

Adam O. Emmerich†

In death, as in life, Abner Mikva has been an inspiration to me. The flood of admiration, affection, and anecdote that has poured forth following Judge Mikva's death, and in celebration of his ninetieth birthday just this year—from the president, Supreme Court justices (and nominees), senators, congresspersons, governors, mayors, elected representatives at every level of government, from children and grandchildren, from young people caught up in the excitement and promise of the Mikva Challenge, and from colleagues and mentees from every walk of life—has been impressive in every respect, and profoundly affecting. Those of us who had the privilege of working for the judge were not surprised; we felt the same way when we were honored to clerk for him, and we have treasured that magic year as we made our way in life and the law. Still, we were humbled to learn again all of the ways in which the judge fought fiercely to make our world a better place, on the broadest possible tapestry of national and international affairs, and the time and love he gave so freely to so many, family, friends, colleagues, and mentees, in their legions.

The Abner Mikva story has been well told by many articulate and witty people, who knew him well throughout his years of service and accomplishment. (And in some cases well before, going back as far as the maternity ward, in the case of Newt Minow.) It would not be my place to retell those chapters. I will stick to what I know best, which is what a great lawyer, great judge, and great boss Judge Mikva was.

Judge Mikva's prowess as a lawyer's lawyer is often overlooked in accounts of his life. Of course, there is the obligatory mention of his service as Editor-in-Chief of this *Law Review*. *The Law Review*, as he thought of it then, as we thought of it when I had the privilege of serving, and as I am sure the students and editors at The University of Chicago Law School still do today. And oftentimes also a retelling of one of the first great Abner

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Mikva stories—the proposed merger of *The Law Review* with that East Coast competitor, the *Harvard Law Review*, in response to that school's offer of cut-price subscriptions for law students not fortunate enough to attend an institution with its own law review. Then-Editor-in-Chief Mikva famously wrote back to Harvard, saying:

Thank you so much for your generous offer, but the University of Chicago has a quite distinguished law review of its own. But your proposal raises an interesting possibility. Perhaps we should merge our two law reviews and create a single law review that would clearly dominate over all competitors. I know there might be a problem about the name, so I suggest a simple solution: We use the first half of our name and the second half of yours. Hence, the new journal would be known as *The University of Chicago Law Review*.

As in the famous law review merger proposal, such is Judge Mikva's puckish, humane, disarming persona, and such is the scope of Judge Mikva's accomplishments on a broad stage of politics and public affairs—as a charismatic catalyst for mobilizing fervent volunteers at the grassroots in his political campaigns, as a reforming legislator, as a man who dreamed of big change in society and made a dent in achieving that mission—that his intellect, insight, and craftsmanship as a lawyer are often given less prominence than would be the case had Mikva not been such a great human being, who excelled and achieved in so many ways.

To put it simply, Judge Mikva was a great lawyer and a great judge. Given that he came to the DC Circuit from Congress, it would not be unfair to say that there was something of a suspicion that Judge Mikva would approach the business of the court with the sensibility of the congressman he had been. That was never the case. Judge Mikva understood what was going on in the vastly complex cases arising out of the regulatory state, which made up the meat and potatoes of the court's business. He understood the intricacies and obscurities of the legislative mandates being carried out, and understood the politics and personality that make the federal government and its organs human, complex, unpredictable, and intractable. But this experience and insight were icing on the cake of the discipline and rigor Judge Mikva brought to his time on the DC Circuit. He was first and foremost a consummate jurist. A well-informed, insightful, no-baloney jurist, but also one who was as razor-sharp a lawyer as one could imagine.

There is no court in our country more intimately involved with both the executive and legislative branches than is the DC Circuit. The Supreme Court of course has the last word, and its great pronouncements in administrative law and statutory interpretation provide a frame within which the regulatory state and its agencies must operate and against which the actions of the executive, the independent agencies, and the legislature must be measured and tested. But the business end of that measurement, review, and, when necessary, correction is the DC Circuit. No one understood that better than Judge Mikva, and he was uniquely qualified for that role.

The breadth of cases that Judge Mikva participated in hearing and deciding during my time in his chambers speaks eloquently to the scope of the regulatory state that exists in our United States. A small sample of the more interesting such cases might include those listed in the attached appendix. In each case, Judge Mikva dug deep, mastered (easily, I might add) the facts and the law, got the context of things (including oftentimes the extremes of advocacy that clients or counsel had demanded or resorted to), and engaged intensely with his clerks, his colleagues on the bench, and counsel at argument to test his own thinking and analysis. He was never too proud to take account of something he had overlooked or incompletely understood, and the process of thinking and drafting and ultimately common law-making in which we participated during our clerkship has provided a lifetime foundation on which we have all built.

Judge Mikva was equally a scholar of the law. A speech delivered by Judge Mikva at the *American University Law Review's* banquet during the time I clerked for him well demonstrates the judge's sophisticated understanding of the relationship between a reviewing court and an administrative agency.<sup>1</sup> Judge Mikva came close to criticizing, but did not quite criticize, the Supreme Court's *Chevron* decision. He acknowledged the Supreme Court's supremacy, but suggested that lower courts would suffer from confusion and uncertainty as a result of the Supreme Court having "muffle[d] the beat"<sup>2</sup> and created a standard of "deference" no more certain than the length of the chancellor's foot. This was

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<sup>1</sup> See generally Abner J. Mikva, *How Should the Courts Treat Administrative Agencies*, 36 Am U L Rev 1 (1986).

<sup>2</sup> *Id.* at 9.

classic Judge Mikva, putting complicated legal concepts in commonsense, profoundly insightful, and not in the least pedantic terms.

While Judge Mikva brought intellect and insight to bear on the important, intricate, and sprawling administrative procedure docket of the DC Circuit, he never gave less than his all to cases with a more human scale—the repeat offender challenging the fairness of his trial, the lone plaintiff who faced discrimination on the job. Judge Mikva never forgot that litigants were real people with real problems, looking to the law for help. One of the judge’s greatest qualities was his compassion for the human condition, with all its frailties. He genuinely liked people, and believed it was a privilege to serve them. That feeling was contagious, and we clerks equally felt it a privilege to serve in Judge Mikva’s chambers.

It is often said in these sorts of tributes that we shall not see his like again. For the sake of our polity, I hope that the work Judge Mikva did in his lifetime, in Congress, on the bench, in the White House, and most of all in the Mikva Challenge, will encourage and inspire many others to follow in his footsteps (including in the law, which is, properly understood and lived, always a branch of public service); to bring to bear the same passion, loyalty, intellect, aspiration, pragmatism, and good fellowship that characterized all that Judge Mikva did in his life, and in all his relationships, including with those of us fortunate to spend an intense year with him; and to chip away at making the world a better place. Most of us will have trouble approaching being anything like the person Judge Mikva was and doing anything like what he achieved. But no one would be prouder or happier than Judge Mikva to have encouraged the effort or in the accomplishment. He was a *mensch*, and we shall miss him.

## APPENDIX A. SELECTED DC CIRCUIT 1985–86 CASES

*Population Institute v McPherson*, 797 F2d 1062 (DC Cir 1986), concerning a dispute between a grantee of the UN Fund for Population Activities and the administrator of the Agency for International Development, in which the former alleged that the latter had improperly withheld funds earmarked by Congress.

*Community Nutrition Institute v Young*, 773 F2d 1356 (DC Cir 1985), regarding a challenge to the FDA's decision to approve, without a public hearing, aspartame's use as a food additive in liquids.

*San Luis Obispo Mothers for Peace v United States Nuclear Regulatory Commission*, 789 F2d 26 (DC Cir 1986) (en banc) (Mikva concurring in part and concurring in result in part), reviewing the Nuclear Regulatory Commission's grant of certain licenses for nuclear power plants, in light of a challenge that, among other things, the Commission had acted arbitrarily and capriciously in failing to consider earthquakes.

*Gregg v Barrett*, 771 F2d 539 (DC Cir 1985), in which certain members of Congress and other private plaintiffs brought suit alleging that the preparation of the Congressional Record was defective, rejecting the suit as to the members of Congress on separation-of-powers grounds under the doctrine of remedial discretion and as to the private plaintiffs on First Amendment grounds.

*Thompson Medical Co v FTC*, 791 F2d 189 (DC Cir 1986), in which a challenge to an FTC order concerning labeling and advertising requirements for an over-the-counter medication was rejected by considering not only the FTC order on its own but also whether and how the FTC and FDA could both exercise review over medication, noting that drug advertising and drug safety could indeed represent another instance of "overlapping and concurring regulatory jurisdiction." Id at 192.

*Dameron v Washington Magazine, Inc*, 779 F2d 736 (DC Cir 1985), concerning the allegedly libelous publication by *The Washingtonian* of an article in which it asserted that air traffic controllers had been partly responsible for certain airplane crashes and discussing both the official report privilege, given NTSB reports on the crashes, and the public figure doctrine (though applied, by the court's own admission, to an "involuntary, limited-purpose public figure"), rejecting the application of the former, but concluding the latter applied to protect the publication in this instance. Id at 737.

*Randolph-Sheppard Vendors of America v Weinberger*, 795 F2d 90 (DC Cir 1986), involving a suit under the Randolph-Sheppard Act which required that blind persons licensed by state agencies be given priority to operate vending facilities on federal property.

*Reuters Ltd v FCC*, 781 F2d 946 (DC Cir 1986), reviewing the decision of the FCC to rescind certain microwave radio station licenses in a manner that would represent a departure from its own rules and regulations.

*Grano v Barry*, 783 F2d 1104 (DC Cir 1986), considering an appeal on recovery of attorney fees under the Civil Rights Attorney's Fees Awards Act in connection with citizens seeking to prevent the demolition of a historic tavern.

*In re AOV Industries, Inc.*, 792 F2d 1140 (DC Cir 1986), as to the appropriate standard for challenges to bankruptcy reorganization plans being dismissed as moot.

*Fink v National Savings and Trust Co.*, 772 F2d 951 (DC Cir 1985), which arose from an ERISA dispute, and dealt with, among other issues, the liability of cofiduciaries of an ERISA trust fund for breaches of fiduciary duty by the trustee.

*Brown v Marsh*, 777 F2d 8 (DC Cir 1985), in which a civilian Army employee brought a Title VII suit alleging race discrimination, and dealing with exhaustion of administrative remedies and the consultation of an EEO counselor, in a case that had been, in some form or the other, pending for well over a decade.

*Mudd v United States*, 798 F2d 1509 (DC Cir 1986), finding that a trial order limiting the right of a criminal defendant to consult with counsel on the defendant's testimony during a weekend recess violated the Sixth Amendment without the need for a showing of prejudice.