PROCEEDINGS OF THE DIRECTORS ROUNDTABLE

HONORING THE JUDICIARY AS A CO-EQUAL BRANCH OF GOVERNMENT:

A DIALOGUE WITH DISTINGUISHED JUDGES

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DISTINGUISHED SPEAKERS:
Judge Mary M. Schroeder, Chief Justice of the U.S. Court of Appeals for the Ninth Circuit
Justice Ruth V. McGregor, Chief Justice of the Arizona Supreme Court
Justice W. Scott Bales, Justice of the Arizona Supreme Court
Robert G. Schaffer, Partner, Lewis and Roca LLP
Jack Friedman, Chairman of the Directors Roundtable

(The biographies of the speakers are presented at the end of this transcript. Further information about the Directors Roundtable can be found at our Website directorsroundtable.com.)

MR. FRIEDMAN: Good morning. I'm Jack Friedman, Chairman of the Directors Roundtable. This event is one of a national series that our civic group is organizing on the subject "Honoring the Judiciary as a Co-Equal Branch of Government: A Dialogue with Distinguished Judges". This series is unique because the Judiciary is being honored by business leaders nationally rather than just by the Bar. We have an opportunity today to hear from several distinguished members of the Federal and state judiciary in Arizona and one of the leading members of the Bar who'll be moderating the event.

If you believe some politicians and the media, every judge gets up in the morning and says, "I can't wait to go to work today and impose my personal beliefs on everybody I come in contact with." I think everybody here knows that's actually the reverse of the truth. Judges are constrained to apply the law, including those that they can't believe were drafted the way they were, but are part of the law.

As someone personally based in California, I'd like to just make a couple comments about the image and importance of Arizona. I'd like to point out something which you may not realize. On the national news, your congressional representatives from Arizona, both in the House and the Senate – and I don't mean just John McCain – get more interviews on the Sunday shows and other national news than the whole congressional delegation of California does. It's a very interesting question as to why so many of the members of your delegation are considered to be opinion-leaders in Washington.

We will now turn to Robert Schaffer of Lewis and Roca, whose leadership regarding this event is invaluable. I also want to thank him for being our moderator.

MR. SCHAFFER: Thank you, Jack, for your comments, and also for organizing this event and events like this one around the country. This is one of several Directors Roundtable events that will be

held across the country involving members of the state and Federal judiciary. I thank Jack and his organization for his efforts.

Let me also begin, as well, by thanking all of you for joining me today to honor the dedication and selfless public service of the many members of the state and Federal judiciary in Arizona who are represented by our distinguished guests today.

Before I introduce our speakers, let me say first of all that those of us who have had the privilege of trying cases in front of the courts, and you members of the business community in the audience that have had the privilege of having your cases decided by the courts, all of us know that those decisions will be based on the facts and the law and independent of popular and political pressures by the other branches of governments. I think that means an awful lot.

The judges in Arizona, both the state and Federal judges, are some of the best in the country. The Arizona state judiciary has the reputation nationwide of having one of the best judiciaries, in no small part due to the efforts of the people sitting next to me.

In addition to honoring the state and local judges in Arizona, one of the important purposes of this event is to acknowledge the contributions of the Late Chief Justice William Rehnquist and also Justice Sandra Day O'Connor. Throughout their careers on the bench they have been dedicated public servants and dedicated defenders of the courts. When they thought their voices could make a difference, they didn't hesitate to speak out. I think history will remember them as judges who skillfully maintained the balance between deciding cases the way they thought the case should be decided under the rule of law and maintaining the public's respect for the judiciary. And I hope we have an opportunity today to discuss some of the contributions that have been made by Chief Justice Rehnquist and Justice O'Connor. And I know Justice O'Connor was instrumental in bringing about one of the pillars of judicial independence in Arizona, which is the merit selection system, which we'll talk about a little bit this morning.

Another important purpose of this gathering is to provide an opportunity for our speakers today to discuss some of the challenges and concerns that are on their minds as leaders of the Ninth Circuit and of the Arizona judiciary.

At the Federal level, perhaps the greatest concern, and I think Chief Judge Schroeder will agree with me on this, is the lack of public funding as was noted by Chief Justice Roberts in his first report to Congress, and the difficulties and heroic efforts that the courts are making to deal with those problems, in particular in the Ninth Circuit with its heavy caseloads. And on the state system, legislation has again been introduced to modify the merit selection system and also to remove the Supreme Court's rule-making authority, and we'll have an opportunity to discuss some of those issues today, as well.

So let me begin by introducing our distinguished panel this morning. At the far end is Chief Judge Mary Schroeder of the Ninth Circuit Court of Appeals. Chief Judge Schroeder has the distinction of having served in both the state court system and the Federal court system. She was a judge on the Arizona Court of Appeals from 1975 to 1979 when she joined the Ninth Circuit, and in 2000 she began her seven-year term as Chief Judge of the Ninth Circuit.

During her time on the Ninth Circuit, she's been duly recognized as having skillfully and efficiently guided the Ninth Circuit, the largest judicial circuit in the country, as it deals with the twin

problems of ever-expanding caseload and also budget constraints. And I hope she'll have an opportunity to talk about some of those issues today, as well.

Sitting to Judge Schroeder's left is the Chief Justice of the Arizona Supreme Court, Chief Justice Ruth McGregor. Ruth McGregor is a native of Iowa came to Arizona and attended Arizona State Law School. And she had the privilege of serving as a law clerk to Sandra Day O'Connor in the middle of her 15-year tenure as a private practitioner. In 1989 she was appointed to the Arizona Court of Appeals, and then in 1998 was pointed by Governor Hull to the Arizona Supreme Court, which gave her the distinction of having been appointed to the bench by both a Democrat and a Republican governor. In June of 2005 she became the Chief Justice of the Arizona Supreme Court upon the retirement of then-Chief Justice Bud Jones.

And to my immediate right is the Arizona Supreme Court's newest member, Justice Scott Bales, and I'm privileged also to say my former colleague. Justice Bales also had the privilege of clerking for Sandra Day O'Connor and then came back to Arizona where he entered private practice and then held many positions in various government posts, including Assistant U.S. Attorney; Deputy Assistant Attorney General, Department of Justice; and most recently, before his appointment to the court, as Arizona Solicitor General.

So at this point I'll turn the discussion over to Chief Judge Schroeder to make her remarks and for the others to make their remarks, and then we'll have a roundtable discussion and then an opportunity for you all to ask any questions or make comments that you have.

JUDGE SCHROEDER: Thank you very much, Bob. It's an honor for me to be here. I really thank you very much for putting together this panel.

Jack, you referred to the fact that Arizona has so many people who are quoted frequently in the national press – more than California. And I just want to point out that that's a product, I think, of a great tradition in Arizona of welcoming new people to this state and welcoming talent to this state. None of us, I don't think, were born in Arizona. None of us were educated through college in Arizona. And yet we have been privileged to have known great people here in Arizona who have helped us along and who have said, "We need people who can help Arizona," and I think that is the tradition that we have here.

And it's a very unusual tradition if you look at it in terms of women. You are looking at the only place in the country where you are going to see the chief of the Federal courts and the chief justice of the state courts who are both women and who have worked together for years.

We are all joined together because we have known each other for years, not because of some kind of inside Brahmin-like aristocracy, but because we have just known each other. Just to give you an idea, shortly before Ruth entered ASU law school, my husband joined the faculty, which brought me to Arizona in the first place. The year after she graduated from ASU I joined the Arizona Court of Appeals. I served on the Court for several years and was then appointed to the Ninth Circuit. At that time Ruth was a partner in a major firm here in Phoenix. My position on the Arizona Court of Appeals was filled by Sandra Day O'Connor. Well, a short two years later Sandra went to Washington to an obscure court there. She wanted to take someone with her to help set up her chambers and whom she knew and could trust, and she took Ruth.

Then a few years after that I hired a young law clerk and the young law clerk's name were Janet Napolitano. Janet Napolitano had never been to Arizona at the time that I hired her, but she decided this is a pretty good place, and she looked around, saw a lot of opportunity, decided, "This is where I'm going to practice law." She went to work for a law firm where she got to know a young fellow named Scott Bales, who had clerked for one of our great justices on the Supreme Court from Arizona. That's how he had been introduced to the state, I assume. When Janet became attorney general, she took Scott with her to be the Solicitor General, where he argued any number of cases before the Ninth Circuit and just got an incredible reputation for being a skilled but honest advocate, which is extremely important. So as you can see, we do represent a very good tradition here. The independence of this state is perhaps typified nationally, of course, and historically by Barry Goldwater.

It's not a coincidence that the first woman on the U.S. Supreme Court was from Arizona. It's not a coincidence that the two of us represent the only two women in our positions in the country in the same state. The Chief Judge of the Maricopa County Superior Court, which is one of the largest, most progressive courts in the country, is also a woman, and the immediate past chief judge of the Bankruptcy Court is a woman. And we, of course, are all products of merit selection here in Arizona, as was Sandra Day O'Connor.

I think that this kind of friendship and understanding between the Federal and the State courts that we have here in Arizona is very important for our ability to help understand the problems that come to the Court. Understanding the relations of the Federal and the state courts and the particular problems that they both may have are very important right now. Certainly that's true with respect to death-penalty litigation, habeas corpus litigation, to surprising extent bankruptcy litigation and its relation to domestic relations. There are just all kinds of areas that we need to understand each other better, and we can do that here in Arizona in a way that others can't.

We encourage all of the public to talk to us, let us know one way or another what some of the problems are that is concerning you. We should meet more, and we'll talk about it and see what we can do. Right now we are in a very difficult period for both the Federal and the state courts, which is why I think we're all so pleased to be here. Both the state and the Federal courts are under attack. The courts have always been the weakest branch, but what is unusual now is that it's much more ideological than it used to be. We are seeing attacks on results and a lack of respect, in my view, for the process.

I had a talk with the Chief Justice Roberts about this briefly soon after he was confirmed, that the relations between Congress and the Federal courts are as bad as anybody can ever remember in history right now.

I will give you a very good example of how that plays out, particularly in the business context, and that is the recent bankruptcy legislation that was passed. We have very good relations in Ninth Circuit. We meet with the bankruptcy attorneys and our chief district judges at least once, twice, or three times a year. I think that all the bankruptcy judges, all the district judges, all the Federal judges, and most of the debtor and creditor attorneys in the country – all agree that this is very bad legislation. What happened was that for whatever reason the judges and the lawyers were cut out of the process of drafting it, so it has procedural impediments in it that are going to be very difficult with all kinds of

interlocutory appeals stuck in. We're trying to work out a system so that we are signaled what are the key issues that need to be decided under this legislation so that we can resolve them.

We think it's very important that we in the Ninth Circuit cover the entire West so that if we decide one of these issues, it will be resolved and will not hold up bankruptcies throughout the west, that it will really help the administration of justice. As you know, many of our bankruptcies in Arizona involve creditors in California and the same is true with the neighboring states of California. So that is an example of where the system went wrong, in the administrative provisions of that bill.

The executive branch can make an enormous difference in what happens to the courts. And when homeland security was set up, there was a separation of the enforcement of immigration law, the border patrol went to Homeland Security, and the administrative adjudication of those cases, principally asylum cases, stayed in the Department of Justice. Now, you may think, "So what?" Well, as a result, the resources went to Homeland Security, and the Department of Justice was left with immigration appeals that were still working with technological resources that were at least 20 years old. We learned this by going to the Justice Department and saying, "What is happening?" The result was that they had to stop giving administrative review to a lot of these cases and the cases went directly to the Court of Appeals. Our immigration appeals increased by 500 percent in the course of two years. We went from 900 to 5,000. And in the Second Circuit it was even worse. They increased, I think, something like 1300 percent, something like that. All because these cases began to go directly from the immigration judges to the Court of Appeals. And this has been an enormous burden on the Courts of Appeals nationally.

It's a result of decisions made in another branch, in this case the combination of the executive and the legislative, without really an understanding of what impact it's going to have on the courts. So we really need the help of business, of our consumers, of everybody who's concerned about the courts, in order to communicate some of these things to the legislative and the executive branches.

You may recall in the sentencing area Chairman Sensenbrenner of the House Judiciary Committee sent a letter to the Seventh Circuit complaining they had imposed a sentence that was too low. One of the judges on that circuit commented to me that the Seventh Circuit as a whole was not too concerned about this and courteously responded to the Chairman's concerns. But one of the judges who were on that panel commented to me that she had already escaped from tyranny in Europe once, and she didn't want to feel that she had to do it again.

Regarding the Ninth Circuit, the lack of understanding and animosity is felt in the efforts to divide the Ninth Circuit, which the vast majority of our judges on the Ninth Circuit oppose; which all of our chief judges past and those in line to be chiefs in the future, who understand the administration of justice in the west, oppose; because it doesn't make any sense in our view to split the border, for example, between California and Arizona into two different circuits with two different laws governing it.

There is no way to split the Ninth Circuit and have an equitable division because 70 percent of the cases are from California. Unless you divide California into different circuits, which nobody is even talking about doing, you're going to have one circuit that's got all the cases and one circuit that's got all of the territory, because these are vast, vast amounts of distance that we're talking about in the west.

I think one of the things that concern me very much as the Chief Judge of the Ninth Circuit with responsibility for the administration of the courts of the west is that we are now in our leadership in Washington and in the Supreme Court dominated by folks who are from the east. We have lost the two giants from Arizona on the Supreme Court in Justice O'Connor and Justice Rehnquist. There is only one justice on the United States Supreme Court who is appointed from west of the Mississippi, and that's Justice Kennedy.

I worry that there's a lack of understanding that Maricopa County, where we're sitting now, is bigger than the state of Connecticut, and this is something that people don't understand. We do not understand why Vermont and New Hampshire should be in different circuits. This makes no sense to us. Well, it's historic. It's because of trade routes and because of what happened during the 13 colonies. Vermont went with New York and New Hampshire went with Boston. Every major city in the 13 colonies had its own circuit. We can't do that in the west. And we have problems of immigration, of security, of other issues that we really need to be heard on.

MR. FRIEDMAN: Can I just make one more brief comment as we move on?

I am someone who comes from California. I'm not speaking officially for the Directors Roundtable. We don't take positions on these things. As food for thought, it's very valuable for the whole country not to keep California from being isolated; to have California learn from the experience of the other states; and to have that interaction. California does not always tell the other states what to do – a type of image that arises because it's so big – there is education that also goes the other way. If we get our own circuit, then we just end up running along our particular lines.

JUDGE SCHROEDER: Yes. And may I just say that there is no question that every effort to split the circuit historically has been an effort to isolate or divide or marginalize California. That's true historically. It's not good for the neighboring states and the business that they do with California.

MR. SCHAFFER: Thank you, Judge Schroeder. Chief Justice McGregor?

JUSTICE MCGREGOR: Thank you. I add my thanks to all of you for coming here. It's good to see all of you and to be here with Scott, who I of course see every day, almost, and Mary, who I don't get to see quite as often.

Many of you know some of the problems that we're facing within the state court system, but I'd like to talk briefly about those and about some of the things that are of particular concern to us. When you look at the various suggestions that are being made for ways to change the judicial system in Arizona, they come in different sizes and shapes and primarily from one group of legislators within the Arizona legislature. But they're all aimed at doing one of two things, and often are an attempt to do both of them. One is to try to find a way to have our judges be selected more on the basis of political views or ideology rather than on the basis of qualifications. The other general function of some of the changes that have been suggested is to reduce the authority of the judicial branch to govern and to administer itself, and instead give that authority to the legislature in a way that we don't do with any other branch of government. I mean, the executive branch is not administrated by the legislative branch or vice versa. But many of these, and I'll talk very briefly about them, are intended to do just that with the judicial branch.

A number of the suggested changes that come from our legislature every year have to do with attempts to change our merit selection system. Those of you here know that in 1974 we went to merit selection rather than elections for all of our appellate judges and for our trial court judges in Maricopa and Pima County. A commission made up of ten members of the public and five lawyers and chaired by me or another member of our court looks at applications from people who want to be judges, interviews them, holds public hearings, makes their decision in public, and sends a list of at least three names to the governor who must select from that list. The commissions are directed to look at merit overall, but also to consider diversity, and merit selection has much improved and increased diversity in our courts in Arizona.

One suggestion that has been made this year as in past years in the legislature is to do away with the commissions, to allow the governor unfettered authority to choose whoever she or he wishes to nominate, the notion being that this is sort of like the Federal system. Well, our commissions really do the due diligence that is done by other groups within the Federal system. They work very hard to make sure that the governor has no opportunity to appoint anyone who is not qualified for the position he or she seeks.

Another suggestion is to add senate confirmation to our merit selection process, sometimes with the use of the commissions and sometimes without. And another is to add senate reconfirmation, where judges would have to be reconfirmed by the senate at the end of each of our terms; four years for trial judges, six years for appellate judges. Another is to simply return to elections and give up merit selection all together.

All of these are intended, I think you can see, to increase political influence and to somehow control the views of judges who we hope will be impartial in making their decisions. But the challenges go beyond those to our merit selection system. A number of them, as I say, deal with somehow taking away the authority of the court to administer ourselves as a branch of government.

Let me tell you something about what we are administering. Our court has statewide administrative authority for the court system since the model courts amendment to our Constitution in 1960. Statewide, the courts have more than 9,000 employees. We have courts at more than 200 locations. More than 400 judges are involved. The overall budgets for our courts coming from local, county, and state is more than $500 million, and we decide more than two-and-a-half-million cases a year. That's 10,000 cases a day.

The notion that there will be no central administration of this system, which must be interconnected not only with the various levels of the court system, but with our justice system partners, just boggles my mind. I can't imagine why somebody would think it better to not have a central administration, or even worse in my view, to somehow have the legislature trying to administer the court system. Nobody would try to run any kind of private business, I think, in that way.

Another proposal has been to remove our court's authority to enact rules that govern the state court system. As everybody in here who is a lawyer or who has been a litigant knows, the purpose of the rules is to provide an orderly process through the courts and to give everybody a level playing field. Every year we face proposals that would give the legislature rather than the courts the final say over the rules. Now, the legislature already can enact rules in Arizona. Only on those very rare occasions where there is a direct conflict between rules enacted by the legislature and rules enacted by

the court does the court's rule-making authority given to us by the Arizona Constitution come into play. Very seldom do we not find a way to make the rules work together.

But when there is a problem, it makes more sense to me that the body that understands the processes in the court would be the one that has the final decision. Again, I can't imagine the legislature wanting to give a different branch of government authority to make the rules that govern their processes, and yet this is suggested every year.

The other way that our ability to run our branch of government is really threatened is through budget authority. Now, the legislature clearly is the only body which has the authority to appropriate funds. There's no question about that. But that can be used either to support other branches of government or not. Over the last years we've all been through a budget crisis, which hopefully is ended at least for the short term in Arizona. Everybody had to give up funds and make due with less. But over that period of time the judicial branch's share of general fund appropriations in Arizona has gone from 2.2 percent – it's always been very small, you know – down to about one and a half percent. During that same time of budget crisis, the percentage of general fund appropriation that goes to the legislative branch has remained the same, although the total amounts obviously decreased.

As a lawyer, and some of you have heard me ask this question before, but I'm still waiting for answers, my inclination always is to say, "Let's define the problem." Now, we agree that there are ways that we need to improve our courts, and we have ongoing programs to do that. But I really want to define the problem and then look for a way to attack that problem.

What are the reasons for these changes? Is it because merit selection isn't producing qualified judges? Well, those of you who appear in our courts know that we are subjected to evaluations by everyone who appears in the court; by the lawyers, by the witnesses, by the jurors, by judges in the lower courts, and all of that information is compiled and produced, and judges are rated on whether they know the law, apply the law to the facts, whether they are courteous and professional in their dealings with people in the courtroom, whether they carry out their administrative abilities efficiently, and so forth.

No matter which of those measures you look to, and no matter which group-of-people rating you look to, lawyers, litigants, pro pers, 95 percent of those people rate the judges' performance as satisfactory or above. 95 percent. I think that's a really good measure of whether our merit selection judges, who are exposed to this judicial performance review, are qualified. Well, is it because we don't get any diversity through merit selection? Those of you who have practiced as I have for more than 30 years in this state know that merit selection has really brought a lot of diversity to our court system.

Is it because our judges, as some people suggest, really do make decisions on a political basis? One of the measures for that is to look at our courts, since we get accused of this most often, especially when Scott came and made us three Democrats and two Republicans rather than vice versa.

But we have kind of a measure of that. We have decisions where there is a dissenting opinion by one or more justices. So I went back to 1998, which is when I came to the court, and I've been there the longest now, to look and see in how many of those split decisions did we split on party lines? There were about 50 cases where there was a dissent. You know how many? One. There was one

case where we split on party lines, and that was on whether indirect purchasers could bring an antitrust action under Arizona's equivalent of the Clayton Act. So it wasn't something that probably most of you are following. So we obviously don't make decisions on the basis of our political views.

As I tell people, you can say we're stupid. You can say we don't understand the law. You can say we don't write it clearly. But you really can't, if you look at the facts, say we're making decisions on the basis of our party affiliation. Well, is it because our judicial system doesn't believe in being accountable? Do we just kind of sit there and let nothing happen? Well, I think that the Arizona court system really is known for being innovative and progressive across the country. I wish some of you could go to the meetings of lawyers and judges and – and hear what they say. It's kind of a prophet in our own country. But across the nation the Arizona court system, as a result of a lot of years of very hard work by lawyers and judges and volunteers, is so well-regarded. You would be so happy to hear what is said about the Arizona court system.

So I'd like you, as I close, to think to yourself, if you used three terms, adjectives, to describe what you want in a judge, what adjectives would you use? I hope you would say something like impartial, intelligent, well-informed, fair, any of a number of things, attributes. I hope you wouldn't say that, "I want an ideologue. That I want somebody who imposes his or her political views. That I want somebody who follows the views of a political party." I don't think we would want that in our judges, and yet that's what some of these changes would lead us toward. I think it's a very, very dangerous path to going down.

Justice Kennedy from the Supreme Court said, and this is one of my favorite quotations, "The law makes a promise: Neutrality. If the promise gets broken, the law as we know it ceases to exist." I think the stakes are just that high in what's happening with the challenges to the Arizona state court system, and I would hope that when called upon you would be willing to help us: so that we can maintain a court system that is impartial and that gives everybody a level playing field when they come into court; so that we can apply the law to the facts and move forward with a system that is well-administered, that is efficiently run, and that really responds to the needs of the people who come into our courts.

Thank you.

JUSTICE BALES: I would like to thank Bob for putting this panel together and you for attending.

It's been remarked that Sandra O'Connor was an early proponent of merit selection in Arizona. She herself actually was first appointed to the court of appeals through that system, and each of us actually began our judicial careers through that system. I think there's a danger that those of us in Arizona who've known merit selection for now 30-plus years will in some ways take for granted how that process works and not recognize what the alternatives really mean. For that reason, I'm going to talk a little bit about what's happening to the process of judicial elections at the state level in other places around the country, because most states in fact do elect at least some of their judges.

Thirty-nine states have elections for at least one level of their judiciary, and 85 percent of all judges across the country stand for election, whether in their initial selection or for retention or some

combination of the two. And just this year 30 states will hold elections for one or more members of their state Supreme Courts.

That fact needs to be understood against another perhaps more powerful fact. The nature of judicial elections across the country has changed dramatically in just the last five/ten years. They have become much more expensive, they've become much more partisan, and they have become the subject of much focused efforts by various interest groups to trying to elect judges whom they hope will advance their particular agendas.

I will give you some examples. In 2004 the average cost for a successful candidate for a state Supreme Court seat in those states that have elections was something on the order of $652,000. That is a successful candidate on average raised and spent that much money. Now, that was a 45 percent increase as compared to the same figure just two years before in 2002. Perhaps even more dramatic, in 2004 in a race for an Illinois Supreme Court seat, two opposing candidates between them spent $9.3 million. That was more than was spent in 18 senate races across the country. In a West Virginia race, one individual contributed more than $2 million to the campaign. That particular individual was a coal-company executive whose business had a case pending before the state Supreme Court.

Television advertising is another thing that's changed dramatically. In 2004 about $25 million was spent on judicial-related TV ads across the country. That was two-and-a-half times the amount that was spent just five years before, and a decade ago TV advertising in connection with judicial races was almost unknown. In six states that had very contested judicial elections in 2004, a collection of interest groups between them spent $7-and-a-half million on TV advertising, and that represented 30 percent of the total TV advertising in those races in those states.

So as I said, the nature of judicial elections has changed dramatically in just the last decade. That's partly a consequence of the fact that the ability of states to regulate judicial elections has been eroding. Traditionally states took various steps to try to distinguish judicial campaigns from other campaigns for political offices.

Judges were limited in what they could say if they were trying to be elected; they were limited from whom they could raise money and how; and they were limited in what they could do in terms of identifying themselves by party affiliations. That has all changed. Some would say the underpinnings of that type of scheme have been eliminated as a consequence of a 2002 U.S. Supreme Court decision. In that case Republican Party of Minnesota v. White, the court, by a five-four vote where the Court held that state prohibitions on judicial candidates announcing their views on issues likely to come before them violated the First Amendment.

In essence, the Court said that the First-Amendment interests of the judicial candidates outweighed concerns for impartiality or independence of the courts that might be implicated if judicial candidates were essentially unregulated in what they could say in seeking to be elected. Now, as a consequence of the White case, lower courts around the country have begun to strike down other limits that regulate judicial elections. Some courts, for example, have struck down laws that prohibit judicial candidates from making pledges or promises as to how they'll conduct themselves in office. Arizona has such a prohibition, but ours has not yet been attacked.

You've probably read that last week the U.S. Supreme Court declined certiorari in a case. It's actually the follow-up to the White decision, where the Eighth Circuit struck down two restrictions on judicial campaigns. The Eighth Circuit held that the First Amendment was violated by prohibitions on partisan activities by judicial candidates. The ones that were at issue there prohibited judges from identifying publicly their party affiliation; from attending party events, such as fundraisers; and from either seeking or accepting party endorsements. The state Minnesota, had tried to have a nonpartisan structure for judicial elections. And that was one thing the Eighth Circuit said was unconstitutional.

The other thing the Eighth Circuit struck down was a prohibition on personal solicitation by judges for fundraising purposes. So the court held in effect that the judges have a First-Amendment right to at least solicit large groups or to send out written solicitations over their signature to raise campaign funds. What this means, obviously, is that the line between judicial campaigns and other campaigns for public office, or the line between party candidates versus nonpartisan candidates, and has eroded in those states trying to preserve those distinctions. As that happens, not surprisingly, special-interest groups have rushed in. As I mentioned, in some of the most contested judicial races, almost a third of the TV advertising in the last round of elections came from interest groups that were trying to advocate on behalf of candidates they hoped would advance their positions on issues ranging from abortion to tort reform.

Another development that has occurred is that various interest groups are now sending out questionnaires to judicial candidates, and they ask questions like, "Do you think that punitive damages should be limited? Do you think the legislature has the power to enact tort reform? Do you believe the Constitution protects the right of privacy?" They use the responses that they get from those questionnaires to put together TV ads or to put together voter guides that support or attack particular judicial candidates.

The implications for the judicial candidates are obvious. If you hope to become elected in a state where that occurs, you can only succeed if you can respond; and you can only respond if you can raise sufficient funds yourself to buy the advertising; and that in turn virtually guarantees that judges have to become more partisan in what they do in order to get elected.

The threat that this poses to impartial and independent courts has been recognized. It's been recognized by judges, lawyers, and increasingly businesses. A recent survey in Texas, which does have partisan judicial elections, asked judges, "Do you think campaign contributions actually influence judicial decision-making?" And this was an anonymous survey. Half the judges said that it did. Interestingly in Texas, four out of five citizens in general and four out of five lawyers believed that campaign contributions influence judicial decision-making.

The threat that this kind of an election process poses was recognized most recently by businesses in their supporting certiorari in that case I mentioned from the Eighth Circuit. Thirty-nine businesses, including 3M, General Motors, and Wal-Mart, joined together in an amicus brief urging the Supreme Court to take review of that case to clarify what states can do to try to ensure nonpartisan or at least less-politicized judicial elections.

The corporations pointed out:

"Look. There's an inherent threat to a fair and impartial judiciary if we let those campaigns run just the same way as the election of any other public official. Moreover, we as businesses are put – (and this was their words) between a rock and a hard place, because it's almost impossible to turn down requests for campaign contributions from people who you think might later be adjudicating important decisions that will impact your business."

And finally they said:

"It creates an almost inherent conflict of interest, because it makes it impossible for us to make major campaign contributions without at least the suggestion that we're trying to later influence how people will rule on our cases when they come to the courts."

The Supreme Court, as I said, declined certiorari in that case. But sooner or later the boundaries of what states can do in this respect are going to have to be fleshed out at the level of the Supreme Court. In the meantime, I think all of us here should consider as people are talking about moving away from merit selection or undermining it in one sense or another, what it really means is to have highly politicized, partisan elections of judges. It threatens three things that are at the core of what we ask for from courts.

First of all, it threatens the rule of law. Because after all, the very notion of courts and the rule of law is premised on courts making decisions that aren't popular, but instead are the ones that are the right decisions based on the constitutions and the statutes.

Second, it threatens importantly the separation of powers. Because if you tell judges that basically you have to be a partisan political candidate to get elected, it means that you have to basically imbed yourself in the party structure within each state, and that typically means that you're to one degree or another beholden to the highest-elected political official of your party. That means that you have to curry favor and maintain it with either the chief executive, if that's the person of your party, or the highest-elected legislative official, and obviously that undermines the separation of powers.

And finally, and perhaps most importantly, it's inconsistent with the notion of a fair and impartial judiciary. If we really want courts to be fair, we can't have their members being selected based on whether they've successfully made promises to a broad-enough array of constituencies to maintain their position in office.

Thank you.

MR. FRIEDMAN: Can I ask just one quick follow-up question?

In the hearings for the U.S. Supreme Court, people were saying over and over again: The nominee is not supposed to make comments about issues – not only specific cases, but even vague issues that might come before the court someday. But is he or she allowed to make precisely the same comments in an election?" Why wouldn't the First Amendment say he has a right to make comments in the hearings?

JUSTICE BALES: I think there are two things that are going on, and maybe I'll be overruled by more experienced judges in saying this. In the cases that I was discussing, the question is whether

states through their canons of judicial ethics can limit what candidates for judicial office can do, and if they violate those limits sanction them.

There are really three different kinds of limits on what judges say. As I said, there are limits on announcing your views on issues that might come before the court, which was the most broadly worded restriction. There is a prohibition on making pledges or promises about how you'll conduct yourself in office, other than saying that you'll act faithfully and impartially in upholding your duties. And finally, there is a restriction on committing yourself as to how you as a judge will act on issues or cases that come before you.

Only the first was struck down in White. The limits on what Federal appointees say in response to a Senate committee I think are largely self-imposed as opposed to being a question of whether a state as a matter of statute or state rule can restrict what the judges say.

MR. FRIEDMAN: It was said in the news that the U.S. Supreme Court is virtually the only major court in the United States that has no canon of ethics that applies to its judges.

JUDGE SCHROEDER: That's true. They are not bound by it. I've been a member of the Codes of Conduct Committee at the U.S. Judicial Conference. A judge is not supposed to comment on how the judge would decide cases that would come before the judge, because you are supposed to be impartial. How can a judge be impartial if the judge has already said, "This is the way I would decide an abortion case"?

But there is a right of free speech of everyone, including judges, and this has been a matter of extreme tension in trying to work out the proper ethical standards. For example, we had a tussle over what spouses of judges could say who were running for political offices, and even mothers of judges. So as you can see, this gets to be difficult.

This is just my personal view, I think the nominees weren't pressed as hard as they could have been pressed not with respect to how they would decide particular cases or issues, but where would they draw from their experience in order to reach the decision? I think there could have been much more probing questions along that line. And this is one of the differences between t he legislature and the courts. The courts are about process, and the legislature is about results. A judge may come before the legislature who is comfortable talking about process, but doesn't want to talk about the result because he can't prejudge it. In contrast, the legislature is concerned about, "How are you going to do this?"

JUSTICE MCGREGOR: Could I just add one point? One of the things that's coming up in the state courts (particularly which have elections in which a judicial candidate is allowed to say what his or her position would be on an issue that's likely to come before them) is whether when it does come before the court, can that judge then sit on the case?

A number of states have revised their canons to make that a basis for mandatory recusal or disqualification. So that if I have announced in an election process, whether partisan, nonpartisan, or retention, how I will vote if something comes before the court, then there at the very least an appearance of impropriety in allowing me to sit on that case because I cannot be impartial. So under those conditions, some states under their code of judicial conduct the judge is disqualified from sitting on a case. My own view is under Arizona's canons of judicial conduct; we probably would be

disqualified from sitting on a case if before appointment or election we had announced our position. But in some states I think that's explicit.

MR. FRIEDMAN: Just one more thing. After the Kelo eminent domain property case, Supreme Court Justice Stevens gave a talk, and said, "I voted with the majority on the case, although I'm personally opposed to the result."

JUDGE SCHROEDER: And we're often in that position as judges. So again, a candidate might say, "I'm personally in favor of X or Y. I mean, if I were drawing up the law, this is the way I would do it, but I'd leave open the question of what the law is."

You know, I'm not the wisest on this panel, but I am the oldest, and not just barely. I do remember what it was like before merit selection in Arizona, and I will tell you how we got merit selection in Arizona. It was because of a state trial court judge named Tom Tang who had a couple of juveniles before him. He was a juvenile judge in Maricopa County. He gave them probation in a case involving a very serious crime of violence. He gave them probation because he thought that they shouldn't be stuck for life in prison. He was pilloried by the press. Somebody ran against him and said, "This is terrible. We shouldn't have judges like this on the bench. He is a terrible man." And he was defeated.

It was after that that really concerned citizens of Arizona, particularly from the business community, said, "We cannot have this." They went by initiative to get merit selection. Tom Tang then went on to be appointed to the Ninth Circuit and served with great distinction as my colleague on the Ninth Circuit. That's how we got it in the first place, because of people who went out and said, "We would have decided that case differently, and when that case comes up before us we would never give anybody probation."

MR. SCHAFFER: I think it's interesting. I first learned about merit selection, probably as an undergraduate. I learned it as the Missouri Plan, because Missouri was the first state in the Union, I think, that had adopted merit selection. In preparing for this today, I noticed that there are serious efforts in Missouri to cut back on merit selection and indeed to impose a system where, the state senate, I believe, would reconfirm judges after a period of years.

I think the expressed popular concern is that perhaps judges have taken their independence too far. At least that's the expressed concern. But I think when you really drill down and look at what the informed criticism is of the courts, you have a hard time figuring out what the problem is. And I wonder, given the history in Arizona of the efforts of the business community to adopt a merit selection system, whether we're going to see a backlash against some of the practices that are now starting to take place in judicial elections, such as all of this additional money and the inability of states to restrict that. Are we going to start seeing a backlash by the business community? Is there a trend already away from judicial elections? Is that a possibility?

JUSTICE MCGREGOR: I think that you are starting to see some recognition in the business community as well as in some other groups about the impact of these judicial elections and what has happened. Scott mentioned what happened with the amicus brief that was filed in the case before the Supreme Court.

Before the last election in Missouri where there was some talk in the legislature about submitting to the people a change in the Missouri Plan and going back to elections, that was really heated up. It was very easy for Missouri to look across the river at what was happening I think it's the Fifth District of Illinois, southern Illinois, where this horrible election was going on. And it was this business community, led by Emerson and Anheuser-Busch and a lot of the other major businesses who went to the legislature and said, "This has got to stop. This foolishness about going back to elections has got to stop." And indeed it was.

You know, legislators profess to see this being a self-serving comment when it's made by somebody on the court. I guess in one way it is, because most of us wouldn't have run for election. Most of your business litigation is not personal-injury action. Most of it is one business and another business in a business or a commercial dispute, so the need for an impartial judge is really important there. But I think that as people are seeing what's happening across the country, we're starting to see – I don't know whether I would just call it a backlash. More of a reawakening as to what's happening.

JUDGE SCHROEDER: I hope so. Scott used the key word. It's "beholden." You don't want judges who are beholden. Look at what we are seeing in the Congress today with the scandals because people are trying to buy votes, legislative votes. You do not want people buying judicial votes. It's really that simple.

MR. SCHAFFER: The Federal system of course has an explicit role for the Senate, the advice and consent role. And in his 2004 annual report to Congress, Chief Justice Rehnquist noted that in the Federal system, the combination of the nomination and consent process and life tenure, provides a workable balance between accountability and independence. My question would be for the justices on the State Supreme Court: Is there really any harm in having an advice and consent role in the state system given the fact that it's used in the Federal system?

JUSTICE BALES: The systems are very different in the way judges are confirmed and also in their tenure. Remember at the state level there is a constraint at the front end in terms of the selection, because the only people who can become judges through merit selection are those who first are nominated by the 15-person citizens committee which is structured to ensure input from all around the state and not just lawyers. The majority of the merit selection committee, 10 out of the 15 members, is nonlawyers.

JUSTICE MCGREGOR: And they are confirmed by the Senate.

JUSTICE BALES: And the governor has to nominate only from those people that are first approved by the commission. On the back end there is a form of accountability through the retention elections. State judges don't have life tenure. There are those limits on the executive's powers to appoint, and then a check on the judge's ability to retain office. I think given that, there's not reason to change. Why change something that's not broken?

MR. SCHAFFER: One additional difference I think is that the state court has mandatory retirement.

JUSTICE MCGREGOR: Right.

MR. SCHAFFER: Whereas in the Federal system there is not. There are some pretty prominent law professors, including one of my professors in law school, Paul Carrington, who has proposed a system of term limits for Supreme Court justices that would be, I think, for 18-year terms. A sitting president would have at least two nominations, and this would add an element of accountability to the political branches while at the same time providing a long-enough tenure, 18 years, so that the justices would continue to be independent. They would be able to decide cases according to what they think are right. What do you think about that, Judge Schroeder?

JUDGE SCHROEDER: That's Paul's theory. I talked to him about that. I'm a great fan of Paul Carrington. But, you know, what you get at the end of those 18 years is you have judges who have to find a job.

MR. SCHAFFER: Does that influence them?

JUDGE SCHROEDER: Yes, is that really ensuring independence if somebody is going to have to go out and work at a law firm at the end of the 18 years?

MR. SCHAFFER: I think it also may take away the experience factor. Do we really want to term-limit someone like Justice O'Connor or Chief Justice Rehnquist who has substantial experience on the bench or has become, as in the case of Chief Justice Rehnquist, an effective administrator of the courts?

AUDIENCE MEMBER: Scott said that a mining company in West Virginia contributed more than $2 million to a West Virginia Supreme Court justice race? I don't understand why the business community is supporting merit selection.

JUSTICE BALES: Every year the U.S. Chamber of Commerce nationally does a survey on perceptions of fairness of state courts around the country. The states that are at the bottom of that list consistently are those states that have partisan elections for every level of their judiciary. I think businesses recognize that. If judges are selected through partisan campaigns and have to raise campaign contributions it threatens the impartiality of the courts.

AUDIENCE MEMBER: Except Wal-Mart and GM and 3M could buy judges. I mean, they've got enough money to buy judges, you know?

JUSTIC MCGREGOR: One of my friends who is a lobbyist or governmental representative or whatever we call them now, represents mostly business interests. He said that in talking with legislators in Arizona, he says, "Please don't do this to my clients. Don't make us go back to elections where we have to raise enough money to counteract the trial lawyers' association. That's not really where we want to spend our money. We're getting good judges. We're pleased with the judges we have. Please don't throw us into this mess."

MR. FRIEDMAN: I had once a situation where a bankers association in California said:

"Please don't invite so and so, head of the Senate Banking Committee, to speak in California, even though they weren't going to cohost the event. Don't even invite him to the state, because every time he comes to the state his staff will call us when he gets back to Washington and ask for more donations just because he appears here."

So at least part of the business community really does feel they're vulnerable to the politicians asking them for money all the time.

AUDIENCE MEMBER: They'd rather buy other things than judges.

AUDIENCE MEMBER: I have a question for the justices. Most people have no idea what any of you look like. Even a lot of attorneys do not get close to Judge Schroeder because she's over in the Federal building. The courts are out of touch. Why not do a ten-year plan where the Ninth Circuit and state courts make an effort to contact the people and let them know that what you're going is going to have an impact on their lives?

MR. FRIEDMAN: The basic question is, "Isn't it useful for the courts to have some sort of proactive programming to have better contact with the public and also maybe to humanize some of the court procedures on a day-to-day basis where people come before the courts feel a more personal connection to how they're treated by the officers of the court.

JUSTICE MCGREGOR: We can always do more in this. One of the things we do is, of course, rating our judges on whether they are courteous to people who appear in their courtrooms, whether they are clear in their explanations and what is happening.

Our judges are out in the community on a weekly, almost daily basis. Judge Mundell of the Maricopa County Superior Court is having a series of community focus groups where she goes out and is in various parts of the community where people are invited to come and talk about what the court is doing, about how it impacts them, about how it can be improved.

The drug problem should be mentioned. Everybody knows that problem. One of the things that our courts have tried to do to address that problem is through our drug courts, through our mental-health courts. The municipal courts are holding court one day a week at the new campus for the homeless. Our judges are out in the school system and talking with students there.

We just published a book called When You Turn 18, with the Arizona Foundation for Legal Services and Education that tells students about how their legal rights and responsibilities change when they turn 18, and it talks about tobacco and drugs and transportation and domestic affairs. We have a Web site called Law for Kids.org where these children and their parents can come on and see what their rights, responsibilities and duties are. We just revamped entirely the rules of procedure in our family courts to try to make them be more responsive. About five years ago Arizona was one of the first states that redid our juvenile courts to enact the Model Family Rule so that children who were dependent would not stay in the system for so long. There's way more that we could do. I don't disagree that we need to be out in the community.

I will tell you this. The Arizona Supreme Court, starting last summer, has been making a real effort to get out in the community. And since last June I have talked to more than 10,000 people in one group or another, and the rest of our court has talked to probably another 4- or 5,000 people. As a note, I'm not sure I care if people recognize me or not. I think maybe it's better if they don't. We need to have a better connection, not only with our court, but with all of our courts. Our justice of the peace courts and our municipal courts are doing some wonderful work in trying to connect with the community and with children in the schools. We just started a new essay contest. We support the We the People Program with high school and junior high school students each year.

We're open to ideas. I hope if you have some other ideas about things we can do. If there are instances where judges are not courteous to people in their courtroom, that's a violation of our judicial code of conduct. You can file a complaint about that and the commission will look into it. So is there more? Yes. But are we trying – we're trying very hard and will continue to try more.

AUDIENCE MEMBER: And the panel's talked exclusively this morning about legislative attacks, and I had a question about the executive. In the past three months or so I think there's been one Federal judge who's resigned in his capacity as a FISA court judge related to Federal terrorism issues. I was struck, Justice Bales, when you described the things that the attacks in the elections will do. It's pretty much exactly what this judge said as he resigned. He did not resign as a district judge. He resigned just in his FISA capacity. He said that the executive threatens the rule of law, the separation of powers, and the sense of a fair and impartial judiciary.

So Judge Schroeder, I'd ask you, do judges in your circuit who serve in a FISA capacity have an obligation to resign or at least to speak truth to power?

JUDGE SCHROEDER: Whether or not a judge feels an obligation to step down from a position that the judge has been appointed to I think is a very personal thing. I do believe that the role of the courts was best summarized by one of my colleagues, Wally Tashima. A few years ago he looked back at the Japanese internment, because he was interned as a young boy in Arizona.

He described the function of the Federal courts as this: to make sure the government obeys the law. I think that what we are seeing in terms of the controversy over whether the executive is or is not obeying the law will be discussed at length in all three branches of the government in the future. I think it's an important question to rise always as citizens, "Is our government obeying the law."

AUDIENCE MEMBER: I appreciate the panel's focus on two particular institutional or structural threats to judicial independence: the way we select judges and the legislative involvement in the court's administration.

I guess my thoughts right now are at a somewhat different level. Back in November 2005, Justice O'Connor gave a very fine speech, which is grounded on her concerns about the threats of the independence of the judiciary. There must be some attempt to imbue the concept of an independent judiciary in school kids or others that are not in the legal or business community.

MR. SCHAFFER: I guess the question is whether there is a role for the courts in influencing public opinion both in your off-the-bench role and as well as in how you decide cases, and how that influences public opinion.

JUSTICE BALES: In a sense I think the level of the rhetoric has increased more so than it ever has, at least in my own memory. And I think the degree of understanding that many of the criticisms reflect seems to have increased. In a way this is very discouraging to me because the attacks have become bitterer, more partisan, and at the same time less thoughtful, less well-grounded. There's an inevitable tension between the different branches of our government on both the state and the Federal level. In Arizona there has been an ongoing debate about merit selection ever since it was first adopted. So in that sense I don't think this is new or novel, but I think that the threat that is now posed to judicial independence is at least in my experience unprecedented, and I think in our state is probably unprecedented since we first adopt merit selection.

AUDIENCE MEMBER: I'll be brief. The debate has been ongoing for a long time now regarding whether or not to retain the merit selection system. What has been the role or the effect in terms of the discussion of our Clean Election System related to public funding of elections. That would seem to eliminate some of the concerns regarding purchasing judicial voting.

JUSTICE MCGREGOR: Clean Elections does not apply to our judges who run for election. They are not entitled to funding under Clean Elections. And if there were to be public funding, it would probably have to come from some source other than what we now use for Clean Elections. It's a surcharge on filings and criminal fees. And it just seems inappropriate to fund judicial elections with something that judges control to some extent. So there is no public funding of elections for judges in Arizona.

MR. FRIEDMAN: What would money be used for if we were fair with the courts and gave them more funding?

JUDGE SCHROEDER: Right now the Federal courts need funding for court security. We need funding for staff to handle the caseload as it comes to us in surges. We do need additional funding for the salaries of judges. But I don't put that at the top of the list. I think what we need most of all is funding for our staff and our buildings and the wherewithal that we need to do the work here in the west where there's a rising caseload.

We always ask for an average in the Federal courts of the needs of all the country, and that means that we in growing courts always are underfunded in the west, and people in the east where they have been static or even dropping get overfunded. I mean that we should stop funding by averages and give the money where it's needed; here.

JUSTICE MCGREGOR: In Arizona we have a very complex system for funding our courts with funding coming from municipalities, from counties, and from the State. State funding is actually relatively limited. Our biggest specific need for funding in Arizona is to have an identifiable and dependable source for technology funding. I can go on a long time about this, but let me just tell you in one sentence. Our case-management system in this state which runs two-and-a-half million cases every year is being managed by a software system that is 18 years old. It is in a code called Panther that we can't find anybody who even knows and that our tech people tell me is spaghetti code. The legislature has limited our technology funds for the last several years. We must have, to run a system as large and complex as ours, dependable and sufficient funding for technology. We need better funding for all of our court employees at every level, but particularly those who depend upon State funding.

MR. FRIEDMAN: All of the speakers worked with or worked for Chief Justice Rehnquist and Justice O'Connor. Could each of you give us a sense of them as people and their contribution to our country?

JUDGE SCHROEDER: Chief Justice Rehnquist, before he was stricken by illness, was an extraordinarily thoughtful and multi-talented Chief Justice. He was an historian and author of many books on the law. He had an excellent sense of humor, but ran the meeting of the United States Judicial Conference with an iron hand. He was devoted to his family and they to him.

Justice O'Connor's and my careers intertwined for more than 30 years. She took my seat on the Arizona Court of Appeals when I went to the Circuit, and she served as our Ninth Circuit Justice for most of my Chief Judgeship. As the first woman on the Supreme Court, she was the role model's role model and was always patient, gracious, courteous, and attentive to all of us who idolized her. Just trying to do that would have driven most of us crazy.

JUSTICE MCGREGOR: Justice O'Connor brought to the court the personal attributes that had served her so well in life and in other positions: her work ethic, her sense of fairness and justice, her open-mindedness, her integrity and intelligence, and her sense of humor. Her contributions to the Court came, I think, from applying those attributes to the cases before her. She considered each case on its merits, with predisposition, to find the best, most just, outcome. Her contributions to the Court were not, of course limited to deciding cases. She also used her influence to bring increased attention to the position of women in the legal profession, to the principles of the rule of law, to the need to value and support judicial independence, to the importance of professionalism among lawyers and judges, and to the benefits of teaching civic education.

JUSTICE BALES: Over her career, Justice O'Connor has powerfully shown that a person's opportunities should not be limited by gender or background and that lawyers can make important contributions to their communities through public service. As a Justice, she exemplified the ideal of a judge who is committed to deciding each case carefully, independently, and fairly. In her personal manner, she remarkably combines graciousness, unflagging energy, and a generous sense of humor. As our only Justice who was also a member of the Cowgirl Hall of Fame, she brought to the Court a distinct voice of practical wisdom. With her retirement from the Court, she will no doubt commit herself to continued efforts in support of civic education, judicial independence and the rule of law.

MR. SCHAFFER: I was very fortunate to have been selected to serve as a law clerk to Chief Justice Rehnquist. Working alongside the Chief Justice and seeing how he did things and how efficiently he processed information made quite an impression on me. Looking back, I think the two qualities that stand out, and perhaps the same two qualities that allowed him to achieve so much success on the Court, are, first, he was extraordinarily smart. And second, he was a very likeable person. He lacked any pretense at all. Others have remarked upon his humility, but it is true. He was very down to earth. He loved old-fashioned things like Christmas parties, sing-alongs, and one-dollar bets. When it came to his court work, he stated his views simply, clearly and concisely. He also treated his colleagues and others with respect. He never tried to strong-arm anyone into changing their views. He was much too smart to think those tactics could have any success over the long-term. Instead, he led in a quiet way, largely by the strength of his position. Whether you happened to agree with him or disagree with him, if you knew him you liked him. And that was true for all of his colleagues at the Court when I was there. To the other justices, he wasn't just "the" Chief, he was "our" Chief. And he will be missed.

MR. FRIEDMAN: On behalf of the Directors Roundtable, I'd like to thank Bob Schaffer. He guided us concerning this event. I want to thank you very much for your leadership. Secondly, I'd like to thank all of our speakers for sharing their expertise. This is part of a national series which we hope to do over time. And third, I'd like to thank the audience. The purpose of the Directors Roundtable is to provide valuable information for the audience.

Thank you.

Judge Mary M. Schroeder

Judge, U.S. Court of Appeals for the Ninth Circuit,
Room 6421,
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Judge Schroeder joined the Court of Appeals for the Ninth Circuit in 1979. Before that, she served on the Arizona Court of Appeals for four years and was the youngest woman appellate judge in America at the time. She previously was in private practice in Phoenix and worked as a trial attorney with the Civil Division of the United States Department of Justice. She has been president of the National Association of Women Judges and is a member of the Council of the American Law Institute. In the 1960s, she was one of only six women in her law school class at the University of Chicago. In the summers, she was unable to find a position as a law clerk because it was an era when female law clerks were not being hired. When she began to look for her first job as a lawyer, she had endless interviews but no offers. Moving with her husband to Arizona, where he had a teaching job, Judge Schroeder came to a state where no woman lawyer had ever before been employed at a major law firm. However, she soon became a partner at Lewis and Roca, one of the largest firms in Arizona.

As a lawyer in Arizona, she chaired the committee that drafted and secured passage of Arizona's first civil rights law. Judge Schroeder is joining two current women chief judges of federal appellate courts--Carolyn King of the Fifth Circuit, based in New Orleans, and Stephanie Seymour of the Tenth Circuit, based in Denver. Judge Schroeder said she has come to realize that the role of women is "not to feminize the courts, but to humanize them."

As chief judge, Judge Schroeder will assume the administrative responsibilities of both the court of appeals and the Judicial Council of the Ninth Circuit, a board of judges governing the region. She will also sit on all 11-judge en banc panels, helping to set the direction of Ninth Circuit law. She already has announced the formation of two new programs--a confidential hotline for judges in need of crisis counseling for issues such as bereavement and substance abuse and a pilot program that will allow the citation of unpublished opinions in petitions for rehearing or requests for publication.

As a member of the Ninth Circuit Court, Judge Schroeder has established a record as a prolific writer and scholar who also has acquired considerable administrative experience under Chief Judge Hug's tutelage. Among her noteworthy cases is Hirabayashi vs. United States, 8282 F.2d591 (9th Circuit 1987), which held 50 years after World War II that the Japanese internment was unconstitutional. Judge Schroeder wrote in her opinion that the order to intern "caused needless suffering and shame for thousands of American citizens." She currently is a member of the three-judge panel considering A&M Records et al v. Napster, a case that has captured the attention of the Internet world. Judge Schroeder joined the Court of Appeals for the Ninth Circuit in 1979.

Before that, she served on the Arizona Court of Appeals for four years and was the youngest woman appellate judge in America at the time. She previously was in private practice in Phoenix and worked as a trial attorney with the Civil Division of the United States Department of Justice. She has been president of the National Association of Women Judges and is a member of the Council of the American Law Institute.

Nominated for appointment March 9, 1979 by President Carter (D).

Education: Swarthmore College, 1958-62, B.A.; University of Chicago Law School, 1962-65, J.D.

Career Record: 1965-69, trial attorney, Civil Division, Dept. of Justice; 1969-70, Law Clerk, Arizona Supreme Court; 1971-75, Partner, Lewis and Roca; 1975-79, Judge, Arizona Court of Appeals. Admitted to Illinois Bar, 1966; DC Bar, 1966; Arizona Bar, 1970.

Notable Cases, Decisions: Gerdom v. Continental Airlines, Inc., 692 F.2d 602, 9th Cir., 1982; Golden Eagle Distributing Corp. v. Burroughs Corp., 801 F.2d 1531, 9th Cir., 1986; Hirabayashi v. U.S., 828 F.2d 591, 9th Cir., 1987; Prudential Insurance Co. of America v. Lai, 42 F.3d 1299, 9th Cir., 1994; Natl. Broadcasting Co., Inc. v. Bradshaw, 70 F.3d 69, 9th Cir., 1995; Pilkington PLC v. Perelman, 72 F.3d 1396, 9th Cir., 1995; Valentino v. Carter-Wallace, Inc., 97 F.3d 1227, 9th Cir., 1996; Urantia Foundation v. Maaherra, 114 F.3d 955, 9th Cir., 1997.

Chief Justice Ruth V. McGregor

EDUCATION:

- LL.M., University of Virginia, 1998
- J.D., summa cum laude, Arizona State University College of Law, May 1974
  - Class rank: First
  - Editorial Board, Arizona State University Law Journal
  - Armstrong Award (1974 outstanding graduate)
- M.A., University of Iowa, August 1965
- B.A., summa cum laude, University of Iowa, May 1964
  - Class rank: First in College of Liberal Arts
  - Martar Board; Phi Beta Kappa; Alpha Lambda Delta
- Manson Community High School, Manson, Iowa

PROFESSIONAL EXPERIENCE:

- Chief Justice, Arizona Supreme Court, June 2005-
- Vice Chief Justice, Arizona Supreme Court, 2002 - June 2005
- Justice, Arizona Supreme Court, 1998 - present
- Judge, Arizona Court of Appeals, December 1989 - February 1998
  - Chief Judge, July 1995 - July 1997
  - Vice Chief Judge, July 1993 - July 1995
- United States Supreme Court: Law clerk to Justice Sandra Day O'Connor, September 1981 - July 1982

PRIVATE LAW PRACTICE:

Fennemore Craig--Phoenix, Arizona, August 1974 - September 1981, August 1982 - December 1989

Practice involved civil trial, administrative and appellate work in state and federal agencies and courts. During her 15 years in private practice, McGregor worked in widely diverse substantive areas of law. As her practice became more specialized, she concentrated in the area of employment law.

McGregor acted in several managerial positions for Fennemore Craig, one of the five largest private law firms in Phoenix, including terms as the firm's first female hiring partner and as a member of its management committee.

OTHER PROFESSIONAL ORGANIZATIONS AND ACTIVITIES:

- American Inns of Court Foundation
  - Board of Trustees, 1998-
  - Secretary, 2000-2004
  - Chair, National Nominating Committee, 1995-1998; 2002-2005
- Arizona Inns of Court
  - Master of the Bench, 1988-
  - President, 1991-1992

Program Chair, 1990-1991
- American Bar Association
Council, Section of Legal Education and Admission to the Bar 2003-
Standards Committee, 2002-2003
The Central and East European Law Initiative,1991-
1991-1992: Served as member of four-person team that traveled to Lithuania to assist parliament in drafting a constitution and restructuring the judicial system.
1993: Returned to Lithuania to present judicial ethics seminars.
1995: Served as member of training seminar for members of Constitutional Court of the Federation of Bosnia-Herzegovina.
State Visitation Committee (law college accreditation), 1992, 1998
State Membership Chair, 1985-1989
- Arizona Judicial Council, 1995-1997; 2005-
Commission of Technology, 1990-1995;1998-2005
Chair, 1999-2005
Public Access to Records Committee, 1997
- Arizona Judges' Association 1990-
Executive Committee, 1990-1998
President, 1993-1994
Vice-President, 1992-1993
Secretary, 1991-1992
- National Association of Women Judges, 1990-
Vice-President, 1999-2001
Executive Committee, 1995-2001
Chair, 1994 Convention Committee
Chair, Genome Justice Project, 2001-2005
- Supreme Court of Arizona Commission on Judicial Conduct, 1991-1997
Vice-chair, 1993-1997
- Judicial College of Arizona Supreme Court
Board Member, 1998-2004
- Supreme Court of Arizona Disciplinary Commission, 1984-1989
- State Bar of Arizona
Faculty, Professionalism Course, 1992-1996; 2002-
Civil Practice and Procedure Committee, 1991-1993
Member, Board of Legal Specialization
- Founding Fellow, Arizona Bar Foundation
- Arizona Women Lawyers' Association, 1975-

Justice W. Scott Bales

EDUCATION:

-J.D., magna cum laude, Harvard Law School,1983;
Harvard Law Review, Board of Editors, 1981-1983
-M.A., Economics, Harvard University,1980
-B.A., summa cum laude, Michigan State University, 1978
Phi Beta Kappa, Phi Kappa Phi, Omicron Delta Epsilon

JUDICIAL CLERKSHIPS:

-U.S. Supreme Court, Justice Sandra Day O'Connor, 1984-1985
-U.S. Court of Appeals for the Ninth Circuit, Judge Joseph T. Sneed III, 1983-1984
-Office of the Solicitor General, U.S. Department of Justice, 1983

PROFESSIONAL EXPERIENCE:

-Justice, Arizona Supreme Court, 2005-Present
-Lewis and Roca LLP, 2001-2005
American Academy of Appellate Lawyers, 2003
Director's Award for Superior Performance as an Assistant U.S. Attorney, U.S. Department of Justice, Executive Office of U.S. Attorneys, 2001
-Solicitor General, Office of the Arizona Attorney General, 1999-2001
Team AG Award, 2000
-Assistant U.S. Attorney, District of Arizona, 1995-1999
Deputy Assistant Attorney General, Office of Policy Development, U.S. Department of Justice, 1998-1999
Special Investigative Counsel, Office of the Inspector General, U.S. Department of Justice, 1995-1997 (FBI Laboratory Investigation); U.S. Attorney General's Distinguished Service Award 1998; Inspector General's Award of Merit, 1997
-Meyer, Hendricks, Victor, Osborn & Maledon, 1985-1994

PROFESSIONAL AFFILIATIONS AND ACTIVITIES:

-Board of Directors, Arizona Foundation for Legal Services and Education, 2004-2005;
Foundation for Justice Award, 2005
-Ninth Circuit Court of Appeals, Advisory Committee on Rules of Practice, 2001-2005
-Arizona Lawyer Representative, Ninth Circuit Judicial Conference, 2002-2005; Chair 2004-2005
-Chair, District of Arizona, U.S. Magistrate Judge Merit Selection Committee (Phoenix), 2003-2004
-Judge Pro Tempore, Arizona Court of Appeals, 1993, 1998-1999; Maricopa County,1995-2002
-State Bar of Arizona
Appellate Practice Section, Executive Council, 2003-Present; Chair 2004-2005
Task Force on Access to Justice, 2002-2004
Rules of Professional Conduct Committee, 1999-2005
Civil Practice and Procedure Committee, 1996-1998
Criminal Rules Committee, 1995
-Volunteer Bar Counsel, Arizona State Bar Disciplinary Proceedings, 1993

-Arizona State Senate Ethics Committee, Special Investigative Counsel, 1991

TEACHING

-University of Arizona, Adjunct Professor of Law; Election Law, 2003-2005

-Arizona State University, Adjunct Professor of Law; Election Law, 2001; Origins of the Constitution, 1993; Presidential Powers, 1989-1991; Advanced Civil Procedure, 1988; The Supreme Court, 1988

-Harvard University, Teaching Fellow, 1979-1983; Social Analysis 10 (introductory economics), 1979-1983; Allyn Young Prize for Excellence in Teaching Economics 1980, 1981; Antitrust Law and Economics, 1982-1983; The Supreme Court and the Constitution, 1982

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Education:

- Duke University School of Law, J.D., 1996
- University of Kansas, B.A., 1993 with Highest Distinction

Admitted in:

- Arizona

About Mr. Schaffer

Mr. Schaffer is a partner in the firm's Appellate Practice, Commercial Litigation, and E-Discovery and Data Management practice groups. Mr. Schaffer is also Chair of the firm's Antitrust and Trade Regulation Practice Group. His practice is concentrated in the area of complex commercial litigation, including antitrust, class actions, lender liability, legal malpractice, constitutional and other commercial disputes.

Representative Cases

Mr. Schaffer's recent litigation experience includes:

- Representation of Arizona golf resorts in antitrust litigation concerning alleged group boycott and price-fixing claims.
- Representation of major Phoenix law firm in a legal malpractice case. Obtained dismissal of the bulk of the plaintiff's alleged damages before trial and successfully defended ruling on appeal. *Western Corrections Group v. Sacks Tierney*, 208 Ariz. 583, 96 P.2d 1070 (Ariz. App. 2004).
- Representation of a national movie theater company in a multi-million dollar class-action suit involving complex federal statutory and constitutional issues. *ESI Ergonomic Solutions, LLC v. United Artists*, 203 Ariz. 94, 50 P.2d 844 (Ariz. App. 2002)
- Representation of Roman Catholic Diocese of Phoenix in appeal involving grand jury proceedings. *Roman Catholic Diocese of Phoenix v. Superior Court*, 204 Ariz. 225, 62 P.2d 970 (Ariz. App. 2003)
- Representation of avionics equipment manufacturer in appeal of summary judgment ruling involving complex antitrust claims.
- Regularly counsels clients in the areas of antitrust, electronic discovery and data management.

Professional Activities

Mr. Schaffer served as a law clerk to the Honorable William H. Rehnquist, Chief Justice of the United States Supreme Court in 1998-1999 and the Honorable Deanell Reece Tacha, Chief Judge of the United States Court of Appeals for the Tenth Circuit in 1996-1997.

Court Admissions

Mr. Schaffer is admitted to practice in a number of state and federal courts, including the Supreme Court of Arizona and the Ninth and Tenth Circuit Court of Appeals.

Speeches and Publications

Moderator, The Directors' Roundtable, "Honoring the Judiciary as a Co-Equal Branch of Government: A Dialogue with Distinguished Federal and State Judges" (Phoenix, January 2006)

Speaker, Joint Meeting of the Antitrust and Intellectual Property Sections, State Bar of Arizona, "Antitrust and IP in the Supreme Court's 2005-06 Term (Phoenix, December 2005)

Panelist, Arizona Federal District Court Conference, Jurisdiction and other Significant Civil Litigation Issues Arising From the Internet" (Tucson, February 2003)

"The Public Interest in Private Party Immunity: Extending Qualified Immunity from 1983 Suits to Private Prison Officials," 45 Duke L.J. 1049 (1996)

Bar Affiliations

Mr. Schaffer is a member of the Maricopa County Bar Association, the State Bar of Arizona, and the American Bar Association.

Education

Duke University School of Law, J.D., 1996
University of Kansas, B.A. 1993 with highest distinction. .

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BUSINESS PROFILE: Operating executive and investor in diverse business ventures, and advisor to boards of directors for three decades since graduation from the Harvard Business School. Special capabilities include:

- Identifying profitable investment opportunities by applying expertise in finance, accounting, and law (member of the California Bar).
- Dealmaking, acquisitions, and refinancings involving either healthy companies, or problem companies needing turnaround, cost cutting, or special financing.
- Improving profitability of operating businesses and real estate properties including normal operations, out of court workouts, and Chapter 11. Personally act as operating executive, troubleshooter, or advisor.

MANAGEMENT & INVESTMENT EXPERIENCE:

1987 - Present ● Active in private business interests and Chairman of the Directors Roundtable, a civic group headquartered in the United States which organizes the preeminent worldwide programming for directors and their advisors. Deal personally with world business and government leaders.

1979-86 ● Chief Executive. Created a real estate investment business and served as managing partner for more than 50 real estate joint ventures. Evaluated major real estate holdings nationwide for two of the wealthiest families in America.

1976-78 ● For the investment banking firm of Salomon Brothers at the world headquarters, conducted financial analysis of investments and transactions. Reviewed corporate operations for mergers and acquisitions, including a proposed multi-billion dollar acquisition of a major U.S. pharmaceutical company by a European corporation.

1969-75 ● Management consultant for Arthur D. Little, Inc., one of the world's largest consulting firms. Engagements for Fortune 100 boards of directors involving strategy, marketing, personnel, cost cutting, and acquisitions. Clients in communications, retailing, consumer products, and basic industries. Special expertise in international investment. Analyzed the marketing and financial prospects of a multi-billion dollar oil and tanker deal with Saudi Arabia for a consortium of utilities. Author of a study on Japanese investment in America

which was translated by the Japanese Foreign Ministry and distributed by it to the major corporate chairmen in that country.

MANAGEMENT & INVESTMENT EXPERIENCE: (continued):

- Investment publications include a detailed national Barron's article recommending the highly litigated Executive Life muni-GICs for investment (rose 60% within three months).

- Appeared on ABC, CBS, NBC, CNN and PBS. Authored numerous business articles in the Wall Street Journal, Barron's and the New York Times.

- Appointed as adjunct faculty in finance and economics at Columbia, NYU, UC (Berkeley), and UCLA.

- Honored in Who's Who in World Jewry.

SPECIAL PROJECT:

- Author of Jewish Voices & Visions, including biographies of distinguished Jewish and non-Jewish individuals in diverse fields including Abba Eban, Yitzhak Rabin, Isaac Bashevis Singer, Simon Wiesenthal, James D. Wolfensohn, and preeminent Nobel Prize winners, financiers, and industrialists worldwide.

EDUCATION:

Harvard Business School MBA in Finance and Economics.

UCLA School of Law J.D., Law Review.