

rose bird update

Beware when the great God lets loose a thinker on this planet.

R W Emerson, *Essays*

The Chief Justice of the Californian Supreme Court, Rose Bird, was voted out of office last November. The election meant the end of her period as Chief Justice which commenced in 1977. She left the bench on 5 January, 1987. Two other Justices on the Californian Supreme Court, Associate Justices Grodin and Reynoso, were also ousted in that election. They, like Ms Bird, were appointed by the liberal Democrat governor Mr Edmund (Jerry) Brown. Justice Reynoso was the Supreme Court's first Hispanic member. This is the first time that any appellate justice has been rejected by voters in the 52 year history of judicial confirmation elections in California.

About US\$10million was estimated to have been spent by lobbyists attempting to oust Ms Bird from judicial office. In addition, the conservative governor of California, Governor Deukmejian, called for the Chief Justice's removal. The campaign against Ms Bird has a long history and was largely based upon the issue of the over-ruling of death sentences handed down by trial judges by the Californian Supreme Court as well as allegations that she was 'soft on crime'. Her opponents argued that she personally opposed the use of the death penalty under any circumstances and twisted the law to achieve the overruling of death sentences by the lower courts. Her supporters argued, as did she, that she was upholding the rule of law and applying it to rectify errors made by the lower courts in reaching the sentence imposed. Her supporters also argued that the highly emotional campaign against her was a campaign by right-wingers and particular lobbyists, for example the gun lobby, to politicise the court and the judicial process generally. The fact that Ms Bird's vote always formed part of a majority vote on a bench of seven in all those decisions which rejected the imposition of the death penalty on legal grounds,

did not appear to influence the electorate, who voted against her 2 to 1, a far more decisive margin than against Justices Grodin and Reynoso. This was probably a result of the fact that the campaign was strongly personalised against her in particular, rather than the court as a whole. It has been suggested that the unseating of the other two justices arose from a transfer to them of the antipathy towards Ms Bird.

The reasons for the singling out of Ms Bird as a symbol of liberalism by those who opposed the court's verdicts have been the subject of some speculation. Feminists have argued that her very visibility as not only the only woman on the bench but also her striking appearance made her the most effective symbol to oppose. Her critics have argued, however, that she failed to manage the court effectively and was unsuccessful in the task of encouraging the bench to reach some degree of homogeneity in the judgments they handed down.

Governor Deukmejian whose views on social issues have been said to closely parallel those of President Reagan, will nominate three new justices to replace those ousted. His nominations are subject to evaluation by the State Bar and approval by the three member Commission on Judicial Appointments, as well as voter confirmation in 1988. Justice Allen Broussard will be likely to be the only liberal and the only remaining Jerry Brown appointee on the court.

The politics and forces which have resulted in Ms Bird's departure from the bench are perhaps a microcosm of the conflict and confusion surrounding the issue of the use of guns in the United States. It is a constitutional right in that country to carry a gun and it appears that there is no chance of any change in this law. One attempt at reform in California, called the 'use a gun, go to jail' law which made prison sentences compulsory for those convicted of using a gun to commit certain crimes, was overturned by the Californian Supreme Court itself. Although guns ap-

pear to be freely available and their use condoned, the campaign against Rose Bird, involving televised public calls for her removal by parents and relatives of murder victims and led by a coalition of these people together with conservatives and public prosecutors was clearly based on a strongly retributive concept of justice: in other words 'an eye for an eye and a tooth for a tooth'. As one journalist has noted:

The mixture is odd: civilization on the surface, but raw anger and confusion just beneath. That is compounded by the availability of hand guns, which result in the deaths of 20,000 Americans every year.

The perplexity ranges from lawyers and doctors, who may keep a gun in the bedroom, and a mace stick in their breast pocket, to street-wise kids who carry a flick-knife or a cheap 'Saturday night' pistol . . .

People in the US insist on their constitutional right to bear arms, but cringe every night as they pass potential muggers, all of them armed.

It was these feelings that brought down the Chief Justice of California . . .

Hugh Nevill, 'Chief Justice defeated by death-penalty lobby', *Canberra Times*, November 1986.

Ms Bird's own view on this confusion felt by Americans is that it has resulted in increased pressure upon the courts to provide certainty in a society struggling to deal with its own internal conflicts. The process is not helped by ambitious politicians who create ambiguous laws in an attempt to defuse possible criticism of their government by passing the buck to the courts to clarify the law and make the hard decisions. In her view

American society, with its children exposed to some sixteen thousand hours of television by age eighteen, demands instant answers to the most complex of problems and is willing to implement startlingly radical ideas after little or no reflection . . . We have truly become 'instant' society.

Address for Sydney Law Week, Law Institute Journal, December 1986, 1328at 1130

Her message is clear that short-term emotional responses are no solution to complex and long-term legal and social problems. Perhaps this raises the issue of the utility of confirmation or ratification elections for judges in a society which is so oriented towards instant answers and away from the detailed deliberative process which the rule of law necessarily involves. Independence of the judiciary, is, then, perhaps threatened by a system which subjects the appointment of judges to regular confirmation by the electorate in such a 'fast-track' ahistorical political climate. Ms Bird's own prediction following her defeat was that

Future justices will have to, in effect, please the governor to stay on the court. We will see executions based, not on the law, but on political expediency. That would be tragic.

San Francisco Chronicle, 6 November 1986

spotlight on no bills again

If any man is indiscreet enough to impart to you any sensational information get out of his way before he has time to tell you not to publish it. A lot of people are apt to confess their sins in the hope of avoiding publicity.

W S Robinson quoting David Syme in *If I Remember Rightly*

Attention has once again been focussed on the issue of 'no bills' — the decision not to proceed with a charge or, as it is generally known to lawyers, the *nolle prosequi*. The reason for the renewed interest is the decision of the Director of Public Prosecutions not to proceed with a conspiracy charge against Mr Morgan Ryan, as reported in the *Sydney Morning Herald* of 9 January 1987.

Generally speaking there is a very low level of public visibility of this area of prosecutorial decision-making. Decisions involving political connotations of some kind — such as the Ryan case — attract the attention of Parliament and the media and as a result lead to a certain degree of public scrutiny. Indeed, the Director of Public Prosecutions said that he thought it appropriate, in the circumstances of the decision relating to the Ryan case and the publicity that it had generated,