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The Case of Rose Bird

Kathleen A. Cairns

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THE CASE OF ROSE BIRD

*Gender, Politics, and
the California Courts*

KATHLEEN A. CAIRNS

University of Nebraska Press

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ACKNOWLEDGMENTS

Thirty years ago, as a newspaper reporter, I covered Chief Justice Rose Elizabeth Bird's unsuccessful 1986 retention election. It was a depressing and brutal affair, and shortly after it ended I happily put it behind me. Little did I know that decades later I would revisit Bird and her tortured tenure atop the nation's premier state supreme court. I have many people to thank for helping me reconstruct the life and times of this complicated, enigmatic, and remarkable woman.

Wallace Kaufman and Edwin Gauld grew up in Sea Cliff, New York, and helped me immeasurably in my efforts to understand the geography and cultural landscape of the town where Bird lived during her teenage years in the 1950s. Gauld went far beyond simply providing a snapshot of Sea Cliff. He located acquaintances of Bird's who knew her before she became quite so reluctant to share personal information. Bird always asserted that she had grown up poor and an "outsider." Information about her youth in Sea Cliff revealed the accuracy of these statements.

At UC Berkeley I thank Boalt Hall librarian Bill Benemann for providing a list of the law school's class of 1965—nearly two hundred men and only eight women, including Bird—and a poem Bird wrote for a student publication. Also at Berkeley I thank the Bancroft Library staff, specifically Crystal Miles, for helping me navigate permissions for photos

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Introduction

In fall 2010 former eBay chief executive Meg Whitman was the Republican candidate for governor of California. At campaign stops across the state, she accused her Democratic opponent, Edmund G. “Jerry” Brown Jr., of being “soft on crime.” As evidence Whitman cited Rose Elizabeth Bird, whom Brown had appointed chief justice of the state supreme court thirty-three years earlier in his first iteration as governor.

Whitman could be forgiven for believing that her audience would understand the reference. For more than two decades, beginning in the late 1970s, Bird had been California’s most controversial figure, responsible, according to critics, for keeping vicious killers alive and making it hard to do business in the state. Even after she left the court and became what friends deemed a tragic recluse, Republican candidates continued to use her as a “perennial bogey-person,” useful for stirring up fear and anger among voters. But ten years into the twenty-first century, relatively few people still remembered Bird. “What a pretty name,” one young woman responded, shaking her head in puzzlement. In the end, Brown easily defeated Whitman.

Rose Elizabeth Bird was forty years old when Brown tapped her to become California’s first female supreme court chief justice in February 1977. She already had a history of firsts behind her: first female law clerk of the Nevada Supreme Court, first female deputy public defender in

California's Santa Clara County, first woman to hold a cabinet position in California. Bird also had finished near the top of her class at Boalt Hall, the University of California, Berkeley's storied law school, where she was one of only a handful of female students in the class of 1965.

She had bruised egos and made enemies on her way up. Nonetheless, Bird was utterly unprepared for the outrage that accompanied her court appointment. She was too young; she had never been a judge; she was arrogant, aloof, and controlling. One person called her vindictive. Many said a sitting justice should have received the plum job. In fact, long-serving associate justice Stanley Mosk had expected to get the nod.

After a bruising confirmation hearing, Bird barely won approval from the Commission on Judicial Appointments. It was not an auspicious beginning, and it went downhill from there. She squeaked by in her first retention election in 1978, receiving fewer votes than any previous justice. Disappointed opponents initiated recall efforts, featuring direct-mail solicitations, letter-writing campaigns, and a thudding drumbeat of "soft-on-crime" allegations.

The recall attempts failed, but anti-Bird forces viewed them as training exercises, a prelude to the real battle in 1986, when she again had to go before voters, this time for a twelve-year term. Opponents understood that the notoriously media-averse chief justice would be an inept candidate and that, in any event, judicial ethics would severely restrict her ability to mount an effective counterattack.

After a sophisticated campaign that cost more than \$10 million and garnered national attention, in November 1986 Bird earned another first, this one humiliating. She became the first chief justice in California to be removed from office by voters. Two other justices were defeated as well: Joseph Grodin and Cruz Reynoso, both Jerry Brown appointees. "They were just in the wrong place at the wrong time," said campaign consultant Bill Roberts.¹

What was it about Bird that engendered such widespread and pervasive antipathy and outrage? The level of public attention and scrutiny she received was unprecedented. Historically, few voters knew the names of any sitting justices, periodic retention elections drew disinterested

yawns, and jurists routinely won election by wide margins. In reality the battle over Bird was always about more than one individual. It represented the opening salvo in what has become an ongoing, bitter, and expensive war over control of the nation's judicial system. In this, as in so much else, California stood in the vanguard.

In the two decades before Bird's appointment, the U.S. Supreme Court overturned segregation and miscegenation laws, barred illegal searches, banned prayer in public schools, abolished the death penalty, and granted women the right to terminate pregnancies. Conservatives and even some moderates railed against many of these rulings as judicial activism and "social engineering." In the 1950s and 1960s ultraconservative groups such as the John Birch Society went so far as to erect billboards alongside the nation's highways urging motorists to "Impeach [U.S. Supreme Court chief justice] Earl Warren." Federal judges had lifetime appointments, however. Once confirmed by the U.S. Senate, barring extraordinary circumstances, they enjoyed airtight job security until they died or chose to retire.

In reaching high-profile decisions, the U.S. high court often was persuaded by rulings made earlier by the California Supreme Court, considered the nation's most prestigious and pioneering. Unlike their federal counterparts, California justices had to face the voters in periodic elections, but they had long enjoyed an exalted status that made it virtually impossible to mount effective campaigns against them, no matter how thoroughly their rulings may have angered various interest groups. Solidly entrenched members of the political and legal establishments, these male jurists went to the best schools and often went on to practice law in prestigious firms or teach at elite institutions. They belonged to exclusive private clubs.

Bird had been a criminal defense attorney and an advocate for migrant workers and other underprivileged individuals. She possessed none of the prerequisites that ordinarily conferred prestige and status. She might have gone to a good school, but she was an outsider, not a member of the political elite. Opponents cited many reasons for going after Bird with such a vengeance, but underlying all the explanations was the fact that

they saw her as vulnerable. After years of pent-up anger, to opponents of the judicial status quo she was a godsend.

None of her opponents ever publicly uttered the word “woman” as a factor in their opposition, but gender significantly enhanced her vulnerability. With women historically excluded from the upper echelons of the legal profession, she had no long-established network of allies and colleagues ready to rush into the breach and declare that an attack on a sitting justice represented an assault on the judiciary itself. In fact, many male judges and lawyers resented the notion that an inexperienced female should occupy the same seat once held by such towering figures of jurisprudence as former chief justices Roger Traynor and Phil Gibson.

Bird partisans charged her opponents with sexism, but critics denied that gender had anything to do with their opposition. Instead they cited her abrasive, uncompromising personality, her proplaintiff rulings, and her refusal to uphold death sentences. Bird did possess an abrasive and uncompromising personality, she consistently ruled in favor of plaintiffs, and she voted to overturn every death sentence that came before her. But Roger Traynor had been characterized as a “prima donna,” the pre-Bird court was notoriously plaintiff friendly, and her predecessor as chief justice had written the decision that eliminated (at least temporarily) capital punishment in California.

Her lack of judicial experience also did not set Bird apart. Neither Traynor nor Gibson had spent a single day as a judge before their high court appointments. And one associate justice, William P. Clark, appointed by Governor Ronald Reagan in 1973, had flunked out of both college and law school before passing the state bar exam on his second attempt. No one talked of removing Clark from the bench. California’s first female supreme court justice obviously was required to play by different rules.

Gender may have been the elephant in the room, but timing holds the key to understanding how it enabled opponents to derail Bird’s career. Her appointment came just as second-wave feminism stood at its peak in terms of accomplishments. In the 1970s Congress passed the Equal Rights Amendment, Title IX of the Civil Rights Act, and

the Equal Credit Act. With *Roe v. Wade*, the Supreme Court cited the right to privacy in granting women the right to abortion. More women had begun to enter previously off-limits professions, becoming police officers and firefighters. They took advanced degrees in high-paying, male-dominated fields like law, medicine, and finance.

Many women and men celebrated these gains, but others voiced fears that the women's movement had gone "too far," that a "radical" feminist agenda might topple longstanding institutions and threaten "traditional" values. As a woman sitting atop a court system known for setting precedents in a wide range of areas, Bird automatically became the focus of significant media attention. Additionally, by the 1980s a strong backlash had emerged, with feminists regarded as man-hating lesbians and sad and bitter spinsters. "Just when women's quest for equal rights seemed closest to achieving its objective," wrote Susan Faludi, "the backlash struck it down."²

Never married and childless, Bird was an easy target. Opponents recruited mothers of murdered children to appear in television ads holding photos of their dead offspring. They proclaimed Bird responsible; she had overturned death sentences of vicious male predators. Because she was not a mother, the ads implied, she could never identify with those who had lost children. Bird tried to convey sympathy with victims' families, but her response that she was required by law to follow the Constitution rang hollow. The constant assaults led her to utter some impolitic comments, such as calling her male opponents "bully-boys."

Following her ouster Bird retreated to the Palo Alto, California, home she shared with her mother. Exhausted emotionally and physically, she withdrew from friends and former colleagues. Fellow justices Joseph Grodin and Cruz Reynoso quickly landed positions at prestigious law schools. Bird faced a bleaker future. Law schools did not queue up to hire her; neither did law firms—clients might object. A stint as a television commentator did not last long. Stations had touted her as "the most controversial woman in California," but her commentaries turned out not to be controversial enough.

Without a job, California's first female chief justice lived on a small

pension and turned to volunteer work. One day she walked into a legal aid clinic and offered to copy documents. The young lawyers had no idea who she was and handed her a stack of paper; they were mortified when they discovered her identity. They asked her to work as an attorney, but she declined; she had let her state bar dues lapse.³

In the mid-1990s Bird experienced a recurrence of the breast cancer that had first appeared two decades earlier, and she died of the disease in December 1999 at the age of sixty-three. Obituary writers recalled her as a trailblazing pioneer but also the victim of what had become a new kind of politics that relied on sound-bite slogans, high-powered campaign consultants, direct-mail solicitations, and prodigious fundraising.

During the campaign to oust her, Bird and others had warned of the dangerous, precedent-setting potential in targeting a sitting supreme court justice. “Political forces have been unleashed that will return to haunt us,” said Santa Clara University law professor Gerald Uelman. *CBS Evening News* anchor Dan Rather predicted that anti-Bird forces would take their talents “far beyond the California judiciary and make judges nationwide think twice about politics, pressures, and principles.” And activist actor and director Warren Beatty warned that “political ideologues” would “push to apply an ideological litmus test to judges all over the country.”⁴

The accuracy of these predictions soon became apparent. Less than a year after Bird’s defeat, President Ronald Reagan tapped federal appeals court justice Robert Bork for the U.S. Supreme Court. Confirmation by the Senate would guarantee Bork a job for life. Critics pounced: he opposed civil rights and women’s rights; he would take the court backward, into the antediluvian past. After a bitter battle lasting several weeks, in October 1987 the Senate turned down Bork’s nomination. Four years later court of appeals judge Clarence Thomas became the focus of a bitter Senate confirmation hearing. Allegations of sexual harassment nearly undid him, but he ultimately prevailed by a narrow margin.

The battle soon moved back to the states. Some lower-court judges were targeted, but big-money donors saw high-court justices as much more valuable prey, given their power to shape law policy on the macro

level. In 1992 Mississippi justice James Robertson was targeted and went down to defeat over a ruling mandating murder as a prerequisite for the death penalty. Four years later “tough-on-crime” proponents successfully targeted Nebraska justice David Lanphier and Tennessee Supreme Court chief justice Penny White. And back in California, in 1998, two justices were targeted for a ruling that allowed minors to obtain abortions without parental consent. Both retained their seats.

In 2008 Mississippi voters defeated Justice Oliver Diaz, long a target of the state’s chamber of commerce and other business interests who viewed him as too sympathetic to plaintiffs. Opponents had previously tried unsuccessfully to get Diaz convicted of corruption and tax evasion. In 2010 Iowa conservatives defeated Chief Justice Marsha Ternus and two male colleagues after a high-stakes campaign targeted them for voting to legalize same-sex marriage in that state. In 2012 three Florida high court justices barely held their seats after opponents of “Obamacare” fueled voter outrage at the judges’ decision upholding its constitutionality. And in 2014 two Kansas Supreme Court justices held their seats despite a campaign by victims’ groups angered by a ruling that overturned two death sentences.

Every election season seems to feature new and ever more expensive campaigns aimed at justices who anger powerful constituencies, though opponents’ motives often remain hidden beneath rhetoric that leans heavily on hot-button cultural issues. Often it takes only one controversial ruling to put a target on a justice’s back. Since 2000 judicial retention elections have cost upward of \$275 million, with corporate representatives and trial lawyers among the biggest contributors.

The implications of this phenomenon have fueled intense discussion and debate. “If the day comes that judges make decisions as politicians or theologians, this society and our democracy are in serious trouble,” Iowa justice Marsha Ternus said after her defeat.⁵ Former U.S. Supreme Court justice Sandra Day O’Connor warned that “the public needs to understand that the notion of independence is not only for the benefit of judges, judicial independence is for the benefit of all society.”⁶

Polls suggest that most Americans agree at least philosophically with legal experts about the dangerous influence of large contributors to

judicial elections and the ability of justices to retain independence in the face of constant political threats. As one retired chief justice declared, “It’s pretty hard in big-money races not to take care of your friends. It’s very hard not to dance with the one who brung you.”⁷ But solutions have proven elusive. Suggestions have included the establishment of nonpartisan campaign conduct committees possessing sanctioning power; single fixed terms for justices; and official tracking of donations to judicial campaigns, with the names of contributors posted online.

The clock cannot be rewound to a time before state supreme court campaigns became relentlessly partisan slugfests, but closely examining the place where it all started offers some insight into how canny campaign operatives honed their skills by shaping public perception and then used the fears and concerns of ordinary people to hijack the California Supreme Court. The confluence of gender and politics doomed Rose Bird, and neither she nor her allies possessed the tools to mount an effective counterattack. Long after her defeat, she concluded, “At least three-quarters of the battle is looking the part. Nobody knew what a woman justice was supposed to look like.”⁸

Today everyone knows what a woman justice looks like; virtually every state has had at least one. California currently has a majority of four women on its seven-member court, including Tani Cantil-Sakauye, the state’s second female chief justice. Partisan judicial attacks have become “equal opportunity” affairs. As more women joined the judiciary, voters, it seems, became comfortable with ousting judges, no matter what their gender.

As she ascended the career ladder, Bird could never have envisioned what awaited her at the top rung. She always hoped, she said, to make a difference in the world. She accomplished this goal, though surely not in the way she had hoped. “The legacy of Rose Bird,” one journalist wrote following her death, “is not outlawing the short-handled hoe or bolstering tenants’ rights, but embodying the warning that henceforth, beneath the robe of a jurist, there better beat the heart of a politician.”⁹