

Becoming Chief Justice:

A Personal Memoir of the Confirmation and Transition Processes in the Nomination of Rose Elizabeth Bird

BY ROBERT VANDERET

ON FEBRUARY 12, 1977, Governor Jerry Brown announced his intention to nominate Rose Elizabeth Bird, his 40-year-old Agriculture & Services Agency secretary, to be the next Chief Justice of California, replacing the retiring Donald Wright. The news did not come as a surprise to me. A few days earlier, I had received a telephone call from Secretary Bird asking if I would consider taking a leave of absence from my position as an associate at the Los Angeles law firm, O'Melveny & Myers, to help manage her confirmation process. That confirmation was far from a sure thing. Although it was anticipated that she would receive a positive vote from Associate Justice Mathew Tobriner, who would

chair the three-member Commission on Judicial Appointments panel that would pass on her nomination, the presiding justice of the Court of Appeal, Parker Wood, had already announced his opposition. That left California Attorney General Evelle Younger, a Republican, as the swing vote. His support was far from certain.

My practice at the time was a source of great satisfaction to me. I had managed to secure a niche specialization in the firm's litigation practice, concentrating my work on First

Amendment litigation, primarily defending newspapers, magazines, broadcasters, journalists and book publishers in libel and invasion of privacy suits. The bulk of my work was for media giant Time Inc., but also included clients such as *The Christian Science Monitor*, CBS, NBC and Fox, as well as prominent authors such as Joe McGinniss, Kitty Kelley and Michael Drosnin.

Nonetheless, the exciting opportunity to get involved in a highly publicized political confirmation process was hard to turn down. Plus, my personal friendship with and deep respect for Rose alone would have obligated me to come to her aid whenever she asked.

I had first met Rose Bird in the summer of 1971 when, as a law student who had completed his first year at Stanford Law School, I was a summer law clerk with the

Santa Clara County Public Defender's Office. It was an exciting opportunity: I would get to assist in the trials of criminal defendants as a bar-certified law student working under the supervision of a public defender, write motions to suppress evidence and dismiss complaints, and interview clients in jail. A few weeks after my job began, I was assigned to work exclusively with Deputy Public Defender Rose Bird, widely considered to be the most talented advocate in the office. She was a welcoming and supportive supervisor.

Each morning that summer, we would meet at her house in Palo Alto and drive the short distance to the San Jose Civic Center in Rose's car, joined by my co-clerk for the summer, Dick Neuhoff. Before heading off, we would often sit and share a muffin and conversation with Rose's delightful but tough-as-nails mother, Anne, who lived with her.

Gender equality and political correctness were not widely honored norms in the legal world almost 50 years ago, not that they are uniformly respected even today. When we would tail behind Ms. Bird as she entered the courtroom, it was not unusual to hear from the bench condescending comments such as, "Well, here comes Rosie Bird with her little chickens trailing behind her." Swallowing her pride and placing her obligations to her client above her strong desire to deliver a powerful comeback, lawyer Bird would force a smile, greet the judge affably, and we would all take our seats at the counsel table as the client was brought out for the hearing or trial.

The following academic year, I had the great pleasure of enrolling in a very special course, the Criminal Defense Seminar taught by Professors Anthony Amsterdam and Rose Bird. Amsterdam was a legal giant; as a law student, he wrote a law review note postulating a new First Amendment doctrine, "void for vagueness," that was later adopted in whole by the United States Supreme Court.¹ He later became the leading advocate in the country for abolition of the death penalty.

The great thing about the class, one of the first clinical courses in the nation, was that it afforded students hands-on experience in picking juries, interviewing clients, and arguing before a mock panel of volunteer citizens from the community. The bad thing about the class was that, in the small seminar room where we met in the evening,



California Supreme Court Chief Justice Rose Bird in San Francisco, May 23, 1979. AP Photo/Jim Palmer.

1. See Anthony Amsterdam, "The Void for Vagueness Doctrine in the Supreme Court: A Means to an End" (1960) 109 *U. Pa. L. Rev.* 67.

Amsterdam would chain-smoke cigars. When I returned home to our married-students dorm on campus at night, my wife would make me strip off my clothes in the hallway before entering our apartment and head straight to the shower for a thorough scrubbing and shampoo.

After I had completed the seminar, Professor Bird suggested that I apply for an externship the next semester with Associate Justice Mathew Tobriner. She admired Tobriner greatly and had previously sent other students to extern with him. An extern is basically a temporary law clerk working under the supervision of one of the justice's regular full-time clerks or professional staff attorneys. At the time, they got to review petitions for hearing, write memos to the justice recommending taking or rejecting review and, if fortunate, participate in drafting a "calendar memo" (an oral argument memo shared with the other justices) or a resulting proposed opinion. I had the exciting opportunity to do that once and was pleased when Justice Tobriner adopted the draft opinion with only one minor change: the addition of a single poetic sentence in the middle of the opinion. When the case was reported in the legal press the day following its release, only one sentence from the opinion was quoted: the one added by Tobriner, who was one of the court's finest writers.

I will be eternally grateful to Rose for giving me the opportunity to serve as an extern for Justice Tobriner. Not only did I treasure my time with him both before and after the externship, but it also resulted in one of the longest and most meaningful friendships of my life, with Hal Cohen, one of his two professional staff attorneys.² My wife Sharon and I remain close to Hal and to his fabulous lifemate, Inez Shor Cohen. For the rest of Mat's life, we had the pleasure of celebrating the Pass-over Seder with the Cohens and Justice and Mrs. Tobriner, the dynamic and charming Rosabelle.

In my final year of law school, I vividly remember Rose's disappointment when I informed her that I had accepted an offer from the Los Angeles office of O'Melveny & Myers to join the firm as an associate. She was not a fan of big corporate defense firms and had urged me to become a criminal defense lawyer, either as a public defender or with one of the private criminal defense lawyers she had recommended to me. I never regretted the choice I made, but her disappointment at my decision felt to me like a personal betrayal of her trust and training.

In the years that followed, I remained in close contact with Rose. Sometimes, when legal or personal business took her to Los Angeles, she would stay with us at our oceanfront apartment in Santa Monica and later at our first home in Mandeville Canyon. She was always a delightful house guest.

2. See Jake Dear, "Hal Cohen: Tributes to the California Supreme Court's Most Extraordinary and Influential Staff Attorney" (Fall/Winter 2020) *CSCHS Review* 11–18.



Criminal Defense Seminar class at Stanford Law School, 1972, with Professors Rose Bird and Anthony Amsterdam (in the suit behind Bird). The author is to Bird's right. *Photo courtesy of Judge Robert Vanderet.*

So, when I received the summons from Secretary Bird, I informed the firm's management of my intention to take an unpaid leave-of-absence to assist her in preparing for her confirmation hearings. It was easily approved. No law firm would look askance at having a lawyer develop a close relationship with an appellate justice, although if anyone ever thought it would curry favor for the firm with the Chief Justice, they had never met Rose.

I flew to Palo Alto and spent the next few days conferring with Bird and a few other of her close former students, strategizing about how to handle questions, anticipating which adverse witnesses might be called to testify against her — we knew for example that Bishop Roger Mahoney, a foe of hers from the farmworker battle days, would strongly oppose her nomination — and developing our own list of witnesses to testify on her behalf. At Rose's insistence, I was put on the list to offer supporting testimony for her nomination, and I was eager to do so.

As I mentioned, the vote we most needed to secure to achieve confirmation was that of Attorney General Evelle Younger. One of Younger's closest outside advisors was Charles G. Bakaly, Jr., the head of the Labor Department at O'Melveny & Myers, which represented employers in labor negotiations with unions. Bakaly was, and still remains, a giant of the bar in Los Angeles, and also someone with whom I have always had a warm and mutually admiring relationship, or at least I'd like to think so. I can still remember watching Evelle Younger's face as I began my testimony on behalf of Bird's nomination. When I identified myself as a lawyer practicing with the O'Melveny firm, his head visibly snapped up as if he'd been slapped across the face. While I would like to imagine otherwise, I am certain that my testimony played no role in his decision to confirm the nomination, which was based, I am confident, on an honest evaluation of her qualifications for the position. (Bakaly would later play a leading role in the successful campaign to defeat the Chief Justice when her confirmation came to a public vote in 1986.)



Chief Justice Rose Elizabeth Bird (*center*) and (*left to right*) Associate Justices Stanley Mosk, Malcolm M. Lucas, Cruz Reynoso, Joseph Grodin, Edward Panelli and Allen Broussard. Photo: Courtesy of the Judicial Council of California.

I joined Rose in celebrating her confirmation and was also pleased to attend her swearing-in on March 26, 1977, at the former Supreme Court hearing room in the B. F. Hastings Building in Old Sacramento. Governor Jerry Brown administered the oath, substituting himself for Acting Chief Justice Mathew Tobriner, for whom he once served as a law clerk.

As the newly-confirmed Chief Justice prepared to assume her new position, she put together what she called a “transition team” and asked me to serve in that role along with several others. She thought that I would be particularly well suited for the role since I had externed for and remained close to Justice Tobriner, who had been the acting chief and had good personal relations with others on the Court, including Justices Mosk and Sullivan as well as their law clerks and professional staff attorneys.

My first task was to prepare her with respect to cases that were pending before the Court and which she would be involved in hearing and deciding. Typical of her concern for others, she also asked me to do the same for Wiley Manuel, who had been nominated to the Court at the same time as she. I knew this would take some time, so I again arranged an unpaid leave of absence from my firm and moved to San Francisco for the transition process. Hal and Inez Cohen kindly offered to have me stay with them in their Noe Valley home in San Francisco. My intrusion on their family life would last for more than a month, an imposition that was duly noted by the Cohens’ then four-year-old son, Teddy, who pointedly asked me one day while I was shaving, “Are you ever going to go home?” (Dr. Ted Cohen is today a highly-respected epidemiologist at the Yale School of Public Health in New Haven, with a primary research focus on tuberculosis; he has long since absolved me of my sin of intrusion. If his sister Sara, now a prominent lawyer and noted death penalty opponent in Pennsylvania, harbored similar sentiments, she kept them from me.)

Needless to say, although her practice had exclusively focused on criminal law, Rose Bird proved a quick study in every area of civil law she encountered as Chief. As a First Amendment lawyer, I remember the admiration I later felt for her superb concurring opinion in *Guglielmi*

v. Spelling-Goldberg Productions,³ which addressed the First Amendment implications of right of publicity and defamation actions involving fictionalized biopics:

No such constitutional dichotomy exists in this area between truthful and fictional accounts. They have equal constitutional stature and each is as likely to fulfill the objectives underlying the constitutional guarantees of free expression. Moreover, in defamation cases, the concern is with defamatory lies masquerading as truth. In contrast, the author who denotes his work as fiction proclaims his literary license and indifference to “the facts.” There is no pretense. All fiction, by definition, eschews an obligation to be faithful to historical truth. Every fiction writer knows his creation is in some sense “false.” That is the nature of the art.⁴

I was also especially pleased to note that Justices Tobriner and Manuel joined in her concurring opinion in *Guglielmi*.

My second task during the transition period was to get the new Chief Justice physically set up in her chambers. I failed miserably in this task, precipitating an incident that Bird herself said “nearly caused a riot”: the moving of the Court’s conference table. The incident is recalled the Kathleen Cairn’s meticulously researched 2016 book, *The Case of Rose Bird*,⁵ but here is the unreported background to the episode: It had always struck me that the positioning of the table where the court met each week unnecessarily infringed on the space available to the Chief Justice for her adjacent chambers. When it is positioned parallel to the wall facing the street, as it always had been, it easily takes up half of the space in the chambers, even though it is used regularly perhaps one-half day each week for conferences.

I was determined to afford the new Chief Justice a little more room for her own chambers. Accordingly, on my own and without her knowledge or approval, I moved the table so that it was positioned perpendicular to the wall of windows, allowing the Chief Justice a bit more personal space within her own office. (When I say I moved it, I mean I physically moved it, which was no easy task; that massive table was built for the ages.) You would have thought that I had evicted the justices from the courthouse: the outrage from the other members of the Court, especially Justice Mosk, was immediate and vociferous. As was typical of her character, Bird did not try to deflect blame from herself by explaining, truthfully, that it was done without her knowledge. Instead, she apologized and had the table returned to its original position. (I’m not sure if she moved it herself, though it wouldn’t surprise me to learn that she had done so.)

3. (1979) 25 Cal.3d 871.

4. *Id.* 871.

5. Kathleen A. Cairns, *The Case of Rose Bird*, Lincoln, NE: Univ. of Nebraska Press, 2016, 107.

With the end of the transition period, I returned to my practice in Los Angeles, and her aide and closest personal friend, Steve Buehl, another stellar Stanford Law graduate, took over assisting her in her new job on the Court. For several years, I remained in contact with Chief Justice Bird and our interactions were warm and cordial. I had the honor of introducing her at several prominent bar functions, including an address at the annual Constitutional Rights Foundation dinner, and at a memorial dinner held in tribute to Justice Tobriner following his passing, to raise funds to endow an annual Tobriner Memorial Lecture at Hastings Law School. (Over the years, the annual lecture featured such prominent speakers as Justice William Brennan, Laurence Tribe, Anthony Lewis, John Hope Franklin and J. Skelly Wright.)

At some point, however, and I still have no clear notion of what prompted the break, Rose stopped communicating with me. It is possible that my partner Chuck Bakaly's role in the election campaign against her caused her to doubt my own support for her retention. If that was, in fact, the reason, she was mistaken. I was a vocal and public supporter of her tenure on the bench and penned op/ed pieces in the *Los Angeles Times* supporting her retention.

There are also those who might attribute her actions to what has been characterized in her as a streak of paranoia and vindictiveness. That characterization seems to have first surfaced following a bitter dust-up Bird had with Bishop Roger Mahoney during the contentious farmworker negotiations. The irony is that it was Mahoney himself who relentlessly went after Bird following their clash in that encounter, testifying against

her at the confirmation hearings, and publicly trying to undermine her credibility and reputation during her tenure on the Court, including through the election retention campaign and even after her removal.

It would be easy, therefore, to dismiss the charge as a projection of Mahoney's own personality, but it is not that simple. In other instances where Bird felt that she was the target of unfair criticism, whether true or not, or where her authority or control was challenged, these traits clearly manifested themselves by lashing out at others or cutting them out of her life. These were certainly not dominant aspects of her personality, but there is no question that they were there.

Whatever the reason, I had no further contact with Rose up to her untimely death from cancer in December 1999. Along with many other of her former friends and associates, I attended the memorial service for her in Los Angeles.

I will always cherish my memories of Rose Elizabeth Bird. She was a passionate defender of the poor, the disadvantaged and the marginalized. She was a vigorous advocate of the rights of the accused, and a zealous defender of constitutional liberties. Her legal mind was superbly analytic and her opinions well-reasoned and well-written. When I think of her, I still see the twinkle in her eyes, her infectious laugh, and the genuine warmth of her interactions with friends. I miss her greatly. ★

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