



# ATLANTIC LEGAL FOUNDATION

## 2013 ANNUAL REPORT

### The Year in Review

Over the past year, as it has for almost forty years, Atlantic Legal has been an energetic advocate for the rule of law and limited constitutional and efficient government in courts and administrative agencies across the country. We have had the guidance of a sterling board of directors and advisory council and have been privileged to represent some of the nation's most respected guardians of sound public policy. A brief review of the issues we have addressed shows that the Foundation has responsibly advocated points of law that are fundamental to a stable and free society and sound economy.

*Noel Canning*, in the Supreme Court of the United States, raises fundamental issues of separation of powers. The District of Columbia Circuit held that the President exceeded his authority to make recess appointments. If that ruling is affirmed, the President's power to fill vacancies under the Constitution's Recess Appointments Clause will be limited and rulings of the National Labor Relations Board and other federal agencies made by illegally constituted bodies may be infirm. Our brief argues that the plain meaning and history of the Recess Appointments Clause support the circuit court's decision.

The power of Congress's treaty powers was before the Court in *Bond v. United States* where we contended that the fundamental structure of the Constitution requires a holding that Congress has a limited set of powers which cannot be expanded by the executive or legislative branches.

In another Supreme Court case, *DaimlerChrysler AG v. Bauman*, we argued that the exercise of general jurisdiction over a foreign corporation through the contacts of its United States subsidiary violated due process and exceeded the legitimate reach of U.S. judicial power. We argued that the "agency" test employed by the Ninth Circuit violated the Due Process clause and would have profoundly harmful consequences for international commerce. The Court, without dissent, reversed the Ninth Circuit.

We filed three other Supreme Court briefs during the year. In *Mariner's Cove* the Foundation urged the Court to grant *certiorari* in a "taking" case when the government refused compensation for the loss of periodic assessments owed to a townhouse association by property owners whose parcels were taken by the federal government for a flood control project. In *Harris v. Quinn* we supported the plaintiffs' contentions that a collective bargaining agreement that required Medicaid home-care personal assistants to pay a fee for unwanted union representation violates the First Amendment. In *Chamber of Commerce v. EPA* we urged the Court to overturn the EPA's disregard of procedural due process.



Burdensome state and municipal obligations to fund employees' pensions (and the not-uncommon abuse of public retirement systems) have drawn the increased attention of good government groups in many jurisdictions. In New York, the Empire Center for Public Policy, a non-partisan think tank, is seeking data under the New York Freedom of Information Law on payments made by New York State and City Teachers' Retirement Systems. The retirement systems object to disclosing the pension information requested. The Court of Appeals granted the Foundation's motion to file an *amicus* brief on behalf of the Citizens Union of the City of New York and the Citizens Budget Commission, two venerable good government groups. Our clients contend that the lower courts' rulings rejecting disclosure contravene the purpose of the Freedom of Information Law: public access to government records and transparency, and that lower courts violated fundamental principles of statutory interpretation and their reliance on earlier case law was misguided.

The Foundation's representation of distinguished scientists continued. In Pennsylvania, the Supreme Court forcefully directed lower courts to apply rules governing admissibility of expert opinion long advocated by our clients in *amicus* briefs. Similar arguments were made in California appellate courts in three cases in which the standards for admission of expert testimony remain uncertain.

Finally, the United State Court of Appeals for the Second Circuit agreed with our contention that the Vermont laws which would have negated the federal license extension for a nuclear power plant were pre-empted by the Atomic Energy Act. The same court rejected our argument in another appeal that state and local source of income laws, such as the one the United States sought to compel Westchester County to enact, are pre-empted by federal Section 8 legislation.

The Foundation was proud to bestow its twenty-sixth Annual Award on Bill Nuti, Chairman, Chief Executive Officer and President of NCR. Evan R. Chesler, Chairman of Cravath, Swaine & Moore LLP, was the fifth recipient of the Foundation's Lifetime Achievement Award. We reproduce here their remarks at the New York City award banquet.

We are pleased by the addition of a new board member: Nicolas Morgan, a member of DLA Piper US LLP. His professional background is detailed later in this report.

Atlantic Legal's board and advisory council remain convinced that our legal system benefits from and needs the vigorous advocacy the Foundation offers. 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 "Dan".

Dan Fisk  
Chairman



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

Bill Slattery  
President



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## In The Courts

The Foundation frequently is asked to participate in appeals raising issues of broad public importance, often in the Supreme Court of the United States. Here is a sample of recent filings; other cases are discussed at the Foundation's website, [www.atlanticlegal.org](http://www.atlanticlegal.org).

## Constitutional and Procedural Issues

### The Executive Appointment Power: *NLRB v. Noel Canning*

The scope of the President's power to act independently of Congress has been in the headlines and the Supreme Court is expected to give guidance when it decides *Noel Canning* involving recess appointments.

In January, 2013, a unanimous three-judge panel of the D.C. Circuit found President Obama's "recess appointments" to be constitutionally invalid for two reasons: first, the appointments were not made during "the Recess" as that term is used in the Recess Appointments Clause; second, the vacancies filled by the President did not "happen" during "the Recess" of the Senate as required by the same provision. Usually, senior officers of the United States and certain independent agency members, such as NLRB Board members, are nominated by the President and then appointed with the "Advice and Consent" of the Senate. U.S. Const. art. II, § 2, cl. 2. The Constitution's Recess Appointments

Clause, however, provides an exception to the general rule and allows the President to "fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session." Art. II, § 2, cl. 3.

On the date of the President's recess appointments to the NLRB, the Senate was operating pursuant to a "unanimous consent agreement," under which the Senate met in *pro forma* sessions every third business day. Under the 20th Amendment to the Constitution, "Congress must assemble at least once in every year, and such meeting shall begin at noon on the 3d day of January . . . ." Amend. XX, § 2. Accordingly, in order to fulfill its constitutional duty, the Senate officially convened the second session of the 112th Congress during the January 3 *pro forma* session.



The issue before the D.C. Circuit was whether the recess appointments made the next day took place during “the Recess of the Senate,” and the court held they did not because “the Recess,” as used in the Recess Appointments Clause, is limited to intersession recesses, that is, the time period between one session of the Senate and the next when the Senate is unavailable to act upon nominations from the President. The recess appointments took place not during an intersession recess, but while the Senate was holding *pro forma* sessions and after the second session of the 112th Congress was convened.

The D.C. Circuit also considered an alternative basis for its conclusion that the recess appointments were unconstitutional, holding that the clause only applies to vacancies that actually arise during the Senate’s recess, and not to vacancies that happen to exist at the time the recess begins.

The *Noel Canning* case raises important and fundamental issues of separation of powers. If affirmed, the D.C. Circuit’s decision (and a similar decision by the Third Circuit) will limit the President’s power to fill vacancies under the Recess Appointments Clause.

The Foundation’s *amicus* brief in support of Noel Canning, authored jointly by the Foundation and the Washington, D.C. firm Wiley Rein, LLP, argues that the D.C. Circuit was correct in both of its holdings.

## Personal Jurisdiction over Foreign Corporation: *DaimlerChrysler v. Bauman*

This appeal in the Supreme Court arises from allegations by Argentine residents that DaimlerChrysler’s Argentine subsidiary aided the Argentine military junta in committing human-rights abuses from 1976-1983 during the “Dirty War.” The plaintiffs sued DaimlerChrysler, the German parent company, in federal district court in California. The district court concluded it did not have jurisdiction over the German corporation and dismissed the case.

The Ninth Circuit Court of Appeals reversed and held that California had “general jurisdiction” over Daimler, a German corporation with no facilities or personnel in the United States. The appeals court ruled that there were sufficient contacts with California because a U.S. subsidiary of Daimler sells vehicles made by Daimler in Germany in California. The Ninth Circuit concluded there was general jurisdiction in a case in which foreign plaintiffs sue a foreign corporation for events that occurred entirely outside the United

States. The Ninth Circuit formulated an “agency” test, under which an entity will be considered an “agent” of another company if (1) the subsidiary’s services are “sufficiently important” to the parent company that the parent would continue to perform those services either by itself or through a new representative and (2) the parent company has a “right to control” its subsidiary, even if it does not in fact exercise control.

In our *amicus* brief in support of Daimler, we argued that the Ninth Circuit’s “agency” test violated the Due Process clause because the contacts the Ninth Circuit panel deemed sufficient for general jurisdiction fall far short of the kind and degree outlined by the Supreme Court in prior cases.

## Compulsory Union Support: *Harris v. Quinn*

Over the past decade, more than a dozen states have forced independent contractors who are paid through Medicaid to join public-sector unions. In 2003, Illinois unionized home healthcare workers and gave a union the right to collect compulsory fees from the workers’ paychecks. This, we argue in a brief filed jointly with the Center for Constitutional Jurisprudence and the Pacific Legal Foundation in the U. S. Supreme Court, infringes home healthcare workers’ First Amendment right of association and the right to petition the government.

In 2003, a majority of the Rehabilitation Program personal assistants voted to designate SEIU Healthcare as their collective bargaining representative with Illinois. The union and the state negotiated a “fair share” provision requiring “all Personal Assistants who are not members of the Union. . .to pay



their proportionate share of the costs of the collective bargaining process, contract administration and pursuing matters affecting wages, hours and other conditions of employment.”

Pamela Harris and others provide in-home care to disabled individuals through Medicaid-waiver programs run by Illinois. Their pay is reimbursed by Medicaid (through the State of Illinois). The home healthcare providers claimed that the “fair share” provision of their collective bargaining agreement which are not allocated for political purposes, violated the First Amendment by compelling payment to support collective bargaining.

The Seventh Circuit held that home healthcare providers in the Illinois home-care Medicaid waiver program were State employees who may be compelled to support legitimate, non-ideological, union activities germane to collective-bargaining representation. The home healthcare workers argue that they are not employees of the state, but instead are employed by the individual Medicaid recipient, and that the forcible unionization of home healthcare workers serves none of the compelling purposes for public-sector unionization that have been articulated by the Supreme Court —promoting “labor peace” and eliminating “free riders.”

We argue that neither aim is promoted by a system, such as Illinois’s, in which employees work in different locations and in which the customer, the disabled person paying the healthcare worker through a Medicaid disbursement, controls every crucial aspect of the employment relationship, including hiring and firing. The Illinois law only allows collective bargaining for higher wages and benefits and is only about petitioning the government for higher wages and benefits, and does not address workplace conditions at all. Public sector bargaining is a political process that concerns the allocation of scarce government resources, and there is no meaningful distinction between an employee group lobbying for a salary increase, a business lobbying for a government loan or tax credit, or a taxpayer association lobbying for lower taxes. All of these groups seek to influence government to accept their policy preferences and advance their particular goals. There is no basis for granting one group the power to compel financial support from citizens who oppose those policy goals. Public sector “bargaining” is indistinguishable from other lobbying activity, and thus use of non-members’ money infringes long-recognized constitutional protections against compelled speech and compelled association.

## Expansion of Domestic Government Jurisdiction Through Use of the Treaty Power: *Bond v. United States*

The Foundation, together with the Cato Institute and the Claremont Institute, filed a brief in the Supreme Court in an important case on Congress’s treaty powers, arguing that Congressional powers are limited by the Constitution and may not be expanded by treaties.

The Third Circuit held that Bond’s constitutional challenge to her conviction under the Chemical Weapons Convention Implementation Act was not well-founded because the basic limits on the federal government’s power are not “applicable” to statutes that implement a valid treaty. Although it had misgivings about this conclusion, the Third Circuit viewed this result as compelled by *Missouri v. Holland* (1920), which states that “if [a] treaty is valid there can be no dispute about the validity of the statute [implementing that treaty] under Article 1, Section 8, as a necessary and proper means to execute the powers of the Government.” The Third Circuit broadly construed *Holland* as

allowing the Senate and the President to expand the federal government’s constitutional authority by negotiating a valid treaty requiring implementing legislation otherwise in excess of Congress’s enumerated powers.

In our brief, we stressed that *Holland* ignores the fundamental structure of the Constitution, that the basic scheme of enumerated powers provides Congress with a limited set of powers, and the Tenth Amendment limits Congress to those enumerated powers. Permitting the President and one house of Congress to expand federal power by treaty violates this structure, potentially empowering the federal government to regulate all aspects of life. The Constitution explicitly vests Congress with the legislative powers “herein granted.” *Holland* undermines this structural check on both the legislative branch and the powers of the branches that are derived from and dependent on the legislative power. The Constitution prescribes a specific, detailed and cumbersome amendment process to expand Congress’s powers in Article V.



## **Takings – Intangible Interests in Real Property: *Mariner’s Cove Townhouse Association v. United States***

The Foundation urged the Supreme Court to grant *certiorari* in a “takings” case when the government refused compensation for the loss of periodic assessments owed to a townhouse association by property owners whose parcels were taken by the federal government for a flood control project.

Mariner’s Cove Townhouse Association is a “common interest development” in Louisiana. Under the homeowners agreement, each of the homeowners is required to pay pro rata assessments to help fund such services as maintenance, repairs, and the operation of water and sewer systems. These assessment obligations “run with the land” and are assumed by any subsequent purchasers of homes within the development. In the wake of Hurricane Katrina, the U.S. Army Corp of Engineers seized fourteen of the fifty-eight lots that were a part of the development to facilitate access to a pumping station.

Mariner’s Cove argued that the Takings Clause of the Fifth Amendment required the government to compensate it for the loss of the periodic assessments owed by each lot owner and that the seizure of the 25% of the lots in the development severely undermined its assessment base.

The Fifth Circuit held that while the development’s assessment base was a property interest, it was not a compensable property interest under the Takings Clause because of “public policy concerns” that holding real covenants such as a right to assessments compensable would “unduly burden” the government’s ability to exercise its eminent domain power.

We urged the Supreme Court to grant *certiorari* and affirm that the Fifth Amendment protects all property interests.

## **Public Pension Funds – Freedom of Information Disclosure: *Empire Center v. New York State Teachers’ Pension System***

The Foundation filed a brief in the New York Court of Appeals on behalf of the Citizens Budget Commission and the Citizens Union of New York City in support of a freedom of information request by the Empire Center for Public Policy in two related cases, *Empire Center v. New York State Teachers’ Pension System* and *Empire Center v. Teachers’ Retirement System of the City of New York*.

The cases arise out of requests for information by Empire Center, pursuant to New York’s Freedom of Information Law, for information about retired members of the two immense public employee retirement systems: their names, last employers, cumulative years of service at retirement, gross retirement benefits, retirement dates, and membership dates. Both retirement systems refused to provide the names of their retirees, invoking Section 89(7) of New York’s Freedom of Information Law, which provides that nothing in the law shall require “the disclosure of the *home address*. . . of a *retiree* of a public employees’

retirement system; nor shall anything in this article require the disclosure of the *name or home address of a beneficiary of a public employees’ retirement system*,” arguing that a “retiree” is also a “beneficiary.”

The lower courts held that they were constrained by an earlier decision of the Court of Appeals to find for the retirement systems. Atlantic Legal argues that Section 89(7) is an exception to the broad disclosure mandate of FOIL, and should be narrowly construed to promote the overarching purpose of FOIL—public access to government records and transparency—and the holdings of the lower courts are manifestly contrary to the purposes of FOIL and particularly troubling given taxpayers’ justified concerns over the fiscal issues facing state and local government; principles of statutory construction, especially the principle that a law should not be construed to render legislative language superfluous when it is practicable to give to each a distinct and separate meaning, should be recognized and the case relied upon by the lower courts sought both names and addresses of retirees, and not—as in this case—just the names of retirees.



## Sound Science

### Failure to Ensure Quality of Data used by EPA: *Chamber of Commerce v. Environmental Protection Agency*

We filed an *amicus* brief in support of the petition of *certiorari* in the Supreme Court on behalf of the Institute for Trade, Standards and Sustainable Development in *Chamber of Commerce of the United States v. Environmental Protection Agency*. ITSSD is a nonprofit legal research and educational organization whose Advisory Board consists of scientists and engineers; ITSSD analyzes U.S. foreign and intergovernmental environment, health, safety and other regulations from the perspectives of sustainable development concepts. We argued that EPA disregarded procedural due process requirements intended to ensure the quality of agency-disseminated third-party-developed scientific data and that the D.C. Circuit failed to examine carefully whether EPA's evaluation of data from external sources upon which the Administrator's final "Endangerment Findings" primarily relied satisfied Information Quality Act requirements and agency guidelines.

## Admissibility of Sound Science in State Court Litigation

On behalf of six prominent scientists, one a Nobel Prize recipient, the Foundation filed an *amicus* letter urging the California Supreme Court to grant the petition for review in *Strickland v. Union Carbide Corporation*, a case with important implications for asbestos litigation in particular and product liability cases generally in California.

Mr. Strickland worked in construction for many years with wall board and "joint compound" which contained asbestos; in the case of Union Carbide's product, it was solely the chrysotile form of asbestos. He was also exposed to many other asbestos-containing products, including some which contained the amphibole form of asbestos. He died of peritoneal mesothelioma, a cancer of the lining of the chest cavity.

At issue is whether plaintiffs' expert's testimony that Strickland's exposure to a pure form of chrysotile asbestos (not contaminated with amphiboles) that Union Carbide marketed in the 1960's and 1970's was a "substantial cause" of Strickland's peritoneal mesothelioma. It is generally accepted that both amphibole asbestos and chrysotile asbestos can cause pleural mesothelioma, a cancer of the lining of the lung. It is also generally accepted that chrysotile asbestos is a far less potent carcinogen than amphibole asbestos. There is consensus that amphibole asbestos can cause peritoneal mesothelioma, but most experts do not believe that chrysotile asbestos has been shown to cause peritoneal mesothelioma.

Plaintiffs produced no evidence to show how frequently Mr. Strickland was exposed to Union Carbide's chrysotile product. Plaintiffs' industrial hygiene expert estimated the momentary levels of a person's exposure to asbestos fibers during use of the various products that Strickland encountered, including joint compounds, but he did not attempt to calculate Strickland's overall exposures to chrysotile generally or to Union Carbide's products in particular. As is common in asbestos cases, the plaintiffs sued many companies that made products containing various types of asbestos. By the time of trial, all of the other defendants had settled, leaving Union Carbide as the lone defendant. A biopsy of Strickland's lung tissues showed that he had been exposed to very high concentrations of amphibole asbestos fibers.

Plaintiffs' expert on medical causation is a frequent plaintiff's expert in mesothelioma cases. He testified that in his opinion Strickland's exposure to Union Carbide's product was a "substantial cause" of Strickland's mesothelioma.

In our *amicus* letter we argued that plaintiff's expert's conclusion that chrysotile can cause peritoneal mesothelioma has a number of defects.



We argued that courts should not accept an unproven and untestable theory as evidence.

We urged the California Supreme Court to grant review to clarify that lower courts should adhere to the two pronged test for causation in asbestos injury litigation as it was articulated in *Rutherford v. Owens Illinois, Inc.* (1997) 16 Ca1.4th 953, and not the diluted versions applied by the lower courts in this and other cases, and that the court should provide much needed guidance to trial judges who, while charged with responsibility to act as “gatekeepers” for the admissibility of expert testimony, cannot fulfill that responsibility when the criteria for admissibility of expert testimony are unclear.

Also in the California Supreme Court, joined by the International Association of Defense Counsel, we urged the court in two cases (*Liu v. Superior Court* and *Garrett v. Howmedica Osteonics*) to exclude at the summary judgment stage expert evidence that would be excluded at trial.

## Standard of Liability in Product Liability Cases

Atlantic Legal filed a brief in the Pennsylvania Supreme Court in *Tincher v. Omega Flex, Inc.*, a design defect case which arises out of the failure of flexible steel piping carrying natural gas which was struck by lightning, resulting in a serious fire.

The Pennsylvania Supreme Court asked the parties (and *amici*) for supplemental briefing on two questions: (1) Whether Pennsylvania should replace the strict liability analysis of Section 402A of the Restatement (Second) of Torts with the analysis of the Restatement (Third) of Torts: Product Liability, section 2 and (2) Whether the holding should be applied retroactively.

The Foundation argued that Pennsylvania should explicitly adopt Restatement (Third) of Torts: Products Liability. Pennsylvania’s implementation of the Restatement (Second) has been inconsistent, contradictory, somewhat illogical, and confusing. While repeatedly stating in decisional law that strict product liability law allows of no negligence concepts, the Pennsylvania Supreme Court and Superior Court have created numerous exceptions that do, in fact, import negligence concepts (such as “foreseeability” or “intended use”).

## Charter School Advocacy

While they are still opposed by defenders of the public education status quo, public charter schools are now available as an alternative to conventional, often failing, public schools across the country. Indeed, the number of students has surpassed 2.5 million with 600 new schools opening for the 2013-14 school year. In most states public charter schools are in such demand that admission is determined by lottery with long waiting lists. Where they do not meet their stated goals, charters are closed.

Atlantic Legal has been a staunch defender of charter schools and their advocates since 2001. Notably, together with the national labor law firm Jackson Lewis P.C., we have published a series of monographs titled *Leveling the Playing Field: What Charter School Leaders Need to Know About Union Organizing*. One national professional education organization has reported: “We have time and again referenced the content [of the guides] and often refer charter school teachers to the website.”

In addition, the Foundation has gone to court or appeared in administrative agencies on behalf of charters where they have been challenged on diverse grounds in New York, New Jersey, Florida, Ohio and Tennessee. Of particular importance has been the contention in New York and Ohio courts that because charter schools are privately operated they are not government sub-divisions.



# Annual Award to Bill Nuti



Bill Nuti is Chairman, CEO and President of NCR Corporation. NCR is the global leader in consumer transaction technologies, enabling more than 485 million transactions daily across retail, financial, travel, hospitality, telecom and technology, and small business. Mr. Nuti is highly respected for his leadership skills and acclaimed for his vision and expertise in transforming and reinventing companies for sustainable and profitable growth.

Since joining NCR in 2005, Mr. Nuti has orchestrated one of the most successful business reinventions in recent history, while transforming the way consumers connect, interact and transact with business. With over a century of legacy and culture at its back, he made critical decisions to reinvent NCR over the long term, including shifting the core business model of NCR from hardware to more software and SaaS, spinning-off Teradata, moving the company's headquarters to Georgia, building a global manufacturing network in five countries, acquiring several high-growth com-

panies in the software and SaaS space, and expanding into new markets, adjacencies and underpenetrated emerging markets. Throughout his tenure, NCR has been recognized for its humanitarian contributions with the Red Cross Good Neighbor Award and its commitment to employee training and development with the American Society for Training and Development (ASTD) BEST Award.

Prior to joining NCR as CEO, Mr. Nuti served as president and CEO of Symbol Technologies. He led a challenging and highly successful turnaround of Symbol, returning the company to profitability for the first time in five years. In 2005, he was recognized as the "Best Turnaround Executive" by the American Business Awards. Mr. Nuti joined Symbol following more than ten years at Cisco Systems, where he held positions of increasing responsibility.

He is a frequent speaker at high-profile business and technology events. He also is an established enterprise and business policy leader in Washington, D.C., where he founded a CEO policy forum on tax reform and competitiveness. He also spoke at the White House Forum on "Strategy for American Innovation."

He is a member of the Georgia Institute of Technology advisory board, a Long Island University trustee and a member of the United Continental Holdings board of directors. Mr. Nuti holds a bachelor's degree in finance and economics from Long Island University.

## "Reinvention" - Bill Nuti Remarks

It is truly an honor to be with you all this evening. I want to thank the Atlantic Legal Foundation for recognizing me with their Annual Award. I'd also like to congratulate Evan Chesler on his Lifetime Achievement Award.

What I'd like to spend some time speaking with you about this evening is something that I care very deeply about. It's been a guiding light and driving force throughout my life—it's called *reinvention*.

During President Obama's second inaugural speech he said the following:

*'America's possibilities are limitless, for we possess all the qualities that this world without boundaries demands: youth and drive; diversity and openness; an endless capacity for risk and a gift for reinvention.'*



If there's one thing that I have learned in my life it is this—having a 'gift for reinvention' is only the beginning of the journey. If you want to achieve success, *it takes vision, imagination, disruption, and speed, while recognizing there are no shortcuts.*

I was raised in the Bronx projects. The word projects typically evokes a visual of a neighborhood filled with low-income housing, people barely scraping by to make ends meet, not to mention the criminal element always lurking around the corner. For me, this was the place I called home.

My parents were hard-working Italian-Americans who only wanted what all parents want for their children—they wanted to give me the opportunity to pursue my dreams. And when you're born into a challenging environment, you spend most of your time dreaming of a way out – a way to a better life – a way to 'reinvent' your circumstances, so your past doesn't define your future.

My first brush with reinvention was my first job as a 9-year-old newspaper boy. Delivering newspapers in apartment buildings with no elevators was no easy task. You would start your route at the bottom of the building, work your way up to the top, and then you would walk all the way back down to the bottom again and over to the next apartment building—and start all over. So, I thought to myself— there has to be a better way to do this.

The next time I reached the top of an apartment building and was finished delivering papers, I simply walked out onto the roof and jumped, yes jumped, to the roof of the adjacent building. This became my strategy for delivering newspapers day after day. For the record, maybe the buildings weren't so tall and maybe the distance of the jumps wasn't as far and dramatic as I remember them to be, but nonetheless, I had reinvented the newspaper boy delivery process in New York and I lived to tell about it.

Fast forward to the times we are living in today. It seems like everything around us is being reinvented, from our methods of communication to how we pay for goods and services. Reinvention is essential for survival. Think about how many iconic companies have just disappeared because they failed to reinvent.

NCR is an iconic company that was founded in 1884. Just think about that for a second. How many companies can you name that have survived for 130 years and countless eras in history?

When I was hired in 2005 as Chairman and CEO, however, it was at a time when NCR was struggling. The company had no strategy for growth and sustainable profitability and any shareholder value was simply being created by unsustainable cost-cutting. At this time, many wondered if NCR would even survive—or if there was any *viable future* for the company. And perhaps that is what drew me to the NCR opportunity. It goes back to my upbringing in the Bronx. Where I grew up, your *viable future* was what you could see right in front of you at that moment. And that's how most people were judging NCR at the time.

What NCR needed was a vision for the future. And just as I created a vision for a better life for myself, I set out to create a vision for a more productive and profitable NCR.

Reinvention begins with an *aspirational vision*. In 2005, when I would ask employees what our company vision was very few beyond the management team could tell me. When you set out to create a vision, you must first ask yourself a simple question: *Where do you want to go and what makes it so very different from where you are today?* At NCR, we knew that simply being the 'cash register company' or even the 'ATM company' would not be the path toward long-term, sustainable growth in an increasingly digital and mobile world. So we created a bold and aspirational vision: *to lead how the world connects, interacts and transacts with business*. This was a watershed moment in the company's history.

That single vision statement transformed NCR. If you walk the halls of NCR today, our employees can share our vision with you. Over the past nine years, I have said that single vision statement so many times to employees, customers, partners, and investors; and each time I say it, I realize it's no longer a vision we are describing—it's a vision *we are living*. Today, we enable nearly 500 million transactions every single day, across financial, retail, travel, hospitality, telecom and technology, and small business. Without NCR's vision, the way you interact and transact with businesses would be very different. NCR's vision is making *your* life easier as a consumer, each and every day.

This vision drives our company mission, business goals and business strategy. It has been the guidepost on our journey. And every reinvention journey needs a vision; a guidepost that keeps you focused on the



end goal. Because with every reinvention there are highs and lows, and there will be times when people will think you're just downright crazy. I call this *courageous imagination*.

When I told people that we should spin-off Teradata from NCR, people were simply shocked. Teradata, a data-warehousing business that was a part of NCR at the time, was one of its most profitable assets. Why would you want to spin-off one of your most profitable assets, not to mention as a CEO, why would you want to run a smaller company? The problem was that Teradata served a different market and customer than the rest of NCR. And, because it was a very profitable business with high margins, all the investment was going to Teradata, while the rest of NCR was starving, with little support. We made the decision to spin-off Teradata, essentially becoming two separate companies. Today, both companies are thriving independently.

Which brings me to the next key tenet of reinvention—being disruptive is a good thing. You grow up being taught to 'raise your hand,' 'wait your turn' and 'ask for permission.' It's not often you hear someone tell you that 'being disruptive is a good thing.' I'm here to tell you that it's a must if you want to execute a successful reinvention.

One of the biggest issues to overcome when you're looking to progress your company, your culture, your solutions or your processes is the issue of incumbency. When you are so used to doing things in a way that has led to successful outcomes in the past, incumbency can become a dangerous, comfortable place. For example, when you are the incumbent vendor, you begin to get more comfortable with your customer. You often rely on what you know works and you maintain the status quo. You can start to think that you're in a place where you don't have to change at a rapid pace, which is often exactly when the competition sneaks in.

You cannot do the same thing the same way over and over again and expect to reach new levels. To reinvent yourself, your company or even a process, you have to disrupt. You have to push yourself to go beyond 'best practice' and reach for the 'next practice.' At NCR, we're always changing, transforming and evolving. We're not changing for change's sake, we're changing with purpose. One of the key fundamental cultural changes we've made is moving away from incremental innovation to more disruptive innovation.

We have an equation—*half the cost, twice the quality, four times the customer value*. So whatever you built last year, build it for half the cost, twice the quality you built it for, and four times the value to our customers. And this equation doesn't just apply to our engineers. I want people working on what might be perceived as mundane processes to be disruptive. Some might say the Quote-to-Cash sales management process is a mundane process. I would tell you that you can be disruptive in thinking about how you handle that process; and I want every employee to feel empowered to think that way.

Now a reinvention does not happen overnight. However, in today's business environment, *speed wins the race*. Businesses must move quicker than ever before to stay relevant, compete and survive. Technology is evolving at a rapid pace and the speed of innovation will only accelerate. What is relevant today will be antiquated next week. That app you just downloaded—well you can be sure there will be a newer, better version of it tomorrow. Because today, it's not the big that beat the small—it's *the fast that beat the slow*.

When I took the reins at NCR, we were not fast-moving, agile or entrepreneurial. We had a culture that forgot how to take risks; a culture that had developed muscle memory on how not to grow. One of the first changes I set out to make at NCR was to address our lack of agility and speed. We installed a management system that was designed to give more timely, useful company performance data to make business and customer decisions more quickly. We set a goal to be first-to-market with products, pricing and quality that is disruptive in nature. We focused on our ability to rapidly convert, manufacture and build a supply chain around these solutions and bring them to market effectively, by geography.

How quickly we are adjusting our playbook for the future, is one of the main reasons we have been able to pull away from our historic competitors and define a new category for ourselves called 'consumer transaction technologies.' However, the pacing and sequencing of the changes you make are extremely important. You can only do so many things so quickly. The organization can only digest so much. I can move significantly faster than most of the members of our team, but I can also turn around and no one will be behind me.



A reinvention is not a 100-yard, one-mile or five-mile race—it's a marathon. And like any race or marathon, *there are no shortcuts to victory or to greatness*. When I became CEO, NCR was already in the process of a turnaround. A tremendous amount of cost was being cut from the company across various areas to meet our quarterly profit goals. The problem with that turnaround formula is that kind of cost cutting is not sustainable if you want to grow over the long term.

That's the difference between a turnaround and a reinvention. Turnarounds are for short-term gain while a reinvention is done to drive long-term, sustainable growth. A successful reinvention requires the ability to take smart risks and make the right investments. At the height of the Great Recession, we invested in our company and our people. We reinvigorated employee training and development and built a global manufacturing network in five countries, three of which are in emerging markets.

To reinvent, you must create new solutions and transform old ones. You must adopt new processes, structures, models and ways of thinking. And most importantly you must continue to change before you have to. Today, NCR is a trusted, innovative, vibrant and agile enterprise that one analyst called ... *'the top start-up of 2013.'* Yes, we are very proud of our 130-year-old tradition, but we're just getting started!

'Don't be afraid to take risks, always.' I look back and realize these are words I have lived by my whole life, from roof hopping to deliver newspapers to the dramatic steps we have taken to reinvent NCR.

Whatever role you play in your organization, you have an opportunity to be an innovator and a pioneer in defining *your vision* for the future. I encourage you to push the limits of what's possible. And remember, all of us have been blessed with the 'gift for reinvention'—what you do with that gift is up to you.

Thank you once again for this tremendous honor.

## Lifetime Achievement Award to Evan Chesler



Evan R. Chesler is Chairman of Cravath, Swaine & Moore LLP. He joined Cravath in 1976 and became partner in 1982. Mr. Chesler was elected Presiding Partner in January 2007 and Chairman in January 2013, the first person to be given that title in the Firm's history.

Mr. Chesler has broad experience in both trial and appellate courts, and has tried numerous cases in federal and state courts all over the country. He handles a wide variety of litigation and has represented companies and their management in virtually every industry.

He received an A.B. degree, with highest honors in History, from New York University, an M.A. in Russian Area Studies at Hunter College and a J.D. *cum laude* from NYU School of Law, where he was elected to the Order of the Coif, was Topics Editor of the Law Review, served as a junior fellow at the Center for International Studies, twice received the John Norton

Pomeroy Prize for academic excellence and was awarded the Benjamin Butler Prize. Following graduation, Mr. Chesler clerked for Hon. Inzer B. Wyatt of the U.S. District Court for the Southern District of New York.

Mr. Chesler is a fellow of the American College of Trial Lawyers. He is also a trustee of the New York Public Library, Chairman of its Lawyers' Committee and Chairman of the Executive Committee of its Board. He is an adjunct professor of law at New York University School of Law, and is a member of the Board of Trustees



of NYU and NYU School of Law. He is also a member of NYU's Board of Overseers of the Faculty of Arts and Science and founder and Chairman of LAMP (the Lawyer Alumni Mentoring Program), a program for undergraduate, prelaw students that has aided over 200 students over the past decade, most of whom are now practicing attorneys or law school students. Mr. Chesler is the President of the Dwight Opperman Institute of Judicial Administration and a member of the Board of Directors of the International Institute for Conflict Prevention and Resolution (CPR).

## "Truth, Justice and the American Way" - Evan Chesler Remarks

When I was a young boy in the 1950's, my favorite TV show appeared on Saturday mornings at 11:00 a.m. It was the "Adventures of Superman", starring George Reeves. The special effects were not very special, the acting was not of Academy Award (or even daytime Emmy) quality and the scripts were neither eloquent nor elegant.

But the hero was a singularly American, post-WWII brand of hero. He was modest, confident, brave, discreet, honest (but for the hidden uniform under his gray flannel suit) and tough (so long as there was no kryptonite in the vicinity).

At the end of each episode – as the credits for those who wrote and produced this masterpiece of the Eisenhower years rolled across my 12-inch Philco, black and white screen – Superman appeared, with the American flag waving gracefully behind him. And then a baritone voice recited the superhero's credo, "Truth, Justice and the American Way".

That was a long time ago. All of the actors from the original TV series are long gone. No one reads comic books anymore, except the collectors who show up at VFW buildings on Sunday afternoons to trade and sell them. Of course, the character lives on in the hearts and wallets of Hollywood studio executives.

And what has become of the America to whose 1950's values Superman promised his allegiance?

We lost a president in Dallas in 1963. We lived through the Civil Rights Movement; we endured the chaotic and tragic year of 1968 (when we lost MLK, RFK and our cities burned in anger); we survived the oil embargo, three recessions (including the worst in 80 years). We fought a war in Southeast Asia, two in the Persian Gulf, another in Afghanistan. And, of course, we endured the profound national tragedy of September 11, 2001. Most recently, we seem to be moving to a cool war against our former adversary in the Cold War.

Today, we seem to be an intractably divided nation. The 99% confront the 1% with anger and frustration at the growing divide between them. We still struggle with our ancient bed sore of race relations, even while our first African-American president sits in the White House. Our elected representatives have reduced to a sordid art form their apparent inability to communicate, much less legislate, for the common good. We seem not to trust our institutions or each other. Schools and movie theaters in tranquil, bucolic towns have become the scenes of senseless gun violence.

It can be painted as a bleak, dark picture. But I can still see the grainy image of the American hero, his flag behind him, his motto intoned by a voice of authority.

After all we have been through these past 50 or 60 years, we are still the team to beat. Much of the world still wants to buy what we innovate, to imitate us, even to be us. We still come to the aid of strangers devastated by natural disasters. We still send our young warriors into harm's way, far from their homes and families, to protect what we often casually expect we will always have. We still protect the rights of the accused, make the state prove its case, harbor a healthy skepticism of power, applaud the underdog, admire self-made success, give our money to worthy causes, do our best to educate our children and, maybe above all else, believe that tomorrow is likely to be better than today.

We are probably less likely than our 1950's forebears to accept the truth of what the other guy says. But we can still be convinced.



We are probably less likely than our 1950's predecessors to assume justice will always be done. But we wouldn't trade our system for anyone else's.

We are probably less likely than our 1950's counterparts to agree on how to describe the American Way. But I suspect we all know it when we see it.

And what became of the little boy who watched his TV hero all those years ago? Personally, I am very grateful for the opportunities America has given me. I doubt that I would have had anything like those opportunities anywhere else in the world.

I have the honor to be the chairman of a great American law firm that has existed almost since the beginning of our republic. It has allowed me to do things, go places, meet people I would never otherwise have done, seen or met.

I am a trustee of the university that gave me a scholarship so that I could get a quality education. I am a trustee of our city's public library, where I spent my childhood afternoons while my hard working parents earned the money to pay the bills.

Only in America could someone like me have had this kind of life.

So, I believe that "Truth, Justice and the American Way" still exist. I am proud to accept this Lifetime Achievement Award and I thank you for this honor.

## Photographs from the Annual Award Dinner



Jeffrey Taylor, Rebecca Ransom



Seth Levine, Dana Ng





Dr. Barbara Gots, Dr. Ron Gots, Martin Kaufman



David Highet, Yi Highet



Kathy Gray, Donald Gray, Margaret Slattery



Dan Fisk, Ned Lewis, Larry McMichael, Jim Rodgers



Dan Fisk, Angelo DeGiglio, Eric Cottle



Terry Budd, Ken Jacobs





Thomas Kendris, Steven Sokolow



Bill Slattery, Bill Nuti, Peter Dorsman



Don Steiner, Jerry Wilkinson, Ken Ward



Bo Hong, John McCarthy, Peter Valentine, Marcy Cohen, Tim Meehan



Henry Butler, Tom Gottshall, Nick Morgan



Ted Normand, Robin Henry, William Ohlemeyer, Nate Holcomb





Barbara Chesler, Evan Chesler, Matthew Chesler, Becky Baum



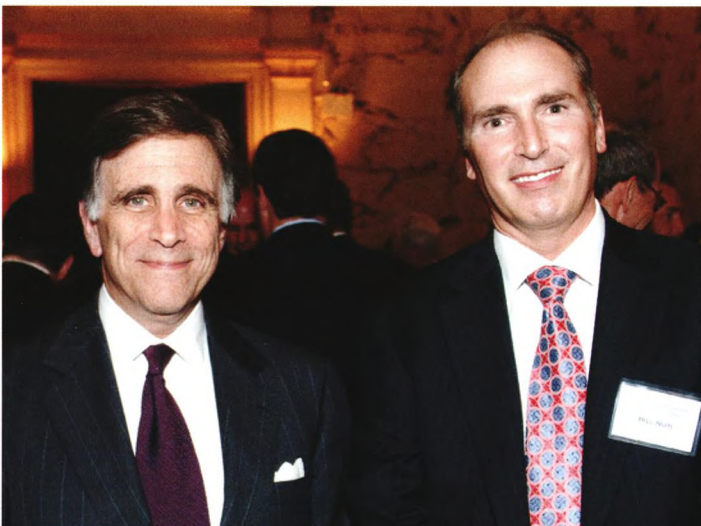
Bob Lonergan, Dick Wilson, Doug Foster, Briscoe Smith



Richard Aftanas, Kimberly Aftanas



Andrew Levander, Bill Nuti, Jen Daniels, Kathleen Massey



Evan Chesler, Bill Nuti



Bill Slattery





Jen Daniels



Evan Chesler



Bill Nuti



Vintage Tiffany Mantel Clock presented to Bill Nuti



Bill Nuti



Evan Chesler, Dan Fisk, Bill Nuti



# Annual Award Recipients 1988-2013

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**  
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*American International Group, Inc.*

2002



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

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*  
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1990



**Irving S. Shapiro**  
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1989



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1988



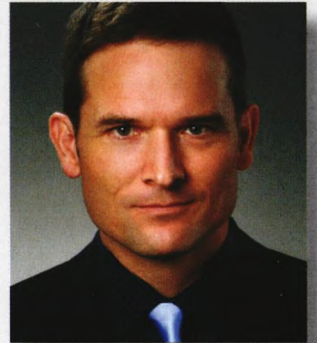
**Hon. William E. Simon**  
*Former Secretary of Treasury*



## New Board Member

Nicolas Morgan is a partner and West Coast Chair, Securities Enforcement Practice of DLA Piper US LLP.

He practices complex securities litigation in state and federal courts with special emphasis in representing issuers, officers and directors, investment funds, analysts, and brokers in connection with Securities and Exchange Commission and Financial Industry Regulatory Authority investigations, litigation, and arbitration. Mr. Morgan also advises clients in non-litigation settings, such as counseling public companies, funds and broker-dealer firms in securities compliance and corporate governance issues, conducting internal investigations and assisting in regulatory examinations by the SEC's Division of Corporation Finance and Office of Compliance Inspections and Examinations.



**Nicolas Morgan**

For more than seven years, from 1998 to 2005, Mr. Morgan prosecuted securities fraud in the SEC's Enforcement Division, rising from staff attorney to branch chief to senior trial counsel. Mr. Morgan also served as a Special Assistant US Attorney for the Southern District of California, obtaining indictments against the principals of a \$330 million subprime mortgage lending scheme.

Mr. Morgan writes and speaks on SEC enforcement and securities litigation issues and has served as a faculty member, speaker, and panelist at conferences on corporate compliance and securities regulation.

He holds a B.A. degree from the University of California at Los Angeles and a J.D. from the University of California, Davis School of Law.

## Board Speaker

At the Foundation's June 2013 dinner meeting, Jeh Johnson, then a member of Paul, Weiss, Rifkind, Wharton & Garrison LLP, discussed his experiences as General Counsel of the Department of Defense. Secretary Robert Gates wrote recently of Mr. Johnson: "...the finest lawyer I ever worked with in government" and he "trusted and respected him like no other lawyer I had ever worked with."

Mr. Johnson was confirmed by the Senate as Secretary of Homeland Security in December, 2013. Earlier, Mr. Johnson served as General Counsel of the Air Force and as Assistant United States Attorney in the Southern District of New York.



**Jeh Johnson**



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

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

The Foundation currently concentrates primarily on four areas: representing prominent scientists and academicians in advocating the admissibility in judicial and regulatory proceedings of sound expert opinion evidence; parental choice in education; corporate governance; and application of constitutional guarantees to individuals and corporations faced with authority of government agencies.

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

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