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IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

JUDGE LEVENTHAL'S PORTRAIT CEREMONY
RECEIVED IN CHIEF JUDGE MIKVA'S CHAMBERS

November 20, 1991

Washington, D.C.

[THIS TRANSCRIPT WAS PREPARED FROM A TAPE RECORDING.]

PRESENT:

CHIEF JUDGE ABNER J. MIKVA

CHIEF JUSTICE WILLIAM H. REHNQUIST,

Chief Justice of the United States

THE HONORABLE WARREN E. BURGER,

Former Chief Justice of the United States

JUSTICE ANTONIN SCALIA, U.S. Supreme Court

CHIEF JUDGE ARTHUR NIMS, U.S. Tax Court

CHIEF JUDGE NEBEKER, Court of Veterans Appeals

JUDGE GERALD REILLY, D.C. Court of Appeals

JUDGE MICHAEL FARRELL, D.C. Court of Appeals

JUDGE S. MARTIN TEEL, U.S. Bankruptcy Court

JUDGE IVERS, Court of Veterans Appeals

JUDGE HENRY GREEN, D.C. Superior Court

JUDGE GREGORY MIZE, D.C. Superior Court

JUDGE JAMES BELSON, D.C. Court of Appeals

CHIEF JUDGE HELEN W. NIES, U.S. Court of Appeals

for the Federal Circuit

JUDGE STEPHEN EILPERIN, D.C. Superior Court

JUDGE PAUL MICHEL, U.S. Court of Appeals

for the Federal Circuit

JUDGE JOHN STEADMAN, D.C. Court of Appeals

PRESENT: (Continued)

CHIEF JUDGE AUBREY E. ROBINSON, U.S. District Court

JUDGE JOYCE H. GREEN, U.S. District Court

JUDGE THOMAS F. HOGAN, U.S. District Court

JUDGE NORMA H. JOHNSON, U.S. District Court

JUDGE ROYCE C. LAMBERTH, U.S. District Court

JUDGE HAROLD H. GREENE, U.S. District Court

JUDGE JUNE L. GREEN, U.S. District Court

JUDGE LEWIS F. OBERDORFER, U.S. District Court

JUDGE WILLIAM B. BRYANT, U.S. District Court

JUDGE STANLEY S. HARRIS, U.S. District Court

JUDGE CHARLES R. RICHEY, U.S. District Court

JUDGE STANLEY SPORKIN, U.S. District Court

JAY STEVENS, U.S. Attorney

COMMISSIONER BELVA NEWTON

JIM ROBERTSON

JOHN SEXTON, Dean, New York University Law School

DAN MARCUS

ROBERT BONNER

NANCY LAZAR

P R O C E E D I N G S

CHIEF JUDGE MIKVA: This is a very joyous occasion for the Court.

Let me first welcome some very special people who are present: Chief Justice Warren Burger is here and Justice Scalia, and we welcome you both to these precincts that you have occupied before. It is nice to have you back.

I also note that Mrs. Leventhal is here and the family, and we are very glad you are here.

I knew Harold Leventhal for a long time, but I had the privilege of serving with him for only a short period of time. But even in that short period, it was clear that this was a special kind of giant in judicial circles. I was a freshman judge, and just hanging around him was a great education, even for that short period. He had enthusiasm and excitement and interest in what the court was doing, and his particular role in it was infectious.

My regret, of course, was that our tenure together was so short. My great benefit was that I at least had that short exposure to him, as a fellow jurist.

I at this point would like to ask our Circuit Justice, the Chief Justice of the United States, who also

knew Harold Leventhal, to speak of Harold and give some of reminiscence.

THE CHIEF JUSTICE OF THE UNITED STATES: Thank you very much, Judge Mikva.

I had the pleasure of knowing Judge Leventhal socially for perhaps eight or ten years. We had lunch together on occasion, and I know I always looked forward to those lunches. He was a person of great wit and insight, a delightful luncheon companion and a delightful person to talk to at any time.

He was, of course, an able lawyer and an able judge, as Chief Judge Mikva has indicated. But there are a fair number of people who meet that description, and yet who also seem to embody the maxim that a legal education sharpens your mind by narrowing it.

Judge Leventhal was not one of those people. His interests ranged far beyond the law, far beyond kind of Washington interests such as government. He used to talk of his family, of which was very proud, and of a number of other things which didn't have much to do with the law at all, but made our lunches most interesting.

There are others here today who knew him far better

than I did, but it is a great pleasure for me to contribute this very brief memoir of my own.

Thank you, Judge Mikva.

CHIEF JUDGE MIKVA: Thank you, Chief Justice.

Someone who served with him twice as long as I did, but who also knew him from a prior life is my current colleague, Judge Patricia Wald.

Judge Wald?

JUDGE WALD: When I came to the D.C. Circuit in 1979, Harold Leventhal was already a legend. He had been appointed to the court by President Lyndon Johnson in 1965, after an illustrious career beginning in Columbia Law School, where he ranked first in his class and was editor-in-chief of the Law Review, proceeding a pace through successive Supreme Court clerkships to Justices Harlan, Fisk, Stone and Stanley Reed, moving into path-breaking positions before and during World War II at the Department of the Interior, the Office of Price Administration, Office of Price Stabilization, spanning extremes of the legal experience as aide to Justice Jackson at the Nuremberg trials, and Executive Office of the Hoover Commission Task Force on Independent Regulatory Commissions, logging thereafter two decades of service as the

quintessential Washington lawyer, with an interim front-page stint as Counsel to the Democratic National Committee and architect of the compromise that preceded the Mississippi Freedom Party at the volcanic 1964 Democratic Convention.

The Washington Post applauded his nomination, opining that his work had been "statesmanly, as well as politic, and served his country as well as his party, he will bring learning, sensibility and a richly reflective mind to the bench."

He did much more than that. His Columbia Law School classmate and best friend on the circuit, Carl McGowan, wrote later that Judge Leventhal's appoint evoked "feelings of relief, as well as pleasant anticipation." Since Judge McGowan, himself a veteran of only a few years on the bench at that time, confessed that, "Being a swing man inevitably includes a sense of power, but it also makes for a feeling of loneliness, and I at least found the latter more pervasive." Judges Leventhal and McGowan became quickly known as the "Columbia twins," in whose hands lay the balance of power on the court.

Anyone faced with an argument before Judge Leventhal -- I say this from personal experience -- prepared with

alternating pleasure and despair. We knew that no flaw in our argument would escape, no imprecise answer would satisfy, yet, no thoughtful or candid expression or doubt or concern about the effect of the court's ruling one way or another would be put down or dismissed with irritation. More likely, it would be the beginning of a half-hour sojourn into the intersection of law and reality, calculated to delight the frustrated academician in all of us, and to terrify the bureaucrat or hired gun who came to court with rigid client instructions on what to say and what not to say.

In the late sixties, when I was a lawyer for the law reform unit of the Neighborhood Legal Services Program, we prayed that he would be on our panel. He treated us and expected us to be first-class lawyers, and he respected what we were trying to do.

He had in his own Washington lawyering days brought a successful consumer suit against the D.C. Transit bus fare increase pro bono, and he had acted as appointed counsel for indigent defendants. He believed that the cases we argued to him about landlords' rights to evict, the need of civil indigents for records, probationers' rights to notice before revocation were fully as worthy of his talent and energy as

the regulatory conundrums and constitutional watershed on which his enormous reputation was deservedly based.

Harold Leventhal defied ideological labels. The liberals were never sure he was one of them; the conservatives were just as wary. He led, rather than followed. He was ever, as his former law clerk Sam Istrica wrote, a pragmatic Justice. He sought and, in an unlikely number of cases, found ways to accommodate the competing needs of White House demonstrators and national security, the tensions between free exercise and establishment clauses, the frustration of generals and judges attempting to arbitrate the disputes of specialized agencies.

Only on the proper use of perimeter and parameter, did he show adamant inflexibility and an unusual intolerance, reflected ultimately in a solemn letter to the Editor of the Washington Post, setting all of us illiterates straight.

He was also a renaissance man, with a hunger for knowledge and beauty, exercised with discipline and within sure limits. He recognized both the perimeter and the parameters of a judge's role.

During the time I served on the D.C. Crime Commission in the mid-sixties, he was intensely interested in

the roots, the reforms, the background of the crime wave and the harrowing epidemic then infesting the city. He participated in ALI and Administrative Conference proceedings, always looking for the new idea, the better solution to a longstanding dilemma.

His opinion in United States v. Brauner signaled the end of the decade and a half of turbulent intra-circuit debate over the insanity defense. His dissent in United States v. Barker pointed to the disastrous implications of a Nuremberg defense of Watergate defendants and its compulsory reading for judges embroiled in analogous cases today.

I knew Harold Leventhal as a lawyer and judge long before I knew him as a colleague. In 1972, I argued, by appointment on 48-hours notice, before an en banc Court of Appeals a defense of narcotics addiction to the crime of drug possession.

When the case emerged two years later, I had lost, 5-to-4. Judge Leventhal, who appeared to be supportive at oral argument, was the swing vote against me in the court's decision. His own prodigious research had led him to conclude that recognition of such a defense was not the right judgment call.

The aftertaste was bittersweet. It hurt at the time, but I would have to say it was the kind of loss that a lawyer bears proudly. She and her arguments have been treated with care and discernment, and that has been a significant addition to knowledge on an important subject.

Our relationship as fellow judges lasted only three months, but somehow encompassed three sittings, and was the best on-the-job training a baby judge could ask for. He was friendly, helpful, shyly indulgent, never condescending, eager to welcome the first woman on the court, generous in sharing experience, and lavish with advice.

New chambers were being built on the third floor at the time, and we were supposed to be neighbors. But after his sudden death, I opted to take over his old chambers, on the theory that I might benefit, as he would say, just a tad from the osmosis of pure intellectual energy that I was sure permeated all his spaces.

During conferences, he projected the kind of controlled euphoria at the prospect of taking on cases that might involved novel issues or a chance to revisit and do better on an old one. When I circulated my first draft, full of the kind of overkill that new judges are proud to, he was

delicate in his criticism, pointing out that perhaps the page-long footnotes on legal esoterica might be filed away for another day.

He said over and over again that judging on the D.C. Circuit was the best job in the world, and he continued to be amazed that he should be paid for doing it.

As all you legal cognoscenti know, there is precedent and then there is precedent, and many cases fade into the jurisprudential mist, without ever being expressly overruled.

It is, I think, a unique tribute to the intellectual vigor and practical sense of Harold Leventhal's jurisprudence, that his cases are so widely cited today, not just in the textbooks, but in the present day cert opinions.

In 1990 and 1991 alone, a LEXUS check shows there were 77 cites from majority opinions to Leventhal cases, and 8 more in dissents. That translates into almost one-fifth of all our opinions. He stands incontestably as a shining example of a judge who could comprehend the deepest problems of our society, feel strongly about them, explore the universe of options available to the court, and act with courage on the right one.

His forte was administrative law, and he was a mighty contributor to the emergence of the D.C. Circuit as a premier Administrative Law circuit. After the Court Reorganization Act transferred local criminal and civil jurisdiction to the D.C. Courts, Congress provided this Circuit with the unique opportunity for a mid-life transition to a national regulatory court, nature and Harold Leventhal a court of action, and with relish and rigor, he rushed to fill the void with a series of decisions that set the ground rules for judicial review of administrative actions for years to come.

In Chief Justice Warren Burger's words, he was singularly well-equipped for those large, complex administrative law cases which now characterize the docket in this Circuit, cases which pose novel questions of government regulation in the context of advancing frontiers of science and technologies.

Portland Cement, Ethyl, Kennecott Copper, International Harvester, Alabama Power Company -- they gave us the passwords for three decades of administrative law to come, the collaborative partnership between courts and agencies, the hard-look doctrine, the imperative for judges

to wade in and master the substantive law.

He wrote pioneering opinions on hybrid rulemaking, remand for a more adequate rationale, ingredients of inadequate record on review, essentials of a statement of basis and purpose, bars against post-hoc rationalization, warnings to agencies changing course without a reasoned explanation, and more.

He had worked as counselor and policymaker to government, he knew intimately its strengths and weaknesses, its strategies to survive and its proclivities on occasion to mislead. He was ever vigilant for government abuse, yet ever optimistic that government could be a power for good and a force to bring balance to the community, exquisitely attuned to what his friend Carl McGowan called the realities of large-scale government in a democratic society.

He was the friendly skeptic, whose favorite quote, drawn from some British Empire crisis, was "Meanwhile, the colonial office had not been idle, it had lost the file."

[Laughter.]

Within the realm of administrative law, he seemed to care especially for the then tender shoots of environmental law. He sensed that here was the legacy his generation would

leave to the future. He wrote separately on the subject of environmental decision-making in the role of the courts, and he ruled that environmental values held a special place in the hierarchy of concerns for which a reviewing court must insure adequate agency consideration. His major law opinions were in this area, opinions quoted at length and a large part legislated into the Clean Air Act Amendments of 1977.

Harold Leventhal was, finally, an oppression activist judge, yet cognizant of the limits of his role. He left to the agencies the choice of policies, but he insisted they choose with care deliberation and fairness, and leave a proper paper trail behind. He thought, in pre-Chevron days, that judges could read statutes, find legislative intent or even mood, and hold agencies accountable. His vision of a collaborative partnership between agencies and courts may have proved a trifle optimistic, but it served well as a launch vehicle for his hard look and reasoned decision-making doctrines.

Carl McGowan, as usually, said it best at Judge Leventhal's memorial service 12 years ago: "What mercifully endures," he said, "is the reassurance Judge Leventhal's life has provided of the primacy of the individual intelligence

and the wonders it can work in mitigating the conditions of human kind."

Harold Leventhal gave this court 15 years of productive, creative, disciplined, generous-hearted and politically astute lawmaking. He led the court through an era of transition, and left us tragically, as we were about to pass into another. On that chill and windy November day 12 years ago, as taps played out for him at Arlington National Cemetery, I thought, we need you now more than ever. I would echo the same today.

I am glad he is back with us in spirit in this portrait.

CHIEF JUDGE MIKVA: Thank you, Judge Wald. That is a wonderfully insightful picture of Harold Leventhal and his great influence on this Court.

Let me also acknowledge the presence of Chief Judge Aubrey Robinson and so many of his colleagues from the District Court who also had the pleasure of serving with Judge Leventhal.

We have asked two of his former law clerks to speak on his behalf. The first one is someone that I first knew, I thought he was as professional clerk, he had clerked for Judge

Leventhal and clerked for Judge Bazelon, and then he went on to clerk for Chief Justice Warren Burger.

I thought that that is what John Sexton had decided he was going to do with the rest of his life, and I was pleased and surprised to find that he had other intentions besides, and, lo and behold, he is now the Dean of New York University Law School, and a wonderful speaker to speak on behalf of clerking for Judge Leventhal.

John Sexton.

MR. SEXTON: Thank you very much, Judge Mikva, Mr. Chief Justice, Chief Justice Burger, Justice Scalia, Judges, Mrs. Leventhal --

[The remarks of Mr. Sexton were inaudible on the tape.]

CHIEF JUDGE MIKVA: Thank you, Dean Sexton, for those very eloquent words.

Robert T. Hart is a lawyer in St. Louis, who, too, had the good fortune to clerk for Judge Leventhal. Therefore, he had the good fortune to clerk for Chief Justice Rehnquist.

Mr. Hart, I welcome you to the Court.

MR. HART: [The remarks of Mr. Hart were inaudible on the tape.]

CHIEF JUDGE MIKVA: Thank you, Mr. Hart, for that very eloquent glimpse of breadth and scope of this marvelous judge.

Every event like this has a lightning rod, and the last law clerk who will actually present the portrait is the lightning rod at this event. He helped spark the interest and enthusiasm of the clerks to produce the portrait. I don't think they did the painting, but they did everything else but. He initiated the efforts to get this ceremony under way and bring the people who are here today.

It is a belief among judges that the first set of law clerks they hire have a great deal to do with the shaping of their judicial careers. If so, we should very proud of some of the things that occur today.

I would like to ask Dan Marcus to present the portrait at this time.

MR. MARCUS: [The remarks of Mr. Marcus were inaudible on the tape.]

[Presentation of portrait, applause.]

CHIEF JUDGE MIKVA: Dan Marcus, thank you, and I thank all of the clerks on behalf of the Court of Appeals for this, and we gratefully accept this portrait of this Judge

who has had such an important role to play in our Court. I think all of you who are here today can remember why it is that this wonderful public man had such an influence on all of those whose paths he crossed.

Please join us at the reception. Marshal, please adjourn the Court.

[Whereupon, the Court was adjourned.]

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