

The Twenty-Eighth Annual
Chester Bedell Memorial Lecture

“THE INDEPENDENCE OF THE AMERICAN LAWYER”

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By
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in cooperation with
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Waco, Texas

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Ken Starr is a native of Texas who graduated from Sam Houston High School in San Antonio as a straight A student. He first attended Harding University in Arkansas and later transferred to George Washington University in Washington, D.C. where he received his Bachelor of Arts degree in 1968. He attended Brown University where he earned a Masters degree in 1969 and then went to Duke University School of Law graduating with his J.D. in 1973.

After graduation from law school, Starr was a law clerk for U.S. Circuit Judge David W. Dyer of the U.S. Court of Appeals for the Fifth Circuit (1973-1974) and for Chief Justice Warren Burger (1975-1977). Starr then went into private practice until in 1981 he was appointed and served as counselor to U.S. Attorney General William French Smith.

Starr served as a Judge of the Court of Appeals for the D.C. Circuit (1983-1989) and as Solicitor General of the United States (1989-1993) and has argued as Solicitor General and later in private practice 32 cases before the United States Supreme Court.

Starr was named to serve as Independent Counsel in several high profile investigations and in 1994 Starr was appointed by a special three judge division of the D.C. Circuit to continue the Whitewater investigation which included an investigation of perjury and obstruction of justice charges against President William Clinton.

In 2004 Starr was named Dean of the Pepperdine Law School where he taught current constitutional issues and civil procedure. In 2010 Starr was named as President and Chancellor of Baylor University in Waco, Texas.

Ken Starr, distinguished academician, lawyer and public servant, was named Time Magazine's Man of the Year in 1998.

THE INDEPENDENCE OF THE AMERICAN LAWYER

Thank you for inviting me to be here with you today. It is an honor to be called upon to give this year's Chester Bedell Memorial Lecture on the "Independence of the American Lawyer." Chester Bedell was the embodiment of what it means to be an independent American Lawyer. Alexis de Tocqueville famously wrote: "In America there are neither nobles nor men of letters, and the people distrust the rich. Lawyers therefore form the superior political class and the most intellectual portion of society." Chester Bedell embodied the noble Tocquevillian vision.

It is also a great honor to follow in the wake of past lecturers who have paid tribute to Chester and his work. As those prior lecturers demonstrate, the independence of the American lawyer is a rich and varied subject. Last year, Judge Belvin Perry focused on the issue of exoneration. His work with the Florida Supreme Court Innocence Commission is a powerful illustration of what it means to be a truly independent American lawyer. The year before, Barry Richard's focus on the writ of habeas corpus pointed to the need, at all times, to protect human liberty in our constitutional order. Three years ago, Stephen Bright's focus on the importance of defending the poor, and the challenges confronting the public defender system in Florida, illustrated the importance of American lawyers at their best and noblest -- to protect the rights of everyone.

Today, let's return to the basics -- the overarching value of the independence of America's lawyers. We begin with America's story -- a grand narrative intimately tied to the professionalism and courage of the nation's lawyers throughout our history. The once-radical idea of the sovereignty of "We the People" ripened, through revolution, into political independence for the United States; constitutionally protected freedoms enshrined in the Bill of Rights; and the extra-constitutional growth (supported by the Free Press Clause) of the so-called Fourth Estate -- a term coined by the great British friend of America's struggle for independence, Edmund Burke.

Now, as we reach the 226th anniversary of the American constitutional experience (and the 237th year of American Independence), we see current, high-profile examples -- worldwide -- of the vital importance of lawyer independence.

Consider Pakistan. In 2007, a period of turmoil in Pakistan

led to the attempted dismissal by President Pervez Musharraf of Supreme Court Chief Justice Iftikhar Muhammad Chaudhry. The Chief refused to resign, and in so doing inspired a powerful revolt by Pakistani lawyers who supported judicial independence specifically and the rule of law more generally. Labeled a “Lawyers’ Mutiny”, the Pakistan lawyers’ movement generated larger, more public protests that, ironically, endangered President Musharraf’s own hold on office. His attack on the Pakistani judiciary’s independence suddenly became a boomerang. In a bold move five months later, the Pakistani Supreme Court reinstated the Chief Justice and dismissed the charges against him -- further weakening Musharraf’s hold on power. Soon after, President Musharraf publicly accepted the Court’s ruling. Having learned an important civics lesson, the chastened President concluded -- belatedly -- that judicial independence was essential for the country’s welfare. Yet, Musharraf continued to persecute the judiciary during his declared “emergency rule” at the end of 2007, in which Musharraf suspended the Constitution, dissolved the Supreme Court, and arrested hundreds of protesting lawyers. However, Musharraf would soon pay for his mistakes in 2008 when he was forced to step down as President. As this week’s newspapers report, Musharraf now finds himself under house arrest in Pakistan, facing charges of high treason.

Consider also the now-unfolding drama in Egypt -- and the on-going battle between the potentially-dominant Muslim Brotherhood and the still-serving judges appointed by ousted President Hosni Mubarak. As recently as this week, supporters of the current president, Mohammed Morsi, clashed with opponents of his Muslim brotherhood in Mansoura, and now military reinforcements are moving closer to Egypt’s main cities to protect protestors from Morsi’s backers. One cause of these violent demonstrations comes from a ruling in Egypt’s Supreme Constitutional Court this month. They ruled that the laws governing the election of Egypt’s Parliament were invalid. Since the members of Parliament were purportedly invalidly elected, many citizens believed that the Parliament’s newly-formed Constitution lacked both national consensus and political legitimacy. To make bad matters worse, the Muslim Brotherhood members of Parliament have proposed a measure that would lower

judges' mandatory retirement age from 70 to 60 -- a gambit that, if enacted, could force more than 3,000 judges to leave the bench. Both these issues have added fuel to the fire as the Muslim Brotherhood seeks to appoint judges who favor current President Mohammed Morsi's politics. Think of -- in our own country -- FDR's Court-packing plan in 1937.

Let's now return to home base, and briefly march down the memory lane of lawyer independence, as an integral part of the American story. A logical starting point is the American Revolution. What better example than John Adams, the great Boston lawyer, statesman and future President. In his magisterial biography of America's second President, David McCullough recounts an impressive story of one of Mr. Adams' famous trials. During trial, Mr. Adams realized, to his horror, that his client had failed to bring an important document to court -- one that Mr. Adams deemed vital for success at trial. Rather than run the potential risk of losing the case for lack of evidence, Mr. Adams -- the fiercely determined lawyer -- filibustered, speaking to the Judge and Jury for a solid five hours -- just enough time for his forgetful client to scoot out of court, engage in seek-and-find and return with the much-needed document.

As a practicing lawyer, John Adams is most famously remembered, of course, for his role as the defense attorney in the Boston Massacre trials -- defending the young British Redcoats and their Captain in the wake of the deaths of five patriots on that fateful evening of March 5, 1770. Mr. Adams took on the case just one day after the Massacre. Despite the fact that his remarkably-talented wife Abigail was pregnant with their 4th child, Charles; despite the fact that he would be paid only 18 guineas (just over \$30) for his Herculean efforts; and finally, despite the public contempt he knew he would surely face, the resolute Yankee lawyer cheerfully accepted the weighty responsibility thrust upon him. His decision was wildly unpopular. Indeed, his once-thriving law practice plummeted, practically overnight, by over 50%. As a source of encouragement, Mr. Adams turned to the words of the Italian jurist and politician, Cesare Beccaria, in his most famous work, *Of Crimes and Punishments*: "If by supporting the rights of mankind and of invincible truth, I shall contribute to save from the agonies of death one unfortunate victim

of tyranny, or of ignorance, equally fatal, his blessing and tears of transport will be a sufficient consolation to me for the contempt of all mankind.”

That’s quite a trade-off -- and an inspiration to all lawyers. On the third anniversary of the Massacre (March 5, 1773), John Adams wrote this about that scaring experience: “It was ... one of the most gallant, generous, manly, and disinterested Actions of my whole Life, and one of the best Pieces of Service I ever rendered my Country. Judgment of Death against those Soldiers would have been as foul a Stain upon this Country as the Execution of the Quakers or Witches, anciently. As the Evidence was, the Verdict of the Jury was exactly right.”

Mr. Adams’ lawyerly contributions were, of course, not confined to the courtroom. To the contrary, he was the principal architect of the iconic Massachusetts Constitution of 1780 -- the oldest written, still-governing constitution anywhere on the planet. This foundational document helped guide the fashioning of America’s Constitution in Philadelphia just seven years later. Indeed, the very concept of “We the People” can be traced directly back to the Preamble of Massachusetts’ long-lived Constitution. The Bay State’s founding document provided a structure of government firmly grounded in separation-of-powers principles. It established a two-house legislature, a strong executive with veto power, and, remarkably for the time, an independent judiciary with lifetime tenure -- in the words of the document “as long as they behave themselves well;” a harbinger of the elegant language of Article III.

This was a path-breaking achievement. To accomplish this mighty task, Mr. Adams, the lawyer, sequestered himself at his home in Quincy, Massachusetts, carefully crafting what would become an historic document. To his intellectual credit, if not modesty, Mr. Adams based much of the proposed state constitution on his own previously-published treatise, *Thoughts on Government*. Much to his surprise, and to his delight, the Massachusetts Constitutional Convention made only a few edits to his draft, and adopted virtually the entire document verbatim. Of his mighty work, John Adams opined: “I take vast satisfaction in the general approbation of the Massachusetts Constitution. If the people are as wise and honest in the choice

of their rulers, as they have been in framing a government, they will be happy, and I shall die content with the prospect for my children.”

In that pivotal period of our history, Mr. Adams’ illustrious contemporary to the south in Virginia was the Great Wordsmith of America’s independence, Thomas Jefferson. Under the brilliant tutelage of George Wythe, Jefferson emerged as a highly gifted, extraordinarily well-read lawyer upon his admission to the Virginia bar in April 1767. For Mr. Jefferson, the study of law was far more than a means of earning a living. To the contrary, in Jefferson’s view, closely examining the issues of the law, great and small, led naturally to contemplation of society’s history, politics, culture, and the moral conscience of its citizenry.

Although he practiced law for only a short period, Mr. Jefferson tried and won many cases from 1767 to 1774. Jon Meacham recalls in his magnificent, recently-published biography of Jefferson: “Contemporaries recalled Jefferson as a bright, enthusiastic, and intellectually curious lawyer. His practice was eclectic. One case involved the theft of a bottle of whiskey and a shirt, another a charge of slander.” Earlier this week I was in the Washington D.C. area. Stamped on the monument that memorializes our nation’s third President are these powerful words: “I am not an advocate for frequent changes in laws and constitutions, but laws and institutions must go hand in hand with the progress of the human mind. As that becomes more developed, more enlightened, as new discoveries are made, new truths discovered and manners and opinions change, with the change of circumstances, institutions must advance also to keep pace with the times.”

And how can a meditation on the independence of American lawyers overlook Lincoln? From the moment Abraham Lincoln became a lawyer in 1837 until his nomination for President in 1860, the law was the very center of his professional life. In his highly successful practice, Lincoln was famously ethical and upright. He once wrote: “There is a vague popular belief that lawyers are necessarily dishonest, [but] let no young man choosing the law for a calling for a moment yield to this popular belief – resolve to be honest at all events; and if in your own judgment you cannot be an honest lawyer, resolve to be honest without being a lawyer.”

Lincoln's attitude toward the Judiciary, particularly in light of his vehement disagreement with the horrific *Dred Scott* decision, was admirably balanced. Mr. Lincoln had great respect for our judicial system and for the bedrock importance in a constitutional democracy of judicial review, but he recognized that the decisions of judges and justices were rendered by mere mortals. They could be wrong. Despite his strong feelings about the *Dred Scott* decision, Mr. Lincoln was careful to confine his criticism to the decision in question and the justices who rendered it, never attacking the judicial system itself.

We move on. In the 20th Century, during a time of dramatic change within American society, one lawyer stands head and shoulders above the rest as the exemplary independent American lawyer -- Thurgood Marshall. Serving as Chief Counsel for the NAACP, Marshall is justly renowned for his role in *Brown vs. Board of Education* -- and the elaborate litigation process that led up to that dramatic victory for equality. Mark Tushnet, William Nelson Cromwell Professor of Law at Harvard, writes: "Marshall had what might seem to be an extremely simple view of the Reconstruction Amendments -- the 13th, 14th, and 15th. He thought racial equality was just plain common sense. [Marshall] was an idealist about the Constitution in that it embodied this idea of racial equality that everyone should be able to understand." Despite the extraordinary obstacles, Marshall was never reticent or reluctant. He was a leader among leaders, a brilliant legal strategist whose magnetic personality and fierce determination enabled him to withstand the intense pressures of his enormously demanding work.

A contemporary of Thurgood Marshall, and perhaps the greatest judicial wordsmith of the 20th century, was Justice Robert Jackson. Ten years ago, a wonderful book was published. The title: *That Man* -- an unfinished manuscript written by Justice Jackson about the President whom he brilliantly served and greatly admired -- Franklin Delano Roosevelt. The manuscript was discovered by Jackson's son, a highly successful lawyer in New York City, after his father's death. The manuscript lay unattended to for years, until the family eventually decided to bring it out of the shadows. By virtue of the hard work of Professor John Barrett of the St. John's School of Law,

those semi-organized papers have been -- for this past decade -- a treasure trove of materials and reflections about one of the most important Presidents in American history.

One episode in Jackson's public service bears recounting, for it goes to the heart of the independent lawyer. With Europe engulfed in war, and with American public opinion strongly isolationist in sentiment, President Roosevelt responded boldly to Winston Churchill's plea for help to a badly besieged Mother Country with Lend-Lease -- a program fashioned by the United States between 1941 and 1945 that supplied Great Britain, the USSR, the Republic of China, France, and other Allied nations with over \$50 billion in war materials. Was this unorthodox, indeed unprecedented, action by the President constitutional? Then-Attorney General Robert Jackson opined that it was.

Eleven years later, Attorney General Jackson found himself as a widely-heralded Supreme Court Justice. This time, the nation was at war -- the Korean Conflict was raging over 6,000 miles away. The war effort required high efficiency in productivity here at home, especially in the production of munitions. However, labor unrest erupted in the domestic steel industry, which was obviously critical in carrying on the war effort.

In the midst of a war, on June 2, 1952, President Truman saw that strikes and steel mill closures were on the horizon. To avert these shutdowns, Truman directed his Secretary of Commerce to seize and run the steel mills. The issue went immediately to court with the Supreme Court handing down its landmark decision in the fabled *Steel Seizure* case, holding that President Truman had exceeded his powers under separation-of-powers principles. Throughout the oral arguments President Truman's Solicitor General and Acting Attorney General, Philip Perlman, contended that FDR's various wartime seizures -- and Robert Jackson's legal opinions -- served as precedent to support President Truman's actions. This seemingly put Supreme Court Justice Robert Jackson in an awkward position. As former Attorney General to Franklin D. Roosevelt, Jackson now stood in the midst of a firestorm over the extent of presidential power. Having argued during WWII in favor of such sweeping presidential action, it was widely expected that Justice Jackson would once again side

with the Administration. Not so.

In the course of oral argument, Justice Jackson commented: “I looked it up because I wondered how much of this was laid at my door...I claimed everything, of course, like every other Attorney General does. It was a custom that did not leave the Department of Justice when I did.” The dutiful lawyer had become the truly independent judge. (I am reminded by a comment made to me when I was privileged to begin service on the United States Court of Appeals. My colleague, Harry T. Edwards, appointed by President Carter, made the following wise observation: “Ken, you will know you are truly an independent judge when you, in conscience, vote against the people who appointed you.”) He was no longer making a lawyer’s argument, but reaching the conclusion of a judge who enjoyed Article III independence.

Finally, we turn to the modern-day successor to Justice Marshall and Justice Jackson -- a Solicitor General who became a Justice. Elena Kagan served, with great distinction, as Dean of the Harvard Law School. President Obama appointed her in his first Term as Solicitor General. The future Justice served in that capacity for just over a year. Upon the retirement of Justice John Paul Stevens, President Obama nominated her to serve on the nation’s highest court.

And now our final study in the independence of the lawyer turned judge. In the closely-watched case last Term involving religious liberty, *Hosanna-Tabor v. EEOC*, the Supreme Court unanimously rejected the provocative position taken by Kagan’s former shop, the Office of the Solicitor General (representing the EEOC). The case was a great moment for religious liberty. In the process, Justice Kagan showed her independence from her former office – and voted against those who had appointed her.

The independent American lawyer: Mr. Lincoln said it best, as we bring this tribute to Chester Bedell to a close. “No client ever had money enough to bribe my conscience or to stop its utterance against wrong, and oppression. My conscience is my own - my creators - not man’s. I shall never sink the rights of mankind to the malice, wrong, or avarice of another’s wishes, though those wishes come to me in the relation of client and attorney.”

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