

**The Thirty Second Annual
Chester Bedell Memorial Lecture**

"THE INDEPENDENCE OF THE AMERICAN LAWYER"

*Presented to The Florida Bar
By
The Chester Bedell Memorial Foundation
in cooperation with
The Trial Lawyers and Criminal Law Sections*

Boca Raton Hotel & Club
Boca Raton, Florida
June 23, 2017

JUDGE ROSEMARY BARKETT
The Hague, Netherlands

The Honorable Rosemary Barkett

Rosemary Barkett joined the Iren-United States Claims Tribunal in The Hague in October 2013. Immediately prior to joining this Tribunal, Judge Barkett served as one of twelve active judges on the United States Court of Appeals for the Eleventh Circuit to which she was nominated by President William J. Clinton and received her appointment in 1994. While serving on the 11th Circuit, she authored several landmark opinions in the areas of constitutional law, sexual harassment, disability rights, labor rights, privacy rights, rights of speech and association, and immigration. Judge Barkett's service on the judiciary began in 1979 when Florida's governor appointed her as a state trial court judge, later in 1984 elevated her to serve as a state appellate court judge, and then in 1985 appointed her to the Florida Supreme Court, making first the first woman Justice in the Florida Supreme Court's history. On July 1, 1992, her colleagues chose her to become Florida's first woman Chief Justice.

Judge Barkett has pursued her interest in education as well as in jurisprudence off the bench, serving on the faculty of Florida's Judicial College, the National Judicial College, The Institute of Judicial Administration's New Appellate Judge Seminar, the Aspen Institute's Justice and Society Seminars and various other Appellate Judges Seminars and law courses. She has taught seminars on Constitutionalism and Human Rights and Comparative Constitutions at Columbia Law School with Professor Louis Henkin. In addition, she has lectured in Kuwait, Dubai, Qatar, Damascus, Turkey, Algeria, China, Haiti, Khyrgystan Mexico, Russia, Egypt, Tunisia and Morocco on various substantive and procedural topics as well as on matters pertaining to court administration. She presently serves on the Board of the ABA's Rule of Law Initiative and chairs its Committee on the Middle East and North Africa Division.

Judge Barkett has received dozens of honors and awards for her work as a judge and as an individual committed to improving justice. The recipient of seven honorary degrees from institutions of higher learning, Judge Barkett has also earned dozens of prestigious honors and awards from national and state professional, civic and charitable groups, including being named by Florida's Eleventh Judicial Circuit historical Society as a 2008 Legal Legend. She has also received *The Margaret Brent Women Lawyers of Achievement Award*, presented by the ABA Commission on Women in the Profession, and the *Latin Business and Professional Women Lifetime Achievement Award*, in addition to being inducted into the Florida Women's Hall of Fame. She is a member of the International Women's Forum, and the American Society of International Law, where she serves on the Judicial Outreach Program Advisory Board. She was also the *National Association of Women Judges Honoree of the Year in 1999*. Two awards are given in Judge Barkett's name annually - the Rosemary Barkett Outstanding Achievement Award given to an outstanding lawyer by the Florida Association of Women Lawyers and The Rosemary Barkett Award presented by the Academy of Florida Trial Lawyers to a person who has demonstrated outstanding commitment to equal justice under law. She has also been honored by the naming of the "Rosemanry Barkett Inn of Appellate Law" in Miami, Florida.

INTRODUCTION

MR. PILLANS: The Chester Bedell Foundation was created to honor the legacy of Chester Bedell. He was born in 1904, admitted to practice in 1924, when he was 20. He went to law school for a brief time, but was admitted to the Bar without having obtained a law degree. He passed away in 1981, but for more than 50 years, he had a special presence throughout the courts of the State of Florida.

I had the privilege in the late '60s and early '70s to be his associate and junior partner and it's said of him -- and I can say it's truly accurate -- he was self-effacing, very soft spoken, always courteous. I never heard him raise his voice in the courtroom or in the office. And you could always rely on what he said, no matter whether it helped or hurt, and judges, juries, and other lawyers always knew that he spoke what he truly believed.

It was such that the American Bar Foundation in 1977 gave him an award naming him the lawyer who had practiced for more than 50 years who epitomized the very best of the American trial lawyer.

Today we're here, the 32nd lecture in the series sponsored by the Foundation the overriding theme of which has been the independence of the American lawyer. That's a broad topic and many of our speakers have taken very different approaches.

I'm told by our present lecturer that she's going to be saying something a little different. So we can all look forward to that. It's someone who probably needs no introduction, and I'll try to be brief.

Unusual background. It's Judge or Justice Barkett, who for ten years served as a nun with the Sisters of St. Joseph, then went to law school at the University of Florida, and became a very stellar and top-rated trial lawyer.

She was appointed to the circuit bench in Palm Beach County, Florida, and served as chief judge of that circuit. She served on the Fourth District Court of Appeal, and then she was the first woman to be appointed to the Florida Supreme Court and she was the first woman Chief Justice.

I know we have maybe the second, could it be?

JUSTICE PARIENTE: Only the second.

MR. PILLANS: Only the second.

JUSTICE PARIENTE: And third here.

MR. PILLANS: And third.

JUSTICE PARIENTE: Second and third.

MR. PILLANS: And they are very special guests that wanted to come and help us honor Justice Barkett.

Judge Barkett then went on to the 11th Circuit Court of Appeals. And today, although I'm not quite clear what the tribunal does, she now is in The Hague and sits on them Iranian - United States Claims Tribunal.

She has had so many honors and awards that it would take up most of the rest of the afternoon for me to go through them. They're listed in your program in great detail. And if you have any doubt of her accomplishments, please review that.

As I mentioned, Chester Bedell felt it very important that we talk about the independence of the American lawyer. And there is no one better suited to do that than Judge Barkett.

I note that in 1992, along with Justice Kogan, she fought for a mandatory pro bono obligation by all lawyers. And when she did that, she said, and I quote almost verbatim, "It's only when the most influential members of our society" -- and I think she was referring to lawyers like those of us here in the room today -- "truly understand the legal problems of most Floridians, that meaningful solutions will assure access to the courts without which there will never be equal justice."

That's what she believed then and I know it's what she believes now. And it's my great honor to call on Rosemary Barkett to present the 32nd Lecture.

JUDGE BARKETT: Thank you. Thank you. Thank you very much.

The Independence of the American Lawyer

June 23, 2017

Rosemary Barkett

Even though this lecture has been given since 1986, and others have lauded Chester Bedell each year for some 30 plus years—including those who actually knew and practiced with him—I am not going to skip the opportunity to do so once more.

His legal ability and integrity are well documented. He has been called the "quintessential trial lawyer" and "a lawyer's lawyer" by his peers.

But one of the most remarkable measures of his greatness is that he has inspired members of one of the greatest Bars in the world to stop for a few minutes every year to think about what is meant by that phrase: "the independence of the American lawyer."

Out of all the tributes he received, I think Chester Bedell would have been most proud to know that he had moved us to talk about the issues raised in the lectures of the past.

Those lectures all express the common thought that in preparing for it, lecture, each speaker has been forced to contemplate the meaning of that phrase.

Some spoke of the need for lawyers to be independent from the power of governmental influence, or the institutional public, or from the influence of clients who push for unethical conduct.

Some spoke about the need to develop and maintain access to courts; others, about defending the poor and the need for a brave and independent judiciary in addition to independent lawyers.

Several quoted Louis Brandeis' concern that too many lawyers were

simply tools of great corporations and neglected to use their powers for the protection of the people.

Sandy D'Alemberte warned about the unbridled discretion of prosecutors and the uselessness of mandatory prison terms which achieved astronomical costs but never the goals they sought to accomplish.

Judge Perry talked about the flaws in our criminal justice system when he noted 292 post-conviction DNA exonerations while he served on the Innocence Project.

Two years ago, when I was asked to give this lecture, almost every one of these topics came to mind, and I do think that we must continually reflect on the progress made—or not—on each of these issues as we seek to achieve a more “just” society and a “more perfect union.”

But, perhaps, because of who I am and because of the time in which we now live, my focus landed on the fifth word of the topic of this annual speech: The Independence of the *American* Lawyer and what it means to be an independent *American* Lawyer in our constitutional democracy. And I especially thought about what I thought it meant to me—a Syrian, Mexican immigrant.

I was born in Mexico of Syrian parents. My family came to Miami when I was six, and I grew up in a time and place where immigrants were proud to be immigrants and extremely proud to have become Americans.

Then as a lawyer and a judge, studying the Declaration of Independence and our Bill of Rights and applying them to actually enforce the principles upon which this country was founded made me even prouder to be part of this great experiment in government—a

government that was built by immigrants, for the remarkable and actually expressed purposes of “establish[ing] justice” and securing the “blessings of Liberty to ourselves and our Posterity.”¹

From the time of our revolution in 1776 to the present — well, the almost present — we have continuously and publicly recognized that we are, uniquely, a land of immigrants and refugees dedicated to welcoming those from different nations, creeds, and cultures and protecting their rights to life, liberty, justice, and equality. George Washington said in 1776:

“The bosom of America is open to receive not only the Opulent and respected Stranger, but the oppressed and persecuted of all Nations and Religions; whom we shall welcome to a participation of all our rights and privileges...”

One hundred years later, the poem of Emma Lazarus’ inscribed on the Statue of Liberty remarkably echoes George Washington’s words promising a “world-wide welcome” to the tired, the poor, and the masses who were seeking to “breathe free.”

President Lyndon Johnson noted:

“Our beautiful America was built by a nation of strangers ... The land flourished because it was fed from so many sources — because it was nourished by so many cultures and traditions and peoples.”

George W. Bush articulated the same thought when he said:

“Nearly all Americans have ancestors who braved the oceans—liberty-loving risk takers in search of an ideal — the largest voluntary migrations in recorded history. . . .

¹ U.S. Const. pmbl.

Immigration is not just a link to America's past; it's also a bridge to America's future."

Today, our obligation to care for immigrants and refugees derives from much more than just tradition. In 1968, we signed the 1967 Protocol to the United Nations Convention Relating to the Status of Refugees,² which was developed to assure that a country cannot expel or return a "refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, political opinion, or his membership in a particular social group."³

And then in 1980 Congress gave effect to this treaty and the international legal obligations we assumed by passing the Refugee Act.⁴ Thus, pursuant to our laws a person has the legal right under both international law and our domestic statutes to ask for asylum and to receive due process protections to effectuate that right.

The United States also ratified the United Nations Convention Against Torture⁵ which prohibits any country from returning, extraditing, or repatriating any person to a state "where there are substantial grounds for believing that he would be in danger of being subjected to torture."⁶

Thus, we have passed laws and signed Treaties, which our Constitution defines as part of the Law of the Land,⁷ enshrining our original ideals into law to welcome "the poor", the "homeless," and the persecuted.

² UN Protocol Relating to the Status of Refugees, 31 January 1967, 606 U.N.T.S.267.

³ Id. at art. 33.

⁴ Refugee Act of 1980. Pub. L. 96-212. 94 Stat. 102. 17 March 1980

⁵ UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 December 1984, 1465 U.N.T.S. 85.

⁶ Id. at art. 3. 7 U.S. CONST. art III, § 2.

⁷ U.S. Const. art III, § 2.

Which brings me back to the concept of being independent, American, and a lawyer—especially one who was welcomed into this country in the historic spirit of the ideals of our Founding Fathers.

Senator John McCain recently captured the essence of our international role as Americans and America in an Open Letter titled "Why We Must Support Human Rights".⁸ He said:

In the real world, . . . the demand for human rights and dignity, the longing for liberty and justice... the hatred of oppression and corruption ... is reality...

We are a country with a conscience. We have long believed moral concerns must be an essential part of our foreign policy, not a departure from it. . . .

Our values are our strength and greatest treasure. We are distinguished from other countries because we are not made from a land or tribe or particular race or creed, but from an ideal that liberty is the inalienable right of mankind and in accord with nature and nature's Creator.

Senator McCain's eloquence reflects how I have always felt as an American. But, having ideals does not blind us to the fact that we are also human and, thus, we know that upholding ideals is never easy.

No matter how good we are or try to be, history shows that we will be tempted to ignore our fundamental principles and our laws, or to bypass the ideals we may sometimes think are too hard to observe, especially in the name of public safety. It is the continuing effort to acknowledge and correct mistakes that makes a person or a country great. Our continuing effort to rectify errors can be seen throughout our history in examples

⁸ John McCain, *Why We Must Support Human Rights*, N.Y. TIMES, May 8, 2017, at A21.

of great legal achievements that occurred, but only after astronomical failures. For example, *Brown v. Board of Education*⁹ was preceded first, by three abhorrent decisions: First, *Dred Scott v. Sandford*,¹⁰ in which the then Chief Justice declared that all blacks—slaves as well as free—were not and could never become citizens of the United States; Second, *The Civil Rights Cases*,¹¹ striking down the Civil Rights Act of 1875 and permitting racial discrimination in businesses and public accommodations, even after the 13th 14th and 15th Amendments were passed; and, finally, *Plessy v. Ferguson*,¹² upholding state segregation and leading to decades of Jim Crow laws.

I could add the history of the lengthy failure to grant women human rights—including the right to be free from gender violence as well as several other examples of failures in other areas throughout our history.

We were not great when we made and/or supported those positions. But our history also tells us that when we have erred, we have worked hard to correct the error.

And we have become a greater country, *not* because we have succeeded in achieving our goals of equality and justice—which we obviously have not yet done. We achieve greatness when we do not discard the ideals of our Founders after every failure, but rather continue to cherish those ideals, recognizing our shortcomings, and working harder to achieve the justice and equality we have sought from our very beginnings.

Thus, we look to our history, as well as to our future, not only to remember and renew the ideals of our Forefathers, but also to avoid the

⁹ 347 U.S. 483 (1954).

¹⁰ 60 U.S. 393 (1856).

¹¹ 109 U.S. 3 (1883).

¹² 163 U.S. 537 (1896).

mistakes of the past. And today, my focus is on working to assure that our immigration and refugee policies reflect our values, ideals, and legal obligations and not reflect the lapses that have sometimes occurred in the past.

We have, for example, previously precluded entry to the United States based only upon fear and racism. For the first 100 years of our history we had open immigration. Then, in 1882, Congress passed the Chinese Exclusion Act,¹³ the very first restriction on immigration into the United States, which prohibited the immigration of all Chinese persons. The Act was supported and advanced by entities like the “Supreme Order of Caucasians,” whose primary focus was to evict the Chinese from the United States for no other reason than that they were Chinese. And the Act passed—notwithstanding the efforts of the anti-slavery/ Republican Senator George Hoar who described the Act as “nothing less than the legalization of racial discrimination.”¹⁴ It took until 1943 for the Chinese Exclusion Act to be finally repealed.¹⁵

There were other periodic attempts to use immigration laws to implement racism and bigotry. For example, the Emergency Quota Act of 1921¹⁶ and the Immigration Quota Act of 1924¹⁷ restricted immigration by implementing quotas based on national origin. These laws aimed to reduce immigration from outside the Western Hemisphere, specifically targeting those from Southern and Eastern Europe, especially Italians and Eastern European Jews, and virtually closing the border to anyone

¹³ An act to execute certain treaty stipulations relating to Chinese, Pub.L. 47-126, 22 Stat. 58 (1882) (repealed 1943)

¹⁴ Roger Daniels, *COMING TO AMERICA: A HISTORY OF IMMIGRATION AND ETHNICITY IN AMERICAN LIFE* 271 (2002).

¹⁵ The Magnuson Act (An Act to repeal the Chinese Exclusion Act, to establish quotas, and for other purposes), Pub.L. 78-199; 57 Stat. 600 (1943).

¹⁶ Emergency Quota Act of 1921, Pub.L. 67-5, 42 Stat. 5 (repealed 1965)

¹⁷ Immigration Act of 1924, Pub.L. 68-139, 43 Stat. 153, 154-55 (repealed 1965)

from Africa and Asia.¹⁸

The caps imposed by these Acts were the legal basis the United States cited in 1939 to reject the ship carrying approximately 900 mostly Jewish refugees, fleeing Nazi Germany and begging for asylum in Miami, Florida.¹⁹ These Acts too were later repealed, but not in time to assist those refugees. When repealing the quota systems some forty-years later,²⁰ Lyndon Johnson recognized we had gone too far, saying “for over four decades the immigration policy of the United States has been twisted and has been distorted by the harsh injustice of the national origins quota system under which families were kept apart”²¹

And I can think of no clearer consequence of the abandonment of values and ideals than our appalling seizure and captivity of Japanese Americans and immigrants during World War II. The Supreme Court’s decision in *Korematsu v. United States*²² baselessly upheld the authority of the Government to imprison people arbitrarily and indefinitely solely on the basis of national origin. It took us until 1988, with the passage of the Civil Liberties Act,²³ to formally recognize that the internment was

¹⁸ See John A. Scanlan, *Immigration Law and the Illusion of Numerical Control*, 36 U. MIAMI L. REV. 819, 823–26 (1983).

¹⁹ See *Voyage of the St. Louis*, UNITED STATES HOLOCAUST MEMORIAL MUSEUM, <https://www.ushmm.org/wlc/en/article.php?ModuleId=10005267> (last visited May 15, 2017). In May 1939, approximately 930 refugees, most of them Jewish, boarded the St. Louis in Hamburg, Germany to escape Nazi persecution. The refugees had applied for American visas and planned to stay in Cuba until the visas were approved. However, Cuba permitted only about 30 passengers to disembark and enter. The St. Louis then continued to the Florida coast requesting entry for the refugees. After being denied entry in Florida, the St. Louis continued to the Eastern coast of Canada, which likewise denied entry to all of the refugees on board. The refugees were finally returned to Europe and accepted by Belgium, the Netherlands, the United Kingdom, and France. During the Holocaust, approximately 250 of the refugees that had returned to continental Europe were killed.

²⁰ Immigration and Nationality Act of 1965, Pub.L. 89-236, 79 Stat. 911 (1968).

²¹ President Lyndon B. Johnson, *Remarks at the Signing of the Immigration Bill* (Oct. 3, 1965).

²² 323 U.S. 214 (1944).

²³ Civil Liberties Act of 1988, Pub.L. 100-383, 102 Stat. 904

meritless and based solely on “race prejudice, war hysteria, and a failure of political leadership.”²⁴

And now, although our own historical values coincide with our treaty commitments to grant asylum and to provide refuge to those who fear persecution or discrimination or death in their own countries, we are not meeting our obligations in either regard.

Today, many asylum seekers are subjected to expedited removal or are indefinitely detained, effectively depriving them of their due process rights. Others are not even given the chance to request asylum in our country.

And the problem of accepting and housing refugees has generated a worldwide crisis which cannot be ignored, simply because it may not be in our direct line of vision here in the United States. The magnitude of the problem for refugees fleeing death and terrifying conditions in war-torn countries or dangerous in other ways, cannot possibly be exaggerated. Nor do I minimize the problems faced by countries attempting to balance liberty, justice and equality with the safety of their citizens.

In Lebanon, one in four people are refugees, the highest ratio in the world. Lebanon’s infrastructure, barely adequate before the refugee crisis, is overwhelmed with the tremendous and unexpected influx of massive numbers of refugees. The biggest burden of the influx of refugees is being borne by the countries least able to assist them. And on the other hand, countries with the greatest excess of wealth are hardly doing enough—or are impeding refugees and asylum seekers from finding the sanctuary to which they are entitled. I wish I had the time

²⁴ Commission on Wartime Relocation and Internment of Civilians, *PERSONAL JUSTICE DENIED: REPORT OF THE COMMISSION ON WARTIME RELOCATION AND INTERNMENT OF CIVILIANS*. (Tetsuden Kashima and United States, 2011).

to paint a clear picture, for example, of the thousands and thousands of children, who have crossed alone into the United States, many of whom are entitled to asylum or refugee status, but are completely precluded from or cannot maneuver through the complex system we have established in order to obtain the legal remedies to which they may very well be entitled.

As lawyers, we have a distinctive vantage point and opportunity. We can combine our historical appreciation for inherently vulnerable classes, our unique knowledge of law, and our access to the fora of legal change to raise these issues and fight for them and/or support those who do.

I know many here are neither uninformed nor inactive, and I applaud you for your example and your pro-bono efforts and the example and efforts of scores of lawyers and their supporters who recently volunteered, collectively, hundreds of hours at airports assuring the due process rights of those entering the country.

As an American, immigration and the treatment of immigrants is a topic that is very meaningful to me. As a Mexican and Syrian immigrant, the face of two of the Peoples that have been recently maligned and defamed, it is even more meaningful to me. I hope that I, and my family, can serve as a reminder that being Mexican or Syrian or a member of any religion, does not automatically make one a terrorist or a threat to any country—and that Mexicans, Syrians, or members of any other ethnicity can become extremely good citizens of any adopted country.

Let me end the way John McCain ended his Open Letter saying:

To view foreign policy as simply transactional is more dangerous than its proponents realize. Depriving the oppressed of a beacon of

hope could lose us the world we have built and thrived in. It could cost our reputation in history as the nation distinct from all others in our achievements, our identity and our enduring influence on mankind. Our values are central to all three.²⁵

I have loved the identity and reputation this country has held throughout the years—not because of our “might”—but because we were created to establish justice and were made “from an ideal that liberty is the inalienable right of mankind.”

We have promised in many ways to assure that liberty to those who face persecution, torture or death in their countries.

I think we should keep our promises.

Thank You.

²⁵ John McCain, *Why We Must Support Human Rights*, N.Y. TIMES, May 8, 2017, at A21. This sentiment echoes Dean Acheson’s speech in 1951 wherein he likewise eloquently concludes... “The greatest asset we have in all the world—even greater than our material power—is the American idea. No one needs to tell an American audience all the things that this holds for us. It is so much a part of our everyday lives that we do not stop to define it, or to put it into packages for export. But throughout the world, wherever people are oppressed, wherever people dream of freedom and opportunity, they feel the inspiration of the American idea.”

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
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Lord William of Mostyn QC.....	1995
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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