

# Golden Gate University Law Review

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Volume 14

Issue 3 *Women's Law Forum - Symposium Issue:*  
*National Association of Women Judges*

Article 5

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January 1984

## Book Review: Framed: The New Right Attack on Chief Justice Rose Bird and the Courts

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### Recommended Citation

Winifred L. Hepperle, *Book Review: Framed: The New Right Attack on Chief Justice Rose Bird and the Courts*, 14 Golden Gate U. L. Rev. (1984).  
<http://digitalcommons.law.ggu.edu/ggulrev/vol14/iss3/5>

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## BOOK REVIEW

**FRAMED: THE NEW RIGHT ATTACK ON CHIEF JUSTICE ROSE BIRD AND THE COURTS** By Betty Medsger. The Pilgrim Press, 1983. \$17.95

*Reviewed by Winifred L. Hepperle\**

When California's Chief Justice Rose Elizabeth Bird was honored with the "Judge of the Year" award by some two hundred women judges at the National Association of Women Judges annual meeting held in San Francisco last October, the audience was urged to read *Framed*. Justice Vaino Spencer of the California Court of Appeal introduced Bird. Amplifying the usual laudatory comments, Spencer detailed the attacks mounted in the public forum against the Chief Justice by law and order forces in the state. Then, holding up the book, she said, "this sets the record straight." Conveniently, copies were on sale. Subsequently, some judges reported they were perturbed by the sales activity since both the organization's policy and judicial canons eschew political involvement.<sup>1</sup>

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1. Phillip Carrizosa, *Female Judges Try To Be Apolitical at S.F. Convention*; *The Los Angeles Daily Journal*, October 13, 1983, p.1.

Amid continued calls for more female judges and increased "networking," the National Association of Women Judges carefully walked a political tightrope during its recent four-day convention here.

On one hand, the 171 women judges attending the convention at the Mark Hopkins Hotel showed no hesitation in honoring Chief Justice Rose Bird of California with its "Judge of the Year" award, praising Bird for her courage and steadfastness in resisting five recall attempts and speaking out forcefully in defense of the judiciary.

On the other hand, however, some women judges, particularly those on the federal bench, were a bit perturbed to walk into the registration room and see "For Sale" copies of a new book that not only extols Bird but goes on to issue a blistering attack on President Reagan's term as California governor and on former state Supreme Court Justice William Clark, now Reagan's national security adviser.

"We can't get involved in politics," said out-going president

The theme of *Framed* is stated in the author's introduction: the New Right plans the destruction of independent state and federal courts in the United States.<sup>2</sup> Medsger's scenario proposes that the media were "manipulated to create a picture of dishonesty and chaos" in the California court system, and this, in turn, furthered the "goal of the enemies of the courts to intimidate judges into making judicial decisions according to political pressure—to fear partisan money being used against them in elections. More important, they are trying to coerce courts into abandoning the traditional dictates of the Constitution, the law, and the evidence in individual cases."<sup>3</sup>

Medsger has another purpose, which although not specifically mentioned in the Introduction, is explained extensively in the first chapter: that purpose is to defend Chief Justice Bird. According to Medsger, Bird has become the Far Right's symbol of what is wrong with the courts.<sup>4</sup>

The drama in *Framed* revolves around events following the 1978 state confirmation election of Chief Justice Bird. The day of the election the press reported that the California Supreme Court had deliberately delayed filing a controversial decision until after the election.<sup>5</sup> This charge led to an investigation of the

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Gladys Kessler, presiding judge of the Washington, D.C., Superior Court's family division. "We are still judges and bound by the canons of judicial ethics, particularly the federal judges who have very strict canons."

2. MEDSGER, *FRAMED: THE NEW RIGHT ATTACK ON CHIEF JUSTICE BIRD AND THE COURTS* xv (1983), quoting California State Senator H. L. Richardson, "This is an attack on the state courts, and tomorrow we will attack the federal courts."

3. *Id.*

4. *Id.* at 3. "Since Bird was appointed in 1977, becoming the first woman ever to serve on the state's highest court, there have been repeated attempts to remove her, including five unsuccessful recall campaigns that never made it to the ballot stage. . . . In California, at least, Rose Bird has been made as strong a symbol of what's wrong with the courts as motherhood and apple pie are symbols of Americanism." *Id.*

In Chapter 4, "An Intruder in the Village of the Court," a discussion of Bird's early days on the Supreme Court begins with the assertion ". . . that people, both in and out of the court, have gone to shocking lengths, including the use of lies and half-truths, to try to ruin her." *Id.* at 52.

5. Bird was appointed by Governor Jerry Brown to fill the vacancy created by the retirement of Chief Justice Donald R. Wright. As provided by the state constitution, she was running unopposed for confirmation. CAL. CONST. Art. VI, § 16(d).

## WOMEN'S LAW FORUM

Court.

*Framed* is not the first report on this episode. In 1981, Preble Stolz published an extensive analysis with primary focus on the court's history, composition, and operation, and on the public sessions of the Commission on Judicial Performance.<sup>6</sup> Medsger's approach is more personalized, with emphasis on Chief Justice Bird and court intrigue. What makes this report unique is Medsger's revelation of the secret portion of hearings on whether the Supreme Court decision had in fact been delayed for political reasons. Although her book contains a mixture of fact and innuendo, new and old information, testimony and gossip, analysis and conjecture, bias and rhetoric, it provides a perspective that will be of interest, perhaps value, to journalists, political scientists, and power brokers. Whether judges, particularly women judges, will find insights into their own role and responsibilities, is less certain.

Democratic Governor Jerry Brown appointed Bird Chief Justice in 1977. Before her appointment, there was public speculation that Associate Justice Stanley Mosk, a Democrat, would be awarded the post. Medsger writes that as the first woman named to the court, and one who had no judicial experience, Bird received severe scrutiny, particularly from the Right Wing. After the Commission on Judicial Appointments confirmed her, California State Senator H. L. Richardson, an influential arch-conservative, mounted a campaign to oust her. When a series of recall attempts failed, the confirmation election became a critical turning point—to Richardson, to Bird, and to her supporters, including Associate Justice Matthew O. Tobriner.

A front page *Los Angeles Times* story<sup>7</sup> on election day named Tobriner responsible for delaying the decision in *People v. Tanner*.<sup>8</sup> This decision involved the constitutionality of the

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6. STOLZ, JUDGING JUDGES (1981). See also, Richard Thompson, *Two Books, Two Views on the High-Court Political Battle*, CALIF. J., November 1983 at 421. [Hereinafter cited as Thompson, *Two Books*].

7. MEDSGER, *supra* note 2, at 80.

8. *People v. Tanner*, 24 Cal. 3d 514, 156 Cal. Rptr. 450, 596 P.2d 328 (1979). The case was before the Supreme Court on appeal from the trial judge's ruling that, because Tanner's hold-up gun was unloaded and inoperable, the court had authority to strike the charge that a gun was used, thus avoiding an otherwise mandatory prison sentence. The first decision, filed on December 22, 1978, upheld that view. On petition for rehearing the

1978 controversial "use a gun, go to prison" legislation. Two unnamed Supreme Court Justices were cited as press sources.<sup>9</sup> The day after the election, the Chief Justice, who had been confirmed by a bare 51.7% of the voters, asked the Commission on Judicial Performance for an investigation and a public report into the media charges. She did not consult the other court members before she made the request or issued the press release.<sup>10</sup>

As a prelude to a discussion of the investigation, Medsger details intra-court activities and personality disputes. Her pointed interpretation and comments forewarn the reader that the book's title signifies her ultimate conclusion: Chief Justice Bird was "framed." To support this premise, Medsger consistently pictures Bird as carrying the sword of righteousness while dueling with her opponents, particularly Associate Justice William P. Clark, a conservative appointee of former Governor Reagan. The two justices fence over judicial philosophy, decisions, footnotes, and civility. Other court members become enmeshed, one stood aloof, and one died before the matter was closed.<sup>11</sup>

When the Commission on Judicial Performance agreed to investigate the *Tanner* issue, the question of whether the hearing would be open or closed became critical. Both the state Constitution and Judicial Council rule required confidentiality.<sup>12</sup> But faced with media clamor for an exception to the rule, and with the support of the Chief Justice, the Judicial Council (a policy body mostly composed of the Chief Justice's appointees) finally ordered a public hearing.<sup>13</sup>

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court reversed the decision when Justice Mosk changed his vote, resulting in a majority opposed to that position.

Note diversity of opinions: Opinion by Clark, with Mosk, Richardson, and Manuel concurring; separate concurring and dissenting opinion by Tobriner, with Newman concurring; separate concurring opinion by Newman; separate concurring and dissenting opinion by Bird.

9. MEDSGER, *supra* note 2, at 82.

10. MEDSGER, *supra* note 2 at 88.

11. Justice Wiley W. Manuel died on January 5, 1981.

12. CAL. CONST. art. VI, § 18; CAL. R. CT., R. 902.

13. CAL. R. CT., 902.5, Modification of Confidentiality Requirement.

## WOMEN'S LAW FORUM

Televised, taped, and reported, Chief Counsel Seth Hufstедler and other Commission members examined the Justices and some staff members at length. Justice Frank Richardson was questioned first, followed by Justice Tobriner, Chief Justice Bird, and Justice Clark. There were, however, two holdouts. Justice Newman refused to appear and Justice Mosk refused to testify in public. Mosk subsequently filed a lawsuit challenging the constitutionality of the open hearing. This issue was ultimately resolved in his favor<sup>14</sup> by a substitute, *ad hoc*, Supreme Court named by the Chief Justice.<sup>15</sup> After the Commission hearings were closed to the public and press, Mosk agreed to testify. Newman never changed his mind.

With apparent access to the transcript and other sealed information,<sup>16</sup> Medsger fills six chapters, complete with historical background, ample quotations, running commentary, and even a few pictures of the Justices in other settings. The author provides information about testimony, strategy, and differences among Commission members.

Seeking to paint Clark into a corner, Medsger labels him "The Lone Public Accuser"<sup>17</sup> and traces the convolutions involved in writing the *Tanner* decision, as it went back and forth among the judges with each one struggling to respond, refute, or support a previous modification. Medsger's point is that Clark refrained from publicly holding Tobriner responsible for the delay until after Mosk stated he would not testify in public.<sup>18</sup> Clark, then believing he was free to testify without contradiction, reported a conversation with Mosk in which Mosk had implicated Tobriner. Subsequently, Mosk presented his version at the closed hearing and made two points. First, he denied talking to Clark about the *Tanner* case or about Tobriner's part in pre-

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14. MEDSGER, *supra* note 2, at 177-78.

15. *Id.* at 173. Justice Newman, who had refused to testify before the Commission on Judicial Performance, later refused to recuse himself from membership on the Supreme Court hearing on the constitutionality of the question of opening the Commission on Judicial Performance hearings. He was subsequently ordered to do so by vote of the remaining *ad hoc* Supreme Court.

16. "I obtained the secret testimony from more than one source." MEDSGER, *supra* note 2, at 187. See Thompson, *Two Books*, *supra* note 6, at 422, for his views on how Medsger obtained the information.

17. MEDSGER, *supra* note 2, at 137.

18. *Id.* at 166.

paring the opinion. Second, he denied ever talking to Tobriner about a delay in the *Tanner* filing. Tobriner returned to the stand and verified those statements.<sup>19</sup> The author is clearly convinced that Clark fabricated his testimony. However, Mosk began to back away from his statements as he explained how Clark might have confused several conversations about different cases. When a Commissioner questioned Mosk about how to correct a now public mistake, that mistake being Clark's allegation that Tobriner held up the decision, Mosk refused to respond, except to say ". . . that's the vice in having public hearings."<sup>20</sup> To underscore her point that Clark's fabrication was not entirely exposed, Medsger quotes the Commissioner's response: ". . . are you saying Justice Tobriner now has no alternative but to twist slowly in the wind?"<sup>21</sup>

Since then Mosk has refused all comment. But Medsger does not let him off the hook:

In a letter written in November 1979, a little more than three months after he testified before the Commission, Mosk said: "The question is whether Fairbanks [the *Times* reporter] was telling the truth to his editors" on election eve. Mosk wrote then that when he expressed outrage to Fairbanks on 27 February for his election-day story, Fairbanks attributed the story to a "break-down in communications" between himself and Endicott [the night they were working on the story.] After Mosk's testimony the Commission was back to its original and sole source of an accusation of delay: The *Los Angeles Times* election-day story. It would have been significant to tell the Commission that the writer of the story had admitted to Mosk that the story was flawed, perhaps fatally. Instead of doing so, Mosk kept this information to himself.<sup>22</sup>

As the hearings continued, the Commission was close to dis-

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19. *Id.* at 179-91.

20. *Id.* at 185.

21. *Id.*

22. *Id.* at 191.

array. Two members resigned and those remaining apparently held widely divergent views on how to close the case. Ultimately, a short, non-specific statement was issued to the effect that “. . . [t]he status of the investigation is that it is now terminated and the result hereby announced is that no formal charges will be filed against any Supreme Court Justice . . . .”<sup>23</sup>

Medsger faults the report as “inexplicit and plaintive,” as though tailor-made to become “a weapon in the arsenal of the right-wing enemies of the court.”<sup>24</sup> The rationale for this statement (at least to this reader) is not clear.<sup>25</sup> And that flaw—the failure to tie each fact specifically to each conclusion—is one which persists throughout the book.

Medsger’s treatment and analysis of Bird’s role throughout this period seems inexplicably restrained. The reader would hope to find an understanding of Bird’s feelings, ambitions, frustrations, and satisfactions. Instead, the author gives the Chief Justice a rather passing treatment, lacking the depth of analysis provided for Tobriner, for example. The author’s treatment of issues specifically concerning Bird are, not unexpectedly, generally protective. One instance is the question of why Bird issued a hurried request for an investigation and press release without consulting the entire court. The author’s explanation is that it was unlikely that any court member who might be leaking secret court information to the press would agree to ask for a hearing; as a private citizen, Bird could make an individual request; and the Commission would have investigated the accusations anyway.<sup>26</sup>

This protectiveness extends even to points of view expressed by others. For example, Medsger responds to Stolz’ conclusion that Bird “was prepared to sacrifice the core values of a collegial institution for transient benefits of her own design,” with her own conclusion that he (Stolz) suffers from naivete.<sup>27</sup>

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23. *Id.* at 193.

24. *Id.* at 197.

25. Medsger feels that as the language was so vague and plaintive, politicians and lay people could read it to mean whatever they wanted it to mean—even as a call for impeachment. *Id.* at 197.

26. *Id.* at 88-89, 92.

27. *Id.* at 273.

Stolz’s gentle analysis of Clark is in sharp contrast to his anal-

With respect to her further charge that Stolz' views were "politically motivated,"<sup>28</sup> because he was disappointed at not being appointed to the bench by governor Brown, the prospective reader should be aware that the *Framed* jacket blurb describes the book as a "detailed journalistic investigation . . . of how the right wing ideology and sexism were combined to try to destroy a woman judge."<sup>29</sup> In other words, Medsger's analysis is no more free from built-in bias than Stolz'.

Medsger finds little to praise and much to fault among the other actors in this judicial drama.

- She describes the petty squabbles among judges and staff over desks, draperies, locks, and loyalties.<sup>30</sup>
- She denounces the Judicial Council's sloppy reasoning when it decided to open the Commission hearings to the public.<sup>31</sup>
- She criticizes the failure of Seth Hufstedler, Special Counsel to the Commission, to select an effective strategy for prosecution of the hearings.<sup>32</sup>
- Finally, she comments that the Commission's inability to adopt cohesive policy and withstand media pressure, caused two members to resign in frustration before the hearing was completed.<sup>33</sup>

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ysis of Bird. In asking for an investigation without consulting with the full court, he said, she "was prepared to sacrifice the core values of a collegial institution for transient benefits of her own design . . . exposing extraordinary indifference to the basic nature of the institution of which she was a member." Stolz has said he thinks Bird suffers from a personality flaw that makes her unfit to be Chief Justice. Given Stolz's lack of acknowledgement of the record of Clark's behavior, one cannot help but conclude after reading the public record of the investigation, let alone the private record, that he suffers from naivete, and that his work suffers from serious flaws in research, scholarship, and judgment.

*Id.*

28. *Id.*

29. *Id.* at cover jacket.

30. *Id.* at 66-68.

31. *Id.* at 94-98.

32. *Id.* at 169.

33. *Id.* at 175.

**WOMEN'S LAW FORUM**

Medsger's concluding analysis reiterates her view that the media's gullibility results in deception of the public. She makes sweeping statements which are never satisfactorily documented. For example:

If one does not take the sum of Clark's actions and perceive conscious design, one must view Clark as having drifted into an amazing number of accidental actions and comments that just happened to add up to a pattern of maliciousness.

Because *most members of the press looked at these events through the same pair of glasses*, the public had no way of getting the truth. It had no protection. It was the captive audience of the monotone California press. And the national press merely repeated what the major California press reported most of the time.

Consequently, the public was the biggest loser in all of this. It was deceived and lied to by politicians who used gossip about individuals on the court and misstated the facts about the court's decisions. The public was inadequately informed by reporters—some of whom may have purposely misled their readers, some of whom slavishly reported whatever was said to them by sources without checking official records to see if what was said was true, and some of whom were simply following the leader, in this case the *Los Angeles Times*.<sup>34</sup> (emphasis added)

Nevertheless, recent court commentators do not seem to be “slavishly” following that lead. Chief Justice Bird has been described as a “tireless worker and capable administrator”<sup>35</sup> who is “thriving on her full and hectic schedule.”<sup>36</sup> The court itself is

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34. *Id.* at 274.

35. Schoemehl, *The AirCal Interview ROSE BIRD*, [sic], *AirCal*, August 1983 at 26.

For all the past furor, Bird seems somewhat above it all, spending her time instead on the judicial job at hand. Court observers say she is a tireless worker and a capable administrator who has placed her profession before her personal life.

*Id.*

36. Hamilton, *Bird—A New Way of Life since Victory over Cancer*, *San Francisco Examiner*, Dec. 18, 1983 at 1, col. 4.

pictured as functioning "remarkably well."<sup>37</sup> On the other hand, the Chief Justice has been criticized<sup>38</sup> and the court itself has been praised and critiqued. Stephen Barnett, a University of California law professor, recently remarked on the court's "courage in deciding tough issues," but expressed hope that the "justices [will] become more careful and judicious in their work and more craftsmanlike."<sup>39</sup> He also makes the valuable point that

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She can acknowledge emotions and feelings. "As Chief Justice, you have people tell you what they think of you in print." She paused and grinned. "It's painful, but I am grateful. [sic] It taught me a lot, but I expect it in this kind of job. Look at history, . . . you find that anyone in public life who has introduced new ideas is controversial . . ."

Bolstered by her new lifestyle, the chief justice appears to be thriving on her full and hectic schedule.

37. See *e.g.*, *Profile*, Los Angeles Daily Journal, Jan. 2, 1984 at 1 col. 3.

38. See Erler, *Bird's Views: Not Exactly What the Framers Had in Mind, In Regarding the Majority as Just Another Special Interest, She Perverts Our Legal System*, Los Angeles Daily Journal, July 13, 1983 at 4, col. 2.

As the rules of the game govern the actions of the umpire, so does the rule of law govern the actions of judges. As any criticism of the umpire is necessarily partisan criticism from one of the teams (or its supporters) involved in the game, so any criticism of judges is partisan criticism animated by special interests. Ultimately, according to the chief justice's argument, any criticism of the courts must *ipso facto* be an attack on the rule of law itself.

This argument is as disingenuous as it is dishonest. Criticism of the courts today does not proceed from a belief that the courts adhere too rigidly to the rule of the law, but from a precisely opposite reason—that the courts have generally abandoned any idea of the rule of law. Who today does not know that the courts have aggrandized to themselves a vast array of legislative and executive tasks? Courts routinely make laws through their power to interpret legislative enactments and through the use of their equity power. The courts today are probably responsible for creating more public policy than legislatures are.

39. Kang, *Liberal scholar at Boalt urges more restraint for Bird court*, San Francisco Chronicle, Jan. 1, 1984 at B3, Col. 1.

The State Supreme Court should exercise "judicial restraint" if it wants to maintain its independence and respect, a comprehensive study by a legal scholar has suggested.

Stephen R. Barnett, law professor at Boalt Hall, the law school at the University of California at Berkeley, warned in an article in California Law Review that the extent to which the court has been rewriting statutes to reflect its own policy views provides "cause for concern."

## WOMEN'S LAW FORUM

the court gets political feedback, but not scholarly or professional views. Barnett sums it up:

The judiciary indeed deserves and needs sanctuary from political attack. But it cannot expect that protection unless it observes the limits of the judicial function and adheres to "the rule of law." The decisions of the California Supreme Court in 1982 were creditable in a number of ways, but they also give reason for concern that the court is inviting the attacks of which the chief justice complains.<sup>40</sup>

The difference between his statement and Medsger's final assessment demonstrates the difference in perspective:

It is important that all who are not far-right realize that an attack against Rose Bird is an attack against them, against the judiciary as a whole, both in California and in the nation . . . .

Bird is the decoy used maliciously to lead the public into thinking that the way to solve the crime problem is to blame the courts. As the evidence has shown, this is a dangerous trap indeed. It solves no problems and serves no constituency,

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"The judiciary indeed deserves and needs sanctuary from political attack," Barnett wrote. "But it cannot expect that protection unless it observes the limits of the judicial function and adheres to 'the rule of law.'"

Barnett, a veteran court watcher and a specialist in tort, copyright and communications laws, said he considers himself a "liberal" who may agree with the results of many of the opinions of the court. "My objection is just that the court shouldn't be making them. The problem is the extent to which it's proper to express your political view in judicial decision-making. . . ."

He praised them for their capacity for hard work, their courage in deciding tough issues and never ducking them, and their diligence in producing dissenting opinions.

But "my ultimate conclusions are negative," Barnett said. "I hope it would contribute to making the justices more careful and judicious in their work and more craftsmanlike."

"One of the problems is that the court does not get professional and scholarly feedback. They get political feedback, but that's not the kind of feedback the court needs."

Barnett plans to do a periodic study of the court, perhaps every two or three years.

40. Barnett, *The Supreme Court of California, 1981-1982. Foreward: The Emerging Court*, 71 CALIF. L. REV. 1134, 1192 (1983).

but it gains considerable political mileage for the New Right and denigrates the basic concepts of justice.<sup>41</sup>

This bitterness and myopia permeate the entire text, even to Medsger's closing sentence which quotes a former court staff member as saying, "We are hoping that she will commit a major boo-boo . . . and this time we will get her."<sup>42</sup>

Medsger is concerned with serious, intense, and important issues. The focus is on one question, but not really a question: Was Chief Justice Bird "framed," and how? The author's conclusion is never in doubt; what is difficult to ascertain are the factual bases for the repeated charges that the Right Wing is strangling the judicial system.

Some important questions remain:

- What are the media responses to assertions that they have been duped and used by Right Wing actions?
- Is only the Right Wing to be feared?
- Why did staff loyalty falter when Bird joined the court? Is it still in jeopardy, as suggested by the last sentence of the volume?
- What are the Chief Justice's goals and plans? Are they being achieved?

The weakness of *Framed* lies in those things that Medsger does not include in her evaluation. There is no discussion of the strength existing among judicial leaders, the dogged independence of the media, the demonstrated fortitude of judges to rise above squalid complaints,<sup>43</sup> and the inherent sensibility of citizens.

Medsger implies that "salesmanship" can wreck the court system; that the public has been sold a bill of goods; and that criticism of even one judge is an attack on the nation's judiciary.

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41. MEDSGER, *supra* note 2, at 283-84.

42. *Id.* at 284.

43. Frank Richardson, a Reagan appointee is described as "the only justice on the court never to have been tainted by any hint of wrongdoing in the events leading to the investigation." *Id.* at 112.

Yet an activist Chief Justice and a creative court must expect, and are indeed entitled to hear comment and criticism, constructive and otherwise.

The report has value, nonetheless, for it reminds us that Supreme Court judges are human, each with differing convictions, loyalties, and perspectives. It presents a view of the appellate process, the work-mode of the court, and the enormous demands and pressures on it. It should alert all courts to act with prudence, for the system is easily misunderstood, and if misunderstood, there are few defenders either able or willing to speak up.

The press might also learn from this volume. At a minimum it illustrates the need for independent, accurate, and honest reporting. Finally, but of at least equal importance, perhaps some citizens will move a notch closer to understanding the court system and their own obligation to consider all assessments carefully.

At the Women Judges' meeting, Bird said she had not read this book because it would be too painful. Perhaps it is just as well. For this account offers little that is constructive or hopeful. Rather, the Supreme Court, the Judicial Council, the Commission on Judicial Performance, and the court system are left "twisting in the wind."