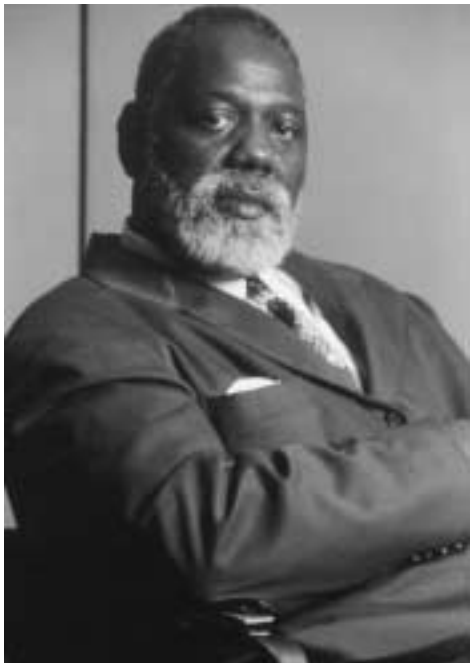
Thus instead of defending the right of private individuals to speak out on matters of importance, the government has perversely claimed a right for itself to be free of citizen action that it deems to be meddlesome. Nothing could be further from what the framers had in mind when they created a government of limited powers.

CIR Sues to End Boston Discrimination Against Summer Bible Camp

Al Gore is for it. George W. Bush made it a big part of his campaign. The idea is that sometimes religious organizations serve *secular* functions better than non-sectarian organizations. As long as religious providers do not proselytize, why not let them participate in public welfare programs on the same terms as anyone else?

Actually, the idea is not a new one. For seven years, the city of Boston included Mason Cathedral's summer bible camp, Keys of Life, in its SummerWorks program. SummerWorks uses federal job training funds to pay teenagers to work in any one of 150 or so city-approved job sites. The program gives inner-city teenagers practical job experience while providing non-profit organizations with needed summer help. At Keys of Life, teens were given jobs as counselors.

All of this came to an end two summers ago, when city officials discovered "religious activities" (gasp!) during a surprise inspection of the bible camp. The "religious activities" in question consisted of a recitation of the Lord's Prayer every morning, followed by a short Bible story and discussion. These activities were led by the camp director, Kenya Cross, not by the counselors. Counselors and campers would then spend the rest of the day playing games, going on field trips, swimming, reading – exactly the sort of secular activities one might find at any summer day camp.



Mason Cathedral Pastor, the Rev. Thomas Cross, is suing the City of Boston to let city-paid teen counselors continue to work at his summer bible study camp

City officials demanded that all prayer cease. When Cross pointed out that as the director of a bible camp, she couldn't exactly eliminate prayer, city officials demanded that the counselors stand in a separate part of the room during that time. Although this was a somewhat heavy-handed way to impress youngsters with the religious neutrality of the state, Cross agreed to the procedure in the interest of keeping the camp going.

As it turned out, city officials remained so disturbed by the presence of SummerWorks counselors in the room during prayer time that they yanked them from the program just a few days later. This left Cross and her father, the Rev. Thomas Cross, scrambling to replace half of their camp staff for the remainder of the summer.

So on September 12 of this year, CIR filed suit in U.S. District Court in Boston. We are challenging the "we want to have it both ways" strategy whereby Boston wants the benefits of Keys of Life's participation in SummerWorks while, at the same time, it demands that the bible camp secularize itself and prevent its own employees from exercising their First Amendment right to participate in incidental religious expression.

Needless to say, the First Amendment does not permit

the government to police the religious choices of individual citizens in this manner. The counselors freely chose to work at Keys of Life out of hundreds of other approved worksites (most of which were secular in nature). Cross and her father went out of their way to make sure the counselors (and their parents) understood the religious character of Keys of Life before the summer began. And Cross repeatedly told the counselors that participation in the short morning prayer and Bible story — the sole religious activities of the day — was strictly voluntary.

Mason Cathedral represents the next battleground over church-state relations. As jurisdictions include more "faith based" organizations in public welfare and other programs, government officials will be increasingly tempted to regulate and control those organizations and to otherwise strip them of their religious character. The stakes are high, especially if the Supreme Court permits religious schools to participate in school voucher programs.

That is why CIR is determined to make the Mason Cathedral litigation a centerpiece of its vigorous on-going effort to protect the individual's constitutional right to religious expression.

CIR Supports Choice

CIR's cases on behalf of Columbia Union College and Mason Cathedral reflect a comprehensive legal strategy for defeating efforts by government officials to limit participation by religious organizations in the burgeoning array of public programs based on individual choice.

What then are some of the key elements in CIR's winning strategy?

- CIR commissions its own litigation and builds its cases from the ground up. This approach is certainly more costly and time-consuming than the *Amicus* brief, but it is infinitely more effective in First Amendment cases where a strong set of underlying facts is critical.
- While many religious organizations approach CIR for help in cases involving choice programs, CIR carefully screens all prospective cases to come up with the handful that have the potential to change the law in fundamental ways.
- Once a case is selected, it is developed with great care since even a small error could disrupt the fragile voting block on the Court that is receptive to further involvement of religious organizations in choice programs. Often CIR will enlist the *pro bono* assistance of first-rate attorneys to act as co-counsel.

It is important that hard-won gains in the area of individual choice not be undermined by relentless efforts to subvert choice involving religious organizations. CIR will continue to build on its unparalleled track record in spotting and developing cases that expose and challenge this wrongful assault on individual rights.

CIR's New CEO —Terence Pell

As the pages of this new Docket Report attest, these are exciting times for CIR. Two victories before the Supreme Court last term, three recent victories in our free expression cases, and the racial preferences "trials of the century" beginning in January 2001 — results like these are impressive by any measure, but especially in light of CIR's small size and budget.

CIR is now at the forefront of three major realignments in American constitutional law. Each promises to reimpose principled limits on government authority. And each will make a huge difference in the everyday lives of Americans.

CIR's victory last term in *Morrison, successfully challenging* the constitutionality of the Violence Against Women Act, will likely impose significant new restraints on the authority of Congress to interfere in state and local policy and make it that much more difficult for Washington-based advocacy groups to impose their agendas in every nook and cranny of the country.

A win in CIR's cases on behalf of Columbia Union College and Mason Cathedral will protect the right of religious organizations to participate in government funded programs on the same terms as other groups. The inclusion of religious organizations in individual choice programs — especially in the areas of education and social welfare — is one of the most promising developments in public policy in years and must not be compromised by governmental attempts to dilute or eliminate the religious character of those newly participating institutions.

And CIR's race preference cases — particularly against the University of Michigan — are the most visible and best positioned efforts to finally end government race engineering in public college admissions. A win in these cases will hasten the day when students are admitted to colleges and universities on the basis of their academic credentials rather than the color of their skin.

High stakes cases are important to CIR, to be sure, but they are more important to the country. For over twenty years, the Left has had unfettered ability to cloak its policy nostrums in constitutional respectability. Almost alone among conservative public interest law firms, CIR has enjoyed one startling success after another in challenging that tactic.

At the end of the day, CIR stands or falls with the idea that restoring a robust constitutional structure that places principled limits on *all* government activity is more critical now than ever. The question on the table should not be about *reinventing* government preferences, subsidies, and regulation but rather about the fundamentally more interesting possibility of *ending* unrestricted government involvement in the everyday lives of citizens. More so than any other organization, CIR can make this latter debate a reality.

CIR is a "do tank" not a "think tank." We believe that the resources are already at hand to move the country firmly in the direction of a credible and principled conception of limited government built on a restored sense of the right and ability of individuals to control their own destinies.

Mr. Pell was named CEO in March 2000. Prior to that, he served as CIR's Senior Counsel. Mr. Pell received a B.A. from Haverford College, a J.D. from Cornell Law School and a Ph.D. from Notre Dame.

We are grateful for the support of many individuals — friends, donors, and attorneys — who have helped make CIR one of the premier public interest law firms. With your continued support, we will find new ways to re-invigorate principled, constitutional limits on government action.

I hope you share my enthusiasm for what promises to be an exciting future for CIR.

Terry Pell

IN OTHER CASES...

Boulahanis v. Board of Regents

CIR's challenge to gender proportionality in college athletics hit a bump in the road when the U.S. Supreme Court declined to consider CIR's constitutional challenge to the widespread practice of eliminating men's athletic teams in order to assure gender equality. The Court let stand a ruling that Title IX provides the sole statutory remedy for sex discrimination in college athletics and thus precludes a separate legal challenge under the Equal Protection clause of the 14th Amendment."

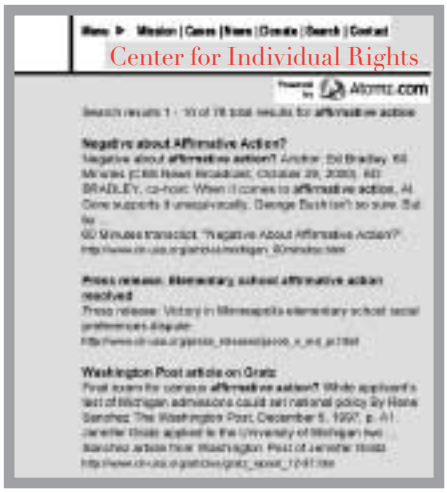
GRID v. FCC; U.S. v. Szoka

CIR's client Jerry Szoka has operated the GRID, a Cleveland-based, low-power "microradio" station that has been broadcasting dance music without commercial interruption since September 1995 — or at least he used to. Earlier this year, the FCC forced him to shut down the station for transmitting his signal without a license. The truth of the matter is that there was no license to be had since the FCC banned microbroadcasters from the airwaves. The FCC contended — until January of this year, when it rescinded its policy — that low-power broadcasters would create uncontrollable electromagnetic interference with commercial broadcasters. Though its change of heart would suggest that its prior ban was arbitrary and capricious, the FCC is determined to punish Szoka and the other microbroadcasters who had the temerity to challenge the agency. On February 23, U.S. District Court Judge Kathleen O'Malley upheld the FCC's seizure of Szoka's equipment, but questioned whether the FCC ban was constitutional under the First Amendment. CIR is appealing that ruling while simultaneously bringing an action against the FCC before the U.S. Court of Appeals for the D.C. Circuit.

U.S. v. New York City Board of Education

On October 23, CIR General Counsel Michael Rosman appeared before the U.S. Court of Appeals for the Second Circuit to challenge a sweetheart consent degree negotiated between the Clinton Justice Department and the New York City Board of Education. Although the suit did not allege intentional discrimination, the consent degree did grant retroactive seniority rights as well as preferential promotion and testing aid to minority and women custodians. In effect, the School Board "funded" a "remedy" for non-existent discrimination by permanently "taxing" the seniority rights of non-minority custodians. CIR is representing several white custodians who objected to this arrangement.

CIR's New Web Site
Great moments in technology:



"The Eagle has landed."
"One small step for [a] man, one giant leap for mankind."
"CIR's web site is up."

CIR was incredibly fortunate to have the (free) services of Michael Hoes, a Northwestern University student and computer whiz extraordinaire. Michael spent the summer completely re-designing CIR's extensive web site to take advantage of new technology.

As a public interest law firm, CIR devotes a great deal of effort explaining its cases to students, scholars, and other lawyers. Increasingly, this effort takes place on the web, where interested individuals can download copies of briefs, articles, and other information about CIR and its programs.

To see the results of Michael's efforts, point your browser to: **http://www.cir-usa.org**

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