

## Hon. Mary Murphy Schroeder

By  
Jon M. Sands

The bench had great sight lines. But it wasn't the court bench where she usually sat, it was at a stadium. It was in the late innings at a spring training game in Phoenix, and her Cubs were coming to bat. The March sun was warm. She drank a soda, ate a hotdog with relish, and grinned a wicked grin: it was going to be a good year for the team. Mary Murphy Schroeder, a judge on the U.S. Court of Appeals for the Ninth Circuit and ardent baseball fan, was happy.

"Harry would've been pleased," she said. Most anyone else would have thought she meant the late Chicago sportscaster. That would be a case of mistaken identity. The "Harry" the judge referred to was Professor Harry Kalven, who taught at the University of Chicago Law School and who rooted for the Cubs. "Kalven," as the judge explained, "taught the first year class in torts." "His constant references to the Cubs," she further explained, "made them seem like they were parties to every case." Judge Schroeder left the impression that, to Kalven, *Palsgraf* really took place at Wrigley Field and that Cardoza struck out Andrews to record the win. The judge honors Kalven's memory by having an annual spring training outing to a Cubs game.

This ritual outing has been going on for some time, ever since she came to Phoenix, moving from being a government lawyer to private practice; from the state court of appeals to the Ninth Circuit; and she'll continue to come even when she becomes the chief judge, which is slated to happen soon. Once a Cubs fan, always a Cubs fan.

The judge became a Cubs fan at an early age. Although born in Colorado, her professorial parents soon moved to the University of Illinois at Urbana. Her father taught rhetoric and parliamentary procedure (he had that thankless task of being the parliamentarian at the infamous Democratic Convention in Chicago in 1968) and her mother had been a debate coach. She graduated from Swarthmore and the University of Chicago Law School, where she continues to be actively involved, serving on the Board of Visitors.

Soon after the game, the judge was back in her chambers at the U.S. courthouse. As you enter, you notice a single hanging photograph. It is black-and-white. The background has sharp edged grey mountains. In the foreground center is a white obelisk with Japanese characters. The photograph is of a monument to a Japanese interment camp site. It is bleak and haunting.

In 1943, the Supreme Court sanctioned the constitutionality of the regulations excluding all persons of Japanese

ancestry from the West Coast and moving them into concentration camps. The case involved Gordon Hirabayashi. Over half a century later, it was Judge Schroeder's honor to grant redress in a case involving the same litigant. In seeking to erase the conviction through a writ of error, Hirabayashi pointed to evidence that the government had suppressed concerning the actuality of threats or danger. In vacating Hirabayashi's conviction, Judge Schroeder found not only error, but prejudice, writing that "the orders were based upon racial stereotypes, and that the orders caused needless suffering and shame for thousands of American citizens."

The photograph hangs on the wall as a reminder of the prejudices and passions that can afflict courts. It also is a reminder of the need to do justice. Over the years since this opinion, the one of which the judge is most proud, Gordon Hirabayashi became a symbol and spokesperson for the remembrance of the Japanese interment. In 1998, he gave a talk in Phoenix. After he recounted his experience with the courts, Hirabayashi ended his talk by reading a letter that was sent to him by a young student at Brown University several years ago. In the letter, the student wrote that she was extremely disappointed that she could not attend a lecture he was giving due to a prior commitment she had to keep. The student then recounted that when she was a young girl, her mother told her that she was about to make a most important decision in her life and went on to explain the case to her. The important decision that her mother was about to make was the Hirabayashi case. The student's mother was Judge Schroeder.

Judge Schroeder, who was in the audience, was unaware of the letter. Ten years after the decision, the judge finally had an opportunity to meet Gordon Hirabayashi. It was a heartfelt moment.

The next day the judge is off to San Francisco. It is a trip she makes often and can recite the various flight times from memory and necessity. San Francisco is the seat of the Ninth Circuit and Judge Schroeder sits on appellate panels there as well as numerous committees. Judge Schroeder, who has served for nearly 20 years (she was confirmed in 1979), will soon be chief judge. She bristles when asked whether it will be of the Ninth Circuit or a new circuit if there is a split. She is a diehard advocate for maintaining the Ninth Circuit intact.

"Keeping the circuit together," explains Judge Schroeder, "is good for the administration of justice." She has expressed her views to the commission studying alternatives to structuring the federal courts of appeals (*i.e.*, the problem of the Ninth) and has argued long and hard with those advocating a division. The judge sees little to be gained with a split, while much to lose, notably a uniform application of federal law over the western United States. The judge points to the benefits of electronic networks and

computers in knitting the large circuit tightly together.

Over the 20 years the judge has sat on the Ninth Circuit, she has witnessed waves of issues rise, break, ebb, all while new ones began to mount. At times it may seem like a deluge, but it is the constant change that she loves. From the vantage point of the Ninth Circuit, she notes that long decline in the number of civil appeals from trials. When civil appellate issues arise, it is usually from summary judgments or orders. Taking their place, and flooding the court, are criminal appeals. The federalization of crime has seen a steady rise in appeal, and the advent of the federal sentencing guidelines have led to a significant increase. It seems to her that almost a quarter of the criminal appeals



involve sentencing issues. There is, she acknowledged, no end in sight. It becomes the challenge of the circuit to continue to afford each appeal justice and due consideration.

The increase in the federal workload, both at the trial court and appellate level, has led to an increasing institutionalization of the appellate process. This is inevitable and is occurring among all circuits. Judge Schroeder feels strongly that an opinion should be reflective of a distinctive voice. She is one of the remaining judges who can fairly recite the line of Justice Brandeis, "We do our own work." Partly because of her taste and her own deep involvement in the process of judging, she drafts her own opinions. The drafts over the years have gone from banging out roughs on manual typewriters, to dictated first versions, and now to word processors. Nonetheless, however they are written, the voice is Judge Schroeder's.

You can be sure it is Judge Schroeder's because the opinions are read out loud before they go final. This reading exposes awkwardness, fuzziness and odd phrases. Paragraph by paragraph, the judge and clerk taking turns, the opinion is given voice. It is a distinctive exercise to promote clarity. The result, as one eminent lawyer comments, is that there are no superfluities of knowledge, no wandering travels through collateral issues; learning and scholarship are where they are needed but not where they would be simple finery. Judge Schroeder remains, always, the shortest distance between two points.

If the judge does drafts, then do her clerks serve as mere researchers? Clerks describe working with the judge as a dialogue, with the first word usually being the judge's but from then the give and take is ongoing. The discussion over the law starts with the draft and continues through

memos, across library tables piled high with books, on car rides to and from courthouses, and on walks (always double time with the judge) to get coffee. Working with the judge, her clerks agree, is learning the art of the law. In writing opinions, clerks get to see her ardor, intellectual toughness and her empathy with the fragility of people (remember, she is a Cubs fan). Most of all, her clerks, whom she regards as her extended family, bear witness to her indignation at injustice. Very few people, as one clerk noted, are so extraordinary that you are sure your own life would have been quite different without them. The judge is one such person.

Under her tutelage, the judge's clerks have fanned out to a myriad of careers. Private

practice has the most, but there are also many in public service. Indeed, it is not unusual to have two of the judge's ex-clerks arguing an appeal, one from the U.S. attorney's office and one from the public defender's. Others clerks have ventured into business. All remain part of the extended family. None that I know have yet been able to address the judge by any title other than "judge" despite her pleadings.

The judge's immediate family includes her husband and fellow law school classmate, Milton Schroeder, whose decision to take a faculty position at the Arizona State University College of Law brought the judge to Phoenix, and her daughters, Carrie, who is a graduate student in religious studies at Duke, and Kate, who is a music major at ASU. There is also Hershey, the springer spaniel that appeared 13 years ago when the judge was on a calendar and has stayed ever since.

Back in the judge's chambers, clerk applications for next year are already piling up. Half, if not more, of the applicants are women. This has been quite a change since the judge went to law school. At the University of Chicago in 1965, out of a class of 160, there were five women. Judge Schroeder in this, as in many areas, was a trailblazer. She graduated and went to the civil division of the Department of Justice. There she established a 20-win streak. When she and her husband moved to Phoenix so he could teach, she clerked for a state supreme court justice who, in giving her his portrait at the end of the year, wrote that she was destined to become the best "woman lawyer" in the state. She was hired by a major Phoenix firm, Lewis & Roca, when

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esting bi-monthly newsletter on electronic media and discovery.)

The *Chicago Tribune* article emphasized that many employers and employees do not realize that their company's main server will make routine backups of all files on a daily basis and then archive these "snapshots," permitting recovery months or even years later by what the article called "computer snoops."

In addition to considering the purchase of software, companies also should adopt electronic-document retention policies that take into account the various types of files lodged on their server. Of course, not all documents should be subject to the same destruction cycle. Though potentially relevant documents cannot be destroyed once litigation has begun, it is permissible to design a program to purge e-mail periodically, as a routine business practice. E-mail is a good candidate for early destruction since so much of it is transitory. It is also a good candidate because, unlike letters and formal memos that tend to elicit

greater consideration, many e-mail messages are the result of a whim. Messages written as the result of a whim are more likely to haunt the writer, or the writer's employer.

The *New York Times* article alluded to earlier in this column reported that employees at Seattle-based Amazon.com, the online bookstore, were recently welcomed to an event called "Sweep and Keep" that rewarded them with lattes (yes, Seattle is the home of Starbucks Coffee, too) for immediate compliance with a directive that called for purging e-mail messages that were unnecessary for legal reasons or business purposes.

As this column has previously urged, employers should have written policies informing employees that they should not expect privacy on the company's e-mail system, that messages they think they are deleting may still be retrieved, and that e-mail messages must be neither abusive nor defamatory and can be neither sexually offensive nor obscene. The American Management Association has reported in

its latest annual survey that 20 percent of their respondents indicated that they monitored employee e-mail, up from 15 percent a year earlier.

The *Times* reported in the Microsoft case that, "E-mail has emerged as the star witness — a fact that appears to be giving pause to executives accustomed to clicking 'send' without a second thought."

A second thought is clearly warranted, and perhaps a third. When the heavy thinking is over, the best advice for both employers and employees will almost certainly be the terse, common sense last line of Zawinski's surviving personal web page. "Perhaps it is best to just never say anything that you wouldn't want published." Lesson learned. ■

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## ■ Profile (cont. from page 19)

major firms simply did not hire women, and she went into construction/employment litigation, an area where she was frequently the sole woman practitioner in the field west of the Mississippi. As a tribute to her, when she went on the state court of appeals bench, she received the unusual tribute from the head of the state AFL-CIO, who gave her a legal dictionary inscribed: "To Mary Schroeder as she goes to the Court of Appeals: an employer's lawyer, she has always been fair to labor." When she was confirmed to the Ninth Circuit, she was the youngest judge at that time.

The rumors are that the judge is incapable of saying "no" to any committee assignment or moot court request. This is understandable given her long involvement in the community and

her engagement on national and state issues. In practice, she was the chair to draft and enact the State of Arizona Civil Rights Act. As an active leader in the National Association of Women Judges (NAWJ), she was instrumental in moderating the differences between the supporters of the Violence Against Women Act of 1994 and was a resource as to how it would affect judicial administration. She will serve as the president for 1998-99.

When it comes to the FBA, the judge has long been an active member. Her view of it as the bar for federal practitioners is one she espouses to both the bar and to the bench. She is a frequent speaker at the Phoenix chapter's luncheons and is active in the mounting of the annual seminar.

It is said that at the testimonial dinner for Bill Clem, a famous major

league umpire, a speaker rose to praise Clem by saying, "He always calls them the way he sees them." At this, a second speaker rose to disagree. "No, he always calls them the way they are." Clem then got up and replied, "You're both wrong. Until I call 'em, they ain't nothing." The same is true with the judge. Whether on the judicial bench or baseball bench, Judge Schroeder's keen eye always follows the ball. ■

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