

## Rose Bird's "Case":

ANOMALOUS CONFLUENCE OF UNIQUE CIRCUMSTANCES  
OR LASTING DAMAGE TO JUDICIAL INDEPENDENCE?

BY PAUL D. FOGEL\*

KATHLEEN A. CAIRNS

**THE CASE OF ROSE BIRD:  
GENDER, POLITICS, AND THE  
CALIFORNIA COURTS**

328 pages; \$36.95 (Hardcover).

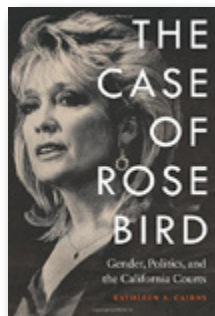
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**K**ATHLEEN CAIRNS' INSIGHTFUL, well-written, and meticulously-researched book, *The Case of Rose Bird*, shows how and why California's seemingly apolitical Supreme Court became politicized, exposing justices for the first time to the vagaries of electoral politics — and affecting, possibly, the entire California judiciary. Indeed, as this review is being written, several sitting California trial judges face challenges, even from the left, that have little or nothing to do with their competence, temperament, or other relevant criteria — a poignant reminder of how Bird's "case" is very much still with us.

Cairns entitles her book *The Case of Rose Bird* rather than one that bears just Bird's name — and entitles her chapter about the 1986 retention election "The People v. Rose Bird." She may be suggesting that the battle over Bird is like a trial and that we should decide her "case" based on the "evidence" that each "side" proffers.

Whatever Cairns' title signifies, she believes Bird's "case" forever compromised judicial independence. Cairns correctly notes that the controversy over Bird was the "opening salvo" in an "ongoing, bitter, and expensive war over control of the nation's judicial system." Although the \$10 million spent on California's 1986 Supreme Court retention election was record-setting then, since the 1990s, more than \$300 million has been spent on judicial campaigns nationally. Spending like this no doubt tests judges' resolve to adhere to the rule of law and to facilitate challenges to excesses of power and injustice.

Rose Bird was a trailblazing and controversial figure from any perspective. Yet ironically, as Cairns points out, today, relatively few remember her, much less why



her "case" is so important. Indeed, although Bird's photo looms large in a hallway at her alma mater, Berkeley Law, students generally are unaware how the battles over her controversial 1977 nomination and the grueling 1978 and 1986 retention elections affected judicial selection and, arguably, judicial decision making. By examining "where it all started," Cairns argues, we can gain insight into how "canny campaign operatives honed their skills by shaping public perception" and

used ordinary persons' fears and concerns to "hijack the California Supreme Court."

The book's thesis, which Cairns documents in detail, is that Bird's gender "significantly enhanced her vulnerability," all but dooming her quest to remain in the top spot at one of the nation's most influential courts. As a symbol of change, Bird threatened to dominate the courts at a time when the women's rights movement was strong. For Cairns, timing was everything: "second-wave feminism" reached its peak in the early 1980s (the first "wave" was in the late 19th and early 20th centuries), making Bird — unmarried, childless, young, and (to many) stubborn, controlling, uncompromising, and principled to a fault — an easy target for those wanting to push back. And that "target" was easier to "hit" when other Jerry Brown justices — Cruz Reynoso, Joe Grodin, and Frank Newman in particular — joined her in controversial rulings.

Cairns chronicles Bird's meteoric rise — hardworking and gifted student, Ford Foundation fellow, Nevada Supreme Court law clerk, deputy public defender, Stanford Law instructor, Jerry Brown campaign aide and confidante, Agricultural and Services Agency secretary, and finally, chief justice. Even beyond her many "firsts" (first woman justice, let alone chief, first woman and non-farmer agriculture secretary, etc.), her achievements were impressive. They included banning the short-handled hoe for farmworkers, authoring the Agricultural Labor Relations Act, streamlining and improving Supreme Court operations, continuing the push for state trial court funding, promoting an independent office devoted to representing capital defendants, and, of course, participating in or authoring major decisions.

In spite of these achievements, Cairns argues, the "confluence of gender and politics doomed Rose Bird,

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and neither she nor her allies possessed the tools to mount an effective counterattack.” As Bird said, “I was a woman being placed at the head of an aristocratic body, a kind of priesthood.” Cairns documents well why that “priesthood” was not ready for (much less welcoming of) a high priestess of Bird’s ilk.

Cairns also shows how difficult and uncompromising Bird could be — describing her (or quoting others’ descriptions of her) as “judgmental,” “abrupt,” “brutally honest,” “hard on herself and others,” “self-righteous,” “suspicious,” “aloof,” “a loner,” “willing to speak truth to power,” rejecting “government by public relations,” “unnecessarily antagonistic,” unable to tell “white lies” or “stroke egos,” and lacking “subtlety.”

It was widely publicized that Bird never voted to affirm any of the 60 death sentences that came before her. Her absolutism in this regard may have been fueled by her unwavering devotion to process. Consider *People v. Frierson*, which declared the 1977 death penalty initiative constitutional. Cairns labels Bird’s *Frierson* dissent “excessively confrontational.” In it, Bird faulted the majority for having “rush[ed] to judgment” in deciding key issues in dicta, and wrote that “[n]o matter how clamorous the movement of the moment,” the prohibition on cruel and unusual punishment “may not be submitted to vote [and depends] on the outcome of no election.”” Aware of the public’s focus on the death penalty, Cairns notes, Bird knew she was “walking into a minefield” where “[e]very future death penalty opinion of hers would go under a microscope.”

Bird’s December 1978 letter to the Commission on Judicial Performance — sent by her alone without consulting her colleagues and opposed even by her ally Justice Newman — triggered the Commission’s hearings to investigate the Court’s alleged delay in issuing the pro-defense *People v. Tanner* decision until after the 1978 retention election. Cairns suggests that Justice William Clark’s pre-election day discussions with outsiders prompted a *Los Angeles Times* article accusing the Court of the delay. But Cairns omits mentioning the widely reported question the *Times* reporter asked Clark (“If in the morning you were to read the story I described to you [about *Tanner*’s filing being delayed], would you throw your coffee cup against the wall?”) and Clark’s nonresponse (“I might have responded with a chuckle”); the colloquy suggested he was the source, although that was never proved.



#### THE BIRD COURT

STANDING, LEFT TO RIGHT: Associate Justices Malcolm M. Lucas, Cruz Reynoso, Joseph Grodin, Edward Panelli; SEATED, LEFT TO RIGHT: Associate Justice Stanley Mosk, Chief Justice Rose Bird, and Associate Justice Allen Broussard.

PHOTO: CALIFORNIA SUPREME COURT

The hearings were the first time the public was exposed to the Court’s inner workings — including, Cairns says, the justices’ “petty, hypersensitive, and backstabbing” ways. With the hearings, Cairns asserts, the justices descended from “Olympian heights to mingle with mere mortals,” which, she says, fueled the emergence of a “political judiciary.”

By 1979, when the *Tanner* hearings ended, and with a death penalty law upheld yet no executions carried out, Attorney General (and later Governor) George Deukmejian’s moment was at hand. He was able to join (or mount) the campaign to defeat Bird and others in 1986, which would enable him to appoint several Supreme Court justices in one fell swoop. It was at that “moment,” Cairns says, that Bird began facing her “real ordeal” — years of scrutiny of her every move and rulings. Those years gave Bird’s opponents the chance to “shap[e] her image as an ‘extremist,’ ‘judicial activist,’ and an all-around unsympathetic individual,” culminating in the unprecedented and nasty campaign that removed her.

To her credit, Cairns balances the negatives about Bird with accounts of her more positive side — her many caring and thoughtful actions, her loyalty to friends, and her quick wit and good sense of humor. Cairns’ point, however, is that that side was all but lost in her opponents’ zeal to shape her as an “activist,” out-of-touch justice who deserved to lose. And, ironically, Cairns says, Deukmejian, who had “spent nearly a decade stalking [Bird],” would forever be linked to her. One fellow Republican, Cairns reports, said that Bird is the foundation of his legacy: Deukmejian lacked other remarkable career achievements, but his relentless attacks forever changed the judiciary and the Court.

Cairns' book is accessible not only to those trained in the law, but to anyone interested in how Bird's "case" shaped history. Cairns achieves this accessibility by giving the reader context — the pioneering role the Court had in shaping criminal defendants' and consumers' rights in the decades before Bird arrived, the absence of viable opposition to justices' appointments or retention before her, the impenetrable "old boys' club" she repeatedly confronted (including Justice Stanley Mosk's open and continuing hostility as the heir apparent who was not named chief), and the death penalty jurisprudence at the time the voters adopted the confounding 1977 and 1978 capital punishment laws.

Cairns posits that even before Bird arrived, the Court was pushing the law into new territory, which her gender and lack of experience enabled opponents to slow or even reverse. Her continued willingness to challenge the "business and prosecutorial establishments" enhanced her vulnerability, permitting "corporate leaders" to partner with law and order groups to gain control of the Court. Concerned about the Bird Court's pro-plaintiff rulings, Cairns notes, big business jumped on the "tough on crime" bandwagon already in motion, with campaign consultants "provid[ing] the emotional rhetoric [while] corporate interests provided the cash."

Bird's negative character traits that Cairns describes may also explain her stubborn (even "foolhardy") decision to manage what one friend called her "isolated" and "ineffectual" 1986 campaign — which included writing her own television spots while also running California's judiciary. This, like her judicial decisions, encouraged and aided her opponents' campaign to politicize a judiciary led by an "uncompromising" chief.

Cairns poignantly describes the personal cost and political scars that Bird's defeat carried. She experienced a post-election slide into near oblivion in which she became, as one former judge described her, a "virtual pariah." Bird faced a compromised ability to earn a living worthy of a former chief (she said she "learned to scale down and live like a student again"). And she confronted an increasingly difficult struggle with another recurrence of breast cancer, from which she died at a young 63.

In her final chapters, Cairns attempts to answer whether the 1986 election was an "anomaly" that required "a female target possessing thin skin, a hypersensitive, prickly personality and an unyielding sense of how she believed the law should work," or, rather, was "the vanguard of a larger movement aimed at challenging the judiciary itself." A *Los Angeles Times* remembrance answered that question, opining that Bird's defeat "woke a slumbering giant" and that her legacy embodies a "warning" that "henceforth, beneath the robe of a jurist, there better beat the heart of a politician."

Agreeing with that opinion, Cairns cites several post-Bird examples: Robert Bork's failed Supreme Court nomination subjected him to the "relentless glare of media exposure" — to which Bird's confirmation had seemingly "opened the door." Karl Rove led conservative moves against a plaintiff-friendly Texas Supreme Court. A Mississippi justice lost after barring the death penalty for a rapist who had not killed his victim. A Nebraska justice was defeated after the opposition criticized his decisions overturning a term-limits law and requiring malice in second degree murder cases. A Tennessee justice lost for overturning a defendant's death sentence (but affirming his conviction) and for being an "uppity woman" who lacked "family values" and never took her husband's name. And three Iowa justices lost their 2010 retention bids after striking down Iowa's gay marriage ban.

In California, Chief Justice Ronald M. George and Justice Ming Chin retained their seats in 1998 after they were targeted for invalidating a law requiring parental consent for minors' abortions. Even so, Cairns notes, their campaigns were distracting and expensive (\$1 million each). Here and elsewhere, although judges have fended off similar efforts, well-funded and organized campaigns requiring judges to respond are now the norm. Cairns mentions Justice Otto Kaus's famous remark — ignoring the political consequences of visible decisions is like ignoring a "crocodile in your bathtub" — underscoring the fact that a single unpopular ruling can upend a lengthy, successful, or otherwise unblemished judicial career. Santa Clara Superior Court Judge Aaron Persky's "case" is Exhibit A.

Cairns ends her book with an overview of the current California Supreme Court justices, all of whom have avoided the kind of criticism leveled at Bird and her opponents. In his second stint as governor, Jerry Brown's Supreme Court appointments — a diverse, young, and inexperienced group of justices — all received unanimous confirmation votes, and the electorate now pays far less attention to retention elections. Cairns notes that in contrast to Bird, Chief Justice Tani Cantil-Sakauye receives accolades for her feminine demeanor — she is described as "disarming, charming, accessible, and self deprecating." And although Cantil-Sakauye has publicly stated California's death penalty is "not working," no one has demanded her removal or even criticized her for her stance.

One is therefore left to wonder whether Bird's "case" really was, as Cairns says, a unique "confluence of forces" conspiring to doom her, or whether that "conspiracy" could rear its head again if circumstances presented themselves. While we wait and see, we have Cairns to thank for a well-structured peek into a dark period in California's judicial history. ★