



# ATLANTIC LEGAL FOUNDATION 2016 ANNUAL REPORT

## The Year in Review

In 2016 the Atlantic Legal Foundation continued its proactive, productive efforts in courts across the country, vigorously pursuing its mission of advancing the rule of law by advocating limited and efficient government, free enterprise, individual liberty, school choice and sound science.

The Foundation maintained its status as the nation's preeminent public interest law firm in advocating application of clear and sound rules for the admissibility of expert testimony in toxic tort, product liability and other litigation by filing briefs on behalf of distinguished scientists and business and legal associations in asbestos and other cases focusing on the trial judge's "gatekeeping" responsibility in admitting or excluding expert testimony.

Constitutional and important procedural issues were a focus in several briefs in the Supreme Court of the United States. The Court agreed with our position that "jurisdictional determinations" by the U.S. Army Corps of Engineers (and EPA) in enforcing the Clean Water Act are appealable to federal courts. The Court ruled unanimously that property owners can challenge a jurisdictional determination in court without the property owner first having to apply for a permit or risk severe penalties before having their "day in court."

We continued to challenge class-action abuse in the Supreme Court in cases involving certification of massive classes of plaintiffs in antitrust, employment and consumer class actions involving potentially billions of dollars in damages. Class action abuse is important because, as the Supreme Court has recognized, certification of huge classes exposes defendants to enormous potential damages and puts immense pressure on defendants to settle litigations that have little merit because the cases become "bet the company" exposures.

The Foundation filed briefs in the Supreme Court and federal appellate courts in cases involving federal preemption of state law in the fields of aviation safety and in the enforcement of contractual arbitration provisions in employment and consumer contracts.

In state courts, the Foundation supported review by the California Supreme Court of erroneous rulings by lower courts on California's standard of proof of causation in asbestos cases.

We continued our work on behalf of charter schools with distribution of our "Leveling the Playing Field" series of guides for charter school leaders. Efforts are well underway to update these guides in 2017.

Sadly, in February of 2016, our Nation lost one of its all-time most respected, most scholarly, prolific, and well written U.S. Supreme Court Justices, Antonin Scalia. In tribute, we include a section in this 2016 Annual Report dedicated to his legacy. Note the cover of this Annual Report shows the U.S. Supreme Court House with our flag at half-mast in his honor. The George Mason School of Law, under the direction of our Foundation's long term Advisory Council member, Dean Henry Butler, has been renamed the Scalia Law School. Our memory and respect for Justice Scalia's engaging personality, commanding scholarship, respect for our Constitution, and compelling influence on American jurisprudence, will long endure.

On March 22, 2016, we were privileged to present the Foundation's twenty-eighth Annual Award for 2015 to the Honorable former Oklahoma Governor Frank Keating, who recently retired as the President and CEO of the American Banker's Association. Governor Keating was introduced by the Honorable former US Attorney General Ed Meese, whose introduction along with Governor Keating's remarks on "Lessons Learned in a Life of Challenges," are reproduced in the Foundation's Report for 2015.

Preceding the introduction and tributes for Governor Keating, Chairman Fisk presented a Tiffany crystal star to Bill Slattery in recognition of his 15 years of distinguished service to the Foundation before his retirement as President late in the summer of 2015.

On December 1, 2016, we were privileged to present the Foundation's twenty-ninth Annual Award for 2016 to the Honorable Former Chairman of the Securities and Exchange Commission, Harvey L. Pitt, Chief Executive Officer of Kalorama Partners, LLC, who was introduced by billionaire hedge fund entrepreneur, John Paulson.

Sharing the stage with Chairman Pitt was the Honorable Michael Mukasey, the 81<sup>st</sup> Attorney General of the United States and Former Chief Judge of the United States District Court for the Southern District of New York, for the presentation of the Foundation's Special Lifetime Achievement Award. General Mukasey was introduced by America's Mayor, the Honorable Rudy Guiliani.

As the year 2015 came to a close, we named five new distinguished Directors and two new high caliber Council Members who were officially installed at our March 23, 2016 Board meeting. Photos and bios of these outstanding professionals who have joined the leadership of our Foundation are presented in the Foundation's 2015 Annual Report and in this Report for 2016 as well.

Atlantic Legal's board and advisory council remain convinced that our legal system needs the kind of responsible, objective, and vigorous advocacy the Foundation has provided for nearly 40 years. We are grateful for the loyal support of our contributors, leadership and staff, enabling the Foundation to continue its important work.



A handwritten signature in black ink, appearing to read "Marty Kaufman".

Marty Kaufman  
Executive Vice President  
& General Counsel



A handwritten signature in black ink, appearing to read "Dan".

Dan Fisk  
Chairman & President

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## Executive Summary

### About Atlantic Legal Foundation

- Atlantic Legal Foundation has been defending liberty for 40 years, since its establishment in 1977.
- Atlantic Legal Foundation is a nonprofit, nonpartisan public interest law firm with a history of advocating for individual liberty, free enterprise, property rights, limited and efficient government, sound science in the courtroom, and school choice. Atlantic Legal provides legal representation, without fee, to individuals, corporations, trade associations, parents, scientists and educators.
- The Foundation frequently files amicus curiae briefs in high-profile court cases in the United States Supreme Court, federal circuit courts and state supreme courts.

### Constitutional Issues

Atlantic Legal Foundation participates in important cases involving the expansive and capricious exercise of governmental power, as well as the interplay between U.S. law and international law. Among the issues we have addressed: challenging state and local attempts to regulate interstate and foreign commerce, combatting limits on free speech on college campuses, and opposing expansive assertions of U.S. court jurisdiction over foreign entities and transactions.

### Sound Science

Atlantic Legal is the nation's preeminent public interest law firm advocating for the admissibility of sound medical and expert testimony in toxic tort, product liability and other litigation. Atlantic Legal fights the admissibility of "junk" science, and fosters the use of sound science principles in judicial and regulatory proceedings. Our amicus briefs on behalf of several Nobel laureates and numerous other prominent scientists were cited and relied on by the majority in the landmark Daubert trilogy of U. S. Supreme Court cases.

## Corporate Issues

Atlantic Legal advocates for responsible corporate governance and advocates against intrusive regulation of business. The Foundation was an early proponent of preservation of the attorney-client privilege against compulsory waiver of that essential protection where corporate misconduct has been asserted. It has challenged abuse of class action procedures and has strongly advocated for the enforcement of arbitration agreements.

## School Choice

Atlantic Legal's work in this area is focused on supporting charter schools. A major part of this effort is publishing a series of state law guides, written by nationally known labor law attorneys, to educate charter school leaders about what they need to know to deal with efforts by public employee unions to burden charter schools with intrusive union work rules that stifle innovation.

The Foundation also provides legal counsel to and represents charter schools and charter school advocates in court at no cost.

## Position Papers and Conferences

Atlantic Legal publishes papers on legal issues of public concern, such as: inadequate judicial compensation and its impact on the New York economy, the need for a restructuring of New York's court system, correcting weaknesses in law school curricula, and the need for and benefits of parental choice in K through 12 education. Of note, we have published a series of state-specific guides for charter school leaders entitled "Leveling the Playing Field: What Charter School Leaders Can Do When the Union Calls."

The Foundation sponsors conferences on topics of importance to the business and legal communities, such as: Science and Public Policy Implications of the Health Effects of Electromagnetic Fields; the Attorney-Client Privilege – Erosion, Ethics, Problems and Solutions; Corporate Litigation – How to Reduce Corporate Litigation Costs and Still Win Your Case.





# In Tribute To Antonin Scalia 1936 – 2016

Associate Justice of the Supreme Court of the United States  
Sept. 26, 1986 – Feb. 13, 2016



Antonin Scalia, the impassioned strict constructionist of the U.S. Constitution, was born on March 11, 1936, in Trenton, New Jersey. His father, Salvatore Eugene, was an Italian immigrant who later became a professor at Brooklyn College while his mother, Catherine Panaro, was born to Italian immigrants in Trenton and was a primary school teacher. Scalia's family moved to Queens, New York when he was a young child. He excelled academically and obtained a scholarship to St. Francis Xavier High School in Manhattan. He went on to graduate as the class valedictorian and started studying at Georgetown University in 1953.

At Georgetown, Scalia was a lauded debater and thespian. He studied abroad in Switzerland during his junior year, and his pursuit of excellence led him to graduate as valedictorian of his undergraduate class with a bachelor's degree in history in 1957. Scalia's practiced devotion to education was rewarded when he entered Harvard Law School, as he became the Notes Editor for the Harvard Law Review and, in 1960, graduated valedictorian for the third time in his life. Scalia also served as a Sheldon Fellow through Harvard after graduation, which granted him the opportunity to travel and research in Europe the following year.

Scalia entered private practice in 1961 at the international law firm Jones Day. While he excelled as a commercial law attorney for the next six years, he recognized that he held greater appreciation for the academic aspects of law rather than the practical ones. Thus, he left his practice in 1967 to become an administrative law professor at the University of Virginia. Scalia taught until 1971 when he was appointed general counsel for the Office of Telecommunications Policy by President Richard Nixon. One of his primary duties was to brainstorm federal policies for cable television expansion. Between 1972 and 1974, he served as chairman for the U.S. Administration Conference, which implemented methods to increase the efficiency of the federal bureaucracy. President Nixon then nominated Scalia for Assistant Attorney General for the Office of Legal Counsel. Following Nixon's resignation, President Gerald Ford sustained the nomination and Scalia was confirmed by Senate vote in August, 1974. After dealing with many disputes between the executive and legislative branches in the aftermath of the Watergate scandal, Scalia returned to teaching and joined the faculty at the University of Chicago Law School in 1977. He taught at Chicago until 1982 when President Ronald Reagan nominated him for the United States Court of Appeals for the District of Columbia Circuit. Scalia was sworn in on August 17, 1982. During his four years on the bench, Scalia earned favor for his mastery of legal writing and natural wit. His conservative aura was well-received by the Reagan administration. When Chief Justice Warren Burger retired from the Supreme Court and Associate Justice William Rehnquist was named to succeed him, President Reagan chose Scalia as his nominee for Rehnquist's seat. Scalia's nomination hearing was mostly a formality and the Senate unanimously confirmed his nomination with a 98-0 vote. He took his seat as an Associate Justice of the Supreme Court on September 26, 1986.

Justice Scalia was never at a loss for words on the bench. He asked many questions and was sometimes brutally forceful in persuading both petitioner and respondent attorneys to fall in line with his legal conclusions.

Justice Scalia's questioning was meticulous, exploring the nuances of legal text, while his comments were often bludgeoning. He also possessed a sense of humor that caused the courtroom to erupt in laughter on a regular basis. The witty and thorough writing Justice Scalia honed while on the D.C. Circuit carried over to the Supreme Court. He wrote more concurring opinions than any other justice in Supreme Court history, and is third for most dissenting opinions. His opinions were expertly written, but his tone could sometimes be considered by some to be crass or offensive. Many of his memorable quips even made headlines (e.g., his dissent in *King v. Burwell* in 2015, the "Obamacare" case, included references to "pure applesauce," "jiggery-pokery," and "SCOTUScare").

Justice Scalia was an originalist who interpreted the U.S. Constitution in accordance with the meanings and intentions that were present when it was first adopted. This legal philosophy is the ideological opposite to a "living Constitution" (an interpretation endorsed by Justices Breyer and Ginsburg) that evolves by incorporating the contemporary meanings and intentions of society at-large. Among other things, Justice Scalia supported state's rights, believed that there is no constitutional right to abortion (dissenting in *Planned Parenthood v. Casey*, which protected a woman's right to terminate a pregnancy without undue burden), shied away from laws that make distinctions between protected classes (dissenting in *Lawrence v. Texas*, which decriminalized homosexual sodomy), favored the constitutionality of the death penalty (dissenting in *Roper v. Simmons*, which found it was unconstitutional to impose the death penalty on adults for crimes committed while they were legal minors), and endorsed an individual's right to carry firearms (writing the majority opinion in *District of Columbia v. Heller*, which protects an individual's right to own a firearm for lawful purposes). Ideologically speaking, Scalia was closer to a moderate conservative like Justice Anthony Kennedy, rather than a far-right conservative like Justice Clarence Thomas. Outside of work on the Supreme Court, Justice Scalia was a hunter, and avid supporter of opera and many theatrical arts. He was a man of mark.



# In The Courts

In 2015, the Foundation focused on issues affecting the market economy, including constitutional and procedural issues, abuse of class actions, enforceability of arbitration agreements, and admissibility of expert evidence and the use of sound science in judicial proceedings. Atlantic Legal also litigated important cases involving the expansive and capricious exercise of governmental power and the interplay between U.S. law and international law. Among the issues we have addressed were excessive regulation by federal executive branch agencies, state and local attempts to regulate interstate and foreign commerce, and expansive assertions of U.S. court jurisdiction over foreign entities and transactions.

Atlantic Legal is the nation's leading public interest law firm advocating for the admissibility of sound medical and scientific expert testimony in toxic tort, product liability and other litigation and fighting against the admissibility of "junk" science. We seek to foster the use of sound scientific principles in judicial and regulatory proceedings. Our amicus briefs on behalf of more than 20 Nobel laureates and numerous other prominent scientists have been cited and relied on by the majority in the landmark Daubert trilogy of U. S. Supreme Court cases, and we have represented dozens of distinguished scientists, including more than 20 Nobel Prize winners, in cases in which we seek to educate judges and regulators about the application of sound scientific methods in legal and rule-making proceedings.

The Foundation advocates for responsible corporate governance and advocates against intrusive regulation of business. We were an early proponent of preservation of the attorney-client privilege against compulsory waiver of that essential protection where corporate misconduct has been asserted. In 2016 we have focused our work in this area on the abuse of class action procedures and threats to the enforcement of arbitration agreements.

Atlantic Legal's work advocating for educational choice is focused on supporting charter schools. A major part of this effort has been publishing a series of state law guides, written by nationally known labor law attorneys, to equip charter school administrators and sponsors to deal with efforts by public employee unions to limit the creation of charter schools or to burden charter schools with intrusive union work rules and other regulations that stifle innovation. The Foundation also provides legal counsel to charter schools and represents charter schools and charter school advocates in court at no cost.

## Constitutional and Procedural Issues

In an important case involving the right of property owners to seek prompt judicial review of administrative action, the Supreme Court in 2016 unanimously held in *U.S. Army Corps of Engineers v. Hawkes* that jurisdictional determinations by the Army Corps of Engineers are reviewable in federal court under the Administrative Procedure Act. The Supreme Court's decision is significant because property owners no longer are forced to choose between proceeding to develop their property at the risk of heavy fines, or delaying a project while awaiting the end of an arduous and expensive permit process.

Administrative Agency Overreach - Judicial Review of Agency Action - Administrative Procedures Act

*U.S. Army Corps of Engineers v. Hawkes Co., Inc.*, U.S. Supreme Court, No. 15-290 - Clean Water Act - administrative procedure - judicial review.

Under the Clean Water Act (CWA), the Army Corps of Engineers may issue a site-specific Jurisdictional Determination (JD) designating all or a portion of private land as affecting "waters of the United States" subject to federal regulation. A JD effectively prohibits the landowner from using the

regulated portion of his land without a federal permit. The EPA and the Army Corps of Engineers had taken the position that a landowner can challenge a JD in court only after making a prohibitively costly and time-consuming application for a permit, which the Corps (or EPA, which shares jurisdiction over CWA enforcement with the Corps) may then issue a permit, issue a permit with conditions and limitations, or deny a permit outright. The permit

application would be unnecessary, and outside the agency's power, if the Corps or EPA incorrectly asserts that the property is a "wetlands" under the agency's broad definition.

Some U.S. Courts of Appeals refused to review such determinations under the Administrative Procedure Act (APA), because they are not "final agency action." In *Hawkes*, the U.S. Court of Appeals for the Eighth Circuit held that a final jurisdictional determination is judicially reviewable. That decision was in direct conflict with the Fifth Circuit's decision in *Kent Recycling v. U.S. Army Corps of Engineers* (in which the Foundation had also filed an amicus brief). In both *Hawkes* and *Kent Recycling*, the Army Corps of Engineers made a final jurisdictional determination that the subject site was subject to CWA regulation and could not be developed without a permit.

The Foundation argued that jurisdictional determinations have immediate, actual and serious real-world impact on the property owner, as did the compliance order in *Sackett v. EPA*, decided by the Supreme Court in 2012.

On May 31, 2016 the Supreme Court ruled in favor of *Hawkes Co.* in a unanimous judgment with three separate concurrences. Chief Justice Roberts, writing the majority opinion, noted that by issuing an approved JD, the Corps for all practical purposes has ruled definitively that respondents' property contains jurisdictional waters, and that an approved JD gives rise to "direct and appreciable legal consequences." The majority opinion rejected the government's argument that the landowner has adequate alternatives to prompt adjudication and held that the alternatives expose the landowner to substantial and unnecessary expense, resulting in a denial of due process.

Constitutional Law - First Amendment - Compelled Speech and Association - Mandatory Public Employee Union "Agency Fees"

*Friedrichs v. California Teachers Association*, U.S. Supreme Court, No. 14-915 - merits - decided March 29, 2016.

In this important challenge to the mandatory payment of "agency fees" to the California public school teachers union by teachers who have not joined the teachers union, the Supreme Court split 4-4, leaving the Ninth Circuit's decision in favor of the union intact.

California law requires every teacher working in most of its public schools to financially contribute to the local teachers union and to its state and national affiliates in order to subsidize expenses the union claims are "germane" to collective bargaining. For teachers who chose not to join the union, these payments, called "agency fees," in theory pay for the union's efforts to improve teachers' wages and fringe benefits through collective bargaining, and prevent non-union members from benefitting from the union's collective bargaining efforts without paying union dues.

We filed an amicus brief on the merits in which we argued that public employee union collective bargaining is increasingly intertwined with politics, and the act of bargaining by public employee unions is itself political and thus agency fees compel support of political speech. Collective bargaining, lobbying, and political advocacy are so interrelated that it is difficult to draw the line between where collective bargaining expenses end and political advocacy expenses begin.

The Court split 4-4 on this case, leaving the Ninth Circuit's decision dismissing the teachers' challenge in effect. The split decision was not accompanied by an opinion on the merits of the argument; all that was issued was a one line statement that the Court was split 4-4.

We anticipate that this issue will come before the Court again once a successor to Justice Scalia is confirmed.

"Political Question Doctrine" - U.S. Naval Operations — Command Decisions.

*Cooper v. Tokyo Electric Power Company* - Ninth Circuit, No. 1580110 B - "Political Question Doctrine" as applied to naval operations - decision pending.



This case is a putative class action, in which more than 230 U.S. Naval personnel seek to represent a class of 70,000 individuals who were allegedly exposed to radiation from the Fukushima Nuclear Power Plant in Japan (FNPP) during Operation Tomodachi, the U.S. military's emergency effort to provide assistance to Japan after the massive March, 2011 earthquake and tsunami that killed more than 15,000 people. The Fukushima nuclear power plant was owned and operated by Tokyo Electric Power Company (TEPCO). Plaintiffs assert claims against TEPCO for negligence, nuisance, strict liability (based on failure to warn, design defect, and ultrahazardous activity), intentional infliction of emotional distress, and loss of consortium. Plaintiffs seek unspecified compensatory and punitive damages and a \$1 billion medical monitoring fund, despite the fact that the U.S. Navy has already conducted an extensive study of a large sample of service members who participated in the operation and found no increased incidence of radiation-related disease.

TEPCO moved to dismiss the complaint on numerous grounds. That motion was granted in part and denied in part. TEPCO took an interlocutory appeal to the Ninth Circuit to resolve two important and unsettled questions of law: (1) whether the "political question doctrine" bars adjudication of claims for injuries resulting from discretionary military decisions that allegedly exposed U.S. service members to hazardous conditions; and (2) whether and to what extent the common law "firefighter's rule," which bars certain claims by emergency responders who are injured while responding to an incident, applies to U.S. military personnel injured during an overseas humanitarian mission.

In this case, if the U.S. Navy was aware of the risks posed by the Fukushima reactor and, nevertheless, had decided to position the aircraft carrier off the coast of Japan near the site of the nuclear plant, under U.S. law the Navy's action would be a "superseding intervening cause" of plaintiffs' alleged injuries, and the causation chain would be broken, thus eliminating any liability for other entities, including TEPCO. To make this determination, a U.S. court would have to inquire into the Navy's decision-making process. Adjudication of Plaintiffs' claims would require inquiry into the reasonableness of military operational and Executive branch policy choices in the spheres of military affairs and foreign relations.

The Foundation filed an amicus brief on behalf of five four-star admirals with extensive experience in commanding aircraft carriers, carrier groups, the U.S. Navy Pacific Fleet, the Pacific Command. One was Vice Chief of Naval Operations. The Foundation's amicus brief focuses principally on the operational aspects of the U.S. Navy's participation in rescue activities and on how judicial intervention would violate the "political question" doctrine and would be inimical to U.S. military and diplomatic objectives. We argue that U. S. courts should not hear cases that involve so-called "political questions," because such questions are not justiciable.

Judicial examination of the decision to deploy U.S. navy vessels off the coast of Japan following the tsunami and explosion at the nuclear power plant would necessarily go to the heart of how the military conducts recovery operations under bilateral and multilateral treaties and would require examination of decisions by the President, cabinet officers, and the military chain of command.

We argue that decisions as to how, when, why and where to deploy military personnel are within the discretion of the military and the President as Commander-in-Chief, and should not be second-guessed by courts or juries.

The Ninth Circuit has not decided the pending motions.

Enforceability of Arbitration Clauses - Employment Contracts - Epic Systems Corp. v. Lewis, No. 152997, Ernst & Young v. Morris, No. 16300, NLRB v. Murphy Oil, No. \*\*\*

In January 2017, the Supreme Court granted certiorari review in three cases to resolve a circuit split arising from contrary conclusions drawn by several circuits on whether class and collective action waivers in employment arbitration agreements violate the National Labor Relations Act or whether the Federal Arbitration Act trumps the NLRA. Classaction waivers in employment agreements have been struck down by the Ninth and Seventh Circuits, but upheld by the Second, Fifth and Eighth Circuits.

The Ninth and Seventh Circuits held that the NLRA is a “congressional command” that creates an exception to the Federal Arbitration Act’s promotion of arbitration as a preferred means of dispute resolution. The Fifth Circuit, in *NLRB v. Murphy Oil*, No. 16307, held that the NLRA was not an unambiguous “congressional command,” and that it did not fall within the Federal Arbitration Act’s “saving clause” that does not require courts to enforce an “illegal” agreement.

The petition for certiorari in *Epic Systems Corporation v. Lewis*, asks the Court to review the Seventh Circuit’s ruling that a software company violated the NLRA by imposing a mandatory arbitration agreement that barred employees from seeking class, collective, or representative remedies to wage and hour disputes. The circuit court held that the waiver interfered with employees’ protected rights under section 7 of the NLRA to engage in “concerted activity.”

As a general matter, the Federal Arbitration Act requires courts to enforce agreements to arbitrate according to their terms,” including for “federal statutory claims, unless the Federal Arbitration Act’s mandate has been ‘overridden by a contrary congressional command.’ The Seventh Circuit held that Epic’s arbitration agreement was “illegal” under the NLRA, and that because illegality was a “generally applicable contract defense,” the Federal Arbitration Act did not require enforcement of the agreement.

The Seventh Circuit’s decision ignores the Supreme Court’s directive in *Concepcion v. AT&T Mobility* that the Federal Arbitration Act’s saving clause does not include contract defenses that “stand as an obstacle to the accomplishment of the Federal Arbitration Act’s objectives” and the Seventh Circuit relied on a contract defense that undoubtedly disfavors arbitration — just what the Court in *Concepcion* forbade.

In *Ernst & Young v. Morris*, the majority of a divided panel of the Ninth Circuit construed Section 7 of the NLRA as protecting “a range of concerted employee activity, including the right to seek to improve working conditions through resort to administrative and judicial forums” thus establishing a “substantive right” for employees “to pursue work-related legal claims, and to do so together.” The arbitration provision, the majority wrote, “prevents concerted activity by employees in arbitration proceedings, and the requirement that employees only use arbitration prevents the initiation of concerted legal action anywhere else” and thus the provision interferes with a protected Section 7 right in violation of Section 8 of the NLRA, and cannot be enforced. Relying on the Federal Arbitration Act’s saving clause, which provides that an arbitration agreement is enforceable “save upon such grounds as exist at law or in equity for the revocation of any contract,” the majority concluded that Ernst & Young’s arbitration provision was unenforceable.

The dissent contended that the majority had adopted reasoning “directly contrary” to the Supreme Court’s arbitration jurisprudence. Further, the NLRA contained nothing “remotely close” to a “contrary congressional command” that would trump the Federal Arbitration Act.

Three courts of appeal have held that an agreement requiring an employee to arbitrate claims against an employer on an individual basis is enforceable under the Federal Arbitration Act and does not violate the NLRA. The Eighth Circuit began from the premise that courts are required to “enforce arbitration agreements according to their terms,” unless there is a “contrary congressional command for another statute to override the Federal Arbitration Act’s mandate.” Because neither the NLRA nor the FLSA contained such a command, the Eighth Circuit concluded that the arbitration agreement at issue was enforceable.

The Second Circuit reached the same conclusion in another case in which Ernst & Young was a defendant and the same arbitration agreement as in *Morris* was at issue. There, plaintiff worked for E&Y and, pursuant to the same Common Ground Dispute Resolution Program at issue in *Morris*, agreed to resolve all disputes with E&Y by individual arbitration. After the plaintiff filed a class action in federal court, E&Y moved to compel arbitration. Like the Eighth Circuit, the Second Circuit began from the premise that arbitration agreements should be enforced according to

their terms unless the Federal Arbitration Act's mandate has been overridden by a contrary congressional command, and the court found no such contrary command in either the NLRA or the Fair Labor Standards Act.

In *Murphy Oil, U.S.A., Inc. Cir. NLRB*, (5th Cir. 2015) the NLRB had ruled that an arbitration agreement "infringed on the substantive rights protected by Section 7 [of the NLRA]". The Fifth Circuit, on *Murphy Oil's* petition for review, reasoned that neither the Federal Arbitration Act's saving clause nor any other statute's contrary congressional command precluded enforcement. The Fifth Circuit did not find a "contrary congressional command" or inherent conflict with the Federal Arbitration Act in the text, legislative history, or purposes of the NLRA.

In 2016 the Foundation filed amicus briefs urging the Court to grant review in *Epic* and *Ernst & Young*, in which the employers appealed. In our amicus brief at the petition stage, we argued that there is a clear and obvious circuit split arising from contrary conclusions drawn by several circuits about whether class and collective action waivers in employment arbitration agreements violate the National Labor Relations Act and whether the Federal Arbitration Act nonetheless trumps the NLRA, evidenced by the fact that three petitions had been filed with the Court in the space of a single month, involving very similar legal and factual issues, and that petitions have been filed by both employers and the NLRB. We did not file an amicus brief in *Murphy Oil*, in which the NLRB sought review of the Fifth Circuit's decision.

In early 2017 we will be briefing all three cases on the merits. We will argue that the Federal Arbitration Act establishes a presumption in favor of enforcing arbitration agreements as written, that the presumption can be overcome only by another statute that is a "congressional command" that is contrary to the Federal Arbitration Act's mandate, and that the text and history of the NLRA is not such a contrary command.

#### Enforceability of Arbitration Clauses - Franchise Contracts

*Dickey's Barbecue Restaurants, Inc., et al. v. Chorley Enterprises, Inc., et al.* - U.S. Supreme Court, No. 15-719 - arbitration - federal preemption - petition for certiorari denied.

The issue in this case was whether a state law can require franchise contracts to include a clause negating an arbitration provision. We argued that the Federal Arbitration Act preempted Maryland's law, but the Fourth Circuit disagreed and the Supreme Court denied *Dickey's* petition for certiorari.

In this case, the Fourth Circuit held that the Federal Arbitration Act did not preempt a state mandated "Maryland Clause" in a Franchise Agreement that negated an agreement's mandatory arbitration provision which required arbitration of all claims arising under the Maryland Franchise Law. The Maryland Clause was imposed by Maryland regulators as a condition of approval of the Franchise Agreement, and thus the franchiser's ability to do business in Maryland. The Fourth Circuit held that even though Maryland franchise regulators required inclusion of the Maryland Clause, the inclusion of the clause was "voluntary" because "*Dickey's* was not forced to do anything. It had several options. It could have simply declined to do business in Maryland. Or . . . it could have filed a declaratory action challenging the Maryland Commissioner of Securities' position before including the Maryland Clause in its Agreements."

We argued that an otherwise preempted state law, rule or regulation that is required by a state regulator to be included in a contract as a condition for doing business in the state, is not "voluntary." The Federal Arbitration Act's clear legislative purpose is to promote arbitration as a speedy and efficient means of resolving commercial disputes. The Fourth Circuit's decision creates an exception to preemption that not only affects arbitration clauses, but also empowers state regulators to undermine and circumvent other federal laws and permits states to use a "back door" to impose otherwise preempted conditions in contracts or state licenses.

The Supreme Court denied the petition for certiorari.

AVCO Corp. v. Sikkelee, U.S. Supreme Court, No. 16-323 - Federal Preemption - Federal Aviation Act - Petition for Certiorari denied

Does Federal Aviation Administration approval of an engine design preempt claims under state products liability law? The Foundation argued that the Federal Aviation Act preempts the field of aviation safety and that the claim should be dismissed. The Third Circuit held that preemption applies only to “in air operations” and not to manufacture or design of aircraft or components. The Supreme Court declined to review the Third Circuit’s decision.

David Sikkelee died when the private Cessna 172N aircraft he was piloting crashed. Two years before the crash the Cessna’s engine had been overhauled and a new carburetor installed pursuant to the manufacturer’s “type-certified” design. Mr. Sikkelee’s widow filed suit, claiming that the crash resulted from alleged manufacturing and design defects in the Cessna’s engine — specifically, a “malfunction or defect in the engine’s carburetor.”

AVCO’s Lycoming division has been manufacturing engines for general aviation aircraft for decades. Lycoming sold the engine at issue in 1969. Nearly thirty years later, the engine was installed “factory new” on the Cessna 172, even though this engine-airframe combination is not certified or approved by the Federal Aviation Administration. An employee of a field office of the Federal Aviation Administration issued

a oneoff approval to allow this engine to be installed in this airplane.

AVCO and others were sued in federal court by Sikkelee’s widow who asserted products liability claims under design defect and failure to warn theories. AVCO moved for summary judgment, arguing that Sikkelee failed to identify any applicable federal standards of care that were breached and were causally related to the accident. AVCO also moved for summary judgment on grounds that the jury should not be permitted to second guess the Federal Aviation Administration’s certification and approval of the engine design.

The district court granted summary judgment in part, holding that the Federal Aviation Administration type certification of the engine entitled AVCO to summary judgment on the design related claims. The district court found that the state law claims fell within the preempted field of “air safety” and granted partial summary judgment with respect to the defective design claim. The court found the type certificate issued to the manufacturer by the Federal Aviation Administration established the federal standard of care, and the “issuance of a type certificate for the . . . engine meant that the federal standard of care had been satisfied as a matter of law.” The court denied summary judgment on the failure to warn claim. The district court also denied summary judgment in part. Sikkelee and AVCO appealed to the Third Circuit.

The appeal raised important issues of “implied field preemption.” AVCO argued that the pervasive regulation of the entire field of aviation safety, which had been settled law in the Third Circuit for fifteen years, mandates dismissal of plaintiff’s claims and that juries should not be allowed to second guess regulatory decisions made by the Federal Aviation Administration in its design and certification approvals. Sikkelee argued that a prior Third Circuit case, which holds that state law standards of care are preempted by the pervasive federal regulation of the field of aviation safety, was wrongly decided, that the case applies only to commercial airline operation and does not apply to aircraft manufacturing. Sikkelee also attacked the aircraft certification process, arguing that the Federal Aviation Administration relies on manufacturer-provided information and that aircraft certification is not pervasively regulated.

The Third Circuit drew a distinction between claims based on “in air” operations and those based on design defects, holding that preemption does not extend to product liability claims. The court concluded that Congress did not express a clear and manifest intent “to preempt aircraft products liability claims in a categorical way.” The court held that state law applied to product liability claims, subject to “traditional principles of conflict preemption” to resolve



any conflicts between the pertinent type certificate specifications and state law standards of care. The Third Circuit observed that, because state law has consistently been applied to product liability claims, the presumption against preemption applies to aviation product liability cases.

The Foundation's amicus brief in the Third Circuit focused on the preemption issues, and argued that *Abdullah v. American Airlines, Inc.* (3rd Circuit 1999) (and cases from other circuits) held that federal law preempts the "entire field" of aviation safety and establishes exclusive, standards of care for aviation safety, and plaintiff's theory that a jury should be allowed to second-guess the Federal Aviation Administration's determination that the engine complied with the applicable federal standards of care would thwart Congress's intent to vest the Federal Aviation Administration with complete and exclusive authority over aviation safety in order to create a uniform regulatory scheme in which the Federal Aviation Administration's regulations are pervasive, and cover virtually all facets of air safety, including the design and manufacture of aircraft engines.

The court considered a brief filed by the Federal Aviation Administration, but disregarded the Federal Aviation Administration's conclusion that the Act and Federal Aviation Administration regulations were "'intended to create federal standards of care' for manufacturing and design defect claims."

AVCO asked the U.S. Supreme Court to review the Third Circuit decision, arguing that:

- The Third Circuit's holding that the Federal Aviation Act does not preempt the entire field of aviation safety deepens a preexisting circuit conflict between the Second and Tenth Circuits.
- The Third Circuit's decision is erroneous because the Federal Aviation Act creates a comprehensive scheme governing aviation safety, an area dominated by federal interests, and leaves no room for "supplementation" by state law standards of care.

Our amicus brief in support of AVCO's petition for certiorari in the Supreme Court, filed in October, 2016 emphasized the circuit split and the impracticality of the Third Circuit's attempt to distinguish between claims arising from "in air" operations and claims arising from the safety of aircraft design, manufacture, or maintenance.

Unfortunately, the Supreme Court denied review.

#### Class Actions - Use of Statistical Sampling to Establish Injury to Class

*Tyson Foods v. Bouaphakeo* - U.S. Supreme Court, No. 141146 - merits - class action - proof of actual injury.

Plaintiffs claimed that current and former workers at a processing factory were owed wages for the time it took to put on and take off protective gear. Based on the average dressing time of a sample of workers, plaintiffs' lawyers calculated how much in overtime wages all of the class members were allegedly owed for "donning and doffing" work clothing and gear, but ignored the substantial variation in time required for donning and doffing of different types of gear for the over 400 different jobs at the plant.

For a case to proceed as a class action, all members of a class must share a common issue of fact and common questions of law must predominate. Plaintiff workers were allowed to sue as a class for wages earned, using an average to prove the time lost in earnings, even though there are different types of gear for the over 400 different jobs.

The Foundation opposed class certification because the facts proving loss of income were not common to all the plaintiffs, and there were very large disparities in the time members of the alleged class took to "don and doff" their protective gear. A statistical average of time to dress and undress, as in this case, lumps together those that might have suffered damage by being underpaid with those who did not suffer any injury at all and were not owed any

overtime pay. Basing claims on a sample of employees and applying that average to a disparate group of over 3,300 individuals is flawed, and the use of averages disguised very significant differences within job classifications and between job classifications. In *Wal-Mart v. Dukes*, the Supreme Court decertified a class based on a sample, holding that the class must “resolve an issue that is central to the validity of each one of the claims in one stroke” and under the *Dukes* doctrine, the claims against Tyson Foods should also be handled on an individual basis because of the wide variation.

The Supreme Court affirmed class certification, holding that statistical sampling can be used to establish class-wide injury, but on narrow grounds that the National Labor Relations Act imposes on employers the burden of maintaining wage and hour records, which Tyson had not done in this case.

Separation of Powers - Economic Substance Doctrine - Law Made by IRS and Courts, Not Congress.

*Santander Holdings v. United States* - First Circuit - foreign tax credits — “economic substance doctrine”

The Santander case involves foreign tax credits claimed on its U.S. federal tax returns for income taxes paid to the United Kingdom on a transaction with Barclays Bank. In the transaction, Barclays made a five-year, billion dollar loan to Santander at a favorable interest rate, using a loan structure that Barclays developed to produce U.K. tax benefits for Barclays. Barclays effectively shared its U.K. tax benefits with Santander through the favorable interest rate on the five-year loan. (Several other U.S.-based banks also entered into identical transactions with Barclays.)

The Internal Revenue Service challenged the transactions on the ground that they lacked economic substance, arguing that the transactions had no reasonable possibility of profit because (a) the reduced interest on the loan was not profit to Santander, but was instead effectively a tax rebate; and (b) foreign taxes paid by Santander to the U.K. as part of the loan structure should be considered nontax “transaction costs” that exceeded any potential profit from the transaction. The IRS disallowed the foreign tax credits for which Santander and the other banks were eligible, and assessed penalties.

Two cases involving the identical loan structure were decided in favor of the Government by the United States Courts of Appeals for the Federal Circuit and the Second Circuit. In *Santander*, however, the United States District Court for the District of Massachusetts granted summary judgment to Santander. The Government sought review in the First Circuit.

We filed an amicus brief in the First Circuit in support of the taxpayer. We focused on separation of powers principles and argued that Congress has addressed the question of foreign tax credits, and the economic substance doctrine should not be applied in a way that allows judicial second-guessing of the legislature’s judgment.

The First Circuit reversed and ruled for the Government, finding that the underlying transaction was tax-motivated and had no economic substance. The Supreme Court, as it had in the *AIG*, *Salem Financial*, and *Bank of New York* cases, declined the petition for certiorari.

Expansive Theories of Tort Liability - “Innovator Liability”

*T. H., A Minor, et al. v. Novartis Pharmaceuticals Corporation* - California Supreme Court - merits - “Innovator Liability”

In this case the issue is whether Novartis Pharmaceuticals Corporation, a manufacturer of a brand name asthma medication, can be held liable for neurological injuries allegedly sustained by twin minors in utero after their mother was prescribed and consumed a generic form of the medication nearly six years after Novartis and sold its interests in the medication.

The California Court of Appeal, an intermediate court, held that Novartis could be held liable for in utero injuries to an infant resulting from the mother's "off label" use of the drug Brethine to control premature labor, when Brethine had been approved by the FDA only for treatment of pulmonary disease. Here, plaintiffs alleged that before it sold its rights to Brethine and its active compound, terbutaline, in 2001, Novartis learned of studies showing that (in this case) off label use of the asthma medication to inhibit preterm labor could cause birth defects. Plaintiffs could state negligent failure to warn and negligent misrepresentation claims against Novartis based on its failure to change the drug label warnings before selling its rights in the drug, so long as they could allege and prove that the failure to change the warnings was a substantial factor contributing to their injury in 2007 from their mother's ingesting the generic version of the drug. The decision holds that the manufacturer of a brand name drug may be held liable for negligent failure to warn and negligent misrepresentation to plaintiffs injured by taking a generic version of the manufacturer's brand name drug.

The pregnancy, and use of Brethine by TH's mother, occurred several years after Novartis had sold the brand rights to Brethine to a smaller company. Nevertheless, plaintiff claimed that Novartis had a duty under federal law to update the warning label and that Novartis's failure to update Brethine's label and to warn against the potential risk posed to fetal health, breached a duty of care under federal law. Plaintiffs alleged that several studies published before Novartis sold the rights to Brethine showed the risks posed to fetal health, creating an inference that Novartis was aware of Brethine's potential risk and thus was required to "promptly review all adverse drug experience information" under FDA regulations.

Plaintiffs allege that had Novartis added a warning about the risks associated with Brethine before it sold the Brethine brand rights, all subsequent manufacturers would have had to use the same label with the same warning under federal regulations. Additionally, plaintiffs argue that it was foreseeable that Novartis's failure to update the label would cause doctors to continue prescribing Brethine for management of preterm labor years after Novartis sold the brand rights to the drug because no manufacturer of generic Brethine or any subsequent purchaser of the Brethine brand rights would add such a warning.

On appeal, Novartis argued that the Court of Appeal's decision is contrary to the Supreme Court of California's prior ruling that "a product manufacturer may not be held liable in strict liability or negligence for harm caused by another manufacturer's product . . . ." Plaintiffs argued that the Court of Appeal's ruling was in line with principles of California tort law — those who cause misinformation to be disseminated to the public are liable for the consequences of foreseeable reliance on that misinformation. Plaintiffs also made a public policy argument that assigning liability to brand-name manufacturers is a necessary recourse for victims of mislabeled drugs and Novartis could have avoided the liability by simply updating Brethine's label.

Novartis argued that imposing a duty on a party that derived no economic benefit from the sale of products that injured the plaintiff is contrary to fundamental concepts of tort liability and would (1) improperly target defendants for the conduct of other companies over which they have no control, (2) impose excessive and unrealistic burdens on manufacturers to become experts in other manufacturers' products, and (3) undermine consumer safety by inundating users with excessive warnings from every company that had any historical or indirect contact with the product.

The primary argument we made in our amicus brief is that products liability has always presupposed that the product sold by the defendant is the product that caused the injury. The Court below dispensed with that requirement in holding that a defendant could be held liable for a defectively labeled generic drug even though the defendant never manufactured the generic drug, the generic drug that caused the alleged injury was manufactured by a putative competitor, and the defendant no longer manufactured the branded version of that drug. Imposing damages for injuries caused by a competitor has never been a function of tort law. This form of liability is so antithetical to the

law of torts that it collides with other fundamental principles embedded in the Constitution and in federal law.

If California law imposes liability in a case such as this, it is preempted by the Patent Act, which vests in the federal government the exclusive right to issue and regulate patents. The courts have consistently held that state laws that seek to diminish the economic value of a patented product solely because it was innovative, as was the case here, are preempted. Further, the relationship between a generic drug and a brand name product is exclusively regulated by the Drug Price Competition and Patent Term Extension Act of 1984, commonly known as “Hatch-Waxman,” which preempts any state action that upsets the balance between the interests of generic and brand drug manufacturers.

The California Supreme Court had not ruled, or even scheduled oral argument, as of the end of 2016.

#### Vested Rights - Ex Post Facto Legislation

##### Liberty Mutual v. New York - NY Court of Appeals

New York’s Workers’ Compensation Law (“WCL”) requires employers to compensate their employees for work-related injuries. Many employers satisfy that obligation by obtaining workers’ compensation insurance from private carriers. Because injuries can have consequences long after the accident — indeed long after the employment relationship has ended — workers’ compensation insurance covers all claims arising out of injuries suffered during the policy period, even if the claim arises years or decades after the injury was suffered. Workers’ compensation cases can “reopen” after being closed for years, where the employee suffers additional harm — such as a worsened condition — long after it had appeared that the worker had been fully compensated.

In 1933, the New York state legislature enacted Section 25a of the WCL, establishing a fund (the “Fund”) to cover workers’ compensation cases that had been closed for a statutorily defined period but were reopened when some new or additional harm arising out of the original injury occurred. Liability in such reopened cases was, the exclusive responsibility of the Fund, not the insurance company. The Fund was financed by assessments charged to insurance companies, but passed through to employers, separate from their premiums.

Insurance carriers adopted policy language that defined their coverage by reference to the law in effect during the policy period, which assigned liability for Section 25a claims to the Fund, not carriers. Premium rates were approved by a State-designated entity, based on the Fund’s (not the carriers’) responsibility for Section 25a claims. Both the policies and the premium rates were approved by the New York State Department of Financial Services (“DFS”). Employers paid carriers those premiums in exchange for the agreed coverage.

That system remained until 2013, when the Legislature amended the Workers Compensation Law, closing the Fund to cases that were reopened after 2013, regardless of whether the policy under which the reopened case arose was issued before or after the amendment was enacted. At the time, Governor Cuomo explained that closing the Fund would “save” employers hundreds of millions of dollars in assessments per year while eliminating a “windfall” for carriers. His premise was that the premiums historically charged by carriers had covered Section 25a liability even though that liability was the Fund’s responsibility. That premise was wrong — the State-approved premiums that employers had been charged before the amendment were specifically based on the assumption that carriers had no liability for Section 25a claims because such claims were solely the Fund’s responsibility.

As a result of the State’s error and the enactment of the 2013 amendment, carriers became liable for Section 25a claims not only under future policies, but also under past policies whose State-approved premiums had already been paid and could not be supplemented and whose State-approved terms were already agreed to by carriers and employers, and which could not be unilaterally terminated or amended by the carrier. The Compensation Insurance Rating Board determined that the amendment imposed a new, “unfunded liability” under preexisting policies that



would cost carriers \$1.1 to \$1.6 billion. To cover their share of this unfunded liability, Liberty Mutual and affiliated companies — all State-approved workers' compensation insurance carriers — had to increase their loss reserves by \$62 million.

Plaintiffs challenged the amendment on the ground that its retroactive application to policies already written violates the United States and New York State constitutions. Specifically, Plaintiffs contended that the imposition of a new, unanticipated, substantial, and unfunded liability, which the State sought to justify by the erroneous claim that the amendment prevented a windfall to carriers, violated the Contracts, Takings, and Due Process Clauses of the U.S. Constitution, and analogous provisions of the New York constitution.

The Appellate Division, First Department unanimously held that the statute was unconstitutional as retroactively applied to policies issued before October 1, 2013. The Appellate Division disagreed with the State's argument that the Amendment was "a mere "allocation of economic benefits and burdens" relating to the workers' compensation scheme. The court observed that the "closure of the Fund ... deprived [carriers] of the entirety of the benefit of [the Fund] and created a new class of unfunded liability." The court stated that whereas prior retroactive amendments to the workers' compensation scheme were justified by the Legislature's considered determination to impose retroactive liability that served some important public function, the Amendment "reflect[ed] the incorrect belief that the increased costs to carriers for pre-October 1, 2013 claims were already taken into account in the calculation of [carriers'] premiums."

The State's argument that the Legislature must have discretion to adjust the benefits and burdens of the workers' compensation scheme is true so far as it goes, but there are important constitutional limitations on the Legislature's exercise of its policymaking judgment, and those limitations were transgressed here. The New York Court of Appeals has been cautious about retroactive legislation, and has carefully preserved the line between permissible and impermissible adjustments.

Retroactive legislation and regulation warrants special attention under the U.S. and State constitutions. Unlike other retroactive amendments to the Workers Compensation Law that have been upheld by New York courts, which expand coverage and protection for injured workers, workers will continue to be compensated to the same extent they were before the amendment. The amendment's only real effect is to transfer the cost of coverage for Section 25a claims from employers to carriers. The only explanation the State has ever offered — to save employers their assessments and eliminate the windfall obtained by carriers — was based on the demonstrably mistaken belief that the premiums carriers charged already covered Section 25a liability. The State has never explained, much less defended, the Legislature's (and the Governor's) fundamental error.

In the Court of Appeals, Liberty Mutual argues that the amendment operates retroactively by substantially increasing plaintiffs' financial obligations to their employer-insureds under preexisting policies and because it shifts Section 25a liability under preexisting policies from the Fund to the insurance companies. Liberty Mutual also argues that the amendment's retroactive effect violates the contracts, takings and due process clauses of the U.S. and New York constitutions.

Our amicus brief in the Court of Appeals will address the retroactivity issue.

Asbestos Products Liability - "Every Fiber" Theory – Court's Gatekeeper Role

Davis v. Honeywell International, Inc. - California Supreme Court - admissibility of expert testimony - asbestos - "each and every fiber" theory of causation.

The California Court of Appeal held that the controversial “single fiber theory” of causation in an asbestos case was admissible under California expert testimony law, and that such determination can properly be submitted to a jury. Atlantic Legal urged the California Supreme Court to review that decision because the “single fiber theory” is inconsistent with generally accepted principles of disease causation, but that court denied the petition for review.

Although trial courts are supposed to play a “gatekeeper” role to keep out unreliable expert evidence, the trial and intermediate appellate courts in Davis allowed the jury, not the court in its “gatekeeper” role, to decide whether to accept the “single fiber” theory of lung disease causation. Courts around the country (notably New York, Pennsylvania, and Texas) have rejected efforts by plaintiffs’ experts to testify that every asbestos exposure is a “substantial factor” in causing disease.

Sam Davis worked as an auto mechanic and home remodeler. In his auto mechanic job he used Bendix brake linings (for which defendant Honeywell, which had acquired Bendix, was responsible). These brake linings contained 50 percent chrysotile asbestos by weight. Chrysotile asbestos is considerably less carcinogenic than other forms of asbestos. Prior to trial, Honeywell filed a motion to preclude plaintiff from presenting expert opinion testimony that every exposure to asbestos above background levels contributed to Davis’s disease. The motion was denied, and plaintiff’s pathology and pulmonology experts were permitted to assert the single fiber theory. The jury found for plaintiffs.

Honeywell appealed. Honeywell’s primary basis for appeal was that the “every exposure counts” testimony by plaintiff’s pathologist should have been excluded because: (1) the testimony was speculative and illogical; (2) the regulatory standards relied upon by that expert cannot establish causation; (3) no appropriate scientific literature supports the theory; and (4) the theory is contrary to California causation law articulated in the leading case *Rutherford v. Owens-Illinois* (1997), which held that not every exposure to asbestos is a “substantial factor” in causing disease. The California Court of Appeal rejected each of Honeywell’s arguments, holding that it is for the jury to resolve the conflict between the every exposure theory and any competing expert opinions. The Court of Appeal interpreted *Rutherford* as not requiring a “dose level estimation,” and instead read *Rutherford* as supporting the conclusion that even a very small dose could increase the risk of asbestos-related cancer.

We argued that the “each and every fiber” theory of asbestos-related pulmonary disease is not supported by the scientific literature, does not satisfy the “substantial” causation standard, and that the trial court did not properly exercise its “gate-keeping” role.

Unfortunately, the California Supreme Court denied review.

#### Mass Tort Liability – Court’s Gatekeeper Role - Forum Shopping - Talcum Powder Litigation

Johnson & Johnson lost two talcum powder cases in St. Louis, Missouri in 2016: a jury awarded \$72 million to the family of a woman who died from ovarian cancer after using talcum baby powder sold by J&J and another jury awarded \$55 million to a South Dakota woman who blamed J&J powder for her ovarian cancer. J&J was found liable for negligence, conspiracy, and failure to warn women of the increased cancer risk linked with the use of cosmetic talc in the genital area. J&J has appealed these St. Louis verdicts.

In March 2017, another jury in St. Louis rendered a verdict for J&J in another talcum powder case, deciding that plaintiff has not offered sufficient evidence of a causal link between her use of J&J talcum powder products and her ovarian cancer.

More than 1,000 additional individual lawsuits have been filed, many of them in St. Louis, on behalf of women who were diagnosed with ovarian cancer after using talcum powder products for feminine hygiene.

In New Jersey, a state court in Atlantic City has dismissed two lawsuits alleging that talcum powder products caused ovarian cancer. The judge found that the plaintiffs' experts who claimed that J&J Baby Powder caused ovarian cancer could not adequately support their theories, a decision that highlights the lack of scientific evidence behind plaintiffs' allegations. The ruling was made after a two-week hearing to determine the sufficiency of the scientific evidence at the core of these talcum powder litigations. The judge ruled that testimony from plaintiffs' experts suffered from "multiple deficiencies" and did not provide an adequate basis for the claims. This ruling will affect the more than 200 talcum powder lawsuits consolidated before a single judge in New Jersey state courts, but won't have an impact on the more than 1,200 suits in state court in Missouri.

J&J is the defendant in two class action lawsuits which claim J&J is responsible for ovarian cancer through use of its talcum powder products, Johnson's Baby Powder and Shower to Shower. Plaintiffs contend that the American Cancer Society, the World Health Organization, and other health agencies have raised concerns that the use of baby powder and body powder products for feminine hygiene containing talcum may place women at an increased risk of developing ovarian cancer. When talcum powder products are used in the vaginal area, it can travel through the Fallopian tubes to the ovaries, causing irritation that could lead to ovarian cancer, plaintiffs claim. Some health experts have estimated that about 10% of ovarian cancer cases and deaths from the disease in the U.S. are caused by talcum powder products.

J&J's position is that "Science, research, clinical evidence and decades of studies by medical experts around the world continue to support the safety of cosmetic talc" and that there is no direct link between talcum powder and ovarian cancer.

The science underlying the claims is somewhat dubious. There is a paucity of medical reports that accurately assess the risks in a real world environment. Many of the studies suffer from selection bias and the inherent unreliability of patient self-reporting. Critical data such as the dose exposure and concentration has not been stringently evaluated or controlled. Further, there are differences in formulation between the various products, application method, and application frequency and duration, which vary based on personal preferences.

There are many studies that have confirmed the safety of talcum powder use. Two widelyaccepted, forwardlooking, prospective cohort studies that included more than 130,000 women and were run over a long period of time — the Nurses' Health Study by the Harvard School of Public Health published in 2000 and 2010 and the Women's Health Initiative Observational Cohort by the U.S. National Institutes of Health published in 2014 — found no association between talc used for feminine hygiene and ovarian cancer. Another forwardlooking, prospective cohort study, The Sister Study, published in 2016 by researchers from the National Institute of Environmental Health Sciences, involved 50,884 women in the U.S. and Puerto Rico and found no association between talc use and ovarian cancer. No governmental or nongovernmental authority has concluded that talc causes ovarian cancer.

The different outcomes in St. Louis and New Jersey illustrate the importance of trial courts serving as gatekeepers and carefully vetting proffered expert testimony. These are issues that the Foundation has repeatedly addressed in many cases.

# Charter School Advocacy



In advocating for educational choice, Atlantic Legal focuses primarily on supporting charter schools, an effective alternative to failing district schools. A major part of this effort has been the publication of a series of state-specific law guides “Leveling the Playing Field,” written by nationally known labor law attorneys, to educate charter school leaders about what they need to know to deal with efforts by public employee unions to curb charter schools by unionizing charter school teaching staff and burdening charter schools with intrusive union work rules that stifle innovation.

In 2016, we provided counsel to the University High School in Fresno, California concerning the critical renewal of its charter in the face of opposition. Notably, University High School recently ranked in the highest percentiles in reading aptitude and in math skills among schools throughout the world.

The Head of School of University High School (“UHS”) in Fresno, California, contacted Atlantic Legal about serious problems with its authorizing district with respect to the school’s admissions criteria. UHS was in the process of applying for its periodic reauthorization. The school has regular outside counsel, but the Head of School wanted a second legal opinion and approached Atlantic Legal Foundation because of the Foundation’s national experience and reputation in this specialized area of the law.

The mission of UHS has emphasized music and academic achievement from the school’s beginning. The school’s current admissions criteria state that “students will be accepted to UHS during their eighth grade year for the ninth grade. All students are required to take four years of music performance and theory. Therefore, students must have met the standard of “intermediate proficiency” in vocal or instrumental music (usually attained with two years of experience).”

One of the distinguishing features of UHS — and one of the primary reasons families seek to send their children to the charter school — is its music program. Music courses and participation in music ensembles are at the very heart of UHS. The California Charter Schools Act allows charter schools to define their educational program, and UHS has defined its program to emphasize music.

In order to realize its educational goals — which have resulted in superlative achievement (well over 90% of the graduating class goes on to college) — one strategy utilized by UHS has been admission requirements targeting the school’s educational emphasis. In prior charter terms, UHS has established admission requirements for both music and mathematics. For the 2017-22 charter term, UHS has removed the mathematics requirement, but the music requirement remains. UHS utilizes the music admission requirement to ensure that student applicants are actually interested in music



because they must take a music course and participate in an ensemble each year they enroll at UHS. The music requirement for admission can be satisfied by a student simply participating in a music course prior to being admitted to UHS; the student does not have to receive a certain grade, or even pass a music test, to be admitted.

The authorizing district has questioned these criteria, asserting that UHS has to show that the admissions criteria do not have an “adverse impact” on protected minorities. UHS’s student population is ethnically diverse, with a significant Asian-American contingent. The authorizing district is saying, in effect, that UHS must accept everyone who applies. UHS takes the position that its admissions criteria are tailored to the school’s mission, which has been approved by the district in prior years. The authorizer is pressing UHS to drop this requirement. UHS’s board is resisting. The Head of School has sought a second opinion on whether UHS’s requirement is legal.

Atlantic Legal reviewed and commented on UHS’s draft response to the authorizing district. We will continue to work with the UHS board and outside counsel in their further dialog with the district and, if necessary, assist with a legal challenge to any adverse action by the district.

#### Elmhurst, New York Charter School

Atlantic Legal has been working with volunteer outside counsel for a group of parents who are forming a charter school in the Elmhurst section of the Borough of Queens. The lawyer is a single practitioner whose legal practice and expertise is mainly real estate law and who has little or no experience with charter school law. The attorney has sought Atlantic Legal’s assistance in guiding the sponsors of the charter school through the charter authorization process, with emphasis on governance issues.

The Elmhurst section of Queens (District 24) is very diverse racially, ethnically and culturally, with a Latino majority and a large Asian minority (mainly South Asian — Indian, Pakistani and Bangladeshi) and East Asian (Chinese and Taiwanese). The demographics of District 24 would likely make the charter a Title 1 school, serving a predominately immigrant population with a large contingent of “English As A Second Language” (ESL) students.

The charter sponsors hope to open in Fall 2017 with a kindergarten class of 75-100 students in Year 1 and adding one grade each year, with an ultimate goal of K-5 with 450-600 students. Atlantic Legal would be involved “from the ground up.”

#### Leveling the Playing Field - New California Edition

California’s charter movement has been a leader in energizing public education with a robust infusion of innovative schools. Now more than 1,200 strong, serving over 600,000 students statewide, California’s charter schools represent a diversity of instructional programs and operational design as unique as the communities they serve.

As the movement has evolved from a handful of schools focused on improving and increasing innovation, to a broad-based movement focused on high quality outcomes, increasing attention has been focused on examining the diversity of operational structures, and how to enhance the vital role of teachers.

One element of school operations and structures that has been hotly debated is the role of collective bargaining in the charter structure. The operational flexibility that charters enjoy has typically led charter leaders to try to remain unencumbered by the collective bargaining agreements that constrain district schools, although some charters choose to integrate collective bargaining in their design.

Efforts to organize charter school teachers and other employees are likely to have a significant impact on the flexibility the school needs to meet its charter responsibilities, and charter administrators need to know how to react when the union seeks to represent employees. Charter boards and administrators are well advised to seek counsel from firms that practice regularly in this area.

Whatever choices charter communities make to best serve their students, we believe that those choices must be made with the benefit of full information, transparent communication, and clarity about the roles and responsibilities of charter boards, leaders, teachers, and all others engaged in each charter’s community.

The Foundation's Leveling the Playing Field monographs are designed to answer important questions about the unionization process, what charter leaders must do to foster positive labor relations, and where and how to seek help to improve operational quality.

New editions of state-specific versions of Leveling the Playing Field, starting with California (expected to be released in March 2017), are prompted by significant developments in labor law as applied to charters. Beginning in 2012, and continuing to now, the National Labor Relations Board has taken jurisdiction over individual charter schools in several states. Since 2012, the NLRB or its regional offices have asserted jurisdiction over charter schools, despite state or local law, at schools in Illinois, Pennsylvania, New York, Michigan, Louisiana, Minnesota, Ohio, Texas and California. In one notable California decision, the NLRB denied a request for review and thus upheld a 2015 regional decision asserting NLRB jurisdiction over a California charter school which was duly organized under the California Charter Schools Act; the NLRB processed the Union's NLRB representation petition over the School's objections.

The trend is toward NLRB jurisdiction over charter school union organizing. In no case since 2012 has the NLRB failed to take jurisdiction over a charter school when it was asked to do so. Teachers unions now recognize this jurisdictional tendency and may opt to initiate NLRB jurisdiction and voting procedures themselves.

The Foundation is planning to update other state versions of its Leveling the Playing Field series.

We are encouraged that the charter school movement will receive accelerated impetus with the appointment of charter school advocate, Betsy DeVoss, as U.S. Secretary of Education.

# 2016 Annual Award Presented to The Honorable Harvey L. Pitt



In 1988, the Foundation presented its first Annual Award to honor a person who exemplifies the ideals and principles of public service and private enterprise. In this twenty-ninth presentation we were pleased to honor Harvey L. Pitt, with Atlantic Legal's Annual Award for 2016.

Harvey Pitt is the Chief Executive Officer of the global strategic business consulting firm, Kalorama Partners, LLC, and its law firm affiliate, Kalorama Legal Services, PLLC. Prior to founding the Kalorama firms, Mr. Pitt served as the twenty-sixth Chairman of the United States Securities and Exchange Commission. In that role, from 2001 until 2003, Mr. Pitt was responsible, among other things, for overseeing the SEC's response to the market disruptions resulting from the terrorist attacks of 9/11, for creating the SEC's "real time enforcement" program, and for leading the Commission's adoption of dozens of rules in response to the corporate and accounting crises generated by the excesses of the 1990s.

For nearly a quarter century before serving as SEC Chairman, Mr. Pitt was a senior corporate partner in the international law firm, Fried, Frank LLP. He was a founding trustee and first President of the SEC Historical Society, and participates in numerous bar and continuing legal education activities to further public consideration of significant corporate and securities law issues. Mr. Pitt was an Adjunct Professor at Georgetown University Law Center (1975-84), George Washington University Law School (1974-82), University of Pennsylvania School of Law (1983-84), and Yale Law School (2007).

Former Chairman Pitt served previously with the SEC, from 1968 until 1978, including three years as SEC General Counsel (1975-78). He received a J.D. degree from St. John's University School of Law (1968), and a B.A. from City University of New York (Brooklyn College) (1965). He received an honorary LL.D. degree from St. John's University in 2002, and the Brooklyn College President's Medal of Distinction in 2003. In 2011, he received the William O. Douglas Award for lifetime contributions to the field of securities law. In 2011, Mr. Pitt was inducted into the NACD Directorship 100 Corporate Governance Hall of Fame. In 2014, he was inducted into the Securities Enforcement Hall of Fame.

Mr. Pitt is currently a member of the Advisory Council of the Public Company Accounting Oversight Board, a not-for-profit corporation created by the Sarbanes-Oxley Act of 2002 to oversee the audits of public companies and broker-dealers. He serves as a fiduciary director of CQS (UK) LLP and CQS Investment Management Limited. Further, he is an independent fiduciary director of the international hedge funds of Paulson & Co. Inc., and a member of their Audit Committees. He is also a member of the Regulatory and Compliance Advisory Council for Millennium Capital Management, LLC as well as Balyasny Asset Management L.P. In addition, he is a senior advisor to Teneo Holdings LLC, a global business consulting firm. He previously served for three years on the National Cathedral School's Board of Trustees, where he was, at various times, Board Vice-Chair, Co-Chair of the Board's Governance Committee and Chair of the Audit and Compensation Committees. Mr. Pitt previously served as a Director and member of the Audit Committee of root 9B Technologies Inc., a cybersecurity and business solutions public company. He also served as a Director of Approva Corporation, a software firm that assisted Sarbanes-Oxley compliance efforts by public companies. He previously served as a Director and Chair of the Audit and Compensation Committees of GWU Medical Faculty Associates, Inc., a §501(c)(3) corporation providing medical care to the Washington, D.C. metropolitan area.

# LIFETIME ACHIEVEMENT AWARD

## The Honorable Michael Mukasey



Michael B. Mukasey served as the 81st Attorney General of the United States, the nation's chief law enforcement officer, from November 2007 to January 2009. During that time, he oversaw the U.S. Justice Department and advised on critical issues of domestic and international law. From 1988 to 2006, he served as a district judge in the United States District Court for the Southern District of New York, becoming chief judge in 2000. In February 2009, Judge Mukasey joined the New York office of Debevoise & Plimpton LLP, where he is of counsel in the litigation department and focuses his practice primarily on internal investigations, independent board reviews and corporate governance.

Over the past nearly 30 years, on a few occasions, the Atlantic Legal Foundation has recognized a truly outstanding professional for a lifetime of achievements meriting special recognition. At the Foundation's

December 1, 2016 Awards Dinner in the elegant Harvard Hall of the Harvard Club in New York City, Judge Mukasey joined a distinguished few who have been recognized with this award, including:

Dr. Frederick Seitz, President Emeritus,  
The Rockefeller University (2006)

Hon. Judith S. Kaye,  
retired Chief Judge of the State of New York (2009)

Kathryn S. Wylde, President and CEO,  
Partnership for New York City (2011)

Richard Wilson, Mallinckrodt Professor of Physics, Emeritus,  
Harvard University (2013)

Evan R. Chesler, Chairman,  
Cravath, Swaine & Moore LLP (2014)



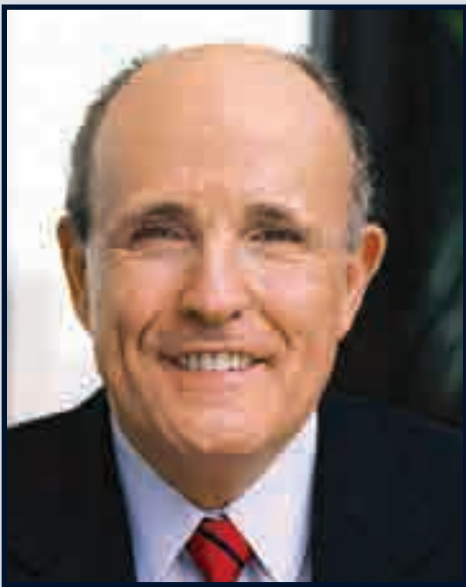
## Dan Fisk's introduction of Rudy Giuliani:



We have arrived at the fun part of the evening.

America's Mayor Rudy Giuliani, who really needs no introduction, will introduce Michael Mukasey, who will speak and then John Paulson will introduce Harvey Pitt. We will reserve Q&A until both of them have spoken and then I will come up and present these gifts...then we will go into Q&A and both Judge Mukasey and Harvey Pitt understand that if they get stumped on any of your questions they can draw on Rudy and John to help them answer those questions. We are in for a real treat here. So Rudy, please...

## Rudy Giuliani's introduction of Judge/General Mukasey



Introduction of the  
Honorable Michael Mukasey  
by America's Mayor,  
the Honorable Rudy Giuliani,  
the 107th Mayor of New York City  
(Jan. 1, 1994 - Dec. 31, 2001);  
US Attorney for the Southern District of New York  
(June 3, 1983 - Jan. 1, 1989);  
US Associate Attorney General  
(Jan. 1981 - June 1983);  
Time magazine's Person of the Year for 2001,  
given an honorary Knighthood in 2002 by the UK's Queen  
Elizabeth II, and recognized nationally as a great American  
and revered icon of the Republican party.

Thank you very much Dan! It is very nice to be back here. Dan reminded me that I received the Foundation's award in 1998...I feel so old! I am here to introduce my closest friend, Michael Mukasey, who I got to meet the day that he became an Assistant US Attorney in the Southern District of New York. From the day I met him, I realized he was a very special man...and now that I have known him for 520 years...or whatever it is...he has never disappointed me. He is a very special man and a very special patriot, not just a man! We worked together on cases when we were Assistant US Attorneys — we became close personal friends, we separated for a few years when I went to the Justice Department and he went to Patterson Belknap Webb & Tyler and then we became law partners where we handled cases together as law partners. I am a really good lawyer. He is a great legal scholar and lawyer — exceptional! ...and I know them all, and a couple of them are phonies — he's for

real. Michael then became a Judge after a tremendous career as an Assistant US Attorney and as a private lawyer, representing wonderful clients, all of whom were falsely accused — like people like Harvey Pitt, who by the way...congratulations. Harvey and I have had a long relationship and Harvey is a giant in helping to straighten out capitalism and make it legal and fair — which is really what it has to be. He has been a great asset to our country many, many times in preserving what hopefully will now be the direction we go in — we are going to move from the directions we are going in now which is socialism to the direction we will be going in which is capitalism — but fair — with a level and fair playing field. Harvey has always understood that balance brilliantly. Harvey, congratulations tonight on your award. I have tremendous admiration for you.

When Michael left Patterson Belknap Webb & Tyler, he became the United States District Judge in the Southern District of New York. He wasn't just the US District Judge in the Southern District of New York; he was the best United States District Judge in the Southern District of New York without doubt, without question. He became the Chief Judge and handled some of the most complex cases. He handled them all brilliantly and with great courage, including the one involving Islamic terrorism and the Blind Sheikh for which he was threatened with death with what they call a "Fatwa" which means they want to kill you. If you think that is not serious, it is. I have five of them [crowd laughs]. ...get rid of that guy over there.

...but he did it. He did it brilliantly. I think everyone of his colleagues would tell you he was a great Judge and a great Chief Judge and then President George W. Bush had the wisdom to select him as Attorney General of the United States. Probably one of the best choices President Bush made. He was a great and courageous Attorney General in ways you will probably never know and he'll never tell you because we have been at war since about 1997 — we realized it in 2001 — and then we forgot about it in 2009 — and maybe now we will remember again that we are at war.

Why are we at war? ...because they are at war against us. When someone is at war against you, and you are not at war against them, you're losing. Michael always understood we are at war and conducted himself that way as Attorney General and he took a Justice Department that was demoralized, took a Justice Department that was in some stage of chaos at the time, and turned it into a great Justice Department. Hopefully his successor, Judge Sessions will do the same thing because the Justice Department for me today is a disgrace. Hopefully that is going to change really quickly. Michael did it and I think Judge Sessions could do it.

You couldn't possibly have someone who deserves the Lifetime Achievement Award more from an organization like this that champions Charter Schools, Freedom for People, has been out there fighting the battle for the things that are necessary to change America. There are many things that can change America, as I was saying before...the single most important thing is education. If we don't break up the Teachers Union monopoly on our public school system, we are going to have an uneducated America. We are 27<sup>th</sup> in language and we are 36<sup>th</sup> in math and these happen to be the best scores that we have. The rest get worse. This used to be the country with the best public school system in the world; this used to be the country where the city university was the free Harvard and now we are a country that is looking upon our black, Hispanic and poor children as who gives a damn about the kind of education they have because the teacher's union is more important. If we don't fight that, if we don't win that battle ...my kids and your kids can do fine, we can put them in private school, but they can't. Your kids and my kids are going to grow up with a group of uneducated Americans. If we don't fight and win that battle in the next four years, everything else we do can help us for a little while but it won't help us twenty years from now and your organization has been the organization at the forefront of that battle. For that I have tremendous admiration for you. You could not have picked a better person for a Lifetime Achievement Award than my best friend... Michael Mukasey. [Crowd applauds]



Judge/General Mukasey:

In the privacy of this room, of all that I have done and been in my life, my proudest achievement is having been a close friend of the man you just heard from for close to 45 years. It's been a great – great experience.

I want to thank the Atlantic Legal Foundation — and of course Rudy for that lavish introduction — for what it stands for — which is simple...“Standards”. When John Keeney contacted me about this award, I was very pleased to hear that the Foundation was inviting me to speak at its Annual dinner, which was great – I spoke here once before. He told me that the event would include an award – that was also great – please understand that it was not necessary to confer an award, I would have spoken without any award – but when he told me it was a Lifetime Achievement Award, I felt a little bit nervous. I hate to be ungracious but it's an ominous concept. (Laughter in the crowd) It says whatever achievement your life is destined to contain, you are adjudged to have reached your limit. Indeed if you think about it, the only award that you get

after a Lifetime Achievement Award is one that would have to be conferred posthumously. So please understand that if you were to ever invite me back to speak again, it doesn't necessarily have to involve an award. In fact we can forget all about the award this evening.

That said, I turn to the future of America and my topic for this evening, which is phrased, “the Ongoing Struggle.” I had thought at the time I rather hastily chose that title that my talk would be a discussion of the Islamist terrorism we have been dealing with for decades, its current manifestations, and what the likelihood is that we can overcome it within our lifetime.

But then came the election, which still would have allowed for a description of where we are, but would have cast some doubt on any prescription I might make because the new Administration is still taking shape and has not yet taken office.

But also, there arose a political phenomenon that didn't exactly debut but certainly sharpened after the election. It had already started on college campuses, but the rest of the world caught on in a hurry. I am talking about the phenomenon of people not being able to put up with a political result that contradict their expectations and preferences. When I say not being able to put up with, I mean strong psychological reaction – or claims of strong psychological reaction – usually involving wallowing with others in shared misery.

As I said, the phenomenon started on college campuses, as kind of a combination of the goldfish swallowing craze of the first third of the Twentieth Century and the student radicalism of the mid to late 1960's.

However, the outside world, or at least a substantial part of it, is on the way to becoming one vast college campus, planted thick with rules about what may not be said, and even how to say what may be said. Although the world is becoming like the campuses, that doesn't mean that the campuses themselves do not remain in the vanguard of this trend. At Yale, a dispute last year about Halloween costumes – really – led students to surround a college Master and his wife – Nicholas and Ericka Christakis, both highly accomplished academics – and scream obscenities at them, after which the Christakis were left so unprotected they had to resign, and the President of the University, Peter Salovey, announced a \$50 million grant to promote diversity and heal racial wounds by, among other things, establishing a Center For The Study Of Race, Indigeneity, and Transnational Migration, whatever all that means.

In what looks like an attempt then to one-up himself, President Salovey followed up this Center with the incomprehensible name by setting up a committee to establish principles on renaming, so as to consider, for example, whether to rename Calhoun College, named for John C. Calhoun – who, served as Congressman, Senator, Secretary of War and Vice President, but who was also a supporter of slavery. President Salovey actually had announced that Calhoun college would not be renamed, but then he decided to leave it up to the new Committee as to whether to rename Calhoun College.

President Salovey had better be careful to restrict the jurisdiction of that Committee because, as Roger Kimball pointed out in a delightful Wall Street Journal article a couple of months ago, John C. Calhoun was a Piker compared to Elihu Yale, who did not merely support slavery but actually bought and sold slaves himself. So stay tuned – any day now we may wake up to find that Yale itself has been renamed.

Actually, to make the record complete, I should acknowledge an Op-Ed column by President Salovey published in the Wall Street Journal last month in which, not surprisingly, he portrays Yale as a largely peaceful garden of diverse views, although he has to take a bit of poetic license at some points in his essay to do that – for example the article tells us that no one is permitted “to disrupt or otherwise prevent a scheduled speaker from having his or her say.” At other points in the article, the soft bureaucratic fog covers nasty facts, and blurs the outlines, like snow falling on garbage, so the disgusting treatment of the Christakis is wrapped in a reference to “difficult confrontations and moments in which individuals demonstrated poor judgement about where and how to speak,” and for good measure – because cameras recorded part of what happened – he adds that “in a volatile world with social media and cameras on every phone, emotional moments can be taken out of context and magnified, distorting or obscuring an accurate view of events.”

Or, to put it another way, who you gonna believe – me or your lyin’ eyes?

Now, I won’t say similar episodes have occurred at many schools – because each one has its own unique madcap features so it is hard to describe them as similar – but almost equally egregious episodes have taken place at Brown, Bowdoin, Vanderbilt – You name it.

To be sure, there are occasional pockets of resistance. At the University of Chicago, for example, where the Dean of Students, John Ellison, recently affirmed in a letter to Freshmen that the University is committed to free speech, and just so that there could be no mistake about the focus of his concern, he added that “our commitment to academic freedom means that we do not support so-called ‘Trigger Warnings,’ we do not cancel invited speakers because their topics might prove controversial, and we do not condone the creation of intellectual ‘Safe Spaces’ where individuals can retreat from ideas and perspectives at odds with their own.”

However, after Dean Ellison issued his letter it was responded to in another letter – from 150 University of Chicago faculty members, who said that although they held varied views on Safe Spaces and Trigger Warnings, they wanted to assure the incoming Freshmen – indeed everyone at the University of Chicago – that all 150 of them thought it entirely legitimate for such measures as Safe Space and Trigger Warnings to be requested by students and the availability of such measures debated, and that the debate could encompass whether speech could legitimately be interrupted by what they called “concrete pressures of the political.”

I guess I could stand here for whatever time is allotted to me and regale you with accounts not just from academia, but also the workplace, the political arena – wherever we live and work. And we could all have several good hearty laughs at the expense of the blowhards who are inflicting this on us, and the weasels who are going along with it.

But when we have 150 faculty members at the University of Chicago who sign on to a single letter – which is an extraordinary achievement in itself – a letter in which they tell us we should all consider whether there are instances when it is legitimate to interrupt speech due to “concrete pressures of the political” – when we’ve gotten that far, it’s not a laughing matter.

I assume that all of us here are against that sort of thing – or at least most of us – but we should also be somewhat dismayed to see that – as Nadine Strossen of the ACLU wrote to me in an email – people we would hope and expect to be stalwart defenders of free speech instead are giving in to the current vogue of silencing opinions they may find disturbing or with which they may disagree, in order to reach outcomes or conclusions they find socially worthy.

I think we owe it to the seriousness of the subject, and to the seriousness of this Foundation, to press beyond a description of symptoms, and to ask how and why we got here – here being the point where you can get 150 faculty members at the University of Chicago to agree that we have to consider whether speech may have to yield on occasion to – their phrase – “Concrete Pressures of the Political”?

Let's start by unpacking that phrase – Concrete Pressures of the Political. How can “the Political” – which, whatever it is, is an abstraction, an idea or a series of ideas – how can an abstraction impose “Concrete Pressures?” if the term concrete pressure has any meaning, it is tangible pressure, palpable pressure, urgent pressure; the kind of pressure you feel if someone holds a gun to your head, or is holding someone you know hostage, against a demand that you change your conduct, that's concrete pressure. But how does the Political exert concrete pressure?

I think the answer is that the pressure is concrete if you take the position that there is only one acceptable answer to a political question – the politically correct answer. Once you get that far, anything else is unacceptable – concretely unacceptable.

So how did we get to a politics that exerts concrete pressure?

Part of the answer I think lies in the political history that followed World War II. Others have written about that history, and some earlier relevant history, notably John Fonte and Yoram Hazony, who are the authors, respectively, of a splendid book called *Sovereignty or Submission*, and a splendid essay called *Nationalism and the Future of Western Freedom*. Daniel Hannan, the British conservative member of the E-U Parliament, may also be counted in that number.

All three of these people, and others who hold similar views, are defenders of the sovereignty of democratic nations as the key to maintaining freedom. All of them describe the current manifestation of an age-old struggle between global governance and self-government.

Self-government by nations that adhere to minimal standards of freedom and dignity – standards easily captured, for example in the Ten Commandments – that kind of government in different nations necessarily involves a variety of constitutions, religions (or lack of them), and economies – each serving a population with a more or less shared background and experience.

The resulting systems, and the ideas that are exchanged and that compete among and within those notions, are bound to result in a variety of governance choices in different countries. So Italy, Greece, Poland, India, Ethiopia, England, Estonia, Finland, Israel – all differ within generally accepted standards of democratic systems. There is no single standard of what system is right, nor is there any aspiration to such a standard.

But once universal standards begin to prevail, as they did with the experimental unification of the European Continent – an experiment that is to say the least showing strains – then we have come a long way toward accepting a single standard of what is right.

And a single standard for what is right will not tolerate deviation. Just to offer a few examples from our own politics, President Obama announced in a speech before the General Assembly of the United Nations that the future will not belong to those who defame the Prophet of Islam.

The losing candidate for the Presidency of the United States told an audience that she was prepared to enlist, and to enlist others, and the Government, in a campaign to “protect the rights of [what she described as] all people to worship the way they choose” by using what she described as “some old fashioned techniques of peer pressure and shaming” so as to assure that, as she put it, “people don't feel they have the support to do what we abhor.”

I say “what she described as the right of all people to worship the way they choose: Advisedly; that speech was not about the right to worship; that speech was delivered to an entity called the OIC – The Organization For Islamic Cooperation – Which is the bloc of 56 Muslim countries at the United Nations plus the Palestinian Territories – places where there is only one religion whose adherents may worship the way they choose, and where if adherents to other religions try to worship the way they choose, they may find themselves under some really concrete pressure.

What she had in mind was an intimidation campaign in which the government – in violation of the First Amendment – would participate directly with others in harassment and browbeating directed against people who advocate views about Islam and Islamists that the participants in that campaign abhor.



This was part of that candidate's effort to implement U.N. Human Rights Council Resolution 16/18, which calls upon member States to punish "any advocacy of religious hatred against individuals that constitutes incitement to discrimination, hostility or violence." Understand that incitement to violence is not protected under U.S. law, but the important point here is that the test of incitement here is less a matter of content of the speech than of the consequences of the speech, and in fact the U.N. special rapporteur on this subject has listed the United States as a country that needs to adopt legislative measures to restrict hate speech.

In 2010, when the Arizona Legislature passed a law that permitted that State's Law Enforcement Officers to try to enforce laws against illegal immigration, the Obama Administration responded with a report submitted to the U.N. Human Rights Council – a report that aligned the administration with an international effort to brand the State of Arizona as a violator of human rights. By the way, the U.N. Human Rights Council included such noted defenders of human rights as Cuba, China, the Russian Federation, and Saudi Arabia.

Resort to the United Nations when our own constitutional system is found wanting is not uncommon in the current administration. The President supported the idea of submitting to the Security Council a resolution that would call upon states that signed the Nuclear Test Ban Treaty, whether they ratified it or not, to refrain from taking any step that would defeat the object and purpose of the comprehensive Test Ban Treaty. That Treaty, although signed by President Clinton, has been rejected by the Senate because it would inhibit this country's ability to modernize its nuclear arsenal. However, if the Resolution passes in the U.N. international law would appear to prohibit any act that would defeat the object and purpose of the Treaty, with the result that U.S. nuclear tests would violate the object and purpose of a Treaty the Senate has refused to ratify.

Understand that what is going on here is a substitution of the goal of pre-ordained outcomes in place of the goal of lawful and fair process, and that the method to impose pre-ordained outcomes is old-fashioned intimidation.

Although we are most familiar with this phenomenon in the United States, because we experience it most directly here, it is by no means confined to this country. Look at the protests from self-designated right thinkers around the world who branded as racists a majority of voters in the U.K. who thought their country would be better off if it withdrew from the European Union.

The supporters of Brexit – 52% of those who voted on the subject; millions of people – could not be regarded as simply holding a different view of who should run the economy and other aspects of life in the U.K.; but rather were to be regarded as morally deficient because the E.U. is regarded among opinion shapers as a positive political development, even though the populations of France, the Netherlands and Ireland – three of the nations that comprise the E.U. – rejected the E.U. constitution when they had the chance to vote on it; the bureaucrats simply went ahead anyway, disregarding the results of the referendums, so that approval of the referendum permitting a common currency and "ever-closer union" was taken as approval of everything that followed.

In France, there is a growing body of speech laws. TV commentator and journalist Eric Zemmour escaped punishment for commenting the "Chechens, Roma, Kosovars, Africans and North Africans" are today's equivalent of the Normans, Huns, Arabs and great invasions that followed the fall of Rome, in their tendency to mug, rob and rape, but the radio station on which he made the comments received a warning from France's media authority, the Conseil Supérieur De L'Audovisuel, and over the summer he was fined for making similar comments in Belgium.

The truth is that in many places in the western world, people now feel the need to hesitate before acting and speaking as they would have if the norms that gave rise to variations on the theme of freedom and democracy were still in control.

There have been several attempts to fight this tendency, some elsewhere, some in our own country. In the U.K. for example, the Brexit vote was in part such an attempt; in France, the rise of the Nationalist Party of Marine Le Pen is a part of it. In our own country, there are at least two distinct sources of pushback against this tendency. One is religiously inspired, and opposes for example the Supreme Court's new nationwide definition of marriage, or the availability of partial birth abortion. Although this point of view rarely takes note of the threat posed by weakening the concept of sovereignty of the National State.

The other source of pushback is strongly Nationalist, and objects to multilateralism, and subjecting ourselves to the control of international organizations and forums, but this Nationalist pushback rarely takes note of threats to cultural and religious standards.

In the United States we are lucky because we have been given something to help us resist across the board forces that would undermine our civic life – on the one hand the force that pulls us in the direction of accepting standards imposed on us that we have not adopted for ourselves, and on the other hand the force that would allow us to resist those standards only in part – either solely the part that offends culture and religion, or solely the part that offends Nationalism.

The something we have been given to help keep us out of that quandary and help us to resist across the board the faceless mandarins who run the international bureaucracy and the domestic campuses, is something that other nations do not have. That something is a written Constitution going back more than 225 years that is still considered a proper object of veneration in our own country, and at least admiration if not out-right veneration elsewhere.

It sets up a government that spreads and balances power, between and among three branches of the Federal Government as well as between the Federal Government and the States. A government exquisitely designed to overcome the dilemma described in Federalist 51, that if men were angels, no government would be necessary, and if angels were to govern men, no restraint on government would be necessary.

In protecting that written Constitution, we can still employ the tools of rhetoric, including ridicule, to hoot down attempts to change that written Constitution in the guise of making it “LIVE”. And also to hoot down attempts to claim that because the outcome of the election did not live up to the expectations of some, or down to the expectations of the remainder, people may retreat into a state of denial, and invite others to join them.

We can do that only with sheer tenacity of a sort that involves holding to and insisting on standards of free speech that others may mock.

I think the expression of the kind of tenacity I am referring to may be found in what was written on a small brass plate that was fastened to the topmost spar that supported the highest sail on each British Man of War back in the days of sailing ships – a short but forceful message to the sailors who climbed up to that height: that inscription was simple and direct: “HOLD FAST”

Thank you very much.

# Introduction of The Honorable Harvey Pitt by The Renowned John Paulson

American Hedge Fund Manager and Billionaire Founder and President of Paulson & Co.



Good evening everybody and thank you for inviting me to introduce Harvey Pitt tonight. I see a lot of lawyers here and that's one thing I don't qualify for... I'm not a lawyer, but what's even better than being a lawyer is that I use a lot of lawyers, including at some point most of the firms represented here tonight.

My job tonight is a simple one, which is to introduce an extraordinary individual who has spent a life time insuring our security markets are free, safe and equitable. A little background on Harvey... Harvey joined the SEC straight out of law school in 1968 and became the agency's youngest ever General Counsel. He then spent almost a quarter century as a Senior Partner at Fried Frank. In 2001, he was appointed Chairman of the SEC, where he skillfully guided the financial markets back to full operations after September 11<sup>th</sup>. Subsequently he founded Kalorama Partners, a global strategic business consulting firm – a position that also affords him great viability as a commentator on financial subjects for a wide variety of media and outlets.

Harvey has also served on the faculty of Georgetown University Law Center, George Washington University Law School, University of Pennsylvania School of Law and Yale Law School. Harvey's many achievements make him the perfect recipient of this award from the Atlantic Legal Foundation.

On a personal note, I have had the good fortune to have Harvey as a special advisor to our firm. Our relationship started after Dodd Frank was passed. At that point I asked my General Counsel for a copy of the legislation. He brought in a book, I kid you not, it was over 1400 pages. I took a look at it and realized my glasses weren't adequate to read this thing... I needed a magnifying glass. I realized that with this heightened regulatory environment that we were in, I needed the best counsel I could find to make sure we were operating within the confines of all the regulatory oversight that was represented by this new law. At that point we retained Harvey.

I am grateful for the counsel he has given me and my firm over these many years. One of the great things about introducing Harvey tonight is having the opportunity to show my appreciation, personally and publicly for the great work he has done.

Thank you Harvey.

# Remarks of The Honorable Harvey L. Pitt

## Perspectives on Corporate Governance in a Changing World



Thank you, John, for that gracious introduction and for your friendship. I have known John for many years now, and have learned a great deal from him. In addition to being a brilliant money manager, he demonstrates exceptional transparency, integrity and investor attention. And, my sincere thanks to the Atlantic Legal Foundation Board, its Chairman, Dan Fisk, and my dear friend (former partner, and Godfather to my youngest son), Bob Juceam, for these dual honors. I say “dual” honors, because I consider it a distinct privilege and pleasure – surpassing the personal award I’m honored to receive – to help celebrate the Foundation’s deserving Lifetime Achievement Award winner, Attorney General and Chief Judge Mukasey, a remarkable public servant with a distinguished career both in the public and private practice of law. I would also be remiss if I did not express what a rare pleasure it is to share an evening with my favorite Mayor, and truly great and dedicated American I admire, Rudy Giuliani.

As the Foundation enters its forties, it can proudly claim great successes, reflecting the best attributes of the private sector – non-partisan public-interest advocacy, supporting (among other things) individual liberties,

genuine corporate responsibility, government fidelity to due process, promotion of school choice (an issue I am certain Judge Mukasey believes in strongly). I’m honored by this award, and even more so by the presence here of many present and former colleagues and friends, distinguished guests, the best lawyer in my family and beyond – my oldest son, Jonathan – and my wife/girlfriend, Saree, the love of my life, and the life of my love.

Tonight, before this distinguished gathering, with your indulgence and patience, I’d like to offer a few words about my perspectives on corporate governance at a time when our country is at the incipient stages of potentially profound changes that almost fifty percent of our Nation’s voters supported. But, whether you supported the changes just commencing, or align with those who didn’t, we should all be able to agree – without yet actually having experienced it – that the incoming Administration promises to be vastly different from the one that’s departing. Of particular note, it seems likely that, over the next four years, there’ll be less reliance upon the Fourth Branch of Government – specifically our regulatory agencies – to prescribe and mandate normative standards of conduct.

Our penchant for incessant regulatory pronouncements calls to mind Black Flag’s fabled and stark “Roach Motel” advertisements of the mid-70s – to paraphrase, regulations check in, but they never check out! Weaning ourselves away from excessive reliance on cumbersome and verbose regulations is both a good thing, and long overdue. In his lucid narrative, entitled “The Death of Corporate Reputation,” Yale Law Professor, Jonathan Macey, demonstrates that our over-reliance on prescriptive regulations has resulted in less attention by Wall and Main Street firms to preserving their institutional commitments to integrity and brand reputation. One need only look at the recent Wells Fargo and Volkswagen fiascos to see the wisdom and consequences of Professor Macey’s observations.

Professor Macey’s salient reflections should, nonetheless, cause us to consider the common folk wisdom exhorting us to “be careful what we wish for.” Put another way, there are serious consequences associated with curbing the bureaucracy’s insatiable penchant for throwing new regulations at every problem that arises. The minimization, and even absence, of prescriptive rules – by definition – brings with it a likely increase in government enforcement of those rules that remain, and a likely concomitant increase in private litigation. Moreover, the concomitant replacement of prescriptive rules with principles-based regulation – a better way of regulating – provides law enforcers with opportunities to attack practices they view as unprincipled, whether or not those regulated understood that their prior conduct was encompassed within the principles-based rules they’re accused of violating.

One of my sincerest regrets of my professional career is the observation that otherwise smart and savvy business people often practice what I refer to as “reverse laissez faire” – that is, waiting for government to tell them

- Whether what they’re doing is wrong,
- Why it’s wrong, and
- How they must fix the wrongs they’ve allegedly committed.

Those of you who know me know I believe that all wisdom comes – in one form or another – from the movies. Business people who practice reverse laissez faire remind me of a scene from one of my favorite movies, “Casablanca,” when Captain Renault (Claude Rains) is enforcing a Nazi directive to shut down Rick’s (Humphrey Bogart’s) Café. When Captain Renault is asked to explain the basis for shutting the Café down, Claude Rains asserts he’s “shocked, shocked, to discover that there’s gambling taking place on these premises,” at the precise moment that one of Humphrey Bogart’s employees hands Claude Rains an envelope and says “here are your gambling winnings, sir!” When those who practice reverse laissez faire learn of the government’s answers to the three issues I’ve delineated, they too, are “shocked, shocked,” to discover that they don’t like the government’s answers.

The only thing that’s shocking is the predilection of many businesses to sit back and wait for the government to question their conduct. Albert Einstein has been attributed with the observation that irrationality is repeating the same conduct, over and over again, but expecting a different result each time. That appears to be the mindset of those business people who practice reverse laissez faire. But, the brave new world we appear about to enter calls for a very different mindset. In that regard, I’d like to leave you with a few thoughts about the proper perspective businesses should adopt about corporate governance in the brave new world we’re about to enter:

- The concept of corporate governance is not part of some left-wing conspiracy. Good corporate governance is good business. If your business depends on customers or clients to achieve profitability, and if it depends on shareholders to provide permanent capital to use in growing the business – and whose business doesn’t? – your business must demonstrate that it understands and responds to the legitimate needs of its customer, clients and shareholders.
- Smart CEOs should resist the “Sara Pitt” syndrome. Sara Pitt, my mother, was a self-medicating health fanatic, who believed she was better than any doctor. That’s why it took us two years to persuade her to see a specialist about her chronic stomach pains. After her doctor’s appointment, as a dutiful son, I inquired about how her visit had gone. She responded without a second’s hesitation: “You know, Harvey, I was never sick a day in my life until I went to see that damn doctor!” Many CEOs operate exactly as my mother did – they think that, if no one tells them their business has cancer, their business is healthy! But, the real world doesn’t work that way. You have to go looking for problems before they find you.
- Talk and listen to your shareholders and customers. The purpose of most companies is, and should be, to make a profit from the successful provision of goods or services. The best way to learn how you’re doing is to talk to those who, of necessity, judge you every day. That means talking to shareholders to understand their perspectives about the Company’s performance, and to customers to understand their satisfaction level with the quality of your goods and services.
- If you look around the Boardroom, and you think you’re the smartest and hardest working member of the Board, you’re on the wrong board! The days are long gone when corporate boards were private clubs whose principal mission was to ratify the predilections of its senior management. Today, there are still impassive and inert boards, at least until something untoward occurs. The relationship between directors and management hasn’t changed since corporations first became the favored form of business enterprise – boards oversee, managers manage. But, oversight implies something more than simply assuming everything management is doing is fine. This requires directors to:
  - Develop their own agendas
    - Ask penetrating questions
    - Understand the potential disadvantages of any proposed course of action
    - Periodically arrange to hear from contrarians, in order to avoid insular thinking
- Read the Wall Street Journal. I don’t get paid for saying this but, every day, the Wall Street Journal provides astute business people with lessons on how not to govern or manage their own businesses. If you just read



the headlines, and never ask whether what's happening at other companies could happen at yours, you're missing a critical bet. The stories of business missteps aren't merely a form of entertainment, they're a tool for managers and directors to prevent the same problems from occurring at their businesses.

- And, perhaps most significantly, government, like nature, abhors a vacuum. If you aren't figuring out the best standards and principles to apply in running your business, be assured that the government will be only too happy to do that for you! And, you can also be certain you won't like the government's solutions. Both on a company-by-company basis, and on an industry-wide basis, smart companies develop high standards for the conduct of their business, and then make certain they actually adhere to those standards.

I end where I began. I've learned — the hard way — as both a government official and as a child — that I was often blamed when things went wrong, whether or not those things were actually my fault. When receiving an honor like the one I'm receiving tonight, I find it useful to remind myself that the accolades accorded me are vastly overstated, and those that aren't overstated have always been the product of considerable efforts by my past and present colleagues, and were achieved solely because I've had the unconditional support of my loving family. Indeed, a loving family is the best honor any individual can achieve, and as to that, I've been blessed with far more familial love and support than I could ever have imagined!

Thank you for this honor, and for this rewarding celebration.



Dan Fisk:

That was enlightening, insightful, entertaining and remarkably worthy of remembrance and guidance. We have come to the point of our program where we have gifts to present. This one in blue is for you Judge and this one is for you Harvey. Rather than unwrap these presents you can take them home neatly wrapped as they are...and we have on our video screen, visible for all, just what they are. Those are beautiful jewelry cases made in Great Britain out of burlwood with ebony trim, heavy brass and brass plates. The one on the left says to the Honorable Harvey L. Pitt, In appreciation For Your Distinguished Service to the Private and Public Sectors from the Atlantic Legal Foundation, December 1, 2016. The one on the right is to the Honorable Michael Mukasey, Lifetime Achievement Award, In Recognition of your Distinguished Service to the Private and Public Sectors and again from the Atlantic Legal Foundation, December 1, 2016. There is a treat in each of those cases for you. To the left, Harvey, you will find two bull and bear cufflinks made by Deacon Francis, also in the UK with ruby eyes. Judge, on the right, law books with gavels – Guilty, Not

Guilty, designed and manufactured by the famous Jan Leslie. Both of these cuff link sets are featured at Bergdorf Goodman here in the city in the beautiful cases you will find in the Men's Quarters there. Both are handsome gifts, I think. I hope you both like them and can use them. Thank you both so much for your insightful remarks tonight and for honoring us by allowing us to honor you.



# Photographs from the Annual Awards Reception and Dinner







Dan Fisk, Rudy Giuliani, Michael Mukasey,  
John Paulson, Harvey Pitt



Frank Broidy, Diane Fisk, Dan Fisk, Marty Kaufman,  
Edward Broidy



Dan & Diane Fisk and Barbara & Greg Morrow



Diane Fisk, Jake Baker, Kareem Shaya



Tracy Bacigalupo...telling it like it is...



John Wyand, Alexander Kenney, Gregory Morrow



Jacqueline Hurley, Alexander Kenney



Matthew Curtis, Singleton McAllister, Bobby Griffin



Gus duPont, Jack David



Tempa Berish, Alinne Majarian, Diane Fisk



Harvey, Saree & son Jonathan Pitt





Chairman Fisk greets son Jonathan as proud parents Harvey & Saree Pitt look on...



The Fisks & The Pitts



Dan Fisk, Diane Fisk, Alinne Majarian, Tempa Berish, Eric Robbins



The Wife...the Husband Handsome Couple



Steve Mathews, Saree Pitt, Consuelo Hitchcock, Harvey Pitt



Marty Kaufman & Marcy Cohen





Marty Kaufman, Marcy Cohen, Pieter Puijpe



Tom Birsic, Michael Zanic, Edward Broidy,  
Gus duPont



Chris Dee, Ken Jacobs, Eric Cottle, John Bicks



Frank Jimenez, Steve Harmelin, Jay Stephens



Michael Jakowsky, Tom Walsh, Ken Yormark



Sheila Walpin, Ruth King



Anthony D'Iorio, David Wood



Jacqueline Hurley, John & Charlotte Kenney,  
Alex Kenney



Catherine Nance & Cindy Fornelli



Mary Beth Buchanan, Jay Stephens, Bill Leone



Summer Farris, Serena Palumbo, Derek Bush,  
Bob Davis, Moses Lin



Lance Wilson, Leah Brownlee, Barbara Morrow,  
Tom Evans





Kareem Shaya, Jake Baker, Luke Apicella,  
Frank Broidy



Saree Pitt, Lynne Johnson, Jonathan Pitt,  
Ken Yormark, Bob Juceam



Jeff Bell, Spencer Klein, Tom Walsh



Jay Stephens, Dan Fisk, Sophia & Bill Primps



Dan Fisk, Charlotte Kenney, Jacqueline Hurley,  
Alex Kenney, Pamela Newman, John Kenney



Trouble brewing with Edward Broidy & Rudy Guiliani



Edward Broidy, Anthony D'Iorio, Tom Birsic,  
Rudy Guiliani



Saree Pitt, Lynne Johnson, Jonathan Pitt,  
Ken Yormark, Bob Juceam



Jeff Bell, Spencer Klein, Tom Walsh



Jay Stephens, Dan Fisk, Sophia & Bill Primps



Dan Fisk, Charlotte Kenney, Jacqueline Hurley,  
Alex Kenney, Pamela Newman, John Kenney



Dan Fisk & Rudy Guiliani





Dan & Diane Fisk and Rudy



Pamela Newman, Rudy, Nelson Happy



Thomas Kavaler, Michael Mukasey,  
Hon. Loretta Praska, Mary Beth Buchanan



Lifetime Achievement Honoree Michael Mukasey  
& Atlantic Legal Chairman Dan Fisk



Gary Naftalis, Michael Mukasey



Frank Broidy, Rudy Giuliani, Edward Broidy





Meeting with fans...Tempa Berish, Eric Robbins,  
Tee Cirillo, Rudy



James & Sofia Von Moltke, Frank Jimenez



Moses Lin, Patrick Roach, Rudy Giuliani,  
Edward Broidy, Marcy Cohen, Pieter Puijpe



John Kenney, John Paulson, Dan Fisk



Michael Mukasey, Rudy Giuliani, John Paulson  
Collaborating...



Michael, Rudy, John, Harvey  
You cannot make this stuff up...



The movers and the shakers...



Justice must prevail...  
Michael Mukasey, Rudy, Bob Juceam



John Paulson & Charlotte Kenney



Chairman Dan Fisk speaks...







Diane Fisk & John Paulson



Harvey & Saree Pitt



Susan Mukasey, John Kenney, Diane Fisk



Having a good time...



Tempa Berish



Tempa Berish



Eric Robbins...has the next big printing job for Atlantic Legal in the bag...



Lynne Johnson



Larry McMichael



So let it be written...so let it be done...  
Steve Harmelin



Bob Juceam & The Mayor





Judge Mukasey



Tom Birsic



Atlantic Legal Foundation Vice Chairman,  
Gus duPont...proud of the Foundation



Cheri Mazza, Steve Whelan



Are you kidding me...



I'm listening...





Scott Silverman



David Wood



In the glow of the evening...



Tom Walsh, looking skeptical...



So engaged...



Julianna LeMieux



So true...



Such a memorable evening...



You know it...



You've got to do what you've got to do...  
Bob Juceam & Rudy Giuliani



Thought provoking...



John Bicks





It's irrefutable...Eric Cottle



Tee Cirillo



Judge Mukasey



If you will only consider...



Captivating...



Pondering...



I think so too...



You cannot be serious...



Would I kid you...



Thomas Kavaler  
Resonates with me...



Absolutely...  
The Hon. Loretta Praska



Jamal Haughton





Kindrid spirits...



That's amazing, Tom...



You expect me to believe that...  
Sheila Walpin



Only in America...  
Ruth King



Gee Whilakers...  
Jacques Busquet



Pieter...caught in the middle...





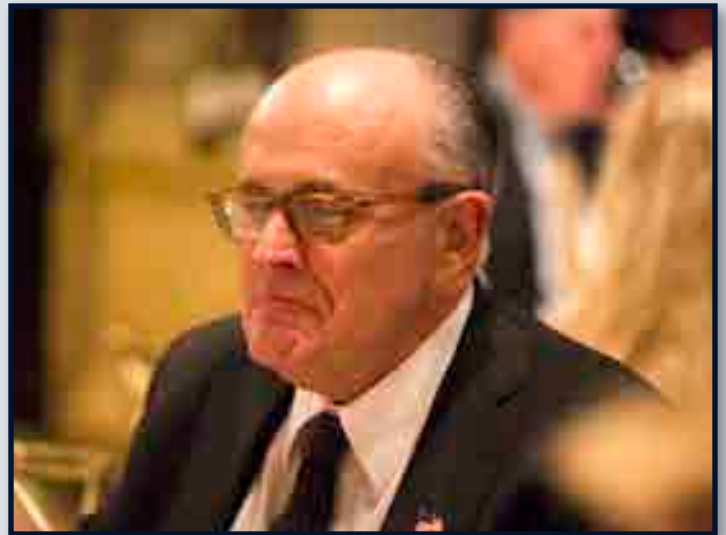
It's unprecedented...Patrick Roach



You make a good point...



Magical moments...



A time for refecation...



So engaging...



She would be a great ambassador...



Such fun...



Susan Mukasey & John Kenney



Best friends



Great hedge, John...



Barbara Morrow & Dan Fisk



And now for the program...





Rudy Guiliani introduces Judge Mukasey



The Honorable Michael Mukasey speaks...



When Judge Mukasey speaks...people listen...



John Paulson introduces Harvey Pitt



Serious thoughts...2016 Annual Awardee  
The Honorable Harvey Pitt







Well received...



and understood...



Proud wife...



Sound advice...



Jay Stephens



Classy evening...



The presentation...



Commemorative gifts presented



Great event...  
Bob Juceam



A good time was had by all...  
Mike Szymanski, Judy & Howard Steinberg



# Annual Award Recipients 1988-2016

2016



**Hon. Harvey L. Pitt**  
Chief Executive Officer  
Kalorama Partners, LLC  
Chairman of the United States Securities and  
Exchange Commission (2001-2003)

2015



**Hon. Frank Keating**  
President and CEO (Ret.)  
American Bankers Association  
Governor of Oklahoma (1995-2003)

2014



**H. Lawrence Culp, Jr.**  
President and CEO (Ret.)  
Danaher Corporation

2013



**Bill Nuti**  
Chairman, CEO and President  
NCR Corporation

2012



**William H. Swanson**  
Chairman and CEO  
Raytheon Company

2011



**Edward J. Ludwig**  
Chairman of the Board  
BD

2010



**W. James McNerney, Jr.**  
Chairman, President and CEO  
The Boeing Company

2009



**Chad Holliday**  
Chairman of the Board  
DuPont

2008



**William C. Weldon**  
Chairman of the Board and CEO  
Johnson & Johnson

2007



**Hon. Fred F. Fielding**  
Counsel to  
President George W. Bush  
Former Counsel to  
President Ronald Reagan

2006



**Thomas J. Donohue**  
President and CEO  
U.S. Chamber of Commerce

2005



**Edward D. Breen**  
Chairman and CEO  
Tyco International Ltd.

2004



**Hon. George J. Mitchell**  
Former United States Senator  
Chairman, The Walt Disney Company  
Partner, Piper Rudnick LLP

2003



**Maurice R. Greenberg**  
Chairman and CEO  
American International Group, Inc.

2002



**Henry A. McKinnell, Jr., Ph.D.**  
Chairman and CEO  
Pfizer Inc

# Annual Award Recipients 1988-2016

2001



Hon. William S. Cohen  
Former Secretary of Defense  
and United States Senator

2000



Norman R. Augustine  
Retired Chairman and CEO  
Lockheed Martin Corporation

1999



General P. X. Kelley  
Former Commandant of  
the Marine Corps

1998



Hon. Rudolph Giuliani  
Mayor of New York City

1997



Hon. Donald Rumsfeld  
Former Secretary of Defense

1996



Bruce Atwater  
Retired Chairman and CEO  
General Mills, Inc.

1995



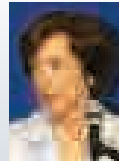
Alfred C. DeCrane, Jr.  
Chairman and CEO  
Texaco Inc.

1994



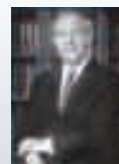
Malcolm S. Forbes, Jr.  
President and CEO  
Forbes, Inc.

1993



Amb. Carla Anderson Hills  
United States Trade Representative

1992



Paul H. Henson  
Retired Chairman and CEO  
Sprint Corporation

1991



Walter B. Wriston  
Retired Chairman and CEO  
Citicorp

1990



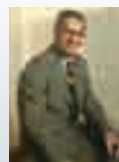
Irving S. Shapiro  
Retired Chairman and CEO  
DuPont

1989



Edmund T. Pratt, Jr.  
Chairman and CEO  
Pfizer Inc

1988



Hon. William E. Simon  
Former Secretary of Treasury



# Board Speaker



**Jeffrey Mortimer, CFA**  
Director of  
Investment Strategy  
Bank of NY Mellon

At the Foundation's June 30, 2016 Board dinner at the Harvard Club in New York City, Jeffrey Mortimer shared his scholarly insights on the "Economic and Financial Market Outlook" including his proprietary perspective on the "Interaction between the Economy and Stock Market" as depicted in an interesting chart of concentric circles, characterized by some observers as a "Wheel of Wisdom." He was well received and presented with a Tiffany sterling silver dollar sign money clip in appreciation for his presentation.

Jeffrey Mortimer is the director of investment strategy for BNY Mellon Wealth Management. In this role, he leads a team that sets capital market expectations and is responsible for making asset allocation recommendations.

Jeff has more than 25 years of experience in the financial services industry. Prior to joining the firm, Jeff worked for Charles Schwab for 13 years in increasingly senior positions, culminating with his appointment as chief investment officer. He also worked for nearly 10 years in boutique firms in the Boston area, serving high net worth individuals and families.

He is a national speaker on issues of investment strategy, the financial markets and the economy. He has been featured in numerous media outlets, including Barron's, Fortune, Bloomberg and CNBC. He serves on the Advisory Board for the Stephen D. Cutler Center for Investments and Finance at Babson College.

## Education

- Master of Business Administration, University of Chicago Graduate School of Business
- Bachelor of Science, Babson College

## Certifications

- CFA charterholder

# New Board Members

## Elected late in 2015, the following Directors assumed responsibility in 2016



Scot Elder

Senior Vice President, Chief Legal Counsel  
Medtronic Surgical Technologies & RTG Sales/Commercial Operations

Scot Elder was named Chief Counsel of Medtronic Surgical Technologies (a \$12B division within Medtronic) in 2014 and also recently took over as lead lawyer over the Commercial Operations for the Restorative Therapies Group. Prior to that time, Scot served as Senior Legal Director and Chief Compliance Officer of the business. Prior to joining Medtronic in 2009, Scot practiced commercial litigation and business transactions at Holland & Knight, LLP and was also Chief Litigation Officer for the St Joe Company.

Scot is fluent in Japanese and also proficient in Mandarin Chinese. He earned a bachelor's degree in History and Japanese from the University of Utah in 1998 and a Juris Doctor from the University of California, Los Angeles (UCLA) School of Law in 2002.



Thomas E. Evans

Vice President and General Counsel  
Wal-Mart Stores, Inc. – Merchandising, Marketing and Supply Chain

Thomas E. Evans is Vice President and General Counsel of Merchandising, Marketing and Supply Chain for Wal-Mart Stores, Inc. in Bentonville, Arkansas, where he currently has responsibility for the legal affairs of Walmart's domestic Merchandising, Marketing, Supply Chain, Healthcare, Import and Customs Compliance. Prior to joining Walmart, he was Associate General Counsel at McLane Company, Inc. in Temple, Texas, a former Walmart subsidiary, and now a wholly owned subsidiary of Berkshire Hathaway. At McLane, he was primarily responsible for providing legal support to the commercial business; the development and implementation of legal strategy for litigation, regulatory compliance, transportation and logistics. Before joining McLane Company, Tom was in private practice with law firms in Dallas and Austin. He received a B.A. from Trinity University in San Antonio, Texas, and a J.D. from Washington and Lee University in Lexington, Virginia. He is a member of the Texas Bar. He is active in a number of professional organizations such as the Transportation Lawyers Association, Trucking Industry Defense Association and currently serves on the Advisory Board of the American Trucking Associations Litigation Center.



Tim E. Flannigan

Chief Legal Officer and Corporate Secretary  
Cancer Treatment Centers of America Global, Inc.

Timothy (Tim) E. Flannigan is Chief Legal Officer and Corporate Secretary at Cancer Treatment Centers of America Global, Inc. Mr. Flannigan's experience spans 35 years at the highest levels of private practice, government service and in-house corporate representation, including serving in the White House as Deputy Assistant and Deputy Counsel to the President and in the Department of Justice as Assistant Attorney General for the Office of Legal Counsel. He also served as senior law clerk to the Honorable Warren E. Burger, Chief Justice of the United States. Mr. Flannigan was Senior Vice President and General Counsel for Corporate and International Law at Tyco International Ltd. In that role, he was part of a small team of high quality leaders brought in to rescue Tyco from the effects of the misdeeds of its former senior management. His leadership of Tyco's global compliance program was central to restoring Tyco's credibility with financial markets and other stakeholders, including law enforcement authorities around the world. He has frequently served as a formal and informal advisor to appointed and elected public officials and to national political campaigns. He holds a B.A. from Brigham Young University and J.D. and MBA degrees from the University of Virginia.



Maryanne R. Lavan

Senior Vice President, General Counsel and Corporate Secretary  
Lockheed Martin Corporation

Maryanne R. Lavan is the Senior Vice President, General Counsel and Corporate Secretary for Lockheed Martin Corporation effective September 24, 2010. She is responsible for management of the Corporation's legal affairs and law department, including serving as counsel to Lockheed Martin Corporation's senior leadership and the Board of Directors.

Prior to her current position, she served as Vice President of Corporate Internal Audit, providing independent assessments of governance, internal controls and risk management across Lockheed Martin Corporation. Ms. Lavan joined Lockheed Martin in 1990 as an attorney and served in increasingly responsible positions within the Lockheed Martin legal department.

Ms. Lavan graduated magna cum laude from the State University of New York at Albany with a Bachelor of Science degree. She received her juris doctor degree from the Washington College of Law, American University, where she was a member of the Law Review.

Ms. Lavan is an active member of the Public Contract Law Section of the American Bar Association. She serves on the Board of Directors of the National Chamber Litigation Center, on the Governing Board for the National Cathedral School, and as a Trustee of The University at Albany Foundation.



Alinne Majarian, JD

Community Bank

FVP, Business Development Officer – Specialty Deposits

Alinne Majarian is a dedicated Business Development and Escrow Banker for Community Bank in the West U.S. markets. Previously she held a similar office with BNY Mellon, a global financial services company focused on helping clients manage and service their financial assets. Escrow Services is a niche financial services product delivering third party escrow agency services for M&A cash holdbacks, settlements from commercial litigation, court ordered personal injury or divorce settlements, construction contracts, contractual obligations, bankruptcy liquidation and other corporate transactions.

Alinne has over 10 years of experience in business development and contract negotiation for large financial institutions. Her previous roles included working as Vice President within the Strategic Alliances Division at Bank of America and the Retail Partnership Channel at Citibank.

Alinne earned her Juris Doctor from the University of La Verne College of Law, has a Level 6 Business Management QCF Securities Certification, and a Bachelor of Arts from California State University Fullerton. She is an active member of the Los Angeles County Bar Association, Beverly Hills Bar Association, ProVisors, and the Association for Corporate Growth Los Angeles Chapter.

## New Advisory Council Members In 2016 & Early 2017



Steve A. Matthews

Steve A. Matthews is a Shareholder of Haynsworth Sinkler Boyd, P.A. in Columbia, South Carolina. He is experienced in a wide range of practice areas including corporate and government finance, mergers and acquisitions, intellectual property, complex litigation, and government and administrative law. He is recognized in The Best Lawyers in America® - Appellate Practice. Much of his current practice is concentrated in the area of entrepreneurial start-ups where he represents both developers and licensee-purchasers of software, hardware and other innovative technology. He is also an active litigator in complex corporate, IP, information technology and appellate matters involving mission critical aspects of his firm's clients' businesses. Mr. Matthews is also a certified mediator for civil court actions in South Carolina.



Thomas V. Walsh

Thomas V. Walsh is a Shareholder in the White Plains, New York office of Jackson Lewis P.C. Since joining the firm in 1986, Mr. Walsh has represented employers in all aspects of labor and employment law and litigation before state, federal, and appellate courts, regulatory agencies, as well as in numerous arbitrations. Mr. Walsh has extensive experience in collective bargaining, representing employers faced with union organizing drives, and in proceedings before the National Labor Relations Board. He has a senior role in the firm's Labor Practice Group and has been instrumental in developing strategic initiatives and guidelines for labor lawyers in various aspects of practice before the National Labor Relations Board, most recently in responding to the Board's burdensome new election rules.

Mr. Walsh is admitted to the courts of New York, the United States Courts of Appeals for the Second, Fourth, Sixth, Eighth, and District of Columbia Circuits, as well as the U.S. Supreme Court.

Mr. Walsh counsels the American Health Care Association on national labor issues of concern to its member companies. He is an active member of the Associated Builders and Contractors, the national construction industry group. Beyond that, Mr. Walsh advises employers in diverse industries, including communications, retail, property management, transportation, energy, manufacturing, gaming, and more.

He frequently lectures on labor and employment law developments before numerous other professional and business organizations. Mr. Walsh is also co-author of the Atlantic Legal Foundation's series "Leveling the Playing Field – What Charter School Leaders Need to Know About Union Organizing."

Mr. Walsh received a B.A., summa cum laude, from Long Island University and his Juris Doctor from St. John's University.





Hank Campbell

President, American Council on Science and Health

Hank Campbell became the second President of the American Council on Science and Health in June of 2015, succeeding the co-founder, Dr. Elizabeth Whelan.

Prior to joining the Council, he was the founder of the Science 2.0 movement and brought science to tens of millions of people since its inception in 2006. Along with Science 2.0, his articles have appeared in the Wall Street Journal, USA Today, Wired and many more.

His early career was spent in business and executive positions at various physics software companies, one of which resulted in an IPO. He attended Duquesne University and was commissioned as a U.S. Army officer in 1987.

Campbell is married with children.



Julianna LeMieux

Senior Fellow in Molecular Biology

Dr. Julianna LeMieux received her Ph.D. in Molecular Biology and Microbiology from Tufts University School of Medicine where she studied the pathogenic bacteria *Streptococcus pneumoniae*. She followed that with a post-doc at MIT, working on the nematode *C. elegans*.

After teaching as an assistant professor for four years, she realized her passion for science communication and left her faculty position to join the team at the American Council on Science and Health in April 2016.

She also served as a faculty member in the Citizen Science program at Bard College for two years, and stays on in a training role and as part of a working group.

She enjoys writing about a myriad of different topics, but is especially interested in infectious diseases, global health and vaccines. She also enjoys co-authoring articles for USA Today with her colleagues.

She lives in NYC with her husband and three children and loves exploring the city with them. She can be reached at [julianna@acsh.org](mailto:julianna@acsh.org)



Sean Casey

Sean Casey is an Intellectual Property attorney specializing in several distinct areas of intellectual property law with a strong background in mechanical and electro-mechanical design engineering, as well as software engineering. He has more than 20 years of experience in managing worldwide patent and technology portfolios in both law firms and large corporate law departments.

His intellectual property experience includes preparation, prosecution, post-grant proceeding, and litigation of technologies that include advanced aerospace technologies, complex computer hardware and software systems and components; Internet and e-commerce related systems; intra- and extracorporeal medical devices including minimally invasive surgical instruments, biotechnological systems and processes, compositions, and devices, related to many different industries, including steel, automotive, mining, rail, petroleum, agriculture, food preparation and processing, medical device, cell culturing and testing, material handling, and consumer products.

Prior to joining Brooks Kushman, Sean served most recently as in-house counsel for a large Fortune 50 aerospace and manufacturing company during the last 10 years. Previously, he was a managing director for a Midwest regional law firm. Before becoming a patent attorney, he served as an aerospace design engineer for the McDonnell Douglas Aerospace Space and Defense Systems Division (now Boeing) where he was responsible for the design, analysis, integration, and testing of a variety of components, structures, and mechanisms for a national and defense engineering project including various launch vehicles and the International Space Station, where several of his components and systems are now on orbit. There he expanded his expertise in additional engineering disciplines including the analyses of strength, thermal, and electrical properties of materials, components, and mechanisms.

Sean received a Bachelor of Science degree cum laude in aerospace engineering from the Boston University College of Engineering, where he was elected to Tau Beta Pi. He received his Juris Doctor degree from Southwestern University School of Law in Los Angeles. He is active in a number of local and national bar associations.



Kristin Calve is Co-founder of Law Business Media and Publisher of Metropolitan Corporate Counsel, an integrated digital and print media platform, that celebrates its 25th year of providing cutting-edge news and analysis to corporate law departments, executives and board members in 2017. Law Business Media also publishes In-House Tech and In-House Ops, and hosts a number of webinars for lawyers and legal professionals. Kristin is a former ALM executive where she helped launch the Daily Deal and created and led the VerdictSearch division of the NLJ Litigation Network. Prior to ALM, Kristin held key leadership positions at other media companies, including A&E / The History Channel International. She is the founder of Topstone Angels, which focuses on funding and advising early-stage companies. Kristin lives in Darien, CT with her husband Joe, four children, Freddy, Jack, Frankie & Charlie and their four dogs.



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



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