

MARY SCHROEDER AND HER CIRCUIT

Matters of Opinion

Judge Mary Schroeder has a habit of making history.

She was one of only six women in her law school class. She chaired the committee that wrote and secured passage of Arizona's first civil rights law.

It was her 1987 decision that found the World War II internment of Japanese Americans unconstitutional. And in 2000, she became the first woman chief judge of the nation's largest judicial circuit.

ARIZONA ATTORNEY: Thank you for letting us catch up with you and with the Ninth Circuit generally.

Let me start where our readers would want me to start: Of all the statements that have most occupied your time of late is the one that begins "I pledge allegiance to the flag."

Have you heard from the public on the Pledge of Allegiance case [*Newdow v. U.S. Congress*, finding the Pledge unconstitutional], and what kind of reaction have you gotten?

Judge Mary Schroeder: I have received a lot of letters that have mainly been form letters and telegrams. Some of them are quite impassioned statements, some opposing the decision, some are quite impassioned statements in favor of the decision.

I was not on the panel when our court declined to hear the case en banc. The majority of the judges felt that the Supreme Court needed to take a look at the case, and some of the justices on the Supreme Court indicated that they would take a serious look at it. And I think that's where it ultimately does belong.

AZAT: The decision not to review en banc was a complex one? (see sidebar on p. 16)

Schroeder: That's right. There are a lot of reasons that judges will not vote to take a case en banc. It may be that the judge agrees with the decision; it may be that the judge believes that the

on the record



Supreme Court should look at the issue, because our court en banc can overrule our own precedent, but the Supreme Court precedent would still be there.

Sometimes judges decide not to take a case en banc because they think in the overall scheme of things, it's not really a very important case. I don't think that was a large reason in the minds of many of our judges. A number of them did dissent from the refusal to take the case en banc on the grounds that however you felt about the case, it was an important case and our court should take it en banc for that reason.

AZAT: I suppose you don't want to handicap the case?

Schroeder: No way. Besides, cases have a way of changing. Frequently new counsel are brought in, they take a whole new look at the case, and they analyze the legal issues differently.

AZAT: How often do the court of appeals judges in the Circuit interact?

Schroeder: We have lots of interaction with the judges. We send frequent e-mails on various matters ranging from whether to take a case en banc to whether or not to have a holiday dinner to where we should have our next retreat.

I believe very much that judges should get together to discuss things other than the case under submission. I think our court





has had a tradition of a court retreat where we get together with our spouses for two or three days. We never take notes; we just talk about issues that are troubling us generally. Two of the newer judges on the court chair that; we reexamine how we do things from time to time, which I think is extremely important.

AZAT: Why have the newer judges chair that?

Schroeder: Because they provide a new perspective. They are seeing this for the first time. They may question why we do things a certain way, they bring their own experience to bear. It gives us a chance to get to know them a little better and their background, their strengths and weaknesses. That is very important on a collegial court. It's very important as Chief Judge, because I'm going to have to ask those people to do things when they need to be done. I need to know who is good at certain things, and who has certain skills, who has contacts with the academic community, for example, with Congress, with the bar leadership.

AZAT: It's now old hat to you to have controversial cases, but do you have to train yourself to remain collegial with fellow judges with whom you may strongly disagree on cases?

Schroeder: I've been quite proud that, with few exceptions, we have stayed away from the kind of harsh rhetoric that is sometimes used in some courts on occasion that I think sets a bad tone, a bad example. I think we've been fortunate and very disciplined in staying away from that and in dealing

with the views of our colleagues with which we disagree as views with which we disagree and not people we dislike.

AZAT: Has the panel system helped?

Schroeder: Absolutely. The system of different panels and of sitting with all the judges certainly helps a great deal. Our cases are so varied, and we actually disagree on a very, very tiny percentage of our cases. We offer published opinions in only about 20 percent, if that, and of those, 80 percent are affirmances.

AZAT: You are not a court of last resort, one on which you sit on the same unchanging panel; has that been an aid?

Schroeder: The fact that we're not a court of last resort helps with the collegiality to a certain extent, although a number of federal circuit courts are known for their history of not being collegial. In one court for many years [for example], some of the judges would not speak to each other. They were a very small court, and all in the same building.

The effort we make to sit on different

panels and to have a random drawing so that no one has the chance to "fix" a panel, there is no certainty in the result of our en bancs either.

AZAT: Last year, you instituted a confidential counseling service for the judges. What has the judges' response been?

Schroeder: I think that having a counselor has greatly increased judges' sensitivity to the fact that they are human beings and that sometimes they have to go ask for advice. Now, the judges have not yet routinely called the counselor for advice, but they are much more likely to call me or the chair of our wellness committee, or go to their district judge and talk over problems than I think they were five years ago. And I think that's all to the good.

AZAT: How would you describe the stresses that come with the job?

Schroeder: I think the greatest stress is the isolation. We all come from busy lives where the phone rang constantly, where we were very busy talking to people, where we met with lawyers and clients all the time. You become an appellate judge and the phone never rings. You become a district court [trial] judge, and you are the only one in that courtroom who gets to decide, and you have to do it by yourself. You have no peers to do it with you in the way that you had in a law firm.

A related stress is that you have to leave a lot of activities that you may have engaged in before: fund-raising activities, charity events, political work. So you have to channel your activities in different directions.

AZAT: And the workload?

Schroeder: There is a growing caseload, par-

BIOGRAPHY

Mary M. Schroeder

Chief Judge, Ninth Circuit Court of Appeals

EDUCATION

BA, Swarthmore, 1962; JD, University of Chicago, 1965

CLERKSHIP

With Justice Jesse Udall, Arizona Supreme Court

LAW EXPERIENCE

U.S. Department of Justice, 1965-69; Lewis and Roca, 1971-75; Arizona Court of Appeals, 1975-79; 1979-Present, Circuit Judge, Ninth Circuit (Chief Judge since 2000)

FAMILY

Husband, Milton, is a professor at the ASU School of Law; two daughters, one in a postdoctoral program at Ithaca College in Religious History, the other in a music theory graduate program at UC-Santa Barbara.



ticularly in Arizona and California, and Congress has not been as responsive as it should have been in providing the resources to deal with that. We've had very great difficulties in filling vacancies, which has created diminished morale in a number of courts. Sometimes some of the judges have the feeling that nobody cares. That's not a good feeling to have.

AZAT: How do you address it?

Schroeder: It's difficult to address in that it's attributable to congressional inaction. But we're doing what we can to mobilize our judges now that Congress has gotten itself organized.

AZAT: Do you see a worsening view of judges fostered in the media?

Schroeder: We are working very hard to improve our relations with the media. I think that one of the things I have learned

proposals to split the Ninth Circuit?

Schroeder: I think that the driving force behind the two situations where there have been discussions [to split] is the desire of some political interests to want to have a court that can be controlled by those political interests. I think that behind it all is pretty much politics.

AZAT: The Ninth Circuit has been active in community outreach, especially to schools. Why is that important?

Schroeder: We [as a society] are doing a terrible job of teaching children about our history and about our Constitution. The President has appointed David McCullough, the historian, to chair a commission devoted to improving the teaching of civics and history.

AZAT: And you played a role in helping to rectify mistakes of history through your

En Banc Et Al.

- The Ninth Circuit encompasses the Court of Appeals and district, bankruptcy and magistrate courts (350 active judges).
 - The Court of Appeals adjudicates the most cases of all 12 federal circuits. It is authorized to have 28 active judges, and it covers the largest geographic territory—nine states as well as regions in the Pacific Ocean.
- Cases that come to the Court of Appeals go before three-judge panels, with the judges randomly assigned.
 - When the Circuit reviews a panel's decision "en banc," the case goes before 10 of the Court's judges, also randomly assigned, as well as the Chief Judge. For such rehearing to be granted, a majority of the Circuit's active judges must vote for it.

is that the media really wants to have better relationships with the courts, because they want to be able to inform the public about what a case is really about. I think the media wants to understand better how the process works, so we help make ourselves more available to the media, to explain what's happening, perhaps on background, not necessarily on the record. I think this will help everyone.

AZAT: What is your take on the recurring

ruling in *Hirabayashi* [*v. United States*, holding unconstitutional the civil internment of Japanese Americans]. Do you look back on that case with fondness?

Schroeder: Oh, yes, I think so. Very few lawyers and judges ever get the chance to undo a gigantic historic injustice. It was a highlight of my career.

AZAT: We are now at war. Given, as you said, that people have not learned their history very well and that we've witnessed

injustices of our own during wartime, do you fear the effects of nativism?

Schroeder: Oh, always, there's always that danger. Because it's inherent in people to tend to be drawn to people who look just like them. We have to teach about differences and teach about respect. We have to teach about history and how people have suffered.

AZAT: I see that you're reading a recent book by Peter Irons [*Jim Crow's Children: The Broken Promise of the Brown Decision*].

Schroeder: Yes, he did the research that uncovered the documents that showed that the Japanese internment was based on a lie of a threat to security. [This book] is on the legacy of *Brown v. Board of Education*. I think it is that we haven't improved the education very much for minorities despite the ending of lawful segregation.

AZAT: What else do you like to read?

Schroeder: I read history; I'm a great fan of Stephen Ambrose. I read mystery novels, and I do books on tape when I drive in and out. My favorite author on books on tape is Charles Dickens, because he wrote to read aloud.

AZAT: You originally came to Arizona because your husband [Milton Schroeder] got a job as a law professor at ASU. Did you like the move here?

Schroeder: I loved Arizona from the first day that I got here. We spent our first night in Sedona, and I thought I had gone to heaven.

I am a swimmer, and to live someplace where I can swim all year long is wonderful.

AZAT: In *Hirabayashi*, you said that one of the roles of the judiciary is to protect our freedom and civil liberties.

Schroeder: And it's at least as important today. I think that the courage of the judges, for example, in the civil rights cases during the second half of the 20th century has been vindicated. I hope there is a public recognition in the great courage that judges have shown in deciding cases. ▲