

THE RISE AND FALL OF ROSE BIRD

A Career Killed by the Death Penalty

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Justice Rose Bird, in the sixty-one capital cases heard by the California Supreme Court while she served as its Chief Justice, never voted to uphold a death sentence. Nearly every obituary written after her December 4, 1999 death made reference to this fact, noting that her votes on capital punishment led to her ouster from office in the election of 1986. This was true, both in reports from neutral observers and those written by organizations and individuals that could be characterized as sympathetic to her views. The *New York Times*, on December 6, 1999, wrote “[a]fter the death penalty was reinstated in California in the late 1970’s, Judge Bird never upheld a death sentence, voting to vacate such sentences 61 times. She survived repeated efforts to recall her, but she was ousted after Governor George Deukmejian, a Republican, led an aggressive campaign against her. To this day, Ms. Bird’s name remains a kind of reflexive shorthand in California for ‘soft-on-crime liberal’.”¹

In the *ACLU News*, published by the American Civil Liberties Union of Northern California, actor Mike Farrell, of M.A.S.H. television series fame, and President of Death Penalty Focus, in a tribute to Justice Bird, wrote:

Virtually without exception, obituaries of former California Chief Justice Rose Bird attribute her 1986 electoral defeat to her unwavering opposition to the death penalty. In fact, her purported opposition to the death penalty was not the motivation for conservatives who set out to remove the state’s first female

¹ Todd S. Purdum, *Rose Bird, Once California’s Chief Justice, Is Dead at 63* (New York Times, Dec. 6, 1999) B18.

Supreme Court justice from office, rather it was the club they used to punish her for other trespasses.²

Any discussion of Rose Bird must include and even concentrate on this lightning rod issue. A review of the political campaign against her re-election in 1986 shows that the death penalty was the issue presented to the voters to justify her removal from office. A more thorough analysis shows that Mike Farrell was probably correct when he concludes that the death penalty was not the primary motive for conservatives who wanted her ouster, rather it was the most powerful weapon they could use to influence the electorate against Justice Bird.

Tom Wicker, in an editorial for the *New York Times*, entitled, *A Naked Power Grab*, offered the following analysis and opinion:

Don't believe for a moment that the campaign to oust Chief Justice Rose Bird from the California Supreme Court is a spontaneous public uprising. Four groups working to defeat her reconfirmation have raised more than \$5.6 million, much of it through direct mail to previous contributors on conservative mailing lists.

... Don't believe, either, that the effort to get rid of Chief Justice Bird, ... is non partisan. Gov. George Deukmejian, a Republican up for re-election; Mike Curb, the Republican candidate for lieutenant governor, and Ed Zschau, the Republican candidate for the U.S. Senate, have all campaigned openly against her.

... Don't believe, finally, that the anti-Bird campaign is about the death penalty, although that is the emotional issue that Mr. Roberts, the Republican and the right wing have fanned into near-hysteria. ...

Thus, the death penalty is only the trumped-up excuse for the anti-Bird campaign - the actual purpose of which clearly is to put a conservative majority on the California Supreme Court. ... And a deeper motive of the business groups involved in the anti-Bird campaign - big contributors include the Independent Oil Producers Agency and the Western Growers Association - was suggested when Crime Victims for Court Reform issued a paper charging the Bird court with being "anti-business."³

Wicker's position is documented in a book, *The People vs. Rose Bird*, written by Joseph

² *ACLU News - The Newspaper of the ACLU of Northern California*, January/February 2000. Found at <http://www.aclunc.org/aclunews/news12000/bird.html> , accessed April 26, 2006.

³ Tom Wicker, *In the Nation; A Naked Power Grab* (New York Times, Sept. 14, 1986), Sec. 4; Page 25.

M. Gughemetti, president of the American Land Alliance, a conservative, right-wing coalition of private property-rights advocates, wherein he states that five major issues came before the Bird court and asserts the conservative belief that Bird wanted the court to usurp the work of the legislature and the electorate. The issues were; Proposition 13, the Death Penalty, Reapportionment, the Victim's Bill of Rights and the Balanced Federal Budget Amendment.⁴

Rose Bird, nominated by Governor Jerry Brown, was sworn in as the first woman member of the California Supreme Court and its Chief Justice on March 26, 1977. This was merely the latest in a number of 'firsts' in her life. She was born on November 2, 1936, to parents who were chicken ranchers in Tucson, Arizona. Her parents separated when she was five and her father died a short time thereafter. Her mother, Anne, moved the family, including Bird's two older brothers, to New York where she found work in a factory to support them.⁵ Her mother saw education as a means to keep her children from factory work and encouraged her daughter to experience all that education had to offer. In particular, she encouraged her to avoid being pigeonholed in traditional female courses of study.⁶

Bird earned a full academic scholarship to Long Island University, graduating magna cum laude, in 1958 and from Boalt Hall School of Law at the University of California, Berkeley, with academic distinction and awards for best oral advocacy and brief writing, in 1965.⁷ On

⁴ Joseph M. Gughemetti, *The People vs Rose Bird* (San Mateo; Terra View Publications, 1985) 46.

⁵ Brenda Farrington Myers, *Rose Bird and the Rule of Law* (Fullerton; Thesis Presented to the Faculty of California State University, Fullerton, 1991) 4, citing "Rose Elizabeth Bird", *Current Biography*, 45 (May 1984), 10.

⁶ Betty Medsger, *Framed: The New Right Attack on Chief Justice Rose Bird and the Courts* (New York; The Pilgrim Press, 1983) 14.

⁷ *Ibid.*, 12.

graduating, she spent a year as the first female clerk for the Nevada Supreme Court and then became the first woman lawyer hired in the Santa Clara County Public Defender's office. She worked as a trial lawyer, eventually heading the appellate department for the office. After eight years she resigned with the intention of establishing a private practice. She had met Jerry Brown while she was in graduate school at Berkeley and when she heard that he was going to run for governor of California, she volunteered to work in the campaign, driving him to meetings when he was in San Mateo.⁸

After his election, Brown offered her a position in his transition team and eventually offered her a position in his cabinet as the first non-farmer Secretary of Agriculture and Services, the largest government agency in California. She became the first woman to hold a cabinet position in California government. It was in this position that she started to make enemies in big agri-business, outlawing the short hoe, a tool that caused serious health and physical problems for farm workers. She also was integral to passage of the Agriculture Labor Relations Act, guaranteeing farm workers the right to organize and negotiate labor contracts.⁹ Brown was a supporter of Cesar Chavez and the United Farm Workers and no friend of agri-business. When asked if he appointed Bird because of her gender, he responded "I was looking primarily for integrity and intellectual honesty, ability and a willingness to work hard for the public interest. And that philosophy cuts across all the appointments that I'm making ... Rose Bird is a very well organized, very intelligent person. She has excellent skills in evaluating people." He went on to say that, "She's extremely honest. And I think she's committed to the kind of society I think we

⁸ Edwin Chen, *Rose Bird - A Study in Contrasts* (Los Angeles Times, May 20, 1982) B1.

⁹ Medsger, *supra.*, 8.

ought to have.”¹⁰

In 1977, at the age of 40, despite having no judicial experience, Bird was appointed by Brown to the California Supreme Court, to serve as its Chief Justice. She would be the first woman member of the court and only the second woman to serve as a chief justice of a state supreme court.¹¹ At the same time, Brown nominated the first black person to the court, Wiley Manuel.¹² Although opposed by almost all Republican politicians in the state, it was the reluctant vote of Republican Attorney General Evelle Younger that provided the 2-1 vote from the Commission on Judicial Appointments. The commission is made up of three members: the State Attorney General, the Chief Justice of the court (or acting chief justice, if there is no chief) and the Senior Presiding Justice of the State Court of Appeal. Bird received the vote of Acting Chief Justice Mathew Tobriner, with Senior Presiding Justice Parker Wood voting against her appointment, citing her lack of judicial experience. Wood’s position was one advocated by most opponents to Bird’s appointment, often as a cover for their opposition to what was perceived as her liberal beliefs on crime. It should be noted that a couple of days before the vote, Wood sent another member of the Appellate Court to tell Bird that if she would have a Protestant minister testify before the Commission that she was a “fine Christian” and attended church every Sunday, he might vote for her. Bird thought this highly unusual and improper and refused the offer.¹³

Younger stated that, while he preferred someone with judicial experience, it was the

¹⁰ William Endicott, *Agriculture Chief is no Farmer: Women’s Appointment by Brown Breaks Tradition* (Los Angeles Times, Jan. 22, 1975) A18.

¹¹ Chief Justice Susie M. Sharp of North Carolina was the first in 1975.

¹² Gene Blake, *Brown Picks Woman, Black for High Court* (Los Angeles Times, Feb. 13, 1977) A1.

¹³ Medsger, 17.

Governor's prerogative to make the appointment and such choices had been given great deference in prior administrations. He applied what was known as the "Hufstedler test" (former president of the State Bar): the process for judicial qualification should be based on the nominee's ability to perform judicial functions with a high degree of skill and effectiveness.¹⁴ Younger went on to state that the Governor, during his campaign, "...described the kind of appointments he would make. Rose Bird fits the model. The decision as to the kind of chief justice California would have was, in effect, made by our voters in November, 1974."¹⁵ Bird stated that she was "deeply honored" by the confidence placed in her by the commission and that "I hope to dedicate my professional life to assuring fairness and that justice is done. I hope to dedicate all my energies to that end."¹⁶

When Bird was sworn in on March 26, 1977, there was another break with tradition. Normally a new Chief Justice would be sworn in by the Acting Chief Justice and Tobriner expected to perform the ceremony. However, Brown asked to be the one who swore Bird in. For the first two years of his administration, Brown took issue with many in the judiciary, failing to appoint judges to over 80 empty seats. Many believed that this break with tradition reinforced Brown's disrespect for the system. Bird stated that, "He wanted to do it, I think in retrospect, because it was historic. [She was the first woman justice.] Well, that was a breaking of tradition. And that was used as an example of how I didn't understand how the process worked. ...But I felt I couldn't hurt his feelings, after he had made me Chief Justice, by saying, 'You can't swear me in.'" Four years later, Bird said it looked as though "an outsider was being brought in by an

¹⁴ Gughemetti, supra., 7-9.

¹⁵ Blake, supra..

¹⁶ Ibid..

outsider.”¹⁷

Prior writings on Rose Bird and the 1986 vote that removed her from office have gone to great lengths to show that it was more than her position on the death penalty that motivated her opponents. The discussions have looked at the court’s vote in the Tanner cases,¹⁸ a test of the state’s “Use a gun, go to prison” law. When Governor Brown signed the bill into law on Sept. 23, 1975, he stated that:

By signing this bill, I want to send a clear message to every person in this state that using a gun in the commission of a serious crime means a stiff prison sentence. Whatever the circumstances, however eloquent the lawyer, judges will no longer have discretion to grant probation even to first offenders.¹⁹

In Tanner, the trial court found that Tanner was not a suitable candidate for prison and struck the gun allegation so it could sentence Tanner to probation. The Supreme Court upheld the trial court on a 4-3 vote. The case received notoriety when it was alleged, in an election day article in the *Los Angeles Times*, that the court withheld publication of its decision until after the November 1978 election, where Justice Bird first faced the electorate for confirmation to serve a new term in office. An investigation into the allegations showed no impropriety by the court, but the case was revisited, with one justice changing his vote, leading to a 4-3 decision upholding the law.²⁰

Conservatives used the court’s initial ruling as evidence there was a liberal majority on the court that was soft on crime and that its ringleader was Rose Bird. Immediately after her appointment to the court, monies from conservative policy groups and political action

¹⁷ Medsger, 52.

¹⁸ *People v. Tanner*, 24 C3d 514 (1979).

¹⁹ Myers, 13.

²⁰ Medsger, 80-88.

committees, notably those led by California State Senator H. L. Richardson, a conservative Republican, were used to oppose her reconfirmation by the voters. Richardson was a pioneer in the use of direct mail lists to raise money for political causes and in particular for conservative causes. Among the causes in which he triumphed was the removal of Rose Bird from office. He became a powerful force in Republican politics. In 1980, he told a reporter that he “...was not strong enough to say who is going to be nominated for governor, but I’m sure as hell strong enough to say who won’t be nominated.”²¹ Richardson funded and directed a campaign during the 1978 election to keep Rose Bird from receiving enough votes to stay in office. Richardson stated his reason for trying to defeat Bird: “Of all the people on the bench right now, I think she is the least qualified to hold the job that she has. I frankly think that she is a zealot.”²² Prior to the 1978 election, justices who stood for re-election had never received less than 62% of the vote. Most were re-elected with little or no opposition. Richardson’s campaign was vocal, but under-funded, yet it was successful enough to create a 48.3 percent “no” vote on Bird’s re-election.²³

Attempts to unseat Bird continued through the election of 1986. Supreme court justices in California are normally re-elected for twelve-year terms. However, when a justice is appointed to replace a retired or deceased justice, he or she must first stand for reconfirmation by the electorate at the next statewide gubernatorial election held after the appointment. For Rose Bird, this was the 1978 election. In addition, when a justice is appointed, it is to serve the

²¹ Ibid., 78-79.

²² W.B. Hood, *Rose Bird’s Opponents Gear Up for TV Blitz* (Los Angeles Times, Sept. 30, 1978) A1.

²³ William Endicott, *Rose Bird Sees Positive Results: Says Voters Don’t Want Decisions Based on Threats* (Los Angeles Times, Nov. 9, 1978) OC3.

balance of the term of the justice who held that seat. As a result, Bird would have to face re-election in 1986, the end of the term of Chief Justice Wright, her predecessor. Many held the opinion that justices should not be removed from office unless they were shown to be unethical or incompetent. Others held the view that the electorate should remove a justice if public confidence in the judicial officer was lost.²⁴

Those who actively opposed the re-election of Rose Bird adopted a standard that looked to the decisions made by the justice and whether or not the decisions upheld society's desire for toughness on crime. Crime Victims for Crime Reform, led by, among others, the District Attorney of Kern County, stated that it was valid to look at the record of a justice. Crime Victims for Court Reform was one of three major organizations leading the fight against Bird in 1986. Others were Californians to Defeat Rose Bird, led by Howard Jarvis and Paul Gann, the authors of Proposition 13, and Bird Watchers Society, led by Republican Congressman William Dannemeyer. Each of these groups used money to publicize cases that they felt showed Rose Bird was soft on crime.²⁵ An example is the case of Theodore Frank, convicted of kidnaping, raping and murdering a two-and-one-half year old girl. His death sentence was overturned when the court ruled that evidence used in his trial was seized as a result of an overbroad search warrant. The girl's grandmother, co-chair of Crime Victims for Court Reform, blamed the court and specifically, Rose Bird. She stated:

Why investigate a case, go to trial, get a confession when regardless of what the crime is, or the penalty, Rose Bird is going to overturn it. Of course, they should review cases, but I don't think they should turn loose ten murderers because of one that's not a murderer.²⁶

²⁴ Myers, 87-89.

²⁵ Ibid., 88-91.

²⁶ Myers, at page 91, citing Larry Liebert, *A Grieving Grandmother Determined to Oust*

Ads paid for by the anti-Bird forces described brutal crimes and said that “Bird let the killers go free.” Of course, no killers went free; they stayed in prison to serve their sentences after their death sentence had been overturned. Bird defended her record by stating:

I have to read the transcripts of some horrible crimes. If people think judges don't feel for someone whose child has been murdered, that is to deny our humanity. I have been made the symbol for the anger of people who are frightened about their own lives and the media.... Studies show that the prison population in this state is in excess of 47,000.... We are a very tough court.²⁷

In response to Bird's defense, one could look to Gughemetti, citing Bird's dissent in *People v. Jackson*.²⁸ He writes: “Bird stated, ‘Today this court sentenced to his death an impoverished, illiterate and possibly retarded 19-year-old Black youth.’” Bird stated that the 1977 death penalty was unconstitutional, in that it lacked proper procedural safeguards for the sentencing process and the review process. **There was no discussion of the victim in her dissent.**²⁹

Bird stated that she would uphold a death sentence if she found that the trial was fair and the law constitutional.³⁰ Yet, during her time on the court, sixty-one death penalty cases were decided by the court. Fifty-eight death sentences were overturned and Bird voted to overturn the sentence in all sixty-one cases. This was during a time when eighty per-cent of the California

Bird, (San Francisco Chronicle, July 8, 1986) 4.

²⁷ Myers, at page 91, citing Muriel Dobbin, *As Voters Try to Overrule a Top Judge* (U.S. News & World Report, Dec. 2, 1985) 71.

²⁸ *People v. Jackson*, 28 Cal.3rd 264.

²⁹ Gughemetti, 24.

³⁰ Bob Egelko, *Standing in Dispute*, in *California Journal* 17 (September, 1986) 430.

population supported the death penalty.³¹

A review of the books and articles cited in this paper shows that those who place the blame for Bird's defeat on funding by agri-business, the taxpayer revolt, and big banking, and claim that such groups hid behind the death penalty issue, while correct in their analysis, nonetheless seem to be apologists for Bird. What is evident is that the electorate made their decision about Bird based on her rulings in death penalty cases. Because big business successfully hid behind the issue, the electorate was not aware of their presence or motive. What they clearly believed was that California had a chief justice who had a specific philosophical opposition to the death penalty. Further, that she would not, in fact could not, ever vote to uphold a death sentence and was therefore out of step with their beliefs. Voters in 1986 did not care that Rose Bird was a woman; did not care that Rose Bird was an enemy of big farmers; did not care that Rose Bird was not a supporter of property tax reform. They only knew that, from their perspective, Rose Bird did not care about victims of crime.

³¹ California District Attorneys Association White Paper, *Prosecutor's Perspective on California's Death Penalty* (2003), Appendix A.

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