

## **Thank you for Being Ready: Rosalie Wahl holds her place on the Minnesota Supreme Court**

### **Introduction: It is Possible to Soar**

On Friday, June 3<sup>rd</sup> 1977, at a gathering of nearly 4,500 women meeting in St. Cloud Minnesota to hammer out a platform and choose delegates to the upcoming White House Conference on Women in Houston, conference chair Minnesota Secretary of State Joan Grove announced that Governor Rudy Perpich would appoint Rosalie Wahl to the state supreme court—the first woman and its 72nd justice. The crowd erupted as Wahl came to the microphone. Wahl promised to:

not cease to be an advocate for those whose rights have been denied or infringed. . . . I am remembering tonight, all those generations of women who have gone before us. I am remembering Elizabeth Cady Stanton, as a little girl in the mid-1820s, walking into her father's law office with a pair of sharp scissors and a novel plan to amend the laws by cutting from his law books all the bad laws he had shown her "that made so many women cry". . . . I am remembering that remarkable Quaker, Susan B. Anthony, who met Elizabeth Cady Stanton at the Second Women's Rights convention in 1852 . . . they knew scorn, fury, hardship, adventure, agonizing disappointment. And they never even saw the promised land. I am remembering Mary Peek's grandmother, Kari Sougstand Anderson, as a young woman in Norway, refusing to marry the man chosen by her father, asking for her dowry, coming to the new world alone, knowing no English—as an old woman of 78 years, being the first person in line to vote at the first election after the ratification of the 19th Amendment. I am remembering Sojourner Truth—and all those brave, unnamed, unremembered women, who gave so much that we might have the freedom and opportunity that is ours.

Wahl spoke of being a mother of four starting law school, inspired to write this poem:

Foot in nest  
Wing in sky  
Bound by each  
Hover I.

"Now," she said, "I know it is not necessary to hover. Now I know it is possible to soar, to know the vastness of the sky and then come back, fully to the nest, enriched by the vision of the whole and by the exercise." At a reception in St. Paul on June 9<sup>th</sup> to celebrate the appointment, party activist Koryne

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Horbal clasped Wahl's hand and tearfully said, "Thank you for being ready." In 1963, when Rosalie Wahl entered law school at night, few women became lawyers and almost none became judges.

And you know, that was the thing. . . . I didn't know what I was getting ready for. But none of you know what you are getting ready for. But getting ready is important, because then when the opportunity comes along, you are able—you have these credentials, and you've this knowledge, and you've got this experience, and you know you can do it. It doesn't happen otherwise (Krueger 1994, 14).

In 1978, St. Paul attorney and chair of the Minnesota Women Lawyers endorsement committee Judith Oakes would reflect that "no other government appointment has stirred as much emotion as Wahl."

A small band of feminist activists from the newly formed DFL Feminist Caucus persuaded Governor Perpich that it was time for a woman on the bench—that an all-male supreme court was no longer acceptable and convinced him to choose Wahl from among other women. But these historic successes would mean little if Wahl could not hold her seat against three male challengers in the 1978 election.

### **Background: Present but Powerless**

When Jimmy Carter was elected president in 1976, his running mate, Minnesotan Walter Mondale, vacated a U.S. Senate seat. Governor Wendall Anderson resigned as governor, and his little-known lieutenant governor, Rudy Perpich, became governor and appointed Anderson to the Senate seat. Perpich had previously admitted that he "sought the office of lieutenant governor because he knew that the state would never elect a 'bohunk from the Range' as governor unless that 'bohunk' backed into the job" (Elazar, Gray, and Spano 1999, 127). Rudolph Perpich had been an early and outspoken opponent of the war in Vietnam and a supporter of Eugene McCarthy. He was flamboyant and unpredictable (Wilson 2005). He was ridiculed for his sponsorship of a chopsticks factory, dying his hair but refusing to admit it, and for championing a silly idea that would never work—the Mall of America (Elazar, Gray and Spano 1999, 128-9). The son of an immigrant Croatian coal miner and labor organizer, Perpich became a dentist and then entered politics. He was Minnesota's first Catholic governor and first governor from the Iron Range, as well as one of the rare governors not of Scandinavian descent (Auerbach 1984, 60).

Although he took the Democratic Farmer Labor Party (DFL) label, he held little fondness for the party machine and patronage, favoring a new brand of politics "bringing together former Vietnam War protesters, women's rights and gay rights advocates, environmentalists, and advocates for the poor and disadvantaged" (Wilson 2005, 38). Minnesota has both a party nominating convention in June and a September primary where party-endorsed candidates often lose. Perpich, for example, won the primary and the election after failing to receive the party endorsement in 1982. Politics in Minnesota in the 1970s resembled ward politics more than the current direct mail media campaigns that are so dependent on big money. And Perpich, like Hubert Humphrey before him, was a people person and a populist. He

cultivated networks of supporters who themselves were networked opinion leaders—people who could deliver the votes. And lots of those pivotal people were women.

State and local political parties relied on the labor of women skilled political operatives who were not in paid full-time work (although they often had significant family responsibilities) as committee women, volunteers, fundraisers, and organizers but they were often patronized and excluded from leadership responsibilities, denied respect, and unpaid (Boneparth 1977, Freeman 2000, Rymph 2006). New Orleans Mayor Moon Landrieu described it as, “Women do the lickin’ and stickin,’ while men plan the strategy” (Tolchin and Tolchin 1973, 13). (Happily, Moon’s daughter Mary proved him wrong and became a U.S. Senator.) For years, active women such as Arvonne Fraser (wife of Congressman Don Fraser who later became mayor of Minneapolis and herself a candidate for lieutenant governor) had been the backbone of campaigns and even Fraser’s Congressional office. In 1966, Betty Kane launched a statewide DFL Women’s Federation “to promote the interests of women in the DFL Party, to inform them of the function, structure and goals of a liberal political party, and to encourage them to become politically active. For its time, this was a giant step forward” (Auerbach 1984, 67). Yet there remained:

a pervasive feeling that women were still being courted to act as the party’s chore doers. They rang the doorbells, distributed literature, poured the coffee, served as volunteer office helpers and campaign workers. But they were rarely encouraged to seek delegate seats or elective office (Auerbach 1984, 67).

As Koryne Horbal explains, “[e]ach year we’d have a federation meeting and the male legislators would come and talk to us, to get us ready to be the volunteers again” (Watkins and Rothchild 1996, 224). The title of Esther Wattenberg’s report for the DFL Feminist Caucus says it all, women were *Present but Powerless*, and the report painstakingly documents women’s underrepresentation as campaign managers, financial directors, members of district executive committees, state central committee people, officers, delegates to the state and national conventions, elective office, members of commissions, and lawyers in the attorney general’s office. In the late 1960s and early 1970s, women began to demand not just a voice, but seats at the table, commensurate with their numbers and the work they did for the party. They rejected their permanent relegation to mere volunteers. A button at the time expressed the sentiment: “If we can’t make policy, we won’t make coffee!”

The DFL Women’s Caucus replaced the DFL Women’s Federation in 1971 and morphed into the DFL Feminist Caucus in 1973 to fight for feminism within the party—to pressure the party to run more women candidates, and, more importantly, to ensure that DFL candidates were pro-choice. After the Supreme Court ruled the U.S. Constitution protected women’s right to an abortion in *Roe v. Wade* in 1973, Horbal recalls the stampede of DFL legislators advocating a constitutional amendment to prohibit abortion (Watkins and Rothchild 1996, 226). Such efforts galvanized the DFL Feminist Caucus to make

sure the party was pro-choice. The DFL party's identification with choice, thus, was then a fairly recent phenomenon (Sanbanmatsu 2002); many Catholics and Lutherans who were progressive on other issues were social conservatives on issues related to sexuality and gender.

In early January of 1977, Perpich formally addressed the DFL Feminist Caucus, the first governor to do so (Lacey, January 16, 1977, A1). Perpich announced his hand-picked choice of Gloria Griffin to head an eight-member recruitment and recommendation committee for state appointments. Griffin had run unsuccessfully for the 3rd district congressional seat and chaired a search for head of the Pollution Control Agency that resulted in the appointment of Sandra Garderbring (later appointed to the Minnesota Supreme Court by Perpich). In response to a question by Koryne Horbal, Perpich promised to fill the next vacancy on the Supreme Court with a woman leading to banner newspaper headlines the next day saying "Woman in top court promised" (Lacey January 16, 1977, A1). Perpich said:

I hope that by the end of my term—and hopefully long before that—the numbers of women and minorities in state government will increase dramatically, and I'll work very hard to see that happens . . . . We aren't doing this because it's the political thing to do but because it's the right thing to do (Lacey, January 16, 1977, A1).

*Minneapolis Star* reporters Gwen Jones and Carol Lacey were present and reported. When President Carter nominated Senator Mondale's former law partner and associate justice of the Minnesota Supreme Court, Harry MacLaughlin, to the federal bench, Jones immediately wrote a front-page column reminding the governor and all readers of his promise.

Perpich's commitment to women was not merely expedient, recognizing women as party workers and playing to the emerging gender gap in turnout and voting. "Rudy was not afraid of strong women, either. He was married to one; his mother was one. He was the first governor of Minnesota to choose a woman for his running mate" (Wahl 2005, x). Perpich traced his commitment to women back to his days as a grocery delivery boy, coming upon battered housewives sobbing at kitchen tables or literally flying out the back screen door after a punch (Wilson 2005, 15). Perpich championed equal pay for women teachers as a Hibbing School Board member and later championed comparable worth in Minnesota and through the National Governor's Association, an unpopular move among those governors determined to reduce governmental spending. Not only did he recognize the importance of women's perspective on the bench, but he saw women as "people who rocked the boat" and Perpich wanted to rock the boat.

Coming from the Iron Range (Northeast Minnesota), and the son of a labor organizer, Perpich had fondness neither for the Twin Cities' legal establishment nor the Minnesota Bar Association. The 1970s were a period of change as Minnesota's courts were consolidated and became a state-wide system rather than a patchwork system of local courts (Court Reorganization Act of 1977). Eventually, the legislature created a court of appeals, and during the Carter administration, the number of judges on the federal bench increased dramatically, too, creating the sense that many positions were going to open up.

Perpich wanted to appoint women to the bench not only to diversify it, but because they were outsiders. His desire to shake things up and not just find a woman with the attributes of the typical male appointee explains a lot about his choice of Rosalie Wahl.

Although women were gaining entry into law schools and their numbers inched upwards, few made it to the bench. In 1977, no woman had served on the U.S. Supreme Court, only one woman sat on a federal appellate court, and only five other women served on state supreme courts (Cooper 1994, 45). The first woman to serve as a Minnesota trial court judge, Susanne C. Sedgwick, a Republican, acquired a seat on the Hennepin County court by running against an incumbent in 1970 (Cooper 1994, 36). Rahn Westby, a 25-year-old lawyer who later co-chaired the Ramsey County Women's Political Caucus, had been one of four women in her class at William Mitchell College of Law—a free-standing St. Paul law school unaffiliated with any college or university—and endured patronizing remarks by male faculty. She recalls feeling that women lawyers were not getting anywhere professionally and needed to “pole-vault” someone onto the high court to break the gridlock of women in the legal profession. In her view, appointing a woman to the Supreme Court was a necessary stage in women's integration of the legal profession (Connolly 1994, 20).

Each state has its own system for choosing judges, few of which mirror the federal judiciary's procedure of executive appointment with Senate confirmation. Most have some sort of popular election. Either judges run for office and are elected just like legislators, or governors appoint them, with or without advice from nominating commissions and with or without legislative approval. Alternatively, voters can simply choose whether or not to retain their judges—if they throw a judge out of office, the governor then appoints the replacement. Minnesota's system is a hybrid (Kronebusch 1998). Formally, supreme court justices run for office, but in practice, sitting justices inform the governor when they are going to step down, and the governor nominates a replacement when the retirement is announced, allowing the nominee to run as an incumbent. If a justice was appointed more than a year before the next election, he or she had to stand in the next one, and then again every six years. As of 1977, only one member of the Minnesota Supreme Court, C. Donald Peterson, had obtained his seat by election rather than appointment. The last incumbent unseated in an election was in 1900. Serious challenges to sitting justices were rare.

Governor Perpich's process of replacing MacLaughlin was unusual. He did not name his appointee as the news of MacLaughlin's elevation broke. Instead, he announced he would appoint a yet-to-be identified woman, making the process seem more like a beauty contest than a serious process of choosing a supreme court justice. Wahl was by no means the only or even the obvious choice.

### **Rosalie Wahl: Nobody There to Smooth the Way**

Sara Rosalie Erwin was born near Augusta, Kansas. Her mother died when she was three, and she was raised by her grandmother and her Aunt Sara—an unmarried nurse and nursing educator at the University of Kansas hospital who played a pivotal role in encouraging her professional aspirations and helping to finance her education, as well as providing a role model of an educated independent woman. Tragedy struck again at age seven when she witnessed her grandfather and younger brother killed before her eyes by a train. She had gone across the tracks to open a gate while they waited on the wagon. The train gave no whistle as it came around the hill late and struck the wagon. She recalls:

From the time I went to high school and even when I went to college, too, it was like I had a family and I had an extended family, but it wasn't like other people's family. I mean, I didn't have really a primary family. Now I see in the way I did with my children, you go out and you smooth the road and you talk to the people and you make the path. I didn't have anybody making the path . . . it prepared me to do a lot of other things where there was nobody there to smooth the way or to open the doors or whatever and to not be really too frightened of unknown kinds of things that lay ahead (Cooper 1994, 5-6).

A Quaker since college, Rosalie grew up in a little stone Methodist church on a wooded hillside. In college, she worked to fight racism through the YWCA and lived in a racially-integrated communal home at the University of Kansas in the 1940s. She edited the *Daily Kansan* and became interested in the cooperative movement. Her fiancé was killed in WWII. She later met, married, and moved to Minnesota with her husband, Roswell Wahl, and lived with friends on forty acres north of Circle Pines at what they hoped would be an intentional community. Although it was never financially viable, the ten-year experiment fostered close personal ties among the families. Armed with a sixteen-year-old undergraduate degree in sociology and the mother of four, at age 37 Wahl enrolled in night school at the William Mitchell College of Law.

One catalyst for enrolling was the experience she had as she worked to preserve a bookmobile in her local community and establish a county library system. After promising their support, several county commissioners changed their votes overnight because of pressure not to take federal funds from a foundation. Wahl was appalled and felt double crossed (Cooper 1994, 22; Watkins and Rothchild 1996, 176-179).

[I was] just really getting tired of getting people together time and again, to go and tell these MEN what ought to be done out there that they should have seen for themselves, that should have been done. And I was just really getting tired of waiting outside of doors while these people made up their minds about what was going to happen in our lives. And so I decided...that law was kind of a key to some of those doors (Krueger 1994, 17).

She also remembers attending a dinner for then Congressman Joe Karth, DFL, who represented St. Paul and sitting next to Mary Lou Klas who was then a lawyer. “She had some small children, and here she

was in law. And I thought, maybe, if she could do it, I could do it too (Krueger 1994, 10). (Klas later went on to distinguished service on the Ramsey County District Court). Once again, Aunt Sara helped with finances. One other woman, Ellen Dresselhuis, was in her class. Dresselhuis, who later went on to represent women in pathbreaking sex discrimination suits, recalls that Rosalie, unlike her, was a feminist way back then, advocating for more women in law school (Watkins and Rothchild 1996, 270-273). The only woman on the faculty was Carol Floren, the law librarian—a pattern typical of legal faculties at the time (Epstein 1983). During her second year, the birth of her fifth child, Jenny, caused her to miss a week of classes. “My friends across the meadow every morning would come and get Jenny after she was born...and take care of her so I could study. I had that kind of help” (Krueger 1994, 5). She composed this wry poem called “On Considering the Advisability of Studying Law.”

That one who would through thistles pass  
Needs shoes  
Else, barefoot,  
Stay on grass.

Also that second year she was invited to a breakfast meeting by Phi Delta Delta, a women’s legal fraternity, where she met Esther Tomljanovich,<sup>1</sup> (the third woman appointed to the Minnesota Supreme Court in 1990) who had been a lawyer since the 1950s, and Phyllis Jones who was in the Ramsey County Attorney’s office. Wahl recounts the transformative experience of finding others who were like her, “all of a sudden I realized I wasn’t a duck. I was a swan” (Cooper 1994, 26). She was no longer the only, the oddball. When Phi Delta Delta merged with the male legal fraternity, Phi Alpha Delta, Wahl, along with Tomljanovich, Judith Oakes, and Nancy Olkon founded Minnesota Women Lawyers in September of 1972 to “secure the full and equal participation of women in the legal profession and in a just society” (Jacobs and Meson 1991, 26).

Head of the state public defender’s office, C. Paul Jones, gave Wahl her first opportunity when she graduated in 1967. The legislature had established the office in 1966 in response to the growing recognition of the legal rights of the poor and indigent prisoners. Jones was looking for lawyers. He was one of the first legal employers willing to take women on a part-time basis—an important consideration for mothers of children. (Wahl divorced in 1972.) The happenstance of this oasis of nondiscrimination and flexibility meant that many prominent women attorneys in Minnesota had experience defending the indigent—an experience that profoundly shaped Wahl’s outlook on law and justice. Although she did a

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<sup>1</sup> Tomljanovich describes one of their early collaborations: “In the early 1970s, we decided to act on our conviction that women belonged where the decisions were being made. I filed for the city council of our newly consolidated city. Rosalie Wahl was my campaign manager. I remember her dismay when she was told her candidate would not be welcome at the local service club luncheon because: ‘One of our members is a candidate.’ Of course, women could not be members of the service club—a clear reminder of how much needed to be done before we could ever get inside those places where decisions were made, let alone have our voice heard” (Tomljanovich 1995, 7).

great deal of appellate work (109 cases in all), including arguing many cases before the Minnesota Supreme Court, Wahl never tried or argued a case before a woman judge.

### **What's so special about the penis?**

Nadine Strossen, President of the American Civil Liberties Union, recalled serving as the only female Minnesota Supreme Court clerk in 1976 and experiencing Wahl's oratorical prowess firsthand:

Defending a convicted criminal, as usual, Wahl had taken a position on behalf of her client in favor of a gender-neutral vision of equality, challenging a Minnesota law that punished male-female rape much more harshly than any other sexual crime, no matter how violent and no matter how much physical and psychological harm ensued. Oral argument occurred long before Lorena Bobbitt's infamous castration of her husband in 1994 freed the American media to use the "p-word."

So picture Rosalie making this argument to nine elderly male justices, most of them Scandinavian Lutherans straight out of Lake Wobegon. In the whole courtroom, Rosalie and I were probably the only women. And she certainly did not look like a stereotypical bra-burning feminist or radical criminal defense lawyer either. She looked more like the archetype of everybody's favorite kindergarten teacher. So I can still feel the shock waves when Rosalie began to raise her voice in impassioned argument. Just try to imagine these nine male justices' response to her opening salvo, as she boldly demanded

"What's so special about the penis!?"

The penis does not kill.

The penis does not maim.

The penis is not a deadly weapon."

By this point the justices were almost hiding under their bench. After the argument, when I conferred with the justice for whom I was clerking about drafting an opinion, he was still blushing. He gave me lots of leeway in drafting the opinion, but I'll never forget one very stern instruction. "You will not," he said, "use THAT WORD in the opinion." When I left his chambers to return to the common workspace then shared by the law clerks, and related this conversation to my co-clerks—remember, they were all guys, they were thrilled. All of them generously devoted the rest of the afternoon to helping me with my draft by coming up with a list of synonyms for "THAT WORD." The grand total was somewhere in the 80s (Strossen 2003).

Wahl's experience as a public defender created another opportunity when William Mitchell College of Law hired her to help establish the criminal and civil law clinic in 1973. Law clinics expose students to the nuts and bolts of legal practice as opposed to appellate doctrinal exegesis. Clinical law faculty have less status than other law faculty and many of them are dedicated to justice and social change—public interest law. She taught around sixty students a year, thirty each semester. She also taught an appellate law seminar. "Students stood in line all night before registration to be assured of a place in the clinic" (Juergens 2003, 18). In the years that Wahl was at William Mitchell, she formed close bonds with many students and colleagues who stayed in Minnesota and maintained their interest in social justice. Bob Oliphant, for example, who worked with her at the public defender's office and then recruited her to help establish a criminal clinical program at the University of Minnesota, (she moved to Mitchell after one year) later played a crucial role in her campaign.



Wahl engendered deep affection, admiration, and loyalty with almost everyone with whom she worked. Not only did she exemplify the high ideals of the committed life, but she believed in nurturing and mentoring those around her. Her former students, as well as the members of her group therapy group, consciousness raising group, and neighbors formed the nucleus of those dedicated to her appointment and subsequent election.

**“The people’s choice”** (Stone, *Minneapolis Tribune*, June 13, 1977).

The mid-1970s were the heyday of organized feminism (Evans 2003). Feminism was new (again) and exciting. Congress had passed the Equal Rights Amendment (ERA) and activists were optimistic that the states would ratify it. Jimmy Carter was president and, although he was personally ambivalent about choice, he appointed Sarah Weddington (the lawyer who argued *Roe v. Wade* before the U.S. Supreme Court) to advise him on women’s issues—to secure ratification of ERA and to facilitate the appointment of women to public office. The radical right had not yet fully organized to stop ERA and defeat liberal pro-choice senators, which they did as voters swept Ronald Reagan into office in 1980.

Feminists in Minnesota were a highly visible group that came to be perceived as having more power, resources, and troops than they actually commanded. Mostly, activists lived in the Twin Cities and were tied to each other—some from the anti-war movement, others from the DFL Feminist Caucus. Women divided about whether the best way to proceed was inside one party (the Republican Party had not yet turned to the right) or working across party lines, as the Minnesota Women’s Political Caucus did. Rahn Westby, a young William Mitchell graduate and feminist activist, and her co-chair, Carol Connolly of the Ramsey County Women’s Political Caucus, made increasing women in the judiciary as a top priority early on—a parallel strategy of the National Women’s Political Caucus. They wanted a high profile appointment to break the gender barrier and began winnowing the pool. Realistically, there were few women old enough with enough legal experience to consider.

Along with the Minnesota Women’s Political Caucus (whose national office was working on the appointment of women in the Carter administration), Minnesota Women Lawyers (MWL) was determined to overcome the problem of men elective officials who said they would appoint qualified women if only they could find them. MWL formed a committee to forward names of women qualified to serve on the bench. Wahl served on the committee, which Phyllis Jones headed, and they sent a questionnaire to all women lawyers asking if they would be willing to serve on boards or on the bench. (Perpich subsequently appointed Jones to the Tenth Judicial District Court in 1984.) Wahl did not send her questionnaire back for two years. She had never practiced before a woman judge and she said the male judges all seemed “poured from the same mold.” Judge Joe Summers, however, was an exception and he changed her mind about seeking a judicial appointment.

He was wonderful in the court room. Judges control the atmosphere in their courtroom. Joe was always so friendly with the people who appeared before him. Some judges treated people like dirt—especially the public defender clients. Joe did not do that. He would greet the defendants when they came in and would talk to them as if they were people. I could see that Joe Summers was very much a person and was a very good judge. Slowly I got the idea that being a judge was possible (Young and Ankeny 2000, 137).

Wahl finally decided, “well, you know, there comes a point when if you’re urging the appointment of women, you just have to put up or shut up. So then I decided, yeah. I said yes” (Cooper 1994, 38).

Minnesota Women Lawyers’ endorsement committee, chaired by Judith L. Oakes, winnowed the list of eighteen names to seven (Doris Huspeni, Phyllis Gene Jones, Roberta Levy, Delores Orey, Susanne Sedgwick, Esther Tomljanovich, and Rosalie Wahl) and sent the names to Koryne Horbal in a letter dated March 24, 1977, asking to meet with other representatives of women’s groups “to discuss the best way of meeting our mutual goal” (Jones, May 13, 1977, 11B). Wahl was also on lists that the Minnesota Women’s Political Caucus and DFL Feminist Caucus submitted to Perpich (Cooper 1994, 47). Leaders of the Minnesota Women’s Political Caucus also met with the Governor, who told them he had narrowed the list to two, one of whom was Wahl. *Star-Tribune* Reporter Gwen Jones reported that Sedgwick, the only sitting judge of the group, was the frontrunner. Notes from one of the pivotal staff members, Ray Bohn, indicate that Perpich’s inner circle used three criteria to decide between the possibilities: DFL, lawyer, and humaneness. Perpich advisors and the DFL Feminist Caucus saw Sedgwick as a Republican and this put her out of the running. In the end three women emerged as finalists. Press reports featured pictures and biographical descriptions, reminiscent of speculation on vice presidential choices. Such open discussion of possible appointments was unprecedented in the history of judicial selection in Minnesota and more akin to current speculations about the U.S. Supreme Court. University of Minnesota law professor Roberta Levy and Hennepin Municipal Judge Diana Murphy were the other two finalists. (Levy later became the first woman Hennepin County District chief judge while Murphy was the first woman appointed to the federal bench from Minnesota and was later the first woman appointee to the Eighth Circuit of the U.S. Court of Appeals).

Why Wahl? Feminists in Minnesota wanted qualified women on the bench—but they also wanted feminists. As Arvonne Fraser recalls, in the 1970s you either were a feminist or you were not, and those who were knew each other. Perpich called Fraser to ask her about Wahl, and she wholeheartedly supported her. As mentioned earlier, Wahl’s outsider status as William Mitchell graduate, a late entry into the profession, and a defender of indigent criminal defendants would appeal to Perpich. Griffin recounts that Perpich staffer Ronnie Brooks was determined to get Wahl in first to meet with Perpich, convinced that once he met her, the decision would be made. Connolly described the organization behind the scenes:

Lawyer Westby's part in the campaign is symbolic of the time and commitment expended by countless women. Westby had little furniture in her townhouse, and she filled the empty space with index cards of names of possible supporters. She took an unpaid leave from the then law firm of Thomson, Wylde to organize the assault-style method of endless telegrams, letters and phone calls to the governor (Connolly 1994, 21).

Hundreds of women, including Westby's grandmother, sent postcards to convince Perpich that Wahl was the front runner. Wahl recounts,

Rahn Westby, who was a student, was just doing all the things that you need to do, I mean, getting people to write and call and sort of organizing the whole thing. I was unaware of a lot of this, I mean, that was going on. But it was there and the Governor knew about that (Cooper 1994, 50).

Although Wahl did not know what was in her file—she was told that it was fat. Her former students, each with his or her own index card maintained in perfect order by clinical legal secretary Bert (Alberta Dowlin—the nerve center of the operation), dispersed in legal jobs in the region from Kathleen Gearin in the county attorney's office (as of 2005, a Ramsey County district judge) to Joe Marshall in the attorney general's office to Tom Mott on the DFL Central Committee, wrote letters testifying to how great she was.

Insiders knew that Perpich would often be persuaded by the person he talked to last. Tom Mott “hung out” outside the governor's door. Koryne Horbal and Jeri Rasmussen remained at the governor's residence late into the evening right before he was to decide, determined to be the last people he spoke with.

Strossen recalls deciding that they would have more leverage with the Governor if they pushed for a single candidate. Feminists knew if they were divided that they would squander this historic opportunity—“we couldn't afford to fight” recalls Westby (Connolly 1994, 20). Although Wahl had been active in her local community (first woman president of Lake Elmo PTA, first editor of the Circle Pines newsletter, member of the library board, etc.), as well a trailblazer for women in law school, and active in a sorority for women in the legal profession, she was not a DFL insider. She was, however, a member of the DFL Feminist Caucus and Minnesota National Organization for Women, a founding member of both Minnesota Women's Political Caucus and Minnesota Women Lawyers, and was present at the DFL Feminist Caucus meeting where Perpich made his promise. Wahl was later a pivotal member of feminist groups such as the National Association of Women Judges. Her path to the bench was very different from men's—the old adage is “a judge is a lawyer who knows a Senator.” She met Perpich for the first time when he interviewed her. Nor was she the darling of the Minnesota State Bar Association which, prior to the Perpich administration, had recommended names to the governor who largely rubber-stamped its choice.

Legal ability was not the only factor. Some thought Levy, a law professor from Philadelphia, was too young and inexperienced. Westby remembers some sexists questioning whether her prominent, opinionated, law professor husband would have his hand on the tiller. Others, like Jeanne Coyne and Diana Murphy were thought to be better fitted to positions to open up soon on the federal bench. Perpich had clear goals in his appointments to the bench, but his primary concern with Wahl, or whomever he chose, was that she be able to retain the seat. Ambitious lawyers who wanted to be judges would likely challenge any sitting judges perceived as “weak.” Perpich knew that the first woman appointed would have many challengers who wanted a seat on the Supreme Court. If she were defeated, he would then have squandered the power to shape the bench. Speaking from a pay phone at a bar in St. Paul, Carol Connolly assured the governor that she could put her life on hold to manage Wahl’s campaign, a campaign that had no shortage of devoted troops. If Wahl lost, it would be a long time before any Governor could be persuaded to appoint another woman, nor would any woman be a credible candidate for challenging an incumbent. Among the candidates, Wahl would play best in a state-wide campaign.

The day before he was to make the announcement, Perpich’s staff member, Ray Bohn, called Wahl and said, “The Governor would like to talk to you” (Cooper 1994, 48). She was working at William Mitchell and eating a piece of chicken, so she washed her hands and went over to the Capitol (Krueger 1994, 6). She said, “I had never met Rudy Perpich until then. And I remember being very surprised when he stood up and how very tall he was...so very tall” (Krueger 1994, 6). They talked and then she met with Senator Nick Coleman, Hy Berman, Terry Montgomery, Ray Bohn—the Governor’s kitchen cabinet for the judicial appointment—and the Governor.

On Friday, when Wahl and her daughter Sara arrived in their motel in St. Cloud, Bohn called to say the governor had not yet decided. While they waited, Wahl prepared her remarks. A journalist from the St. Paul paper hoping for a scoop called and asked for Justice Wahl and was told he was premature. Finally, the call came from Bohn. Perpich announced his choice of Wahl at his son’s high school graduation in Hibbing—with typical Perpich flair for the dramatic and preference for holding events and making announcements outside of the Twin Cities. The choice was then relayed to Joan Grove who announced it to the St. Cloud delegates who went wild. On May 27<sup>th</sup>, most of the women who had been candidates had lunch together. Rosalie’s handwritten note on that day in her calendar reads “a magnificent display of support of women by women.” Because MacLaughlin’s confirmation was delayed, Wahl was not sworn in until October 31<sup>st</sup>

### **The campaign: “nine zip won’t do it”<sup>2</sup>**

While there have been no shortage of dirty campaigners and negative campaigns in American history, few had a gendered component because few women ran. Running for the Senate in 1956, Nixon branded his opponent, Helen Douglas, a communist, showing a penchant for dirty tricks that continued as vice-president and president. Another unpredictable populist governor, Jerry Brown of California, had appointed a woman, Rose Bird, as the first woman and the first chief justice of the California Supreme Court in February of 1977 (Culver and Wold 1986). Bird just barely held her seat in 1978 but subsequently lost a retention election in a notoriously dirty campaign. And in 1984, Vice Presidential nominee Geraldine Ferraro would see her husband’s business practices as an Italian-American linked to the mafia, the Catholic Church attack her as dangerously pro-choice (but not male pro-choice office holders), and the media criticize her for showing her slip as she clasped hands with Walter Mondale or waved to crowds (Ferraro 1985). Were women smart enough? Were women tough enough to push the nuclear button? Could they command men? And who was making supper for their ‘neglected’ husbands and children? The media preferred to discuss their dress sizes rather than backgrounds and policy positions.

The gendered attack on women candidates generally makes two appeals: that women are incompetent (they lack the essential experience of men candidates) and they are “soft,” usually meaning soft on crime. (The more subterranean attacks usually question their sexual orientation.) Large law firms openly discriminated by refusing to hire women (such as Sandra Day O’Connor, near the top of her class in Stanford Law School), governors and presidents failed to appoint them to the bench, and then the American Bar Association would rate them as unqualified or merely qualified because they lacked sufficient experience (Cook 1987, 1988). Perhaps saddest is the not infrequent case of husbands intentionally sabotaging women’s candidacies. The most notorious example is Minnesota’s first woman Congressperson, Coya Knutson, a former state legislator elected to the Ninth District in 1954 (without the DFL endorsement), unseating the Republican incumbent. As she sought her third term, her husband wrote her an open letter urging her to assume her wifely duties in Oklee, Minnesota, saying “Come Home Coya.” (Her husband later reported that her DFL primary opponents convinced him to write the letter [Lass 1998, 285-87].) She was narrowly defeated by her Republican opponent.

Even before the governor decided which woman he would appoint, ambitious men who coveted a seat on the Supreme Court had drawn their knives. Wahl’s opponents did not say directly that a woman

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<sup>2</sup>Wahl credits the women of Minnesota for putting gender on the agenda, in her words: “This opportunity [to serve on the court] opened up because the women of Minnesota had become sufficiently organized and sufficiently powerful to say to a governor, ‘Nine-zip won’t do it’” (Wahl 1986, 156). When asked about the possible effect of her gender on the public’s view of the court, she stated, “I’m sure men would think there was something missing if there were a court sitting up there made up of nine women” (Jones, June 21 1977, 1C). In 1983, the Court changed

should not serve on the bench, but the gendered nature of the attacks lay close to the surface. Wahl was immediately targeted as the most vulnerable sitting justice. As Perpich had predicted, for the first time in two decades, a seated Supreme Court Justice had a serious opponent, or rather in Wahl's case, three, meaning she would face a primary. Ramsey County District Court Judge Jerome J. Plunkett, Rochester District Court Judge Daniel Foley, and former Attorney General Robert W. Mattson filed. (Wahl's first Supreme Court opinion, *State v. Flowers*, reversed one of Plunkett's convictions.) Supreme Court Justice C. Donald Peterson was also up for reelection and he faced a challenge from gay rights lawyer Jack Baker, who objected to the Court's ruling refusing to recognize same-sex marriages. Baker, in Wahl's opinion, "was a pretty good lawyer" who had run against other incumbents (Cooper 1994, 63).

Connolly always suspected that "the boys" were in cahoots to bring down Wahl. One day, for example, Marcia Fleur from TV station KSTP called Wahl to say she had received the confidential police file of Rosalie's son who had had a brush with the law. Mattson had delivered the papers to the press himself, alleging Wahl had pulled strings on her son's behalf. Connolly went to pick up the file and that was the end of the matter, but Wahl thought, "I have to win, I cannot let Mattson become a Supreme Court justice."

The rival candidates said Wahl lacked judicial experience. Plunkett, for example, dismissed her clinical work as merely "taking students down and showing them where the criminal court was." Although she defeated Plunkett in the primary—Wahl was the lead vote getter with more than 231,000 votes to the next highest vote getter Mattson's 130,000—Plunkett's attacks against her were echoed by Mattson in the general election. Plunkett had received 93,319 votes and Foley 104,610. If all those who voted for Plunkett and Foley voted for Mattson, Wahl would lose her seat. The general campaign turned even more negative. Mattson ran a series of negative ads giving reasons to vote against Wahl. He claimed she had a poor win/loss record before the Supreme Court. Another ad, patterned after the campaign against Rose Bird in California, charged that "Ms. [sic] Wahl lets rapists loose." (She was the sole dissenter in *State v. Willis*, (269 N.W.2d [Minn. 1978]) a case of a rapist who had held his victim at knifepoint. Wahl had dissented because a trial court had suppressed evidence and the police had unlawfully searched the defendant's house.) Another ad charged she let drug dealers loose. At a debate sponsored by AAUW, Mattson said things that were blatantly untrue, while the outraged well-informed women in the audience gasped in dismay. This campaign was going to be a lot different than getting elected to the Lake Elmo PTA. And if Wahl lost, would a future governor ever give another woman a seat on the bench?

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to only seven members.

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## Cast of Characters

Wendall Anderson: Governor of the State of Minnesota, appointed senator when Mondale vacated his senate seat.

Jack Baker: Gay rights lawyer who challenged sitting Supreme Court Justice C. Donald Peterson in 1978.

Hy Berman: History Professor at the University of Minnesota. Was one of three close advisers to Governor Perpich on the Rosalie Wahl nomination.

Kathleen Blatz: First woman Chief Justice of the Minnesota Supreme Court.

Ray Bohn: One of three close advisers to Governor Perpich on the Wahl nomination.

Ronnie Brooks: Perpich staffer who favored the appointment of Wahl.

Nick Coleman: State Senator who was one of four people advising Governor Perpich on whom to appoint to the Minnesota Supreme Court.

Carol Connolly: Poet, journalist, and DFL activist. Co-chaired the Citizens Committee to Retain Rosalie Wahl.

Jeanne Coyne: Second woman appointed to the Minnesota Supreme Court.

Daniel Foley: Rochester District Court Judge who challenged Wahl in 1978. Foley was appointed to the Minnesota Court of Appeals in 1983.

Arvonne Fraser: Candidate for Lieutenant Governor. Wife of Minneapolis mayor and Congressman Don Fraser. Feminist activist. Head of first women's program at the U.S. Agency for International Development. Ambassador to U.N. Committee to oversee implementation on the Convention on the Elimination of All Forms of Discrimination against Women.

Sandra Garderbring: Appointed by Governor Perpich to head the Pollution Control Agency. Later appointed by Perpich to the Minnesota Supreme Court, serving with a majority of women members.

Kathleen Gearin: A former student of Wahl's who worked in the county attorney's office and later served as a Ramsey County district judge.

Gloria Griffin: Unsuccessful candidate for Congress for the 3<sup>rd</sup> District. Chaired search for head of Pollution Control Agency. Governor Perpich's adviser on women appointments.

Joan Growe: Secretary of State and chair of the St. Cloud Conference to elect delegates to the White House Conference on Women in Houston.

Koryne Horbal: Founder of DFL Feminist Caucus. Co-chair of DFL State Party. Ambassador to U.N. Committee on the Status of Women.

Muriel Humphrey: Widow of Senator and Vice-President Hubert H. Humphrey. Assumed Senate seat for remainder of Humphrey's term after his death.

Gwen Jones: *Minneapolis Star* reporter who reported on Wahl's selection by Perpich. Present at DFL Feminist Caucus meeting where Perpich promised to appoint a woman to the next vacancy of the Minnesota Supreme Court.

Paul Jones. Public Defender who hired Rosalie Wahl, and many other women attorneys part-time.

Phyllis Jones: A lawyer in the Ramsey County Attorney's office. Headed Minnesota Women Lawyers' Committee to develop lists of women willing to serve as judges. Perpich subsequently appointed her as a judge on the Tenth Judicial District Court in 1984.

Carol Lacey: *Minneapolis Star* reporter who reported on Wahl's selection by Perpich. Present at DFL Feminist Caucus meeting where Perpich promised to appoint a woman to the next vacancy of the Minnesota Supreme Court.

Roberta Levy: University of Minnesota Law Professor. One of Perpich's finalists for the Minnesota Supreme Court. Later served as the first woman Hennepin County District Chief Judge.

Harry MacLaughlin: President Carter appointed him to the federal bench from the Minnesota Supreme Court, creating a vacancy for Governor Perpich to fill.

Joe Marshall: A former student of Wahl's who worked in the Attorney General's office.

Robert W. Mattson: Former Minnesota Attorney General who challenged Wahl in 1978. He and Wahl won the primary election but Wahl defeated him in the general election.

Walter Mondale: Senator from Minnesota, Vice President under Jimmy Carter, Democratic nominee for president who chose Geraldine Ferraro as his running mate, Ambassador to Japan.

Terry Montgomery: Governor Perpich's chief of staff. One of four people advising Governor Perpich on whom to appoint to the Minnesota Supreme Court.

Tom Mott: A former student of Wahl's who served on the DFL Central Committee.

Diana Murphy: Hennepin Municipal Judge who was one of Perpich's finalists for the Minnesota Supreme Court. First woman appointed to the federal bench in Minnesota and first woman to serve on the Eighth District Court of Appeals.

Gail Murray: Woman judge who allegedly heard the complaint from Perpich's mother over pay discrimination.

Judith Oaks: Chair of the Endorsement Committee for Minnesota Women Lawyers.

Bob Oliphant: Worked with Wahl in public defender's office, recruited her to establish a clinical program at the University of Minnesota. Co-chaired the Citizens Committee to Retain Rosalie Wahl.

Rudy Perpich: Governor of Minnesota who appointed Wahl. Lieutenant governor who became governor and appointed Wendall Anderson to Walter Mondale's Senate seat. Minnesota's first Catholic governor and first governor from the Iron Range (the northeast part of the state). Democratic Farmer Labor party member, yet he ran without the party's endorsement in 1982. Officially pro-life, his appointments were mainly pro-choice. A champion of women.

C. Donald Peterson: Sitting justice on the Minnesota Supreme Court, up for re-election in 1978 with Justice Wahl.

Jerome T. Plunkett: Ramsey County District Court judge who ran against Wahl in 1978.

Al Quie: Governor of Minnesota. Defeated Governor Perpich in 1978. Appointed Jeanne Coyne to the Minnesota Supreme Court.

Jeri Rasmussen: DFL feminist leader. Stayed at Governor's mansion late with Koryne Horbal to ensure that the last person Governor Perpich spoke with the night before his decision was advocating for Wahl.

Kathleen Ridder: Republican feminist activist and heiress. Encouraged Governor Quie to appoint women.

Susanne C. Sedgwick: First woman Minnesota district court judge. Challenged an incumbent to win her seat as a municipal court judge in 1970. On Perpich's short-list for the Minnesota Supreme Court.

Nadine Strossen: President of the American Civil Liberties Union, former Minnesota Supreme Court law clerk, chair of the Hennepin County Women's Political Caucus, member of the DFL Feminist Caucus.

Esther Tomljanovich: Third woman appointed to the Minnesota Supreme Court. A lawyer since the 1950s.

Rahn Westby: Former lawyer, William Mitchell graduate, co-chair of St. Paul Women's Political Caucus. Worked for Wahl nomination and election.

## Discussion Questions

1. What should Rosalie Wahl's campaign plan be? Imagine that you are Carol Connolly or Rahn Westby, what activities would you pursue? How would you use the candidate's time, remembering that she is a sitting judge?
2. What networks might Wahl draw on for support? How are those different than the usual support for judicial office holders?
3. What are Wahl's assets? How can she use them effectively?
4. What is relevant to this story about the specific social and political context of judicial elections in Minnesota? How do judges obtain their positions in other states? Countries?
5. How should we select judges? Are judicial candidates different from candidates for other elective offices?
6. How should the Wahl campaign frame the question of why she should serve? Because it is time for a woman? To preserve the integrity and independence of the judiciary?
7. How should Wahl woo legal elites?
8. Why did Wahl attract such fervent and dedicated supporters?
9. What was happening in the feminist movement in 1977? What was the Houston conference and why was it important? What is different about feminism now? How does that shape the environment for women candidates?