

Atlantic Legal Foundation

Annual Report

MARCH 2006

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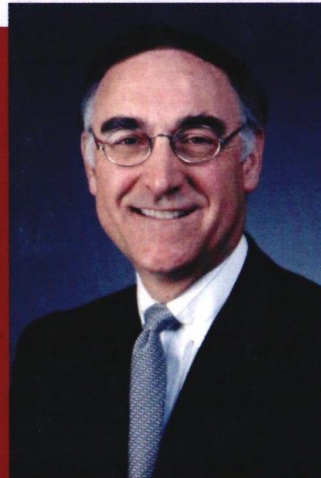
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The Year in Review

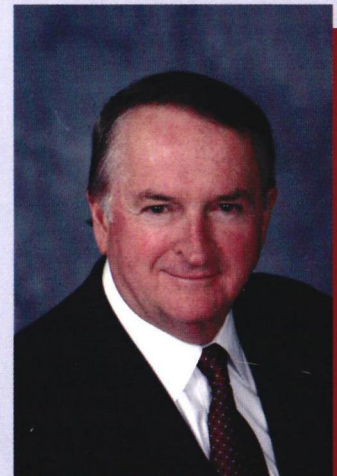


Dan Fisk
Chairman

The year 2006 was one of the Foundation's busiest and most productive. Our work proved successful for clients in courtrooms and tribunals across the United States. Some examples are illustrative.

Early in the year, the Supreme Court of the United States ruled in *Rumsfeld v. Forum for Academic and Institutional Rights* that the U.S. military should enjoy access to campus recruiting on the same basis as that afforded private employers, rejecting First Amendment claims of plaintiff-academicians. The Foundation's *amicus* brief on behalf of a distinguished assemblage of former Defense

Department officials and high-ranking military leaders brought compelling arguments to the Court's attention. Co-counseling with Greenberg Traurig, LLP, the Foundation argued that the constitutionality of the Solomon Amendment should be upheld because on-campus recruiting is essential to our national defense, is necessary to maintain an all-volunteer military—especially to recruit highly qualified specialists in many fields, including law and medicine—and that Congress, not the Judiciary, has the Constitutional responsibility for raising and supporting the armed forces and had explicitly made the considered judgment that on-campus recruiting is vital to achieving that goal.



Bill Slattery
President

Later in the year, the Foundation represented other individuals at another point on the academic spectrum: leaders of a fledgling charter school in rural New Jersey. State regulators had refused to permit a new charter school to open its doors... just days before the school year was to begin. Vigorous advocacy by the Foundation (this time partnering with McCarter & English) in an unusually tight time frame forced the state regulators to reverse the decision and—for at least a brief period—Benchmark could offer school choice to parents and their children to that point locked into failing schools.

In the *GEOD* litigation, in Newark federal court, we seek to apply the historic victory we achieved striking down New Jersey's unfairly applied affirmative action program to a state agency seeking to hide behind federal regulations. If our client prevails, ill-conceived discrimination in government contracting will need dramatic retooling to meet Constitutional norms. And in another Supreme Court appeal, we urged on behalf of highly regarded scientists that the solution to the threat of carbon dioxide emissions is more complex than is recognized by some environmental activists.

The Foundation's work in other courts and agencies, federal and state, throughout the nation is reviewed in more detail below.

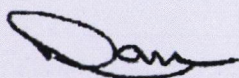
We are pleased to report that the theme of our 2005 Washington D.C. conference on the erosion of the attorney-client privilege has resonated with other concerned organizations, leading to increased and wide criticism of Department of Justice (and other federal agencies) standards for corporate "cooperation" in investigations of suspected criminal misconduct. While some changes have been made in the much-criticized Thompson Memorandum, additional modifications applicable in a corporate setting are sorely needed. The government's aggressive posture respecting the privilege has served to alert lawyers throughout the nation that proper application of the privilege is at the heart of the lawyers' role in our system of justice.

Thomas J. Donohue, President and Chief Executive Officer of the U.S. Chamber of Commerce, was the recipient of Atlantic Legal's Annual Award at our sold-out reception and dinner. Mr. Donohue's remarks highlighted efforts to correct abuses in the civil justice system and we are pleased that he has agreed to their publication here.

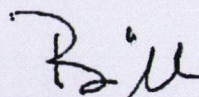
Dr. Frederick Seitz, the Foundation's Director *Emeritus*, also was recognized at the Award Dinner with the Foundation's inaugural Lifetime Achievement Award. The Foundation was proud to join so many other institutions which have celebrated this remarkably gifted scientist, educator and citizen.

We were please to welcome new directors Donald M. Gray, Robert L. Haig, Esq., and Elia Weinbach, Esq., and advisors John H. Carley, Esq., Dr. Hung K. Cheung, Robert Gold, Esq., Thomas R. Gottshall, Esq., Richard A. Hauser, Esq., John J. Kenney, Esq., Dr. Dennis McBride, and Dr. Ozgur Ozkan, to our leadership. We look forward to their participation and we are gratified that our work has deserved their support and that we will have the benefit of their guidance.

We also are grateful to the corporations, foundations and concerned citizens who generously have supported our mission. As the Foundation begins its third decade, the need for solid and objective support for the rule of law, for limited and responsible government and for free enterprise remains crucial as the nation experiences an increasingly challenging domestic and international environment. We trust the Foundation's work will continue to warrant your support.



Hayward D. Fisk
Chairman



William H. Slattery
President

Lifetime Achievement Award to Seitz

Atlantic Legal's Director *Emeritus*, Dr. Frederick Seitz, was honored as the recipient of the Foundation's first Lifetime Achievement Award on November 2, 2006. Dr. Seitz has been a valued member of Atlantic Legal's leadership for more than fifteen years.

Dr. Seitz's career has included positions at the University of Pennsylvania, the Carnegie Institute of Technology, and General Electric. During World War II, he worked for the National Defense Research Committee, the Manhattan District, and as a consultant to the Secretary of War. From 1946 to 1947 he was director of the training program on peaceful uses of atomic energy at Oak Ridge National Laboratory. Appointed professor of physics at the University of Illinois in 1949, Seitz became department chair in 1957 and a dean and vice president for research in 1964. He joined The Rockefeller University as its president in 1968 and is now president *emeritus* of the university.

Dr. Seitz was elected to the National Academy of Sciences in 1951, serving as its part-time president for three years before assuming full-time responsibility in 1965, serving until 1968. He has served as advisor to NATO, on the President's Science Advisory Board, the Smithsonian Institution, and other national and international agencies. He has been honored with the Franklin Medal of Science (1973), two NASA Public Service awards (1969 and 1979), the National Science Foundation's Vannevar Bush Award (1983), National Academy of Engineering's Distinguished Honoree Award (1995), as well as honorary degrees from over thirty universities worldwide. In 1993, the University of Illinois named its Material Research Laboratory in Dr. Seitz's honor. Stanford University has honored him with the Hoover Medal and Princeton University with the Madison Medal. In 1997 the Council of the Smithsonian Institution presented him with the Joseph Henry Medal.

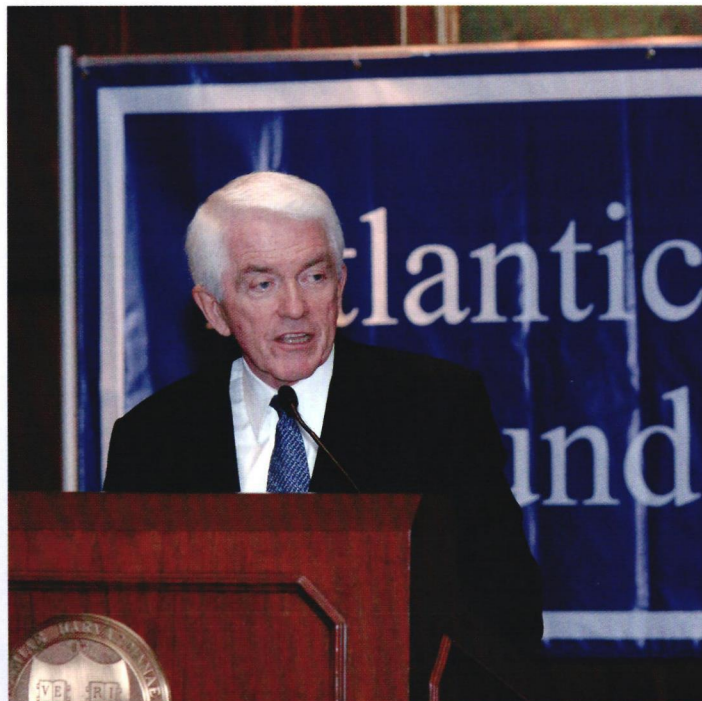
He has written classic works in physics including *Modern Theory of Solids* (1940), was co-editor of the series *Solid State Physics* (started in 1954), and examined the evolution of science in *The Science Matrix* (1992). He wrote his autobiography *On the Frontier: My Life in Science* in 1994 and published *Stalin's Captive: Nikolaus Riehl and the Soviet Race for the Bomb*. In 1995, the University of Illinois published his most recent book, *Electronic Genie, The Tangled History of Silicon in Electronics*.



Honoree Fred Seitz

Atlantic Legal Honors Donohue

Thomas J. Donohue was the recipient of the Foundation's nineteenth Annual Award at a reception and dinner at the Harvard Club of New York City on November 2, 2006. Tom Donohue has been President and Chief Executive Officer of the U.S. Chamber of Commerce, the world's largest business federation representing three million companies, since 1997. He serves on a number of corporate boards of directors and is a member of the President's Council on the 21st Century Workforce and the President's Advisory Committee for Trade Policy and Negotiations. Among other accomplishments under his leadership at the Chamber has been the establishment of the Chamber Institute for Legal Reform which has won significant reforms in the courts and in elections for state attorneys general and judges. The work of the Chamber, particularly its efforts to combat abuse of the civil justice system, was highlighted in his remarks reproduced here.



Honoree Thomas J. Donohue

Remarks of Thomas J. Donohue

"I am deeply honored to be singled out this evening, when you consider the extraordinary list of national leaders and people of great significance who have received this award. I am particularly pleased to be here this evening at a time that you honor Dr. Seitz, who is among the half dozen Americans who have led and contributed so much, not only to science, but to modern thought, to national security and to national well-being. In recognizing me, what you're really talking about is the extraordinary role that the Chamber has played in bringing an expanded focus, an extraordinary amount of resources and a level of courage to the question of legal reform, more than we were able to do before. So, I accept this recognition on behalf of all of the people that have helped make that possible.

So, as we gather tonight let me say that I want to thank the Atlantic Legal Foundation. We are great believers in plurality. The more people that carry the banner and the torch of legal reform, the better off we are. We appreciate your contributions to the protection of free enterprise. Business increasingly looks to the courts to correct the abuses to

our free market and our civil justice systems. And much of the work you've done here, as well as what we've done in our own Institute for Legal Reform and our law firm, the National Chamber Litigation Center, addresses those issues. Let me thank you very much for that.

When we started the Institute for Legal Reform, the trial bar was dominating the game. They were the only people putting serious money into this arena. And busi-

"I want to thank the Atlantic Legal Foundation... We appreciate your contributions to the protection of free enterprise. Business increasingly looks to the courts to correct the abuses to our free market and our civil justice systems."

ness was just beginning to field a team. Now, we went to the Roundtable and to other people and we formed a collaborative arrangement. And we said that we're going to go out and provide protection for the American business community, and who wants to put up their money and their good advice and their energy. And we will go out and take on this issue.

“We aren’t against plaintiff lawyers. We’re not even against class action lawyers. We’re against abuses of the civil justice system committed by a very small percentage of the nation’s lawyers.”

Now, make it very clear. We’re not against lawyers. We aren’t against plaintiff lawyers. We’re not even against class action lawyers. We’re against abuses of the civil justice system committed by a very small percentage of the nation’s lawyers. We employ a wide range of tactics, from federal and state legislative advocacy, to public education campaigns, and grass roots activism, to push back against the most egregious abuses. Slowly but surely we’re making progress.

And the statistics are great. You know, Madison County, Illinois, was a cesspool of the American legal system. They’ve had one class action suit this year. They had a hundred a few years ago at this time of the year. And I think that sort of says something about what we believe. *The Wall Street Journal* has been writing extensively about the benefits that American companies have gotten.... We’ve made progress in Florida and in Ohio, Texas, Mississippi, South Carolina and Georgia. And we’re winning in the courts. We sue the federal government about a hundred times a year.

You know you’re succeeding against the trial bar when it tries to re-brand itself. The trial bar guys, you know, just changed their name to the American Association for Justice. When I was a kid, my uncle used to have a farm. And we used to try to dress the pig up as a horse and it didn’t work. When they’re trying to hide who they are, it’s a story that you ought to know about.

The trial bar, however, remains very entrepreneurial. I’ve never seen as much money as they’re putting into the trial court and state attorneys general races this year. And we got into it and now they’re back. And while we succeeded in reforming the trial bar’s practices in some areas, they’re up and running and they’re very serious.

For example, in Miller County, Arkansas, that’s a new jurisdiction for class actions. Google settled a class action for ninety million dollars there earlier this year. And Delaware and California courts will be the latest jurisdictions where the asbestos people are trying to go. When they go there and add some muscle to the deal, we’re going to put some more muscle into it.

Now, they’re also trying to change their strategy by exporting class action suits. And the trial bar, a little slow in the pickup, has figured it out. So, we’re over in Europe, France, the Netherlands. They’re all trying to export there. Why? Well, they figure, if they can’t sell it here, they’ve got to sell it there.

Now, second, the ILR and the Chamber are increasingly concerned about how state attorneys general are using lawsuits to run for governor. We’ve got one in this city that’s going to win the governor’s race. He’s already working on his presidential campaign. And he’s somebody to watch. And, by the way, you know, Spitzer doesn’t say a lot of nice things about me, so I’m not going to return the favor.

But the point is there are some things that you can do that just don’t make sense. We’re working with attorneys general broadly to get them committed to a series of practices that are honorable and legitimate. And, yes, they should go after people that break the law.

“...if you don’t have the attorney client privilege, you’re going to get into a lot of problems, because the CEO is not going to talk to his lawyer...he’s not going to get very good advice.”

In fact, we have a new thing we’re going to start doing—I think people know it, but I’ll announce it here—we’re going to start putting out a report card on each attorney general and their office. So we asked each state to send us some information on how they operate. About a third of them said, sure, we’ll send you the stuff. And we’ve got about a third of them that yawned and pretended like they didn’t hear us. And a third of them told us to forget it. So, we are now telling them, listen, we’ve been there, we’ve done this, so we’re going to do two things. We’re going to file freedom of information act requests to get what we want. And second, what we can’t get, we’re just going to use public information and liberally interpret what we think it is that you do. And if you’re dumb

enough to let us do that, then we look forward to doing it with great enthusiasm.

The trial bar remains active in the securities litigation and derivative suits. Derivative suits are particularly difficult, you see, because they're on behalf of the shareholders against the board. Boards of directors right now—and I'm on a bunch of public company boards—are so risk averse that they shake when they go to board meetings. And directors have more lawyers than the company has. And they spend more time on risk avoidance than they do, in my opinion, on trying to advance the company, because of all these lawsuits.

A derivative suit is interesting because the only people that can pay derivative claims are either D&O insurance, or the individual directors; they immediately want to settle. The money goes back to the company from the D&O policy except that the lawyers keep a share. And I think we're going to see a lot of changes in those. You may have noticed that Milberg Weiss has got a small problem right now. We take no credit for that, notwithstanding the stuff that we gave the Justice Department.

We're working on another set of issues. And this is where I get passionate and angry. You know, the Constitution is very clear. It provides for every individual—be he an employee, or she, a director—or a company, the right to due process in this country. The presumption of innocence until somebody proves you guilty. The right to have your case heard without being extorted by elements of government that want a settlement and not a trial.

And the right to attorney client privilege. You know, if you don't have the attorney client privilege, you're going to get into a lot of problems, because the CEO is not going to talk to his lawyer...he's not going to get very good advice. And employees who would normally get legal advice before they go ahead and do things are not going to look for advice. And I am encouraged to tell you with the help of a lot of people, we have got the House and the Senate leaning over the podium in the judiciary committees telling the Deputy Attorney General, you will change the Thompson Memorandum, you will straighten out this deal before we get back from elections or we're going to fix it.

“We are stepping up the efforts to expose fraud and abuse in medical screenings and the issues of silica and asbestos.”

We are stepping up the efforts to expose fraud and abuse in medical screenings and the issues of silica and asbestos. If you went down to Texas to Judge Jack's courtroom, I think you might find a great big book on the desk that she's sort of paging through. You know what she's doing, don't you? It appears that in a whole lot of union hiring halls, they brought in mobile x-ray machines and took x-rays of everybody. Then they had a group of doctors who allegedly read the x-rays. And then they filed complaints for all of these people, both on silica illness and asbestos illness at the same time, which is practically medically impossible. And many of these people filed as many as thirty cases. So, the judge got the doctors in there and said, well, tell us how you read all these x-rays and it was, “well, um, I'm not sure we read the x-rays.” “Well, doctor, you better go get a lawyer.” And now, there's a U.S. Attorney in New York, one of the toughest districts in the country, who's got a grand jury, and they're waltzing all these people in there and pretty soon, we're going to be hearing a lot of people singing a different tune. This is going to get really interesting.

“And people with asbestosis are not being helped because of everybody else that claimed they walked passed the building or business with asbestos and therefore ought to be paid.”



Atlantic Legal Directors Steve Harmelin, Chuck Work and Bob Lonergan join honoree Tom Donohue.

We're sending a message that we want to hear honest claims. And when people are sick and injured and affected they ought to be paid and paid now. And people with asbestosis are not being helped because of everybody else that claimed they walked passed the building or business with asbestos and therefore ought to be paid.

So, I think, as we look for a strategy in the future I think the business community needs to become more courageous. Defending companies are too quick to settle. It's about time to tell those lawyers, we'll see you in court. We'll hire very good lawyers and you had better be good at what you do, because we're coming after you.

And, second, the business community needs to stay united and advance a legal reform agenda that makes sense and that is supported for a long period of time. You know, it's chump change, the amount of money that we spend on this. We spend forty-five to fifty million dollars a year in legal reform. Defend one case and you'll cover all that three times over. So, we need to be very, very aggressive.

And third, we need to clearly and persuasively articulate that lawsuit abuse is the most damaging thing we can do to consumers, to small business and to our nation's competitiveness. If we want to compete around the world, we can't do it with a millstone around our neck. And in many cases, plaintiffs walk away with little more than coupons. And finally, we have to continue to commit a high level of resources to legal reform, human resources, courageous resources and dollar and cents resources. These people we're competing with are well-financed, well-led by very, very smart people and very committed to what they're doing. After all, I would be committed as well if I were on that team.

“as we look for a strategy in the future I think the business community needs to become more courageous. Defending companies are too quick to settle.”

But the bottom line is: Our responsibility is to seek each other out. Different organizations and different people. With a common agenda to protect the Constitution, to protect our fellow citizens, to protect our country in a competitive way. And if we fail to do that, then we yield to a group of people whose fundamental interest is to suck the vitality out of American industry and the American economy and the American way of life and put the money in their pockets. And I am fundamentally opposed to that.

“We need to celebrate those people that are challenging folks who have done wrong. And we need to own up to that. But we need to challenge those who are simply attacking companies and individuals and systems for their own economic well being.”

So, let me end tonight with two thoughts. First, we need to collectively continue this effort. We need to celebrate those people that are challenging folks who have done wrong. And we need to own up to that. But we need to challenge those who are simply attacking companies and individuals and systems for their own economic well being.

And, let me say again to this extraordinary organization, how honored and pleased I am that by singling me out for this award that you have recognized the collective work of hundreds of companies, of the Chamber and of other legal organizations around this country who have collaborated to come up with a system that's better than what we had. And to say clearly that we're going to represent what is right in this country no matter what it costs and how long we have to work and whatever the price is. And for all of your thoughtfulness and your accomplishment and for your thoughtful honor, I say thank you very much.”



Virgil Conway, Tom Donohue, Atlantic Legal President Bill Slattery, Elaine Conway. Mr. Conway is the former Chairman of New York's Metropolitan Transportation Authority.



Atlantic Legal Advisors Roger Kaplan and Hamilton Osborne.



Atlantic Legal Director Cliff Storms, Millicent Kaufman and Jim Wyer, former Atlantic Legal Chairman and Director.



Briscoe Smith, Tom Donohue, Bill Slattery and Fred Seitz.



Atlantic Legal President Bill Slattery welcomes guests and honorees.



**Atlantic Legal Senior Vice President
and Counsel Briscoe Smith.**



**Atlantic Legal Chairman Dan Fisk
celebrates honoree Fred Seitz.**



Atlantic Legal Director Chuck Work.



**Stanton D. Anderson, Special Counsel to the President,
U. S. Chamber of Commerce.**



Lisa Rickard, President of the U. S. Chamber Institute For Legal Reform.



Atlantic Legal Chairman Dan Fisk and honoree Tom Donohue.



Honoree Thomas Donohue addresses "The Continuing Challenge of Legal Reform" in the inviting ambience of the Main Dining Room of the Harvard Club.



Brian Carr and Derrell Bradford of Excellent Education for Everyone.



Director Frank Menaker and Tracy Bacigalupo of DLA Piper.



THE CITY OF NEW YORK
OFFICE OF THE MAYOR
NEW YORK, N.Y. 10007

November 2, 2006

Dear Friends:

It is a pleasure to welcome everyone gathered with the Atlantic Legal Foundation to honor Thomas J. Donohue and Dr. Frederick Seitz.

Mr. Donahue has been president and chief executive officer of the U.S. Chamber of Commerce since 1997. Under this New York native's adroit leadership, the Chamber has increased in influence and found itself on its best-ever financial footing. Dr. Seitz, this institution's director *emeritus*, has made innumerable contributions to our City, our nation, and our world, serving as everything from a NATO advisor to an esteemed physics professor and president of Rockefeller University. I commend these two exemplary citizens for their steadfast commitment to improving the quality of life for all New Yorkers.

Here in New York, a courthouse on Centre Street bears the inscription "the true administration of justice is the firmest pillar of good government." Since its establishment in 1976, the Atlantic Legal Foundation has provided representation without fee for parents, scientists, educators, and other New Yorkers and Americans – an invaluable asset in our efforts to insure a more fair and effective legal process for all. On behalf of the City of New York, please accept my best wishes for an enjoyable evening and continued success.

Sincerely,

Michael R. Bloomberg
Mayor

Supreme Court Advocacy

Foundation lawyers went to the United States Supreme Court three times during 2006 in diverse cases involving military recruiting, dredging of inland waterways and the regulation of carbon dioxide emissions. The Court's response was generally favorable with one appeal yet to be decided.

The Court unanimously decided *Rumsfeld v. Forum for Academic and Institutional Rights*, and upheld the government's right to withhold funding from colleges and universities which do not provide military recruiters with equal access to campus facilities and students, agreeing with the arguments made by Atlantic Legal in its *amicus* brief. Atlantic Legal filed its brief on behalf of twenty-nine high-ranking former senior U.S. military officers and Department of Defense officials.

Co-counseling with Greenberg Traurig, LLP, we argued that on-campus recruiting is essential to our national defense, necessary to maintain an all-volunteer military—especially to recruit highly qualified specialists in many fields, including law and medicine—and that Congress, not the Judiciary, has the Constitutional responsibility for “raising and supporting a military” and has explicitly made the considered judgment that on-campus recruiting is vital to achieving that goal.

The Court held that Congress could require equal access by military recruiters, relying in part on Congress' power to raise and support the military, an argument Atlantic Legal made in its *amicus* brief: “The Constitution grants Congress the power to ‘provide for the common Defence,’ ‘[t]o raise and support Armies,’ and ‘[t]o provide and maintain a Navy.’ Congress' power in this area ‘is broad and sweeping,’ and there is no dispute in this case that it includes the authority to require campus access for military recruiters....”[Citations omitted.]



Atlantic Legal's Senior Vice President and General Counsel Martin Kaufman has participated in more than twenty four U.S. Supreme Court appeals and certiorari petitions.

The Court explained that any alleged compelled speech is incidental and that the conduct at issue is not so inherently expressive that it is protected under the First Amendment. Moreover, students and faculty may associate to express their disapproval of the military's message. Chief Justice John Roberts, writing for the unanimous Court, wrote: “A military recruiter's mere presence on campus does not violate a law school's right to associate, regardless of how repugnant the law school considers the recruiter's message.... In this case, FAIR has attempted to stretch a number of First Amendment doctrines well beyond the sort

of activities these doctrines protect.”

Partnering with New England Legal Foundation, Atlantic Legal filed an *amicus* brief in *Rapanos v. United States*, a case which may clarify whether U.S. Army Corps of Engineers has the authority under the Clean Water Act to regulate the dredging and filling of inland wetlands. In June 2006, a fractured court (there was no majority opinion--the case being decided by a plurality opinion by Justice Scalia) rejected the Government's “hydrologic connection” theory, and held that the phrase “the waters of the United States” includes only those relatively permanent, standing or continuously flowing bodies of water “forming geographic features” that are described in ordinary parlance as “streams,” “oceans, rivers, [and] lakes,” and does not include channels through which water flows intermittently or ephemerally, or channels that periodically provide drainage for rainfall. The Court held that the Corps' expansive interpretation of that phrase is thus not “based on [a] permissible construction of the statute.”

Justice Kennedy, concurring, agreed that the hydrologic connection theory goes too far, so he joined the plurality for reversal, but he would apply all of the factors in two leading earlier cases. His preferred test would focus on whether the putative wetlands have a “significant nexus” to waters that are, or reasonably could be, made navigable.

Commonwealth of Massachusetts, et al. v. Environmental Protection Agency began when the Commonwealth of Massachusetts and others filed a petition for rulemaking with the Environmental Protection Agency seeking to have EPA regulate carbon dioxide emissions from new passenger cars and light trucks under the Clean Air Act. When EPA declined to make a determination that carbon dioxide emissions “endangered” the environment and refused to issue regulations, the states and environmental groups sued. The Court of Appeals for the D.C. Circuit upheld EPA’s decision. The Supreme Court’s decision is expected this spring.

Atlantic Legal Foundation filed an *amicus* brief on behalf of ten prominent scientists who, for different reasons, believed the D.C. Circuit’s decision was correct. Some of the Atlantic Legal’s clients believe that the “uncertainty” cited by EPA is overstated and should not inhibit action to reduce emissions of greenhouse gases; others of our clients are not convinced that human activity is the principal cause of climate change.

The Foundation’s brief emphasizes several reasons, on which all of our clients agree, why the EPA’s ultimate decision was correct because a single sector of the economy or a region of the world is too small by itself to significantly reduce the world’s carbon dioxide emissions. A comprehensive plan, which may well consist of a number of initiatives that address the problem in different ways in different countries, is needed. Atlantic Legal’s clients are concerned that forcing a particular approach to the problem will perpetuate a way of thinking about potential solutions that is unhelpful, and they are also concerned that in the long run the narrow approach suggested by Massachusetts and the other petitioners will delay rather than advance a comprehensive solution and be unnecessarily expensive and inefficient.

New Jersey Preferences Challenged Again



Officers and employees of GEOD.

Following the Foundation’s success in the *GEOD v. New Jersey* case, Atlantic Legal filed a similar lawsuit against New Jersey Transit, seeking to have its “Disadvantaged Business Enterprise” program declared unlawful and permanently enjoined.

For many of its construction and engineering and design contracts, NJ Transit has set “Disadvantaged Business Enterprise” “goals” ranging from 20% to 30%. Some of NJ Transit’s funding is derived from the State of New Jersey, and projects funded through state funding are subject to the consent decree in *GEOD v. New Jersey*, which prohibits the State of New Jersey and its agencies from requiring that a certain percentage of contracts or subcontracts be awarded to minority and woman-owned businesses. However, the vast majority of NJ Transit’s funding is from

U.S. Department of Transportation programs, and thus is subject to the Department's DBE criteria. Federal regulations establish an "aspirational" ten percent DBE participation for projects receiving federal funding, but leave the calculation of appropriate goals, and the means of achieving them, to state agencies and other entities that receive federal funding. The federal regulations also require recipients of federal funds to utilize "race neutral" measures to the maximum extent possible to attain "DBE goals."

Our client alleges that NJ Transit's program is based on a "disparity study" that is methodologically unsound so there is no "strong evidence" of past or present discrimination and NJ Transit does not have a "compelling interest" in remedying actual present or past discrimination or its effects, that NJ Transit's DBE program is not "narrowly tailored" to remedy past or present discrimination against specified groups, and that New Jersey Transit does not use "race neutral" means to the maximum possible extent. Discovery and dispositive motions are underway.

Foundation Promotes School Choice

Charter schools are now well-established fixtures on the public school, K-12, landscape. Nevertheless, opposition to this modest form of school choice remains and Atlantic Legal's Charter School Advocacy Program continues to support charter school initiatives in court and through other forms of advocacy.

The Benchmark Battle

Most observers agree that vigorous oversight of charter schools is indeed a good thing, bringing accountability that so often is not found in conventional public schools. However, regulation can cross the line and result in bureaucratic bungling, as experienced by the Benchmark Academy Charter School which called on Atlantic Legal for emergency assistance late in the summer of 2006.

This charter high school in rural New Jersey had been granted a "preliminary" charter in early 2006, and its planning for opening in September 2006 was going smoothly (or so its founders were led to believe by the Department of Education), until mid-July, when Benchmark received notification from the Department demanding the charter's "surrender." The grounds for this harsh action were alleged to be Benchmark's inadequate finances (due to "under enrollment") and the fact that the majority of the students were not in Benchmark's "district of residence."

Assisted by David Apy of McCarter & English (a member of Atlantic Legal's Advisory Council) Atlantic Legal filed a response with the Commissioner, high-

lighting crucial errors underlying the ruling.

The decision to deny the charter coming a mere two business days before school was set to open, led to difficulties for students, parents, teachers and administrators. Parents had purchased uniforms and required supplies and had transferred their children from their former neighborhood schools. Teachers and administrators had left jobs or passed up job opportunities for the school year to work at Benchmark. Efforts to have the Commissioner's staff re-consider their last-minute ultimatum were unsuccessful.

The Foundation immediately appealed to the State Board of Education and at the same time to the Superior Court (on the grounds that the Board could not hear and decide an administrative appeal in time for the school to



The Foundation's successful lawsuit on behalf of Benchmark Academy could not derail Commissioner's opposition.

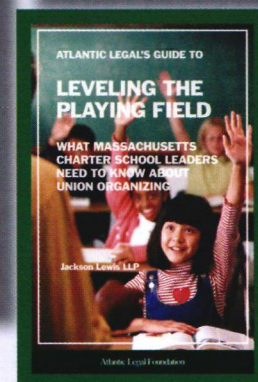
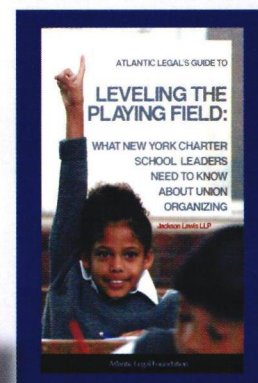
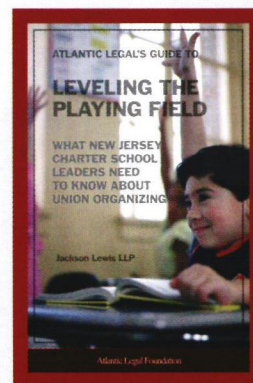
open). In both appeals the Commissioner's bases for denying a final charter were thoroughly rebutted. The court remanded the matter to the Board with instructions to decide the administrative appeal promptly. Then, in a unanimous decision, the Board reversed the determination of the Commissioner and Benchmark promptly opened.

The school's founder expressed gratitude to Atlantic Legal and McCarter & English: "Heartfelt thanks....What a victory to overturn the Commissioner's decision and get our charter. The students, parents and staff of Benchmark thank you for your hours, hard work and dedication."

Although Benchmark won the battle, unfortunately it did not win the war. Because of the uncertainty as to its ability to open (generated, of course, by the Commissioner's demand for surrender of the charter), early enrollment suffered and the Commissioner revoked the charter yet again. Undaunted, Benchmark founders have revived their application to open in the fall of 2007.

What Charter Leaders Need To Know About Union Organizing

The Foundation published two more guides in its series dealing with unionization of charter school employees, during 2006. *Leveling the Playing Field: What Massachusetts Charter School Leaders Need to Know About Union Organizing* was introduced at a conference featuring charter school panelists and lawyers from the Boston office of Jackson Lewis LLP. A New Jersey edition of the guide was launched at a conference sponsored by the New Jersey Charter School Research Center at Rutgers. This New Jersey edition includes a review of New Jersey state law relevant to the determination of employees to petition for ending a union relationship. Work on guides for other states and related materials is underway.



Curbing Class Actions

Much attention recently has focused on the abusive use of class action litigation leading to coerced settlements, negligible recovery for injured plaintiffs and enormous fees for the plaintiffs' bar. Some businesses have sought protection from class actions by requiring their customers to waive such collective action as a condition of doing business.

Atlantic Legal has filed an *amicus* brief on behalf of several current and retired general counsels of major corporations in the *American Express Merchants' Litigation* which is pending in the U.S. Court of Appeals for the Second Circuit. The putative class action plaintiffs appeal from a judgment enforcing arbitration clauses containing waivers of collective action, i.e. agreeing to arbitrate and to forgo class actions.

The plaintiffs are merchants, not consumers. They argue that their individual antitrust claims, even after trebling and taking into account recovery of attorneys' fees, do not warrant

the expenditure needed for discovery and expert witness fees to establish liability. They argue further that under these circumstances forcing arbitration with the collective waiver provision would be anti-competitive or unconscionable.

The enforceability of collective action waivers in the consumer context has been generally, but not always, upheld. However, this is the first time the Second Circuit has been asked to rule in a commercial ("business to business"), rather than consumer, context. Atlantic Legal's brief argues that business to business dealings need to be predictable and stable; that business entities should be free to agree to resolve their disputes on an individual basis and that merchants can decline to accept the waiver if they wish. The Foundation also argued that the unconscionability of collective action waivers is for the court to determine and that the collective action waivers are enforceable in New York and other jurisdictions.

New Directors and Advisors

Atlantic Legal's already distinguished leadership was enhanced during the year by the addition of new Board and Advisory Council members. The Foundation's roster of prominent business and professional leaders and respected scientists is unequalled in the public interest foundation community. Atlantic Legal's leadership determines the cases and projects the Foundation takes on, ensuring that the Foundation's mission will be served effectively.

Board Members



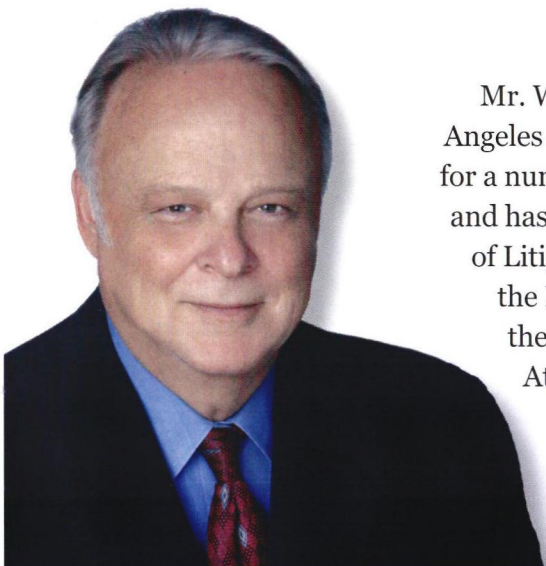
Donald M. Gray

Mr. Gray is a private investor and retired investment banker. He was formerly Managing Director at U.B.S. and at Morgan Stanley and earlier was a partner at Kidder Peabody. He currently serves on the Georgia Tech Advisory Board, as a Director of the Chronic Obstructive Pulmonary Disease Foundation, and as Co-Chairman of the Bronxville Historical Conservancy. He is a graduate of Georgia Tech and the Harvard Business School.

Robert L. Haig, Esq.

Mr. Haig is a partner with Kelley Drye & Warren LLP in New York City. His practice focuses on commercial, personal injury, and other types of civil litigation. Mr. Haig served as President of the New York County Lawyers' Association from 1992 to 1994, and as a member of the New York State Bar Association's Executive Committee from 1991 to 1994. He is a member of the American Law Institute and is a Life Fellow at both the American Bar Foundation and the New York Bar Foundation. Mr. Haig is the Editor-in-Chief of the six volume *Business and Commercial Litigation in Federal Courts* and of *Commercial Litigation in New York State Courts*. Mr. Haig is a graduate of Yale College and Harvard Law School.





Elia Weinbach, Esq.

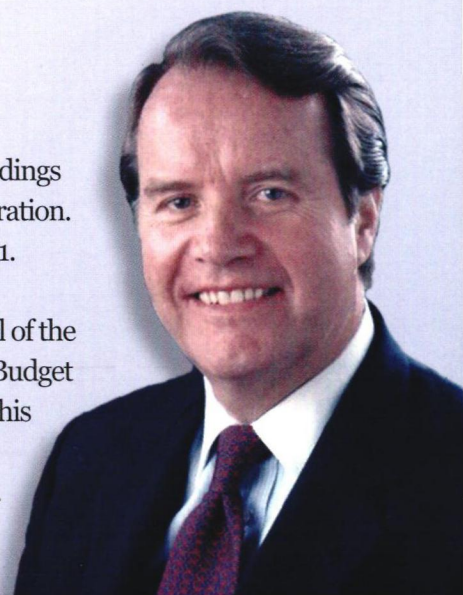
Mr. Weinbach is a litigation partner and member of the Governing Board of the Los Angeles and Washington D.C. law firm of Mitchell Silberberg & Knupp LLP. He served for a number of years as the firm's General Counsel and prior to that as its Ethics Chair and has also served as Co-Chair of the Committee on Corporate Counsel (ABA Section of Litigation). Within the Central District of California Mr. Weinbach is a member of the Federal Criminal Indigent Defense Panel, the Pro Bono Civil Rights Panel, and the U.S. Judge Selection Committee Panel. He is a former Assistant United States Attorney. In 2004 Mr. Weinbach was named one of California's *Super Lawyers*.

Mr. Weinbach is a graduate of New York University. He was a Fulbright Scholar at Oxford University and received his J.D. from Harvard University.

Advisory Council Members

John H. Carley, Esq.

Mr. Carley is the Senior Vice President - Legal and Regulatory Affairs for CD Finance Holdings in New York, having served in that position until 2006 with its predecessor, Cendant Corporation. Mr. Carley practiced law in New York City as a litigation partner at Rogers & Wells until 1981. In 1971, President Nixon appointed him to the Board of Foreign Scholarships in the State Department. In 1981, Mr. Carley joined the Reagan Administration, first as General Counsel of the Federal Trade Commission and then as General Counsel of the Office of Management and Budget in the Executive Office of the President. In 1995, Mayor Rudolph Giuliani asked him to join his administration as Special Counsel to the Deputy Mayor for Economic Development. Mr. Carley has also served as Deputy New York State Attorney General for Public Advocacy. He is a graduate of Rutgers University and Yale Law School.

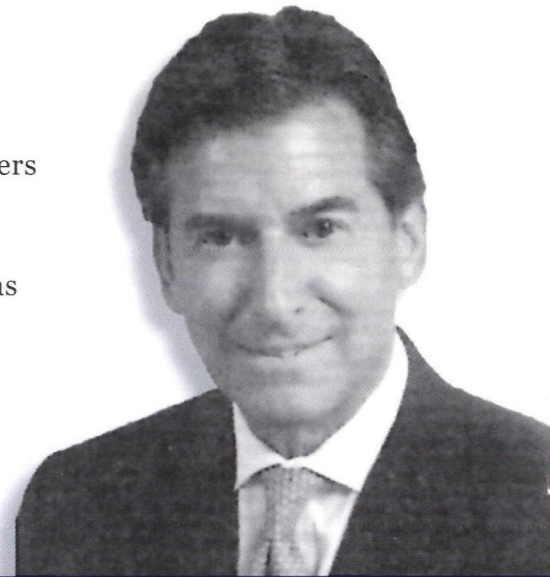


Hung K. Cheung, M.D., M.P.H.

Dr. Cheung is Vice President for Clinical Medicine at the International Center for Toxicology and Medicine, Chief Medical Officer at Building Health Science, and a Fellow of the American College of Occupational and Environmental Medicine. Previous positions held by Dr. Cheung include Regional Medical Director for Concentra Medical Advisory Services, Director of the Potomac Occupational Health Group, and Director of the Odenton, MD Community Medical Center. In 1999 he was named Physician of the Year by the Maryland Academy of Physician Assistants. Dr. Cheung received his B.S. degree from Loyola College, his M.D. degree from the University of Maryland and his M.P.H. degree from Johns Hopkins.

Robert Gold, Esq.

Mr. Gold is a partner at DLA Piper in New York City. His practice centers on civil and criminal litigation, internal investigations and arbitrations. In his thirty-five years of private practice, Mr. Gold has been a member of Shea & Gould, Gold & Wachtel, and McDermott, Will & Emery. He has served as an Assistant United States Attorney for the Southern District of New York, assigned to the Official Corruption Unit and the Securities Fraud Unit. Mr. Gold received his B.A. degree from Columbia College, and his M.B.A. and J.D. degrees from Cornell University.

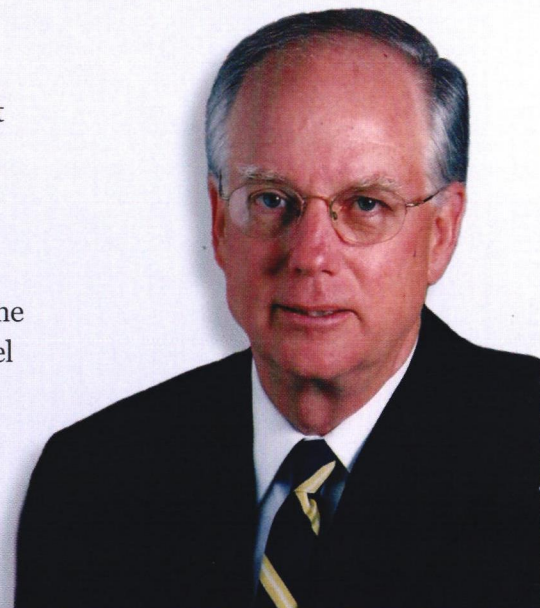


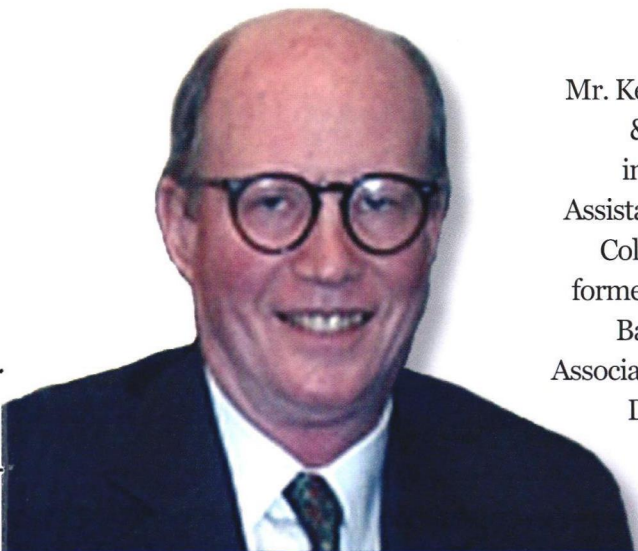
Thomas R. Gottshall, Esq.

Mr. Gottshall is a partner at the Columbia, SC law firm of Haynsworth Sinkler Boyd, P.A. His practice involves litigation, primarily in the products liability, environmental, pharmaceutical and toxic tort fields. He has served as Chair of the Products Committee of the Torts and Insurance Practice Section of the American Bar Association. He is Chairman of the South Carolina Advisory Board for Victims Assistance and a Board Member of the South Carolina Philharmonic. Mr. Gottshall is a graduate of Yale College and the University of Pennsylvania Law School.

Richard A. Hauser, Esq.

Mr. Hauser is the President of the National Legal Center for the Public Interest in Washington, DC. Prior to joining the National Legal Center he served as General Counsel for the Department of Housing and Urban Development. He was nominated by President George Bush and confirmed by the Senate in 2001 and served as the chief legal advisor to the Secretary and other agency Principal Staff. Before becoming General Counsel for HUD, Mr. Hauser was a partner in the Washington office of Baker & Hostetler, and served previously as Deputy Counsel for President Reagan. Mr. Hauser served as Chairman of the Pennsylvania Avenue Development Corporation from 1987 –1998. He received his B.S. in Economics from the Wharton School of the University of Pennsylvania and his LL.B. from the University of Miami School of Law.



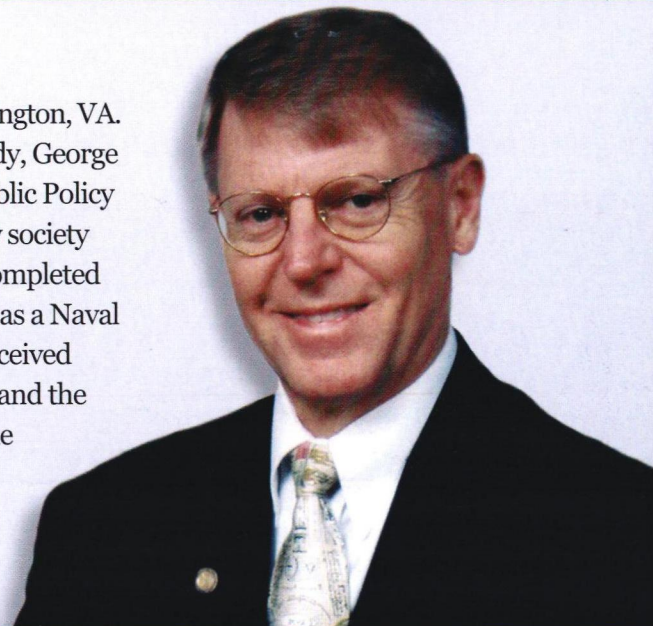


John J. Kenney, Esq.

Mr. Kenney practices law in New York City. He was a partner at Simpson Thacher & Bartlett LLP from 1981 until 2005. He served as an Assistant U.S. Attorney in the Southern District of New York from 1971 to 1980. He was the Executive Assistant U.S. Attorney from 1977 to 1980. Mr. Kenney is a Fellow at the American College of Trial Lawyers and is listed in *The Best Lawyers in America*. He is the former President of the New York County Lawyers' Association and of the Federal Bar Council and has served as the Chair of the Criminal Law Committee of the Association of the Bar of the City of New York. In addition, Mr. Kenney serves as a Director of the Citizens Crime Commission of the City of New York and of the American Association for the International Commission of Jurists, Inc. He is a graduate of St. Michael's College and Fordham Law School.

Dennis McBride, Ph.D., M.P.A.

Dr. McBride is President of the Potomac Institute for Policy Studies in Arlington, VA. He is also a Research Professor at the Krasnow Institute for Advanced Study, George Mason University, an affiliated professor at the Georgetown University Public Policy Institute, and Vice President of the Policy Studies Organization, a scholarly society associated with the American Political Science Association. Dr. McBride completed a twenty-year Naval career at the grade of Captain, Medical Service Corps, as a Naval Aerospace Experimental Psychologist, and a flight test engineer. He has received numerous military decorations including Defense Superior Service Medal and the Legion of Merit. Dr. McBride's formal education includes enrollment at the University of Georgia, University of Southern California and the London School of Economics. He earned a Ph.D. degree, three Master of Science degrees, a Bachelor of Science degree and an M.P.A.



Ozgur I. Ozkan, M.D.

Dr. Ozkan is a Fellow at The Eye Center, Alexandria, VA. Dr. Ozkan has previously served at Loyola University Medical Center and at the Georgetown University Medical Center. Dr. Ozkan has received numerous honors over his career, among them the Physician Recognition Award with Commendation in 2005 and the Devic Academic Scholarship for Georgetown University School of Medicine. Dr. Ozkan is a graduate of Georgetown University and Georgetown University School of Medicine.

Wyer Retires from Board

James I. Wyer, longtime member of the Board of Directors of the Foundation, announced his retirement from the Board, effective at the end of 2006.

Jim served on the Board of the Foundation for more than two decades and as Chairman of the Board for over eleven years, and witnessed its growth over almost three decades. During his tenure as Chairman, he was instrumental in the formation of the Science Advisory Council, which added the knowledge and perspective of prominent scientists to that of the accomplished lawyers and business executives who serve on the Board and Advisory Council. Jim also was a leader in expanding the Foundation's docket to include a vigorous *amicus* program in cases involving property rights, excessive government regulation, individual rights, sound science and the law and corporate governance.

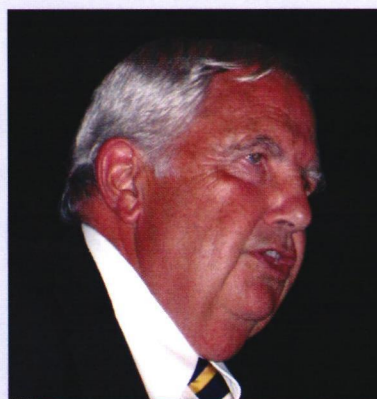
Jim is an accomplished attorney, having served as general counsel of a major corporation and as a partner in a distinguished law firm. He graced Atlantic Legal both with his professional sagacity and his personal interest in the Foundation's work and its staff.

At the Foundation's November 2006 meeting the Board adopted a resolution recognizing Jim for his "unparalleled leadership and dedication to the mission of the Foundation" and designating him as Chairman *Emeritus*.

Worth Noting

Atlantic Legal is pleased to record the recognition of accomplishments of its leaders by other organizations.

- Board Chairman **Hayward D. Fisk** was the keynote speaker at a Los Angeles conference sponsored by *The National Law Journal* in partnership with the Directors Roundtable. Dan discussed significant economic and policy repercussions of civil litigation abuse and suggested methods to reform the civil justice system.
- Director **Stephen Harmelin** was selected for the Hugh O'Brian Youth Leadership's Albert Schweitzer Leadership Award. The citation summarized Steve's outstanding record of public service and professional accomplishment.
- Director **Donald Gray** received the Concordia College President's Award for Excellence in Educational Service to the Community. His "superlative credentials and accomplishments" were cited along with his "understated personal style, enlivened by enthusiasm and sense of fun."



Fred Fielding, Counsel to Presidents Reagan and George W. Bush, discusses work of 9/11 Commission at the Foundation's June, 2006 meeting.

- Advisor **Richard Wilson** has been awarded the 2005 Erice Prize for Science and Peace. "For his long lasting involvement in 'The Spirit of Erice' and its promotion to people of different cultures and various civilizations with remarkable success, that allows the new generations to envi-

sion the future with hope and confidence. Confidence and hope rooted in frontier Scientific Culture of which Professor Wilson is an illustrious contributor."

Interns Contribute



Atlantic Legal's 2006 summer interns with French's Abraham Lincoln statue. (L to R) George Fachner, Addie Downing, Joe Pinto and Weston Friedman.

Atlantic Legal again hosted an outstanding group of student interns during 2006. They undertook many tasks—substantive and administrative—and participated in seminars designed to put the Foundation's projects in legal and historic perspective.

The interns clearly benefited from their experience. Joseph Pinto, now a first year law student at University of Pennsylvania, remarked: "the work I took part in...gave me a good sense of the practice of law in the public interest...the people I met at Atlantic Legal were of the highest caliber...attorneys and interns."

George Fachner, candidate for a masters degree in public policy at George Mason University added: "My work at Atlantic Legal will prove to be a valuable experience for future endeavors, professional and academic."

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A copy of the Foundation's latest annual financial report may be obtained from the Foundation or from the New York Attorney General's Charities Bureau, Attn: FOIL Officer, 120 Broadway, New York, NY 10271. A copy of the official registration and financial information of the Atlantic Legal Foundation (Cert. 1257) may be obtained by calling the Pennsylvania Department of State at (717) 783-1720. Registration does not imply endorsement.

The Atlantic Legal Foundation is a nonprofit, nonpartisan public interest law firm with a demonstrable three-decade record of advancing the rule of law by advocating limited, effective government, free enterprise, individual liberty, school choice and sound science in the courtroom. To accomplish its goals, Atlantic Legal provides legal representation and counsel, without fee, to parents, scientists, educators, and other individuals, corporations, trade associations and other groups. The Foundation also undertakes educational efforts in the form of handbooks and conferences on pertinent legal matters.

Atlantic Legal's Board of Directors and Advisory Council include the active and retired chief legal officers of some of America's most respected corporations, distinguished scientists and academicians and members of national and international law firms.

The Foundation currently concentrates primarily on four areas: representing prominent scientists and academicians in advocating the admissibility in judicial and regulatory proceedings of sound expert opinion evidence; parental choice in education; corporate governance; and, equal protection under the law by government agencies.

Atlantic Legal's cases and initiatives have resulted in the protection of the rights of thousands of schoolchildren, employees, independent businessmen, and entrepreneurs. In case after case, Atlantic Legal brings about favorable resolutions for individuals and corporations who continue to be challenged by those who use the legal process to deny fundamental rights and liberties. Please visit www.atlanticlegal.org where the Foundation's most recent activities are detailed.



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