The Thirteenth Annual
Chester Bedell Memorial Lecture

"THE INDEPENDENCE OF THE AMERICAN LAWYER"

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"A BILL OF RIGHTS FOR THE PRESIDENCY??"

Lawrence E. Walsh

It is an honor to be invited to address the Trial Lawyers Section of the Florida State Bar Association and it is a particular privilege to be one of a series of speakers who have memorialized Chester Bedell, an outstanding trial lawyer of this country and a proud leader of the bar of this state. I have always been extremely grateful to the Jacksonville Bar Association. It was the only local bar association to invite me to speak after I finished my term as ABA president, but more important, it permitted me to be present as it congratulated Chester Bedell after he received the 1977 American Bar Association award for 50 years of service to his profession.

Having practiced most of my life in one of this country's more provincial communities, New York City, I still remember how impressed I was with Florida's glistening delegation when I was first elected to the American Bar Association House of Delegates. Led by state delegate Bob Erwin, it projected Chesterfield Smith to become one of the Association's most challenging and innovative presidents whilej, at the same time, Reese Smith rose into key positions in the American Bar Endowment and the American Bar Foundation and a few years later became a second Floridian president within a single decade. Sandy D'Alemberte followed a little later. As Florida's national and political power has expanded, this association has continued its role of admirable leadership.

What do we mean when we talk about the independent bar? We of course think of the independence of a lawyer in his handling of a case as he balances his obligations to his client and to the courts. Chester Bedell consistently emphasized a lawyer's duty to keep his judgement free from that of his clients. Many of us, particularly trial lawyers, also have in mind the English example, the unity of judges and senior barristers acting as benchers in their Inns of Court, formulating standards for the education and conduct of members of the bar and even informally participating in the selection of judges to be recommended by the Lord Chancellor. In this country, with its undivided bar of hundreds of thousands of lawyers, this pattern of professional unity is less simple, but nevertheless a priceless reality. Although on a much larger and less intimate scale, there is still a unity of the bar and the courts. The early development by bar associations of cannons of ethics for lawyers and judges has been followed by countless joint committee studies of points of difficulty. For example, the American Law Institute, combining judges, teachers and practicing lawyers, has for seventy-five years developed its restatements of judicial interpretations and its model statutes. The commissioners of uniform state laws formulate and keep up to date the Uniform Commercial Code and related statutes. The American Law Institute and the American Bar Association and state bar associations have joined forces to improve our profession by continuing legal education.

When Chester Bedell became a lawyer, the bar had a somewhat more monopolistic responsibility for the administration of justice. Cases were decided by lawyer-like deductions from long-standing precedents of the common law. Since then, legislation has addressed many parts of the law. Originally, the new statutes had a hard time to survive because courts and lawyers subjected them to a harsh test, not only a narrow view of state and federal constitutions, but also a court's own interpretation of whether the statute was a reasonable means to an approved end and the least offensive possible means to that end.

Court administration of civil cases was also largely influenced by private lawyers. The federal rules of practice had not yet been adopted. Discovery was essentially unaided by the courts. Court calendars in civil cases were left to the initiative of the lawyers. When I became a judge in 1954, the largest United States District Court (the Southern District of New York) still used a central calendar system. Cases were not assigned to a judge until sent out for trial. It had a backlog of 10,000 cases with no effective method for moving them. Lawyers contended that when they were ready to try a case they would move it and until then the courts should leave it alone. Pretrial motions were heard by one or several of the nineteen judges as they happened to be sitting in the court's central motion part.

As the growth of our country has required legislatures, courts and administrative agencies increasingly to take the initiative, the role of the bar has become somewhat less monopolistic but none the less, independent. A court's reputation still depends upon the bar that serves it. The education and the development of the lawyers who do the work of courts and government agencies and the continuing standards that guide them remain largely that of the independent bar. Respect for the rule of law depends upon its leadership and upon its gaining and keeping the confidence of the public.

Even though government has expanded its responsibility for the administration and enforcement of the law, the independent bar continues to be the most sophisticated and the most detached observer of these activities. Somewhat like Congress's responsibility for oversight of government agencies, the independent bar has leadership responsibility for the preservation of the rule of law, even among the highest officials of our government.

Previous Bedell lectures have, with remarkably little repetition, elucidated many aspects of the responsibilities of the independent bar. This afternoon I should like to focus briefly on the role of the independent bar in enforcing the rule of law at the highest level of our government. A few years ago Lord Williams, Princess Diana's lawyer, in his Bedell lecture, described the role of the independent barrister in England and Wales, where on one day he may be defense counsel, but the next day a prosecutor. Here, of course, lawyers in private practice are much less likely to be drawn into a prosecution. Nevertheless, the independent

bar has oversight responsibility. for fairness as well as effectiveness in the difficult and delicate problem of investigating and prosecuting a president and in evaluating the role of the independent counsel and the Independent Counsel Act as they deal with this responsibility.

First, let us remember that the Independent Counsel Act was truly the product of the independent bar. It was Chesterfield Smith, president of the ABA, who led the expression of public outrage on the Sunday morning after the Saturday night massacre, in which independent counsel Archibald Cox was fired and two successive attorney generals resigned in protest. He denounced President Nixon, called for a new independent counsel and appointed a special committee of the American Bar Association to consider legislation to prevent such a future disgrace. The chairman of that committee came from a neighboring state, Bill Spann of Atlanta, later president of the ABA. That committee drafted the outlines of the present act. It was extensively debated in the House of Delegates and approved. Congress enacted it into law.

This outstanding example of oversight by an aroused, independent bar was in the tradition of our distant and more dangerous past as when Lord Chief Justice Coke, in a face-to-face showdown, told King James that he was subject to the law and the king retorted that Coke was committing treason. While in the development of our liberty, lawyers have often been overshadowed by and dependent on political forces and while our constitution depends upon the balance of political power among the three branches of government, lawyers continue our profession's watch against arbitrary governmental conduct and autocracy. Even though the power of Congress through impeachment and government oversight overlaps the ancient processes for the enforcement of law, the importance of the independent bar to assist the branches of government is obvious. And the bar's responsibility for independent action is still deep-seated.

Conceptualization epitomizes the contribution of the independent bar. Its expertness includes the development of judgmental guidelines for the enforcement of the rule of law. Twenty-five years ago an ABA committee chaired by one of the ABA's gold medalists, Chief Judge J. Edward Lumbard, Jr., formulated standards for prosecutors which were debated and approved by the House and Delegates and are still the basic guidelines today. Would an effort to develop supplemental guidelines for the investigation of a president, including guidelines for the conduct of independent counsel, be too narrow a subject for the focus of the organized bar, its state bar associations as well as national bar associations?

A first reaction might be, why should busy lawyers and judges contribute their time to formulate standards for so narrow a question? Get rid of independent prosecutors and leave their problem to regularly appointed prosecutors who

already have the benefit of departmental guidelines and the Lumbard study, or leave their regulation to Congress who created them. But there is that haunting voice of Chester Bedell reminding us that the independent bar has a duty to advance the rule of law and extend it to the highest reaches of our society and our government. The fact is that the problems of investigating a president are different in kind from any other investigation.

There are several reasons why I take advantage of a Bedell memorial lecture for so narrow an issue. First, in terms of public approval or disdain for the rule of law, the investigation and prosecution of the president is a most exposed, severe and important test of our asserted claims that all are subject to the rule of law. Second, prosecutorial clumsiness or willfulness in dealing with the president damages not only the president but also, by his distraction, the country. Third, this is far too important a concern to be left to specialists. The continuation of the office of independent counsel and the guidelines for his conduct should not be left to the views of previous independent counsel or to those who have defended persons prosecuted by an independent counsel or to bar association specialist groups. While the views of these groups are valuable, a more detached analysis would also be desirable. The Florida state bar has over the years been a leadership bar, and as the state has grown, this instinct for leadership has continued. It would be a very healthy thing if a state bar association hundreds of miles from Washington reflected the national interest in this matter.

Neither should this problem, which inevitably involves presidential subordinates, be left exclusively to the political judgement of Congress. There is an ever continuing tension between government oversight by Congress and law enforcement through the courts. In the early days of the republic, impeachment was a realistic alternative for any person holding civil office in the government. Now, however, the expansion of the executive branch has been so tremendous that the use of impeachment even for presidential appointees would unduly burden Congress and divert it from its legislative responsibilities. And the impeachment of the president would be a staggering undertaking. Government oversight is now usually expressed by congressional committee exposure of misconduct. This serves to disgrace the miscreant, but not to punish him. Theoretically, the electorate could take into account such exposure at the next election, but this is only effective as to elected officers and in the federal executive branch there are only two, the president and vice president. Rarely, if ever, would a presidential election turn upon misconduct of a subordinate. Other issues are too numerous and too important to use a general election to police a subordinate's conduct in office.

What measures are necessary if the ordinary course of criminal law enforcement is to be made effective against a high executive branch official or against a president? There comes a point where the attorney general and her subordinates cannot credibly prosecute or, more important, exculpate a high official. For

example, a criminal investigation of the president himself or the attorney general herself would ordinarily require the appointment of an independent counsel. The regulations of the Department of Justice have long provided for such an appointment. But the department's regulations were no protection against Archibald Cox being discharged when his investigation came too close to the president. The most important provision of the Independent Counsel Act is the protection of the independent counsel from arbitrary discharge. He can only be discharged for cause and after a court hearing.

The Act also provides a double layer of insulation for the attorney general when she does perceive a conflict of interest and is required to disqualify herself and her department. It provides that not she but an outside agency, a special division of the court of appeals for the District of Columbia, appoint her replacement. Until the appointment of Kenneth Starr in place of Robert Fiske as the independent counsel investigating Whitewater, there was little controversy about this feature of the Act. Since then, there have been suggestions to insure that the appointee at least have prosecutorial experience. A former counsel to the president, Lloyd Cutler, suggested the president appoint a panel of twenty-five experienced persons to be confirmed by the Senate and that the court select future appointees from this group. A problem with this suggestion is that the prospective independent counsel would have been an appointee of the president. It may be that there is a place for the independent bar to play a role, as it does in commenting on judicial nominations. Would it not be desirable to invite a special committee of the ABA or the appropriate state bar association to submit to the appointing panel a background evaluation of a proposed appointee? In addition to the usual judicial standards of integrity, temperament and ability, such a committee could give the appointing panel the bar's evaluation of the prosecutorial and other professional experience of a prospective appointee as well as its view of his experience with matters of sensitive, high level importance.

Most important, what crimes are so important to the national interest that they must be investigated while the president is still in office? I submit that a prosecutor should not be turned loose to harass a sitting president except for misconduct in the exercise of the official powers of his office. This expense and trauma should not be imposed to investigate an event that happened before a person took office. Similarly, the expense and trauma of an independent counsel investigation should not be inflicted to investigate a private escapade unrelated to the performance of the duties of office. Watergate and Iran/Contra involved misconduct in the ongoing discharge of presidential duties. Whitewater did not. Watergate exposed a president committing crimes to stifle political opposition and corruptly arranging payoffs to silence witnesses as to his misuse of office. Iran/Contra exposed a president deceitfully violating specific statutory prohibitions on the use of government funds and personnel in foreign paramilitary

activities and in the foreign sale of United States arms and an attorney general developing a false administration position to deceive Congress and conceal a gross misuse of presidential power. Statutes of limitation for lesser matters should be tolled during a president's term of office.

The next question is what restraint should be expected of a prosecutor investigating the president of the United States. Should a president be subjected to the same tactics as a racketeer or a corrupt municipal official? An ordinary prosecutor investigating a complex conspiracy traditionally begins at the periphery and works inward toward the leading figures by persuading subordinates to confess and implicate their superiors. If the subordinates refuse and if they are vulnerable to prosecution, they may be convicted and, as in the Watergate prosecutions, sentenced to imprisonment to induce their cooperation notwithstanding their previous exemplary records. Should these tactics be used in investigating presidential misconduct? I concluded that in the Iran/Contra investigation they were necessary and appropriate, but this resulted in harsh treatment of some outstanding government officials. It also led to criticism, primarily by political supporters of the Presidents Reagan and Bush and of those indicted. Similar tactics have been used in the Whitewater investigation. A review by the peers of our profession would be welcome.

In the national interest, the president should probably be entitled to greater protection from longshot efforts to prove a minor crime. Somehow when the target is a person who has made a professional career of crime, we are more ready to tolerate tactics which seem out of place when we are dealing with persons elected or appointed to our highest public offices. According to recent information, the Whitewater independent counsel considered a "sting" operation against President Clinton. This involves equipping a cooperating informer with a tape recorder to surreptitiously record admissions or other inculpatory remarks of a targeted individual. This has led to successful prosecution of racketeers and corrupt municipal judges and others. Should this tactic be used against a president? Should a president, carrying out the most demanding and important job in the world, have to guard himself against such tactics when dealing with his confidants -or with his friends? Should such tactics be tolerated for an investigation of personal indiscretions unrelated to official duties? In the Iran/Contra investigation, the opportunities to use these tactics were not attractive and I declined them. I also declined to expose indiscreet personal relationships of subjects of my investigation unrelated to official misconduct. Are generalized guidelines feasible? It is time for an evaluation by the bar.

Similarly, special guidelines for dealing with the media may be necessary. An independent counsel is particularly vulnerable. Unlike an ordinary prosecutor, he usually does not have the support of the administration but rather, its opposition. Isolated and with a small staff, he has to maintain his own relationship with

the media. Investigating a president exceeds most other prosecutions in the intensity of public interest. The prosecutor cannot refuse to talk to the press, at least about his generalized projections, without the danger that frustrated reporters will develop leaks from his staff and even grand jurors. Interim reports to Congress can be useful in explaining generalized questions for the public, such as the effect of congressional immunity of key witnesses.

Instead of statutory restrictions, guidelines developed by the independent bar could help avoid excessive behavior by an independent counsel. On the basis of the past twenty years experience, there is now enough data for the formulation of guidelines less rigid than a statutory limitation, but helpful to a person holding the post. The Department of Justice guidelines, which an independent counsel tries to follow, are not wholly appropriate. There is no way to disregard the difference between investigating the president of the United States and the usual department of justice prosecution, or to disregard the isolation of an independent counsel confronted with the powers of a hostile administration or a hostile congress.

The processes of the courts have always been onerous and expensive, notwithstanding continuing efforts of reform. There are now "nonprofit" organizations, funded in part by tax-exempt contributions by wealthy political ideologues, which employ lawyers to use the intimidating process of the courts for punitive purposes against not only the president, but subordinates who have served him.[1] Is such a deliberate imposition of the burdens of litigation upon modestly paid public officials and former public officials an appropriate incident of the rule of law or is it an intellectually dishonest pursuit requiring evaluation by the independent bar? Assuming that a tax-exempt "watchdog" role is of public value, does it not change character when it becomes a weapon directed at individuals?

Finally, there is a further question of the extent to which the independent bar should concern itself with gross incongruities in the rule of law, particularly as they affect a president, but even more broadly as they undermine the electoral system upon which our democracy depends. Today our electoral system seems to be imperiled or at least desecrated by the open payment of large amounts of money to political party campaign committees from beneficiaries of governmental decisions, whether by lobbyists or by executives of licensed or regulated business activity. We have the incongruity of an independent counsel spending a half a million dollars a month to determine whether the president, in a case now dead for unrelated reasons, lied about a suspected indiscrete sexual relationship with a consenting adult, but there is apparently no question of illegality regarding a one million dollar party campaign contribution by the beneficiary of a presidential license permitting the sale by the contributor's company to a foreign country

[1]See R. Lacayo, Starr's Fellow Traveler . Time, June 22, 1998

of a highly sophisticated device and expertness to enhance that country's nuclear capability.

Does such an incongruity so derogate the rule of law that our profession is committed to protect that the organized bar should undertake its own study of the corrupting influence of "after-the-event" campaign contributions? During World War I, Clemenceau, the French president, said war was too important to be left to generals! Is the elimination of this form of government corruption too important to be left to political leaders? I don't know where Chester Bedell would come down on this question. I'm not certain, myself, but there is an undeniable incongruity if the rule of law requires the intensive policing of lies about the possible private sexual indiscretion of a president while permitting the coincidence of presidential and other governmental decisions and large campaign gifts.

As retirement beckons, each opportunity to talk with those who lead our profession and who will lead it becomes more cherished and the temptations to pose questions rather than answers all the more great. Once more, let me thank you for the honor of talking to you. Once more, let me express my admiration for Chester Bedell.

THE BEDELL LECTURERS

David Boies	1986
Hon. Parker L. McDonald	1987
Robert W. Meserve	1988
Benjamin R. Civiletti	1989
Brendan V. Sullivan	1990
Julius LeVonne Chambers	1991
Roxanne B. Conlin	1992
Joe Stamper	1993
William Steele Sessions	1994
Lord William of Mostyn QC	1995
Ambassador Sol M. Linowitz	1996
Warren B. Lightfoot	1997

The Chester Bedell Memorial Lecture on "The Independence of the American Lawyer" is an annual event at the Trial Lawyers' Section luncheon meeting at the Convention of The Florida Bar. The Bedell Foundation, which receives tax-deductible contributions for support of the Lecture, was created by the Jacksonville Bar Association in 1981 to help preserve the independent bar and to extend that sense of history, duty and destiny that Bedell exemplified in more than 50 years of practice in the courtrooms of Florida.