

Fall 2010

## IN THIS ISSUE

### Let the Sun Shine

page two

### The Best Defense

page three

### CIR Clerk wins Prize

page four

### Housing Officials Go to CIR Summer School

page four

### Peekaboo's Original Sin

page six

### Summer Clerks Swell CIR Ranks

page seven

## Welcome to the Machine

**A**s current events in Washington unmistakably show, the Democratic Party has become a machine for rewarding its friends and harming its foes. Tirelessly, it works to make more and more elements of our society beholden to it, from recipients of unemployment benefits to major corporations eager to deal in “carbon credits.”

In a major new lawsuit, CIR is representing residents of Kinston, North Carolina, who voted not to have *any* party machine—Democrat or Republican—in their town. That is, until the the Obama Justice Department told them they had no choice. The case is an excellent opportu-

nity to strike down one of the most pernicious race preferences in federal law, Section 5 of the Voting Rights Act.

You see, a machine needs levers if it is to function, and for the Obama Administration, one such lever has proven to be Section 5. Back in 1965, when Congress passed the Voting Rights Act, Section 5 was a nonpartisan measure designed to end race discrimination related to voting. Jurisdictions that were “covered” in the statute had to apply to the federal Justice Department for “preclearance” before they could make any changes in voting procedures. Prohibited changes were those with the purpose or

effect of making it harder for minorities to exercise their right to vote. And since this preclearance process was recognized as an extraordinary intrusion into the right of states and localities to fashion their own voting procedures, Section 5 was set to expire in five years.

But instead, Congress kept extending Section 5. The last time was in 2006, when it extended it all the way to 2031 (we think that was the year *The Jetsons* was set in). Along the way, the standard was not-so-subtly changed, to this: a voting change now violates Section 5 if it would lessen the ability of minority voters to elect their *candidates of choice*.

*continued on page six*



*Not in our town: President Terry Pell (far right) with Stephen LaRoque and co-plaintiffs announcing CIR's suit challenging the constitutionality of Section 5 of the Voting Rights Act*



*James O'Keefe in New York City's Central Park*

## Let the Sun Shine

**T**he news industry is so stubbornly herd-like in what it calls “news,” and so monopolistic in its control of what gets published, that finally individuals have taken matters into their own hands. Using the internet, YouTube videos, blogs, and newsgroups, lone “citizen journalists” have found new ways to break the stories the mainstream media think the American people just don’t need to hear.

That’s why at CIR, we decided it was vital to represent independent filmmaker James O’Keefe in several lawsuits against him.

Last year, the 25-year-old O’Keefe and 19-year-old Hannah Giles offered a spectacular example of how a couple of nearly-broke students, armed only with a video camera and a YouTube account, can break a major national news story despite the long-running efforts of the established news industry to pretend it didn’t exist.

Posing as a pimp and his prostitute, O’Keefe and Giles secretly filmed

employees of the “anti-poverty” group ACORN helpfully giving advice about how to break federal tax laws, hide income, and fool banks into issuing a mortgage to run a brothel.

As a result of their sensational reporting, ACORN lost most of its funding and was forced to disband within a matter of weeks. As O’Keefe and Giles learned firsthand, though, the media and their political clients are not about to let a couple of kids barely out of college get control of the national news cycle in this manner. Before O’Keefe and Giles even had time to hitchhike back home, the lawsuits started. One in Pennsylvania, another in Maryland, a third in California. Plus grand jury investigations in a half dozen states. The gist of all this was that O’Keefe and Giles had violated draconian state laws that make it a crime to record one’s conversations without the consent of the other party.

CIR isn’t in the business of providing free legal defense to every kid who gets into trouble with a video camera, of course. Nor are we about

---

to start policing the media stunts launched by the right against the left or, for that matter, by the left against the right. We leave all that to others (though for the record, we thought O’Keefe and Giles’s stunt was a good one). But CIR’s business *is* protecting individuals from the unconstitutional use of state authority. On ACORN’s implausible theory, state law can prohibit even recording federally-funded “anti-poverty” employees in the act of encouraging members of the public to commit federal felonies.

And so we went to bat for O’Keefe. Our strategy for defending him was simple—massive retaliation. Thanks to a generous grant from one of CIR’s longtime donors and with the help of lead counsel Michael Madigan of Orrick Herrington & Sutcliffe, one of the top white-collar defense attorneys in Washington, we prepared to counter each and every lawsuit with a defense grounded firmly in the First Amendment.

Just as we were gearing up on O’Keefe’s behalf, he decided to stage a videotaped demonstration of the unwillingness of Senator Mary Landrieu’s staff to answer constituent phone calls about her vote for Obama Care. That particular exploit landed O’Keefe in jail for a night and started a media frenzy that breathlessly portrayed him as a reckless and sinister individual involved in Watergate-style “wiretapping.”

In time, the less glamorous and more accurate story became known, if (for some reason) less widely reported. This was thanks in no small part to the fact that the FBI had seized O’Keefe’s iPhone video recorder and thus could view every moment of his visit to Senator Landrieu’s office. In the end, the U.S. Attorney charged O’Keefe with a simple misdemeanor for misrepresenting

*continued on page five*

## The Best Defense

Seeing her standing near the curb outside the federal courthouse near the National Mall in Washington that morning, you might not have pegged her as on the vanguard of a new nationwide challenge to resurgent big government liberalism. But this young woman was Anita MonCrief—blogger, citizen journalist, and CIR’s client in a new case to expand legal protection for citizens who take on the powers that be. Very much an average American, these days she wasn’t doing such average things.

Once an employee of the notorious “anti-poverty” organization ACORN, MonCrief had “flipped,” and uploaded onto her blog long accounts of outrageous, inappropriate, and frequently illegal activities by that group. For her pains, she had become the target of an ACORN-instigated federal lawsuit intended to cost her hundreds of thousands of dollars just to defend.

In other words, a lawsuit intended to shut her up.

That particular day in December, she was standing outside the courthouse to meet two lawyers from CIR and two from the Kansas City firm of Graves, Bartle, Marcus & Garrett. This combined legal team

was there to represent her at a hearing in the federal district court and a few hours later during her testimony in front of a congressional panel.

In 2005, full of idealism and a desire to help the poor, MonCrief had left a job with higher pay to work for ACORN, and ACORN assigned her to its subsidiary Project Vote. But she quickly became disillusioned by what she saw. She later wrote on her blog that ACORN used Project Vote—a tax exempt charity prohibited from engaging

in partisan political activity—as a funnel for financing political campaigns on behalf of Democratic candidates.

In 2008, MonCrief gave *New York Times* reporter Stephanie Strom information about what appeared to be illegal coordination between the Obama campaign and Project Vote. She passed on to Strom the list of tapped-out Obama donors that the Obama campaign had sent to Project Vote, with the suggestion that they be mined for additional contributions to support the group’s “get out the vote” campaign.

According to the *Times*’s own account of what hap-

pened next, a week or two before the 2008 election, the paper’s national editor ordered Strom to stop pursuing “the Obama angle” in her articles about ACORN. “We had worked on that story for a while and had come up empty handed,” the editor later wrote, as if that were a reason for killing the story now that their hands (thanks to MonCrief) looked embarrassingly full. According to MonCrief, the reporter explained the decision to kill the Obama story in a different way: the *Times* did not want to print a “gamechanger” so close to the presidential election.

And now MonCrief was *continued on page five*

*CIR client Anita MonCrief explains the post-ACORN world to a gathering of fellow bloggers*



---

---

## Former CIR Law Clerk Wins National Legal Writing Award

**O**ur heartiest congratulations go forth to Joshua

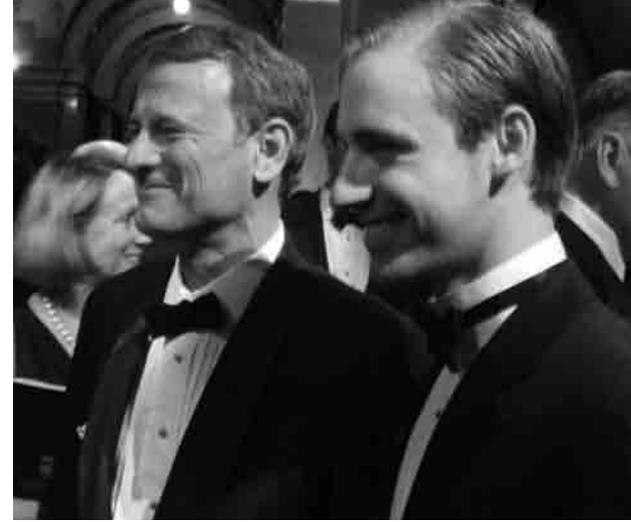
Newborn, a George Mason University School of Law graduate who clerked for CIR in 2008-2009. Josh was selected as 2010's Burton Legal Writing Award Winner.

The Burton Foundation selects only 15 students each year for this prestigious honor, which is presented at an annual black-tie dinner in the Great Hall of the Library of Congress.

Josh's article, "An Analysis of Credible Threat Standing and *Ex Parte Young* for Second Amendment Litigation," began as a CIR summer research assignment in his work for CIR General Counsel Michael Rosman.

"Michael asked me to research a complex area of constitutional law, and I later learned that the same issue had threatened to derail the Heller litigation," Josh said. "I then developed my work for CIR into an article that can guide

*Hobnobbing with the Chief: CIR's Josh Newborn and Chief Justice John Roberts*



future Second Amendment litigation past such procedural roadblocks."

A graduate of St. Vincent College, Josh served as Senior Research Editor of the George Mason Law Review and was an active member on the Moot Court Board. Competing in the NYC Bar National Moot Court Competition, Josh

and his teammates were National Octofinalists and wrote the fourth best brief in the competition. Josh also taught legal writing for first-year law students as a Writing Fellow at George Mason.

It almost seems unnecessary to add that he graduated law school *magna cum laude*, in May 2010.

---

---

## Housing Officials Go to CIR Summer School

**F**rom now on, California bureaucrats should have greater knowledge and appreciation of core First Amendment values than they have displayed hitherto. At least, in between state officials' required attendance at sensitivity training in the perennial topics of racism, genderism, classism, and homophobia, they now—thanks to one of CIR's original lawsuits—must be drilled in the dictates of the new *Julie Waltz First Amendment Policy*.

Mrs. Waltz, a Norco, California, grandmother, fell afoul of state housing officials when she protested the placement of a group

home for the emotionally disabled—principally disturbed young women with tendencies toward fire-setting, suicidal ideation, and exhibitionism—in her quiet residential neighborhood. Justifiably concerned that outright sex offenders would be placed there next, she protested by means of signs in her own yard. But the officials, pursuing a novel legal theory, launched an investigation of Waltz for violating the Fair Housing Act, on the grounds that with her signs she sought to constrict the housing opportunities of the disabled. This investigation seemed to solve a political problem the officials were having—bal-

looning protests against such placements across the state. After the Waltz investigation, which was covered in the media, these protests died down.

Considering all of this a textbook example of the government's violating a citizen's fundamental First Amendment right to petition for redress of grievances, CIR sued the officials on Waltz's behalf. After much discovery, the state realized the risk of going to trial and settled.

Technically, Mrs. Waltz "settled," too, but the word hardly seems an accurate description of the outcome from her perspective. As part of her victory, she demanded, and got,

\$100,000, the insertion of the First Amendment policy in state regulations, the mandatory training of bureaucrats in said policy, and the naming of it after herself.

Briefly, the Julie Waltz First Amendment policy forbids state officials to investigate or otherwise discourage the free expression of citizens, even if the content of it registers on the liberal consciousness as bad and "discriminatory." By making it a reality, we hope we preserved or restored the freedom of Californians at least to complain about their government—a necessary step toward doing something about it.

---

### Let the Sun Shine, *continued from two*

sending who he was. And shortly after that, two of the three state lawsuits were dismissed or settled, with one suit remaining.

The left's all-out assault on O'Keefe makes perfect sense, from its own perspective. Thanks to the internet, the ease with which a lone individual can derail the news monopoly suddenly seems . . . unlimited. Consider these recent examples: the purloined emails that revealed the brutal dishonesty of so-called "climate scientists"; this summer's outing of the

leftist "journalists" and academics conspiring to elect Barack Obama in what they fondly thought was the gated virtual community of JournoList; and even Obama's recent firing—and then immediate re-hiring—of USDA employee Shirley Sherrod based on a videotape of a speech she gave to the NAACP.

Our interest in this new free-for-all is limited but important: namely to enforce a little thing called the First Amendment. More specifically, the Press Clause (as in, "Congress shall make no law . . . abridging the freedom of

speech, or of the press") gives some protection to the gathering and the dissemination of news—and not just by "real journalists" who work for CNN or CBS/ABC/NBC, but by any citizen. And the facts of O'Keefe's cases show that the degree of constitutional protection for news-gathering must be robust, especially these days, if the marketplace of ideas in which the American people make decisions about their own self-government is to be anything like adequately stocked. As James Madison put it, "A popular Government, without

popular information, or the means of acquiring it, is but a Prologue to a Farce or a tragedy; or, perhaps both."

We don't pretend to know what O'Keefe, or others like him, will do next, and we're pretty sure that not everything they try will work—or that we will agree with it. But the First Amendment is not just an ornament to our society, but a vital necessity to good government—and sunlight is still the best disinfectant. Our aim is to make sure state privacy laws aren't manipulated to keep O'Keefe and others from letting the sunshine in.

---

### The Best Defense, *continued from three*

being sued—to the tune of five million dollars. Creatively, the plaintiff claimed that MonCrief had violated federal trademark law when she used the name "Project Vote" in her email and blogging activities. It charged her with trespassing on Project Vote's chattels, revealing its trade secrets, and tortiously interfering with its economic advantage. The complaint had 12 counts in all, a blizzard of legalese well-designed to panic a then-unemployed single mother like MonCrief.

But she didn't panic. And in the courtroom that day, she and her legal team listened as District Judge Richard W. Roberts of the U.S. District Court for the District of Columbia delivered his ruling on her motion to dismiss from the bench. Agreeing with MonCrief, he explained that you cannot violate trademark law by

using another's "mark" to express a point of view. He dismissed some of the other counts, too, but the rest of the case went on.

That was it, for now. Next, MonCrief walked over to a House office building on Capitol Hill, and in a hearing room crowded with spectators and press testified before a joint panel of the House Judiciary and Government Oversight Committees. A sample of her devastating testimony: she said that when the poor came to ACORN for "help," ACORN workers were instructed to get them to become members of ACORN and authorize debits from their bank accounts for monthly "dues." She testified that people who signed the forms authorizing these payments rarely understand that their accounts would be debited by ACORN in perpetuity.

So far, the only named plaintiff in the suit against MonCrief was Project Vote. So we decided to bring

ACORN itself into the open—as a defendant. We countersued both Project Vote and ACORN for abuse of process—alleging ACORN was behind the suit and had brought it merely to punish MonCrief for exercising her First Amendment rights. We also made wide-ranging discovery demands for ACORN's internal documents. Soon after, all parties agreed to dismiss the suit, with prejudice.

ACORN had not expected MonCrief to have access to the likes of CIR's First Amendment lawyers and Graves, Bartle's hard-hitting white-collar defense counsel (a combination made possible by a special and very generous grant from a CIR donor).

So instead of ACORN's, it was CIR's and MonCrief's mission that was accomplished. For this result should make it harder for corrupt, ruthless organizations to silence citizen critics.

Welcome to the Machine,  
*continued from one*

Enter the citizens of Kinston. Voters in this small city (64 percent of them black) voted 2-1 to enact a nonpartisan voting system, under which candidates for public office would run without party affiliation. When Kinston applied to Washington for preclearance of this change, the Holder Justice Department wrote back denying it. DOJ's reasoning? Blacks' candidates of choice are other blacks, and fewer blacks would win nonpartisan elections because of a small but crucial block of white voters who, DOJ opined, will only vote for a black if he is a Democrat.

It is striking how ready the Administration is to impute racial motives even to the actions of groups that usually support it. According to the DOJ letter, blacks vote based on race -- they just want to vote for other blacks -- and many white Democrats won't vote for a black except out of purblind party loyalty, or because they just happen to in the course of voting the party ticket.

The first assumption, at least, is highly questionable. Just ask Michael Steele. When the Republicans nominated him to run for the Senate in Maryland in 2006, black voters turned out in droves -- for his white Democratic opponent, Bill Cardin.

Specifically, blacks voted for the white Democrat, Cardin, and against the black Republican, Steele, by a margin of three to one. What that and other races show is that blacks' "candidates of choice" aren't other blacks, but liberal Democrats (though not, of course, the choice of the 12 percent or so of blacks who usually vote Republican). These days, for blacks as for everyone else, the race of the candidate is not what really counts. Rather, for all demographics in this great and riven land, politics trumps all.

Which alone makes the current version of Section 5 deeply suspect, we think. Certainly, there is nothing more offensive to limited government than a law designed to protect the ability of people to elect candidates from just one of the political parties, members of which party, when elected or reelected, write, extend, or enforce that very law. But as the machine Obama heads feeds and expands, he seems here, with the DOJ's flimsy and false justification, to be using the law in just this politically partisan way.

So on April 7, on behalf of Kinston citizen Stephen LaRoque and other plaintiffs, CIR brought suit against Attorney General Eric Holder over his denial of Kinston's change to nonpartisan voting. The opportunity for this suit

came up suddenly, and we acted just as quickly, signing up as co-counsel the inestimable DC litigator Michael Carvin, who has been in this arena with us before (*Reno v. Bossier Parish School District*).

Carvin aims to convince the Supreme Court to declare Section 5 unconstitutional before the crucial redistricting that will take place in 2011. And though CIR has no interest in partisan redistricting spats between Democrats and Republicans, we do object, on principle, to one party's use of the Voting Rights Act to create for itself a permanent, structural advantage over the other.

It's past time to remove this particular lever from the machine.

We have a better than good shot, thanks to some pre-planning. In a case last year (*Northwest Austin Municipal Utility District No. One v. Holder*), Chief Justice Roberts took pains to lay out why Section 5 probably is unconstitutional, before ruling that the case could be resolved on other grounds. With that result in mind, we decided to represent individuals rather than the municipality in this case: the only issue they have standing to raise is the constitutional one. Unlike in *Northwest Austin*, the only way to win the Kinston case will be by winning. As always, we'll keep you posted.

## PEEKABOO'S

As the Bureau-cratic State expands as fast as Congress and Obama can force-feed it, it gives us some pleasure to report an event with the opposite import. A strange new kind of federal administrative growth has just been judicially pruned, if not hacked off—thanks to CIR's ally and former Board member Michael Carvin (with a little help from us). On June 28, 2010, the U.S. Supreme Court ruled that a federal agency called the Public Company Accounting Oversight Board (or PCAOB, un-affectionately known on the Street as "Peekaboo") was unconstitutional as originally structured.

This ruling was not all those who had brought the suit had hoped, which was to get rid of Peekaboo altogether. But the Roberts Court is "conservative" in more senses than one. Though finding the board had been conceived in sin, the Court adjusted the law to make it constitutional, instead of making Congress recreate the Beast in new legislation, if it could.

The Court did see a problem with Peekaboo—the same problem to which the suit's originators invited its attention: in essence, that this extremely power-

## ORIGINAL SIN

ful agency, with its independent source of funding and sweeping powers over the whole accounting industry, was about as answerable to the American people as a panel of Olympic figure-skating judges. Because Congress gave an unprecedented two layers of “for cause” removal protection to its members, it practically formed a new, free-standing branch of government all by itself.

But not even this was enough for Peekaboo. It claimed it was insulated not only from political, but even from judicial review. That’s where we came in. After Carvin launched his lawsuit on behalf of the accounting firm Beckstead and Watts of Nevada, the federal government rushed to Peekaboo’s defense and argued the courts had no jurisdiction to hear the case. Of course, the government conceded, the firm could always *create* jurisdiction. All it had to do was ignore a Board order and then appeal the resulting “sanction.” If the firm lost that appeal, naturally, the “sanction” it had been forced to provoke would be imposed. As an *amicus*, CIR argued that the firm was entitled to judicial review even without deliberately incurring

such a risk. Fortunately, the Court accepted our arguments, which allowed it to then rule that insulating Peekaboo’s members from removal was unconstitutional—for some weighty reasons. For one thing, this experiment in insulating governmental power over the people *from* the people could be expanded upon all too easily. As Chief Justice John Roberts put it in his majority opinion:

*If Congress can shelter the bureaucracy behind two layers of good-cause tenure, why not a third? At oral argument, the Government was unwilling to concede that even five layers between the President and the Board would be too many. The officers of such an agency—safely encased within a Matryoshka doll of tenure protections—would be immune from Presidential oversight, even as they exercised power in the people’s name.*

If that trend spread far enough, of course, a new kind of tyranny, virtually immune to elections, would be born. The Court at least shut down this parade of horrors—and in so doing made it quite clear that such similar congressional constructs as the future may throw up will not be insulated from review by the courts.

## Summer Clerks Swell CIR Ranks



**E**ach summer, CIR enjoys the help of several law clerks. Our high-intensity litigation offers law students an opportunity to gain valuable hands-on experience with some of the most experienced litigators around and to participate in groundbreaking cases like *LaRoque v. Holder* and *Project Vote v. MonCrief*.

This summer for example, Harvard Law School rising “2L” Whitney Lee Aidenbaum and Columbia University School of Law rising “2L” Richard “Mac” Stone worked closely with CIR’s General Counsel Michael Rosman and other attorneys on CIR’s landmark litigation to protect family rights during this summer’s trial in *Mueller v. Auker*.

Whitney is a *magna cum laude* political science graduate of the University of Pennsylvania, where she was on the Dean’s List and was active in the Sigma Delta Tau Sorority. At Harvard Law, Whitney was named a Dean’s Scholar in First-Year Legal Research and Writing, is active in the Federalist Society, and is an editor on the *Harvard Journal of Law and Public Policy*.

Mac graduated *magna cum laude* from Williams College, with a B.A. in Economics and Philosophy. He was Phi Beta Kappa, was on the Dean’s List each semester, and received the John W. Miller Prize in Philosophy. He spent a year abroad at Exeter College, Oxford University, where he was on the rowing team. Mac is the Public Interest Chair of the Federalist Society and is currently an editor of the *Columbia Journal of Tax Law*.

CENTER FOR INDIVIDUAL RIGHTS  
1233 20th St, N.W., Suite 300  
Washington, D.C. 20036

PRSRT First Class  
US Postage  
PAID  
Suburban, MD  
Permit No. 2295

e-mail: [genl@cir-usa.org](mailto:genl@cir-usa.org)  
web: [www.cir-usa.org](http://www.cir-usa.org)

docket report



---

---

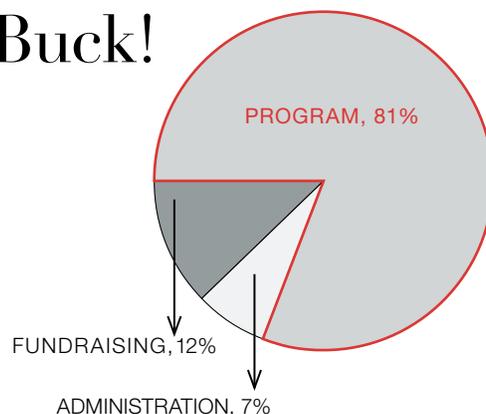
## CIR Delivers Bang for Your Buck!

Certain online charity “watchdog” services purport to analyze and publicize non-profit expenditures based on their internal analysis of IRS tax returns. Usually, they do a fine job. This year, somebody made a big mistake.

The Charity Navigator website claimed CIR devoted 46.1 percent of its budget to “administrative expenses.” The fact, of course, is that last year, CIR spent fully 81 percent of its expenses on its core missions: litigation and public education. Only 12 percent was devoted to fundraising and 7 percent to administration.

These figures are taken directly from CIR’s IRS Form 990, based on its independent audit through March 31, 2010. The form and audit documents can be found and downloaded from CIR’s website, [www.cir-usa.org](http://www.cir-usa.org), or we can mail you copies upon request.

CIR’s efficiency is even greater than it appears: much of our litigation is handled by top-flight members of the



for-profit bar who donate their time *pro bono* to our cases. That means every dollar contributed to CIR results in two to three dollars of legal work promoting our mission.

CIR has worked hard to create its lean and mean, low-overhead operation, and so deliver an unmatched “bang for the buck” in defense of individual rights and limited government. Once we discovered Charity Navigator’s error, we promptly got in touch and it corrected the error on its website.

---

---