INTERVIEW NO. 5

This is the fifth 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 Wednesday, October 2, 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: Ab, when we last met on July 16, 1996, you had been speaking about your time in the Congress, some teaching experiences. I wondered whether, during the time in the Congress, you ever became involved in any battles over confirmation or proceedings over confirmation of nominees by the President for the federal bench.

Judge Mikva: The only one I was peripherally involved in was the nomination that President Nixon had made of Richard Poff who had been a colleague of mine in Congress, a Republican, a southern Virginia Republican. Congressman Andy Jacobs and I decided that we would go over and testify in favor of Congressman Poff because he was catching some grief from the liberals on the Senate Judiciary Committee. While Congressman Poff was very conservative, he was fair; and we thought he would be a rather enlightened voice on the Supreme Court. We didn't expect to get another William Brennan from Richard Nixon anyway. So we were all set to go over, but shortly before we were supposed to testify – I remember where I had already jotted out at least in my mind my testimony for him, my statement for him – he withdrew for personal reasons. And that, I think, is the only time I was involved in any kind of confirmation problems in the Senate, until I ran into my own.

Mr. Pollak: Just a couple of other questions about that era. Were you in the Congress at the times of the assassinations of Kennedy, either Kennedy, John or Robert, and Dr. King?

Judge Mikva: No, I had just been nominated to the Congress for the first time in 1968

when Dr. King and Robert Kennedy were assassinated. I was not there for any of them, and I was not there when President Kennedy was assassinated.

Mr. Pollak: Did such events mark you in any way in your face to public service or to the issues that you faced in the Congress or would face as a judge?

Judge Mikva: Well, they were cataclysmic events. I really felt that in one sense some of our very best political talents, and I include Dr. King in that, were killed off very prematurely and at a time when we desperately needed them and that this accounted for some of the malaise that I think the country went through in the '70s, where we just could not find our way. I don't know what kind of country we would have been if Robert Kennedy had survived. I don't know what kind of a country we would have had if Dr. King had survived. They were important characters, and it's hard to say that history ever turns on one person; but they were such key players in our society and our country and their deaths were so traumatic, that I think the course of our history was changed very dramatically by those two bullets.

Mr. Pollak: Did you in your teaching experience or in your own family or in relation to your children find that these events changed or affected the outlook of the young people?

Judge Mikva: It immediately affected my children because we were then living in Hyde Park. At Dr. King's death, it was obvious that the town was going to go up in smoke in the riots that followed his assassination. I remember racing home from the office; it seems to me it was on a Thursday but I'm not sure, but racing home from the office and picking up my eldest daughter Mary who was then in Kenwood High School on the Southside of Chicago and insisting that we get out of Chicago and go to our summer place, where I thought we would be physically safer. She was very upset because she said that she was finding her experience with her Black

colleagues in high school very moving and that they were all tearfully holding each other and crying about the assassination, which was, indeed, a very moving set of events. But that wasn't the way it played out in most of the neighborhoods of Chicago or in our own neighborhood. Hyde Park itself was spared. Woodlawn was trashed and South Shore was trashed. It was a pretty awful time for Chicago, as it was for most other big cities in the country at the time.

Mr. Pollak: Who were your major mentors and models in the United States Congress, and who would you say from that era had the most lasting influence or what kind of influence on your later service?

Judge Mikva: The people in the Congress when I got here who were fairly major role models for me were, in the House, people like Congressman Robert Kastenmeyer, who was there for many, many years; Congressman Don Fraser who later became Mayor of Minneapolis; Congressman Ben Rosenthal from New York, who passed away; Congressman Phil Burton from California; Congressman Don Edwards from California. We all were in a very little group that called ourselves "The Group" and we were social friends as well as political allies. These were all people who had been there for some years and were approximately contemporaries of mine age-wise, but they all had a little more experience in the Congress than I had. It was very easy to be able to identify with them. Whenever I came on the floor, the first name I would look for in the roll-call to see which way he was voting if it was an issue that I wasn't familiar with was Congressman Kastenmeyer because he represented a district in Wisconsin, the Madison area, and his interests were very similar to mine. He would be the first belle wethers that I would look for – to see how he was voting. It was a clue as to how I should vote. In the Senate, the person that I then admired and continue to admire as the most effective senator far and away was Senator Ted

Kennedy. It was incredible and it remains incredible that if you really want to get something done in the United States, if you are a Democrat, if you're a liberal, Senator Kennedy is the person who is most likely to get it done. He has a staff, the tenacity, the pizazz, the stature; and it was that way back in 1968 just as it is today in 1996. He has worn very well. I know he gets a lot of criticism for some of the things he has done and some of the things he doesn't do, but I consider him far and away the most effective Senator of our time.

Mr. Pollak: Ab, you commented that as you went to the floor you looked to Kastenmeyer if the issue up wasn't one that you hadn't spent time on or hadn't been involved with. Is that a marked distinction from service as a judge? In other words, are there issues in the Congress where you take the lead of someone else because you can't get deeply enough in them to make fully your own judgments?

Judge Mikva: Oh, absolutely. There are perhaps over a thousand roll calls or more in any congressional year, and there is no way you can keep yourself informed. It would be like having to hear a thousand cases in a year. There is no way you can possibly be fully informed on all of them, particularly since some of the issues are as complex and maybe even more complex than a particular case would be on appeal. You get involved in some of those recodifications or environmental issues – the bill can be six or seven inches thick and have hundreds of provisions. It's much more complicated than some of the most complex cases that we handle on appeal. If it isn't one that comes before your committee and if it isn't one that you've been personally involved in, you'd have to follow the leader or you're going to have to, well, you might as well flip a coin. The process that I used and that I think most members evolved into is that I would have one of my assistants take responsibility for every piece of legislation that was coming on the floor. He

or she would try to get as familiar with it as they could. Each morning we would have a staff meeting, and they would go over with me the things that were coming up that day on the floor. I had three separate "idiot cards" as I called them: One was my schedule card, which told me to be at such and such a place at such and such a time. The second one was my voting card. They were color-coded so my voting card as I remember was orange, which was to remind me of how the staff and I had tentatively agreed that I was going to vote on a particular issue when it came up. The third card, color-coded yellow, recorded the things that I was going to try to do legislatively that day; to sit down and talk to one of the co-sponsors of one of my bills or somebody who was doing a similar bill and see if I could get them to take an amendment or something like that. The orange cards, the voting cards, always had to be very tentative because you never knew what amendments would come up. We could sit and talk in the morning about a bill in its pristine form and lo' and behold amendments would be offered changing it completely during the course of the debate. Plus the fact that things would happen during the debate, forces would change, alliances would change. It was interesting, on the orange card, in addition to giving me the way I had tentatively decided I was going to vote, I would list in shorthand phrases the proponents and the opponents, "AFL-CIO-Against," the "Chamber of Commerce-For," "National League of Cities-For," and so on, to give me some idea of who the players were on a bill coming up. But with all that, you'd come on the floor, you've been in Committee or wherever you'd been, and all of a sudden the bells ring and you rush on the floor and there is somebody standing at the door saying vote "Aye," and somebody is standing at the door saying vote "No," and you needed to have somebody that you can look to that you think would give you not only an objective view, but something that would be comparable to yours. I found that

looking for bellwethers was the way to do it. There's an interesting anecdote involving Barney Frank who has a mischievous sense of humor. There was a Member of the Massachusetts delegation who always had trouble making up her mind as to how she would vote. She would come rushing on the floor and she'd be holding her voting card, looking up at the Massachusetts delegation seeing how they were voting, making sure she wasn't too far out of step with everyone else. Whenever Barney would see her come up, he would deliberately flip his vote the other way than he was really voting; and frequently he was the only person voting that way from Massachusetts and sometimes the whole country. This would upset her very much. She'd come over to people and say, "Why do you suppose Barney is voting that way?" Of course, just before the vote closed, he would flip back to the way he intended to vote.

Mr. Pollak: Ab, what was the role of women in the Congress during your service?

Judge Mikva: Well, they played a key role. Some of them were very senior members of the committees. I don't think any of them had a committee chairmanship, a full committee chairmanship; but Martha Griffiths on Ways and Means was a very senior member and played a very important role on the committee. It's just that there weren't as many as of them and they didn't particularly take on women's issues. The country was at a stage, unfortunately, where we really were not very conscious of women's issues. We were late to really face up to the gender discrimination that plagued our country for so much of our history. So there were fewer of them. They were not leaders in the kinds of issues that came about. Women like Pat Schroeder, Bella Abzug, and some of the others came to Congress later.

Mr. Pollak: When you campaigned, were you conscious at all of reaching out for the women's vote or was that not a perception of candidates, of you as a candidate, or others that

were in your shoes?

Judge Mikva: I don't think that really came up. I think that the first galvanizing issue on which there was a distinct gender grouping was the Equal Rights Amendment, and that came up in my second or third term. From there on in, it became a defining issue. Clearly, if you were supporting it, you were supporting its extension and so on, the extension of the period to vote to ratify it, it was a measure of how the district would vote for you. Since I was a supporter of it, I think I did get a lot of help from women who otherwise may not have been inclined to vote for me.

Mr. Pollak: You mark that as a kind of a galvanizing issue for the women's movement.

Judge Mikva: Even though it did not succeed as part of the Constitution, it was the rallying cry for the women's organizations in this country, and it was the measuring stick as I say that separated them in the Congress, as to those who were supportive of equal rights and those who were not.

Mr. Pollak: We're now at a watershed in these interviews, and I want to ask you to introduce and explain how you came to move from the Congress to the federal bench? How did it come to your attention, how did you react to it, what were your feelings, who did you consult, what you want to record?

Judge Mikva: Well one of my great mentors and gurus -- my rabbi, if I can use the New York term -- was David Bazelon. I had known him slightly from Chicago days and gotten to know him better when I was a Member of Congress in Washington and he was already Chief Judge of the U.S. Court of Appeals here. We had maintained a friendship over the years and starting in maybe 1977 or thereabouts, I would start to jog with him. Jogging with David was an

experience. The question was did you walk slowly enough not to get ahead of him. But we would jog around the Kennedy Center, and then he would insist that we have breakfast together. He was always a very fastidious, modest eater. He insisted on plying his guests with all kinds of breakfast dishes, which more than offset whatever calories I had burned up in running with him. But, anyway, we started this routine in perhaps 1977 or so and he kept saying, "Aren't you getting tired of being in Congress? Why don't you come on the Court?" Well, at the time there weren't any vacancies, and it was idle chatter and besides which I wasn't really ready. About that time I really did begin to think about doing something else; I had been on the ballot every two years for over 20 years in Illinois, counting the state legislature and the Congress. The election process, not necessarily the legislative service, but the election process does take its toll. It's like a rubber band – you can snap back just so often and then it doesn't snap back as well. I had worn out several generations of voters in Illinois in those 20 odd years. I remember sitting on the beach with Zoe -- normally we'd take that one last weekend in the fall, usually Labor Day weekend, where we'd go out to our summer place and spend it on the beach and that would be my last weekend until I went back and charged into the fall campaign. We were sitting there and I was thinking about all the things I had to do, money I had to raise, and the campaign schedule I was going to have to keep and I said to Zoe, "This is going to be my last run, 1978." And she said, "Oh you've been saying that for a number of years." I said, "No, I really mean it this time; win or lose, I'm ready to give it up." She said, "What will you do?" I said, "Well, maybe I'll be a judge, or maybe I'll teach." She said, "You won't go back to the practice?" I said, "No, but I really have had enough of elected politics." That spring and summer, Bazelon had been particularly urging me to think about a judgeship because the Congress had just created two new judges for the D.C.

Circuit. He said, "You really ought to think about it." I said, "David, I can't think about anything until after the election, and then we'll talk about it." Well, this '78 election, I won with my usual huge majority of 1200 votes or so, and I came back after the election in December. David and I had lunch or I again jogged with him and he said, "Well, what are you going to do about it?" I said, "Well, I think I'm interested." He said, "Well good, there's this Commission that President Carter's appointing. It's headed up by Joe Tydings, former Senator from Maryland. You know him; you should know him; you should talk to him and find out what the procedures are." So I went back to the office and I called Senator Tydings and he said, "Great, we've got a regular process. I'll send you some papers; fill them out, and I'll ask you to come in and talk to the Nominating Commission." I filled out the papers. I was beginning to get more and more interested, but it still was something off in the distance. Then he called me to tell me that they'd set a date for me to come and talk to the Commission. My visit with the Commission was very interesting. I knew some of the people on it. Dean Griswold was a member of the Commission, and he was very friendly and supportive. But there were two groups that weren't as supportive. One were some D.C. lawyers who were somewhat hostile; as you know, it is still a matter of contention within the District of Columbia Bar as to whether D.C. judgeships should be filled by local people. I was an outsider. I remember one of them said, "Well you know you have been" – both trying to discourage me and influence his fellow commissioners – "you've been away from the law for a long time." I said, "I have?" He said, "Well, you've been in Congress for five terms." I said, "Well, what do you think I've been doing here?" So they were somewhat less than enthusiastic about my candidacy. Then there were a couple of citizens on the Commission who were not lawyers. One of them was this lovely woman from one of the suburbs of

Maryland. She said, "Congressman I've been following your record for many years. I think you have been an outstanding congressman and I don't see why we should waste you on the Court of Appeals. I don't see why you shouldn't stay in Congress." Anyway for all of those complications, the Commission did recommend me. The procedure then was that they gave the President five names for each vacancy; and since there were two vacancies to be filled, they gave a list of 10 names to President Carter. When the list came out, Senator Tydings called and said, "Well, you're in." I said, "Joe, I'm not a modest person, but that's an awfully overwhelming list." There were state Supreme Court justices on there, law school deans and very prominent members of the Bar. He said, "No, you're in because the President is going to look at that list and he is going to see 10 names and only one face." And it is true. Of the 10 names, I was the only one that the President knew. We'd had contact in Congress, we'd campaigned together in '78 and in '76; and sure enough it came to pass. Judge Wald and I were the two people that the President nominated.

Mr. Pollak: Did you have any exchanges of note before the nomination, either with the President or with the White House staff?

Judge Mikva: Shortly before the list went to the President, Tydings called me; he was really a very good counselor of this thing. I don't think he tried to tilt the Commission process, but he clearly was being as friendly and helpful as he could be. He called me and said, "You know," he said, "I think you ought to call the President and tell him that your name is on that list." He said, "If I were President and one of my strong supporters on the Ways and Means Committee was vying for a judgeship, I wouldn't want to read about it; and if I saw his name on the list, I'd like some advance warning of it." I thought about that and that seemed like good

advice, so I called the White House and asked to talk to the President. I was asked what was my business, and I was put through. I said to the President, "I just want you to know that I'm seeking to become a judge on the U.S. Court of Appeals here in Washington; and my name is going to appear on the list that is coming to you with some of the recommended people." He had not really focused on this at all, hadn't even thought about it. He said, "Oh, well I hope you have talked to Senator Stevenson about it because we take a lot of weight from home-state senators." I said, "Mr. President, Senator Stevenson doesn't have anything to say about this. This is one of these appointments that is yours exclusively. I hope he'll vote for me and support me, but it's your call." He said, "Oh really, I guess I didn't know that." Anyway, he said, "Thank you," and shortly thereafter I ended up being one of his nominees.

Mr. Pollak: Were you interviewed at the White House by staff there?

Judge Mikva: No, not until after he had nominated me. He relied very heavily on the Nominating Commission. After I was nominated, then, of course, the Department of Justice came in with all kinds of forms to start the FBI investigative process and so on.

Mr. Pollak: Did you have any communications worth recording in this history in that period with Pat Wald who was to be your colleague in the nomination process?

Judge Mikva: Yes, I had met Pat once before very briefly. I knew of her, of course, and she knew of me, but our paths just hadn't crossed many times. Shortly after we were nominated, she called and said she'd like to come over and chat. I said, "Wonderful." So she came over and I remember her opening remark when she said, "Why do you want to give up all this power to go on the Court?" I laughed and I said, "You sound like one of the members of the Commission." Anyway, we hit it off very well and we remained in close communication during the whole

process. She was having a little bit of trouble on getting confirmed, but nothing like the trouble I was having. . . .

Mr. Pollak: I see, well, why don't you go into that.

Judge Mikva: When it started out, I just assumed that once I was nominated by the President, that was it. Ted Kennedy was Chairman of the Senate Judiciary Committee. The Democrats controlled the Senate substantially. I was a member of the fraternity/sorority. I'd been there, I knew many of the Senators by their first names. We had worked together on many of the issues. I just thought it would be a piece of cake, and, indeed, every time I'd see one of the Senators, I'd be teased. I remember John Culver, who was an old friend from the House days, teased me. He said, "You know, I really need some restoration with my conservative voters." He said, "I think I'll vote against you to show how I really can be objective." I laughed and he laughed. Ted Kennedy called me to congratulate me. He said, "You know it will be pro forma." Actually, it started out that way. Bob Dole, I saw him on an airplane, and he said, "You know the NRA started to get on your case." He said, "That's ridiculous, you can't judge a judicial candidate by one issue coming before him." And others did. I really thought it was going to be easy. Pat, who was not as well known in the Senate, was running into some difficulty mostly on children's issues she'd been involved in and I guess on some of the mental health issues where there was this group of people who felt that we should not try to learn anything more about mental illness than we already know. Treat people like animals, I guess. Anyway, she was running into some difficulty in the beginning, perhaps more than I was. Then mine started to build. At first, the National Rifle Association, apparently after some internal controversy, decided that they were going to make a showcase of my nomination, not really necessarily in

order to beat me, but in order to send a message to all of the other Members of Congress that if you took on the NRA and ever aspired to higher office, you could expect them to be your enemy. They ended up spending over $1 million dollars to try to defeat my nomination. They really turned around the process because it started out like it was practically going to be on the consent calendar; and by the time it was over, I was barely getting out of committee, and the final vote on confirmation was 58 to 31. I remember at one point Senator Thad Cochran, who is still in the Senate, a Republican from Mississippi and an old friend, called me and said, "You know, Ab," – I was at the Dunes – it was during the summer, "right now the vote in the Senate Judiciary Committee is eight to seven in your favor." And he said, "I'm one of the eight. If you think I'm comfortable, being a Mississippi Republican and the deciding vote for you, I'm not. Get off your duff and get some more people supporting you." The final vote, as I recall it in the Senate Judiciary Committee, was nine to six. I didn't get much help. I guess I had never realized how tough the National Rifle Association could be when they really started leaning on some of the people who had rural constituencies, real anti-gun control constituencies. Dole is an example. After telling me how supportive he was – and in the Committee he was; he chewed up the NRA something fierce. But by the time it came out on the floor, he not only voted against me, he spoke against me. Orrin Hatch, who always was and is still a good friend, came to see me and said, "If you need me, I will be there; but I have to tell you that there is just such pressure on me to vote against you, that I really must do so." And he did. Alan Simpson was another old friend who ended up voting no. He still greets me by saying, "It was the worst vote he ever cast." But on the other hand, considering all the times he disagreed with some of my opinions, maybe it wasn't so bad after all.

Mr. Pollak: Were there other issues that fed into the opposition?

Judge Mikva: No. . The NRA tried to put together a coalition. They went to the abortion groups, the anti-abortion groups, who also had strong reason to be opposed to me; but Henry Hyde who was a senior Member in the House told the anti-abortion groups that they were crazy to get involved in that, that I was much more dangerous as a member of the House than I would ever be on the Court and that they should just get out of that and they did. I had some very strong allies in the House: Henry Hyde, Bob Michel, who was then Minority Leader, came to testify for me, Phil Crane came to testify for me. That chilled the NRA's ability to put together a coalition. You cannot underestimate how much that kind of money and the grassroots influence that they had just influenced the state of affairs. They decided that in addition to getting people to vote "no" against me because of my stand on gun issues, gun control, that they would try find some other issues to try to bring up against me. One of them was that they insisted that my appointment violated the Emoluments Clause, which was –

Mr. Pollak: You had voted to increase judiciary salaries?

Judge Mikva: I voted to increase judiciary salaries, not during the term for which I was elected, but in the previous terms, which is true. Their position was it didn't matter what term, as long as you voted it in a previous term, that was enough. I remember they came to, they decided they were going to get some experts to come testify on that. They went to a law professor of Northwestern Law School where my eldest daughter was a student. They had already been turned down by the late Phil Kurland. They offered him $10,000 to come testify, and Phil said he'd think about it. He didn't. They came to this Northwestern professor. They offered him $5,000 to come testify, and he originally said he would. Then his colleagues leaned on him. I

had taught at Northwestern, I had a daughter there, and his colleagues came and said it would just be very inappropriate for a member of the Northwestern faculty to come testify against me. So he finally backed away and announced he wouldn't do it. The NRA people were very irritated because they had already announced his testimony. He saw my daughter walking down the hall one day and said, "Mary, I hope you understand that I decided not to testify because of my high regard for you, I hope you understand." My daughter said, "Sure I do, you're an SOB," and walked away.

Mr. Pollak: What do you recall of your hearing before the Senate Committee? Did you have more than one? Were you probed substantively on your views of issues that might or might not come before your Court?

Judge Mikva: I think the first time that I began to realize that the bloom was fading was when Senator Kennedy called me about April or May and said, "Hey Ab, I think we better put off your hearings until the fall. We just have too much flak, and I think it will be easier in the fall." Well that caused me some concern because I thought that by that time I'd already be a judge. Pat Wald came to see me just about that time, called me, and said that her hearings were scheduled for July or June or something like that and that she was nervous about going in alone; and she somehow thought if we had our confirmation the same day that she would gain strength from my allies, and I would gain strength from hers, and that she was going to ask the Senator to put her hearings off until mine. I said, "Pat, I don't know the Senate processes that well, but my instincts tell me, you are better off going ahead and not getting caught up with my problems, if I bring anything to the table at this point." She was very reluctant. She finally agreed to it then. In retrospect, it probably was good advice I gave her because she did run into flak and she did have

some votes against her but she did get confirmed and, indeed, ended up with seniority on me as a result. She became chief judge before I did. But that was the first sign of trouble.

Then the hearing itself, by that time my friends in the Senate had begun to take it seriously. Kennedy, particularly, Senator Nelson, Gaylord Nelson, Paul Sarbanes, began to realize that this was indeed a nomination in trouble. They started working the bushes and trying to make sure that those votes that hadn't been nailed down against me would support me. The hearing itself was kind of as expected. There were a lot of questions about my position on gun control. Many of the most vigorous opponents didn't show up. Some of my friends didn't show up either because they had decided that it would be better to help me by voting for me rather than giving me help when I didn't need it. The hearing itself, as I said, was pretty much as expected. Senator Biden chaired the hearing, and it was very long. Dole was probably my biggest supporter on the Committee. He kept asking the NRA witnesses if they really thought it made sense to measure a prospective judge on one issue like gun control, all this kind of precedent to set for the future, My daughters, who were all there, were ready to vote for Dole for President right then and there, he was so supportive. But between the time of the hearing and the time of the final vote, later on in September, the NRA had leaned on Senator Dole considerably. He was one of the 31 that voted no.

Mr. Pollak: He was on the Committee?

Judge Mikva: Yes, he was on the Judiciary Committee.

Mr. Pollak: In Committee, how did he vote, he voted against you?

Judge Mikva: No, he voted for me.

Mr. Pollak: He voted for you in Committee. Well every vote that voted for you in

Committee was pretty important.

Judge Mikva: Yes, and I never, you know, I wasn't as upset with him as I was with some others. I guess the one that disturbed me the most was Senator Church. Frank Church and I had been old allies and friends. We fought the Vietnam War efforts together and a lot of other things. He voted against me.

Mr. Pollak: He did, and he had a big NRA constituency?

Judge Mikva: Yes. He was up for re-election. He decided he couldn't win if he voted for me, but he didn't win in any event. It is hard to judge those issues. The problem with single-issue voters is that when it's a close race, as his race was, they can make a difference. My own feeling is that most of the people who supported the NRA didn't vote for him anyway – even though he voted against me. But he lost his re-election effort anyway.

Mr. Pollak: Did the White House help prepare you for your hearing? That is a practice which now occurs.

Judge Mikva: No, there wasn't that much of it then, and besides, I was a member of the Congress, and they probably felt I knew my way around. Bill Cable was part of the legislative liaison team at the time. He was helpful, and they tried to visit all the Senators that were marginal. They would have provided any help I needed, but it wasn't the kind of thorough preparation that now goes on when they prep a judge for the Senate hearings. The other thing I remember is that in the floor debate itself – well there were two things about it, first of all they had trouble getting a time agreement from Senator McClure, the Senator from Idaho. He would not agree to a time agreement. A single senator can block a time agreement. Without a time agreement, Senator Byrd, who was voting against me anyway, who was the Majority Leader,

didn't choose to bring it up. It was in the closing days of session in '79, and he didn't want to lock up the Senate with hours and hours of debate about a judgeship which to him was hardly the most important business of the country. So he told Kennedy that he had to get McClure's agreement. So Kennedy started negotiating, and finally the only way that Kennedy could get an agreement from McClure was if Kennedy would agree to get me and Speaker O'Neill to agree that a bill would pass that would give special standing to any member of Congress to challenge the appointment of any former member of Congress to the Court of Appeals for the District of Columbia Circuit, based on the Emoluments Clause. Now they missed my middle initial, but other than that, it was as close to a bill of attainder as you can imagine. So Kennedy called me and said, "You know, we're going to have to agree to this." He said, "I keep hearing from Justice that legally there is nothing to worry about on the issue, but if we don't do this, we are never going to get Byrd to call your name on the calendar." So I went to Tip O'Neill to tell him the story that this was going to be added to the continuing resolution, that there was going to be a rider with this language. Tip said, "We'll never agree to that." I said, "Tip, if we don't agree, I'll never be a judge." I finally persuaded him that we had to agree to allow it to happen, and that rider went on the continuing resolution and became a part of the post-confirmation problems that I had because two days after I'm confirmed, McClure did indeed file a lawsuit out in Idaho challenging my appointment.

Mr. Pollak: He did? Did it come to a decision?

Judge Mikva: Oh yes. This was all in this little continuing resolution rider, that any Member of Congress could bring it in any District Court within the area that he represented. He could bring it out in Idaho and it would go to a three-judge court, which ended up being a plus

for me, although I don't think he realized it at the time. I was very concerned because I thought that if it went to the District Court, it would be judges that he probably had a hand in nominating. Well, it turned out that the three judges were two District judges, one of them a Roosevelt appointee, one of the older judges, and the second one a Nixon appointee; but the circuit judge that headed up the three-judge court was Betty Fletcher who was on the Ninth Circuit. I did not know Judge Fletcher at the time, but I knew who she was. Anyway, she wrote an opinion that is still used in teaching civil procedure because it has a lot to do with the law of standing. She said that while Congress could create standing on certain kinds of issues, they couldn't create constitutional standing. She wrote that notwithstanding that provision of law, in the rider, there was no standing for an individual to challenge the appointment of a federal judge.

Mr. Pollak: So she didn't reach the merits?

Judge Mikva: She never reached the merits. They filed a petition for cert. and cert. was denied. It was more than a little bit of worry to me because in the middle of everything, the 1980 election occurred and the Department of Justice changed hands; so I no longer had lawyers – my appeal lawyers were, of course, still supporting the case – but the people in charge of making policy at the Department of Justice were no longer friendlies; and I was always concerned that Ed Meese might order the attorney who was handing the case on me to change positions. But he never did. Finally, a year or two later, it was resolved in my favor.

Mr. Pollak: By which time, of course, you had been sitting for a considerable time?

Judge Mikva: I'd been sitting. In fact, one of the things that I remember happened is that the confirmation vote was on September 28 or 27th or something like that. The President has to sign the appointment papers, and they weren't being signed. Oh, before that, though, I remember

that Kennedy, who by this time had begun to realize that this was a serious matter and the NRA was being serious about it, and decided that we better start crossing all the T's and dotting the I's. He called me up the day that the Senate voted and he said, "I'm sending the confirmation up to the White House right now." I said, "Oh," because I wasn't focusing; I was so happy with the vote. (Tape ends)

Mr. Pollak: You were speaking of the movement of the Senate Confirmation Resolution from the Judiciary Committee, or from the full Senate, to the White House in relation to the tactical concerns, I guess, about McClure's suit.

Judge Mikva: Yes. Kennedy said, "Now I want to make sure this resolution is out of here because I don't want him holding it up by his lawsuit." And sure enough Senator McClure filed his lawsuit the next day on the 28th, and one of the people he sued was the Secretary of the Senate, and part of the immediate relief he sought was to ask to hold up sending the resolution on to the President. Well, by that time, that horse had left the barn. I don't think he ever asked to hold up the President's appointment as such, but. . . that's right, he didn't, because one of my concerns was that he might go in for a TRO. So two days passed and I still hadn't been appointed and I called my friends at the White House and said, "What's holding this up?" My contact said, "Well, you know we've got this vote coming up on the Department of Education, and our headcount is close so we want to make sure you're there to vote for it." I said, "Bill, I might be there longer than you think if we don't get this done. I don't know what Senator McClure is going to do in that lawsuit, but he could go in for a temporary restraining order; and if he gets some judge out there to issue one, you know the President may not be able to appoint me until that thing is resolved, which could be forever. So he said, "Well, I'll get back to you." He called

and he called over to the Justice Department and apparently they decided that my vote on the education bill wasn't that important. I think I had Tip O'Neil call over too. I did, because I went to see him and he said, "I don't know why I should be helping them get rid of one of my good congressmen; who knows who's going to take your place?" Anyway, he did call and the appointment came down on September 29. I immediately went over and took my oath.

Mr. Pollak: You did?

Judge Mikva: Oh yes.

Mr. Pollak: You had a swearing in here, was there anything?

Judge Mikva: I did. When I finally got news that it was coming down that day, I went to see the Speaker and said, "Okay I have to resign from the House before I can be sworn into the Court." O'Neil looked and me and said, "Well, don't come to me with that problem, you didn't get here through me, and you can't get out of here through me." Sure enough, when I checked, you resign to somebody in your home State. In Illinois' case, it's the Governor; so I sent a telegram immediately to Governor Thompson that I was resigning from the House effective immediately; and I think I was sworn in originally at the Department of Justice. I can't remember who it was, but somebody delivered the oath and signed the Commission immediately so that that was out of the way. From there, they were dealing with a sitting judge. Then I had a formal swearing-in a couple of weeks later. In fact, Judge Wald and I had a joint swearing in because she had been, even though she had been confirmed in the Fall, or the end of the summer I think she actually took her seat in the Fall. We decided to have our formal swearing-in together.

Mr. Pollak: I see. Was there anything of note at the formal swearing-in that you would record? Any significant statements of your own or others who marked the occasion?

Judge Mikva: No, I remember Senator Kennedy was there beaming. He had put a lot of blood, sweat and tears into my confirmation. I don't think so.

Mr. Pollak: All the way to now, there has been nothing that you thought you wanted, and maybe you hadn't focused on it, to put under any confidentiality stip until some later date. Of course that is always open to you anyway as to the whole thing. I want to ask a question now that, conceivably, I have no idea what the answer is, you'd like to avail yourself if you want to answer. The lore is that you and Judge Wald had an agreement that she would step down as Chief Judge if she ever became it and let you have a crack at it.

Judge Mikva: It wasn't an agreement. This was a statement that she had made to me when we first went on the court, long before... The myth is that we made this agreement to keep Judge Silberman from ever becoming Chief Judge. Nothing could be further from the truth because, when she volunteered this, her generous offer to me, Judge Silberman wasn't on the Court and it had nothing to do with him at all; we had never even thought of what the pecking order was, of who was next. But she, gracious person that she is, said to me at one point when we were just sitting around chit-chatting and talking about the possibility that she was going to be in line to become Chief Judge because I think Judge McGowan was only going to be there for a short period and then Judge Robinson was going to be there for a relatively short period and then she was next because the other people by that time were all over 65 and would not any longer be eligible for the spot. She said, "Well, if I do, I'm going to make sure that I step down early enough for you to get a crack at it too because we really are contemporaries." I said, "That's very generous of you Pat. I don't even know when that occasion will arise." She said "Well, I just want you to know that if I become Chief Judge and you're still on the Court, I would

step down to make sure that you get a crack at it," and she did. I never called her on it. Obviously, it's not something that I had any reason to call her on; she's just a gracious person. I think most people who know her realize that she did it because of the kind of person she is. But it annoyed me that this myth was ginned up by mostly some of her and my right-wing critics who insisted that we had made this kind of "devil's pact" in order to keep Silberman from being Chief Judge. I'm sure, if we had thought about it, I might have urged it [humorously], but it didn't happen that way.

Mr. Pollak: Tell us about your early experience as a judge. Your first activities, whether you went through any training, how you staffed your office. What was it all like?

Judge Mikva: It was a complicated and confusing time.

Mr. Pollak: Right, it was '79 in the Fall?

Judge Mikva: September 29, 1979, my Commission was signed and I immediately moved over, started moving over to the Court. I had already resigned from Congress, as I had to, and so I immediately took up Chambers at the Court. I remember I followed the tradition of not even going over there until after the confirmation vote. I did occasionally see Judge Bazelon but even then, I would be very circumspect. Usually we'd meet out of the building. I think I once met in his chambers. I was very careful not to be seen walking in because I didn't want people to assume that I was taking this for granted as, indeed, I shouldn't have. Immediately following the confirmation vote, I went over and got with the Circuit Executive; and he showed me the chambers I was going to have temporarily while they completed my regular chambers. I started taking on staff. I brought over my two secretaries from the Hill. I had to scurry about and find clerks in a hurry because, again, I wouldn't have even thought about interviewing anybody until

after the confirmation. I found three clerks. One I brought with me from the Hill; he had been my legislative assistant, a Georgetown graduate, and he turned out to be a very good clerk. I started gearing up for the first set of hearings, which I found to my amazement and a little bit to my dismay that they had already penciled in Judge Wald and Judge Mikva for that first round of hearings. The first day I walked into the office there were cases, briefs there ready to be read. It was a confusing time. I had done a lot of appellate work but always as a lawyer. The idea of reading briefs not to figure out what was wrong with my opponent's briefs but to read them to try to get the real juice out of them and understand the case and understand how I was going to help decide the case was a very confusing process. You really don't know how to ask for help. I would talk to the sitting judges, and they would all give me their slant on things but you don't go to a judge and say alright, I've got this case, how should I decide it? That isn't the way the process works. I remember some of the early advice I got from Judge McGowan, Carl McGowan, for instance, who said that he tried never to lock into a position firmly until after oral argument; that he would read the briefs always trying to keep his mind as open as possible because frequently the oral argument gave him a different slant than the briefs did. I always remembered that. I think one of the other judges taught me that he thought – oh I remember it was Judge Leventhal – that he thought that some judges spent all their time trying to craft the perfect opinion, and they didn't spend enough time thinking about the case and worrying about the case, and that he really felt that you should use the clerks a lot in the preparation of opinions, but just make sure that they never took control of the opinion. Whether you wrote the first draft or they wrote the first draft, make sure that you wrote the last draft. That was good advice that I tried to follow. And then I remember Judge Wright just kept saying that the best job that

anybody could ever hope to have was to be on the Court of Appeals for the District of Columbia and that I should just enjoy it and not worry about it. I do remember that one of the first batch of cases that I was on was a case called Tygrett vs. whoever was then the Mayor. Tygrett was a policeman who had called in with "blue flu." He tried to start a blue flu episode in Washington, and they had fired him. The police department had fired him. It had been up on appeal once before, and the panel had sent it back because of failure of proof or something, failure of the process of the way they had fired him. This was now up on its second time. This time the District judge had upheld the firing. It was up on appeal again. I was sitting with Judge Ed Tamm, a distinguished member of the Court, and Judge Ed Lumbard, who was a visiting judge from the Second Circuit, a senior judge. Both of them were considered very conservative judges, especially Judge Lumbard. I think he had been an Eisenhower appointee, or something. Judge Tamm might have been appointed by Johnson but had always been considered a part of the conservative wing of the court. The more I read the briefs, and thought about the case, talked about it with my clerks, I felt that the city had again failed to do it the right way. It's a very tricky area, firing somebody because of their political activities or because of their speech; as you know, there are First Amendment implications; if they were trying to fire him because of a failure to obey orders or because of a breach of some disciplinary rule, they hadn't established that in the case. But, as I was thinking about getting ready for argument and thinking about the case, I kept thinking, "this is awful, my very first case, and I'm going to end up writing a dissenting opinion, and that really isn't the way I want to establish my mark on the Court as a great dissenter." I wanted to show that I can be a part of the mainstream of this Court and to affect its decisional process. I really kept brooding about it, and nothing during oral argument reassured me because

the City's counsel was very inept at the argument, whoever it was at the time. Tygrett's attorney, on the other hand, was very good and very effective; and I could see Judge Lumbard scowling at Tygrett's attorney. I was just sure that meant that he was going to be strong for upholding the dismissal and then I'd be writing a dissenting opinion. We came out in the conference room and Lumbard either didn't know or didn't care much about our usual order for which judges went first. Actually, I think, the visiting judge always did go first in conference. Anyway he said, "Damn, we're going to have to reverse those idiots again." I was relieved and sure enough Judge Tamm assigned me the opinion, and I ended up writing for a unanimous court.

Mr. Pollak: Did you have any formal training to be a judge?

Judge Mikva: Oh, we went to judges school.

Mr. Pollak: What was that?

Judge Mikva: The Judicial Center has a few lectures. Actually, it was kind of helpful. It caught me up on a few areas that I had, indeed, lost track of.

Mr. Pollak: Substantive areas?

Judge Mikva: Substantive areas. What was happening in some of the *habeas corpus* doctrine that had been developed, the Fourth Amendment literature that I had not kept up with because during the time I was in Congress, it was not always at the top of my agenda. It was useful in that respect. We had some good people there lecture us and so on, but it was still, when you think about it, there is only one way to be prepared to be an appellate judge and that's to just be involved in as many different experiences in and around the law as you can have and try to develop an appellate mentality. I always thought that Judge McGowan's advice and Judge Leventhal's advice was very, very helpful in that respect: not locking on a particular position

until you've heard oral argument, try to remember the lesson that the ground rules of this process that you're working on. That continued to disturb me as time went on and particularly as we got some of the newer judges who had not had trial experience and had not been trial judges. One of the things that Judge McGowan reminded me of was that there is a strong presumption in favor of the District judge's ruling, that the appellate judges aren't there to hear the case de novo but more than any formal distinction between de novo and appellate review, to remember that the trial judge has not only heard all the evidence and seen the witnesses, but that he has really been the only one to be able to consider the whole case, a holistic approach to the case, if you will. By the time it comes up on appeal, you are seeing bits and pieces of it. Obviously, if the appellant's lawyer is a good one, he will single out those things that particularly were the weakest parts of the trial; but as the Supreme Court has reminded us many times, nobody is entitled to a perfect trial. There is no such thing as a perfect trial. When you don't give the trial judge the presumption of correctness, you end up losing that holistic approach to the case, you end up deciding it on bits and pieces. Sometimes it is important if there is an error, a reversible error, that in and of itself, no matter how good the rest of the trial was, you may have to reverse. But on the other hand, the idea of giving that weight to what the trial judge has done, I found to be very, very useful advice.

Mr. Pollak: It is correct, however, that many of the cases you reviewed probably never had trials?

Judge Mikva: That is correct.

Mr. Pollak: Never had witnesses other than paper witnesses? Did you feel differently about those?

Judge Mikva: To some degree because those usually then involved more purely questions of law or questions of law policy. Remember we're the administrative court; therefore a lot of the cases that came up would be agency review cases where even though there were records and, oh boy, were there records in some of them, again it's not quite the same as the kind of presumption that you allow the trial court.

Mr. Pollak: How large was the court that you joined?

Judge Mikva: Eleven.

Mr. Pollak: Eleven.

Judge Mikva: Right.

Mr. Pollak: Do you want to name the people?

Judge Mikva: Yes, to the extent that I can. Skelly Wright was Chief Judge. Harold Leventhal was a judge. Carl McGowan was there. Ed Tamm, Malcolm Wilkey, Robb,

Mr. Pollak: Robinson?

Judge Mikva: Spottswood Robinson.

Mr. Pollak: Yourself and Pat Wald and then. . .

Judge Mikva: And then Edwards came on to replace Leventhal. No, Ginsburg came on, I'm trying to remember who Ginsburg, oh, Ginsburg came on. Bazelon...

Mr. Pollak: Oh yes, Bazelon was there. Was he on the court when you joined?

Judge Mikva: He'd just taken senior status before I joined. And Edwards took Bazelon's seat and Ginsburg took Leventhal's seat.

Mr. Pollak: I see, yes that's it.

Judge Mikva: It was increased to 12 during my tenure.

Mr. Pollak: You mentioned counsel and advice that you got from Judges McGowan and Leventhal. Did you have immediate camaraderie with some of the judges?

Judge Mikva: I'd known Bazelon for a long time, so obviously I had camaraderie with him. Judge Wald and I had gone through that same fire together of Senate confirmation, so we became allies and good friends from the time we got on the Court. Judge Edwards came on shortly thereafter, and it turned out we had a lot of common experiences. He'd started out his practice in Chicago with a law firm two floors below the one I was with. They were representing management while we were representing the union side, and on many occasions he had carried his senior partners' briefs while I was carrying Arthur Goldberg's briefs. Anyway, we became good friends. Then Skelly Wright was, of course, he was a very outward person who was great. Carl McGowan I had known from Illinois days. We had been managers of the Chicago Bar Association together. So there was a good camaraderie, and I found that I learned a lot from the judges – even from the ones I didn't have a close personal relationship with. For instance, Ed Tamm, who I grew to admire a great deal because he was a very courtly gentlemen, very set in his ways. He felt very strongly about certain things, but there was a great courtliness and civility about him. For instance, one of the things I learned from him – I had written in an opinion "the court below," which is a phrase that is frequently used in appellate literature. When I sent the draft around (he was on the panel) he came to see me; he didn't write back a memo or anything; he came to see me and he said, "You know," he said, "I was a District judge and I always used to resent it when appellate courts would talk about me as being below them." I never used that phrase again. He was right. To demean a process that is really collegial and even though we are a reviewing court, we are not superior human beings.

Mr. Pollak: What kind of relationships developed with judges whose views generally would be more conservative on the legal issues than your own, if I could put it that way?

Judge Mikva: It isn't necessarily conservative or liberal, as different than your own. While a case is going on, if it is a hard-fought case, some of it spills over into, oh necessarily personal relationships; the clerks get very feisty about it, and they argue about it when they go to lunch together. The judges try to avoid talking about the opinion once they reach the point of closure where nobody is going to change their minds. They just don't talk about it until the intensity has faded some. It turns also on the writing style. There are some judges who will go out of their way to avoid any kind of ad hominem invective, any kind of pejorative phrasing; and Tamm was one of them. He would never use nasty language. On the other hand, some of the people who I was closely allied with up there would get so caught up in what they were doing and saying that they wouldn't realize that someone's words could bite very hard on somebody who was disagreeing with them. So that happened, but it turned out that I think the one disappointment I had during those 15 years on the court was that the process of being a judge does not allow for a lot of personal and social collegiality. There isn't the kind of personal bonding that I was used to in the Congress where you would build alliances and build allies and you know you could rely on people. On the court every judge is expected to, and does in fact do, their own processing of a case, thinking on a case. I developed a kind of ritual again and tried to remember what Judge McGowan had said by keeping my mind open. I would resist talking to the other judges and having my clerks commit me to any particular opinion or position until after oral argument. So there isn't a lot of getting together on a case. You don't really, at least I didn't really, discuss the matter with the other judges until conference after oral argument. Then there

would be this brief conference, writing assignments would be made, and from there on in, you would be exchanging memos with each other on the opinions. Since the work is a lot longer and harder than some people appreciate, there just isn't a lot of time for schmoozing. There is very little of the personal interchanges and exchanges that I was used to in the Congress. I think that I found that somewhat disappointing.

Mr. Pollak: I don't, however, have the feeling that you would call it a lonely experience? Maybe I'm wrong about that?

Judge Mikva: No, partly because I refused to do what some judges do who really think that they must break off all ties with any other, almost any other contact, other than fellow judges. I always thought that was a misreading of the canons.

Mr. Pollak: In this early time or any time did you confront cases where it was really difficult to make up your mind what was the right outcome and how did you deal with those if you could generalize at all?

Judge Mikva: More often than one would think. I've always thought of myself as being fairly decisive and being willing to live with consequences of decisions even if they are wrong. But I was amazed at how many important cases came up that really were close. But when you think about it, we were in effect the government court; frequently, not always, the cases that came up involved important public policy questions or at least had public policy consequences; and how they should be decided was a close question. I guess it made me aware of the fact that, even though we'd been at this business for 200 years, there still were a lot of questions of the Constitution and procedure and substance that there really aren't precedents for. I still remember a case involving a criminal law issue in which our court had taken a position many, many years

before -- an opinion that Judge Bazelon had written which had been disagreed with by every other circuit in the country. We had held to it, and the Supreme Court had never granted certiorari. At one point, I think it was Judge Scalia who came to see me and said, "You know, after a certain number of years while we're out in a different orbit than everyone else, we're not doing the law any good by staying out there. It is a settled question every place else. We really ought to get in step with everybody else rather than have this important question turn on where the suit arises." I thought about it and thought about it and realized he was right and that even though on the merits I probably leaned more toward the decision that was the precedent in our circuit, that uniformity was more important than our marching to our own drummer. I remember that whoever our third colleague was very angry with me because I left the fold on that one and joined Judge Scalia.

Mr. Pollak: Can you recall the issue?

Judge Mikva: It had to do with whether the government can rely on matters that come up during the defense's testimony in terms of whether or not to grant a motion to dismiss. If the government has not proved its case on direct, can the trial judge rely on things that come up during the defendant's testimony to fill in whatever was missing in the government's case? Every other circuit had said yes the judge can. We had said no. There are good policy arguments on both sides, particularly since most judges, as you know, in everything except the very clearest of cases, postpone making a decision on a motion to dismiss until the close of the case. It's very, very seldom that a judge will grant a motion to acquit or direct a verdict in a jury case after the close of the government's evidence. Usually they'll say, well, let's hear the defense. The result is that frequently the defense in order to put in an appropriate defense has to refer to elements or

open up areas that didn't get covered in the direct, the government's case. And so you could argue that it's giving the government an unfair second bite at proving its case by letting the trial judge rely on evidence that comes out during the defense that wasn't there during the direct presentation. On the other hand, if it's not a game and we're really talking about getting at a just result, why shouldn't the trial judge be able to consider all of the evidence before him in deciding whether or not there should be an acquittal? So argue the policy almost every which way around the horn. I do remember at the time I was very much torn, and I knew that I agreed with Judge Scalia in the end. There are lots of cases like that.

Mr. Pollak: I would think so. What were your, what work habits did you begin with as you got on the bench?

Judge Mikva: Well, I remembered some of the things I had done and some of the things that I had complained about when I was a law clerk, so I tried to remember them even though they had been a good many years ago, and allow for them in developing my relationship with my clerks.

Mr. Pollak: Like what?

Judge Mikva: Like insisting on a complete bench memo before I even started to read the briefs. Justice Minton had insisted on that, and the result was that it made the clerks very much involved with the case from the beginning. Even if the Justice didn't agree with our recommendation as clerks, we were very familiar with all the arguments plus or minus, for and against, so we could discuss them with the judge and tell him why we recommended what we did; and he didn't have to rely on his reading of the briefs de novo to start to form a view. So I insisted on that, and more and more of the judges during my tenure on the Court left that practice

because the clerks were now into so many other things and they just didn't think it was that worthwhile for the clerks to use up so much of their time doing bench memos. But I insisted on it. I really wanted a detailed bench memo about every case that was going to be heard before I started reading the briefs, which also meant that they had to get them ready a substantial number of days before because I needed time to read the briefs. I insisted on having them ten days or two weeks before oral argument; and so my clerks, as a result, were on a much more time sensitive schedule than the other clerks. But the result was that I could read the briefs against the bench memo, and I found that it was a lot easier and quicker to read the briefs because I could skip through the stuff that wasn't important and get to the chase in a hurry and start to ask why did the clerk recommend we do so and so. Then the discussions I had with the clerks about the case were much more useful because I could say, "What about so and so; what about this case? Why isn't that controlling there?" It gave me much better preparation for oral argument than afterwards. Then the bench memo, if I ended up writing the opinion, was a great jumping off point for the opinion itself.

Mr. Pollak: What other, any other work habits that you found? What kind of days did you put in, what kind of hours, what kind of weekend?

Judge Mikva: The days were as long or longer than when I was in Congress, but they were much more regular. The time was orderly.

Mr. Pollak: You didn't need the idiot card?

Judge Mikva: Right, to remind me of where to go and what to do. I remember seeing Speaker O'Neill (I think I mentioned this story already) at a reception shortly after I went on the Court.

Mr. Pollak: No, I don't think you have.

Judge Mikva: He asked me how I liked it. I said I was enjoying it, and I told him about the orderliness, and I said, "You know something, Tip, every month the clerk sends around a memo asking what days we're available to sit?" This was before we went to a computerized calendar drawn up month-by-month. I said, "It's nice, if I tell them I'm not available on such and such a date, he arranges that I don't have to sit on that day." I said, "You know all the years that I was in Congress, you never once asked when I was available to vote." He laughed and said, "Considering the way you voted sometimes, I wish I had." There was just an orderliness to the Court, and I could take off a day to do something else or concentrate on something that I wanted to do. If I wanted to go off and give a speech some place, I could do it. There was a lot less waste time. Plus the fact that I found it nice to be able to work at home when I wanted to and, of course living as close to the Court as I did, I could go there after dinner if I wanted to for an hour or two or bring some stuff home and go back and forth. It was sort of what I thought was a gentleman's practice -- the kind that I never had when I was practicing law and that I certainly never had when I was in Congress.

Mr. Pollak: Would you confer with the clerk who prepared the bench memo before argument? or all three clerks or four?

Judge Mikva: Almost without exception I would confer with the clerk who worked on the bench memo on that case; and there would be long conferences or short conferences depending on how complicated the case was, how good the memo was. Sometimes the clerks would complain that I would barely confer with them; and I would laugh and say, "That's because the memo was so good." Why gild the lily? Then I developed a practice after I came

back from conference. I remember that one of the things that had frustrated me when I was a clerk was that Justice Minton would come back and he would tell us a little bit about the cases that he had been assigned the opinions to because one of us was expected to draft the opinion; but he would never give us any of the gossip or any other things; and I always thought how much fun it would be if he had. The conferences seemed very mystical – like in the Supreme Court. I had seen the Supreme Court conference room empty but obviously none of the clerks had ever seen the conference room with the conferences going on, which is similar on the Court of Appeals. When the judges are deciding on a case that was to be resolved, only the judges are present. In fact, in the Supreme Court it is a tradition that if anybody needs anything, the junior Justice goes to answer the knock at the door, and the person gets whatever is needed. So I had never been inside a judicial conference; and I could hardly wait to – and, as I said, Minton had never given us any of the gossip about what went on there – so I could hardly wait to see what really went on in the conference of the judges on cases. The conference on the first set of arguments that I heard caused me to be anxious and curious as to what was going to happen. The presiding judge said, "Okay, let's start discussing the cases. By the way is Congress going to bring up that pay raise this year?" which was a little demystifying. But anyway when I came back from conference, I would sit down with the clerks; and the understanding was that no matter how late we went in the conference past the lunch hour, that I preferred them to stay and I would go over all of the cases – not just the ones that we were to write – and give them a very good summary of what went on and who was in what position and what was behind it.

Mr. Pollak: You're talking to the clerks about what went on in the conferences.

Judge Mikva: I would summarize all the cases and what was discussed and what the

decision was and who was writing it and who was dissenting and so on. Then I would prepare post-conference memos, which I would send around to the other judges – this is when I was presiding judge, as senior member or Chief Judge. I would send around these post-conference memos to the other judges summarizing what we had agreed to, who was going to write and what the basis of the opinion was. Even before I was the presiding judge, I would do those memos for my internal purposes so the clerks would know what had been agreed upon. Because I found that one of the things that had happened when I was clerking on the Supreme Court is that judges frequently change their minds, which is fine. They should. They shouldn't be stuck with a wrong decision just because that was the way you came down at the conference, but if there isn't some kind of a memo as to what was agreed upon and who was where, they end up frequently blind-siding their colleagues. I remember that it was a frequent source of gossip on the Court as to who was mad at who at the Supreme Court because so and so had said they were on such and such a side and all of a sudden they end up voting the opposite on an opinion. And I would see that would happen on our Court every once in awhile, and I just found that it was easier if everybody knew (or at least I knew) where everyone said they were so if they changed their minds, it's identified as a change of mind rather than just a slide-through. It happened more than one would expect. Judges do change their mind when writing an opinion. I found that one of the phrases I learned to use and learned to appreciate when other judges used it was to start off saying at the top of a draft of an opinion, "It just doesn't write the way we agreed in conference."

Mr. Pollak: Did you go on the bench after your preparation with the mind that Judge McGowan counseled you to have but with identification of a crux issue or perhaps some pre-prepared questions?

Judge Mikva: I wouldn't always write down the questions, I wouldn't always think through what the questions were, but I usually did try to prepare them in my mind. First of all, I continue to believe that the Holmseian model of what an opinion ought to be is, especially an appellate opinion. The opinion ought to be, as often as possible, a single-issue opinion if it is to perform the work that an appellate opinion is to perform as a precedent, as a teaching tool, as a guidance to the bar; it ought to confine itself as much as it can to a single issue. Covering the waterfront, reinventing the wheel in nearly every opinion not only clutters up the law and confuses the law, it is not useful for any of those purposes that I described. If all you are doing is deciding the case and satisfying the parties on both sides, don't waste all that time putting in a formal written printed opinion. Give them an oral decision from the bench and let them ask questions about it, modify it as you go along. But if you are talking about something that should be the law of the land, a precedent for future cases, it should be a teaching tool to provide guidance to lawyers and litigants for future cases. The clearer it is, the more precise it is, the more specific it is, the better off we are.

Mr. Pollak: Do you have more to say on this focus on a single issue?

Judge Mikva: That's always very hard to get the parties to do, the lawyers to do, because, first of all, especially if the lawyer has tried the case in the trial court or before the agency, he or she is still all hung up on the evidentiary errors that the trier of the facts made and all of the other things that go on in the trial or the presentation of the case before an agency. I remember how hard it was when I was doing appellate work as an advocate to put all that stuff aside and say, "Okay, I'm going to forget about the fact that the judge was cock-eyed wrong on all of the evidence that he excluded and all those other things that he or she did, and I'm going to

concentrate on the one big issue of the case." So, as I said, it's very hard to get the lawyers on oral argument to limit themselves to a single issue, but I would try to focus on whatever the issue was that I thought should resolve the case as much as possible and point my questions there. It's easier said than done when you're dealing with a collegial panel of three judges who have their own beliefs about what the important issues are and what their questions ought to be. I'm sure early on I asked too many questions, I probably too often badgered the lawyers about things that I didn't need to ask them about and I hoped as I became a more mature judge, I limited my questions to those things I really needed to know. On the other hand, I always thought that lawyers, good appellate lawyers, should appreciate an active bench. There's nothing worse as an advocate to stand up there and have the three judges just sit there and ask no questions.

Mr. Pollak: I'm with you on that. How significant to you was your experience as a law clerk as you then became a judge?

Judge Mikva: It was very significant. First of all, it had been my first exposure to the way the court system really worked, as seen from the inside. Of course, I saw the Supreme Court from the inside – it was very significant. But, secondly, it identified for me what the ingredients were for a good relationship between clerks and judge, and I got to see some of the collegiality that judges on the Supreme Court had for each other. I was always very impressed that Justice Minton and Justice Douglas were good friends even though they didn't always agree with each other on the way the cases came down. They were good colleagues, and they respected each other and dealt well with each other. I tried to develop those relationships on our court, as far as I was concerned; and, with very few exceptions, I think I was successful and it makes a difference. It's one thing to disagree with somebody and feel that they are wrong about an issue

or haven't seen an issue in the right way. It's another to not have any confidence in the way that judge is coming out or that there's not enough integrity in the way that judge is deciding cases. I felt that the collegiality and the civility that I saw when I clerked on the Supreme Court among Justices who disagreed about many, many things was something that was worth emulating. I was pleased, as I say, with very, very few exceptions, with the relationships I had with those on the Court. It wasn't always thus and there were exceptions even when I was there, but most of the time the judges could disagree without being disagreeable. I have a very strong warm feeling about Judge Buckley. We probably voted differently more often than any two judges on the court, but I respected his integrity, I respected the honesty of his views, and I always felt that what I saw was what I was getting as a judge.

Mr. Pollak: Is there a freshman period for a new judge?

Judge Mikva: Yeah, they call us baby judges; and I don't know when the freshman period ends or when it doesn't. It probably has to do with when somebody junior to you comes on the court.

Mr. Pollak: I see.

Judge Mikva: I remember Justice Minton used to complain that he was a baby judge on the Supreme Court for a long time because it was quite awhile before someone came out to be junior to him. In my case, it wasn't very long at all before Judge Edwards came on the Court and Judge Ginsburg; and so Judge Wald and I evaded our baby judge status fairly early. But even so, I guess the part of being on the court that remained enjoyable even after 15 years was that I never stopped learning something new about the job or about the judging process. There weren't many boring days.

Mr. Pollak: Were there any rules of the game that were prevalent in the Court that aren't written down anywhere but that you needed to comply with – unwritten rules of the game?

Judge Mikva: Let's see. Now Judge Bazelon had been very strong and written several opinions about what he called "secret law," what you just mentioned as rules or doctrines that governed the way the cases were decided that weren't known to the public. I think all of us were very sensitive to that charge and tried to avoid having any secret law. There probably were behavioral rules that we followed toward each other. For instance, on the bench, we always addressed each other as Judge so-and-so, never by first names, and, hopefully not using any expressions or body language that would suggest our emotions about a particular judge's questions, about a particular judge's position. I think most of the time there was an awareness that, for some of the lawyers, this was their first exposure to the appellate process, that the judges ought to remember that they've all been there themselves in one way or another. In some cases that are important, the emotions run so high that we forget that. I remember on two occasions at least, lawyers fainting – one case involved a fairly senior lawyer who was getting so consumed and bombarded by questions that he found his cure.

Mr. Pollak: Wow.

Judge Mikva: But most of the time, judging was an ongoing learning process, oral advocacy is an ongoing learning process. Generally you tried, I guess was a rule of the game, you tried not to make too clear your tilt on a particular case and how you were going to come down, partly because, frequently after conference and after exchange of drafts of an opinion, you'd change your mind; and the less you'd identified yourself publicly as having been on one side of the issue, the less embarrassing it was to back up. I'd say those were some of the rules I

can think of. There was a feeling that judges ought to be discreet about the Court's business and not talk to the press. . . .

Mr. Pollak: Talking to the press. . .

Judge Mikva: Occasionally when I was chief judge, I would talk to the press about some matter of court-wide procedure but other than that, we didn't discuss cases. I mentioned before that I didn't think that a judge ought to totally disengage from all personal relationships, but you tried to be discreet about what you were doing and use some common sense. For instance, if a lawyer had an oral argument coming up in my court, I would hope that he or she would have sense enough not to ask me for lunch until after the oral argument. In any event, if I knew one was coming up, I would just not think about having lunch with that lawyer until after the oral argument. The same was true with other kinds of contacts. I still start out every morning in the House gym to do my physical exercise and Judge MacKinnon, when he was alive, was also in that same regimen. I could see, for instance, when he was involved with something involving the Independent Counsel or when Congress was discussing amendments to the Independent Counsel statute why he would just disengage if anybody started to talk about amendments to the law or what some Independent Counsel was doing. He would disengage. Similarly, if I was involved in any case that some particular congressman had an interest in and started talking about it, I'd just avoid contact with that person and make sure I wasn't in any kind of conversation with him. It isn't that Judge MacKinnon was going to be brainwashed by any congressman or tip his mitt, while he was Chief Judge of that Special Counsel Division, or that I would be overwhelmingly influenced by something that a congressman said; but there is an appearance problem, and, I think, that most judges try to take that into account with their personal relationships.

Mr. Pollak: I had kind of a concluding question about the beginning of your judicial service. Would you remark on the comparison of your early years as a Judge with your later years as a Judge?

Judge Mikva: I continue to remember that there was not a lot of personal social interchange the way there was in Congress where the people who were your close allies on issues in Congress were frequently, at least in my case, were also very close personal friends. There was that group of Congressmen that I mentioned to you before: Kastenmeyer, Burton, and others. There was never that on the Court but, when I first got here, especially having heard all these terrible stories about the friction between Chief Justice Burger and Judge Bazelon, I was pleasantly surprised to see how collegial the relationships were. There was a little bit of friction every once in a while. Judge Bazelon, as you know, could be a very stormy character, but notwithstanding, even as the Court began to change ideologically with some of President Reagan's appointees coming onto the Court, like Judge Scalia, Judge Bork, Judge Starr, the collegiality remained. Part of it was because of the personalities involved. Justice Scalia, as you know, is a very gregarious person. He is always great fun to be around.

Mr. Pollak: He has a sharp pen, though.

Judge Mikva: He has a sharp pen. It, unfortunately, has gotten sharper since he has been on the Supreme Court.

Mr. Pollak: It appears so.

Judge Mikva: It really has. Also, his view of dissenting opinions has gotten more vigorous on the Court than it was on ours. On our Court, while he wrote some dissents, he didn't feel that that was a unique role that he had to play. I think he more felt on our Court the desire

and the advantages of trying to help make a court. Maybe it was because it was only three people rather than nine, or maybe because our cases don't involve these burning controversies on which he feels so strongly. But, on our court I don't remember him having that sharp a pen or being on so many dissenting opinions. Judge Bork and I were classmates. He was also a very good colleague. We were good personal friends as well as colleagues. The result was that during the early years on the Court – with Judge Wright, McGowan, Bazelon, and later on Bork, Starr and Scalia – there was a lot of collegiality. When we had disagreements about the way the Court should run, they were usually resolved amicably without it boiling over into personal emotions. I remember at one point one of the judges clearly was not capable of sitting on cases and either Judge Bork or Judge Scalia came to Judge Wald and me and told us we really had to do something about it, because they didn't want to make a formal complaint if they could avoid it. We engaged in one of those missions that Justice Holmes has described; we had to persuade the judge to stop sitting on cases; but it was done in a very collegial way without any animosity or bitterness. I think I described earlier the way in which Judge Scalia came and talked to me about our criminal law precedent, when we were the only circuit adhering to it. I always had this feeling that the personal relationships were friendlier and more collegial than later on.

Mr. Pollak: That changed later?

Judge Mikva: It changed.

Mr. Pollak: Any other differences? I mean, are there differences in approaching the issues? Does the judge have his own jurisprudence so more of the issues are closed out as you serve longer?

Judge Mikva: To some degree. I think what happened is that the reputation of the Court

began to change. There was a time when we were known as this very pro-labor Court, where unions and, to some degree, the National Labor Relations Board used to fight to get to our Circuit. I wrote a very sharp decision complaining about the race to the courthouse, about who got to file first and how nasty it was and closing up some of the avenues. Some of my good friends were dismayed that I had written what sounded like such a solid anti-union opinion. But, in fact, unions were determined to try and take advantage of our pro-union reputation and, in fact, as the years wore on, we weren't so pro-union any more. More and more the decisions began to go against the Labor Board and against the unions. Part of that was, I think, that the national jurisprudence changed because of the Supreme Court decisions; the law changed slightly – Congress had made some amendments to the law – and the personnel at the Court changed. You replace a Skelly Wright and David Bazelon with a Larry Silberman and a James Buckley, and you're not going to get as sympathetic an attitude about union grievances and toward the Labor Board that you had before. As far as judges developing their own jurisprudence, some judges were known for having expertise in certain fields. Judge Edwards obviously had expertise in labor issues because he had taught the subject at Michigan for many years and was involved in labor arbitration. Judge Randolph had done a lot of criminal work in the Courts of Appeal in his practice years. The panels are always chosen by lot, so that there is no way for judges to volunteer for a particular case or a case being assigned to a certain judge because of his or her expertise. Secondly, I don't think that anybody on the Court, certainly not the chief judges in my circuit, thought it a good idea for judges to become specialists. We were a court of general appellate jurisdiction and that was what they were trying to be.

Mr. Pollak: I think there was sort of nosed around in Chief Judge Bazelon's time the idea

that he jimmied around the panels?

Judge Mikva: He used to delight in that rumor because, you know when I got on the Court, he said, "You know you have seen the process. It's impossible for the Chief Judge to rig the panel. But I love the fact that people thought I had that kind of power." He said, "And even Burger thought I somehow rigged the panels and he was here and knew better." He said, "What it was, and you know that frequently I would have an issue in mind that I thought needed to be resolved and I would wait for the case to come along that had that issue in it, that I was on the panel on, and then I would just make that the issue of the case." And it's true, because I looked over some of the cases that he was most noted for and that were the most notorious of his tenure. It isn't that he rigged the panel; it's that he elevated the issue to be the top issue in the case. I'm trying to remember one marvelous example of it in a case that he ultimately lost in the court. He could persuade the original panel to stay with him, but then he was overruled in an en banc rehearing and then subsequent panels wouldn't stay with him. It had something to do with whether or not you could judge people by the same standards even though their IQ was substantially below the normal. It was very much a case of trying to say that the people would have a different responsibility for observing the law, be subject to a different treatment under the law if they were retarded and changing the standard. Right now, as you know, mental retardation is not a basis for diminishing the responsibility or even diminishing the punishment unless you can actually show insanity. All these other factors cannot be taken into account except maybe at the discretion of the judge on what kind of sentence he or she applies, and there are various rules and guidelines. Bazelon was pushing this notion that you could take it into account even though it didn't come up to the level of insanity. It was a variation on his old Durham case.

Interestingly, you look at the case and it was just a run of the mill criminal case. He reached into the record and found the fact that the person had a marginal mental ability, and he made that issue the case. It wasn't that he had assigned himself or had got the case particularly to him because it had these issues. They had never been raised.

Mr. Pollak: Does the Chief Judge have any role that might influence outcome of cases by taking in or selecting the visiting judges?

Judge Mikva: Yes, and that was a role that the Chief Judge had. Unfortunately during Judge Wald's tenure, the majority of the Court decided they didn't want to use visitors very often. I objected to our using District judges any more often than we had to because it's very hard for a District judge from the same court to come up and sit on appeal and review his or her peers. It just didn't work. Even if they agreed to overrule or to reverse their colleague, they couldn't do the writing of the opinion. So, I objected and Pat agreed with me on this that we should not use District judges any more often than necessary. During Judge Wald's tenure, the majority of the Court tried to take away the power of the Chief Judge to invite visitors except by making them subject to some kind of a screening process which would have made it impossible for us to get the visitors – sort of a fraternity hazing process. So then it just got to the point where we stopped having visitors – we didn't use them very often at all. So there was that power. The only other power that the Chief Judge had was when in the majority he or she could assign the opinion either to themselves or a colleague. But that was not that great a power because the senior judge on the panel could do that. By the time somebody became Chief Judge, they were usually pretty senior anyway. Long before I was Chief Judge, I was the assigning judge on almost all the panels on which I sat. It was only when I sat with Judge Wald that I didn't get to assign the opinion.

Mr. Pollak: What in your view makes a well-crafted opinion?

Judge Mikva: It should as much as possible be limited to a single issue. It should recite enough facts to make it understandable and make the issue that you're deciding applicable for future cases; but, on the other hand, it should not recite so many facts that it makes the opinion intolerably long and, more important, so many facts that it makes it too easy to distinguish as a future precedent. A good precedent is one that can apply to a lot of cases. If you put too many facts in there that future advocates can distinguish it by saying, that was a blue card, this is a yellow card, as a precedent it's not as useful. It should be short. I think nothing has done more to harm the appellate jurisprudence and law school teaching than the length of opinions. The reason why the Holmes opinion is still such a great teaching tool is that it is one issue, and it is short, and law school teachers can put the whole opinion in their casebooks; they can assign it as an assignment and the issue can be discussed and exemplified. Those are the kinds of things that Langdell had in mind when he first starting advocating using opinions as a means of teaching law rather than teaching by the black letter rules. But when you start out with today's opinions, which sometimes have their own indices they are so long, by the time a law school textbook writer is through cutting it up, you might as well go back to a black letter rule as a way of teaching. So, therefore, legal opinions are just nowhere near as useful as teaching tools as they were during the Holmesian era. But, secondly, they are not as useful in settling the law, in establishing a precedent. If there are ten issues, who knows what issue is really the ratio decidendi of the case. I resent the criticism that is made that law clerks seem too influential in the judicial process. I think the influence they have is a needed and useful influence except when they are allowed to ramble on all the issues that are covered in the opinion. That's one of my objections to the use of

footnotes. One of the ways we end up in all of these unnecessary pastures is that footnotes frequently project issues into the case that don't have to be there. What happens when the opinion has been crafted and there's an argument going on within the judge or between the judge and the clerks as to whether or not this issue needs to be covered or not, it's too easy to say, "Well, let's put it in the footnote." That's how footnote four in Carolene Products got in and ended up creating a whole piece of jurisprudence about disparate impact; that issue shouldn't have been decided in that case and probably, not probably, definitely shouldn't have been decided in a footnote. So I used to resist footnotes on the theory that it was a way of keeping the opinions shorter and cleaner. And I used to talk to my law clerks about it because they're so used to footnotes.

Mr. Pollak: Is it responsible for a Judge to have their law clerks write the initial drafts of the opinions?

Judge Mikva: Oh sure. I think that is one of the great silly arguments that go on in the discussion of appellate jurisprudence – the notion that the judge must be responsible for initially writing every word of the opinion. In the first place, if the judge insists on writing the first draft all the time, in many ways it is the easiest way to lose control of the opinion. If you've written the first draft and it's gone through eight or nine or ten drafts, and the clerks are constantly giving this suggestion and that suggestion – by the time it reaches its final stage, the judge is so tired of it and has so lost his or her perspective, that control frequently is lost. I always found that I didn't care who did the first draft. Some of the time I had the clerks do the first draft. Sometimes I'd write the first draft. But I wanted to make sure that I still felt enthusiastic about the opinion and fresh enough by the time it got to the final draft. That's where my work counted. There were

never questions, when push came to shove, about whose opinion it was. There were occasions when I would have to tease a clerk, saying, "You remember, the commission runs to me; it doesn't say or his clerks." The judge should be able to feel that strongly about an opinion and what's in it at the end of the day and not feel so bored and jaded about it that he's not in control.

Mr. Pollak: What are your views about resolving cases by unpublished opinions? And is that still going on?

Judge Mikva: Oh yes. It's as controversial as ever. The argument has to do with whether or not the Court should publish an opinion which they know about and which some law firms know about but most law firms don't know about, and, if so, what weight should that opinion have as far as future precedents are concerned. Now, as far as I'm concerned, it's the closest thing to secret law that I can imagine that Judge Bazelon used to rail against – the idea that you would have an unpublished opinion that would, in fact, govern future conduct of the Court. So, I felt strongly that, okay, we have to have them because of the volume. The only excuse for having them is that there are just too many appeals being filed. I know Judge Silberman thinks that the judges aren't worked hard enough at this point and that we have too many judges. I never found that to be the case. I think most judges, if asked candidly, would say that there are an awful lot of cases being assigned to each judge; and there is no way every one of them can get a full scale precedential opinion. Well, you can resolve that problem one of two ways. One, you can just decide the case completely without opinion, just say "You win." I think that is less satisfactory to the parties than giving them some explanation of reasonableness. Besides which, I think, judges owe that responsibility to the parties involved to explain how they got there, that they didn't just draw straws, that there was reason to their opinion. On the other hand, there is no way

that a judge, or a group of judges, can devote the kind of time necessary to all the cases that are heard on appeal that are resolved through an opinion that can be used as precedent for future decisions. The solution, therefore, is to come up with these unwritten opinions but with the caveat that the bar is very unhappy about – that it cannot be cited and cannot be used as precedent for future cases. It's the only way that we can resolve the dilemma of the amount of work there and the amount of time the judge has to devote to it. It's a very unhappy answer to most practicing lawyers, as they see it. They can get hold of the unprinted opinions, of course. If they see one that is right on target, it hurts to be unable to cite it.

Mr. Pollak: The Circuit has, as you've remarked, a heavy diet of administrative agency cases – appeals from them -- sometimes directly to the Court of Appeals, big records. Did you take a different approach to those cases than you took to other cases which had smaller records and came from different sources?

Judge Mikva: They were harder to handle, partly because of the size of the record and partly because they usually involved more important issues than who gets a particular pot of money; they usually involve substantial public questions of great moment. So they were harder cases of more consequence, and they were harder to handle because of the size of the records. On the other hand, it's one of the reasons I wanted to go on that Court because it is a public policy court – it is the government court. I always felt that it was involving the same kind of process with which I was involved in Congress, but only from a different end of the telescope. I probably read as many congressional records when I was on the Court as I did when I was in Congress, but they were older. I loved those kind of cases – actually, I'm not sure my clerks always did. The reason I did was they always had very important public policy consequences.

Mr. Pollak: But the process of dealing with them was similar to the other cases?

Judge Mikva: Yes, I didn't want to read all those records if I didn't have to. I wanted to make sure, though, that the clerk read everything in them and make sure that I was aware of all the important matter that was in the record; that meant long bench memos to write, bench memos that required prep time to get ready to sit on a case.

Mr. Pollak: And for some reason, they had to be longer opinions too. Often?

Judge Mikva: Yes, though, again, I think that sometimes we were misguided in our effort to cover every issue. Part of it was the judges felt, with some degree of reason, that they had to cover all the issues that the parties raised because that's the way the Court of Appeals should look at it on review or that's the way the agency would look at it later on. My own feeling was that we would probably be better off sometimes not to be quite as diligent in resolving every issue that is raised.

Mr. Pollak: One practice which went on while you were on the Court, or perhaps during your Chief Judgeship too, was to divide up the opinion writing in those cases and put them out essentially per curiam.

Judge Mikva: It was, again, sometimes necessary because the cases were so convoluted and complex. I never liked it because just as I indicated before that I favored the holistic approach to the way a trial judge handles a case, I favored that on appeals as well. The idea of several judges writing and dividing up the issues – frequently, it would come out looking like conflicting opinions; you'd have trouble reconciling different pieces of it or reconciling different writing styles. For instance, I wouldn't use footnotes, so when I was involved in one of those, I produced a piece of the opinion that had no footnotes. When Judge Robinson was involved, his

piece had more footnotes than text; they looked awkward, and they were awkward. Sometimes, again, the cases were so complex, there was no other way of doing it, but I was never comfortable with it.

Mr. Pollak: You commented that, in your view, the judges had a full diet of work. I intend to question you about your Chief Judgeship sort of separately, maybe we should just reserve this for that time; but I was going to pose a general question about responding to overloaded dockets and what your reactions to that are?

Judge Mikva: There were times when I was on the Court when we were falling substantially behind. It had to do with the amount of time the judges were taking to write their opinions because the judges can always control how many cases they hear by resolving them under the separate rule and using unpublished opinions for the result. Frequently, there was just too long a time span between the time the case was taken under consideration by the panel and the time the opinions came out. This had only to do with the work habits of the individual judge or judges that were involved in writing the opinions. There was one work habit that I tried to use when I came on the court. I don't think Judge McGowan ever mentioned it to me, but he just had this custom of turning everything out in 30 days from the time it was assigned to him. I tried to adhere to that rule; and, if it was taking longer than 30 days, I was yelling at my clerks and my clerks were yelling at me; I was yelling at my colleagues to get word back. One of the rules, this is an unwritten rule, and I don't know if it is reported anywhere, is that when a colleague sends you an opinion, you're supposed to get back to him or her about whether you concur or you don't concur and make changes as quickly as possible. And there is a time limit in the Court rules as to how long before you can go ahead without that judge, that he or she has to catch up, so that you

can come down with the opinion if you've got a court and that third judge hasn't responded. That is a rule that I didn't like to apply too often. Every once in awhile, you had to at least threaten it to get a judge to respond to you. But I did think that the 30-day turnaround on getting an opinion out when it was assigned was a good one to try to follow, and most of the time I did.

Mr. Pollak: Not all the judges are able to do so?

Judge Mikva: No. Again, some judges who write longer opinions and think that they have to cover more of the issues – obviously, it takes longer to write those opinions and get them crafted properly. I'm sure that my critics would say that I too frequently truncated the case into a single issue and it shouldn't have been so truncated. I'm sure that many of the losing parties would say that.

Mr. Pollak: What would you say about your experience in efforts by panels/panel members, or, going even further I suppose, to en banc – the unusual cases that are en banc may be distinguished – but efforts of the panel to reach agreement which would be both at the conference after argument and then in the opinion writing phase?

Judge Mikva: In conference, there was as much discussion as the panelists and the subject matter would bear. There wasn't a lot of effort to persuade in conference. For instance, if somebody said, I think this case should be reversed, if you were on the other side, you'd make a brief pass at it. It's only if the judge said, "I'm really troubled and I don't know how I'm going to come down" that you start to try to advance some arguments. The same was true about lobbying a judge to come out your way after a conference. If a judge announced, "I'm going to dissent," you would maybe shade your opinion a little bit to try to fend off the dissent. Maybe you'd go talk to the dissenter and ask what it would take to bring him/her around. But most of the time,

there was very little lobbying on cases by judges – much less than what goes on in Congress when we would frequently go try to badger a colleague into voting with you or voting for your bill or co-sponsor your bill. There was very little of that on the Court and only some amount when a judge expressed uncertainty about where he or she wanted to come out.

Mr. Pollak: What do you see as the purposes of dissents at the Court of Appeals level?

Judge Mikva: They serve a couple of purposes, I would guess. The most important purpose is it allows the judge to express his or her conscientious point of view on how that case should come out. The judge shouldn't go along with a result that he or she thinks is wrong, and the dissent expresses that disagreement and explains the basis for it. I don't think I ever dissented without some kind of, at least, brief opinion. But if the matter isn't really that important, it's just that you're reading the record differently than the other judges or you have a disagreement on what it is that the Supreme Court meant on some inconsequential case, there isn't a lot more purpose to be served in a dissent than to merely explain what your basis is and go on to the next case. On the other hand, sometimes it is an important public question where you think your views ought to be sent forth to either promote or commence or continue debate about the issue. It ought to be registered. Sometimes it's the way an appellate judge petitions the Supreme Court for certiorari – usually unsuccessfully – but sometimes it works to let the Court know that you're unhappy with what the majority has done and when one of the parties applies for cert. they will cite your dissenting opinion as a basis for taking cert. Sometimes it carries some weight, sometimes it doesn't. The dissent tracks the purposes of the majority opinion. It helps set the precedential value in some kind of a framework that at least the judge disagreed with the way that precedent was established. He or she thinks there are frailties in that precedent, and it is very

helpful as a teaching tool. I find, from my own teaching experiences, that sometimes using a dissent is the greatest way to get the discussion started in class, and sometimes you want it to be discussed if it's a case where you think the dissent is wrong. Just having a judge express his or her disagreement with the majority opinion is the way to get the juices flowing and get things stirred up.

Mr. Pollak: Did you ever have assignments in other circuits? Sit in other circuits?

Judge Mikva: No, I sat on our District Court a couple of times; but during most of the time that I was a judge and when I was Chief Judge, I would have felt very uncomfortable going elsewhere. We had a full load ourselves. If I had any extra time, I would take cases, sit on an extra panel or something, rather than go off and sit elsewhere. But, for most of the time, we had a rule that as long as we were borrowing judges, which we were – we were asking visiting judges to come and sit with us – we couldn't at the same time send judges elsewhere. Now, when Chief Justice Rehnquist became Chief Justice, he modified that rule so that it didn't apply to the senior judges, but it still applies to active judges. If you are in a borrowing circuit, you shouldn't be on the lending end.

Mr. Pollak: What was it like sitting on the district bench?

Judge Mikva: Fascinating, absolutely fascinating. The one I remember particularly was a fender bender that I sat on for Judge Sporkin. It was a diversity case, where an accident occurred here in the District of Columbia. D.C. has a no-fault law, so that there really wasn't any liability question. This was a passenger suing the driver of the car she was a passenger in and the driver of the other car. Somebody was liable, and the only questions were on damages; and the plaintiff's lawyer had turned down $70,000 in settlement.

Mr. Pollak: How did you know that?

Judge Mikva: The lawyers informed me of that in chambers. When they wanted to get me involved in a settlement discussion, I indicated I wasn't strong for it, but they told me that that had already been rejected as an offer, because he knew that one of the parties had insurance of $100,000, so he was pushing pretty hard for $30,000 plus whatever he might get from a pocket deep enough to carry it. But the plaintiff's lawyer was a suburban lawyer, from Maryland, I think, who had read about how generous Washington, D.C., juries were. I must say when the jurors first ended up going into the box, I had a lot of misgivings about them. One of the jurors had great trouble staying awake. I had to constantly keep banging the gavel or talking in a loud voice, and I didn't want to. They didn't seem too interested in all of the medical testimony that was going in, and I was having great trouble trying to make sure that they stayed as focused as I could keep them. The damage evidence was very weak. I thought $70,000 was more than the case was worth. The jury came in with $25,000, which is about where I would have pegged it. Plaintiff was yelling for a retrial. I said, "Well, that's what juries are for." Anyway, I was very pleased with the way it came out.

Mr. Pollak: So, it came in at $25,000.

Judge Mikva: It came in at $25,000 and I thought it was one more example for me of the jury working the way it's supposed to work. It was a great experience for me. I wished I had done more of it because I enjoyed it. I was very trepidatious about it. I remember saying to Judge Sporkin's clerk, I said, "You know I've been away from these evidentiary rulings for a long long time. I haven't tried a case in 25 years, so don't go too far away." And she said, "Don't worry, Judge, when you're sitting up there, you're always right."

Mr. Pollak: Yeah, that was a law clerk?

Judge Mikva: It was the clerk of the court.

Mr. Pollak: Oh, the clerk of the court, of that court? Well, that must have been encouraging to you in terms of the process going on.

Judge Mikva: Oh yeah, I came away from my entire judicial experience convinced that the judicial process works incredibly well.

Mr. Pollak: I'm interested in and maybe it's for a different day, but I'm interested in whether that's a view that is shared by judges across the spectrum of judicial positions on substance of issues.

Judge Mikva: I think it is. There are exceptions. There are a few judges for whom ideology just trumps everything else, and they are so unhappy with the way cases are being decided, or so unhappy with the Supreme Court jurisprudence, or so unhappy with the people who are being appointed to the courts, or so unhappy with their colleagues that it overwhelms their looking at the process. My own feeling is that, sure I'd rather find people that agree with me on all these important issues, and I'd rather that the Supreme Court reflected the jurisprudence of William Brennan in all of his glory, but the process itself works incredibly well. The jury system works well and even when it doesn't, you can almost point to the problem. We had a problem with jury nullification in the District of Columbia for some period where the conviction rate had gone way way down in the federal courts. But it was clearly the problem of the way cases were prosecuted and the way they were being perceived. When Eric Holder became U.S. Attorney, that disturbing trend immediately turned around, and now we are back up to the conviction rates that are in most federal courts – because the prosecutors are using more discretion in what type of

cases should be brought and the way the case is prosecuted, and this frustration on the part of the jurors that the system is somehow stacked against a particular group or a particular set of opinions has diminished. I know I sound like a cheerleader at this point, but I've always taken a little bit of umbrage at describing the court system as the least dangerous branch, because I think the way to properly describe it is as the "most successful branch."

Mr. Pollak: Ab, this is a stopping point, at least, just for this session. I want to put one thing on the record just to reflect your view. We've had five sessions and there's a lot that you've put into it. I wouldn't come to you with a transmittal instrument until you're all done, but if anything were to happen to you, your estate people would want to know your intentions as to what you've already done. Given that, would your intentions be to have it go into the library in the regular way, the way the Oral History Project is processing this? I think your people would want to know. You may want to say that you would hope that there would be grammatical and other kind of editing?

Judge Mikva: I was going to say, I would like to see it edited, but, as far as I can recall of the things you've extracted from me, I don't think that there is anything that I would want to keep sealed for any period of time or anything like that; and I would certainly want it to be available for the purposes for which you are taking it.

Mr. Pollak: Yeah, well that is what I figured your view would be, and I'm sure that it will wend its way to a full conclusion; it will get edited, and you'll sign the donative instrument and you'll make such conditions as you want, but, in the off chance, which has occurred with Judge MacKinnon, for example, I want to make that preparation.

Judge Mikva: Yes, my strong intention is that this be made a part of the history of the court and available for public use.