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## Essay

### AN ESSAY ON JUSTICE FRANK X. GORDON, JR.

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## INTRODUCTION

"A great man represents a great ganglion in the nerves of society, or, to vary the figure, a strategic point in the campaign of history, and part of his greatness consists in his being *there*."

Oliver Wendell Holmes, *John Marshall*, 1901.<sup>1</sup>

History turns on a few pivotal moments in each generation, and its direction is determined by whether the right people are *there* when these moments occur. Arizonans faced such a moment in February of 1988. Governor Evan Mecham, who had taken office just over a year before, stood impeached by the Arizona House of Representatives. As a result of the tempestuous events that brought the state to this point, public confidence in Arizona's leaders was practically nonexistent, and state government drifted largely without a rudder. The public impeachment trial in Arizona's Senate lay ahead, and few believed that the worst of times had been negotiated.

But good fortune was with Arizona, as the duty of presiding over the Senate impeachment trial fell to Frank X. Gordon, Jr. as Chief Justice of the

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1. OLIVER WENDELL HOLMES, *John Marshall*, in *SPEECHES BY OLIVER WENDELL HOLMES* 89 (1934).

Arizona Supreme Court.<sup>2</sup> "To the public, watching the proceedings on television, it seemed as though the Legislature had rung up central casting, asked for an actor to play the 'distinguished judge,' and they sent over Paul Newman."<sup>3</sup> As Arizona's most public trial unfolded in gavel-to-gavel television coverage and daily front page news articles, Arizonans found at the helm a person of "unquestioned integrity, fairness, and objectivity"<sup>4</sup> who could be "as firm as 'The Rock.'"<sup>5</sup>

By the time the trial concluded in the Governor's conviction on two of three charges, Justice Gordon's performance as presiding officer had made him a hero not only to the Arizona public but even to the Arizona legislature, for whom "lawyer-bashing has long been the sport of choice."<sup>6</sup> "Gordon's controlled, gentlemanly performance resulted in a vastly improved image among lawmakers of the entire judiciary and legal profession."<sup>7</sup> Almost immediately a movement began to convince a judge who had moved from relative anonymity outside the legal system to "one of the most recognizable figures in Arizona"<sup>8</sup> to run for governor at the next election. But he twice declined, choosing to use his new-found and hard-earned notoriety to continue with his duties as Chief Justice and with his campaign to reform Arizona's justice system. Left in the wake of his January, 1992 retirement from the judiciary was an appellate judge's usual legacy of published opinions. But, in addition, Justice Gordon retired only after playing the leading role in bringing Arizona one of the most able, efficient, and open court systems in the country, existing in previously unknown harmony with the legislative and executive branches of Arizona government.

### GROWING UP IN KINGMAN

Shortly after his birth in Chicago, Illinois, in 1929, Justice Gordon's family moved to Mohave County, Arizona. His father set up a law practice in the small town of Kingman, the county seat. Frank X. Gordon, Sr. dedicated himself to the legal profession for the rest of his life, practicing up until a few hours before his death in 1968.

Mohave County sprawls across the northwestern part of Arizona, taking in mountains, desert, land along the Colorado River, and the western "Strip Country." The Strip Country is that remote and sparsely populated part of Arizona stretching north of the Grand Canyon to the Utah border. Today this part of the state still is reachable by car from the Mohave County seat only by driving first into Nevada, going north of the Grand Canyon, and then driving back into Arizona.

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2. ARIZ. CONST. art. 8, § 1.

3. Anthony Sommer, *Chief Justice Is Zeroing in on Judiciary Reform*, THE PHOENIX GAZETTE, Oct. 29, 1990, at A1.

4. Interview with Stanley G. Feldman, Arizona Supreme Court Chief Justice (July 8, 1992).

5. Dick Waters, *Frank and Joan—The Agony and the Ecstasy*, KINGMAN MINER, Sept. 12, 1975, at 4.

6. Sommer, *supra* note 3, at A1.

7. *Id.*

8. Pamela Manson, *Last Days on Court for Gordon*, ARIZ. REPUBLIC, Jan. 5, 1992, at A2.

As with many young people in Mohave County, Justice Gordon developed in his youth an undying love for Arizona's mountains, canyons, deserts, lakes and wildlife. Through frequent visits to his father's small town law office and travels with his father around the county, he also gained an appreciation for the effect of the legal system on real people whom he knew outside his father's office. When he later became a judge, these experiences manifested themselves in his continual concern for doing justice for the litigants before him rather than applying lifeless legal doctrines to faceless names. His father also gave him a life-long desire to help those in need of legal assistance without an ever watchful eye on "billable hours" or a client's ability to pay.

The constant wish of Justice Gordon's father was that his son also would become a lawyer and join him in practice in Kingman. Upon graduation from high school, Justice Gordon left Arizona to attend Stanford University, where he obtained a B.A. in sociology in 1951. His classmates included fellow Arizonans, and now United States Supreme Court Justices, Sandra Day O'Connor and William Rehnquist (to whom, at that time, he bore a sufficiently close physical resemblance that each was often confused for the other). But, perhaps more importantly, he met Joan Gordon, to whom he has been married since September, 1950. Their marriage has become one of those rare partnerships where the accomplishments of each have been due in large part to the constant help and companionship of the other.

Justice Gordon had taken some geology coursework at Stanford. During his senior year, he was offered a job in geology nirvana—the Grand Canyon. But he acceded to the wishes of his father, who wanted him to return to obtain a degree in law at the University of Arizona, then Arizona's only law school. The Gordons moved to Tucson to pursue a law degree and begin raising their children.

About sixty students began studying law at the University of Arizona in the fall of 1951, but only twenty-two graduated three years later. After first semester exams of their first year, Justice Gordon and two of his classmates (future Maricopa County Superior Court Judge Stanley Goodfarb and Burr Udall, a future name partner in one of Tucson's most respected law firms) commiserated at a booth at the University Drug store just off campus about what they all thought was their certain failure and the need to look for alternate careers. The future Arizona Supreme Court Justice was certain that his future lay in a department store, perhaps in Fresno, California or Portland, Oregon. But Justice Gordon's career in the retail industry was cut short when Professor Lester Feezer happened upon the dejected trio and put them out of their misery. He let on that they had all passed his class, one of the more difficult at the school. They knew that, if they had passed his class, they had made it through all their classes.

Indeed, Justice Gordon excelled in his legal studies and graduated with honors (although his easygoing approach to moot court reportedly drove his more intense partner to distraction). He was popular with his classmates, who elected him president of the student bar association from a class that included James Duke Cameron, who also would later serve as an Arizona Supreme Court Justice,<sup>9</sup> as well as future Arizona Court of Appeals Judge James Hathaway,

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9. For an essay on Justice Cameron, see John P. Frank & Jenae R. Bunyak, *James Duke Cameron*, 33 ARIZ. L. REV. 735 (1991).

future trial court judges Stanley Goodfarb and Robert Owens, and future United States Bankruptcy Court Judge Lawrence Ollason.

Upon graduation in 1954, Justice Gordon turned down a judicial clerkship on the Arizona Supreme Court and offers from the state's large law firms to fulfill his father's wish that he return to Kingman and join his father's practice. Over the next eight years, Joan and his children adjusted to life in a small town while he embraced his legal practice and the accompanying role of a community leader. His first taste of life as a public servant came with his two years of service as City Attorney for Kingman (a part-time position), but he yearned for something more.

### APPOINTMENT TO SUPERIOR COURT

In 1961, after eight years in private practice in Kingman, Frank Gordon was appointed to the Mohave County Superior Court bench, filling out the unexpired term of the late Charles Elmer. Interestingly, Gordon, a Democrat, was appointed by then-governor Paul Fannin, a Republican. Judge Gordon's case load during his thirteen years as a trial court judge was as diverse as imaginable due in part to the rural nature of Mohave County as well as the fact that, because he was the only superior court judge in the county, nearly every case made its way to him.

An exception occurred when one of the citizens of Kingman filed an action *pro per* against Frank Gordon claiming civil treason. Judge Gordon obviously could not hear his own case. Instead, James Duke Cameron—his former classmate and future Arizona Supreme Court colleague who was a Court of Appeals judge (and an Arizona Supreme Court Justice-elect)—went up to Kingman to adjudicate the matter. Fortunately, Judge Cameron ruled in favor of Judge Gordon.

Unfortunately for Judge Cameron, before leaving town he placed a long distance call from Judge Gordon's chambers to his office in Phoenix. He then forgot about the call until a few days later when he received from the chambers of Judge Gordon a bill for the long distance charges. The record does not reflect whether Judge Cameron ever had the opportunity to review a motion for new trial.

Judge Cameron was not the only member of the judiciary to learn that Judge Gordon treated everyone on both sides of the bench equally. United States District Court Judge Carl Muecke once found himself as a litigant in Judge Gordon's trial court. In response to a question on cross-examination, and although he was represented by counsel, Judge Muecke himself objected and refused to answer. Judge Gordon leaned over to the witness box, and, with a patient smile, remarked, "Judge Muecke, in this court, I am the judge and I make the rulings." Amid laughter in the courtroom, he then quietly overruled the objection.<sup>10</sup>

Perhaps the most memorable part of Judge Gordon's tenure on the Mohave County Superior Court arose when he was required to campaign in a partisan election after his initial appointed term expired. He successfully stood for election in 1962, 1966, 1970 and 1974 and was opposed only once.

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10. Letter from Carl A. Muecke, Senior District Judge (Phoenix), United States District Court, Arizona (n.d.).

He campaigned throughout Mohave County, including in the remote Strip Country. On one campaign trip into the Strip Country, Judge Gordon headed into Colorado City, Arizona (which, not coincidentally, is within walking distance of the State of Utah, a jurisdiction beyond the reach of Arizona's law enforcement officers). Because of the area's remoteness and proximity to Utah, the Strip Country has long been home to small fundamentalist Mormon communities (some of whom still practice polygamy despite its having long been outlawed by the states and by the Mormon Church). From his days traveling throughout Mohave County with his father, Judge Gordon knew that the local residents were highly suspicious of any intruders from the outside world and that the endorsement of the community leader was not only required but was the only endorsement really needed. Consequently, Judge Gordon and his companions met with the community leader in a mid-wife house which was operated by *one* of his wives. It was a very hot and dusty day, and Gordon was offered something "with a bit of a snap." Believing that it would be highly unlikely that any alcohol would be found in this part of the state, he accepted the offer. To his surprise, the community leader pulled a flask of home-made wine from his drawer which, given the circumstances, Gordon could not refuse. This proved to be not only the key to winning the endorsement but also the start of a great friendship between Frank Gordon and the community leader. As luck would have it, Gordon himself was the only superior court judge in Arizona licensed to make home-made wine.

Because the superior court docket was not always full during Judge Gordon's tenure on the court, he offered to be a visiting judge in the other counties of the state on an as-needed basis. By the end of his thirteen-year term as a superior court judge, he had acted as a judge in nearly every county of the state and had served by invitation as a Justice of the Supreme Court on fourteen cases and Judge of the Court of Appeals on nineteen cases. As a result, the legal community throughout the state became aware of his intelligent, caring, and practical approach to resolving the disputes of those appearing before him.

## APPOINTMENT TO THE ARIZONA SUPREME COURT

From statehood in 1912 until 1974, all Arizona's judges were subject to partisan contested elections. After the Arizona legislature's repeated refusal either to adopt a merit selection system or to put such a system to a popular vote, the Citizens' Association on Arizona Courts spearheaded a coalition<sup>11</sup> that put an initiative on the ballot to vote on converting to a merit selection system for Superior Court judges in Maricopa and Pima Counties, Court of Appeals judges, and the justices of the Arizona Supreme Court. The Arizona electorate passed the initiative in the November 1974 general election.<sup>12</sup>

The first test of the merit selection system for the Arizona Supreme Court came when Justice Lorna Lockwood announced that she would step down in September, 1975. Thirty-two people submitted applications for the created vacancy to a nominating commission composed of lawyers and public members.

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11. The coalition included the League of Women Voters, the Arizona Jaycees, the Arizona Judges' Association, and the State Bar of Arizona.

12. For a more detailed discussion of Arizona's adoption of a merit selection system for judges and its early operation, see James Cameron, *Merit Selection in Arizona—The First Two Years*, 1976 ARIZ. ST. L.J. 425.

The Supreme Court's Chief Justice, James Duke Cameron, chaired the commission.<sup>13</sup> The commission reviewed the applications and selected ten people to interview. After the interviews and further investigation by the commission, the names of Mohave County Superior Court Judge Gordon and Court of Appeals Judges Eino Jacobson and L. Ray Haire were submitted to then Governor Raul Castro.<sup>14</sup>

On August 4, 1975, Governor Castro chose Justice Gordon as Arizona's first merit-selected Supreme Court Justice. Justice Gordon had the backing of both the Mohave County and Coconino County bars. Also, during his fourteen years as a trial judge, he had served as President of the Arizona Judges' Association, Secretary of the Governor's Commission on Judicial Qualifications, and as a member of the Supreme Court's Commissions on Rules of Professional Conduct and on Uniform Jury Instructions. Governor Castro explained, "The combination of Judge Gordon's long judicial experience and his proven ability impressed me the most in reaching this decision."<sup>15</sup>

Then, as now, merit selection had its critics, but Justice Gordon has had few. His hometown newspaper reported his appointment to "the highest office accorded a Mohave County resident since statehood" as follows:

While we do not like the new system of appointing, rather than electing judges, because we believe the general voting public is generally smarter than the appointing politicians, we believe Judge Gordon's appointment to be a very good one and a mark of maturity and concern we have long awaited—in vain until now—for Governor Castro to show.

He is far and away Governor Castro's highest calibre appointment.<sup>16</sup>

At age forty-six, Justice Gordon took his seat as the youngest member of the court. He summarized his feelings this way: "It is the ambition of every serious lawyer to be a judge. And it is the ambition of any serious judge to be a supreme court judge. I consider this the top."<sup>17</sup>

## LIFE ON THE SUPREME COURT

Historically, most new members of the Arizona Supreme Court waited to be sworn in before starting work. Although he was not sworn in until mid-September 1975, Justice Gordon started to work without pay a week or two earlier so that he could "hit the ground running." Justice Gordon's early start without pay set the tone for his entire term on the Supreme Court—putting the people of Arizona and the court first and himself second.

13. Since his days as a law school classmate of Justice Gordon, Justice Cameron's public service included popular election both to the Court of Appeals and the Supreme Court after service in the Superior Court. Coincidentally, Justice Cameron ultimately became Arizona's last popularly elected Supreme Court Justice, retiring just a few weeks after Justice Gordon, the first merit-selected Justice, stepped down.

14. By law, when three names are sent to the governor, no more than two may be from the same political party. ARIZ. CONST. art. 6, § 36(E). In this case, Judge Gordon was a Democrat, and Judges Jacobson and Haire were Republicans.

15. Steven Tragash, *Mohave Judge to Take over High Court Post*, ARIZ. REPUBLIC, Aug. 5, 1975, at A1.

16. Editorial, KINGMAN MINER, Aug. 4, 1975, at 4.

17. Steve Daniels, *Gordon Tapped for High Court Post*, KINGMAN MINER, Aug. 4, 1975, at 1.

Starting early carried disadvantages as well as advantages. Justice Gordon was appointed to replace Justice Lorna Lockwood, who had served the state with distinction for many years. Justice Gordon wanted to start before Justice Lockwood's last day and his official swearing-in, but he went out of his way to ensure that Justice Lockwood felt that she not was being hurried out the door. He came to work at odd hours and tried to avoid any setting which might be construed by Justice Lockwood or her staff as suggesting that he was stepping into her position before she was ready to leave.

Having come from a one-judge county, Superior Court Judge Gordon had been privileged to hold himself out as the "No. 1 Judge," which he did, on the personalized license plate of his Volkswagen bus. Unfortunately, moving to Phoenix and joining the state Supreme Court had a slight impact on this status. As the junior justice on the court, he was charged with the responsibility of holding the door open for the other justices when they took the bench and was also seated in the junior justice seat. Justice Gordon quickly acknowledged the change in his status and ceased driving the Volkswagen bus to work within a few weeks of joining the court.

Justice Gordon's caring and sincere nature was reflected by his concern for Justice Lockwood's staff which was somewhat in limbo due to her retirement. He hired Justice Lockwood's secretary and, after expressing genuine interest in her law clerk, offered him a job as well. Throughout this period of transition—and, in fact, throughout his entire term of public service—Justice Gordon was unpretentious and friendly. He became an instant hit with the Supreme Court staff.<sup>18</sup>

Throughout his years on the court, Justice Gordon limited his immediate staff to one secretary and two law clerks. Later, as Chief Justice, he also supervised the remainder of the court's staff. One of his strengths was the ability to recognize the capabilities of his staff and delegate a great deal of responsibility to them. This improved the working environment and, on many occasions, resulted in his staff exceeding their own expectations of themselves and improving their own sense of self-worth.

Tillie Gaio Bybee, his first secretary, had been Justice Lockwood's secretary, and her familiarity with the court proved to be a tremendous help to the new justice. By the time she left, she had been with the court longer than any then-sitting justice or staff person. His next secretary, Elaine Hardwick, ended up with the task of working not only on Justice Gordon's judicial duties but also the administrative responsibilities he acquired when he became Chief Justice of the court in 1987. Both Tillie and Elaine were such an integral part of his team that, when law students interviewing for a clerkship arrived at his chambers, he always had them wait in the outer office and chat for a few minutes with Tillie or Elaine so that he could be sure that any person he hired would be able to work well with the rest of the team.

When filling his two law clerk positions each year, Justice Gordon did not seem to have a preconception about what a clerk should be other than an intelligent writer and team player. He had no preference for any particular law school, gender, political philosophy, or future aspirations in his clerks. Rather,

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18. Letter from Assistant Attorney General Michael C. Cudahy, Justice Gordon's first law clerk (December 14, 1992).

he simply looked for interesting people who could bring something to his chambers. Each clerk would work on one opinion at a time, starting with the oldest case on the judge's list of assigned cases. Justice Gordon always provided his clerks with a memorandum of the court's tentative position before they began drafting an opinion, and he always edited every opinion prepared by his clerks before circulating it to the other justices. Nevertheless, he gave his clerks more freedom to compose opinions than did most of the other justices with whom he served. He often explained that he hired clerks to write and that is what he intended to let them do.

Justice Gordon also encouraged his clerks to discuss opinions they were drafting with each other and with him so as to end up with a better-reasoned opinion. On particularly controversial matters, he would gather together both clerks and Tillie or Elaine and give each an opportunity to express an opinion about the issue at hand. If the judge was persuaded that the court's initial position might be in error, he would then go to the other court members and try to convince them to change their minds. Thus, on those few occasions where there was not unanimity among the staff, all had an opportunity to have their say.

In addition to listening to the opinions of his staff regarding pending decisions, rule changes, administrative matters, and the court's pet projects, Justice Gordon also cultivated a personal relationship with his staff. For years, he and his clerks have had one or two reunions a year—sometimes in restaurants, sometimes in parks, and sometimes at the home of one of the clerks. The only disappointment Justice Gordon would ever publicly express about a clerk would be for those who moved out of state and would thereby attend fewer of these gatherings of the judge's extended family. He also presided over the marriage of more than a few of his clerks (once jointly with Justice Cameron when two of their clerks married each other), engaged in tennis games and cookoffs, offered advice about careers and personal choices, and was there for his staff whenever and wherever needed.

Some of Justice Gordon's words of advice were remembered at the clerk reunion cookout in September 1985, to celebrate the tenth anniversary of his appointment to the Arizona Supreme Court and the 35th anniversary of his marriage to Joan. One former clerk wrote in a memory book prepared for the occasion, "I will remember your advice that the most important thing I could do ... was to enjoy my family." Two lessons were remembered by another former clerk: "(1) Do not lose sight of common sense in the practice of law or your personal life; (2) Stock your boat with the appropriate accoutrements, so that when the fish are not biting you can relax and enjoy the scenery and your friends."

Not only were the clerks and secretaries part of the team, but so too was Joan Gordon. For example, much of the reading that needed to be done with respect to pending cases as well as administrative matters could not be accomplished during the work day and thus, in the evenings, after spending an hour or so with his family, Justice Gordon would retire to spend several hours reading materials dealing with pending matters. Typically, he would stop reading when his eyes were so red and vision so blurred that he could read no more. Obviously, this required Joan's support, support which extended not only to home reading but also reading while on vacations. Many of the Gordons'



vacations were driving vacations, and they had a "deal" whereby Joan agreed to drive while he attempted to keep up with his reading load.

## THE IMPEACHMENT TRIAL OF GOVERNOR EVAN MECHAM

"I always thought the Good Lord thought I had some purpose here. Maybe this is it."

Justice Gordon, describing his role in the impeachment trial of Governor Evan Mecham<sup>19</sup>

At the time, no one could appreciate the irony that occurred at Arizona's capitol on January 5, 1987. First, Justice Gordon took the oath of office to begin his five year tenure as Chief Justice of the Arizona Supreme Court. A few moments later, he administered the oath of office to newly-elected Governor Evan Mecham. Some fifteen months later, Justice Gordon, as Presiding Officer of the senate impeachment trial, signed the April 8, 1988 judgment convicting Governor Mecham and thereby removing him from office.

The days between January 5, 1987 and April 8, 1988 were some of the most tumultuous in Arizona's history. From his first days in office, the new governor touched off a firestorm that, fed by each of his successive actions, consumed any opportunity he might have had to effectively govern the state. Taking office with just forty percent of the vote in a three-way race, Governor Mecham "immediately began to alienate legislators and constituents."<sup>20</sup> By the end of February, 1988, the Arizona House of Representatives (which was controlled by members of the governor's own Republican party) had returned articles of impeachment against him on the basis of allegations that he had failed to report properly a \$350,000 campaign loan from a supporter, that he had obstructed justice by purportedly ordering members of the state's Department of Public Safety not to cooperate with an investigation by the state's Attorney General into an alleged death threat by one member of his administration against his former legislative liaison, and that he had improperly loaned money to his automobile business from a protocol fund into which had been transferred unspent monies donated to his inauguration.<sup>21</sup> By that time, he also faced a recall election (canceled after his subsequent removal from office via impeachment),<sup>22</sup> and a state grand jury had indicted him on six felony charges (as to which he was later acquitted).<sup>23</sup>

The turmoil brought national ridicule on Arizona. As one writer described the situation: "Been out of state lately? ... You may long for the good old days when saying you were from Arizona prompted only envy and ques-

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19. Paul Sweitzer, *Chief Justice Penning History in Daily Journal*, ARIZ. DAILY SUN, Mar. 2, 1988, at A1 (quoting Justice Gordon).

20. Robert J. Glennon, *Impeachment: Lessons from the Mecham Experience*, 30 ARIZ. L. REV. 371, 375 (1988).

21. One commentator has opined, however, that "[n]o single action that Evan Mecham took resulted in his removal; it was the synergistic effect of many actions." Glennon, *supra* note 20, at 373.

22. See *Green v. Osborne*, 157 Ariz. 363, 758 P.2d 138 (1988).

23. For a more complete discussion of the events that led to Governor Mecham's impeachment, see Glennon, *supra* note 20, at 375-79, 382-84.

tions about the Grand Canyon. Now people laugh."<sup>24</sup> Inside the state, things were not much better. The legislature had essentially ceased doing business for the duration of the impeachment proceedings. Upon the governor's impeachment by the House of Representatives, control of the executive branch was turned over to an acting governor.<sup>25</sup> As nonessential state government nearly ground to a halt and the daily headlines barraged readers with more embarrassing news, it was not clear when, if ever, the state would return to some kind of normalcy. But "[j]ust when Arizona was beginning to look like the Grand Buffoon State, Frank X. Gordon Jr. appeared to add an air of dignity to the debacle. ... He's a judge to be proud of."<sup>26</sup>

The Arizona Constitution provides that the responsibility for presiding over the impeachment trial of the governor falls to the Chief Justice of the Arizona Supreme Court.<sup>27</sup> One editorialist commented, "It may have been a rainy day when Evan Mecham filed for governor, but the good Lord smiled on Arizona when the impeachment fell on Frank Gordon's watch."<sup>28</sup>

Arizona had never impeached a governor (and no governor of any state had been removed from office by impeachment since 1929).<sup>29</sup> There had been an impeachment trial of two members of the Arizona Corporation Commission in 1964, and a transcript of that proceeding was available, but the transcript did not describe the procedures used to conduct the trial.<sup>30</sup> Thus, there was little precedent or time-honored procedure for either Justice Gordon or the senate to follow when the senate first convened as a Court of Impeachment on February 11, 1988.

On that very first day, Justice Gordon displayed his considerable talent for being "the calm in the eye of the biggest political storm in Arizona's 76-year history."<sup>31</sup> One day after his impeachment by the house, Governor Mecham asked his followers to "work on intimidating your representatives."<sup>32</sup> When the senate convened as a Court of Impeachment a few days later, Justice Gordon responded:

It is up to all of us as citizens to let the system work. Pressuring your senator to vote based on anything other than his evaluation of the law and evidence is in effect pressuring your senator to violate the oath to uphold the Constitution. Sadly, it cannot go without saying that threats and intimidation can play no part in our process. Not only would this conduct hurt our form of government, it is illegal.<sup>33</sup>

Justice Gordon did not view his role as Presiding Officer as one where he exercised a judge's usual control over a trial. "I see this primarily as a trial in

24. Editorial, *Just in Time—Or, Why Impeachment Isn't a Total Embarrassment*, ARIZ. DAILY STAR, Mar. 27, 1988, at C2.

25. For a discussion of whether this was legally required, see James Weinstein, *The Language of Impeachment*, 20 ARIZ. ST. L.J. 209 (1988).

26. Editorial, *supra* note 24.

27. ARIZ. CONST. art. 8, § 1.

28. Editorial, *Mr. Presiding Officer*, ARIZ. REPUBLIC, Mar. 6, 1988, at C4.

29. Glennon, *supra* note 20, at 372 n.2.

30. Sweitzer, *supra* note 19. Justice Gordon sought to provide better guidance for any possible successors by keeping a journal of the proceedings. *Id.*

31. *Id.*

32. Glennon, *supra* note 20 at 390 (citing ARIZ. DAILY STAR, Feb. 7, 1988, at A1).

33. Glennon, *supra* note 20, at 390-91 (quoting Justice Gordon, Address Before the Members of the Court of Impeachment and Citizens of the State of Arizona (Feb. 11, 1988)).

which the Senate members sit as judges and jurors, and I'm sort of the referee. I see mine as the preliminary role and theirs (senators) as the ultimate role."<sup>34</sup> Indeed, although Justice Gordon in the first instance decided most questions raised during the trial, the rules adopted for this impeachment trial provided that a majority of the senators could overrule his decision.<sup>35</sup> The senators exercised that power once early in the proceedings: When Justice Gordon granted Governor Mechem's new attorneys a two week continuance to prepare for the trial, the senators instead voted to give them one week only.<sup>36</sup> Although Justice Gordon took no offense, the senators seemed reluctant to overturn one of his decisions, and they rarely did so again.

Justice Gordon's performance as Presiding Officer could be used as a model of the quintessential trial judge. He was patient, firm, wise, dignified, and, above all, fair and objective. "At times, simply his presence has been enough to ease tensions and avert what might have been explosive arguments between attorneys and lawmakers."<sup>37</sup>

The quality of the Judge may have shone most brightly in one scene indelibly etched in the minds of all who followed the trial. Attorney Robert A. L'Ecuier testified as an expert witness for Governor Mechem. Mr. L'Ecuier's testimony included the opinion that Governor Mechem's loan from the protocol fund to his car dealership was not improper. On cross-examination, attorney Paul F. Eckstein questioned Mr. L'Ecuier about his reprimand by the state bar some years earlier for an unauthorized loan from a trust fund. When Mr. L'Ecuier insisted on arguing with Mr. Eckstein instead of answering his questions, Justice Gordon stepped in.

Shaking his gavel at the loquacious witness, the judge glared down sternly from his bench and admonished: "See this thing I've got in my hand?" he said, anger peeking through his normal low-key manner. "I have been a judge for 26 years, sir. I've never had to rap this gavel once and find a lawyer in contempt. Now you are tempting me."<sup>38</sup>

These comments came in the sternest of voices from someone who had never come close to losing his temper at any point during the proceedings. Mr. L'Ecuier ceased arguing, looked humbly at the floor, and in a repentant tone said, "I am properly admonished. I am sorry."

Justice Gordon also displayed an ease in adapting to the senate environment. On many mornings during the trial and before the proceedings began, senators would exercise a point of personal privilege to recognize a guest in the gallery, the occurrence of an event of importance to a constituent or a friend, and the like. One morning Justice Gordon opened the proceedings by requesting a point of personal privilege. With the astonished senate and television audience riveted to him, he proceeded to wish his former baby sitter a happy 100th birthday.

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34. Brent Whiting, *Jurist Ready to "Referee" in Senate*, ARIZ. REPUBLIC, Feb. 8, 1988, at A1.

35. Glennon, *supra* note 20, at 392.

36. *Id.*

37. Mary K. Reinhart, *Gordon Offers Grace amid Turmoil*, SCOTTSDALE PROGRESS, Apr. 5, 1988, at 2.

38. John Kolbe, *Superstar Tag Fits, but Gordon Uncomfortable Wearing It*, THE PHOENIX GAZETTE, Apr. 8, 1988, at A2.

By the time of entry of judgment against Governor Mecham on April 8, 1988, Justice Gordon had restored the public's faith in Arizona's constitutional system and its government. A subsequent editorial discussing the legislature's consideration of a proposed increase in the salaries of the state's judges remarked:

By every standard, Gordon was exemplary. He was patient and good humored when the trial grew tense, helpful in guiding legislators through the legal thickets, strong when firmness was required. Simply by doing his job, he became a judicial goodwill ambassador that the Legislature will be hard put to ignore when the time for pay raises arrives.<sup>39</sup>

His chambers received a flood of postcards, letters, phone calls, and even flowers throughout the proceedings. About Justice Gordon's actions on the first day of testimony, one admirer wrote, "How refreshing! How fair! What dignity! I hope you understand what the proceedings this day have done for regaining our self-confidence. Thank you so very much."<sup>40</sup> Or as a note accompanying a bouquet of flowers from "A Winter Visitor" put it, "It's a pleasure to watch a Judge of Justice with such fairness, honesty and integrity. Thank you." Such accolades were not bestowed upon all involved in the impeachment trial. "In fact, he may be the only participant in the legislative impeachment proceedings to escape harsh criticism from either supporters or detractors of the former governor."<sup>41</sup>

### RESISTING THE SIREN'S CALL

Upon the conviction of Governor Mecham in April, 1988, Acting Governor Rose Mofford became simply Governor Mofford. An immediate topic of public conversation was who would be a possible candidate for the next election in 1990. Although he was practically unknown to the general public before the impeachment trial, Justice Gordon's name almost always came up in such conversations. He received pressure from many sources to run, including from family, friends, associates, and people whom he had never met but whom had become admirers as a result of the impeachment trial. He judiciously kept the possibility open while investigating the practicalities of raising campaign money, resigning his seat on the Arizona Supreme Court, and subjecting himself and Joan to the travails of an Arizona gubernatorial campaign.

Governor Mecham had been the only Republican governor in years, and the Republican-controlled legislature became distraught over their belief that Justice Gordon stood poised as an unbeatable Democrat in the 1990 election. Consequently, and perhaps because their regard for his presence and abilities had not waned, the leadership of the house and senate Republicans in January,

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39. Editorial, *Judicial Salaries a Legislative Quandary*, ARIZ. REPUBLIC, May 19, 1988, at A14.

40. Postcard from F. Bock (Feb. 29, 1988).

41. Reinhart, *supra* note 37. Praise for Justice Gordon was not quite unanimous. The convicted Governor Mecham opined, "The chief justice is supposed to be there to see that justice is done, and he didn't do that." Manson, *supra* note 8. Further, a caller to Justice Gordon's chambers reportedly said, "I don't know how you can shave every morning without cutting your own throat." Kerry Fehr, "Run Frank Run": *Top Judge Shares Mecham-Case Mail*, ARIZ. REPUBLIC, Nov. 12, 1988, at B6. The feelings of one other person were unclear: "You probably used well over 10 percent of your brain's capacity in your job." *Id.*

1989 denied Justice Gordon an opportunity to present a State of the Judiciary Address to a joint session of the legislature.<sup>42</sup> Ever the politicians, they did so with an apology.<sup>43</sup>

Soon thereafter, and for a variety of reasons (including his regard for the personable Governor Mofford), Justice Gordon publicly announced that he would not run for governor and "pledged his 'full attention and energy' to his duties as chief justice."<sup>44</sup> Armed with the visibility and respect he had gained for the judiciary as a result of the impeachment trial, Justice Gordon returned to his efforts to modernize Arizona's legal system.

But the embers of his supporters' hope for a gubernatorial campaign would not die out. They burst back into flame on January 18, 1990 when Governor Mofford announced that she would not run for governor after all. The pressure again began to build for Justice Gordon's candidacy, and he again pondered it. But a few weeks later, he announced for a second time that he would not run. Instead he would continue to push his efforts to improve the judiciary throughout the remainder of his term as Chief Justice.<sup>45</sup> One commentator lamented: "Tis a shame. ... [H]e would have brought a touch of class and dignity to the grubby business of scaring up votes. Excessive dignity is seldom a problem in politics."<sup>46</sup> But as that same pundit explained:

Gordon clearly was intrigued by the gubernatorial idea, but only in the way sane people are intrigued by sky-diving. It looks like fun, but not so much fun that you'd actually be dumb enough to *do* it.

Even beyond such practical considerations, however, there was a powerful emotional tug on the judge to stay put—to preside over the modest revolution he has wrought in what has always been the mustiest and slowest to change of the three arms of government.<sup>47</sup>

For those who know Justice Gordon, and despite their disappointment in his not choosing to run for governor at that time, it is obvious that part of the reason he twice declined to do so while he was Chief Justice is that he is not a self-promoter. Given his popularity and the lack of an incumbent, the chances are good that he could have ridden his fame into the governor's office. His intelligence, talents, and ability to surround himself with and rely on an able staff also make it likely that a Gordon administration would have been more than capable. It also had to be difficult to resist the flattery of a broad-based call for a candidacy for one who had never expressed any interest in the office. But, although he did not completely rule out a future run for that or some other office, he eschewed the easy ego trip and instead continued to toil patiently on the projects he had started, but not yet finished, as Chief Justice.

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42. Sam Stanton, *Lawmakers Offer Apology to Chief Justice But Still Deny Use of Chamber for "Political" Talk*, ARIZ. REPUBLIC, Jan. 12, 1989, at B1.

43. *Id.*

44. Editorial, *Chief Justice Gordon's Pledge*, THE PHOENIX GAZETTE, June 14, 1989, at A18.

45. Some might suggest that, by twice declining the lure of the "Draft Gordon" movement, the Justice was merely proving that he must be the right person for the job.

46. John Kolbe, *X Factor: Gordon Didn't Want Demotion, More Hassles*, THE PHOENIX GAZETTE, Feb. 7, 1990, at A2.

47. *Id.* The commentator may have been a little off on the sky-diving analogy. As discussed *infra* at 303, a few months after his retirement from the bench in January, 1992, Justice and Joan Gordon took a long trip to New Zealand and Australia, and while there they took up bungee jumping.

## JUSTICE GORDON'S TERM AS CHIEF JUSTICE

A few years into Justice Gordon's term as Chief Justice, an editorialist referred to him as a person who had been "laboring mightily to pull a reluctant, dusty state judicial system toward the fresh breezes of modern efficiency."<sup>48</sup> Justice Gordon came to the court with certain goals in mind in addition to participating in the case law decision process. He sought to improve the overall efficiency and image of the judiciary system and the state Supreme Court, and he also wanted to help improve the image of attorneys who practice within the State of Arizona. Much of this was ultimately achieved by improving the public's access to the previously shrouded court system, a task he spearheaded as Chief Justice.

Justice Gordon was sworn in as Chief Justice of the Arizona Supreme Court in January of 1987. He began preparing himself for his responsibilities as Chief Justice almost a year before his appointment. He spoke with judges, government and civic officials and the public about the judicial system and what needed to be done to improve it. He also began studying how other state judiciaries were improving their systems. He attended numerous briefings and meetings to orient himself to the new major responsibilities he would be assuming as the head of Arizona's judiciary.<sup>49</sup>

Within six months of becoming Chief Justice, Justice Gordon announced his broad major goals for his five-year term. These goals included: (1) consolidating Arizona's trial courts and broadening management participation within the system; (2) enhancing the delivery of services to the users of the judiciary system; and (3) improving the public's perception of Arizona's judiciary.

Justice Gordon accomplished these goals—and much, much more—during his five-year term. Major initiatives launched under Justice Gordon's term as Chief Justice included: (1) Establishment of Arizona's Council of Judicial Administration (COJA), which later became known as the Arizona Judicial Council (AJC). This provided for a much broader based participative management in the administration of the system and, more notably, for the first time added public members to not only the Council but all of its various committees.

(2) Appointment of a broad-based Commission on the Courts. This Commission was given the task of examining Arizona's court system from top to bottom and recommending action steps to the Supreme Court that could be taken to improve the system's management and overall operation. The Commission submitted to the Supreme Court fifty recommendations, including proposals to unify Arizona's Superior, Justice and Municipal Courts; fund all courts throughout the state; promote alternative dispute resolution; reform juvenile treatment centers; and much more. All but one of the recommendations were adopted by the Supreme Court. Justice Gordon dedicated his final year on the court to obtaining legislative approval of these recommendations. Although not all have yet been implemented, the process of reforming Arizona's courts has moved forward as a result of Justice Gordon's facilitation and support of a broad-based plan.

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48. Editorial, *supra* note 44.

49. Letter from William L. McDonald, former Supreme Court of Arizona Administrative Director (December 3, 1992).

(3) Launching a literacy education program for adult and juvenile probationers that has now been recognized nationally as a model program. In launching this program designed to teach people on probation how to read, the Supreme Court, under Justice Gordon's direction, acted on a link that the court perceived between illiteracy and criminal behavior.<sup>50</sup> This literacy effort now includes thirty-one reading labs throughout the state, located in court centers, high schools, universities and other facilities. The reading laboratory in Mesa, Arizona has been named the Frank X. Gordon Reading Lab. Justice Gordon's literacy work ultimately led to national recognition. At a ceremony at the White House on November 22, 1992, President George Bush and First Lady Barbara Bush presented Justice Gordon and five other people with the Third Annual National Literacy Honors. In a tape of those awards that was nationally broadcast on ABC Television on December 26, 1992, Justice Gordon described attending graduation ceremonies for people who had gone through Arizona's literacy centers: "After many, many years of sending people to prison, it's a very warm and welcome feeling to sit at these graduations and see people with a totally new direction in their lives." When President Bush presented the award to Justice Gordon, he noted, "When you were asked, after completing over 27 years of service on the bench, what you considered your most important decision, you replied, 'Setting up a literacy program for young offenders.'"

(4) Initiating a project to provide for the evaluation of judges so that voters would have better information regarding the retention of judges. This effort was a major recommendation of the Commission on the Courts that continues to be pursued during Justice Stanley Feldman's term as Chief Justice.

Justice Gordon also led a revolution in the way the judiciary interacted with other branches of government and the press. Rather than communicate with the outside solely through the issuance of written opinions and the cases argued to the courts, he and the other judges reached out to meet with the governor, legislators, reporters and others to discuss a broad range of topics relating to the courts. After lunch with then-Chief Justice Gordon, then-Vice Chief Justice Stanley Feldman, two Superior Court judges, and several reporters to discuss Arizona's probation system, one editorialist commented, "This lunch wouldn't have happened 10 years ago .... You used to just wait for the Supreme Court justices to make pronouncements on high. Not talk to them over lunch."<sup>51</sup>

He was largely responsible for the adoption of Rule 28 of the Rules of the Arizona Supreme Court which in its preamble states:

It is the policy of the Arizona Supreme Court to establish an effective process for the adoption, amendment and repeal of rules of procedure for the courts of this state which will provide for public notice and opportunity for comment from the members of the legal profession and the public and proposals to adopt, amend or repeal rules.<sup>52</sup>

Not only does the preamble to this rule express Justice Gordon's goal of drawing the public into the process, but the rule itself allows "any person" to petition for the adoption, amendment or repeal of a rule. Many of the committees

50. Pamela Manson, *Literacy a Legacy of an Ex-Justice: State Reading Project Is a Model for Nation*, ARIZ. REPUBLIC, Dec. 26, 1992, at B-1.

51. Richard de Uriarte, *Supremes: I Hear a Symphony*, THE PHOENIX GAZETTE, Aug. 1, 1988, at A-9 (quoting *Phoenix Gazette* editor Jay Brashear).

52. 17A ARIZ. REV. STAT. ANN. SUP. CT. RULES, Rule 28.

formed under Justice Gordon's direction, often with substantial numbers of non-lawyers and non-judges, were aimed at bringing the public into the court system.

In a further effort to bring the public closer to the judicial process, Justice Gordon was a leader in advocating cameras in the courtroom. Not only has this resulted in the televising of trials and appeals of significant public importance, but it also has resulted in the broadcast of interviews of the finalists for positions on the state Supreme Court. This work led to the National Society of Professional Journalists bestowing on him and Phoenix's public television station KAET-TV an award "for activities in defense of the First Amendment."

Interestingly, while Justice Gordon wanted to bring the judicial system and the public closer together, he was not willing to do so at the expense of litigants or individual rights. For example, in *Lewis R. Pyle Memorial Hospital v. Superior Court*,<sup>53</sup> Gordon wrote that, as a general rule, pretrial depositions are not public proceedings and therefore non-parties could be excluded from those proceedings. In *State ex rel. Pope v. Superior Court*,<sup>54</sup> he wrote the opinion that created a shield protecting the reputations and prior acts of rape victims in criminal rape prosecutions. The court's decision in *Pope*—one of Justice Gordon's early opinions—demonstrated the moderate and progressive attitude that ultimately resulted in Justice Gordon being recognized as one of the best appellate judges in the history of Arizona.

Perhaps the most significant inroad Justice Gordon made in bringing the judicial system to the people of Arizona was with respect to courts of lower jurisdiction. Through the Commission on the Courts, special attention was given to the justice court system. Jurisdictional limits were increased so that more disputes could be resolved in the justice court system,<sup>55</sup> thereby giving more people their "day in court"—something many would not have been able to obtain had they been required to pursue their case in the superior court system. Justice Gordon was a leader in requiring continuing education for judges throughout the state, and he also focused attention on justices of the peace to ensure that those individuals who were unable to retain counsel of their choosing would be given a fair opportunity to present their case in the courts of lower jurisdiction.

Substantial steps to improve the amount of *pro bono* services provided to the public by attorneys also took place while Frank Gordon was Chief Justice. He advocated the adoption as of December 1, 1990, of Arizona Supreme Court Rule 42 ER 6.1, which provides that, as an ethical aspiration, each practicing attorney in Arizona should provide fifty hours of *pro bono* service per year. Justice Gordon also invited a senior member (and *not* a designate) of each of Phoenix's twenty largest law firms to a luncheon and, jointly with the Volunteer Lawyers' Project, personally solicited them to adopt a written *pro bono* policy that he helped draft. Seventeen of the twenty firms adopted the policy within a year. In one year of his working to increase the number of

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53. 149 Ariz. 193, 717 P.2d 872 (1986).

54. 113 Ariz. 22, 545 P.2d 946 (1976).

55. ARIZ. CONST. amend. of Nov. 6, 1990, Ariz. Laws 1990, S.C.R. 1003, *codified at* ARIZ. CONST. art. 6, § 32 (increasing constitutional limit on Justice of the Peace jurisdiction from cases involving up to \$2,500.00 to cases involving up to \$10,000.00); Act of May 14, 1990, Ariz. Laws 1990, ch. 223, sec. 2 (increasing Justice of the Peace jurisdiction from cases involving up to \$500.00 to cases involving up to \$5,000.00).



lawyers doing *pro bono* work, the Volunteer Lawyers' Project pool of attorneys rose from 700 to more than 1100. He continued these efforts up to the afternoon he retired, when he held a meeting with public lawyers to encourage them to do *pro bono* work and to lobby for changes to the laws limiting their ability to do so. In August 1990, the American Bar Association awarded Justice Gordon one of its four *Pro Bono Publico* awards given that year.

Some of Justice Gordon's other projects included involving Arizona's tribes of Native Americans in Arizona's justice system, lobbying the legislature to reform Arizona's archaic system of collecting court-imposed fines, encouraging changes in the system by which voters are given information by judges up for retention election, and recruiting attorneys to volunteer *pro bono* services to military personnel returning to Arizona from assignments during the Persian Gulf conflict. In addition to requiring educational programs for the judges of the State of Arizona, continuing legal education for all attorneys practicing in the state was initiated during Justice Gordon's term as Chief Justice. All in all, the people of the State of Arizona got their money's worth as a result of Justice Gordon's fifteen years on the Arizona State Supreme Court.

### A SAMPLING OF HIS OPINIONS

Justice Gordon also made great contributions to the people of Arizona as a result of many of the decisions he wrote. His opinions reflect his small town upbringing and his practice from his days on the Superior Court of attempting to ensure that the justice system provides just results for all of those affected by court proceedings. Justice Gordon fully respected precedent but where current-day circumstances warranted change, he was not bashful in writing opinions modifying or even doing away with arcane legal principles.

In the case of *Carroll v. Lee*,<sup>56</sup> the court addressed a palimony-type situation involving a couple who had cohabited for fourteen years without ever seriously contemplating marriage. The trial court found that a contract by conduct—not a writing—existed between the man and woman with respect to assets acquired during the years of cohabitation. Although the court of appeals reversed, finding that there was no valid contract, Justice Gordon, writing on behalf of the court, vacated the decision of the court of appeals and found that the woman had contributed "home making" services to the "community" and that this was good and valuable consideration for her interest in the property owned by the couple in joint title. The opinion concludes with a discussion of public policy indicating that the opinion "does not discourage or shake the foundation of marriage in this state."<sup>57</sup> Rather, all the court is doing is enforcing an agreement entered into between two individuals and is re-confirming that "community property rights derive solely from the marital relationship."<sup>58</sup>

Often times Justice Gordon was responsible for authoring opinions dealing with "cutting edge" issues and the applicability of newly enacted legislation. For example, in *Kriz v. Buckeye Petroleum Co., Inc.*,<sup>59</sup> the state supreme court responded to questions that had been certified by the Federal district court for the District of Arizona regarding applicability of the Uniform Contribution

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56. 148 Ariz. 10, 712 P.2d 923 (1986).

57. *Id.* at 16, 712 P.2d at 929.

58. *Id.*

59. 145 Ariz. 374, 701 P.2d 1182 (1985).

Among Tortfeasors Act which Arizona adopted in 1984. In that case, Justice Gordon wrote that the Act would not be applicable to suits filed before the effective date of the Act and that a joint tortfeasor could not make the Act applicable by amending the complaint and adding a contribution claim after the effective date of the Act. The court further indicated that the Act created a separate and distinct cause of action for contribution which would not accrue until one of the several joint tortfeasors had paid more than its share of common liability.

The case of *City of Tucson v. Superior Court*<sup>60</sup> exhibited Justice Gordon's compelling interest in maintaining the quality of Arizona's judiciary. In that case, the court held that communications made to the City of Tucson's Magistrate Merit Selection Commission were privileged from disclosure in a civil action by a former magistrate who was not reappointed.

In 1954, the Arizona Supreme Court held that neither a wife nor minor child had a cause of action for loss of consortium when another person negligently injured the husband/father.<sup>61</sup> The court, through an opinion written by Justice Lorna Lockwood (to whose seat Justice Gordon was appointed upon her retirement), found in 1972 that at least the part of this rule restricting a wife's right to recover was "unjust or out of step with the times" and overruled it.<sup>62</sup> Justice Gordon, writing on behalf of the court, delivered the *coup de grace* to the remainder of this rule in *Villareal v. State Department of Transportation*.<sup>63</sup> A majority of states at the time of the *Villareal* decision still denied a minor child a cause of action for loss of consortium.<sup>64</sup> Nevertheless, Justice Gordon's opinion found the minority view more persuasive, explaining:

The loss of a parent's love, care, companionship, and guidance can severely impact a child's development and have a major influence on a child's welfare and personality throughout life. Because every individual's character and disposition impact on society, it is of highest importance to the child and society that we protect the right to receive the benefits derived from the parental relationship.<sup>65</sup>

Whether a state agency's administrative investigation of an entity within its jurisdiction by means within its constitutional and statutory powers can ever be so unreasonable as to be enjoined was at issue in *Polaris International Metals Corp. v. Arizona Corporation Commission*.<sup>66</sup> The plaintiff corporation in that case sued in 1979, alleging that, since 1971, the Arizona Corporation Commission had been using its powers to investigate plaintiff's securities to harass the plaintiff into leaving the state. In essence, the plaintiff claimed that the Arizona Corporation Commission had been engaged in an endless investigation designed not to result in any formal charges, adjudication, or other conclusion but rather intended to make life difficult for the plaintiff.<sup>67</sup> The trial court granted the commission's motion to dismiss for failure to state a claim

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60. 167 Ariz. 513, 809 P.2d 428 (1991).

61. *Jeune v. Del E. Webb Constr. Co.*, 77 Ariz. 226, 269 P.2d 723 (1954).

62. *City of Glendale v. Bradshaw*, 108 Ariz. 582, 584, 503 P.2d 803, 805 (1972).

63. 160 Ariz. 474, 774 P.2d 213 (1989).

64. *Id.* at 477, 774 P.2d at 217.

65. *Id.* (citing David P. Dwork, Note, *The Child's Right to Sue for Loss of a Parent's Love, Care and Companionship Caused by Tortious Injury to the Parent*, 56 B.U. L. REV. 722, 740-41 (1976)).

66. 133 Ariz. 500, 652 P.2d 1023 (1982).

67. *Id.* at 502-04, 507, 652 P.2d at 1025-27, 1030.

even if the allegations were true.<sup>68</sup> In an opinion authored by Justice Gordon, the Arizona Supreme Court noted that the commission had broad powers to investigate whether a party had violated or was about to violate Arizona's securities laws and that no case could be found in which a court had ever ordered a complete halt to an agency's investigation.<sup>69</sup> But relying on the fundamental role of the judiciary to act as a check and balance on abuses of power by other branches of government, the court held, "[I]f an administrative agency's investigation becomes a tool of harassment and intimidation rather than a means to gather appropriate information, the appropriate court may intrude and stop the incursion into the constitutional liberties of the parties under investigation."<sup>70</sup> Accordingly, the case was returned to the trial court for further proceedings.

In *Richards v. Powercraft Homes, Inc.*,<sup>71</sup> several homeowners sued a subdivision's homebuilder for a variety of defects in their homes. They claimed, among other things, breach of an implied warranty of habitability. Judgment for three of the plaintiffs had been set aside by the Arizona Court of Appeals as these plaintiffs were not the original purchasers of the houses at issue and, thus, were not in privity with the homebuilder from whom the warranty was implied.<sup>72</sup> The basis of the Arizona Court of Appeals' decision was Justice Gordon's prior opinion in *Flory v. Silvercrest Industries, Inc.*<sup>73</sup> In that case it was held that the warranties implied by the Uniform Commercial Code are, by the express language of that code, limited to parties who are in privity with the maker of the warranties. But Justice Gordon noted in *Richards* that the *Flory* opinion explicitly restricted its privity rule to actions arising under the Uniform Commercial Code.<sup>74</sup> The Arizona Supreme Court's opinion in *Richards* holds that the implied warranty of habitability of a home is imposed by common law, not the Uniform Commercial Code, and that the same public policies that justify imposing the warranty as to the original homebuyer also support extending the warranty to subsequent homebuyers.<sup>75</sup>

Through opinions written by Justice Gordon, the Arizona Supreme Court expanded on the law in Arizona relative to employer/employee relations. In *Leikvold v. Valley View Community Hospital*,<sup>76</sup> the court agreed with the employee that personnel manuals can become part of an employment contract.<sup>77</sup> Perhaps even more important from an employee's point of view, the opinion indicated that whether a specific personnel manual modifies an employment-at-will relationship and becomes part of an employment contract is a question of fact.<sup>78</sup> In balancing the rights between employers and employees, the opinion also indicated that employers have the right not to issue any personnel manual

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68. *Id.* at 504, 652 P.2d 1027.

69. *Id.* at 506, 652 P.2d at 1029.

70. *Id.* at 507, 652 P.2d at 1030.

71. 139 Ariz. 242, 678 P.2d 427 (1984).

72. *Id.* at 244, 678 P.2d at 429.

73. 129 Ariz. 574, 633 P.2d 383 (1981).

74. 139 Ariz. at 244, 678 P.2d at 429.

75. *Id.* at 244-45, 678 P.2d at 429-30. The Arizona Supreme Court, in another opinion authored by Justice Gordon, reached a similar result in *Seekings v. Jimmy GMC of Tucson, Inc.*, 130 Ariz. 596, 638 P.2d 210 (1981) (holding that the express warranty of a motor home manufacturer to the ultimate purchaser lies outside the Uniform Commercial Code and cannot be subject to a privity rule, which otherwise would render such an express warranty meaningless).

76. 141 Ariz. 544, 688 P.2d 170 (1984).

77. *Id.* at 548, 688 P.2d at 174.

78. *Id.*

or, when issuing such a manual to clearly and conspicuously tell the employees that the manual is not a part of the employment contract.<sup>79</sup>

The court's later opinion in *Wagner v. City of Globe*<sup>80</sup> expanded on its earlier decision in *Leikvold* in indicating that whether parties intended to modify an employment-at-will relationship is a question of fact.<sup>81</sup> Additionally, the court went to some length in protecting "whistle-blowing activity which serves a public purpose."<sup>82</sup> Thus, through opinions written by Justice Gordon, great strides were made in protecting employees when acting to further the public good.

## RETIREMENT

In January of 1992, Justice Gordon retired at the age of 62. Although he has taken a position with a Phoenix firm on an "of counsel" basis, he is committed to carrying out many of the projects which he fostered while on the supreme court. He plans to live up to his encouragement of *pro bono* work by providing free legal work to the homeless through his church. He remains heavily involved in trying to improve the literacy level among both children and adults coming through Arizona's court system. He also remains "on call" to the state in the event that his services are ever again needed to handle a crisis situation similar to what occurred during the impeachment proceedings of former governor Evan Mecham.

Shortly after his retirement, the Gordons took a long-awaited six-and-a-half week vacation to Australia and New Zealand. To recover from the rigors of nearly thirty years of judicial service, the Gordons relaxed with such mundane pursuits as bungee jumping, snorkeling with reef sharks, and swimming with freshwater crocodiles. On this trip, the justice picked up a digeree doo, a native Australian musical instrument. He has set for himself the goal of becoming the first former state Supreme Court Chief Justice both to bungee jump and master the intricacies of that instrument.

In September 1992, Justice Gordon was invited to Belarus (a former Soviet Union republic) under the auspices of the American Bar Association's Central Eastern European Law Initiative.<sup>83</sup> Along with two law professors, two attorneys, and a United States District Court judge, Justice Gordon gave advice to both the current Belarussian government and the opposition party regarding the drafting of a judicial article in that country's new constitution. When their hosts noted a reluctance to adopt constitutional guarantees the country could not afford now (such as free housing, education and medical and legal care), Justice Gordon's team pointed out particular freedoms that could be guaranteed at no cost (such as freedom of speech, press, religion, and assembly). Justice Gordon also discussed with the Belarussian Chief Justice inter-relationships between the trial courts and appellate courts.<sup>84</sup> Summing up the experience, he explained, "[G]oing to this country and being a part of their drafting team is kind of like

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79. *Id.*

80. 150 Ariz. 82, 722 P.2d 250 (1986).

81. *Id.* at 87, 722 P.2d at 255.

82. *Id.* at 88, 722 P.2d at 257.

83. For a report on this trip, see T. Simons, *Drafting Freedom*, ARIZ. ATT'Y, Jan. 1993, at 12.

84. *Id.* at 13.

being transported back over 200 years in our country and watching the various political debates that were going on about the power to be given the president, the legislature, the judges, and all that.”<sup>85</sup>

Justice Gordon has also continued to work in his judicial role on an as-needed basis. In 1992 he was appointed as a federal mediator by United States District Court Judge Paul Rosenblatt to mediate over the ongoing legal dispute involving gaming activities on Arizona’s Indian reservations. In February of 1993, he issued a written opinion refusing to limit the types of gambling allowed the reservations. The opinion specifically allowed two tribes to install as many as 1800 electronic gambling machines on their reservations and a third tribe to install up to 2600 electronic gambling machines plus table games such as dice, blackjack and poker. It further allowed other Indian tribes in the state to re-negotiate their compacts to include more gambling machines and casino-style table games.<sup>86</sup>

Not only did his opinion address legalities involved in gaming on Indian reservations, but it went to some length to inform the public of the terrible living conditions on the reservations. For example, Gordon wrote: “In all three tribes, depression and feelings of hopelessness prevail. ... None of the tribes would favor gambling as its primary resource if other sources of revenue were available.”<sup>87</sup> Gordon went on to note that he was especially “shocked to see the substandard housing, medical and educational conditions that existed on the Tohono O’odham Reservation. ... The elderly, sick and disabled on that reservation live in conditions not unlike (those of) many Third World countries in Africa today.”<sup>88</sup> This decision resulted in a flurry of political and legal activity. Governor Fife Symington expressed concern that the decision could potentially open the door for full-scale Las Vegas-type casinos in Arizona and, as a result, within a week of the decision called a special session of the Arizona Legislature. Thereafter, Arizona and various tribes reopened negotiations to resolve through compromise agreements any disputes about gaming to be allowed in the reservations. To the extent any disputes are not resolved, resolution of the matter may ultimately rest with former Arizona Governor and now Interior Secretary Bruce Babbitt. Interior Secretary Babbitt could adjudicate the regulatory issues with the tribes and ultimately accept the decision of Justice Gordon and approve the gaming compacts.<sup>89</sup>

While his calendar remains full with his work and projects, Justice Gordon also plans on finding time for his favorite outdoor activities such as fishing, tennis and golfing. He also enjoys cooking. In fact, in 1982, Joan Gordon was a finalist in the Taste of Arizona contest for making jalapeño pickled eggs from a recipe developed by Frank Gordon. He plans on rounding out his days by spending time with family, including his grandchildren in Kingman.

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85. *Id.* at 14.

86. Abraham Kwok, *Mediator Sides with Tribes on Gaming: State Officials Say Ruling Will Open Door to Casinos*, ARIZ. REPUBLIC, Feb. 16, 1993, at A1.

87. *Id.* at A9 (quoting Justice Gordon).

88. *Id.* (quoting Justice Gordon).

89. Pat Flannery, *Tribes Win Right to Expand Gambling: Mediator’s Ruling Allows Full-Scale Casinos*, THE PHOENIX GAZETTE, Feb. 16, 1993, at A1.

## CONCLUSION

Rarely does one who sets high goals have the opportunity to look back and see that the path taken led to fulfillment of each of those goals. This is more the case in the legal profession, where the participants are under even greater scrutiny by their peers and the public. Justice Gordon set goals and achieved them. When faced with perhaps the most difficult task of his career, he presided over the Senate impeachment trial of Governor Mecham with dignity and indirectly achieved one of his principal quests—that of bringing the public closer to the legal system and helping to improve the image of that system among many who were so quick to level criticism.

Justice Gordon approached the position of Chief Justice as having endless potential. He did not limit himself to the traditional administrative/decision-making process. Instead, he wanted the legal system to work for “the people.” He brought the public into the court system as active participants and delivered the legal system in a positive fashion to many whose previous experiences were negative. Probationers were no longer relegated to unemployment and a stagnant period of life; rather, Justice Gordon sought to improve their quality of life by conquering illiteracy, which opened the doors of employment and allowed many to be able to make a positive contribution to society.

Perhaps Justice Gordon will best be remembered for his personal touch. From his early years on the bench to his last day as Chief Justice, he was a motivator who brought out the best in those who were fortunate enough to work with him. He left a judicial system that is a model for the nation—one in which cases get to trial faster and people can pursue their positions without worrying that the one with the most money will be able to use the legal system to wear down the other party. The state government was back on track and public confidence in the state’s leaders was up in part due to the example set by Justice Gordon during his tenure as Chief Justice.

We are all fortunate to have benefitted from the efforts of Frank Gordon during his thirty years as a public servant. We continue to realize the fruits of his labors in his “retirement.” Arizona and its citizens always were and remain both the motivators and the beneficiaries of his timeless devotion and efforts. Thank you, Mr. Chief Justice.