

## Tributes

### TRIBUTE TO JUDGE MARK R. KRAVITZ

by  
*Charles J. Cooper\**

It is a great honor for me to offer a few words in tribute to my dear friend, Judge Mark Kravitz.

Mark and I were friends for over 34 years, from our first day of work in July 1978 as co-clerks to Justice William H. Rehnquist, until ALS<sup>1</sup> exacted its awful, final toll in October 2012. Throughout that long friendship, our professional lives intersected at many points: we worked side-by-side as law clerks; we served together on the Standing Committee on Rules of Practice and Procedure, as well as in The American Law Institute and other such organizations; and we represented a common client in litigation. But to my deep and abiding regret, I never stood in the well of his courtroom as an advocate. I was privileged, however, to observe him preside over a trial, although not before ALS had begun its cruel, relentless assault on Mark's extraordinary powers of communication.

Mark often spoke to me of how much he loved being a federal judge, and his service on the District of Connecticut bench was the last thing he allowed ALS to take from him, just a few weeks before it took his life.<sup>2</sup> He had been a renowned appellate advocate, but judging was truly his calling, a calling to which he gave his last full measure of devotion.

I was first introduced to Mark through a letter from Justice Rehnquist, informing me that my co-clerks for the 1978 Term of the Court would be Bob Haar, a Yale man from St. Louis, Missouri, and Mark Kravitz, a Wesleyan man from New Haven, Connecticut.

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\* Founding member and chairman of Cooper & Kirk, PLLC.

<sup>1</sup> Amyotrophic lateral sclerosis, commonly referred to as Lou Gehrig's Disease.

<sup>2</sup> Michael P. Mayko, *Mark R. Kravitz, Federal Judge, Dies at 62*, CTPOST.COM (Oct. 1, 2012) <http://www.ctpost.com/news/article/Mark-R-Kravitz-federal-judge-dies-at-62-3910193.php>.

Justice Rehnquist liked to have geographic diversity among his law clerks: I had grown up in Huntsville, Alabama; I had gone to college and law school in Alabama; and I had clerked for a judge in the old Fifth Circuit Court of Appeals. I really don't think I had ever *seen* anyone from Connecticut before I met Mark. So, as I looked ahead to beginning my clerkship at the Supreme Court, I began to develop a mental image, a southerner's mental image, of Mark Kravitz of New Haven, Connecticut. My stereotype of a typical New England private school preppie had thick blonde hair, chiseled features, a perfect smile, a distance runner's physique, and was dressed like a mannequin at Brooks Brothers.

Now, I should note that I was conjuring this image of Mark Kravitz in the summer of 1978, when the blockbuster movie *Animal House* was playing all over the country. And I suspect that my mental image of Mark Kravitz was influenced subconsciously by Greg Marmalard, the handsome frat-boy in the movie who was the president of Omega Theta Pi, the "cool" fraternity, and who dated Mandy Pepperidge, the prettiest girl on campus.

Well, on July 5, 1978, as I was sitting in my new office on my first day of work, the door to the office swung open and in walked: a New England private school preppie with thick blonde hair, chiseled features, a perfect smile, a distance runner's physique, dressed like a mannequin at Brooks Brothers. Actually, standing next to Mark, a Brooks Brothers mannequin would look disheveled.

"Don't tell me," I said, "you must be Kravitz."

Two days later, I met Mark's lovely wife Wendy, and all the pieces had fallen into place.

Except one.

I'll admit that some negative elements had crept into my stereotype—after all, some young men who are blessed with Mark's looks, style, and intellectual gifts can be a bit full of themselves, a bit self-absorbed. Like Greg Marmalard.

Well, Mark quickly dispelled that part of the stereotype, and I soon came to believe that he was simply the nicest guy I had ever met. Thirty-four years later, that was still true. Among the law clerks of October Term '78, the quality of humility was not particularly abundant. But Mark was utterly devoid of the self-certainty and egotism that his talents would have made understandable, if not excused. And I never saw Mark in a foul humor or heard him utter a cross word—not even when he took a savage elbow to the face in a basketball game on "the highest court in the land."<sup>3</sup> By the way, it was Justice Byron White who threw the elbow that put Mark in the infirmary—and then *White* called the foul on *Mark*!

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<sup>3</sup> The law clerks for the Supreme Court refer to the fourth-floor gymnasium, and basketball court, as the "highest court in the land." BOB WOODWARD & SCOTT ARMSTRONG, *THE BROTHERS: INSIDE THE SUPREME COURT* 65–66 (1979).

In addition to his good cheer and disarming modesty, Mark also stood out for his extraordinarily powerful and disciplined mind and for his gift for expressing his thoughts with *clarity, force, and elegance*.

But in retrospect, I think that the quality that was most prophetic of Mark's service as a federal judge was his intellectual rigor and *honesty*. In an environment where many of the law clerks wore their politics on their sleeves, *no one*, not even Bob and I, knew for sure whether Mark was liberal or conservative, Democrat or Republican.

And his work betrayed no hint of his ideological biases, whatever they were; no clue of his preferred result, whatever it was. Instead, his work was scrupulously, dispassionately, consistently, and, sometimes, frustratingly *right*. He was just *right*.

In other words, even then, just two years out of law school, Mark Kravitz the law clerk possessed the qualities that made Mark Kravitz the *consummate judge*.

Justice Frankfurter once said of his old friend Judge Learned Hand: "Learned Hand knows what he does not know."<sup>4</sup> Judge Hand was acutely self-conscious of the possibility of error in the search for truth resulting from imperfections of the legal process, and he conscientiously strived to prevent that fate from befalling a party in a case before him.

Likewise, throughout his tenure on the federal bench, Judge Kravitz knew what he did not know. And his mind was always open to the possibility that his mind could be changed. In one of his earliest opinions, just a few months after he was sworn in, he issued a preliminary injunction and an asset freeze on the basis of overwhelming evidence, or so it would seem, of securities fraud.<sup>5</sup> Yet Judge Kravitz assured the defendants:

[T]his Court repeats what it advised the parties at the hearing, which is that if Defendants believe they have a proper basis for seeking to modify, vacate, or dissolve the preliminary injunction and/or asset freeze . . . the Court will entertain such a motion on an expedited basis and is prepared to act promptly.<sup>6</sup>

And here is a passage from an opinion rendered by Judge Kravitz at the end of his career, just a few months before he passed away, this time in the context of denying preliminary relief:

Of course, the Court can only say this based on the evidence before it. Should Plaintiffs discover that this evidence is incorrect or incomplete, the Court's analysis may well change.<sup>7</sup>

As he once admonished a litigant: "Litigation is not a game. It is supposed to be a search for the truth."<sup>8</sup>

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<sup>4</sup> Felix Frankfurter, *Judge Learned Hand*, 60 HARV. L. REV. 325, 327 (1947).

<sup>5</sup> SEC v. Prater, 289 F. Supp. 2d 39, 55 (D. Conn. 2003).

<sup>6</sup> *Id.*

<sup>7</sup> Mitchell v. City of New Haven, 854 F. Supp. 2d 238, 252 (D. Conn. 2012).

<sup>8</sup> Lorusso v. Borer, No. 3:03CV504(MRK), 2006 WL 473729, at \*15 (D. Conn. Feb. 28, 2006).

And when Judge Kravitz went to the law books in search of the rule of law implicated by the facts of the case, he went not as a judicial tourist, seeing only what he came to see. He was determined to see it all; to find and to account for everything bearing on the genuine meaning of the law, as intended by the legislative body responsible for framing and enacting it. The rule of law was safe in Judge Kravitz's hands.

Rarely can an opinion about the quality of a judge's body of work be verified empirically, and such opinions often reveal as much about the commentator as the subject. I am conscious of the concern that my own opinion of Mark Kravitz the judge may be shaped by my love of Mark Kravitz the man. So permit me to submit some empirical facts to a candid world.

During his tragically brief nine-year tenure on the bench, Judge Kravitz adjudicated nearly 2000 cases, and he rendered almost 700 written opinions.<sup>9</sup> Yes, I said 700 written opinions, ranging from a few pages disposing of a rehearing petition to near book-length explorations of complicated and controversial constitutional questions. According to my computer-assisted research, a total of 85 of Judge Kravitz's rulings were appealed to the Second Circuit. He was affirmed outright in 75 of those cases, and he was affirmed in part and reversed in part in six cases. He was reversed in four cases. Yes, I said four cases. I suspect that most people looking at this astounding record would marvel that Judge Kravitz got so many cases right. I find it remarkable that the Second Circuit got only four cases wrong.

So respected was Judge Kravitz by the Second Circuit that he sat by designation on over 100 cases before that court.<sup>10</sup> As Judge Cabranes has noted:

[I]t's relatively commonplace in our Circuit for judges from other courts to *ask* to sit by designation. While we're grateful for their service, quite candidly, we often reward them with little in the way of writing assignments—for the simple reason that we're selfish. But Judge Kravitz is one of the few judges who often sit[] by designation at *our* request, and who *has* been entrusted with substantial writing assignments on behalf of our Court.<sup>11</sup>

The true measure of a trial judge, however, cannot be captured by statistics. It is known only to the lawyers who appear often before him or her—the repeat players who see the judge in action on good days and bad and who know what the judge knows and what the judge wants to know. One such trial lawyer wrote about Judge Kravitz at a time when it had become evident that the end was near. He “want[ed] to weep,” this

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<sup>9</sup> Thomas B. Scheffey, *Judge Kravitz's Death 'A Great Loss to Our Court,'* CONN. L. TRIB., Oct. 8, 2012, <http://ctlawtribune.com/id=1202573998443>.

<sup>10</sup> David F. Levi, Lee H. Rosenthal & Anthony J. Scirica, *ALI Colleagues Remember U.S. District Judge Mark Kravitz*, ALI REP., Fall 2012, at 7, 7.

<sup>11</sup> Jose A. Cabranes, Judge, Presenting the Connecticut Bar Foundation's Distinguished Service Award to Judge Mark Kravitz (May 8, 2012).

seasoned litigator admitted, as he watched ALS “take this man little by little,” garbling his words and crippling his limbs, even as “his mind remain[ed] what it ha[d] always been, a thing of beauty, grace and power.”<sup>12</sup> “He is my judge,” wrote the lawyer.<sup>13</sup> “I do not want to imagine a world without him playing an active part in it. This is a man whom lawyers love; I am one of those lawyers.”<sup>14</sup> These words were written just days after Judge Kravitz had ruled against this lawyer in a major First Amendment case,<sup>15</sup> surely one of the biggest cases of the lawyer’s career.

Another regular litigator before Judge Kravitz recalled that in her last appearance before him: “[I]t was clear to me that we were about to lose him. I was uncharacteristically quiet, afraid that if I spoke, he would detect that I was choking back tears.”<sup>16</sup> She “loved being in his court,” both because his total command of a case “made [her] a better lawyer,” and because, more importantly, his steadfast intellectual honesty made him a faithful guardian of the rule of law.<sup>17</sup> The lawyer who said these things about Judge Kravitz had “never won a case” before him.<sup>18</sup> She also said:

The mark of a good judge is the number of lawyers who are content with the assignment [of their case to the judge]. . . . The mark of a great judge . . . is the number of lawyers who . . . have time and again been on the losing end of his rulings, but cannot wait to draw him again. . . . Mark Kravitz was a great judge.<sup>19</sup>

Those of us who did not have the privilege of litigating cases before Judge Kravitz must content ourselves with the next best thing—his extraordinary legacy of 700 opinions. Judge Kravitz would occasionally send me an opinion that he thought might interest me, and I have read many others besides. I have yet to *find even one* that does not reflect an exceptionally scrupulous, unbiased weighing of the parties’ opposing views and of the evidence and legal precedents bearing on the issue before him. Nor have I been able to find one that I think he got wrong.

Like I said, Mark Kravitz was scrupulously, dispassionately, consistently, and, sometimes, frustratingly *right*. He was just right.

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<sup>12</sup> Norm Pattis, *Sharp Mind, Failing Body and a Flood of Emotions*, CONN. L. TRIB., Apr. 23, 2012, at 38.

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> Mitchell v. City of New Haven, 854 F. Supp. 2d 238, 240, 252 (D. Conn. 2012).

<sup>16</sup> Karen Lee Torre, *The Honorable Mark R. Kravitz*, CONN. L. TRIB., Oct. 5, 2012, <http://ctlawtribune.com/id=1202573941734>.

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*