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# STACKING THE DECK? AN EMPIRICAL ANALYSIS OF AGREEMENT RATES BETWEEN PRO TEMPORE JUSTICES AND CHIEF JUSTICES OF CALIFORNIA, 1977-2003\*

JAMES C. BRENT

*The chief justice of California is empowered to select a pro tempore justice when one or more of the court's regular justices are absent. Chief Justice Rose Bird was accused of using this power to manipulate case outcomes. Contemporary scholarly investigations came to mixed conclusions. Bird's successors have adopted the nondiscretionary method of alphabetical selection. The present study compares the agreement rates of temporary justices with Bird and with her two immediate successors, Malcolm Lucas and Ronald George. It finds evidence of vote bias for Bird, particularly in close cases and cases before April 1981. It does not find evidence of vote bias for Chief Justices Lucas or George, suggesting that a non-discretionary selection procedure should be formally required.*

All collegial courts inevitably experience temporary vacancies created by the absence of one or more of the courts' permanent members. Vacancies may be short, if caused by a conflict of interest in a particular case, or long, if caused by a justice's departure from the court. One way to deal with vacancies is to simply proceed without a full complement of justices, often risking the possibility of a tie vote. The United States Supreme Court does not use temporary justices, an approach emulated by thirteen American states. However, courts of last resort in thirty-seven states provide for the temporary appointment of lower-court judges in at least some of the cases that they decide (Brent, 2004).

State temporary lower-court judges are selected through a wide variety of methods. On one end of the spectrum are the states—a majority—that strive to keep the selection process apolitical and mechanical, usually by delegating the task to the clerk of the court, who selects appointees by a neutral procedure, for example, alphabetically. One of the most unusual—and most neutral—is Washington's practice of drawing names from a glass jar. On the other end of the spectrum are those systems that promote discretion, usually by giving either the chief justice or, less frequently, the governor, the power to make such appointments. Such systems seem to invite political considerations to enter and perhaps dominate the process.

One state with a discretionary system of selecting pro tempore justices is California. The California Supreme Court consists of seven justices. The California Constitution requires the concurrence of four justices to render a decision. Thus, when one or more of the regular justices is absent for any reason, a temporary justice

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is appointed (Art. VI, Sec. 2). The constitution also says, "The Chief Justice may provide for the assignment of any judge to another court but only with the judge's consent if the court is of lower jurisdiction" (Art. VI, Sec. 6). With this small exception, the chief justice's power to select is unlimited, and the chief justice is not required to follow any particular procedure or consult with anybody regarding the choice of a temporary justice.

The political context of the California Supreme Court makes it reasonable to believe that a chief could be tempted to use this power to achieve policy goals. The California Supreme Court has a largely discretionary docket. Many of the cases that it decides present the justices with sharp ideological and policy choices. Partially as a consequence, the court is prominent and visible and has experienced relatively high levels of conflict (Dolan, 2002; Egelko, 1998), which manifests itself in high levels of dissent. This last fact may particularly tempt the chief justice to stack the court with allies in cases in which they could affect the outcome.

Chief Justice Rose Bird was criticized for doing exactly that (Stolz, 1981). When Bird passed away in 1999, popular commentary (e.g., Fried, 1999; Meyerson, 1999) emphasized her opposition to the death penalty, which led the voters to turn her and two colleagues out of office in the retention election of November 1986. In the public mind, the association between Bird and the death penalty is so strongly established that it is often forgotten that Bird took other actions that generated controversy and political opposition. One such controversy involved her temporary judicial appointments. Conservatives were particularly critical of *Assembly v. Deukmejian* (1980), in which the court upheld a Democratic legislative redistricting plan by a 4-3 vote, with a pro tempore justice joining Bird in the majority.

Before Bird became chief justice, the normal practice was to select pro tempore justices from the California Courts of Appeal. Bird initiated the practice of also appointing trial-court judges—from both the municipal and superior court—to the high court, justifying this decision as "an effort to unify the court system and have judges understand what happens at other levels of the judiciary" (Salzman, quoted in Stolz, 1981). One criticism of this practice was that it led to unqualified trial judges deciding cases of great significance (Medsker, 1983:59).

At the time, the charges of manipulation were sufficiently well publicized that at least three scholarly analyses were conducted (Comment, 1980; Wildman and Whitehead, 1985; Barnett and Rubinfeld, 1986). As we will see, those studies produced mixed results. Nevertheless, the charges merely reinforced the popular suspicion that Bird was too concerned with pursuing an ideological agenda. Partially as a consequence, her successors took steps to alter the procedure for selecting pro tempore justices to make the selection less discretionary.

## TEMPORARY JUDGES AND JUDICIAL LEGITIMACY

No scholarly inquiry of the voting behavior of California's pro tempore justices has been conducted since the changes in the selection process were implemented. The

present study aims to assess the effect of these changes by comparing the agreement rates between California pro tempore justices and Chief Justices Rose Bird, Malcolm Lucas, and Ronald M. George from 1977 to 2003. If Chief Justice Bird was indeed manipulating the system, the decision to select judges alphabetically should have resulted in lower levels of agreement between pro tempore justices and Bird's successors. This study will attempt to determine whether this occurred. Such an empirical study, in addition to casting additional light on the behavior of Bird and her successors, may also illuminate the larger issues of whether temporary justices should be used at all and, if so, how they should be selected.

Because temporary judges participate in dozens of cases around the country each year, their use has the potential to undermine public confidence in the courts. Much of the judiciary's power stems from the public's perception of its legitimacy (Fein and Neuborne, 1998; Levinson, 1980), but this sense of legitimacy can be undermined if judges are perceived to be motivated by political rather than legal concerns. Some observers have also expressed concern that appointing lower-court judges to sit on higher courts may affect the quality of deliberations because the temporary insertion of a judge onto a collegial court may disrupt established patterns of interaction. Lower-court judges may not be as qualified as their high-court counterparts, and they may come with different backgrounds than those with whom they are now sitting (Slotnick, 1983).

Selection of judges, including temporary judges, also affects judicial independence, a crucial element of judicial legitimacy. The United States Supreme Court has noted several different conceptions of judicial independence. It may be defined as consisting of "the lack of bias for or against either *party* to the proceeding," or as a "lack of preconception in favor of or against a particular *legal view*" (*Republican Party of Minnesota v. White* 775, 777, emphasis in original). The Court viewed the first of these conceptions of judicial independence as "its root meaning" (at 775), more important than the second. The selection of a temporary judge for a single case thus threatens the "root meaning" of judicial independence, particularly if the selection involves discretion.

Because courts make critical decisions affecting public policy, competing interests will attempt to influence the composition of the judiciary. Executives will often appoint judges whose ideologies are consistent with their own, and interest groups will donate money to like-minded candidates for judgeships, prompting the fear that successful judicial candidates may feel beholden to their political benefactors and vote in ways designed to please them.

In the selection of permanent judges or justices, these attempts at influencing the judiciary are often blunt at best because over the course of their careers, appellate judges rule in numerous cases upon a wide range of issues. Thus, even if jurists have been selected with an eye toward their general judicial philosophy, behavior in specific cases can rarely be predicted with certainty. Because a temporary justice is often

selected for a single, specific case, the appointment of temporary judges would seem to be particularly open to manipulation.

Any selection procedure that involves discretion may raise suspicions that case outcomes are being directly manipulated. This problem would appear to be particularly acute in Alabama, New York, and Texas, where temporary judges are appointed only when the court expects that it will be tied, and a temporary justice is appointed to cast the deciding vote. In Alabama and Texas, the governor is empowered to appoint this tiebreaker; in California, it is the chief justice.

### PREVIOUS EMPIRICAL ANALYSES OF CALIFORNIA'S TEMPORARY JUSTICES

At least three major scholarly studies were conducted at the time Chief Justice Bird's actions were criticized. The first spanned 1954 to 1979 and compared the behavior of temporary justices appointed by Chief Justices Gibson, Traynor, Wright, and Bird. Agreement rates between temporary justices and the appointing chief justice were high for each of the four, ranging from a low of 79 percent (Traynor) to a high of 97 percent (Gibson) (Comment, 1980:437). A high percentage of cases were decided by unanimous or near-unanimous votes, but separate analysis of agreement rates in close cases showed that, to a statistically significant degree, temporary justices were more likely than regular justices to vote in agreement with Chief Justices Gibson, Wright, and Bird. This led the authors to suggest as a plausible conclusion that "some chief justices may have used the appointment power to assure another vote for their own position" (Comment, 1980:439), but they made no specific allegations of impropriety.

Another brief study five years later took a different approach and extended the analysis through April 1985, focusing solely on the Bird court. Temporary justices' agreement rates with Chief Justice Bird were compared with their agreement with acting chief justices who made such appointments in Bird's absence. Finding no significant difference in agreement rates, the authors concluded that the charge of manipulation by Bird "lacks any evidentiary support" (Wildman and Whitehead, 1985:7).

A much more expansive study appeared the following year (Barnett and Rubinfeld, 1986). There, the behavior of pro tempore justices between 1954 and 1984, during the tenures of Chief Justices Gibson, Traynor, Wright, and Bird, was examined. In addition to analyzing agreement rates, the authors also attempted to discern whether the pattern of Bird's assignments revealed an attempt to manipulate. This study showed that temporary justices were somewhat more likely to vote with the chief than were other justices and provided evidence of bias in Chief Justice Bird's assignments before she instituted a procedural change in April 1981. After that date, temporary justices overall were not more likely to support her than temporary justices had earlier supported other chief justices (1986:1141), but temporary justices reappointed to second and subsequent cases did indeed support her at higher rates than their one-shot colleagues did (1986:1144).

Rose Bird's successors, Malcolm Lucas and Ronald George, have made two significant changes to the procedures and criteria for selecting temporary judges. First and perhaps most important, they adopted the practice of selecting temporary judges more-or-less alphabetically, a task handled by the clerk of the court. Judges are asked to participate in alphabetical order but are not always able to serve when it is their turn, perhaps because of prior commitments or involvement in the case being appealed. Chief Justice George specifically explained this change as an attempt to avoid even the appearance of impropriety (George, 2004). Second, Chief Justice Lucas ended the practice of appointing trial court judges and restricted his appointments to the courts of appeals presiding judges with one or more years of experience. Under Chief Justice George, all appellate judges were eligible to serve.

Another change has occurred informally. Chief justices have the discretion to assign retired justices of the court itself, and this practice was relatively common in the past (Barnett and Rubinfeld, 1986), but it has since ended. Under Chief Justice Lucas, retired justices were assigned only to fill the vacancy created by their own retirements, assignments that often lasted several months. Chief Justice George abandoned this practice entirely, and no retired justices have been assigned since July 1996.

Prior studies of California's pro tempore justices have included retired justices in the analysis. The present study focuses instead only on temporary appointees from the lower courts, for several reasons. As noted previously, in July 1996 Chief Justice George stopped assigning retired justices as pro tempore justices. "Retired" justices were assigned by Malcolm Lucas only to fill the vacancies created by their own retirements. The decision to ask (or allow) a justice to remain on the bench until his successor is seated, rather than to appoint a series of lower-court judges to fill the vacancy, theoretically involves discretion on the part of the chief justice. It would not, however, appear to be the same sort of discretion involved in selecting lower-court judges. For one thing, retired justices do not hear only a single case, but instead hear several cases over a period of months. This makes it difficult to argue that they were assigned to manipulate the outcome of a particular case. Instead, assigning a retired justice was not so much an act of policymaking as an act of courtesy and collegiality. Moreover, it also reduced the administrative burden on the chief justice and the lower courts and saved money for California taxpayers. Furthermore, very few of the incentives that the chief justice could normally provide to a lower-court judge would motivate a retired judge to vote to curry the chief's favor. A retired justice is not interested in appointment to a higher court, and likely does not wish to serve on boards or commissions.

### TEMPORARY JUSTICES AND THE CHIEF: NATURAL ALLIES?

Apart from the fact that both chief justices and temporary justices tend to dissent at lower-than-average rates, making their agreement rates rise as a result, pro tempore justices might be likely to vote with the chief for several reasons apart from political manipulation by the chief. For example, "selection preference" may result in the

chief justice appointing temporary justices not based on an anticipated vote in the case, but because the chief justice is familiar with them and appoints them either for patronage reasons, to groom potential members of the court, or to build a corps of allies on the lower courts. Such appointees might be particularly likely to agree with the chief (Barnett and Rubinfeld, 1986:1057). The shift to an alphabetical selection process would seem to eliminate such possibilities. Still another reason, noted by Barnett and Rubinfeld (1986:1058), is that the temporary justices may vote with the chief justice to fulfill their own “desire for reappointment as a temporary justice” (1986:1058), which the chief justice could satisfy. This is related to Barnett and Rubinfeld’s suggestion (1986:1059) that temporary justices may vote with the chief “simply out of gratitude for being appointed to sit with the court.” The chief justice also has the power to assign lower-court judges to other courts, the Judicial Council, or numerous other commissions and boards—positions that some lower-court judges may covet.

Alphabetical selection eliminates most of these posited reasons for agreement between temporary justices and the chief, but it does not eliminate them all. For example, ambition theory (Schlesinger, 1966; Herrick and Moore, 1993) suggests that when political actors seek higher office (“progressive ambition”), they may tailor their behavior to maximize their odds of advancement. As one of three members of the state’s Commission on Judicial Appointments, which must confirm all gubernatorial appointments to the bench, the chief holds the potential to veto an ambitious lower-court judge’s elevation, possibly providing an incentive for that judge to vote with the chief. However, the chance of any individual judge receiving a nomination is fairly small, and it depends far more on pleasing the present governor, or some future, unknown governor, than on pleasing the chief justice, who may well have left the bench by the time such an opportunity for promotion occurs. Moreover, the chief constitutes only one of three votes on the commission, and the commission itself has rarely challenged the governor’s choice, having rejected only two nominations since its creation in 1934 (Gerston and Christenson, 2003). This makes the likelihood that a temporary justice would vote with the chief as part of a campaign for higher office somewhat remote.

### COURT PROCEDURE AND THE CHIEF JUSTICE’S MANTLE OF LEADERSHIP

Entirely apart from manipulation by the chief, there remain reasons to believe that temporary judges will frequently vote with the chief. If a bewildered temporary justice is seeking cues, the chief would appear to be an obvious source. As on the U.S. Supreme Court, the chief justice of California is really merely a “first among equals,” not possessing a weighted vote or effective methods of sanctioning colleagues, and thus would have little formal leverage with which to pressure a temporary justice for a vote. However, the organizational socialization literature suggests that the actions of a leader have an impact on the adaptation of a newcomer to an institution (Major et al., 1995). By the virtue of the position, the chief is likely to be perceived as the



most visible and authoritative member of the court, possessing certain symbolic attributes that certainly might cause a pro tempore justice to perceive him or her as the “leader” of the court.

This mantle of leadership is reinforced by the procedure used to integrate temporary judges into the court’s decision-making process. Because the California Supreme Court is required to render decisions within ninety days of the case being formally submitted at the end of oral argument or have their pay withheld (Art. VI, Sec. 19), the procedure for drafting and negotiating opinions is different from that used by the U.S. Supreme Court. Currently, at least four of the seven justices must vote to grant review. The chief justice then assigns to a justice who voted to grant review the task of drafting a “calendar memorandum,” essentially a first draft of what will often, but certainly not always, become the majority opinion. The draft is then circulated to the remaining justices, and the case is scheduled for oral argument with the consent of a majority of the court (California Supreme Court, 2003:20-22). In most cases, it is only at this point that a pro tempore justice becomes involved in the case. A significant exception occurs when the court is divided 3-3 on whether or not to grant review. In that situation, a temporary justice is selected to break the tie and then also participates in the disposition of the case on the merits (George, 2004).

A copy of the calendar memorandum and the legal briefs filed by the parties are distributed to the temporary justice(s) hearing the case, and all justices are given fifteen days to prepare a preliminary response. The response may take one of four forms—“concur,” “concur with reservations,” “doubtful,” and “dissent,” and justices may, at their option, add other comments. Upon receiving the preliminary responses, the original author has the option of distributing a “yellow memo” response (George, 2004).

For the pro tempore judge, all of the preceding takes place at a physical distance. On the morning of oral argument, the pro tempore justices usually arrive in the city in which argument is to be held. Although the California Supreme Court is based in San Francisco, it regularly holds oral argument in San Francisco, Los Angeles, and Sacramento, and occasionally in other California cities. Temporary justices are not selected by location and must often travel to hear oral argument. After they arrive, they have a brief meeting with the chief justice. They do not usually meet their other colleagues until everyone is donning judicial robes in the cloakroom immediately before oral argument, although they are often known to the high court’s justices because of interactions at other judicial and bar events.

The temporary justices then participate in oral argument, as well as in the subsequent conference. The justices typically hear three cases during their morning session and then meet immediately afterwards to confer about the cases over lunch. They typically hear three more cases in the afternoon, immediately followed by another conference. The chief usually schedules discussion of the case involving the pro tempore justices first, and they usually leave town immediately thereafter. They continue to participate in the drafting and shaping of the opinions, but once again at



**Table 1**  
**Support for Chief Justices by Lower-Court Pro Tempore Justices, 1977-2003**

	<b>Rose Bird</b>	<b>Malcolm Lucas</b>	<b>Ronald George</b>
Votes with chief justice	211 (77.9%)	65 (84.4%)	51 (85.0%)
Votes against chief justice	60 (22.1%)	12 (15.6%)	9 (15.0%)
Total	271	77	60

a distance. Thus they spend only a few short hours in the physical presence of their colleagues (George, 2004).

Whether intentional or not, this procedure emphasizes the primacy and mantle of leadership of the chief justice in the mind of the newcomer. The chief is the individual who makes the appointment. The chief is the justice responsible for receiving and issuing draft memoranda. The chief is the only justice to meet with the temporary justice on a personal, individual basis, however briefly. During that time, the chief instructs the newcomer on procedural matters (George, 2004).

## DATA AND FINDINGS

This study is based on all California Supreme Court cases decided with a published opinion between March 1977 and December 2003 in which one or more lower-court temporary justices participated. Cases were located through a LEXIS search.<sup>1</sup> Data regarding the lower-court judges' political party and prior experience were obtained through various editions of *California Courts and Judges* (Bogen, Thompson, and Smart). If the judge's political party was not explicitly stated, the political party of the appointing governor was used as a surrogate. This imperfect measure (Brace, Langer, and Hall, 2000) may be especially problematic when applied to appointments to intermediate state courts, which have a more muted tradition of partisan conflict and dissent than federal courts (Pinello, 1999), but it is the best measure readily available for this large group of relatively obscure jurists.

During the study period, lower-court judges sitting by assignment cast 408 votes. During Bird's almost ten-year tenure, temporary justices cast 271 votes, an average of 27 per year. The use of lower-court temporary justices decreased dramatically following Bird's departure as a result of lower turnover on the court during those years. Although Chief Justice Lucas served for almost the same amount of time that Bird had, he made only 77 temporary appointments, an average of approximately eight per year. That figure has remained steady under Chief Justice Ronald George.

<sup>1</sup> "Assign! by" was the sole search term utilized. This search term yields 957 hits from March 1977 to December 2003. Cases that did not actually involve temporary justices were excluded. To ensure that this search captured the universe of cases, cases identified in the LEXIS search were cross-checked with the bound volumes of the California Reports for three randomly chosen years. In each year, the LEXIS search had located all appropriate cases.

**Table 2**  
**Support for Rose Bird by Temporary Justices, Before and After April 1, 1981**

	<b>Before April 1981</b>	<b>April 1981 and later</b>
Votes with Bird	47 (94.0%)	164 (74.2%)***
Votes against Bird	3 (6.0%)	57 (25.8%)
Total	50	221

\*\*\*  $p < .001$

**Table 3**  
**Temporary and Associate Justice Agreement Rates with the Chief Justice**

	<b>Temp. Justices</b>	<b>Associate Justices</b>	<b>Advantage</b>
Bird (all)	77.9%	71.4%	+6.5%*
Bird (pre-4/81)	94.0%	78.2%	+15.8%**
Bird (4/81 & later)	74.2%	69.7%	+4.5%
Lucas	84.4%	80.9%	+3.5%
George	85.0%	84.7%	-0.3%

\*\*  $p < .01$

\* $p < .05$

A look at the overall rates of agreement between lower-court pro tempore justices and Chief Justices Bird, Lucas, and George provides little support for the charge that Bird manipulated the selection procedure, as she received support from pro tempore justices only 78 percent of the time, compared to an 85 percent support rate enjoyed by her successors, a difference not statistically significant (see Table 1).

As noted above, Chief Justice Bird changed her selection procedure in April 1981 by widening the selection pool, resulting in a larger number of judges receiving assignments. The support rates for Rose Bird among temporary justices before and after April 1, 1981, strongly suggest that the system in place before April 1981 did indeed work to the advantage of the chief justice (see Table 2). Consistent with Barnett and Rubinfeld (1986), this finding does support the inference of improper influence by the chief during her first three years on the state's high court. After Bird changed her assignment procedures to a more neutral method, her advantage largely disappeared.

Pro tempore justices vote with the chief justice at high rates, regardless of the chief's identity. However, regular associate justices may do so as well. Therefore, Barnett and Rubinfeld compared the rates at which temporary justices agreed with the chief justice with the rate at which the court's regular justices supported the chief. Comparable data for the 1977-2003 period, with the unit of analysis being the votes of individual justices, again support the inference that Rose Bird may have manipu-

**Table 4**  
**Partisan Differences in Support for the Chief Justice**

	<b>Justices of the Same Party</b>	<b>Justices of Opposite Party</b>
Bird	80.9% (174 of 215)	62.7% (32 of 51)**
Lucas	93.3% (42 of 45)	71.9% (23 of 32)**
George	86.4% (38 of 44)	81.3% (13 of 16)

\*\*  $p < .01$

lated the opinion-assignment procedure before April 1981: She enjoyed a large and statistically significant advantage among temporary justices before that date, but not after it. Under alphabetical selection, neither of her successors enjoyed a voting advantage among temporary justices (see Table 3).

Despite significant evidence that judicial behavior can in part be explained by political party (e.g., Hall and Brace, 1997), none of the prior studies of California's pro tempore justices considered whether temporary justices are more likely to support a chief of the same political party. The data (see Table 4) strongly suggest that this was an unfortunate omission, because party seems clearly associated with support for the chief. Overall, justices of the same political party as the chief justice supported the chief 83.6 percent of the time, whereas justices of the opposite party supported the chief only 68.7 percent of the time, a statistically significant difference of almost 15 percentage points. This effect is not limited to the Bird court. In fact, Chief Justice Lucas's advantage of greater support among his fellow Republicans than among Democratic judges (21.4 percent) was even larger than Bird's advantage among her Democratic appointees as compared to Republican justices' votes (18.2 percent). By contrast, the partisan advantage for Chief Justice George was smaller. These findings suggest that who gets appointed actually can matter. With discretionary selection, a strategic chief justice could usefully employ political party as a rough surrogate for a potential appointee's ideology and, by extension, perhaps the appointee's vote. With alphabetical selection, the chief can merely hope for the best.

Barnett and Rubinfeld correctly noted that aggregate support scores are a fairly blunt measure of assignment manipulation by the chief justice. In most cases, the chief would have little incentive to engage in assignment manipulation, either because the case is less important or because the outcome is expected to be one-sided. To account for this, "close" cases—those cases in which the court ultimately split 4-3—were analyzed separately (see Table 5). In this analysis, Chief Justices George and Lucas are combined because of the small number of cases for each. The results are again consistent with the conclusion of assignment manipulation by Chief Justice Bird. To a statistically significant degree, Chief Justice Bird's appointees were more prone to vote with her in close cases than were associate justices, although the effect is much more pronounced before April 1981 than thereafter.

**Table 5**  
**Support for the Chief Justice in 4-3 Cases**

	<b>Temp. Justices</b>	<b>Associate Justices</b>	<b>Advantage</b>
Bird (all)	59.5% (22 of 39)	38.3% (61 of 159)	+21.2%*
Bird (pre-4/81)	100.0% (5 of 5)	37.1% (13 of 35)	+62.9%**
Bird (4/81 & later)	50.0% (17 of 34)	38.7% (48 of 124)	+11.3%
Lucas/George	55.5% (10 of 18)	46.4% (39 of 84)	+9.1%

\*\* p < .01

\* p < .05

These bivariate relationships were tested using a multivariate model, which included as independent variables the type of case (criminal or noncriminal); political party (whether the temporary justice and chief justice belonged to the same party); experience (whether the temporary justice was a trial or appellate court judge); and a variable for the Bird court era. The dependent variable indicated whether or not the temporary justice voted with the chief justice. The Bird court variable was not statistically significant, undermining the finding that temporary justices were more likely to support her than her successors. The only variable that reached statistical significance was the political-party variable.<sup>2</sup>

As already noted, the findings discussed concern only appointees from the lower courts. However, for purposes of comparison with earlier studies, data on retired justices were collected for Chief Justice Lucas. Barnett and Rubinfeld (1986:1124) found that retired justices agreed with Chief Justice Bird in twenty-three of forty-two cases (55 percent). Retired justices were far more supportive of her successor; they supported Chief Justice Lucas in sixty-eight of the seventy-five cases in which they participated—over 90 percent—a statistically significant difference.

## CONCLUSION

Previous studies of pro tempore justices in California have sought evidence of assignment bias by Chief Justice Rose Bird by comparing her with her predecessors. The present study addressed the same question by focusing on her successors. As to Bird, it comes to many of the same conclusions as did Barnett and Rubinfeld (1986). First, temporary justices tend to vote with all chief justices at fairly high rates. Second, the evidence of assignment manipulation by Bird is fairly compelling. It does appear as though Bird's method of assigning the judges before April 1981 had the effect of increasing support for her positions. After April 1981, this effect substantially decreased, but it did not disappear until Bird left office. Most important, the effect was especially pronounced in close cases. Finally, the data revealed the unsurprising

<sup>2</sup> The model was tested utilizing logistic regression, and results are available upon request from the author.

but heretofore unconfirmed hypothesis that party matters: temporary justices are more likely to support a chief justice of their own political party.

Three main issues arise in the debate over the selection of temporary judges. Should they be used? If so, who should select them? And how should they be selected? The findings of this study give us little guidance in answering the first question. The need for temporary justices would appear to be partially a function of the size of the state's high court. As noted by the U.S. Supreme Court, many empirical studies suggest that "smaller juries are less likely to foster effective group deliberation" (*Ballew v. Georgia*, at 232) and that this problem becomes more significant as jury size approaches six. When, as in the California Supreme Court, there are only seven justices, the absence of one or more justices may thus be potentially more damaging to the quality of deliberations than it would be on a larger court. Second, California justices do not enjoy lifetime tenure, perhaps resulting in higher turnover than in the federal courts and, therefore, more frequent vacancies. Between 1994 and 2005, two justices departed the U.S. Supreme Court, while five justices departed from the California Supreme Court. As long as the California judiciary retains these features, pro tempore justices will remain necessary.

The use of temporary justices may also be desirable in certain situations, especially when a court would be otherwise deadlocked. The U.S. Supreme Court not infrequently confronts cases with only eight justices participating. Sometimes, the Court will hold the case over for a year while waiting for a new justice to arrive, resulting in delayed justice for the litigants and continued legal uncertainty for the nation. Sometimes, the Court deadlocks, deciding the case but not establishing precedent, an inefficient use of the Court's limited resources. Neither of these outcomes is desirable. The use of temporary justices permits the California Supreme Court to conduct its duties more efficiently and decisively than would otherwise be true.

If pro tempore justices are to be used, who should select them, and what procedure should be utilized? The second of these questions is far more important than the first. The data strongly suggest that the role of discretion should be reduced or eliminated. Rose Bird utilized a discretionary procedure, and she received an advantage in support from the appointees she selected in this fashion, with that advantage negated once an alphabetical system was adopted. Under an automated system, the process of "appointment" becomes nothing more than an administrative chore that could be handled with ease by a clerk or an aide to the chief justice.

No matter what procedure is utilized, of course, politics may play a role in the court's decision. These findings suggest, for example, that a Republican judge assigned through a random procedure may vote differently than would a Democrat selected through the same procedure. Similarly, one might reasonably expect that in certain cases the appointees' race, gender, religion, or similar factors would influence their behavior. This kind of "politics" is inevitable in a world where human beings must resolve disputes. We cannot eliminate such behavior, but in many contexts, we can attempt to compensate for the individuals' biases by utilizing a more nearly neu-

tral selection procedure. The decision to institute a system of alphabetical rotation in California was correct, but it is also one that could be modified or reversed at any time. To avoid the possible return of discretion, and thus to help reinforce public confidence in the independence of the judiciary, some form of nondiscretionary assignment should be enshrined in the California constitution. **jsj**

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