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

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BOOK REVIEW

FRAMED: THE NEW RIGHT ATTACK ON CHIEF JUSTICE ROSE BIRD AND THE COURTS. By Betty Medsger. New York, NY: The Pilgrim Press. 1983. Pp. xviii + 297. Hardbound. \$17.95.

*Reviewed by Frank A. Jelinch**

This book, written by an investigative journalist, chronicles the story of how the New Right, including high White House officials, with the support of an unquestioning press "framed" high jurists. It explains how an image was created of Rose Bird as the symbol of "what's wrong with the Courts," and how she and the California Supreme Court were held responsible for many of the ills of society. It reports in detail how various vocal and influential California politicians on the right set out to destroy the reputation of the court and remove the Justices from office.

It is an important story which needs to be told. While some have dismissed the attack on the courts in California as a transitory event with about as much popularity as an Edsel, this book points out that the New Right crisis of the court has forged a permanent movement. This movement, which reached its most dramatic success with the near recall of members of the supreme court, makes jurists' court records and political views fair game for media attacks and future recall attempts. Unfortunately, the "Bird hunters" of the 1980's are not merely seeking to dispose the head of the supreme court, but are using her as a decoy to trick the public into believing that she and her brethren are to blame for the rising crime problem in California.

The book is haunting and compelling because of the significance of the story it tells. Unfortunately, one has to overlook with great difficulty the uncompromising bias of the author in her sharp criticism of those who attack the courts. While the subtitle for this book is, "The New Right Attack on Chief Justice Rose Bird and the Courts," it may more aptly be subtitled, "The New Right Attack on

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Chief Justice Rose Bird and the Courts, As Seen by the New Left.”

The author seems to take delight in heaping praises on Chief Justice Rose Bird while heaping coals into the eyes of Interior Secretary William Clark. She asserts that critics claim that Rose Bird's appointment was to Jerry Brown what William Clark's appointment was to Reagan: an affront to both the judiciary and the public. However, she mentions that the only similarity between Clark and Bird is that both worked their way through school—Rose Bird graduated from college and law school with honors whereas William Clark flunked out of both such institutes. The author states that Rose Bird made over 8,027 court appearances in the Santa Clara County Public Defender's Office, but fails to discuss the degree of sophistication of the cases handled or the trial experience or lack of trial experience obtained. It is also difficult to understand how the author can compare the caliber of Bird's appointment to that of various Justices on the United States Supreme Court who had no prior judicial experience, such as Earl Warren and Potter Stewart.

On the other hand, the author elevates William Clark to the position of “one of the most powerful people in America, perhaps the world, for he may be the only person besides Nancy Reagan who has the ear of the President,”¹ and intimates that he someday will be appointed to the United States Supreme Court. She then pulls the pedestal out from under him by showing how he took little interest or participation in oral argument, wrote few opinions and generally appeared to be only “biding his time” on the high court while awaiting appointment to higher office. She gives him no credit for his demonstrated competence as an administrator, but simply attacks him in his position as a jurist. This attack becomes a further affront to the court which the author claims is a game in which only the New Right engages. While vehemently opposing all those in the New Right who attack the court as an institution and the individual Justices by name, the author expresses delight in attacking William Clark and his appointer, implying that the President has no respect for the courts. Presumably, if Reagan had appointed Rose Bird to the supreme court he would have escaped such criticism.

The book reaches the pinnacle of high drama when reporting the unprecedented investigation of the supreme court's delay of the controversial *Tanner*² decision. The author goes into great detail to examine not only the participation by each member of the court and

1. MEDSGER, *FRAMED* 7 (1983).

2. *People v. Tanner*, 587 P.2d 1112, 151 Cal. Rptr. 299 (1978).

each important aspect of their testimony, but their motives as well. She raises questions as to each Justice's participation:

Bird- Did she ask Wiley Manuel to write a dissent in order to ensure the delay of the *Tanner* decision? Did she write her concurring opinion in *Tanner* not out of conviction but out of the desire to add a new element that would effectively delay it?

Tobriner- Did he delay the *Tanner* decision in order to protect the Chief Justice at the polls?

Manuel- Did anyone suggest to him that he should write a separate dissent in *Tanner* in order to delay the case until after the election?

Newman- Did he delay reacting to the Chief Justice's long concurring opinion in the *Fox*³ case in order to prevent the case from being released before the election?

Mosk- Did he leak confidential information to the press before the election in order to adversely affect the Chief Justice's chances at the polls?

Richardson- Was he used as a witness solely to get information about Court procedures on the record?

Clark- Why did he refuse to sign Justice Tobriner's statement that the *Tanner* case had been handled normally? Did he leak confidential information to the press?

Unfortunately, although the author goes into excruciating detail to provide answers to these questions, she seems to be more interested in the motives of the Justices and how they lined up politically on the *Tanner* decision, and in the subsequent investigation. Perhaps this is because the investigation itself left more questions unanswered, or perhaps it is the desire of the author to focus the blame in this entire affair on Justice William Clark whom she terms, "the lone public accuser." It was Justice Clark who made the accusation a month after the election: "In conscience it must be clear to all on the Court that the *Tanner* case was signed up and ready for filing well in advance of November."⁴ At first, he questioned why it was not filed. Near the end of his testimony he claimed that Mosk had told him that Mosk had personally accused Tobriner of withholding decisions until after the election. The only way to clear up the testimony would be to question Mosk. Mosk, however, effectively gagged the commission by filing suit in superior court to make the otherwise

3. *People v. Fox*, 22 C.3d 992, 150 Cal. Rptr. 867 (1978).

4. MEDSGER, *supra* note 1, at 37.

public hearings private.⁵ This charade probably led to less respect for the court than the effect of all the efforts of the New Right to impeach and recall Justices in the last several years.

The message of the book, if there is one, seems to be that the greatest threat to the court came from within in its own handling of the *Tanner* decision and its response to the subsequent investigation. The author concludes with a chapter on how the New Right wanted to set an example for the rest of the country and gave strength to its cause and efforts to remove Justices in other states for political reasons. Unfortunately, lasting damage is done to the courts by such special investigations and their failure to come to grips with the problem of the growing politicization of the courts.

Basically, the commission wanted to buttress the common person's view that the court was apolitical and unanswered by the commission's investigation; its subsequent whitewashing of the court is the real tragedy of the story. The story is not one of "treachery"⁶ on the high court, as the author boldly claims at the beginning of the book, which further demonstrating her lack of objectivity, but is one of real tragedy. The balance between the three branches of government espoused in the Federalist Papers and enshrined in the Constitution of the United States becomes little more than a myth. In this sense the book is not the story of an attack on Rose Bird and the courts by the New Right. It is a poignant revelation that politics not only exist in the courts, but that government is powerless to provide adequate investigation and corrective measures to discipline the courts and to return the judiciary to its rightful place as a separate co-equal branch of government.

5. Furthermore, Justice Newman was the only one of the seven Justices refusing to disqualify himself from considering Mosk's lawsuit. It took more than two months to remove him from the panel of Justices appointed to decide the suit.

6. MEDSGER, *supra* note 1, at xv.