

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).

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## Thirty Years After a Hundred-Year Flood:

CSCHS PRESENTS JUDICIAL ELECTIONS PROGRAM AT STATE BAR ANNUAL MEETING

BY DAVID S. ETTINGER\*

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**T**HIRTY 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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cause for concern when they face the voters. The year 1986 might have been the first time that any California justice lost a retention election, but there had been hints of trouble before that. For example, in 1966, the Supreme Court was strongly criticized for its 5–2 decision in *Mulkey v. Reitman*,<sup>1</sup> which struck down an initiative that permitted Californians to discriminate on any basis in the sale or rental of their property. Justice Grodin recounted at the program that “Supreme Court lore” was that Chief Justice Roger Traynor, who had concurred in the opinion, “had his bags packed” in anticipation of an adverse vote at his retention election six months after the unpopular decision. Traynor won, but his percentage of

“yes” votes was almost 25 points lower than when he had stood for reelection to a new term as associate justice four years earlier. He and two other members of the *Mulkey* majority, Justices Paul Peek (the opinion’s author) and Louis Burke, polled around 15 points behind the one dissenter who was on the ballot that year, Justice Marshall McComb.

Even though a California appellate justice hasn’t lost an election in the past 30 years doesn’t mean that judicial decisionmaking cannot be affected by electoral considerations. Former Justice Otto Kaus, who retired a year before the 1986 election, memorably said that deciding controversial cases while facing reelection was like finding a crocodile in your bathtub when you go in to shave in the morning — you try not to think about it, but it’s hard to think about much else while you’re shaving. After the 1986 election, Chief Justice Lucas disagreed. Altering the metaphor a bit, he claimed that “we’ve taken the alligator out of the bathtub and made alligator shoes out of it.”

More than one study supports the view that the crocodile remains in the bathtub. These studies conclude that, in criminal cases in general, and death penalty cases in particular, judges who are elected — either in contested elections or in yes–no retention elections — are more likely to issue pro-prosecution rulings than those who are appointed and don’t face the voters. And that impact is likely to increase because campaign spending on these races has grown dramatically since the turn of this new century. Of



*Justices Cruz Reynoso (LEFT) and Joseph Grodin (CENTER) with Justice Allen Broussard (RIGHT), on Reynoso’s and Grodin’s last day in office after their electoral defeat two months earlier.*

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course, some find that to be a positive effect. One death penalty advocate not long ago stated he preferred that California courts (with judges subject to electoral review) rather than federal courts (with lifetime judges) have the final word on criminal convictions, bluntly noting, “We can’t get rid of Reinhardt [liberal Ninth Circuit Judge Stephen Reinhardt]. We got rid of Rose Bird.”

There are alternatives. New York’s high court judges, for instance, are appointed by the governor from a list of candidates provided by a judicial nominating commission and are confirmed by the state senate, and they can be reappointed at the end of their 14-year terms.

The program at the State Bar meeting was largely a scholarly examination of judicial elections. After all, Justices Grodin and Reynoso were law professors both before and after their judicial service (and they continue in academia today), and Dean Chemerinsky has been a renowned teacher for years. However, the former justices are not mere dispassionate commentators, nor were they bystanders to history. They lived it. Their willingness during the program to include poignant personal memories of 1986, when they were forced to assume the unfamiliar roles of campaigning as statewide candidates, added to the historical record. ★

#### ENDNOTE

1. *Mulkey v. Reitman*, 64 Cal.2d 529 (1966), aff’d 387 U.S. 369 (1967).