



# ATLANTIC LEGAL FOUNDATION

## 2015 ANNUAL REPORT

### The Year in Review

In 2015 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.

On March 22, 2016, we were privileged to present the Foundation's twenty-eighth Annual Award 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 this Report.

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. See the tribute to Bill further into this Report.

**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 . . . see the Sections infra for the photos and bios of these outstanding professionals who have joined the leadership of our Foundation.**

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 the past 39 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 Fisk".

Dan Fisk  
Chairman & President



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## Executive Summary

### About Atlantic Legal Foundation

- Atlantic Legal Foundation has been defending liberty for 39 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, including: 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 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 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 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 2015 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 timely judicial review of "jurisdictional determinations" by EPA or the Army Corps of Engineers under the Clean Water Act, the Foundation filed an amicus brief on behalf of a couple who were prohibited from building their home on "wetlands."***

***The Supreme Court unanimously held that Jurisdictional Determinations by the Army Corps of Engineers are reviewable in an Article III court under the Administrative Procedure Act because they create significant legal consequences. The Supreme Court's decision in U.S. Army Corps of Engineers v. Hawkes is significant: 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 arduous and expensive permit process to run its course. This could alter the balance of power between the government and property owners by giving property owners immediate access to judicial review.***

### **Administrative Law - Judicial Review under the Clean Water 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 have refused to review such a determination under the Administrative Procedure Act (APA), holding they are not "final agency action" and create no legal consequences. In *Hawkes*, however, the U.S. Court of Appeals for the Eighth Circuit held that a final jurisdictional determination is judicially reviewable. This 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 also filed an *amicus* brief), in which the petition for certiorari was denied. In both *Hawkes* and *Kent Recycling*, the Army Corps of Engineers made a final jurisdictional determination that the subject site is subject to CWA regulation and could not be developed without a permit.

Atlantic Legal's *amicus* brief was filed on behalf of a couple who bought property in Weston, Connecticut several years ago. The couple paid slightly over \$210,000 for 14 acres of undeveloped land in a suburban community, intending to build a \$300,000 house on it. Our brief highlights and puts "a human face" on the barriers and frustrations faced by individual landowners whose property is deemed to include "jurisdictional wetlands" by either the Army Corps of Engineers or the EPA. (In both *Hawkes* and *Kent Recycling* the plaintiffs are commercial enterprises.) Our *amicus* clients spent approximately four years and \$200,000 to obtain local building department and conservation commission approvals. Then, when they started repairing a pre-existing gravel driveway leading from the public street to the site of their house, they received a "cease and desist" letter from the Army Corps of Engineers, asserting probable Clean Water Act jurisdiction and threatening fines of \$37,500 per day and possible imprisonment if they did not immediately stop work. Four years later, after they exhausted all administrative appeals and spent tens of thousands of dollars on engineering and hydrology studies, the Corps of Engineers' regional office affirmed the district engineer's "Jurisdictional Determination" that the property contains or is connected to "waters of the United States" and is therefore subject to federal jurisdiction, despite the fact that the property is miles from any navigable waterway.

Our clients' experience is consistent with the Supreme Court's acknowledgment a decade ago that obtaining a permit is onerous; in *Rapanos v. United States*, 547 U.S. 715 (2006) (in which Atlantic Legal also filed an *amicus* brief), the Supreme Court noted that the "average applicant for an individual permit spends 788 days and \$271,596 in completing the process."

The Foundation argued that, as with the compliance order in *Sackett v. EPA*, 566 U.S. (2012), the JD in this case has immediate and direct legal consequences. It is, in fact, an adjudicative decision that applies the law to the specific property and is legally binding on the agency and the landowner, thereby fixing a legal relationship, the *sine qua non* of "final agency action" under the Administrative Procedure Act, and thus is appealable to an Article III court.

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 also rejected the Corps' argument that the landowner has adequate alternatives to prompt adjudication – either working on the property without a permit and risking substantial penalties or applying for a permit and waiting until it is denied – because those alternatives expose the landowner to substantial (and unnecessary) expense. Of particular note, the Supreme Court's decision in *Hawkes* is significant: 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 arduous and expensive permit process to run its course. This could shift the balance of power between the government and property owners by giving property owners immediate access to judicial review.

Justice Kennedy, in his concurrence, joined by Justices Thomas and Alito, wrote that the reach and systemic consequences of the Clean Water Act remain a cause for concern and suggested that the CWA itself might not comport with due process.

Justice Alito, in an earlier case, noted that the CWA's reach is "notoriously unclear" and that the consequences to landowners can be "crushing" even for inadvertent violations. He also observed that there are "troubling questions regarding the government's power under the CWA to cast doubt on the full use and enjoyment of private property throughout the United States."



EPA and the Army Corps rely greatly on Justice Kennedy's concurrence in an earlier CWA case, *Rapanos v. United States*, to justify the 2015 "Clean Waters" proposed regulation which is currently being challenged. Justice Kennedy's concurrence indicates that at least three justices may be prepared to question whether the current reach of the CWA itself is too broad. Justice Kennedy's concurrence may also result in the government interpreting its jurisdiction more judiciously when it knows its decisions are more likely to be reviewed in court.

## First Amendment, Compelled Speech and Labor Union Agency Fees

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

***Friedrichs v. California Teachers Association***, US Supreme Court, No. 14-915 - merits.

We filed an *amicus* brief on the merits in this challenge to the mandatory payment of "agency fees" to the California public school teachers union by teachers who have chosen not to join the teachers' union.

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 benefiting from the union's collective bargaining efforts without paying union dues.

Petitioners are public school teachers who resigned from the union and objected to paying the agency fee. They claimed that requiring them to make any financial contributions to support a union or to affirmatively "opt out" of contributing to the non-chargeable union expenditures violates their free speech and association rights under the First and Fourteenth Amendments.

The Supreme Court addressed similar issues in *Abood v. Detroit Bd. of Educ.* (1977), in which it upheld a scheme compelling employees to pay agency fees but rejected the idea that unions could use the funds from non-union members for political or ideological causes. In *Abood* and later cases, the Supreme Court recognized that payment of compulsory union dues or agency fees implicates a core First Amendment right not to be compelled to support speech of others, and increased the procedural safeguards for objecting teachers, while reiterating the unions' and the public's interest in preventing "free riding."

The Supreme Court called *Abood* into question in *Harris v. Quinn* (2014), noting that "whether a public employer accedes to a union's demands . . . will depend upon a blend of political ingredients, thereby giving public employees more influence in the decision making process than is possessed by employees similarly organized in the private sector."

In our *amicus* brief, 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. The teachers' union, for example, bargains over pension, tenure, seniority, class-size, curriculum, and other issues that directly or indirectly effect education policy and performance. These are all important issues to the public at large as well as teachers and education administrators, and the agreements reached at the bargaining table will ultimately have a huge effect on the children and the public. Collective bargaining, lobbying, and political advocacy are so related to one another that it is difficult to draw the line where collective bargaining expenses end and political advocacy expenses begin. As the Court in *Harris v. Quinn* noted, *Abood* failed to appreciate the conceptual difficulty of distinguishing between union expenditures that are made for collective-bargaining purposes and those that are made to achieve political ends. In public employee union cases, the employer *is the government*, and therefore, the distinction between collective bargaining directed at the employer, and political advocacy directed at the government, is tenuous at best.

The Court split 4-4 on this case, leaving the Ninth Circuit's decision in effect.



## Class Actions

***In many class actions there is little or no proof that all members of the class have been similarly damaged or injured at all, but some courts have nevertheless certified a class because the “class representative” plaintiffs can show some injury. Litigation becomes a “bet the company” case once a class seeking potentially massive damages is certified, sometimes leading to lucrative settlements, the cost of which is borne either by the defendant company’s shareholders or by consumers through a pass-through of costs.***

Atlantic Legal maintained its active interest in trying to limit massive and abusive class action lawsuits because mere certification of a class can create “bet the company” situations and coerce settlement of cases with little merit. The Court recognized decades ago (and has reemphasized recently) that “certification of a large class may

so increase the defendant’s potential liability and litigation costs that he may find it economically prudent to settle and abandon a meritorious defense.” *Coopers & Lybrand v. Livesay* (1978). Such settlements often benefit the class action plaintiffs’ lawyers, but not members of the class.

We filed *amicus* briefs in several class certification cases before the Supreme Court.

***Dow Chemical Company v. Industrial Polymers, Inc., et al.*** (Urethane Antitrust Litigation) - U.S. Supreme Court, No. 14-1091 - petition stage - class certification - proof of actual injury.

***In this antitrust case, the Tenth Circuit held that the certification was appropriate because injury to the class could be inferred because the price fixing affected the negotiations of all parties. Dow Chemical sought review, arguing that where the plaintiffs had not all experienced the same damages class certification was not appropriate and violated its due process rights. Dow Chemical settled rather than waiting for the Supreme Court’s decision regarding the propriety of class certification.***

In *The Dow Chemical Co. v. Industrial Polymers, Inc.* the Tenth Circuit affirmed a treble-damages judgment exceeding \$1 billion in a nationwide class action on behalf of approximately 2400 industrial purchasers of polyurethane products. The Tenth Circuit recognized that, because of the nature of the polyurethane market, industrial purchasers could play manufacturers off against each other and that even during the alleged conspiracy period buyers “sometimes avoided price hikes by negotiating with the supplier” and “successfully avoided damages.” That should have resulted in denial of class certification in this case. Nevertheless, the Tenth Circuit affirmed class certification and the damages judgment on the ground that class-wide “impact” could be resolved on the basis of either an “inference” that “price-fixing” always causes harm or, alternatively, that a conspiracy to raise the “baseline prices” from which negotiations begin always causes harm.

The central flaw in the Tenth Circuit’s analysis was the court’s use of “inferences” or presumptions of class-wide injury to justify certification of a class. We argued that *Wal-Mart Stores, Inc. v. Dukes* (2011) requires that class plaintiffs demonstrate that class-wide injury can be resolved through common evidence in “one stroke.” This should have precluded class certification in this case, because there was ample evidence that the alleged price-fixing conspiracy did not injure all class members.

Dow Chemical settled the case after it was briefed but before it was argued in the Supreme Court.

***Mullins v. Direct Digital*** - U.S. Supreme Court, No. 15-549 - petition stage - class actions - ascertainability.

***The Seventh Circuit affirmed class certification where the representative plaintiff did not suggest any means of ascertaining class membership. ALF argued that the unverifiable nature of class membership violated the defendant’s due process rights.***

The Foundation filed an *amicus* brief in support of Direct Digital’s petition for certiorari in *Direct Digital, LLC v. Mullins*, a consumer class action certification case. Direct Digital is an online marketer of dietary supplements. The Seventh Circuit affirmed a class certification over Direct Digital’s objection.

The law requires that a plaintiff demonstrate that a class be “ascertainable” before the class is certified. Many courts have required showing not only that the class is defined by objective criteria, but also that there is a reliable and administratively feasible way to identify all those who fall within the class. This is particularly important in consumer



class actions, where purported class members will not have any record that they actually purchased the product, and inaccurate or false claims are frequently filed and paid.

Direct Digital contested the certification in this case because the plaintiff failed to make any showing of a reliable and administratively feasible means for ascertaining class membership. Requiring proof of a feasible plan for identifying plaintiffs is not a universal practice and is an issue that has divided courts and commentators over the past few years. Such a requirement would substantially protect the rights of those who are targeted by class action suits.

In *DirectDigital*, the Seventh Circuit rejected any requirement that a plaintiff show that a class can be feasibly and reliably identified. In essence, the ruling means that in consumer class actions, class membership can be established through nothing more than unsupported, self-identifying affidavits and the representative plaintiff need not demonstrate that there is a reliable way of verifying class membership. In all likelihood, this means that the validity of class membership will never be tested, since the pressure to settle huge consumer class actions becomes almost insurmountable once a class is certified.

We argued that this approach does not comport with defendants' due process rights and that it conflicts with the Supreme Court's recent teachings on class certification.

**Tyson Foods v. Bouaphakeo** - U.S. Supreme Court, No. 14-1146 - merits - class action - proof of actual injury.

***Plaintiff workers were allowed to sue as a class for wages earned for the time spent putting on and taking off protective gear before and after work. However, the plaintiffs were using an average to prove the time lost in earnings, even though there are different types of gear for the over 400 different jobs. Our brief opposed class certification because the facts proving loss in income were not common to all the plaintiffs, and there were very large disparities in "donning and doffing" time among members of the class.***

Plaintiffs claimed that current and former workers at the Tyson processing factory in Iowa are owed wages for the time it takes to put on and take off their protective gear. Based on the average dressing time of a sample of workers, the lawyers determined how much in overtime wages all of the class members are owed for "donning" and "doffing" work clothing and gear. Plaintiffs ignore 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. 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.

We argued that basing claims on a sample of employees and applying that average to a dissimilar group of over 3,300 individuals is flawed. We also showed how the use of cross-job-function-averages disguised very significant differences within job classifications and between job classifications. In *Wal-Mart v. Dukes*, the court decertified a class based on a sample of liability, 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 their wide variation.

The Supreme Court affirmed the Court of Appeals, holding that statistical sampling can be used to establish class-wide injury.

## **Extraterritorial Application of U.S. Law**

***This case raised an important issue of the exercise of U.S. enforcement authority under the Clean Air Act to cover foreign conduct that does not have any impact within the United States. The Foundation argued in favor of territorial jurisdictional limitations. The Supreme Court denied review.***

**Volvo Powertrain v. U.S.** - U.S. Supreme Court, No. 14-915 - petition for certiorari - extraterritorial application of consent decree.

The D.C. Circuit upheld EPA's enforcement decision to seek \$62 million in penalties for 7,262 nonroad diesel engines that were manufactured and sold outside the United States by a foreign affiliate of Powertrain (Penta) for noncompliance with special emission standards imposed by a consent decree between EPA and Powertrain under the Clean Air Act (CAA). The consent decree did not provide for extraterritorial



application. In an earlier case, EPA had affirmatively disavowed authority under the CAA over foreign-manufactured engines not imported into the United States.

The consent decree arose from litigation in which EPA alleged that seven U.S. engine manufacturers used special devices to minimize emissions of heavy duty diesel engines while maximizing fuel efficiency, but increasing emissions during regular highway operation. The manufacturers disputed the allegations, but agreed to settle, and entered into individual consent decrees that required manufacturers to meet more stringent emission requirements two years earlier than would otherwise be required.

The consent decree included a “non-circumvention provision” which stated that the decree requirements applied to all diesel nonroad engines manufactured at any facility owned or operated by the manufacturer for which a certificate of conformity is sought, even if the facility had been sold to a third party. Powertrain did not sell any of its factories. However, Penta (which was not a signatory to the consent decree) used one of Powertrain’s factories in Sweden to manufacture nonroad engines, primarily for use in foreign markets. EPA issued “certificates of conformity” to Penta for these engines even though they did not meet the emissions standards in the consent decree.

EPA subsequently concluded that, under the non-circumvention provision, it could enforce those provisions with respect to the Penta engines, regardless of whether they were imported into the United States – even though Penta was not a signatory to the above decree because the engines had been manufactured in a factory owned by Powertrain. The EPA demanded tens of millions of dollars in stipulated penalties from Powertrain for “noncompliant” foreign emissions from the Penta engines. Powertrain challenged the imposition of penalties in federal court.

The district court treated the issue as one of contract construction and rejected Powertrain’s argument that the consent decree did not apply to foreign engines. The district court did not find that EPA had authority to enforce the Clean Air Act extraterritorially, but it reasoned that the consent decree did not condition compliance with its provisions on the importation of foreign engines and that the decree could require more than did the statute under which the suit was brought.

The D.C. Circuit affirmed. Like the district court, the D.C. Circuit did not find that the Clean Air Act authorized EPA to regulate foreign emissions from nonroad engines, but that there was no issue of “extraterritoriality” because Penta had asked EPA to issue certificates of conformity for the nonroad engines, which permitted Penta to import those engines into the United States, the Circuit Court did not believe it important that in an earlier case EPA had argued that its authority to impose emission standards under the CAA required that the engines *in fact* be imported into the United States, or that the purpose of the CAA is “to protect and enhance the quality of the Nation’s air quality resources so as to protect the public health and welfare.”

The D.C. Circuit, like the district court, treated EPA’s enforcement decision solely as an issue of contractual interpretation, and held that the consent decree can be enforced against Powertrain’s activities regarding engines that are either manufactured in its facilities in the United States or elsewhere if EPA certification is sought.

In its *amicus* brief, the Foundation supported Volvo’s request for Supreme Court review because the case presented an issue of great importance to multinational and foreign corporations with business operations in the United States and abroad. Extraterritorial application of U.S. law not only offends basic precepts of our own law, it also violates international law. Territorial jurisdiction is one of the basic building blocks of international law. It serves to avoid confrontations between nations, which are generated by conflicting and overlapping claims to jurisdiction. International law regards as illegitimate the assertion of jurisdiction over disputes that have no relation to the nation in which those disputes are adjudicated. The history and purpose of the CAA confirm that it is solely intended to regulate emissions within the United States. The enforcement action at issue in this case opens the door to a wrongful expansion of EPA regulatory powers, unauthorized by law, that will only result in needless diplomatic friction.

## **Federal Preemption and Enforcement of Contractual Arbitration Agreements**

Agreements to arbitrate disputes are an important alternative to time-consuming and resource-intensive litigation. Arbitration clauses are common in many types of agreements and part of the fabric of commerce – ranging from consumer contracts, to employment agreements, to stock brokerage account agreements. Without them, companies would spend far more than they already do on dispute resolution, and the court system would be bogged down with myriad cases. Congress recognized the benefits to commerce of expeditious and comparatively inexpensive



alternative dispute resolution in enacting the Federal Arbitration Act. But numerous state courts, seeing arbitration as benefitting business and harming employees and consumers, have sought to circumvent the plain language of the federal arbitration law.

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

***Can a state law require franchise contracts to include a clause negating an arbitration provision? Atlantic Legal argued that the Federal Arbitration Act preempted Maryland's law, but the Fourth Circuit disagreed and the Supreme Court declined review.***

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 requiring arbitration of all claims arising under Maryland's State Franchise Law, even though the Maryland Clause was imposed by Maryland regulators as a condition to approval of the franchiser's Franchise Disclosure Document, Franchise Agreement, and thus the franchiser's ability to do business in Maryland. The Fourth Circuit held that even though Maryland franchise regulators impermissibly required

inclusion of the "Maryland Clause" that negated arbitration of Franchise Law claims, 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 and prerequisite for doing business in the state, is not "voluntary" and is preempted by the Federal Arbitration Act, whose clear legislative purpose was to promote arbitration as a speedy and efficient means of resolving commercial disputes. We argued that the Fourth Circuit's decision creates an expansive exception to preemption that not only affects arbitration clauses, but empowers state regulators to undermine and circumvent other federal laws that preempt state law requirements and permits states to use a "back door" to impose otherwise preempted conditions in contracts.

***DirecTV, Inc. v. Imburgia*** - U.S. Supreme Court, No. 14-462 - merits - preemption - state court refusal to enforce arbitration agreement for public policy reasons.

***A standard form television service contract required arbitration of disputes between the service provider and the customer unless the "law of [the customer's] state" made the arbitration clause unenforceable. California state law at the time the contract was signed disfavored arbitration. A California state court in this case held that the reference to state law allowed the court to hold the arbitration clause unenforceable, because California state law at the time the contract was made disfavored arbitration clauses in consumer contracts. The Foundation argued that a subsequent U.S. Supreme Court held that California law was preempted by the Federal Arbitration Act, that the California court ignored federal preemption, and that the state law the California court relied on was null and void. The U.S. Supreme Court agreed, overturned the California decision, and reiterated its strong support for enforcement of arbitration agreements.***

A provider of paid television programming and a customer entered into a standard form contract that required arbitration of disputes, unless the "law of [the customer's] state" makes the arbitration clause unenforceable. California state law prior to U.S. Supreme Court's decision in *AT&T Mobility v. Concepcion* (2011) disfavored arbitration. The California court held that the reference in the contract to "law of your state" allowed the court to hold the arbitration clause unenforceable, because California state law would have so held.

The Foundation filed an *amicus* brief urging the Supreme Court to reaffirm the primacy of federal arbitration law over inconsistent state laws that seek to limit the availability of efficient private arbitration. We argued that the California appeals court erred in refusing to honor the parties' agreement to arbitrate their dispute. The state court transformed an agreement that forbids class arbitration into an agreement that requires class arbitration in order to be enforceable. The decision can only be described as a brazen attempt to defy *Concepcion* by resurrecting state case law that was explicitly held to be preempted in *Concepcion*. The decision of the California court not only creates a clear conflict between state and federal courts on a matter of federal law, but also exhibits the hostility to arbitration that



led to the enactment of the FAA in the first place as the Supreme Court has held in numerous cases. We argued that the California court's construction of the phrase "the law of your state" to mean "the (nonfederal) law of your state," without considering the preemptive effect of federal law, fundamentally misconstrued the scope of federal preemption. Under the U.S. Constitution, "state law" must incorporate the preemptive effect of federal law, and preempted state law is a legal nullity.

The Supreme Court agreed with us, reversed the California Court of Appeal, and held that a court interpreting a contractual arbitration provision in a way that negates the arbitration clause is preempted by the Federal Arbitration Act (FAA), and concluded that the state court's convoluted contract interpretation did not place arbitration agreements "on equal footing with other contracts." California courts have been especially recalcitrant in recognizing the preemptive effect of the Federal Arbitration Act, but perhaps they will finally abandon their hostility to arbitration. The Supreme Court decision reinforces the requirement that lower courts enforce arbitration agreements according to their terms. Hopefully as a result of this decision arbitration will continue to be an attractive and effective alternative to protracted and costly litigation.

**MHN Government Services v. Zabarowski** - U.S. Supreme Court, No. 14-1458 - merits - arbitration - employment contracts - application of different standards to arbitration agreements.

***Atlantic Legal Foundation filed an amicus brief in the U.S. Supreme Court on the merits in an appeal from a Ninth Circuit affirmance of a district court decision refusing to enforce an arbitration agreement because it found that several provisions are "against public policy" and refused to sever the offending clauses. The case was settled before it was argued.***

Atlantic Legal Foundation (joined by the International Association of Defense Counsel) filed an *amicus* brief in the U.S. Supreme Court on the merits in an appeal from a Ninth Circuit affirmance of a district court decision refusing to enforce an arbitration agreement because it found that several provisions are "against public policy" and refused to sever the "offending" clauses.

The Federal Arbitration Act (FAA) provides that an arbitration agreement shall be enforced "save upon such grounds as exist at law or in equity for the revocation of any contract." California law applies one rule of contract severability to contracts in general, and a different rule of contract severability to agreements to arbitrate. The arbitration-only rule disfavors arbitration and applies even when the agreement

contains an express severability clause. The question presented was whether California's arbitration-only severability rule is preempted by the FAA.

MHN operates a healthcare-consulting business and employs highly educated (masters' degree or higher) professional healthcare workers and counselors. These professionals signed an employment contract containing a clause requiring arbitration, rather than litigation, of all disputes arising out of the employment relationship. The agreement also contained clauses ancillary to the underlying basic promise to arbitrate. The employment contract contained an express severability clause which provided that if any provision of the agreement is invalid or unenforceable the remaining provisions of the agreement remain in effect.

MHN's healthcare workers sued the company in federal court, claiming denial of certain overtime benefits. The district court denied MHN's motion to compel arbitration pursuant to the agreement, finding that several provisions of the arbitration agreement, but not the basic underlying agreement to arbitrate rather than litigate, were unconscionable. Under California state law, if a court finds multiple provisions in an arbitration agreement to be "unconscionable," it can refuse to enforce the agreement in its entirety. Applying this principle, the district court declined to sever the offensive provisions and instead invalidated the entire agreement and refused to hold the employees to their agreement to arbitrate. A divided three-judge panel of the Ninth Circuit affirmed.

In the general contractual context, a court applying California law can deny severance only if it finds, after a provision-by-provision analysis, that the unconscionable provisions permeate the entirety of the contract. The different severance rule applied by the district court to the arbitration agreement – that a court can withhold severance simply upon finding that multiple unconscionable provisions exist, whether or not the offensive provisions "permeate" and



“infect” the entirety of the contract – treats arbitration agreements less favorably than other types of contracts.

Atlantic Legal argued that the California severance rule is preempted by the Federal Arbitration Act and the Supreme Court’s landmark decision in *AT&T Mobility, LLC v. Concepcion*, in which the Court held that the FAA preempts state-law rules that treat arbitration agreements less favorably than other contracts. We also argued that California courts routinely display the very hostility to arbitration that the FAA was designed to end. This case demonstrates that California law, whether construed by state courts or by federal courts sitting in California, is frequently in conflict with the language and purpose of the FAA and the Supreme Court’s FAA jurisprudence. We cited several recent California cases that acknowledge that the case on which the Ninth Circuit relied heavily has been “abrogated in relevant part” by *Concepcion*, but the Ninth Circuit panel in this case did not seem to recognize that the California case it cited is no longer good law.

The case was settled before it could be argued.

***Sikkelee v. Precision Airmotive Corporation*** - U.S. Court of Appeals for the Third Circuit, No. 14-4193 - Products Liability - Federal Preemption - Aviation

***Federal preemption. Plaintiff filed suit for alleged defects in an airplane engine, leading to an airplane crash. The Federal Aviation Administration had approved the engine use in small aircraft. The issue was whether FAA “type engine” approval preempted 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.***

Textron Inc.’s subsidiary, AVCO Corporation (AVCO), and AVCO’s Lycoming Engines division have been manufacturing engines for general aviation aircraft for decades. Lycoming sold an aircraft engine in 1969. Nearly thirty years later, the engine was installed “factory new” on a Cessna aircraft, even though this engine-airframe combination is not certified or approved by the Federal Aviation Administration (FAA). An employee of a field office of the FAA issued a one-off approval to allow this engine to be installed in this airplane.

AVCO and others were sued in federal court by the widow of a newly licensed pilot, who died when his plane crashed. Sikkelee 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 FAA’s certification and approval of engine design.

The district court granted summary judgment in part, holding that the FAA type certification of the model engine entitles AVCO to summary judgment on the design related regulatory grounds asserted by Sikkelee. The district court also denied summary judgment in part. Sikkelee and AVCO each petitioned the United States Court of Appeals for the Third Circuit for leave to appeal.

The appeal raised important issues of federal law under the doctrine of “implied field preemption.” 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 and that the case applies only to commercial airline operation and not aircraft manufacturing. Sikkelee also attacked the aircraft certification process, arguing that the FAA relies on manufacturer-provided information and that aircraft certification is not pervasively regulated.

AVCO argued that the pervasive regulation of the entire field of aviation safety, which has been settled law in the Third Circuit for fifteen years, mandates dismissal of plaintiffs’ claims and that juries should not be allowed to second guess regulatory decisions made by the FAA in its design and certification approvals. AVCO also argued that Sikkelee did not prove any applicable federal standards of care were breached or that any breaches, if they occurred, were causally related to the accident.

The Foundation’s *amicus* brief, filed on behalf of itself and the New England Legal Foundation, 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 FAA’s determination that the engine complied with the applicable federal standards of care would thwart Congress’s intent to vest the FAA with complete and exclusive authority over aviation safety in order to create a uniform regulatory scheme in which the FAA’s regulations are pervasive, and cover virtually all facets of air safety, including the design and manufacture of aircraft engines. Therefore the district court correctly held, consistent with *Abdullah* and with Congress’s intent in enacting the Federal Aviation Act, a plaintiff must plead violations of federal, rather than state, standards of care.

### **Justiciability – “Political Question” Doctrine**

***Cooper v. Tokyo Electric Power Company*** - Ninth Circuit, No. 15-80110 – “Political Question Doctrine” as applied to naval operations.

***U.S. Naval personnel claimed injury from radiation to which they were exposed during an emergency assistance operation in Japan after a tsunami caused a nuclear disaster at a power plant owned by TEPCO. The Foundation filed a brief on behalf of five senior retired admirals questioning the justiciability of the case because it would require the court to examine the military decisions that put the service members at risk in the first place.***

The Foundation filed an *amicus* brief on behalf of five retired flag-rank U.S. Navy officers in *Cooper v. Tokyo Electric Power Company*, brought in the U.S. District Court for the Southern District of California. Our *amicus* clients are all 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.

This case is a putative class action, in which more than 230 service members (seeking to represent a class of 70,000 individuals) claim that they were injured by radiation from the Fukushima Nuclear Power Plant (“FNPP”) during “Operation Tomodachi,” the U.S. military’s emergency effort to provide assistance to Japan after the massive March 11, 2011 earthquake and tsunami that killed more than 15,000 people. The Fukushima nuclear power plant is 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-caused disease.

TEPCO moved to dismiss the complaint on numerous grounds. That motion was granted in part and denied in part. TEPCO was granted permission by the district court to take 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 tortiously created 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. service members injured during an overseas humanitarian mission.

The Foundation’s *amicus* brief focuses principally on the operational aspects of the U.S. Navy’s participation in rescue activities and how judicial intervention would violate the “political question” doctrine and would be inimical to U.S. military and diplomatic objectives. United States courts will not hear cases that involve so-called “political questions,” because such questions are deemed not justiciable.

In this case, if the U.S. Navy had been aware of the risks posed by the Fukushima reactor and, nevertheless, decided to position the aircraft carrier, U.S.S. Ronald Reagan, off the coast of Japan near Fukushima, then, under U.S. law, the Navy’s action may be viewed as a “superseding intervening cause” of plaintiffs’ alleged injuries, and the causation chain would be broken, thus eliminating any potential liability for other entities, including TEPCO. To make this finding, the court would have to inquire into the Navy’s decision-making process, including what it knew and



when it knew it. Adjudication of Plaintiffs' claims would require inquiry into the reasonableness of the military's and Executive branch's policy choices in the spheres of military affairs and foreign relations.

Decisions as to how, when, why and where to deploy military personnel are within the sound discretion of the military and the President as Commander-in-Chief, and should not be second-guessed by courts or juries. A 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 search-and-rescue and recovery operations under bilateral and multilateral treaties and could undermine decisions by the President, cabinet officers, and the military chain of command.

The retired flag officer *amici* spoke to this issue with decades of pertinent experience and offered practical reasons why it would be unwise for a court to interject itself into such matters. The *amici* brought to the court's attention facts, all found in the extensive official public record of the operation, that are inconsistent with the allegations in the complaint.

## Admissibility of Expert Evidence

Atlantic Legal continues its vigorous and effective advocacy on behalf of the application of clear and sound rules for the admissibility of medical and other expert testimony in toxic tort, product liability, and other litigation.

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

***The California Court of Appeals' decision held that the “single fiber theory” to prove causation in an asbestos case was admissible under California expert testimony law, and that such determination can properly be submitted for evaluation by 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.***

California's Court of Appeal held in *Davis v. Honeywell International, Inc.* that the controversial “every exposure counts” theory is admissible under governing California expert witness law to prove causation in an asbestos case.

Although trial courts are supposed to play a “gatekeeper” role to keep out unreliable expert evidence (*Sargon Enterprises, Inc. v. University of Southern California* (2012)), 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 asbestos lung disease causation. Courts from around the country (notably Pennsylvania in *Betz*, Texas in *Bostic*, the 6th Circuit in *Garlock Sealing* and New York in *Juni v. A. O. Smith Inc.*, have rejected efforts by plaintiffs' experts to testify that every asbestos exposure is a “substantial factor” (*Rutherford v. Owens-Illinois* (1997)) 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' disease. The motion was denied, and plaintiff's pathologist and pulmonologist were permitted to testify and advance 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 *Rutherford*, 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. The *Davis* court distinguished the many cases from other jurisdictions rejecting this argument: "[W]e simply disagree" that the "every exposure" theory could not be "reconciled with the fact that mesothelioma and other asbestos-related diseases are dose-dependent."

We argued that the "each and every fiber" theory of asbestos-related pulmonary disease does not meet the "substantial" causation criterion and that the trial court did not properly exercise its "gate-keeping" role.

## Charter School Advocacy

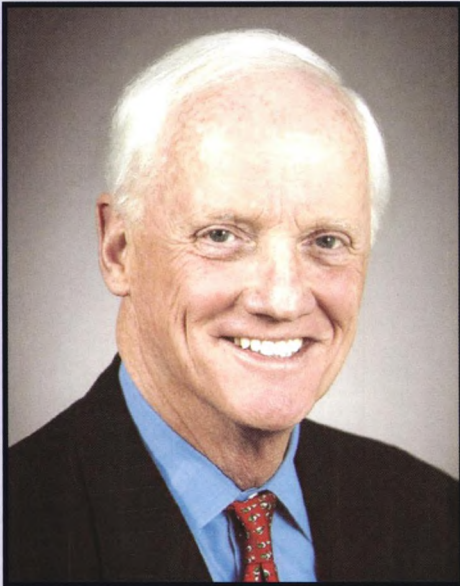


Atlantic Legal's work advocating for educational choice is focused on supporting charter schools. A major part of this effort has been the publication of a series of state-specific law guides "Leveling the Playing Field," written by nationally known labor law attorneys, to educate charter school leaders 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. This series has proven to be quite popular, and in 2015 the Foundation received a request from the California Charter Schools Association – the largest in the nation – to feature our monograph at the Association's Annual Meeting in March 2016.

The Foundation also provides legal counsel to and represents charter schools and charter school advocates in court at no cost. In 2015 we began to examine the feasibility of taking over as lead counsel in a high-profile lawsuit by parents of children in the New York City public schools. The parents allege that the New York State and City public school policies and contracts with the teachers' unions that incorporate rigid seniority and tenure provisions result in less qualified or unqualified teachers being assigned to predominantly minority or low income elementary schools, and harm the students and deprive them of the "adequate" education guaranteed by the N.Y. State Constitution. The collective bargaining agreement between the New York City Board of Education and the teachers' unions force school administrators to base layoffs on seniority alone, with no consideration of a teacher's performance in the classroom. The teachers' union contracts and state law also create a process for dismissing ineffective teachers that involves numerous steps, costs hundreds of thousands of dollars, takes years to complete, and rarely results in termination of ineffective or dangerous teachers.



# 2015 Annual Award Presented to The Honorable Frank Keating



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-eighth presentation we were pleased to honor Frank Keating, with Atlantic Legal's Annual Award for 2015.

Former Governor of Oklahoma Frank Keating retired on December 31, 2015 as president and CEO of the American Bankers Association, a 135 year old association that represents banks of all sizes and is the voice for the nation's \$14 trillion banking industry and its two million employees. Keating became ABA's president and CEO on January 1, 2011, following seven years of service as the president and CEO of the American Council of Life Insurers, and after serving two terms as Oklahoma's 25th governor.

Born in St. Louis, Missouri, Frank grew up in Tulsa, Oklahoma. He received his undergraduate degree from Georgetown University and his law degree from the University of Oklahoma. Frank's 30-year career in law enforcement and public service included service as an FBI agent investigating terrorism incidents and other duties, U.S. Attorney appointed by President Reagan,

state prosecutor, and Oklahoma House and Senate member and minority leader.

He served Presidents Ronald Reagan and George H. W. Bush in the Treasury, Justice, and Housing Departments. His Justice Department and Treasury Department service gave him responsibility for all federal criminal prosecutions in the nation and oversight of agencies such as the Secret Service, U.S. Customs, the Bureau of Alcohol, Tobacco and Firearms, U.S. Marshals, the Bureau of Prisons, the Immigration and Naturalization Service, and all 94 United States Attorneys and the U.S. role in Interpol. As Assistant Secretary of Treasury, and General Counsel and Acting Deputy Secretary of HUD, Keating worked on financial sector issues that are demanding attention today — including housing finance, lending practices, securitization and Bank Secrecy Act issues. He was the highest ranking Oklahoman during the Reagan and Bush administrations.

In 1993 Keating returned to Oklahoma to run for Governor. He won a three-way race by a landslide and was easily re-elected in 1998, becoming only the second governor, and the only Republican, in Oklahoma history to serve two consecutive terms.

As the Governor of Oklahoma, Keating won national acclaim in 1995 for his compassionate and professional handling of the bombing of the Alfred P. Murrah Federal building in Oklahoma City. In the aftermath of the tragedy, Governor Keating and his proactive wife Cathy raised more than six million dollars to fund scholarships for the nearly 200 children left with only one or no parents. His accomplishments as Governor include winning a public vote on right-to-work, welfare and tort reform, the largest tax cuts in Oklahoma history, environmental protection, public-private partnerships and major road building without increasing taxes, and education reform including impetus for charter schools — one of the pillars of the Atlantic Legal Foundation's mission. His work on welfare reform was a first in the nation and served as a model for bipartisan welfare reform during the Clinton administration.

Keating recently served on the Bipartisan Policy Center's Debt Reduction Task Force, a group of former cabinet members, elected officials and key stakeholders of both parties that recommended a series of tough measures to address the nation's fiscal challenges. Currently, he is Chairman of the broadly respected Bipartisan Policy Center. He also served on the BPC's Housing Commission. He has been Chairman of the Advisory Board of Mount Vernon and President of the Federal City Council, and has served on the boards of the National Archives and the Jamestown Foundation.

From June 2002 to June 2003, Keating (a practicing Roman Catholic) served as Chairman of the U.S. Conference of Catholic Bishops National Review Board examining sex abuse by Catholic priests...the subject of the popular



movie "SPOTLIGHT" in theaters this year. Upon resigning from the Review Board days after Los Angeles Cardinal Roger Mahony criticized Keating for comparing some church leaders to the Mafia, Keating commented: "My remarks, which some Bishops found offensive, were deadly accurate. I make no apology...To resist Grand Jury subpoenas, to suppress the names of offending clerics, to deny, to obfuscate, to explain away; that is the model of a criminal organization, not my church."

Keating also is the author of four award-winning children's books – biographies of Will Rogers, Theodore Roosevelt, George Washington, and Standing Bear, the Ponca Indian chief who argued Native Americans deserve the same rights as white Americans. His latest book on Abraham Lincoln is about to go to press. He is the recipient of six honorary degrees.

Frank and his wife Cathy maintain a home in northern Virginia when they are not resident at their ranch in Oklahoma. They have three children and ten grandchildren.

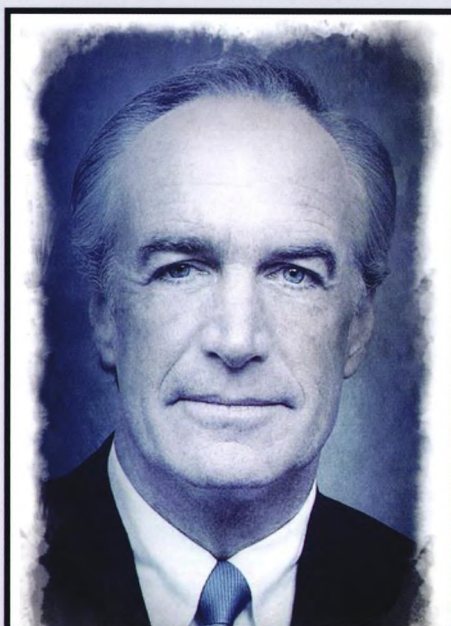
Following glowing tributes to Governor Keating by Dan Blanton, Chairman of the American Banker's Association, and by Gary Hughes, General Counsel of the American Council of Life Insurers on behalf of traveling Dinner Co-Chairs – Rob Nichols, President & CEO of the American Banker's Association and Dirk Kempthorne former Governor of Idaho, US Secretary of the Interior and the current President & CEO of the American Council of Life Insurers – see below, former US Attorney General Ed Meese introduced Governor Keating. His engaging introduction is reproduced preceding Governor Keating's memorable remarks.

## Dinner Co-Chairs



**Mr. Rob Nichols**

- President and CEO, American Bankers Association
- President, Financial Services Forum
- Deputy Assistant Treasury Secretary for Public Affairs under President George W. Bush

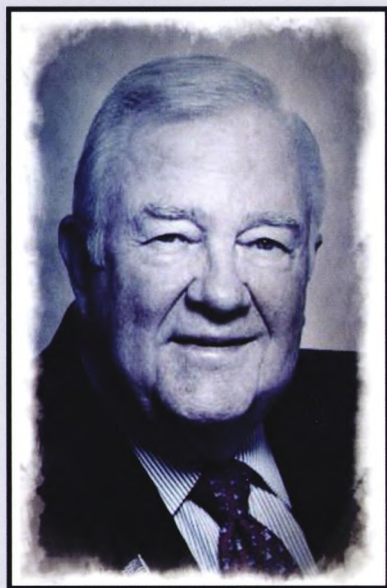


**The Hon. Dirk Kempthorne**

- United States Secretary of the Interior under President George W. Bush
- Governor of The State of Idaho
- Senator of The State of Idaho



## Introduction by The Honorable Ed Meese III



Ed Meese:

Good evening, ladies and gentlemen.

It is a real privilege for me to be here tonight for two reasons, really.

First, my great appreciation for the Atlantic Legal Foundation. One of the things that I have been doing for the last twenty five years for the Foundation is convening the freedom based public interest law groups from around the country. There are about forty of them and one of the stars among those groups is the Atlantic Legal Foundation. So, to be here under their auspices tonight is a great pleasure. They have done a great job. Bill Slattery, Marty Kaufman, Dan Fisk and the whole team, they are doing a terrific job. So, it is great to have them as they champion the kind of things that bring most of us here tonight, ideas like: individual liberty, limited government, free enterprise, constitutional fidelity and the rule of law.

And, I am really pleased to be here and to be able to introduce Frank Keating. He is a good friend from way back, one of my most trusted colleagues from the Justice Department and, even before that, a trusted colleague from the Treasury Department. And when he was in that job, you know, Frank had quite a record. He is one of the few people whom I know, who had a top job in three different parts of the Federal Government and was not indicted!

Seriously, when I think of Frank Keating, three words come to mind: leadership, service and generosity. In terms of leadership, as I mentioned, he has done much for his community, he has done much for his State and he has done much for his country. In State government, for example, there are very few people that have been a leader in both houses of the legislature and then went on to become Governor of the State and it's almost impossible, I believe, for a Republican, other than Frank, to have two consecutive terms as Governor of Oklahoma.

So, as I pointed out earlier tonight, he does favor Oklahoma a little bit but he has a good reason to do that. In our nation, of course, as I mentioned earlier, he was a top official in three Departments and in business he has led two related organizations that together mean so much they are really critical to the economy, that is of course the American Bankers Association and the American Council of Life Insurers. I have to say, by the way, that I have a personal debt to the ABA. By the way, when I heard that being talked tonight I said: "What is the American Bar Association doing here?" But I learned at a very early stage that ABA really means the American Bankers Association and is the only thing that got me through Contracts in Law School. Maybe you don't know it but at that time, I don't know if they still do, they published a little booklet "Contracts in One Easy Lesson" and they did it for people in the banking industry. Well, all the U.S. Attorney law books that explained contracts to you were in such complicated tomes that a poor law student could hardly understand. But somebody put me on to this ABA thing, I read that and, believe me, it explained everything in honest English and, as a result, I passed Contracts in Law School. So I am grateful to the ABA. Well, when you talk about a service I think of Frank and all that he has done in terms of that.

It is literally a thirty years career in law enforcement and public service beginning as an FBI agent, as a State Prosecutor, as a U.S. Attorney, all of that from his early start in Oklahoma and then, of course, in the Federal Government, most people don't realize the jobs that he had. But he had the top law enforcement job in Treasury and then, fortunately for us, when Treasury moved over to our Justice Department he had the top law enforcement job there.

So, he really was one of the few people in history who has had oversight responsibility for the FBI, the Drug Enforcement Administration, the Bureau of Alcohol, Tobacco and Firearms, Customs, Secret Service, Bureau of Prisons, Marshall Service, Immigration and Naturalization, and ninety four U.S. Attorneys. That is really a great experience and Keating provided great leadership and service in those capacities.



And then there is generosity. You know, Frank has made a great contribution to his community and his church in a variety of educational and civic organizations, some of you that are here belong to those organizations and nobody has done more as an individual citizen.

One thing that he and Cathy did, as I have already pointed out with the other organizations, everything that Frank did either in the Federal Government that I knew about or the State government, Cathy was a full and complete partner, enthusiastic and inspiring, and a very important part of that great team. But when he and Cathy moved into the Governor's residence - there the governors don't call it a mansion because that's not exactly, that's kind of affluent sounding. Well this was not a mansion, believe me folks. It was a great building but there wasn't a stick of furniture in that building. Some previous Governor had apparently appropriated all the stuff that was in the building and so after they moved in the bed, they had a place to sleep... that was about it, I happen to know because I was their house guest and they did find an extra bed for me that I think they moved in for the night. But really, there was no furniture so what they did, they set up about having campaigns of Oklahoma citizens to donate to the Governor's residence and, as a result, totally outfitted it with furniture, with all the necessary furnishings and made it a beautiful Governor's residence and then left that, of course, as a permanent gift to the State of Oklahoma and that was just a measure of their generosity.

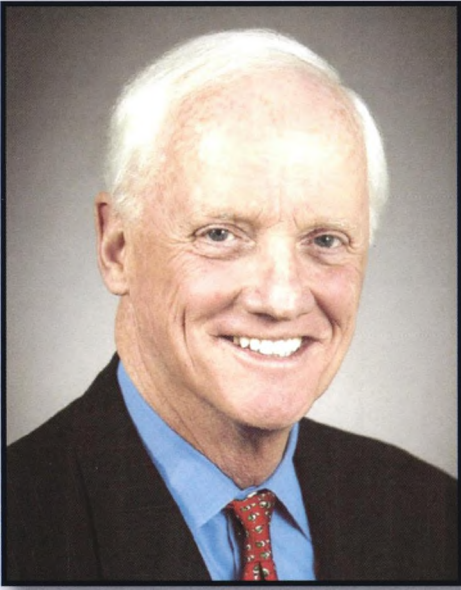
And, they have been champions, both of them, for education and excellence in school choice and in particular for low-income children which has been a very important part of their mission to try to help those who are less fortunate. And then, of course, I would suggest to you and I am sure many of you have seen this. But Frank's finest hour, in my opinion, occurred in 1995 when he showed his compassion and professionalism as he handled the unfortunate bombing of the Federal Building in Oklahoma City. One of the greatest terrorism tragedies really in the history of our country and Frank handled that situation so well by calming the people, taking command of the recovery people and the people who were responding to the emergencies there, and when it was over they didn't stop there. He and Cathy literally raised millions of dollars, some six millions dollars I believe, in order to fund scholarships for those children who had lost their parents in that terrible bombing. That was just a typical example of the kind of generosity Frank and Cathy have shown all through their life together.

So, that's why tonight it's so great to have this opportunity to thank Frank as you already heard from some of his colleagues but also to again recognize the great things he has done for the United States.

You know as we reflect, you probably say to yourself: "That's quite a record." But the one thing I think about Frank that really endears him to me is that beyond all these qualifications, above all of these accomplishments, when you get right down to it he is an all-around good guy. And so, for a man who is a loyal friend, a devoted husband, a dedicated father, a distinguished citizen and a true patriot, join me in honoring Frank Keating.



# Remarks of The Honorable Frank Keating



Frank Keating:

You know years ago I heard about a presidential candidate in the presidential season, as we are now. His staff detested him. Everybody thought he was arrogant, supercilious, foolish, dumb, a complete disaster but he insisted that he was going to run for President and the only person in his staff that decided to stick around was his Public Affairs guy who said: "Well, okay, I will write your speech and then I am leaving. I won't even stay for the speech." And the Senator said: "Fine, that's fine." Notice ... he was not a Governor...

In the glittering of the lovely room in the Capitol where the Presidential candidates used to always announce their candidacies, the Senator stood in front of a very distinguished audience, such as everyone in this room, and with his prepared speech, he said:

"There are those who say that the problems of this country are unsolvable. I say they are wrong and I have a plan." And he turned the page.

"There are those who say that the problems of the inner cities are unsolvable. I say they are wrong and I have a plan." And he turned the page.

"There are those who say that the problems of foreign affairs are unsolvable. I say they are wrong and I have a plan and here is my plan." And he turned the page.

"You are on your own now you miserable son of a bitch."

So, you know, I learned.

Sitting here with three wonderful friends, obviously, Dan Blanton - I called Sir until very recently because he is the new Chairman of the American Bankers Association, a wonderful organization of 5000 unhappy federally regulated banks. And Gary Hughes, as general counsel of the American Council of Life Insurers, and I really loved the law and were very focused on what the ACLI and the law had to say about life insurance. We had 400 happy state regulated CEOs in the life insurance space. I think about Ed Meese, who is a dear friend. Ed and Ursula are here tonight. There isn't and wasn't a finer lawyer, a finer public official servant, a more humble, decent and honorable person, than Ed Meese. (Applause)

Well, Dan Fisk wanted me to briefly talk about "Lessons Learned in a Life of Challenges" and I said:

"Okay, I'll go through several things that I think are rather fun or interesting about my life but Dan Blanton and Gary Hughes told every story I was going to tell, and Ed mopped up. So... let's boogie."

But I just want to say this. To focus as you all do and are here tonight for that purpose. Not to honor me, there are tables of people here who deserve this honor, certainly as much if not more, easily more, than I.

But Cathy and I are so thrilled that you are friends and that so many of you, virtually all of you, are people we have known a long time and the fact that you would come and participate tonight obviously to have an opportunity to converse with each other and obviously have an opportunity to converse with us. That's wonderful, that's the human condition at its best, but to come and honor the Atlantic Legal Foundation, a group of lawyers, a group of scholars, people who get together for the purpose of addressing the ills befalling the country, that can only be solved temporarily, or even permanently by the legal system; the Executive Branch simply does not want to. If you read the little brochure about what Atlantic Legal does, when you think about Class Action abuse, and think about disparate impact abuse,



the creation of a fiction that in a country where you are in trouble when you knowingly do something wrong, whether it is civil or criminal, the obligation of *mens rea* exists in our legal system as a general rule that if I don't do anything about it, how in the world, like a six year old, could I be held responsible for the actions that should be punished for somebody who knows what they are doing and are an adult. But that's disparate impact.

And to challenge those things and to put yourself in the position to have a lot of people criticize you because it's the right thing to do is so, so very important. And I want to say, my new best friends, the Holland & Knight firm are here tonight. Steve Sonberg came here from Miami, the managing partner of the firm that I am with, Dick Duvall and I have been friends forever but I think of people like these lawyers, ordinary people with extraordinary minds, extraordinary gifts... so many of you in this room, Jay Stephens on down who have devoted your lives to make life for fellow Americans better as a result of your commitment to the law. Because when I look back about lessons learned in my own life when I started off after I moved back to Oklahoma as a very young guy, as a member of the State House and the State Senate, I was one of the very few members of the Republican Caucus, that's not the way it is today. But literally in the State House we had very few Republicans in the State Senate when I went there and was the leader of the State Senate, the high watermark for both of them where maybe a fifth of the members were Republicans, the other four fifths were Democrats. Well I thought I had it hard. The Republican Leader of the Arkansas State Senate came to visit me and when I was complaining about the fact that there weren't too many Republicans and I was getting beaten up all the time by the friends of the Party of Jefferson, he said: "You think it's bad, I am the Republican Leader in the State Senate of Arkansas and we are the Republicans in Arkansas, me. There is one of us." So evidently it's quite an honor to be a Republican Leader. But something I learned from Ed Meese ... Lessons Learned in a Life of Challenges. Most of us in this room who were born in the United States, we really haven't had many challenges. Being born in the United States, you got the ball, you are on your opponent's 40 yard line and you are moving. That's being born in the United States.

Being born, as I did, was to two intact parents, mother and dad, lifetime married people, both with college degrees, man, I moved up down to about the 30 yard line. And in the city and the state and a nation where you were born healthy, that's everything. So here you are as a young person, now what will I do with myself? And to be able to, after law school, to be in the FBI and take the education that I received from the Catholic School System and I came from a largely non-Catholic family, that the Catholic School System, it said yes these are p's and these are q's and this is abc and this is  $2 + 2 = 4$  but morality, ethics, integrity, standing for right in effect being for justice, being just. This is what life is all about. This is your obligation as a young citizen-to-be in the world. And I remember, as a young FBI agent, I never saw anyone abused; we would not tolerate that. I never heard of suborning perjury, I never saw fabricated evidence, I never saw cases put together to go after an individual because that person was in the cross hairs of the government. I remember I was investigating a corruption case and I was interviewing then the Mayor of San Francisco where I was an agent at the time, one of the offices I was in, and as I went through the questions I had he said: "The only reason you are here is because your bosses want to get me." And I said: "Sir, all I know is there are allegations made, we inquire as to those allegations and send a report and that's it." But it would never dawn on me at that time as a young FBI agent that there would be anything inappropriate about anything we did.

When we think about today, the cynicism that exists, contrived evidence, fabricated cases, subordination of perjury, that just to me was beyond comprehension. Again, because of that education that I had from my parents and from the Catholic education system and those who trained me to always truth tell, always stand for what is right, always be courageous to advance the interests of the law. That's what America is all about. Later when I was a member of the House and Senate, as I said, there weren't too many Republicans, I learned patience, something that Ed Meese taught me. You know, we have a tendency to say: "This is important watch this political season," "Got to have this done," "By God I don't care what anybody thinks." But in my case I learned patience that because I had R after my name, I was a second class citizen. That didn't mean that I stood around and was frustrated and angry; it meant that I would sit down, get to know my Democrat colleagues and convince them of the rightness of what I was trying to push. We had a residue if you will of Jim Crowe in Oklahoma. The reality of the marketplace, that's the way it was. The flotsam of miscegenation laws. There was a statute that I found in the bowels of the statutes; that if a woman committed a crime it was assumed that if it was committed in the presence of her husband, that she was under his influence. I mean: "What?" But that was on the statute book and I would go to my Democrat friends and say: "Look at these. We need to repeal these, amend these, all of these. This is just, ridiculous."



One day I found a Statute that was basically the law of the land in the case of the involuntary commitment of alcoholics for treatment. You had to commit a crime to be involuntarily committed which meant you, as an alcoholic, would beat up your wife or your wife would beat you up and then someone would say: "Okay, now we are going to commit you to treatment." That was not uncommon around the United States." So I insisted we have a six-men trial or a six-lady trial but a six-people jury trial and let the jury decide and not have to have a crime committed first. It went no place. It was quadruple assigned which was a clue that as a Republican bill, it's not going any place. Finally it arrived on the floor of the State Senate and when I stood up to explain the bill a member of the State Senate's powerful Appropriation Committee, its Chairman and obviously a member of the Jefferson Party stood up and he said: " Senator Keating, I don't mean to hurt your feelings but this is too important a bill to be handled by a Republican." Well, I knew that...I had been there a few years. The point of this story is that I did not get mad, frustrated and angry and walk out. I said: "Thank you, Senator." He passed the bill, he got credit for it and I was joyous. Why? Because we solved the problem. That's the way it was.

Ed made reference to going to Washington and I had three mentor bosses: Jim Baker of Treasury, Ed Meese of Justice and Jack Kemp at HUD. I learned something from each one of them. But Ed Meese taught me persistence and humility, respect for the institution, respect for individuals within the institution. We would pull up to the Justice Department and there would be reporters there who just treated him awfully and instead of getting mad he would say: "Nice to see you," "Thanks so much", "I appreciate it," "Nice to see you." I wanted to punch somebody up, but not Ed. So at Treasury, Justice and HUD, the senior levels of the government, what's the right thing to do, what do we need to do, what is judicial, how to do justice, how to do the right thing under the law. I remember at Treasury for example, the President then, obviously Ronald Reagan, vetoed the embargo against South Africa. He felt an embargo simply didn't work, and he vetoed it. The veto was overridden. Immediately the next day, because embargos were part of my empire, we began to vigorously enforce the South African embargo. Guess what. Nobody from the White House ever called me, you know. Jim Baker never called me because we believed that the law led first. The public, all of us were equal; there is no class system in America. All of this exists for the purpose of advancing the law. That's the way it was. And later, when I became Governor of my State there were issues that I handled that always I tried to make sure in a bipartisan way included the majority Democrats and with them, think about this, in eight years we put right to work in the Constitution, finished the turnpikes, got rid of welfare, trimmed the sales of the trial bar, charter school choice, put the dome on the Capitol building with private money, finished the American last Capitol building through a Democratic House. It was overwhelming. It was, okay I don't control you, you don't control me, but let's sit down and try to satisfy the problems facing us to make this state a better place. And there were really tough issues. The hardest for those of us as lawyers in this room were capital cases. Because I had this huge group of capital punishment cases that were coming my way. Even today, George W. Bush, Rick Perry and I had more executions on our watch than any other governor in recent memory. But I did something very different that wasn't required but I felt was important for my own sake. Even though my discretion was limited in a capital case for instance, I would bring a Criminal Defense Attorney, sit him or her down in my office and say: "Look, did he do it? That's all I want to know. This is first Murder One. Did he do it?" Every time it was: "Yes but bad childhood, yes but cocaine, yes but alcohol." That's all I want to know. Did he do it? and it was never: "He didn't do it."

Well, I felt looking back over some of those agonizing decisions, even after the Oklahoma City bombing, some of the decisions that had to be made, if you have the best facts and you have grounding from your parents and your educational experience and your mentors of doing right, telling it like it is, always standing for integrity and justice and truth, you'll do fine, even if you do make mistakes and you will make mistakes. So for me as I look back at the lessons of my life, I think those things that I did right were as a result of my partnership with Cathy Keating who was always magnetic north on my compass. But also remembering and reflecting on the lessons of my childhood and the people I learned from...find mentors, what's the right thing to do, what's truth, what's justice, what are the facts and what's the law, you'll never make a mistake. If you do those things, you will advance the ball with integrity and decency.

The hardest thing I faced about the time I was leaving office, I was called by Bishop Wilton Gregory, an African American bishop, who at the time was the Chairman of the National Catholic Bishops. Gregory is a Southern Baptist convert to the Catholic church and they asked me to Chair the National Catholic Review Board to address the sex abuse scandal in the Catholic church. At the time the bishops had said we want zero tolerance, transparency and criminal referral. I felt that was fine. That was the issue that needed obviously to be on their plate to advance the interest of children and young people in the faith community. But I remember instantly I told Bishop Gregory: "Bishop,



If we do this right you'll never be a Cardinal and I'll never be a Knight of Malta." And how right I was. And to have a distinguished board including men and women of goodwill, very smart people, appointed not by me but like by Leon Panetta who was a member; Bob Bennett was a member. To sit down and go through these kinds of agonizing cases, but to be aggressive and not pull back when the right thing is x, the wrong thing is y. We were appointed to accomplish something and that is to do right even if we never get invited to another Catholic cocktail party. One of the examples was, after we began our work, one of the Order of Priests, Franciscans, Benedictines or the like, wanted to make a presentation to my Board, but before they did I wanted a victim's account and it was a gentleman from Kansas City. He and his wife came. They were mid 50's, maybe late 50's, and so the board and I said you can speak for 20 minutes and we will begin our work. And they told the story of their son who was abused by a priest. When they finished I could see some of my board members were getting a little uncomfortable and I said: "Well Mr. and Mrs. Jones, thank you for being here, we are very grateful for your being here, I think I speak for my Board to say I hope with all of my heart that your son is fully restored to health.." The father looked at me and his lips began to quiver and he turned crimson red as he said: "Is that it. Fully restored to health." I said: "Yes, Sir." He said: "Our son committed suicide." So, it was a radicalizing moment for me. Here you are in life, all of us, given a responsibility and obligation to do something to fix a problem, you don't turn away and walk away and you don't water it down, you fix it. And they did. The order priest who came had a little brochure. If you are accused of sex abuse in this brochure take up woodworking and bird watching. I looked at it, read through it and said: "Father did you write this?" You know, my Prosecutor's days coming back and he said: "What?" I said: "Did you write this book? None of my Board has ever seen it." He said: "No, but that's what we are giving to anybody who is accused of a clerical sex abuse." And I said: "Woodworking, is that it? Woodworking and bird watching. How about on your knees begging for God's forgiveness for what you did. How about that?" And, you know, it was a shattering moment for him, for them, but it was really a change moment and it wouldn't have happened, but for my aggressiveness, others in other walks of life, and other challenges, saying enough; we don't go there or enough we are going to fix it.

So, lessons learned to me are: integrity, justice, goodness, humility, kindness, but never forget that you are no better than anybody else, and if there is a problem presented to you on your desk, you don't walk away from it, you fix it, you solve it, and you move on because you are going to save people's lives and make life better for everyone else.

Thank you so very much for honoring me.

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Chairman Fisk ... standing ovation. Well deserved:

Governor that was superb. You know I was thinking about you the other day and your great leadership and your faith, your Catholic faith and I was thinking about your skiing injury and empathetic with your lovely wife Cathy being your chauffeur, your angel, and it brought to mind a story that maybe is not well known about Pope Francis who sometime ago had kind of a nostalgic moment and went back to his homeland in Argentina. He arrived at the airport and they had a gleaming pearl white new limousine there to greet him. They loaded up his considerable luggage and the driver proceeded to open the back door for the Pope to get in and the Pope just stood there and said: "You know, they don't let me drive at the Vatican and I'd kind of like to drive." The young guy said: "Your Holiness, I don't think I can do that, I might lose my license and my job." And the Pope said: "Well, that's okay, who's going to tell?" And he was persistent. So, reluctantly the driver got in the back seat and the Pope slid into the driver's seat and they cruised out of the airport and when they got on the open road, the Pope put the pedal to the metal and he opened it up. They were doing 205 kilometers ... you know Argentina's famous for race car drivers ... and the poor guy in the back seat was pleading with him to slow down, your Holiness, he was quite concerned and the Pope just kept powering on until they heard sirens behind and then the Pope compliantly pulled over and the motorcycle cop got off his motorcycle, strode up to the limousine and when he saw the Pope, he quickly did an about face, walked back to his motorcycle, got on his radio and he called into the dispatcher for the Chief and he got the Chief on the radio, and he said: "Chief, I just pulled over a limo going 205 kilometers." And the Chief said: "Well, bust him." And he said: "Well, there is an important person involved here. Maybe, we should talk about this." And the Chief said: "All the more reason to throw the book at him." And the cop said: "Well, he is very important." And the Chief said: "Well, who is it? The Mayor?" The cop said: "No, bigger." "Oh well, is it a Senator." He said: "No, bigger." The Chief said: "Is it the Governor?" And he said: "No, Sir. I think it's God." And the Chief said: "What makes you think it's God?" He said: "Well...his chauffeur is the Pope."



# Dan Fisk



Dan Fisk:

So we have come to that fun part of the program where we have an award to present and you know I lost it. I don't know what happened to it. It's around here. Oh, there we go (pointing to the huge gift wrapped package on the table on the platform).

Okay now.

Governor Keating:

"Well, you know Dan Blanton thought that this large gift wrapped package just might be a casket, I am beginning to worry it is a pair of skis."

(Laughter)

Thank you.

Dan Fisk:

So now we have this working. Joe Hollingsworth can you come over and help?

Some of you remember this is our 28th Annual Award and with very few exceptions we have the tradition, Frank, of presenting a Tiffany engraved mantel clock and Cathy I hope you have a large mantel in your home.

(Laughter)

This may not be a mantel clock, it might be something else . . . I think what we have to do is open it and you look handicapped with your arm in a sling, Governor, so Joe is here to help us. We may have to turn this around. Let's see if we can get this open. I don't know. But, actually I have a knife in my pocket. I do have a knife. There you go. Can you see that? Everybody is curious.

- Keating - "Including me."

- Dan Fisk -

You got it? (Open box)

Okay now.

Here is an envelope in which you will find advice from both our Director Joe Hollingsworth here who is an expert waterfowl hunter, and by my son, Hudson, who is also an excellent waterfowl hunter, that the new Browning A5 3 1/2" is the gun you want. So you have in here advice on that gun and a certificate that will enable you to acquire that gun and either hang it in this beautiful custom made walnut gun cabinet or display one of your beautiful over and under guns in here.

Now, for those of you who can't see, there is a beautiful red leather backing in the inside back of the cabinet, it has a locking key, and there is a key in here for you and so you can safely secure it from your grandkids, put shells in there and so on and I think it is a special gift and you deserve it. The brass plaque at the cabinet's base reads to "The Honorable Frank Keating For your Distinguished Service to the Public and Private Sectors and Continued Straight Shooting . . . Atlantic Legal Foundation . . . March, 2016"

- Frank Keating - "Thank you, thank you very much. That's just great. Thank you."

(Applause)

- Dan Fisk -

So, you are all welcome to come up and see this beautiful custom walnut gun cabinet. Congratulations Governor Keating and congratulations again to you, Bill Slattery. Thank you so much for your fifteen years and thank you all for supporting our Foundation. Good evening . . .



# Photographs from the Annual Award Dinner



*Frank Keating, Patty & Dan Blanton, Dan Fisk*



*Joe Lynyak, Bill Primps*



*Dave Yoho, Diane Fisk, Carole Yoho, Dan Fisk*



*Steve Matthews, Dick Duvall*



*Richard Rahn, Frank Sands, Robert Davis, Jim Sivon, Katie Wechsler & Walter Welsh*



*Rosemary Stewart, Eric Lasker*





*Millicent & Martin Kaufman*



*Robert Shanks, Lynne Halbrooks, Dick Duvall*



*Scot Elder, Kristin Abbott, Ky Lewis*



*Margaret & Bill Slattery*



*Meredith Leshner, Frank Vlossak*



*Hon. Donald Rumsfeld,  
Atlantic Legal's 1997 Honoree*





*Donald Rumsfeld, Diane & Dan Fisk*



*Bob Charrow, Lori Cohen, Laura Klaus*



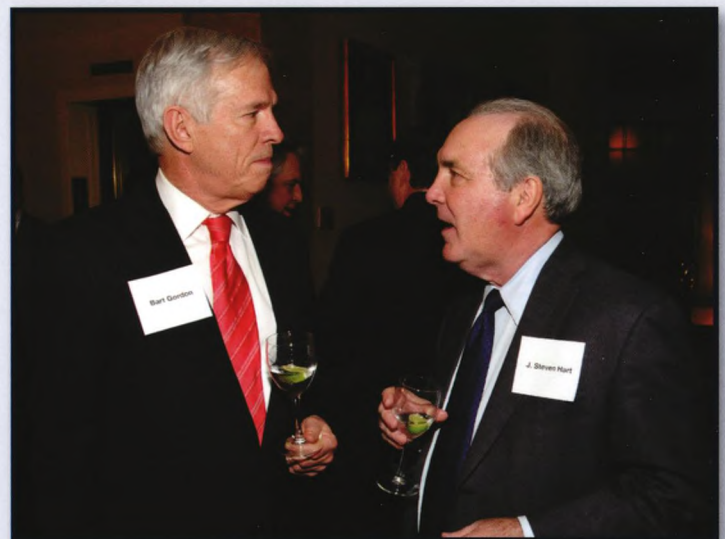
*Bill Primps, Greg Morrow, Joe Lynak*



*Donald Rumsfeld, Bobby Brook*



*Dick Duvall, Steve Sonberg, Dick Dunnells*



*Bert Gordon, J. Steven Hart*





*Byron & Mary Anderson, Larry Burton*



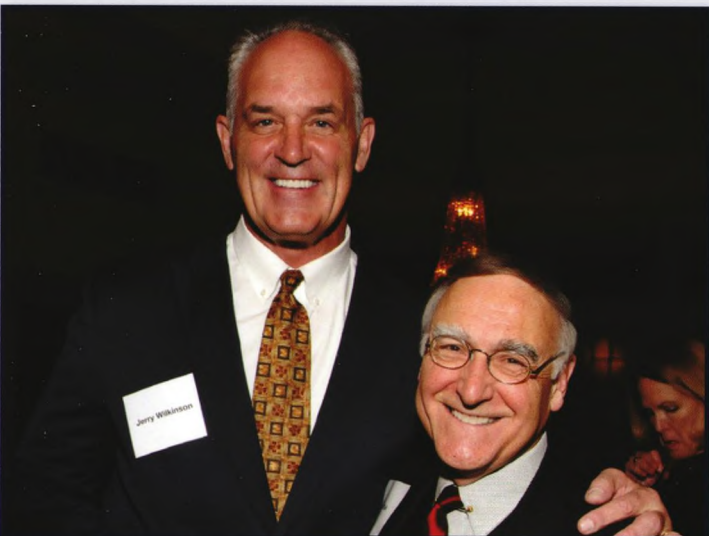
*Dave & Carole Yoho, William Bolger*



*Chuck Work, Evan Farber*



*Anthony D'Loria, Terry Budd, Nick Vari, David Case*



*At 6' 9" & 280#, the famous Jerry Wilkinson  
& the Runt*



*Tom Walsh, Tom Gottshall*





*Dan Polsby, David Keane*



*Robert Shanks, Thomas Boyd*



*Chris Haake, Julia Collison, John Kalas,  
Grant Hollingsworth*



*Dick Whitestone, Patricia Reilly, Lynne Halbrooks*



*Steve Fowler, Dan Smulian, Max Heerman,  
Michael Margolis*



*Rod Perkins, Michael Lovendosky*

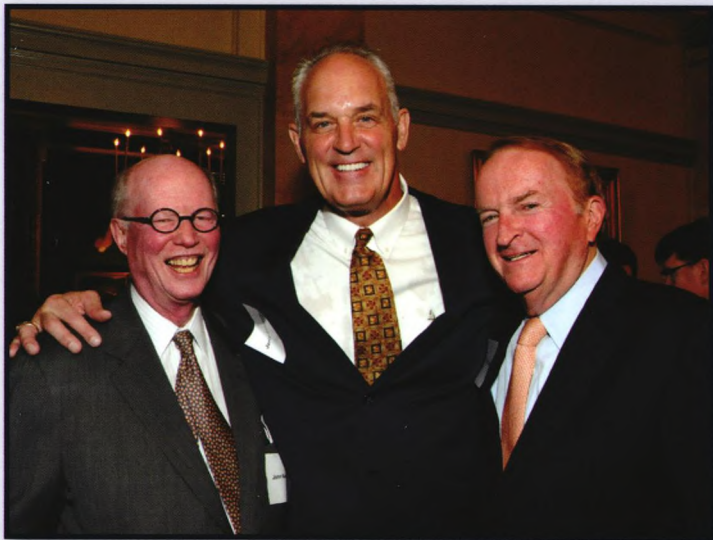




*Tracy Bacigalupo, Greg Morrow*



*Chuck Work, Jay Stephens, Jose Sirven*



*John Kenney, Jerry Wilkinson, Bill Slattery*



*Thomas Boyd, Ed & Ursula Meese*



*Frank Sands, Henry Butler, Hon. Chuck Robb,  
Paige Butler*



*Hon. Bill Sessions, Frank Keating, Dan Fisk*





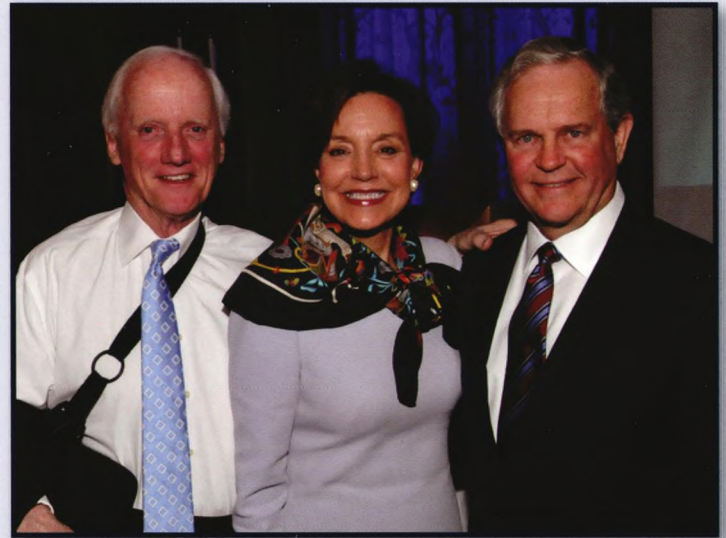
*Dan Blanton, Dave & Carole Yoho*



*The Metropolitan Club*



*Jon & Terry Lenzner, Dan Fisk*



*Frank & Cathy Keating, Jay Stephens*



*Frank Keating, Steve Gordon, Dick Dunnells*

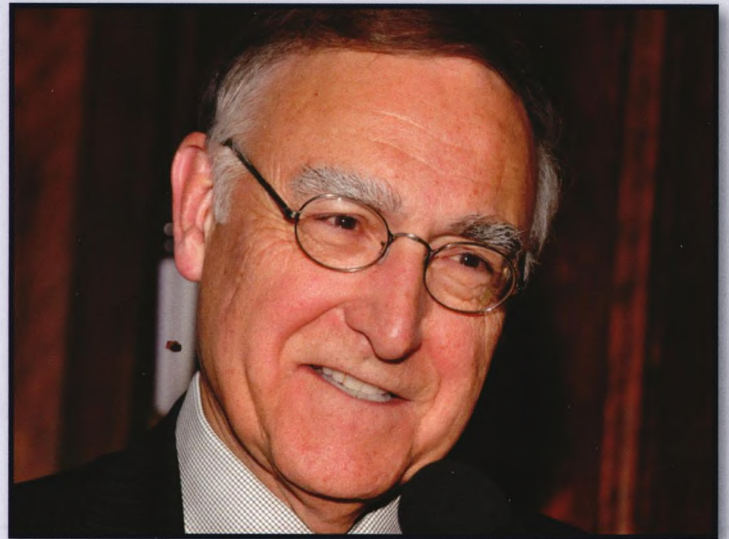


*Dan Fisk, Gary Hughes*





*The Metropolitan Club*



*Dan Fisk*



*Dave Yoho, Former #1 Professional Speaker in the World and Winner of the coveted CPAE and Cavet Awards*



*Dan Blanton,  
Chairman of the American Bankers Association*



*Gary Hughes, General Counsel of the American Council of Life Insurers*



*Hon. Ed Meese, III,  
75th Attorney General of the U.S.*





*The Honorable Ed Meese*



*The Honorable Frank Keating*



*Frank Keating*



*Frank Keating*



*The Award*



*Dan Fisk, Frank Keating*





*Dan Fisk, Frank Keating*



*Chairman Dan Fisk*



*Joe Hollingsworth, Frank Keating, Dan Fisk*



*Joe, Frank, Dan*



*Walnut Gun Case*



*The Inscription*





*Cathy Keating, Ed & Ursula Meese, Marty Kaufman*



*Bill Slattery, Cathy Keating, Ed Meese*



*Dan Fisk, Frank Keating, Diane Fisk*



*Ed Meese, Dave Yoho, Frank Keating*



*Ed & Ursula Meese, Frank Keating*



*Ed Meese, Bill Slattery, Chuck Work*

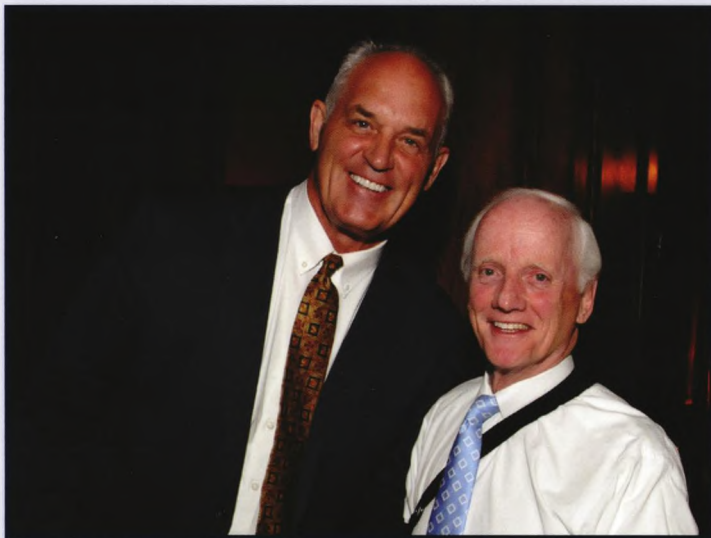




*Ed Meese, Bill Slattery*



*Dan Fisk, Steve Harmelin, Dave Yoho*



*Jerry Wilkinson, Frank Keating*



*Dave Keane, Frank Keating, Andrew Miller*



*Frank & Cathy Keating, Diane & Dan Fisk*



*OH WHAT A NIGHT FOR FRANK  
Joe Hollingsworth, Frank & Dan*



# Annual Award Recipients 1988-2015

**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 1988-2015

**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



**E.J. McMahon**

*President, Empire Center  
for Public Policy*

At the Foundation's June 2015 Board dinner, Edmund J. ("E.J.") McMahon, President of the Empire Center for Public Policy, a think tank based in Albany, explained the center's mission to make New York a better place to live and work by promoting public reforms grounded in free-market principles, personal responsibility, and the ideals of effective and accountable government. Atlantic Legal has worked with Empire Center in the past and expects to do so even more frequently in the future.

Mr. McMahon has authored or co-authored major studies on public pension reform, collective bargaining, population migration, budget trends and tax policy in New York. His influential "Blueprint for a Better Budget," published in January 2010, featured a number of recommendations subsequently implemented under Governors David Paterson and Andrew Cuomo. McMahon also was a leading advocate of an across-the-board cap on property taxes in New York before it was enacted at Governor Cuomo's initiative in 2011.

McMahon has published numerous articles and essays in publications including the *Wall Street Journal*, *The New York Times*, *Barron's*, the *Public Interest*, the *New York Post*, the *New York Daily News*, *Newsday*, and the Manhattan Institute's *City Journal*. His frequent radio and TV interviews have included appearances on CNBC, Fox News Channel and Bloomberg News, as well as on regional cable and broadcast outlets throughout New York State.

McMahon's professional background includes nearly 30 years as an Albany-based analyst and close observer of New York State government. As chief fiscal advisor to the Assembly Republican Conference in the early 1990's, he drafted a personal income tax reform plan that would become the basis for historic tax cuts enacted under Governor George E. Pataki. Previously, as research director of the Public Policy Institute, he worked on the Institute's counter-budget proposals and developed the template for New York's school report cards. He also served as a deputy commissioner in the state Department of Taxation and Finance and as a vice chancellor of the State University of New York.

McMahon is also a senior fellow with the Manhattan Institute for Policy Research, which he joined in June 2000. In January 2005, he opened the Institute's Albany-based Empire Center project, which became an independent non-profit think tank in 2013.

Earlier in his career, he was a staff writer and columnist for the *Albany Times Union* and *The Knickerbocker News*.

McMahon is a graduate of Villanova University.



# William H. Slattery Retires



Bill Slattery served as President of the Atlantic Legal Foundation from 2000 until July, 2015.

Bill graduated from Stanford University in 1965, with distinction and Honors in Economics, and he received his J.D. degree from Yale Law School. His six-year stint with Simpson Thacher & Bartlett in New York City was interrupted by active duty in Vietnam and Okinawa as a Captain in the United States Army. For his service in Vietnam, he was awarded the Bronze Star Medal and the Army Commendation Medal.

Bill subsequently served as Vice President and Counsel of Irving Trust Company and, from 1982 to 2000, was then Senior Vice President and General Counsel of Republic National Bank of New York.

He has been active in several professional groups, including the New York Bankers Association, the Financial Services Roundtable, the New York Clearing House Association and the Association of the Bar of the City of New York.

In recognition of Bill's outstanding service as President and Board Member, at the Foundation's Awards Dinner on March 22, 2016, Chairman Fisk presented him with a Tiffany crystal star, suitably engraved, as reflected in the photo below. Bill has continued to serve on the Board of Directors following his retirement as President.



WILLIAM H. SLATTERY  
In Recognition of 15 Years  
of Outstanding Service As  
President and Board Member  
ATLANTIC LEGAL FOUNDATION  
2000-2015



# New Board Members



**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 \$2B 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 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**

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**

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**

**BNY Mellon Wealth Management  
Vice President, Escrow Sales Specialist – West US Markets**

Alinne Majarian is a dedicated Escrow Banker for BNY Mellon Wealth Management in the West U.S. markets. BNY Mellon is a global financial services company focused on helping clients manage and service their financial assets. Operating in 36 countries and serving more than 100 markets, BNY Mellon is a leading provider of financial services for institutions, corporations and high net worth individuals. 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 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



**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.



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\*Includes supporters of 2015 Annual Awards Dinner held in Washington, DC on March 22, 2016.

## Thank You.

With your help, the Atlantic Legal Foundation has been able to successfully pursue its mission to advocate for the rule of law, limited effective government, free enterprise, individual liberty, school choice and sound science.

The Board of Directors, Advisory Council and Staff of the Foundation thank you for your continued support.



# Atlantic Legal Foundation: Mission and Programs

The Atlantic Legal Foundation is a nonprofit, nonpartisan public interest law firm with a demonstrable nearly four-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 the application of constitutional guarantees to individuals and corporations faced with the 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.

## Atlantic Legal Foundation

2039 Palmer Ave. Suite 104

Larchmont, NY 10538

(914) 834-3322

Facsimile (914) 833-1022

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2039 Palmer Avenue  
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