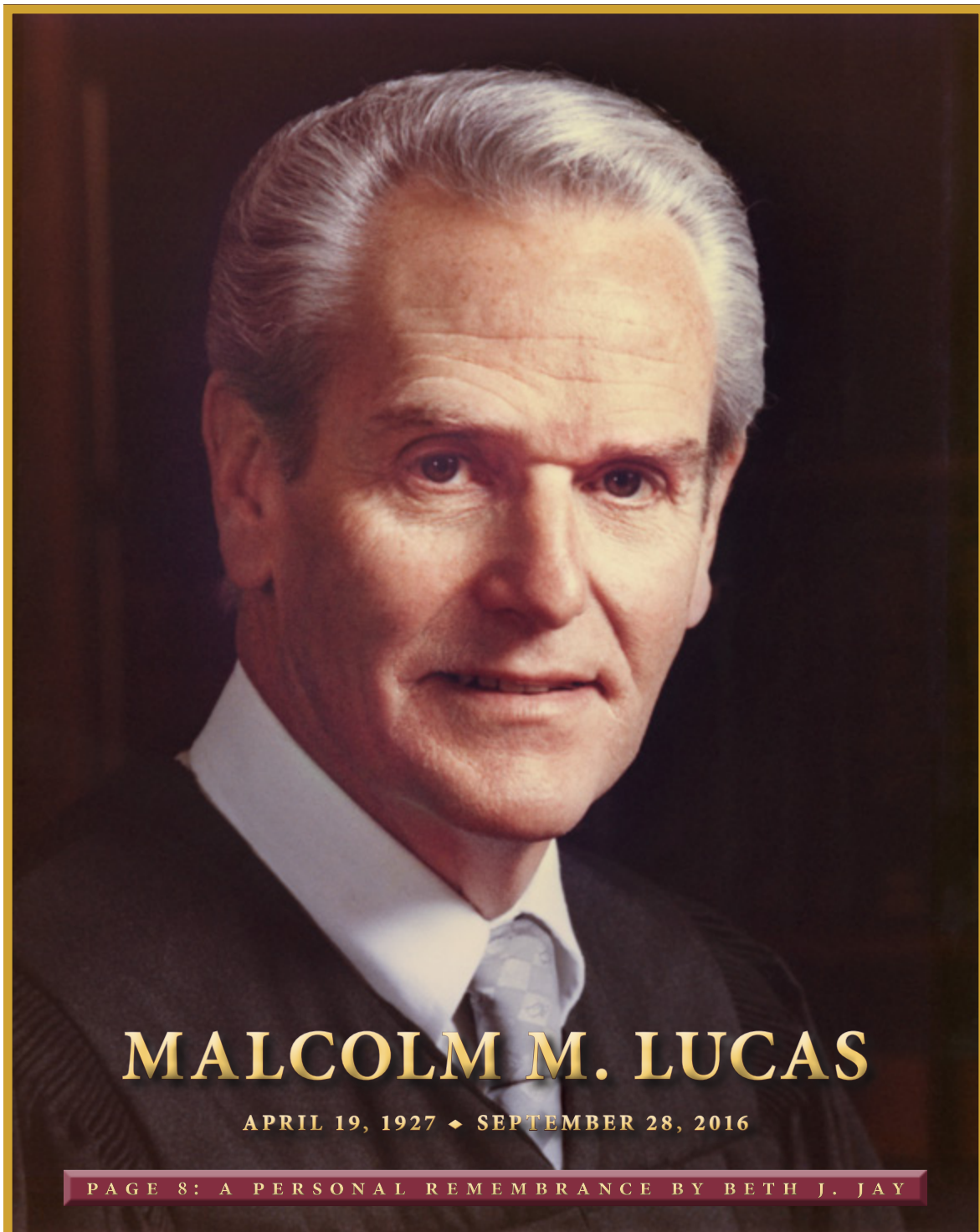




CALIFORNIA SUPREME COURT

Historical Society

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MALCOLM M. LUCAS

APRIL 19, 1927 ♦ SEPTEMBER 28, 2016

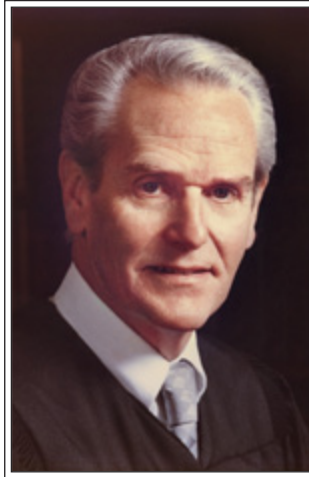
PAGE 8: A PERSONAL REMEMBRANCE BY BETH J. JAY

Malcolm M. Lucas

A PERSONAL REMEMBRANCE

BY BETH J. JAY*

WRITING ABOUT CHIEF JUSTICE LUCAS has proved surprisingly difficult. I spoke to him a few months before his death, and the sound of his still strong and deep voice was particularly moving at a time when our nation was subjected to an election campaign of unprecedented nastiness and vulgarity. Lucas's calm demeanor, rich baritone, elegance, and balance provided a very different atmosphere in which to argue, disagree and compromise. I was distressed at how much the competence and openness with which he led was so absent from the current chaotic ferocity.



Lucas became Chief Justice of California after the state had been through a divisive Court election that resulted in a vote against the retention of his predecessor Rose Bird and two associate justices. Justice Lucas had served as an associate justice for almost three years at the time he was elevated, and I worked with him from the beginning of his tenure through his retirement. Upon becoming Chief Justice, Lucas resolved to calm the waters and restore public respect for the courts. Internally, to consolidate and reassure the Court and its employees, he informed the staff members serving each of the justices who had not been retained that they could stay at the court and he would encourage the new justices to hire them for their staffs. Those who wanted to stay, found a place. He also was determined not to enter into comparisons with his predecessor, and from his first press conferences to the end of his time at the Court, he avoided requests to distinguish the newly constituted Court from its earlier iteration.

As Chief Justice between 1987 to 1996, Lucas faced a range of new responsibilities relating to the Court and to the Judicial Council and its staff arm, the Administrative Office of the Courts. He assigned supervisory duties over cases and internal policies to Graham Campbell and to me, although I gradually moved toward working predominantly on local

and statewide policy and administrative issues and serving as the Court's liaison in a number of arenas. For the Court, Lucas became the overseer of the weekly internal yellow, blue and salmon lists, each named for the color of the paper on which it was printed, containing updated information about case assignments, circulating memoranda and proposed opinions. He presided over the weekly conferences at which the Court decided whether to grant cases for review, and at the conferences after oral argument at which the justices would discuss the disposition of each case. And he handled and

oversaw the varied and numerous daily issues and questions and queries about everything from case protocols to contracts with the official publisher of the state's appellate opinions. Lucas also, like all modern Chiefs, shouldered a full one-seventh share of the Court's opinion caseload.

In a comprehensive new book on the history of the Supreme Court, *Constitutional Governance and Judicial Power*, edited by Harry N. Scheiber, the chapter on the Lucas years by long-time Court observer and journalist, Bob Egelko, provides an excellent review of the major cases during Lucas' tenure. The Court clearly took a more conservative turn in many areas, perhaps most strikingly in the greatly increased affirmance rate in death penalty cases. But its conservatism was not unlimited, and the Court on more than one occasion surprised confident prognosticators. Led by Lucas, the Court upheld the independent authority of the state Constitution in more than one instance — a viewpoint long championed by Justices Stanley Mosk and Joseph Grodin. Lucas was part of the Court's decision holding, contrary to the arguments of Gov. George Deukmejian and his proposed appointee, Rep. Dan Lungren, that approval of only one house of the Legislature was insufficient to confirm Lungren as state treasurer.¹ In another case, concerning the state Constitution's privacy clause, Lucas authored an opinion that allowed the National Collegiate Athletic Association to drug test participants in specific events, but also established that the California Constitution's privacy provision

* Beth Jay served as the principal attorney to Chief Justices Lucas, George and Cantil-Sakauye before retiring from the Supreme Court in 2012.



Chief Justice Malcolm Lucas is congratulated by Gov. George Deukmejian after being sworn in on February 6, 1987. His wife, Joan Lucas, looks on at the Senate Building in San Francisco.

PHOTO BY JIM GERBERICH, ASSOCIATED PRESS

applied both to government and private actors.² In these areas, as in many others, the Court's rulings were not always easy to predict in terms of details and impact. However, in the main, the Court's decisions traveled a more conservative path. Perhaps the best characterization is that the California Supreme Court under Lucas was a court of few extremes nor was it known for trendsetting, yet its opinions made it the most followed court in the country, as demonstrated in a 2007 study.³

Those cases foreshadowed issues that would arise during the tenures of Lucas' successors, Chief Justices Ronald M. George and Tani Cantil-Sakauye, as the Court was called upon to delineate the separation of powers among the branches of state government and the scope of privacy as new forms of communications emerged. These opinions, like many others, planted seeds in the law that grew with later decisions and applications nationwide, as well as in California.

In another area, with which I grew increasingly familiar as his tenure progressed, Lucas began the push that would culminate in major changes such as the move to state funding of all the state's courts, replacing a hybrid system of state and local funding that created inequities among courts located in different counties. He built on efforts that had preceded him, but was able to make concrete advancements that, under the direction of Chief Justice George, finally

blossomed into full application. Inequities persist to this day, but they have been greatly ameliorated by the actions of the courts and Judicial Council, while at the same time made much more difficult to correct by substantial budget cuts repeatedly imposed on the courts. Taking a broad look ahead, Lucas created the 2020 Commission, bringing together judges, lawyers, academics, politicians, social service providers, educators, and members of the public from a variety of backgrounds, to make proposals about how to act in order to ensure courts would be able to provide services for all Californians in the then distant, and now increasingly near, future. A remarkable number of recommendations from the Commission came to pass.⁴

Working with William Vickrey, then administrative director of the Court, Lucas convened meetings with Judicial Council members and other judicial branch leaders to discuss developing a new structure and procedures that would allow the Council to become an effective leader for the judicial branch. As a result of increased caseloads and expectations, the Council took an increasingly important role as the Trial Court Funding and Realignment Act began the push toward full state funding, and other actions building the statewide presence of the judicial branch were adopted. The newly structured Council relied on committees of judges, lawyers and other experts to formulate recommendations for changes in policy and practice.



Chief Justice Lucas and his staff, in his chambers, 1996.

STANDING, LEFT TO RIGHT: *attorneys Beth Jay, Stacey Stokes, Larry Lee, Abbe McCall, Graham Campbell, judicial assistant Gale Tunnell, attorneys Mike Mintz, Alice Collins, and Jake Dear. SEATED: Malcolm M. Lucas.*

PHOTO COURTESY JAKE DEAR COLLECTION

Chief Justice Lucas repeatedly urged the trial courts to “steer not row,” by taking charge of their courtrooms. It was a phrase that appeared in almost all his speeches for a long time. Instead of allowing litigants to set the pace, he stressed the practice of having judges lead, endorsing a pilot project adopted by the Legislature under the leadership of Speaker Willie Brown, requiring trial courts to set pretrial hearings and dispose of cases using a pre-determined calendar of events rather than relying on counsel to move a case forward. This approach proved so effective that it was extended statewide even before the pilot period expired. As a result, matters were settled earlier, dismissed sooner, and fewer matters approached the five-year deadline leading to automatic dismissal. Dockets were cleared and judges set cases set for trial on dates that were no longer simply aspirational but real. Courts made tremendous progress in handling cases in a timely fashion and reducing their large backloads until increasing budget cuts eroded that progress.

Lucas encouraged introspection and self-examination in the judicial branch, an effort that was not always first on the list for many judges. He gave life to a committee investigating gender bias in the courts created by his predecessor just before she left office. After comprehensive study, the group identified many areas in which gender bias abounded and a subsequent implementation committee recommended a range of remedies. Lucas led the Council in their adoption, again a move

not universally greeted with delight within the branch. Committees studying race and ethnic bias, disability issues, and discrimination on the basis of sexual orientation followed. The consolidated Judicial Council’s Fairness and Access Committee continues to monitor related issues and seek solutions when problems appear.

Early on, Lucas mentioned to me that even before he took the federal bench he had resigned from any club or organization to which he belonged that discriminated in membership. I was not surprised. Lucas was fair. He treated everyone with dignity and grace. For many years, at hearings of the Commission on Judicial Appointments, which reviewed gubernatorial nominations to an appellate court seat, a woman we dubbed the Rainbow Lady would appear. She dressed in layers of colorful, mismatched clothing, with a clashing hat, and I think I recall a cloth bag of many colors that contained the papers she brought with her. She would stand to address the Commission, chaired by the Chief, and launch into a narrative that had nothing to do with the nominee, and evolved from a grievance understood only by her. Lucas was always cordial and most importantly, skilled in limiting her to enough time so she felt heard while making sure the proceedings moved expeditiously. That exemplified his basic decency in treating individuals in very different situations. After all, he had allowed a somewhat better dressed, but often opinionated liberal female from the Bronx to work closely with

him on some very sensitive issues. For that, I am and always will be deeply grateful.

There are so many memories, personal and official. Lucas's dry, sometimes almost imperceptible, humor made working with him a pleasure. Before a press conference he held soon after becoming chief justice, I remember speaking with him and Lynn Holton, then the public information officer at the Administrative Office of the Courts. At one point, while discussing the arrangement of the room, the question of placing a table between the Chief and the press arose. After Lynn made some worried remarks about the unknown temper of the reporters, Lucas jokingly asked whether Lynn was concerned about the press coming over the table at him. It became a running punch line for him whenever he thought we were going a little too far in worrying about the potential for problems.

It sometimes took time for people to realize that this dignified, well-spoken gentleman had just launched a zinger. I recall a judges' night at a bar function, where, while seated in the back, I watched as a remark he made about golf clothes with a somewhat unexpected twist, sank in. After a moment of no reaction, heads snapped back in the audience and individuals turned to each other wide-eyed and apparently astonished. You had to listen carefully. Speaking of golf, after appearing at chambers dressed in bright green golf clothes from head to foot, Lucas later observed that many people, from clerks to justices, had suddenly found an urgent reason to see him in chambers — and he didn't plan to do that again. I must admit, after his usual impeccable suits, neckties (occasionally designed by Jerry Garcia, gifts from his son) and starched shirts, the vision of his six-foot, four or so frame in glowing green was not easy to forget.

When the popular television program *L.A. Law* invited him to attend a party given in honor of its 100th episode, Lucas, of course declined, but his objection ostensibly was directed at something other than the clear ethical issue. Referring to an astonishingly misguided earlier episode misrepresenting a Supreme Court hearing on a death penalty appeal, he said he would decline because they had selected a shorter, somewhat heavier and definitely balding actor to play the Chief Justice. We too paused before laughing. It was a brilliant prank on us. Lucas rarely told jokes. His off-hand observations often unexpectedly hit the mark, and none of these few examples can really capture how astute and funny he was. Or what an extraordinarily keen observer he was. Lucas was a very private and reserved person who did not often let much of himself show in public settings. But if you had the privilege to work with him, you got to glimpse his quick wit and the openness and reserve with which he generally approached the world.

Lucas also was smart and thoughtful. A quick study, he was prepared to answer almost any question about

a case or a policy. And he was thorough. Once, when there had been a surfeit of colorful language in some opinions from other chambers, Graham, often a prankster, inserted an intentionally overwrought and over-written sentence in the final draft version of an opinion. Lucas returned the draft with the language circled and a note saying, "Nice try." Although at times I disagreed with his conclusions, I felt comfortable about his close attention and how he arrived at them.

I also learned a great deal from him about functioning under pressure. Early on, Lucas commented on an adverse press report that reflected a distorted understanding of the facts. He reminded me that it was always good to remember you could never win arguing with someone who bought ink by the barrel. Of course, this was in the days before the Internet when physical newspapers were more widely read, but I think the maxim still applies. On another occasion, after an internal disagreement among the Court of Appeal districts about a policy decision I had presented at Lucas' direction, one dissatisfied justice sent a letter to the justices on his court and copied all the Court of Appeal justices. It contained some less than complimentary comments about me and my ability, and I was all set to send a blistering reply. Instead, I listened to Lucas' wise counsel and let it be. The only mentions I heard thereafter about the adopted policy were complimentary. He taught me not to always rise to the bait, no matter how tempting. When I ignored his advice at times in later years, I often ended up encountering the hook.

I sought him out in Sacramento after an Assembly subcommittee had, in 1992, without notice voted to cut the Court's budget by 38 percent, mirroring the initiative-imposed term limits and budget reduction that the Court recently had approved for the legislative branch in an opinion Lucas authored.⁵ The Chief Justice calmly said we'd just have to wait and see. As I recall, there were no public protestations, but that reduction ultimately was not adopted during the state budget process with the governor's participation.

One unfortunate legacy of the court's decision upholding not only budget reductions but also term limits, was that the Legislature did not thereafter invite the Chief Justice to deliver an annual State of the Judiciary address to a joint meeting of their chambers until Chief Justice George was sworn in. I often worked with Lucas on speeches, and I remember being particularly proud of his delivery of one such address that included a thoughtful discussion of the effect of the growing crack epidemic not only on the courts, but on society — and on the need for the courts to be but one part of the overall necessary effort to diminish the terrible toll taken on individuals, families, and communities. It was a harbinger of specialty courts that were subsequently created to take on the challenges of addressing not just the results, but the causes

of drug use and domestic violence, and the intersection between mental health problems and criminal acts. Indeed, one can consider Lucas' tenure as the time when the first steps were taken toward greater engagement with the public that the courts serve. He continued to deliver annual addresses to the bar and the bench at their fall meetings, and he used those to outline policy objectives and changes in the operation of the courts.

I fear I have given an incomplete picture of the Malcolm M. Lucas I knew. There were many other facets to the man. He was proud of his children and told stories about his great white cat, Moby. His second wife, Fiorenza, brought much happiness into his life and energized him for more than 25 years on and off the Court. But what strikes me most, in a time of turmoil and divisiveness, was how smoothly my time with him went and how well the Court operated. He and I disagreed on many things — except, of course, for the fact that he always had the last word. And there was plenty of dissent and disagreement from legislators, judges, lawyers and others. But he listened and considered and even sometimes changed his mind. He was open to difference and how best to accommodate or reject it, but almost always ready to learn from it. He not only

looked like a chief justice from central casting, he honorably tried to comport himself as a chief justice who served the courts and the public and responded with civility and thoughtfulness to all comers. It was my great honor and pleasure to serve him. ★

ENDNOTES

1. *Lungren v. Deukmejian*, 45 Cal.3d 727 (1988).
2. *Hill v. National Collegiate Athletic Assn.*, 7 Cal.4th 1 (1994).
3. Jake Dear, my colleague on the staffs of Chief Justices Lucas, Ronald M. George, and Tani Cantil-Sakauye, coauthored an article studying the rates at which the decisions of the courts of all 50 states have been followed and relied upon by courts of other states over a 65-year period. California Supreme Court cases led by far; and within the California data, at the time of the study, the Lucas Court outperformed the eras of former Chief Justices Gibson, Traynor, Wright, and Bird. (Jake Dear and Edward W. Jessen, "Followed Rates' and Leading State Cases 1940–2005," 41 *UC Davis L. Rev.* 683 (2007).)
4. Commission on the Future of the Courts, *Justice in the Balance 2020: Report on the Commission on the Future of the California Courts* (1993), <http://www.courts.ca.gov/documents/2020.pdf>.
5. *Legislature v. Eu*, 54 Cal.3d 492 (1991).

Thirty Years After a Hundred-Year Flood:

CSCHS PRESENTS JUDICIAL ELECTIONS PROGRAM AT STATE BAR ANNUAL MEETING

BY DAVID S. ETTINGER*

THIRTY YEARS AGO, an election rocked California's Supreme Court. On November 4, 1986, the voters ousted three of the court's seven justices: Chief Justice Rose Bird and Associate Justices Joseph Grodin and Cruz Reynoso. The following year, Justice Malcolm Lucas — who was elevated to Chief Justice to fill the vacancy created by Bird's defeat — analogized the election to "a 100-year flood — a very unusual circumstance, which I do not anticipate happening again."

To remember that historic event, and to examine judicial elections in general, the California Supreme Court Historical Society sponsored a program at the State Bar's annual meeting in October: "Thirty Years After a Hundred Year Flood: Judicial Elections and the Administration of Justice." The event featured Dean Erwin Chemerinsky of the UC Irvine, School of Law, and former Justices Grodin and Reynoso, the two living members of

the trio who lost in 1986. (Chief Justice Bird died in 1999.) I moderated the program.

The panelists discussed the past and present of judicial elections, and also possible changes for the future, with a particular emphasis on California and 1986.

Although early American history saw a number of states giving their judges lifetime appointments, by the time California became a state in the middle of the 19th century, the trend was toward selecting judges in partisan elections. That was the old system in California, and it was not very unusual to have a sitting Supreme Court justice suffer an electoral defeat or even be denied his party's nomination. California's judicial elections evolved, moving to nonpartisan contests in 1911, and finally, in 1934, to the current retention process where Supreme Court and Court of Appeal justices do not face opponents and voters are asked simply to decide "yes" or "no" whether a justice should be elected or reelected. Superior Court judges are still subject to contested, but nonpartisan, elections.

Even with the elimination of partisan and contested elections, California appellate justices have had

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