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# ARTICLES

## A Study of Justice Pro Tempore Assignments in the California Supreme Court

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### *Introduction*

**T**HE CHIEF JUSTICE has the power to fill temporary judicial vacancies on the California Supreme Court by the assignment of justices pro tempore (pro tem).<sup>1</sup> Court critics have suggested that this power has been abused, making the accusation that current Chief Justice Rose Elizabeth Bird has named only judges who will agree with her views to sit as pro tem justices.<sup>2</sup> This charge is un-

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1. CAL. CONST. art. VI, § 6; SUPREME COURT OF CALIFORNIA, PRACTICES AND PROCEDURES 15, 32 (1985). The derivation of this power is explained in Note, *The Selection of Interim Justices in California: An Empirical Study*, 32 STAN. L. REV. 433, 433 n.2 (1980).

This Article is limited to a discussion of pro tem justice assignments during the supreme court's monthly oral argument calendar. A pro tem justice might also be required to sit on weekly conference matters.

2. CALIFORNIA DISTRICT ATTORNEYS' ASSOCIATION, PROSECUTORS WHITE PAPER ON SUPREME COURT CONFIRMATION ELECTIONS 46-47 (1985) [hereinafter cited as CDAA WHITE PAPER]; *Bird Places Pro tems on High Court Who Vote with Her More Often than Not*, L.A. Metropolitan News, Oct. 18, 1985, at 11; *Partisan Judges Cloud Decisions*, San Rafael Inde-

founded. Chief Justice Bird has actually made the pro tem justice selection process more democratic than it had been under her predecessors.

This Article examines the pro tem justice assignments made by the Chief Justice and by acting chief justices<sup>3</sup> during the period from January, 1980 through April, 1985.<sup>4</sup> The Article summarizes the criticism of the pro tem justice assignment process, analyzes the pro tem justice assignments made by Chief Justice Bird, and describes the changes in the system of pro tem justice selection made by Chief Justice Bird. The Article concludes that the charge of abuse lacks any evidentiary support.

### *Analysis*

A 1980 law review note analyzing pro tem justice assignments in California<sup>5</sup> concluded that historically some chief justices in California may have used the assignment power "to assure another vote for their own position."<sup>6</sup> The note analyzed the selection of

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pendent Journal, Dec. 7, 1983, at A-14, col. 1; *Bird Assignments of Justices Are Bitterly Attacked*, L.A.D.J., Feb. 4, 1981, at 1, col. 6; *Assemblyman Attacks Bird Appointments*, L.A. Times, Feb. 3, 1981, at 14, col. 2.

3. See *infra* text accompanying notes 13-21.

4. An earlier analysis of pro tem justice selection examined the period from June 1, 1954 to May 31, 1979. Note, *supra* note 1, at 435. This Article examines all cases decided by the California Supreme Court from January, 1980 through April, 1985 in which a pro tem justice was assigned by the Chief Justice or an acting chief justice. The beginning date of this Article's analysis was selected to evaluate the recent assignment of pro tem justices and to avoid duplication of research already completed. The cases were identified through a search completed on Mead Data Central's Lexis Computer. The name of the pro tem justice appears in the official case reports, which also indicate whether the pro tem justice was assigned by the Chairperson or the Acting Chairperson of the Judicial Council. See, e.g., *Dixon v. State Bar*, 32 Cal. 3d 728, 653 P.2d 321, 187 Cal. Rptr. 30 (1982). The authors assumed that assignments made by the "Chairperson of the Judicial Council" were made by the Chief Justice and appointments made by the "Acting Chairperson of the Judicial Council" were made by an acting chief justice. The California Constitution provides that an acting chief justice shall perform all functions of the chief justice when he or she is absent or unable to act. See CAL. CONST. art. VI § 2. Seven cases in which the Chief Justice made the pro tem justice assignment but did not participate in the decision were not included in the study. Only the final opinion in each case was considered. The votes of the Chief Justice and the pro tem justice were compared to the vote of the court for each case. More than one pro tem justice was appointed in 74 cases. The agreement rate between the pro tem justices and either the majority opinion or the Chief Justice was determined by totaling the number of cases and not the number of votes. The Appendix details the tabulations used reaching the conclusions in the text.

5. Note, *supra* note 1.

6. *Id.* at 439.

pro tem justices during the twenty-five year period from June 1, 1954 to May 31, 1979, covering the judicial tenures of Chief Justices Phil Gibson (1954-1964), Roger Traynor (1964-1970), Donald Wright (1970-1977), and Rose Elizabeth Bird (1977-1979).<sup>7</sup>

This study found that the justice pro tem agreed with the assigning chief justice eighty-seven percent of the time.<sup>8</sup> The pro tem justice agreed with the assigning chief justice in seventy-eight percent of the cases in which the pro tem justice's vote was necessary to reach a concurrence of four justices.<sup>9</sup> The note questions the propriety of this seventy-eight percent figure as being too high and states that an agreement rate of fifty percent between a chief justice and pro tem justices would be more appropriate, given the split of the court itself in these cases.<sup>10</sup> The commentator concluded:

[S]ome chief justices may have used the appointment power to assure another vote for their own position. But cases should not be decided by a 'court-packing' selection of an interim justice. If chief justices assign judges likely to vote with them, or if the public, rightly or wrongly, perceives that this happens, the court's reputation for impartial adjudication could be damaged.<sup>11</sup>

The reputation of the court could be seriously harmed by even an incorrect public perception of "court-packing."<sup>12</sup>

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7. *Id.* at 435.

8. *Id.* at 437. The note acknowledged that these figures were misleading because a large percentage of the cases were decided by unanimous or nearly unanimous votes. *Id.* The note continued to discuss those cases in which a justice pro tem's vote was necessary to reach a majority of four justices. The 25 year sample contained only 50 such cases. The study found that the appointing justice and the justice pro tem agreed in 39 of the 50 cases. *Id.* at 439.

9. *Id.* at 439.

10. *Id.*

11. *Id.*

12. The reputation of the supreme court has been attacked in the past. A controversy arose surrounding the 1978 judicial confirmation election of Chief Justice Bird and Associate Justice Wiley Manuel. See B. MEDSGER, *FRAMED: THE NEW RIGHT ATTACK ON CHIEF JUSTICE BIRD AND THE COURTS* (1983); P. STOLZ, *JUDGING JUDGES: THE INVESTIGATION OF ROSE BIRD AND THE CALIFORNIA SUPREME COURT* (1981). The California District Attorneys' Association has charged that the Chief Justice has "packed" the court by the use of the pro tem justice selection process. See CDAA WHITE PAPER, *supra* note 2, at 46-47. The report asserts that the Chief Justice selects only pro tem justices who agree with her position, charging "only loyalty is required from a Rose Bird Supreme Court appointee." *Id.* at 47. As this Article demonstrates, the allegation of impropriety in pro tem justice assignments is erroneous.

An analysis of Chief Justice Bird's pro tem justice assignments demonstrates that most justices agreed with the court majority opinion. Chief Justice Bird assigned a pro tem justice in 208 cases during the period from January, 1980 through April, 1985. A pro tem justice agreed with the Chief Justice in 160 of the 208 cases.<sup>13</sup> However, 152 of these 160 cases (ninety-five percent) were cases in which five, six, or seven justices agreed with the majority opinion of the court.<sup>14</sup> At least one pro tem justice voted with the majority opinion in 187 of the 208 cases (ninety percent). The numbers demonstrate that pro tem justices had an overwhelming tendency to vote with the court majority opinion, regardless of whether the Chief Justice was part of that majority.

The notion that pro tem justices tend to agree with the court majority is supported by an examination of cases in which an *acting* chief justice assigned a pro tem justice during this same time period. If the chief justice does not sit on a case because of illness or conflict of interest, an acting chief justice is selected, who assigns the pro tem justice.<sup>15</sup> At least one pro tem justice voted with the majority opinion in 100% of the cases in which an acting chief justice made a pro tem justice assignment.<sup>16</sup>

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13. Pro tem justices disagreed with the Chief Justice in 37 cases and split in 11. Concurring votes and concurring and dissenting votes were tabulated as votes with the majority for these purposes. The term "split" is used to describe those cases in which one pro tem justice voted with the majority and one dissented. By this definition, one pro tem justice would have agreed with the chief justice and one pro tem justice disagreed in each "split" case.

14. In 136 out of the 160 cases, the vote was unanimous or there was only one dissenting vote.

15. See CAL. CONST. art. VI, § 2; *supra* note 4.

16. A computer search identified all cases decided by the California State Supreme Court from January, 1980 through April, 1985 in which a pro tem justice was assigned by an acting chief justice. See *supra* note 4. The pro tem justice agreed with the acting chief justice in 20 of the 23 cases and split in three cases. See *supra* note 13 for a definition of "split."

Justice Broussard was the acting chief justice in eight of the 23 cases, and more than one pro tem justice was assigned in two of these eight cases. All eight were decided by a unanimous or nearly unanimous opinion and the pro tem justice agreed with acting Chief Justice Broussard and with the majority in all eight cases.

Justice Manuel was the acting chief justice in two of the 23 cases. More than one pro tem justice was assigned in both cases. Both pro tem justices voted with the majority in one case and split in the other. Acting Chief Justice Manuel voted with the majority in both cases.

Justice Mosk was the acting chief justice in two of the 23 cases. More than one pro tem justice was assigned in both cases and each was decided by unanimous opinion.

The pro tem justice tends to vote with the majority opinion even in "close cases,"<sup>17</sup> those cases in which the regular justices split three to three, three to two, or four to two. Of the 208 cases studied, only forty-five (twenty-two percent) were "close cases." Of these forty-five "close cases" the pro tem justice voted with the majority of the court in thirty-one cases (sixty-nine percent), dissented in nine cases (twenty percent), and split in five cases (eleven percent).<sup>18</sup> The pro tem justice voted with the Chief Justice in twenty-one cases (forty-seven percent), disagreed with the Chief Justice in nineteen cases (forty-two percent), and split in five cases (eleven percent). This forty-seven percent agreement figure shows an absence of abuse in the assignment of pro tem justices.<sup>19</sup>

The pro tem justice's vote more clearly affects the outcome of a case when that vote is necessary to reach a concurrence of four justices.<sup>20</sup> An examination of the cases in which the pro tem justice's vote made a difference shows that a pro tem justice's vote was necessary to reach a four justice concurrence in only thirty-seven of the 208 cases (eighteen percent). Of these cases, both the Chief Justice and the pro tem justice voted with the majority in

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Justice Newman was the acting chief justice in 1 of the 23 cases. Four pro tem justices were assigned and the case was decided by unanimous opinion.

Justice Reynoso was the acting chief justice in 1 of the 23 cases. Four pro tem justices were assigned. The acting chief justice and two of the pro tem justices voted with the majority opinion, and two pro tem justices dissented.

Justice Tobriner was the acting chief justice in 9 of the 23 cases. More than one pro tem justice was assigned in six of the nine cases; four of the nine cases were decided by unanimous vote. Both acting Chief Justice Tobriner and the pro tem justices voted with the majority opinion in eight of the nine cases.

17. The note defined "close cases" as those in which the regular justices split three to three (requiring one pro tem justice vote), three to two (requiring one pro tem justice vote), or four to two. Note, *supra* note 1, at 437. The vote of the pro tem justice could thereby affect the outcome of the case, but would not necessarily affect the outcome where the vote was four to two.

The authors of this Article would not include four to two decisions as close cases because the four justice majority required for decision would be reached without the pro tem justice vote.

18. See *supra* note 13 for a definition of "split."

19. Critics of the court have suggested that the expected rate of agreement between the Chief Justice and the pro tem justices should be close to 50%. CDAA WHITE PAPER, *supra* note 2, at 47; Note, *supra* note 1, at 439. The authors of this Article do not believe that only 50% agreement between justices is to be expected, because it is likely that justices will seek to reach agreement with each other. See *infra* text accompanying note 29. Nevertheless, by the critics own criteria, there has been no abuse of the pro tem justice assignment power.

20. The California Constitution requires a concurrence of four justices for a valid final judgment. CAL. CONST. art. VI, § 2.

only fifteen cases (seven percent of the cases studied).<sup>21</sup> This small percentage cannot support the charge that the Chief Justice tries to influence decisions by assigning only pro tem justices who agree with her.

Chief Justice Rose Elizabeth Bird has established a neutral system for the assignment of pro tem justices, improving upon the system that was in place when she took office. During the first two oral argument calendars to which she had the opportunity to name pro tem justices, the Chief Justice used the previously existing pro tem justice assignment system.<sup>22</sup> Under that system, one pro tem justice was named to sit on all cases requiring a pro tem justice during that entire oral argument calendar.<sup>23</sup> Few judges had an opportunity to sit with the supreme court under this system.

Chief Justice Bird adopted a new policy that would give all judges, including municipal, superior, and appellate court judges, an opportunity to sit with the supreme court.<sup>24</sup> Justice pro tem assignments are now made under the following guidelines: (1) Priority is given to a court of appeal justice who has not sat as a pro tem justice; (2) Convenience of the calendar location and dates for that justice is considered; (3) A court of appeal justice cannot sit on a case which has been decided by his or her own division, but may sit on a case from that district.<sup>25</sup> Under this system, the Chief Justice has assigned virtually every court of appeal justice in the state, including those appointed by the current governor, to sit as a pro tem justice.<sup>26</sup>

It seems evident that under any system of pro tem justice assignments, a chief justice cannot predict how a pro tem justice will vote.<sup>27</sup> The present pro tem justice selection system is designed to

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21. For these calculations, concurring and dissenting opinions were not counted as agreement with the majority opinion. The pro tem justice disagreed with the Chief Justice in 15 cases and split in seven cases. See *supra* note 13 for a definition of "split."

22. Telephone interview with Stephen T. Buehl, Executive Assistant to the Chief Justice (September 19, 1985) [hereinafter cited as Interview].

23. *Id.*

24. *Id.*

25. Article VI, section 3, of the California Constitution authorizes the legislature to divide the state into districts containing a court of appeal with one or more divisions. CAL. CONST. art., VI § 3. There are six court of appeal districts, some of which have as many as eight divisions. CAL. GOV'T CODE §§ 69100, 69102 (West Supp. 1985).

26. Interview, *supra* note 22.

27. Similarly, a chief justice cannot predict when, or for which cases, a vacancy might arise which would lead to a pro tem justice assignment.

include as many judges and justices as possible. More than 170 judges have been given the opportunity to sit with the supreme court since 1977.<sup>28</sup> The notion that Chief Justice Bird, or anyone, could predict how each one of these justices or judges would vote seems ludicrous.

### ***Conclusion***

Shared view points on particular issues among justices can be viewed as a positive force in the evolution of case law. If the Chief Justice and the pro tem justices agree with each other and with most of the rest of the court, it is illogical to infer anything insidious from this fact. The precedential value of decisions, as part of the common law process, is strengthened by unanimity in the decision-making process, at least in terms of public perception.<sup>29</sup>

The charge that the Chief Justice assigns pro tem justices in order to influence the judicial process lacks any evidentiary support. Most of the cases involving pro tem justice assignments resulted in unanimous or nearly unanimous decisions. That a pro tem justice would agree with the Chief Justice is unremarkable because the dominant pattern demonstrated that these justices agreed with the majority opinion. In close cases where the court was divided, the pro tem justices were more divided as well. Pro tem justices agreed with the Chief Justice in less than half (forty-seven percent) of those cases. The pattern described in this Article shows a court engaged in healthy judicial decision-making.

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28. Interview, *supra* note 22.

29. See R. KLUGER, *SIMPLE JUSTICE* 683 (1977) (describing U.S. Supreme Court Justice Earl Warren's desire for a unanimous opinion in *Brown v. Board of Education*, 347 U.S. 483 (1943)).



# APPENDICES

## *Appendix A*

### *Assignment of Pro Tem Justices By Chief Justice Bird (January 1, 1980 through April, 1985)*

I. Number of cases studied	208
II. Number of cases in which more than one pro tem justice was assigned	74
III. Number of cases in which a pro tem justice's vote was necessary to reach a concurrence of four justices	37
A. Number of cases in which a pro tem justice's vote was needed for a concurrence of four justices and the pro tem justice voted with the Chief Justice	15
B. Number of cases in which a pro tem justice's vote was needed for a concurrence of four justices and the pro tem justice disagreed with the Chief Justice	14
C. Number of cases in which a pro tem justice's vote was needed for a concurrence of four justices and the pro tem justices split — one voted with the Chief Justice and one did not	8
IV. Number of cases in which the pro tem justice voted with the majority opinion	176
V. Number of cases in which the pro tem justice dissented	21
VI. Number of cases in which the pro tem justices split — one pro tem justice voted with the majority opinion, and one pro tem justice dissented	11
VII. Number of cases in which the Chief Justice and the pro tem justice agree	160

A.	Number of cases decided by unanimous opinion	57
B.	Number of cases in which there was a majority, concurrence and no dissenting opinion	27
C.	Number of cases in which there was a majority, concurrence, and concurring and dissenting opinion	8
D.	Number of cases in which there was a majority and concurring and dissenting opinion	27
E.	Number of cases in which there was a majority and dissenting opinion	26
	1. Number of cases in which the Chief Justice and the pro tem justice voted with majority opinion	21
	2. Number of cases in which the Chief Justice and the pro tem justice dissented	5
F.	Number of cases in which there was a majority, concurrence, and dissenting opinion	12
	1. Number of cases in which the Chief Justice and the pro tem justice either voted with the majority or concurred	12
G.	Number of cases in which there was a majority, concurring and dissenting, and dissenting opinion	2
H.	Number of cases in which there was a majority, concurrence, concurring and dissenting, and dissenting opinion	1
VIII.	Number of cases in which the Chief Justice and the pro tem justice disagree	37
A.	Number of cases in which there was a majority and dissenting opinion	25

1.	Number of cases in which the Chief Justice dissented and the pro tem justice voted with the majority opinion	16
2.	Number of cases in which the pro tem justice dissented and the Chief Justice voted with the majority opinion	9
B.	Number of cases in which there was a majority, concurrence, and dissenting opinion	10
1.	Number of cases in which the Chief Justice dissented and the pro tem justice voted with the majority	4
2.	Number of cases in which the pro tem justice dissented and the Chief Justice voted with the majority	6
C.	Number of cases in which there was a majority, concurring and dissenting, and dissenting opinion	2
IX.	Number of cases in which the pro tem justices split — one voted with the Chief Justice, one did not	11
A.	Number of cases in which there was a majority, concurrence, and dissenting opinion	1
B.	Number of cases in which there was a majority and dissenting opinion	10
1.	Number of cases in which the Chief Justice dissented, one pro tem justice dissented and one pro tem justice voted with the majority opinion	6
2.	Number of cases in which one pro tem justice dissented, one pro tem justice voted with the majority and the Chief Justice voted with the majority	4

**Appendix B**

*Assignment of Pro Tem Justices by an Acting Chief Justice  
(January, 1980 through April, 1985)*

I. Number of cases studied	23
II. Number of cases in which more than one pro tem justice was assigned	15
III. Number of cases in which the acting chief justice and the pro tem justice agree	20
IV. Number of cases in which the acting chief justice and the pro tem justices split — one pro tem justice voted with the acting chief justice and one did not	3
For Additional information regarding acting chief justice appointments see <i>supra</i> note 16.	

