INTERVIEW NO. 3

This is the third interview of the Oral History of former Chief Judge Abner J. Mikva as part of the Oral History Project of the D.C. Circuit Historical Society. It is being held at his home, 442 New Jersey Avenue, S.E., Washington, D.C., on Thursday, June 20, 1996. The tape and any transcripts made from the tape are confidential and governed by the wishes of the Judge, which ultimately will be made in the form of a written donative instrument.

Mr. Pollak: As I mentioned, you were speaking last time about your commencement of practice with Goldberg's Chicago firm 1952, 1955, and describing an experience you had in a garnishment case.

Judge Mikva: Well, I think I had said that Illinois had this very bad set of creditor remedies laws which allowed a creditor to confess a judgment against a debtor that he claimed was in default. As the term implies, when the person bought something on time, whether it was furniture, or car, or whatever, they would sign a note; and in the note there would be a clause that said, "I hereby authorize the attorney or the creditor to confess judgment against me if I'm deemed to be in default." It was purely a subjective judgment by the creditors as to whether or not he thought the person was in default or was somehow not going to make good on his obligation. The creditors' lawyer would then go in and file a confession of judgment, which would actually be a formal legal judgment against the debtor in court; and based on that judgment, the creditor could then garnishee the wages of the debtor. So that the first time the poor steelworkers who had bought an automobile on time, or furniture on time, or whatever, knew he was in any kind of trouble with his creditor was when the paymaster would tell him, "I can't give you your check, it has been garnisheed." In fact, the term was, "there is a brick on your check," which means that they could not collect their pay. So that the debtor was always bargaining with a gun at his head; indeed, the trigger had already been pulled: he was without his

paycheck. He had to go to the creditor, hat in hand, and work out some kind of an arrangement to try to get his check released, and, frequently, to no avail. Because the Steelworkers' Union had us on kind of a retainer, I would frequently handle these cases for the members. And incidentally, I might add, some of the steel companies themselves as employers were upset about the practices, Inland Steel in particular. Others couldn't care less. It wasn't their problem. And I fought vigorously because I thought the confession of judgment law was just an outrageous law and should be abolished. I didn't like garnishment either for that matter. And I remember that I used to try to fight these cases in municipal court when the steelworker would come to me and say he didn't buy something or he paid them. Nevertheless, there was a brick on his check. This one man came to me who had a very common name. It was Brown or Smith or Jones or something, and he lived on the south side of Chicago. He swore that he had never done business with this furniture company which had garnisheed his wages. Nevertheless, there was a brick on his check, and he hadn't been paid, and he was desperate. So I went to the courthouse, pulled out the file, got the name of the lawyer who had confessed this judgment who worked for a furniture company. I called him up and said, "My man said he never did business with your client." He replied, "Well, I'm sure he is wrong, he probably just forgot or he's probably lying to you." So I said, "No, I've looked at the contract." In order to confess judgment, they would have a copy of the contract with the papers that they filed in court. I said, "I looked at his signature on the contract and the signature of the person who signed that contract is not the same as the signature of my man." He said, "I'm sure that he is lying to you or something." I said, "Well, let me come over to the office, I think I can satisfy you that you've got the wrong man." So I went over there and showed him my man who wrote his name several times and finally persuaded even this hard-

nosed creditors' lawyer that he didn't have the right Brown, Smith, or Jones. At which point the lawyer said, "Well, I guess we made a mistake. I'll tell you what, give me $25 for my time and trouble and we'll call it square." And, it would have been cheaper for me to reach into my own pocket and pull out $25 and give it to him than to have gone through all of the agony I had to go through to get that garnishment released, that judgment vacated and all the other things I had to do before I could get my erroneous employee out of the trouble that he didn't belong in. And there was absolutely no remedy, there was nothing that we could do. I, at one point, tried an abuse of process and malicious prosecution; and the courts just made short shrift of those because the precedents or whatever were awful on this whole thing. So when I came to the legislature sometime later, my first crusade was to do something about these awful creditor remedies; and we did finally get rid of the confession of judgment and a few other things that made it a little harder. I've never forgotten how much trouble I would have saved myself, how much money I would have saved my firm if I had just given this high-binder $25 as he insisted. For justice be done.

Mr. Pollak: Have the laws federally changed the rights of the creditors?

Judge Mikva: Not really. The Federal Truth in Lending Law has helped a little bit, but there are, I think, still states that allow confession of judgments, and assignment of wages, and wage garnishments, and all these other things. It just put the time purchaser at the mercy of the seller. Part of the problem is that when somebody goes in to buy furniture, or goes in to buy a car, or signs a lease, the last thing he is going to do is read all that fine print. One of the remedies I finally got through the legislature was to require the contract to be printed in larger print so that there is at least some hope that people might read it. I still remember, when I was still doing

work with the Steelworkers Union, that frequently union members would come into me on these Thursday nights when it was lawyer night at the union hall, and they would come in with a signed copy of a real estate contract they had already signed, or the lease that they had already signed, and they said, "Somebody at work told me that you'd look this over and see whether it is okay or not." I said, "But, you signed it already, what is the point of my looking it over, you're already on the hook"? He said, "Well, I didn't know." And that is the way business was done then. That's why I've never been a great fan of the good old common law because many of those remedies that were applied against debtors in those situations were common law remedies. Illinois was a common law state. I've never found the good old common law to be that good.

Mr. Pollak: So that meant that as a legislator, you wanted to address these common law rights and remedies?

Judge Mikva: By statutes. It was interesting that that's what's happened actually as this country has moved from a common law system to a statutory system. It has been because of pressure from people – people generally – on the legislators to do something about these problems that the common law allowed. And the reason the common law allowed them, frankly, was the unevenness of the lawyering. In most of these situations, the creditors – the business community – had very good lawyers. The debtors – the purchasers – had very poor lawyers, if any lawyers at all. Illinois has always had a strong usury law. It goes back to the days of when money lending was considered kind of an evil anyway. And so Illinois has always had a very, very tough usury law. I don't know what it is now, but when I was there, you could not charge more than six or seven percent for the lending of money. But the cases had developed all kinds of exceptions to the usury law. The most notorious of which was that if you bought something

on time, the extension of credit for materials that you bought on time was not considered under the usury law; so that an automobile dealer could charge 24 percent on the automobile that you were buying, and it didn't come under the usury law. A real estate seller could charge 18, 20 percent on a mortgage, and it didn't come under the usury law. I was fascinated at the stuff. If you look at the usury statute, there is no way on earth that you could interpret that statute not to include such obvious money lending transactions. When I went back and looked it up for a case I was handling at one point where I was challenging one of these doctrines, I found this marvelous old state supreme court precedent back in the early 1900s which had said time purchase agreements are not under the usury law. You didn't have to look at the reasoning of the opinions or anything else. You just had to look at the lawyering. The lawyering was that some trial judge had found in favor of the debtor and the time seller had taken the matter up on appeal. And, when you looked at the lawyers, there were three or four of the best law firms in Chicago, the best LaSalle Street law firms in Chicago, representing the creditor and the debtor appeared pro se. I'm not surprised at how the law came out in this situation.

Mr. Pollak: Can you attribute any effect of these experiences in early years of practice on your views as a judge when you addressed statutory common law questions?

Judge Mikva: I'm sure they did. We are all victims of our experiences, and I'm sure that those experiences made a very great impression on me as a young lawyer full of enthusiasm for the law when I saw how unfairly the law could be applied to little people as opposed to the people who could afford good lawyers and good lawyering. I am sure that affected my judging. I always looked over at who was sitting at the tables. There was a good defense lawyer in Chicago who used to say that he would never go into court, in criminal court, with anyone at the table

besides himself. Because he liked the idea of the prosecutors having three, four, five lawyers sitting at the table and he liked the impact of the jury of his being there all by himself. I used to look at the counsel tables when I'd see various cases appealed, and count the number of lawyers on each side. If there was a imbalance, I am sure it had some impact on how I looked at the cases. Obviously, intermediate court judges apply the law as it's given to them. But, in those gray areas that frequently arise, I am sure it had some impact even when I tried to avoid it.

Mr. Pollak: I suppose that you might press your clerks to research issues that a party with inadequate lawyer help might have missed.

Judge Mikva: I did. I think my clerks used to complain that I took the pro se petitions that came up much more seriously than I should and frequently used to push to get a lawyer appointed by the court that I could rely on. Of course, in criminal cases, there always was a lawyer. I always worried that the imbalanced lawyering was going to create an unfair result. And there were instances that that happened where, again, if you believe in lawyering as a worthy profession, and I do, then obviously if one side has good lawyers, and the other side has none or poor lawyers, it's going to affect the way the case comes out. I was known even in the Chicago days as being somewhat gentle when it comes to dealing with human behavior. I was never a great believer in capital punishment, and I don't think they ought to hang people from the yardarm for minor infractions. When I was on the Disciplinary Committee of the Chicago Bar Association, I was an absolute bear on lawyers that were accused of not representing their clients; because invariably, not invariably, but quite frequently, it would come up where a lawyer had pocketed the fee from some person and then not done anything for him. As far as I was concerned that lawyer should be out of the profession because almost all of the time they were

exploiting poor people who didn't know what their rights were, didn't have any way of protecting themselves; and the lawyer would let a time date, a jurisdiction date pass or something like that. As far as I was concerned those people just shouldn't be lawyers. It was too important for them to misbehave that way.

Mr. Pollak: What else would you want to recall for this record of these first three or four years of private practice that perhaps other experiences in court or activities beyond the practice that formed you?

Judge Mikva: Well, growing up in the Chicago lawyering community was a special kind of experience. The judges in Illinois are elected, and in Chicago that meant that most people became state and local judges by having worked their way up through the party machinery. It was a glorified form of patronage. It wasn't true of all the judges who sat in the state courts, but it was true of a lot of them. You would always worry that you would end up with one of two problems when you appeared in the state courts in Illinois: either that the judge would not be competent to do whatever the task, or that political influence was going to affect the way the judge came out. I actually had put in mimeographed form a petition to remove cases from the state court to the federal court; I would file such a motion almost automatically whenever somebody would file suit against a client of ours in the state courts on a theory that I was more likely to get an informed and unbiased judgment from the federal judges in Chicago than from the state court judges. I am sure I indicted the entire judicial community in Chicago unfairly, but on the other hand, I was probably more right than wrong in trying to get those cases in the federal court. As a result of my overuse of a petition to remove, I even ended up making some bad precedents in Chicago. Frequently, employers would file lawsuits against some of our union

clients in the state courts, and I would petition to remove the case to the federal court and then move to dismiss the complaint on the ground that it violated the Norris LaGuardia Act, which prohibited lawsuits against unions in most situations. Finally, the Court of Appeals for the Seventh Circuit came down with a precedent that is probably still law, I'm afraid, that said you may not remove a case from the state court to the federal court in order to show that the federal court does not have jurisdiction. I regretted that excessive use of the petition to remove.

Mr. Pollak: Who were your first mentors in your practice? Did you have models that you followed?

Judge Mikva: Well, Arthur Goldberg was certainly one. He was so full of vigor. It was hard to describe how incredibly broad-gauged he was. He was involved in so many matters, public affairs and private affairs, legal matters, and running the law firm; and he did it all with such aplomb. I always admired his capacity to be such a complete professional, a complete generalist, and be a nice guy besides. He was very, very pleasant to be with. Carl Devoe was another one of our partners who had great influence on me because I admired the kind of partnership that he and Goldberg had where he, Devoe, would devote himself to getting clients and making sure that their business events paid off while Goldberg was free to get out in the public sector and do all these glorious things and involvement in the Democratic party.

Mr. Pollak: Did you have more?

Judge Mikva: There was a chancellor, a state court judge in Chicago who had come through the ranks of a Chicago patronage organization and probably couldn't claim that great a law school education, but just turned into a very wise judge. I always admired the way he handled cases that came before him. Some of them were very complicated, and he would work

his way through them. He didn't have much staff. The courts in Chicago didn't spoil their judges by giving them a lot of clerks to help them. He worked his way through these cases, and I always admired his style as a judge. He always was calm. He never raised his voice. He never shouted at anybody. He never lost his temper with anybody. He had an incredible way of controlling the courtroom even though many of the disputes that he ended up with were very, very vexatious and hotly litigated; but he always was in charge. I thought about him often when I would either review cases of problems that the trial judges had had or, for instance later on, when the "Chicago Seven" conspiracy trial was before Judge Julius Hoffman and he gave all this bad publicity to judges who lost control. I thought of this judge often as somebody who was the model of how a judge ought to behave in a testy situation.

Mr. Pollak: If you can't recall his name now, perhaps when you review the transcript it will come to you or we can search for it.

Judge Mikva: He was a chancellor. He came out of the west side of Chicago and was hardly somebody who would be considered likely to turn into being a great judge. I always thought he was one of the best of the state court judges.

Mr. Pollak: Did you have experiences which led you to think that there was corruption in any of the courts that you practiced in?

Judge Mikva: Yes. We were never able to pin it down the way corruption ultimately was pinned down until the scandal like the Greylord scandal in Chicago. I think no one even thought about getting someone to wear a wire or do some of the other things that ultimately led to the scandals and the discovery of these corrupt judges. Plus the fact that there was an unfortunate and unholy conspiracy that was then extant in Chicago and for all I know many of the other big

cities as well. The U.S. Attorney's Office, the federal attorney's office, stayed out of the state and local political matters, and, in turn, they concentrated only on matters that had direct federal links so that, and of course, it was before the Travel Act and some of the other statutes that are used in a great many matters of local activity that are under the federal jurisdiction. But, there was no way of getting the federal government to do some of the things that they have done subsequently. I remember when Jim Thompson, who later on became Governor of Illinois, was U.S. Attorney in the late 1960s perhaps. He was the first U.S. Attorney to really go after local corruption, and he indicted several judges and so on for corrupt activities. There is a story (it may be apocryphal or may be true) of one of the precinct captains who worked at City Hall. He was heard to have said, "Gee, if they were going to start enforcing the law, they could have given us six months notice."

Mr. Pollak: It sounds like a Chicago story.

Judge Mikva: It's a great Chicago story.

Mr. Pollak: Well, you've said that in 1955 you determined to run for the state legislature and were elected. What led you to run for Congress? What was your constituency, and how did it relate to -- we were out in the midst of the 1966 campaign.

Judge Mikva: It was an exciting campaign, but it was the first time I had lost a campaign, and it is no fun. I ended up $30,000 in debt which was a lot of money at that time, especially in a losing campaign. It took me some time to raise it. And I really had to figure out whether this was the end of my political career or not, because I was out of the legislature. One of the things that happened in 1964 was also the reason why I decided not to run for Congress in 1964. In 1964, we ended up with an at-large election in Illinois for the state legislature. The legislature

had failed to reapportion itself, so under the then Constitution we had, the entire House of Representatives ran at large, state-wide.

Mr. Pollak: Really?

Judge Mikva: For the first time ever Mayor Daley asked me to run for reelection to the legislature because he thought I would help the ticket. He let it be known that he agreed with me that Congressman O'Hara, who was by that time 80 or 81, was getting too long in the tooth and the next time out, he'd work it out that I would be the candidate for Congress. So, those were two good blandishments to offer me since that was where I wanted to go. I ran, and running statewide was an interesting experience. There were 236 candidates running for the 177 seats, 118 by each party. The ballot was three and one-half feet long – with all kinds of confusion. It was very exciting running state-wide. Adlai Stevenson III was on the ballot with us, and Paul Simon was running for the State Senate, and I was running, and we had a team around the state campaigning on behalf of the Democrats. It took me into all kinds of nooks and crannies of Illinois that I'd never heard of before. I ran 5th out of 236 candidates statewide.

Mr. Pollak: Well, that must have given you a lift!

Judge Mikva: It was very exciting. Adlai ran first, the Speaker, Jack Touhy ran second. Anthony Scariano, who was my seatmate and roommate, ran third or fourth, and I ran right behind him. I remember when Tony called me up the day after election after all the votes had been counted, and laughed and said, "You know why you didn't do any better than I did?" I said, "No," and he said, "Because your name ends in a vowel," which was always his way of talking about people who are Italian. And that session of the legislature was very exciting. That was when I was Chairman of the House Judiciary Committee and had a lot of influence on what got

passed and what didn't. We had a Democratic Governor and a Democratic House of Representatives, and it was an exciting time. Plus the fact that I had been assured by Daley and by O'Hara that in 1966 I could run for Congress and be the anointed candidate.

Mr. Pollak: Is there a piece or pieces of legislation in that 1964 session that you consider a significant product of your work?

Judge Mikva: I think that was the year we passed a new mental health code into law which was a very aggressive set of standards that protected both civil liberties and aspects of mental patients that had never been protected before. I also think that was the year that we passed a new criminal code, I'm not sure.

Mr. Pollak: But while you were on the Judiciary, there was a new criminal code?

Judge Mikva: Yes, yes, and there were other pieces of legislation. One that I was proudest of -- I think that was also in the 1964 session -- was the establishment of the first state intern program in the legislature. That was very hard to do because the old time legislators did not like the idea of these young political science students running around Springfield. I know one of them said, "You let these people come down here and pay them to come down here, and learn what we know, they'll run against us." The current Governor of Illinois was one of the first interns that came down there, and sure enough he did run against an incumbent legislator and beat him.

Mr. Pollak: Who was that?

Judge Mikva: Jim Edgar. All the fears of the old time pols came to pass.

Mr. Pollak: Had you, through '68, did you experience much appellate litigation in which you were arguing in the case?

Judge Mikva: Quite a bit. I actually had, oh four or five, well, I only had, I think, two arguments, two or three arguments in the U.S. Supreme Court. I had five or six matters in which I'd worked on the briefs and was seeking certiorari or opposing certiorari and I'd done a lot of appeals work in the Court of Appeals in Chicago, in the Seventh Circuit. I had never argued any cases in the D.C. Court of Appeals. I was involved in a brief on one, but I did not argue the case. The other lawyers in the firm did.

Mr. Pollak: Is that true all the way to '79?

Judge Mikva: Yes. I never did argue a case in the United States Court of Appeals for the D.C. Circuit. I was a lawyer of record on the briefs in a couple or three cases, but I never stood up and said, "May it please the court," in the D.C. Circuit. Perhaps my most notorious case that I argued was Times Film v. City of Chicago, in which I set back free speech in movie cases at least twenty-five years. I lost that case, 5 to 4, in the Supreme Court. We had planned the argument very carefully.

Mr. Pollak: We, being who?

Judge Mikva: My co-counsel and my partner. It was probably in the 1950s, late 50s. Dave Feller, who was then partner in the Washington firm, was prepping me for the argument. We analyzed the Justices and their views in previous cases, and we decided that the key to my case was Frankfurter. We had to get Justice Frankfurter. So I designed our argument – Feller kept reminding me to keep it short – like a picture frame in *Vogue*. I had forgotten or didn't know that Chief Justice Warren did not read the briefs before argument or he didn't read them very well. I got up and I was representing a motion picture company, I don't remember the name of the film anymore. It was an art film. It wasn't that bad. I did represent some racy films later

on, but this one wasn't that bad a film, but Chief Justice Warren got on this question did I really think that dirty movies should come under the First Amendment. I spent the whole thirty minutes answering his questions and nobody else's. Black may have thrown in a question but it was a friendly question, and I spent the whole thirty minutes jousting with Chief Warren. When I walked out my partner said, "You idiot, you blew that one." I said, "What do you mean?" He said, "You had Warren, you're going to get Warren," he said, "you didn't say one word to Frankfurter." I said, "But, Warren was so hostile and so angry." He said, "Ah come on, you got Warren." And sure enough, it ended five to four and Warren wrote the dissenting opinion. I didn't get Frankfurter. The Chicago movie censorship law was upheld again. It wasn't until some years later that it was finally struck down.

Mr. Pollak: And what do you conclude from that experience in terms of appellate advocacy and judging?

Judge Mikva: I know judges are very uncomfortable about the fact that lawyers sit down and get these elaborate briefings on who the judges are and plan their strategy on who is on the panel and so on; judges like to think of themselves as being completely value neutral and that they are fungible with each other as far as deciding cases, especially on the intermediate courts. But it is not true. I think that a good appellate lawyer should know his panel as much as he or she can and pitch the argument to the judges that can make a difference in the way their case comes out. This always came up with how lawyers handle the questions of judges. So many lawyers are so anxious to make their argument, make their speech, they get impatient with the judge's questioning, just as I got impatient with Chief Justice Warren's questioning. But if a lawyer thinks, as he should, that the oral argument is the opportunity to satisfy a judge who has

questions about his or her side of the case, then the questions ought to be a golden opportunity, not an interference. I remember seeing lawyers put their finger in the place where they were in their oral argument before some rude judge interrupted them. I remember once admonishing a lawyer not to interrupt the judge and the lawyer said, "But, but he interrupted me." I always said that if I were ever supremely confident of my brief and supremely confident in my skills as an oral advocate, that the perfect oral argument would be for the lawyer to get up and say, "Your honors, it is all in the brief; are there any questions?" I never had that much confidence in my brief or in my advocacy skills, but that really ought to be what appellate lawyers are looking for. What are the things that are bothering this judge, that are keeping the judge from going out to the conference room and voting my way? The way to find that out is to find out what the questions are and satisfy the judge on those questions. Unfortunately, most lawyers don't.

Mr. Pollak: Did you ever experience a lawyer doing anything close to that?

Judge Mikva: Edward Bennett Williams

Mr. Pollak: He did. What did he do?

Judge Mikva: He was always thought of as a great trial lawyer, but I didn't realize what a marvelous appellate lawyer he was until the first time he appeared before my court. His argument was good. The minute a judge would lean forward and question him, he would just stop and stand back and encourage the question. He wanted to know what was bothering you. It is hard to realize, considering what a brilliant trial advocate he was; but he was the best appellate lawyer I heard.

Mr. Pollak: Is that right?

Judge Mikva: He had a great sense of what makes the decisional process work. And I

suppose that's what made him a good trial lawyer too, because he understood how judges and juries made up their minds, just as he understood how appellate judges make up their mind. I recall at least in one of the mine worker cases, if I can get personal, you were pretty good about showing restraint. Don't you represent the trustees?

Mr. Pollak: Yeah, I do. I have for a long, long time. Yes.

Judge Mikva: I was very impressed with the fact that you were willing to let the judges expound their questions. I hope you won that case.

Mr. Pollak: I did.

Judge Mikva: Good.

Mr. Pollak: I share your view that far from an intrusion, the questions are the golden opportunities.

Judge Mikva: But lawyers get so ... uptight. I never wrote out my oral arguments; I learned early on, I forget whether it was Goldberg or Feller whoever told me, "Don't write out an argument; make an outline and put down the things in the key cases. Don't write it out." We have a rule in the Court of Appeals in D.C. that prohibits the reading of arguments. I am amazed at the number of lawyers who, notwithstanding that rule and notwithstanding what a bad practice it is, literally get up there and start reading their arguments.

Mr. Pollak: But it was my observation that Erwin Griswold would read his arguments.

Judge Mikva: It could be. I don't think Erwin ever argued--oh, he must have argued. . ..

Mr. Pollak: I considered him a good advocate.

Judge Mikva: But I don't recall what his advocacy was like. I still consider oral advocacy the crème de la crème.

Mr. Pollak: So do I, so do I.

Judge Mikva: Yes. . . .

Mr. Pollak: It's sport. It's a great sport.

Judge Mikva: It can make a difference. The old adage about you don't win a case on oral argument. That may be true, but you sure can lose it.

Mr. Pollak: Well, you lost in 1966. What did you do from 1966-1968?

Judge Mikva: Practiced law and got ready for 1968. I was bound and determined to run again. I had lost and had lost to this 82-year-old man, who I remember on election night, when the press went to see him and said, "Barrett, how do you feel?" He said, "I feel the way I felt when I climbed San Juan Hill with Teddy Roosevelt." And he had climbed San Juan Hill with Teddy Roosevelt. And, so my competitive spirit had been challenged by losing to him and losing in a very hard-fought race. Also, I missed public life. I missed being in the legislature; I missed the excitement of the effect of decisions on the public issues. Private practice wasn't that interesting, no matter how many good cases I was getting involved in. It is true in that period 1966-68 I did attract some new business. I did get involved with some new clients and I was doing more work for *Playboy* than I'd ever done before. I was devoting something close to full time to practicing law. But then in about the middle of 1967, end of '67, I started to gear up for the '68 race. Since I didn't know what it was going to be like, I had to assume I was going to have a full-scale primary, so I started raising money and started making speeches and started putting together citizens' committees and so on. And because I'd come so close in 1966, Daley decided that he really didn't want to take me on. It wasn't that he didn't want to take me on; he didn't want the organization to lose to me in an all-out fight. They didn't endorse me but they

sort of declared that it would be an open primary, the closest thing to an open primary that the Daley organization would allow. The committeemen were free to do what they wanted, and most of the committeemen supported me. One or two didn't. O'Hara ran again.

Mr. Pollak: He ran again?

Judge Mikva: He ran again. This time I beat him in the primary. Again, it was a very painful race. I learned what an important factor age is in a political race, but how delicately it has to be handled. If you criticize your opponent as being too old, you lose a whole bloc of voters who are that age or older or younger. The group that I had to worry about the most were the 50 to 60 year olds because if they thought I was running against O'Hara because of his age (which really was part of the reason I was running) they would feel trapped because they were already looking over their shoulder; is somebody trying to take my job, is somebody trying to push me out? The 70-year-olds were all on my side because they know how old 70 is, and they don't understand why this 82-year-old was trying to do a young person's work. But it's a very delicate issue. It came up in so many complicated ways.

By the time Congressman O'Hara was 84, he was having trouble with his locomotion. He was not quite as mobile as he had been. My trick was to get him into the district as often as possible. Before I had run against him, he hadn't appeared in the district very often. It was a safe democratic district. With no primary fights, why come back? But I was trying to get him to come back to the district as often as possible and get as many debates as possible. We had one very high-profile debate that was covered by television and so on. Barrett couldn't refuse to come, it was so high a profile. And as he walked onto the stage to be introduced, he literally couldn't lift his feet. He shuffled and he was smiling and waving. He had been a very engaging

politician in his prime. He was looking out at the audience and not looking at his feet; and I knew that if I didn't do something, he would stumble and fall over the television cable. But if I jumped up and helped him, it would look like a real hot-dog trick. It was a few seconds that I saw him going towards this disaster -- I didn't know what to do. Finally, in what I hoped was a stage whisper, I said, "Watch it, Barrett." At the last second he saw the cables and he lifted his foot over the cables. But those were the kinds of dilemmas that I ran into frequently.

Mr. Pollak: You and he were somewhat colleagues before these races. What happened to that relationship?

Judge Mikva: It was strained though when it was over. I think the part that I felt the worst about, though I defend having done it and would do it again, is that shortly after he lost to me, in late '68 or early '69, he became terminally ill and died. Clearly, being in Congress was one of the things that had kept him alive. I don't think that's the way public office ought to be used, but it pained me that I was the instrument that terminated him. I remember going to see him in the hospital after I was elected when he was near death. He was giving me some advice on how I should vote on things. We sort of repaired the damage. But it was not easy. The only issue that separated us at all was the war, and even there it wasn't that he was a hawk as much as it was that he was a Johnson loyalist.

Mr. Pollak: But it was as tough time in politics. It was Hubert Humphrey's race and . . .

Judge Mikva: That was the last convention I attended -- the 1968 Democratic Convention. I was there. I don't think I was a delegate, but I think I was on George McGovern's staff as a matter of fact. I was working for McGovern who was trying to get the nomination and the convention was so painful. The combination of the riots outside and the turmoil inside and

the fact that the Democrats were about to end their long dynasty in the White House just was very sad.

Mr. Pollak: Did you observe the riots?

Judge Mikva: Yes, I did. I, in fact, was a lawyer for several of the people who were arrested in that thing. It was a very, very painful time. I worried about one of my daughters who was working as a volunteer in one of the offices downtown that she might get caught up in it, but she didn't. It was an awful period, which is why it makes this 1996 Convention that I'm looking forward to attending kind of interesting to see if we've finally learned how to handle the Democratic Conventions in Chicago.

Mr. Pollak: Did you move to Washington in '68?

Judge Mikva: In '69. I did after the '68 election which I won, even though Humphrey lost. It was not a good Democratic year. My district was such a solid Democratic district that once the primary was over, it was a foregone conclusion that I would win. Zoe and I started looking for a place in November, and we bought this house in McLean, Virginia, which was our first time ever to live in the suburbs, as opposed to the big city. And the reason was that we had all our children in school. We couldn't afford private schools, and we were discouraged by what we heard about the public schools in Washington. We couldn't afford Montgomery County and Fairfax County seemed to be a great compromise that was available to us. It was a great success for my wife and me. We both enjoyed the house. It was a lovely house. Our kids never did get over the culture shock of moving from the south side of Chicago to Northern Virginia.

Mr. Pollak: I bet. What were their ages when you moved out?

Judge Mikva: Mary was, it was '68, Mary was 15 or 16. Laurie was 14. Rachel was 8.

Mary was just starting her junior year in high school or she was just finishing her junior year. That's right -- she came back for her senior year. The family didn't move until June of '69 because Zoe was teaching and the kids were all in school. It was interesting. I was in McLean for nine months until school ended and then they all came to Washington.

Mr. Pollak: So, you commenced your federal congressional career and you served a couple of terms and then were redistricted?

Judge Mikva: I served in 1968 and was reelected in '70 without any difficulty at all.

Mr. Pollak: Thursday, June 20, 1996, and this is the second side on that day, go ahead Judge.

Judge Mikva: There was a bill on strip mining, which Udall finally brought out of his committee; he was managing it on the floor. It was a carefully crafted compromise of the arguments between the states righters and federal power. I use this in my teaching when I teach a class on legislative process. This one congressman from West Virginia, a big strip mining state, got up and said, "Now will the gentleman from Arizona, Mr. Udall, assure us that this law protects state sovereignty and makes sure that the states continue to manage their own land resources?" Udall said, "The gentleman is absolutely correct; this law very carefully protects state sovereignty and makes sure the states continue to run their own land." And then, later on, an environmentalist congressman got up and said, "Now will the gentleman from Arizona assure us that this bill once and for all establishes federal control over the strip mining disgrace and says that the federal government can once and for all get in there and make sure that this land is not left in a ravaged state?" And, Mr. Udall got up and said, "The gentlemen is absolutely correct. This bill once and for all sets federal standards and says the federal government can resolve this

problem." Then Udall came out to the classroom for a drink of water and one of his colleagues said, "You know, Mo, they both can't be right." Mo looked and said, "The gentleman is absolutely correct."

Mr. Pollak: Is there more to say about these legislative years in Springfield? Did they form the Ab Mikva who came on to the D.C. Circuit in 1979?

Judge Mikva: I think they had an awful lot to do with forming my views as a judge. It was an exciting place. It was a time and a place where you could have a real hands-on effect. The House of Representatives had 177 members which is relatively large, but, of that 177, a large number of them really didn't care about the legislative process. Many of them from the Cook County area were -- they were working their way up the political ladder and this was just one of the steps, a way station in the road. They couldn't care less about what went on. Others were farmers and merchants and so on who were elected out of their local areas and didn't really understand the parliamentary procedures or the legislative procedures. If you were a lawyer and you were enthusiastic about the process, you could just get a lot done even though you weren't part of the establishment. One of my close friends at the time was Paul Simon, later on United States Senator. He and I were roommates. Alan Dixon was one of the reformers in the legislature when I came down there. Dan Rostenkowski was down there. But Rostenkowski's view and Simon's view about the legislative process were vastly different. Rosty was concerned that Springfield was a place you went to first so that you could rise higher on the political ladder. Simon loved the legislative process. He was a great and effective legislator. I was able to get an incredible amount done, notwithstanding the fact that I was not beloved by my party and was considered a liberal even then by the Republicans, and yet there is a lot of legislation that has my

name on it. And I am sure that it impacted the views I have on legislative history and legislative intent and the legislative process generally. I think higher of it. I really do think that the legislative branch necessarily is the first among equals, and I'm sure that all that influenced my views as a judge.

Mr. Pollak: Did your legislative interest tend mostly in the Judiciary Committee jurisdictional area?

Judge Mikva: Yes, but the Judiciary Committee in the state legislature had a very broad jurisdiction. We covered everything that had to do with the law. Frequently, because the Judiciary Committee had lawyers on it and usually people who cared about the process, whenever it was a hard problem, the Judiciary Committee would end up with it. So it wasn't just crime and punishment cases and laws. It wasn't just laws affecting the judicial branch. It was anything having to do with the law. We handled workmen's compensation law revisions for example. We handled the mental health code. Anything that had to do with the law or that the Speaker would think was something that the Judiciary Committee would handle better than some of the other committees, he would send it. I had a very good relationship with the Speaker. In Illinois the Speaker designates the committee chairmen. It is not a matter of seniority or voting by the caucus. The Speaker does the appointing. I had a good relationship with the then-Speaker of the House. He and I had gotten to be friends and even though he was a Daley loyalist, he stood up to the Mayor and designated me as head of the Judiciary Committee. He told me that Daley was very irritated at him about doing that. Not even because Daley disliked me personally, but because to Daley this was rewarding the ingrates in the party. Daley supposedly said to the Speaker, "When you give Mikva and people like that committee chairmanships, you just make it

hard to discipline the troops." Then they say, "What's the point of following or showing party loyalty, you don't get rewarded for it and you reward the ingrates." Touhy's answer was, "Well, I need somebody who I can rely on to get the work out." So, it was an exciting time.

Mr. Pollak: What was the name of the Speaker?

Judge Mikva: Jack Touhy.

Mr. Pollak: Did you have constructive relationships with the opposite party?

Judge Mikva: Yes. In fact, much of the time I had better relationships with the opposite party than I did with my own party. I was considered a maverick by my own party and as far as Daley was concerned, my biggest crime was I had gotten into politics the wrong way. I had run against the party organization and the wages of that kind of attitude should be death, not promotion or success; so I would frequently have trouble with my own party. I would form alliances with the Republicans – usually on issues that had to do with reform and legal matters rather than the issues that divide liberals and conservatives. There was a group of legislators who were known as the "West Side Bloc." These were Democrats and Republicans who came out of the west side of Chicago who were suspect in terms of their mob ties and suspect in terms of their attitudes on various "law and order" activities. We developed a play on that term for our own group. We called ours the "Best Side Bloc." It was a group of Republicans and a few Democrats – Paul Simon and a man by the name of Tony Scariano, who is now an appellate court judge out of Chicago; Paul Simon's wife was a member of the legislature, Jean Hurley; Bob Mann, Bob Marks, Bernard Peskin. We would make alliances with Republicans basically on reform issues; and so we could lure conservative Republicans into our alliance because we weren't dealing with issues of: should the government do it or shouldn't it? It was, if the

government is going to do it, shouldn't it be done efficiently and honestly? It, as I say, it was a very exciting time and we got a lot done.

Mr. Pollak: Is there anything to note for the record on your practice during the years from '57 to '68 when you were serving in the House of Representatives in Illinois?

Judge Mikva: No. There was one zoning dispute that I was handling that, believe it or not, went on during almost that entire period of time. It was a very important matter involving an important building on the near north side of Chicago. Some of the competition was trying to keep my client from building his building. The case went up to the Court of Appeals several times. The Supreme Court denied the petition for certiorari which was filed by my opponent. During that entire period, it sort of sat as a lump in the back of my head as something I had to keep working on and keep getting done, and yet the legislature kept taking more and more time and then running for Congress kept taking more and more time. It was very difficult to balance that.

Mr. Pollak: Do you recall the name of the case?

Judge Mikva: Aaron Weiner was the name of our client; I think his name was is in the title, Weiner v. 22 East Chestnut Street Corporation. We ultimately won. Ultimately our client even won a malicious prosecution award in the courts. But it took a long long time, and I had worthy opponents as lawyers; what is now Jenner & Block were the lawyers on the other side. We fought hammer and tong all the way through the courts of Illinois and the courts of the country trying to resolve this basic ordinance dispute.

Mr. Pollak: In this period, Arthur Goldberg left your firm in '61 to become Secretary of Labor. Did that make a difference?

Judge Mikva: We broke up the formal tie with the Washington office. The office here had been Goldberg, Feller & Bredhoff. The firm in Chicago had been various things but at one time, the latest time, it was Goldberg, Devoe, Shadur & Mikva. When Goldberg left the firm to become Secretary of Labor, we severed our formal ties with the Washington office. The Chicago firm went its way and the Washington office went its way. It created some nervousness – on behalf of both shops -- mostly because we relied on Goldberg as being the linchpin that would hold us all together, but both firms went on to do very well. Our practice changed considerably in Chicago because we no longer represented the national unions the way we had as far as the two-city firm. We did do more real estate work. We started representing *Playboy*, which became a very substantial client of our firm in Chicago and an enjoyable client because it got us involved in all kinds of First Amendment work, censorship work, libel actions. It was an exciting client to have.

Mr. Pollak: Would you describe those years up to the time you ran for the United States Congress as – differ with me please if this isn't right – the years in which you devoted yourself to practice in your firm, to the legislature in Springfield and to your family?

Judge Mikva: Yes, that was it. I suspect that from time to time I neglected each and every one of those responsibilities and objectives. A couple of years ago, we were sitting on the beach in the Dunes. We still have a house out there in the Michigan Dunes across the lake from Chicago and, while it is not the same house, it uses the same beach that we used when the kids were small. We were watching our grandchildren gambol on the beach doing the same things that their mothers had done when they were their age; and I said to my wife, of 48 years standing, I said, "You know I really regret that I missed those years when our kids were doing all this and I

didn't have the time to spend watching them and enjoying them." She glared at me and she said, "How dare you. Our daughters have turned out so well; what makes you think they would have turned out that well if you had been around."

Mr. Pollak: Did you have any teaching during this period?

Judge Mikva: Not really. I occasionally would come in as a guest lecturer at the University of Chicago, mostly in college. My first teaching job was after I went to Congress.

Mr. Pollak: I see. Where was that?

Judge Mikva: Georgetown.

Mr. Pollak: I see, how did that come about?

Judge Mikva: I forget who was dean. It was before Judy Areen was dean.

Mr. Pollak: Bob Pitofsky.

Judge Mikva: No.

Mr. Pollak: Adrian Fisher?

Judge Mikva It must have been Pitofsky. I guess it was Pitofsky. I think it was my second term in Congress. I saw either Bob or one of the law school faculty members. They said, "You know, it is so convenient, you ought to come over and teach a course in the legislative process." The thought appealed to me, and I did do it, and I enjoyed it thoroughly. I think that was while I was still in Congress. I'm sure it was while I was in Congress. And I did do it again when I was on the Court, but the first time was while I was in Congress, and I enjoyed it thoroughly. Then the next time I did any serious teaching was in 1972 when I lost my seat and went back to Chicago. I taught a course in the legislative process at Northwestern Law School for two years.

Mr. Pollak: Let me ask you whether, in still sort of stopping it off before your congressional race, whether you ever had any activities with the Bar, the organized Bar.

Judge Mikva: Yes, I was very active in the Chicago Bar Association. I was on the Board of Managers, which is the governing body of the Board and at that time, the Board of Managers was also a disciplinary body for the Illinois Bar. We operated under the Supreme Court of the state. The disciplinary cases involving lawyers went from us directly to the Supreme Court. The Board of Managers was the next step, or it was the last step, before you went to the Court itself. It had to do with disbarment or suspensions and so on. And that is where I developed those views of feeling very strongly about the need for lawyers' ethics being higher than some marketplace standard. Lawyers dealt so intimately and in such important areas of peoples' lives that you just couldn't afford to tolerate people whose ethics were shoddy or were careless in the way they handled their affairs. It also colored my views, which came up in several cases later on, that it was one thing to discipline lawyers for dishonesty or lack of ethics; it was another for disciplining lawyers who were getting overly zealous. While obviously there had to be some restraints in that the judge had to retain control of the courtroom, that a lot of slack had to be cut for the lawyer to make sure that we didn't interfere with the warm zeal that a lawyer owes his client. I remember how many times I had judges lecture me while I was practicing law, lecture me or yell at me, "You're getting very close to contempt." Because when you get involved in a hot case and the canons of ethics require us to be warm, the line gets very thin between warm zeal and contumacious conduct. I think the judges, good judges, shouldn't be overbearing. The disciplinary body should look long and hard before they allow discipline to stand against a lawyer who was overly protective of his clients.

Mr. Pollak: Did you consider getting into the Kennedy Administration?

Judge Mikva: Oh, I thought about it a little bit. I was enjoying the legislature and I was enjoying the practice a little more. I remember in 1960 Newt Minow had been practicing law in Chicago with Adlai Stevenson, and I was practicing with Arthur Goldberg. Newt and I were boyhood friends; we had grown up together in Milwaukee, and we remained friends and clerked together. Our families were friends. The announcement came that Goldberg was going to become Secretary of Labor and that Stevenson was going to become UN Ambassador. William McCormick Blair, who had been one of the partners in Newt's firm, was also going off to the Kennedy Administration; so Newt and I had lunch and we teasingly talked about starting a law firm called the Remnants firm – the people that were left after Kennedy had raided our firms. The next day I read in the newspaper that Newt had been appointed Chairman of the Federal Communications Commission, so Kennedy's raid continued. Arthur Goldberg offered me a spot in the Labor Department and I toyed with it some, but, again, I was having fun doing what I was doing and I really didn't want to give up my elected political career. I was enjoying the legislature immensely.

Mr. Pollak: Even then did you have plans or hopes that it would go beyond Springfield?

Judge Mikva: Yes, I was already starting to think seriously about Congress. The incumbent congressman in our district was, in 1960, probably already 78 years old.

Mr. Pollak: Who was that?

Judge Mikva: Barrett O'Hara. And he had told me that I was his protégé, and I would be his successor; and I thought well, he'll want one more term, then I can do my turn. Since, by that time, I had gotten pretty well known in the district, I had a good base; I knew I probably would

have to fight for the nomination against the organization. Fighting against a non-incumbent, I thought I could win a primary fight; and it seemed like the logical next step. So I really wasn't interested in going to an appointed position. In '62, when the '62 election came up, I remember seeing Barrett O'Hara at a banquet and he told me he was going to run again in '62 but that this would be his last run and I could be his successor. I said I would like to be, Barrett, I'd be very honored. 1962 came and passed and then '63. Primary elections then were very early in the year, and so you had to start planning early on for the primary. So in about the middle of '63, I started thinking seriously about running and I went to see Barrett O'Hara in Washington. He told me well, he was going to run one more time in '64 and that was going to be his last term. I began to realize that the only way I could get that seat would be to run against him, which I didn't relish doing. But I was thinking about it and actually was beginning to make some plans to do it when President Kennedy was assassinated. There really was no connection between the assassination and my plans except that it just sort of put a pall on everything, put everything on hold. I just sort of dropped it for that time and decided well, I'll wait one more time; and in '66 I'm definitely going to run against him if he doesn't retire. Then when I told him I wasn't going to run in '64, he said, "Oh good, because this is my last term, I'd much rather give you, my successor, a peaceful transfer of the office rather than having to fight you." 1966 came, and guess what, he wanted one more term. So I did end up running against him and losing.

Mr. Pollak: You did run?

Judge Mikva: Oh yes, and in '66 it was a hard-fought primary fight. I came very close. I lost by something under 2,000 votes. It was a very uncomfortable political fight because O'Hara and I agreed on most issues. He had been one of the early opponents of the House Un-American

Activities Committee. He had stands on civil rights and civil liberties that were always solid. The war was beginning to heat up a little bit in '66 and he was a hawk on the war. He was supporting Johnson, and I was already opposing the war but that wasn't that much of an issue in '66. It was an issue but not overwhelming. And, I lost. It divided families and households in Hyde Park and the south side of Chicago where they'd have my placard and my picture in one window and Barrett O'Hara's placard and his picture in another window, because the husband was for me and the wife was for O'Hara.