

George E. MacKinnon

Born: April 22, 1906, in St. Paul, Minnesota

Died: May 1, 1995, in Potomac, Maryland

On April 26, 1985, a ceremony was held in the United States Court- house in Washington, D. C., for the unveiling of a portrait of Judge George Edward MacKinnon, who had served on the Court of Appeals for the District of Columbia Circuit since May 1969. As is customary on these occasions, the speakers, who included former Governor Harold Stassen, District Court Judge Edward Devitt and Chief Justice Warren Burger, reminisced about MacKinnon's pre-court experiences. From these anecdotes it may be concluded that he was superbly prepared for the many important public law issues that were to come before his court.

MacKinnon received his LL.B. from the University of Minnesota Law School in 1929, was admitted to the bar, and became employed as assistant counsel at Investors Syndicate in Minneapolis. He was elected, as a Republican, to represent the 29th District of the Minnesota House of Representatives in 1934, reelected three times, and left office in 1942. While in the state house, he authored the 1936 Old Age Assistance Law, the 1939 Reorganization Act and the 1939 Civil Service Act. During the war, he served in the Navy. In 1946, he was elected to represent the Third District in the U. S. House of Representatives, defeating Democrat Roy W. Wier.¹ It was during this term that he became

¹ Results of the election for congress on November 5, 1946:

George E. MacKinnon (Rep).....	57,397
Roy W. Wier (DFL).....	52,797
Warren Greel.....	1,325

1947 *Blue Book*, at 359.

an ally of fellow Congressman Richard M. Nixon. In a return match two years later, Wier won,² and MacKinnon returned to private practice. Remaining active in politics, he was Richard Nixon's research director during the 1952 campaign. The following year, he was appointed U. S. Attorney for Minnesota and served to 1958, when he resigned to run for governor, a contest he lost to Orville Freeman.³ While U. S. Attorney, he pursued organized crime, which caught the attention of future Attorney General Robert F. Kennedy. Continuing a pattern of alternating private and public employment, he engaged in private practice in 1958-1960, was a special assistant U.S. attorney general in 1960-1961, and general counsel and vice president of the mutual fund behemoth, Investors Mutual Funds, later known as Investors Diversified Services, in 1961-1969.

The final chapter in his life began on April 21, 1969, when he was nominated by President Nixon to a seat on the influential "D.C. Circuit"; he was confirmed by the Senate on May 5, 1969, and received his commission the next day. He took senior status on May 20, 1983, and served on the U. S. Sentencing Commission from 1985 to 1991. He died on May 1, 1995, at age eighty-nine.

² Results of the election for congress on November 2, 1948:

George E. MacKinnon (Rep).....72,402
Roy W. Wier (DFL).....86,171

1949 *Blue Book*, at 352.

³ Results of election for governor on November 4, 1958:

George E. MacKinnon (Rep).....490,731
Orville L. Freeman (DFL).....658,326
Arne Anderson (Industrial Govt.).....10,858

1959-1960 *Blue Book*, at 474.

In an obituary in the *New York Times*, MacKinnon was described as a “fiercely independent judge.” It continued:

Judge MacKinnon was widely viewed as a conservative when President Richard M. Nixon appointed him to the appellate bench in 1969. At the time, the court was considered among the most liberal in the country.

But in the late 1980's, when Republicans wanted to repeal the law creating independent counsels to investigate alleged wrongdoing in the executive branch, Judge MacKinnon defended the law. From 1985 on, he was the presiding judge on the three-member panel that appoints such counsels.

"I don't see any unfairness about it," he said about the law in 1987. "Where else are you going to turn? The courts inherently have the power to see that justice is done."

In 1988 a majority of the appeals court ruled that the independent-counsel law was unconstitutional. Judge MacKinnon dissented, and for it, was criticized by name in the majority opinion written by a colleague, Judge Laurence H. Silberman.

The Supreme Court, in a 7-to-1 decision, overturned the appellate decision.

For six years, beginning in 1985, Judge MacKinnon served on the United States Sentencing Commission, which established uniform sentencing guidelines for Federal crimes. Again, he came in conflict with fellow

judges, when some 200 of them declared in opinions that the guidelines were unconstitutional. But, again, Judge MacKinnon's position was eventually upheld by the Supreme Court.

When the Justice Department sought to incorporate the sentencing commission into the executive branch, Judge MacKinnon fought the idea as something that "could have resulted in tyranny," because it would join prosecuting and sentencing authorities in one branch of Government. Once more, his position was vindicated in a Supreme Court ruling.

As an appellate judge, he frequently dissented from the majority, but found himself in harmony with the Supreme Court. For example, in its review of 29 decisions of the District of Columbia Circuit over one period, the Supreme Court reversed 25 of the rulings, and in each of those 25, Judge MacKinnon had been in dissent.

In *Barnes v. Costle* in 1977, Judge MacKinnon held that sexual harassment could be considered a form of sex discrimination, a ruling that paralleled the view of his daughter, Catherine MacKinnon, who was then a young legal essayist concerned with feminist issues.

George E. MacKinnon was born April 22, 1906, in St. Paul. He attended the University of Colorado for a year and then transferred to the University of Minnesota, where he received a law degree in 1929. He then served as a staff lawyer for Investors Syndicate, now known as Investors Diversified Services, a major mutual fund.

He was a member of the Minnesota Legislature from 1934 until the United States entered World War II, and while there, he helped draft the progressive legislative program of Gov. Harold E. Stassen, a moderate Republican.

In 1946, he was elected to the United States House of Representatives. During his single term, he and Mr. Nixon, who was then a Congressman, helped draft what became the Taft-Hartley Act, which bars unions from forcing a worker to join them to hold a job.

He also worked with Mr. Nixon in investigating whether Alger Hiss had passed Government secrets to the Soviet Union.⁴

MacKinnon donated 178 boxes of his personal papers and court files to the Minnesota Historical Society. They constitute a rich source of information about Minnesota politics in the mid-twentieth century as well as the work of a federal appeals court judge. Box 21 contains biographical data, including a proposal for a memoir, and boxes 35 to 164 hold files of cases he heard on the court (the last has an index to the cases in which he wrote an opinion).

The following transcript of the ceremony of the presentation of George MacKinnon's portrait appeared first at 774 F.2d CIII-CXVIII (1986). It has been reformatted. A copy of the portrait itself is omitted. □

⁴ *New York Times*, May 3, 1995. A notice also appeared in the *St. Paul Pioneer Press*, May 3, 1995, at C.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Portrait Presentation
Ceremony

of

GEORGE E. MACKINNON

April 26, 1985

Ceremonial Courtroom
United States Courthouse
Washington, D.C.

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PROCEEDINGS

THE MARSHAL: This Honorable Court is in session.

CHIEF JUDGE SPOTTSWOOD W. ROBINSON: The court is convened in this special session for the presentation of the portrait of Judge George E. MacKinnon. The Chief Justice of the United States, our Circuit Justice and formerly a member of this court, honors us by his presence on the bench. Another member of the court, Judge Roger Robb, is seated in the audience.

At the outset, I extend a warm welcome to the members of Judge MacKinnon's family who are here: Mrs. Betty MacKinnon, his wife; Mr. James MacKinnon, his son; Mr. Leonard MacKinnon, his son; Mr. Robert Davis, Mrs. MacKinnon's brother, and Mrs. Davis; Mr. Stephen Mark and Mr. Herbert Fowler, Judge MacKinnon's cousins; Ms. Jennifer Johnson and Mr. Paul Mazza, Mrs. MacKinnon's cousins; and Dr. Davis Johnson and Mrs. Johnson, Mrs. MacKinnon's cousins.

We are happy to share this important occasion with a number of distinguished guests. Among them are Justice Rehnquist and Mrs. Rehnquist; Mrs. Warren E. Burger; Mrs. Byron R. White; Mrs. Harry A. Blackmun; Chief Judge Aubrey E. Robinson, Jr., of the United States District Court for the District of Columbia, and judges of that court; Chief. Judge H. Carl Moultrie, I, of the Superior Court of the District of Columbia; Senator David F. Durenburger; Congressman John A. Blatnik; Dr. Richard C. Hal-

verson, Chaplin of the United States Senate; The Honorable William H. Webster, Director of the Federal Bureau of Investigation; The Honorable Joseph E. diGenova, United States Attorney for the District of Columbia; Mr. Fred F. Fielding, Counsel to the President; Mr. William B. Foley, Director of the Administrative Office of the United States Courts, and Mrs. Foley; Mr. A. Leo Levin, Director of the Federal Judicial Center; and Mr. George Augusta, the artist, and Mrs. Augusta.

The court also notes the presence of two of Judge MacKinnon's former secretaries, Mrs. Patricia L. Chatman and Mrs. Cathy J. Vaughn, and his present secretaries, Mrs. Joyce E. Trimboli and Mrs. Judith A. Hunt.

There are other guests who will later appear as participants on the program, and still others, including spouses of some of our circuit and district judges, who are too numerous to mention.

The court recognizes one of Judge MacKinnon's former law clerks, Mr. James F. McHugh, who, within the month, will be sworn in as a Justice of the Massachusetts Superior Court in Boston.

MR. McHUGH: Chief Judge Robinson, Mr. Chief Justice, guests, friends, I am privileged to stand here today on behalf of all of Judge MacKinnon's law clerks, all save Tom Campbell, who will speak for himself in a minute.

Together we are presenting to the court a portrait of the judge painted by George Augusta, the distinguished artist with whose portraits many of you are already familiar. This portrait was painted over the course of several sittings in Massachusetts last summer. The Judge is delighted with the result. I know you will be when you see it.

At the present moment, though, I would like to ask Mr. Augusta, who is with us today, to stand and be recognized.

There are, by my count, 39 of Judge MacKinnon's clerks, people who sit and who sat in his chambers for a year and then, as is the custom, moved along to business, to private practice, to academia, to public service.

Each of us carries something of the Judge's influence with us when we go. That influence has taken many forms. To work for Judge MacKinnon is to learn, for example, the importance of legislative history and what research into legislative history really means.

To work for Judge MacKinnon is to learn the importance 'of facts and relentless pursuit of the facts, as well as the limited utility of legal theories which do not cling closely to those facts.

To work for Judge MacKinnon is, indeed, to learn to work, for the example that he set gave to me, at least, a new meaning of the word dedicated.

But to work for Judge MacKinnon was much, much more. There is, as Jack Wheeler put it in his address to the Circuit Conference last year, laughter and love in his chambers. There was a sense there, also, of duty, a sense of high public purpose, and a sense of honor.

Also, to me, most important, there was a sense of civility—a sense that even the most hotly contested issues and even the most deeply-held convictions could be vigorously debated and argued in measured tones and without a strident air. And to me, in an increasingly disputatious world, that is perhaps the most important influence of all.

So, it is with a great sense of pride, deep affection, and lasting gratitude that I stand here today to present Judge MacKinnon's portrait to this court as a gift from his current and his former law clerks. With it go our best wishes to the Judge and our heartfelt thanks for what he has given to each of us.

About a year ago, Jack Wheeler started the process which brings us together here today. Therefore, I would like him to come with me to unveil the portrait of Judge MacKinnon, not only because he started the process but because of my firm belief that four hands for this project will be better than two.

Jack?

(Portrait [by the artist, George Augusta of Essex, Massachusetts] un-veiled, applause.)

CHIEF JUDGE ROBINSON: Thank you, Mr. McHugh and Mr. Wheeler.

It is with the greatest of pleasure that I accept this portrait on behalf of the court. We are deeply grateful to Judge MacKinnon's law clerks for this wonderful gift and equally appreciative to Judge MacKinnon for the splendid service he has rendered and continues to render to the court. We have long recognized his marvelous abilities and virtues, and have admired his magnificent performance on the bench His portrait will remain a monument to an outstanding judicial career and a constant and perpetual source of inspiration to us all.

The court next recognizes a former Governor of Minnesota, one who needs no introduction the Honorable Harold E. Stassen.

GOVERNOR STASSEN Chief Judge Robinson, Mr. Chief Justice distinguished jurists and friends.

Fifty seven years and seven months ago, on the campus of the University of Minnesota, as I walked along the path high overlooking the rolling Mississippi River with a special friend, Fred Hovde out of Devil's Lake North Dakota he suddenly said to me a significant thing that I remember to this day.

Fred Hovde may I interject was a straight A student in chemical engineering, and a remarkable man Later he went on to become President of Purdue University, after being a Rhodes Scholar

Fred turned to me that day and said, *"I want you to meet an iron man with the brains of a genius."*

Of course even in those long ago student days that stopped me short I said, "Who?" Fred said, "He's coming down the path."

I looked up and striding very affirmatively toward us, was another student with a rather brilliant blazer that almost had you automatically glance down and see if he was wearing kilts or not! I looked him over and said, "Weren't you there yesterday at the beginning of the freshmen law class?"

"That's right," he said. That was my first conversation with George MacKinnon, fifty-seven years and seven months ago!

Then I had the opportunity to watch at close hand while George MacKinnon played 60 minutes of football, in those days when we had great Minnesota teams, being up there with the very best. He played center on the offense, and roving center on the defense. Fred Hovde, the same Fred Hovde, was quarterback, and made the greatest one year record of scoring of anyone in the Big Ten.

Sportswriters used to say they never knew how George and Fred had that uncanny ability to analyze in advance the opposing plays.

Memories of that description of George MacKinnon have stood out through the years; *the iron man with the brains of a genius*. It was in a sense confirmed when he was awarded the Western Conference (Big Ten) medal for the most outstanding combination of scholarship and athletic ability.

But when we graduated in law three years later, I lost track of George MacKinnon. We each went our separate ways to try to make a living as young lawyers in the depression years. Then, when, by a generally labelled accident just ten years later, I was elected as a very very young Governor, and walked into the State Capitol, lo and behold, there was a veteran legislator in his third term in the House, named George MacKinnon.

After the early conferences at the Capitol, I asked George MacKinnon to be the roving center in the legislature for our programs. The objective analysis years later by the political scientists was that his remarkable, roving center activity, not only in the House, but in the more difficult area across in the Senate, brought through the historically most remarkable four years of legislation in the well-being, and the education, and the future of our North Star State!

Then came World War II, and we both went off from the Capitol to the war.

Thus, Mr. Chief Justice and distinguished jurists and, guests, it is those very early memories that I share with you, along with a deep personal appreciation of having the privilege of joining together with you on this day, in honoring George MacKinnon, at the

unveiling of the remarkable and meaningful portrait here presented!

Thank you, Your Honor. (applause)

CHIEF JUDGE ROBINSON: Thank you, Governor Stassen. The court recognizes the Honorable Edward J. Devitt, United States District Judge for the District of Minnesota, a long-time friend and colleague of Judge MacKinnon.

JUDGE DEVITT: Chief Judge Robinson, and Mr. Chief Justice, and Members of the Court, Judge Robb, and Chief Judge Robinson, and distinguished members of the trial court.

I have known George MacKinnon for 50 years, and that's a long time. And it has been a most agreeable relationship. We are fellow Minnesotans. It seems that almost everybody is a fellow Minnesotan of George. And we have shared many experiences. I know him well. He is a man of character and integrity. There's no fluff about, him, no guile; everything is straight up.

We were playing golf one day and George's drive went out some 200 yards, but it landed very close to the out-of-bounds stakes. George shot a second provisional ball. And then we all went out and surveyed the scene to see if there was going to be a two-stroke penalty. His opponents, his partner, the caddies, we all said, "The ball is inbounds."

Now, the normal person would accept that favorable judgment of his playmates but not George. He had to make his own survey, first from one side of the stakes and then from the other. He straightened up and announced, authoritatively, of course, "It's out-of-bounds," and took the penalty. That's MacKinnon. And

that's the kind of a judge he has been, too — impartial judgments on the facts and the law as he saw it.

But it should not be thought that this sometimes dour-acting Scot is without the homey virtues. He has them and in bountiful measure. He is kind, and friendly, and thoughtful, and generous. He is unselfish, very much concerned about his fellow man at all times. He is the most loyal of friends; I know that.

His sense of humor, strange as it may seem, is absolutely amazing, almost as good as that of the Irish people.

Judge MacKinnon came to this court well-equipped through character, and education, wide experience and natural endowments of intelligence and sound judgment to render, a high caliber of judicial service. And that he has done so is clear from an appraisal of his some 740 written opinions, many of them dissents, of course, and from an appraisal of his contribution by those who know best, his fellow judges, the lawyers, and the law clerks, who know so much better than the rest of us.

George MacKinnon has been a good judge for the same basic reason that he has been a good lawyer, a good state legislative leader, a good United States attorney, a good Congressman, a good corporate general counsel and, yes, good, very good at his every endeavor, and all of this because he is a good man.

As the cowl does not make the monk so the robe does not make the judge. It is the person underneath. Put shortly, George MacKinnon is a good judge because he is a good man, and it is this good man whom we honor today.

There are now 753 federal judgeships authorized under Article III of the United States Constitution. In the history of the Republic,

we have had 2,610 justices and judges appointed by the Congress and by the President, with the consent of the Senate. Most of them are little known, and their distinctions recorded for posterity only in the musty files of a clerk's office.

Indeed, it was not until the celebration of the bicentennial of the Declaration of Independence, in 1976 that a list of those judges, with biographies, was compiled by a committee of the judicial conference. Would that we had a more fitting and deserving way to honor members of the Third Branch, for in the words of Chief Justice Warren B. Burger:

The judges of United States courts have played a mighty role in the maintenance of liberty and preservation of the social fabric for almost two hundred years. They have contributed significantly to the preservation of the federal system and to the protection of all of our rights and afforded an example of human freedom to all the world.

Judge MacKinnon's judicial service is fittingly emblematic of that evaluation.

When the beautiful portrait of Judge MacKinnon is placed in these halls, I would hope the painted likeness alone would tell future viewers what we know — that here is a unique and extraordinary person, a man of wisdom and courage, who conscientiously devoted himself, without reserve, to fulfilling faithfully, and with marked distinction, the weighty obligation of the judge's oath.

Congratulations my good friend, Judge MacKinnon. (applause)

CHIEF JUDGE ROBINSON: Thank you, Judge Devitt. The court recognizes a very distinguished lawyer, one of the best known of our time, Mr. James F. Neal.

MR. NEAL: Mr. Chief Justice Burger, Chief Judge Robinson, distinguished jurists, ladies and gentlemen, and particularly Betty MacKinnon.

In February, 1961, then Attorney General Robert Kennedy told me, a poor, young, boy lawyer from Tennessee, that he wanted me to go out to Minnesota and prosecute a case that was very important to him.

I had never prosecuted a case. I had only tried two or three in my then brief career. And the Attorney General told me to look up a man out there by the name of George MacKinnon and maybe he could help me.

I met George MacKinnon then, and his family, out in Minnesota. He took me in his home. He taught me how to prosecute my first case.

He says that he taught me all that I know but not all that he knows.

I still have a vivid picture of the nights sitting around the fire at Judge MacKinnon's home telling me how to prosecute this case. He would say, "Make your case lean and hard, no fat, no wiggle room," and then taking that big hand, he would say, "and then pound fact after fact after fact into that jury until they have no option but to convict."

Judge, over the years, I have passed on what you taught me, these many years ago. I have to confess today I seldom gave you credit. I claimed it all for myself.

Today, sir, I do give you credit.

Thank you. (applause)

CHIEF JUDGE ROBINSON: Thank you, Mr. Neal. The court recognizes another former law clerk to Judge MacKinnon, now a professor at Stanford Law School, Mr. Thomas J. Campbell.

PROFESSOR CAMPBELL: Chief Judge Robinson, Mr. Chief Justice, Mrs. MacKinnon, may it please the court.

What a special honor to have clerked for Judge MacKinnon. What a singular opportunity to learn of law and of character. In the Federalist Number 78, Alexander Hamilton spoke of what would constitute the kind of judge our Constitution envisioned:

“[T]here can be but few men in the society who will have sufficient skill in the laws to qualify them for the station of judges. . . . [T]he number must be still smaller of those who unite the requisite integrity with the requisite knowledge.” The Federalist 401 (Everyman’s Library Edition, 1971).

This text for my remarks today draws from both sides of that ideal judge — the knowledge, ‘and the integrity, the lawyer and the person for whom we clerks were and still are privileged to work.

Let me begin with some description of the lawyer and conclude with some description of the person When each of us received a phone call from a man who insisted on calling himself “George” MacKinnon, we anticipated a year of intense post-graduate legal

education. What none of us could anticipate was the historic occasion to understudy a remarkable legal scholar, one uniquely vindicated in his constitutional legislative and judicial interpretation.

Judge MacKinnon has made his judicial record in times and circumstances that allowed him often to be in the majority but also compelled him often to be in dissent. To Judge MacKinnon the task of writing a well-reasoned dissent was a paramount part of his duty as a judge, and the results of his efforts are remarkable.

In statistical terms, a MacKinnon dissent improves the chances for certiorari more than fourfold. Twenty-nine cases in which Judge MacKinnon dissented have been taken by the Supreme Court; 25 were reversed and remanded, three others reversed in part, and only one simply affirmed.

Such statistics mask the subtlety of these cases, to which topic I will now turn, but in their stark effect, they demonstrate one thing with brilliant clarity — the quality and cogency of Judge MacKinnon's writings command the greatest degree of attention from our country's highest tribunal.

In reviewing the substance of the MacKinnon record over its first 16 years, three persistent themes recur in 555 separate opinions— respect for the Constitution's allocation of powers, respect for the statutes as Congress wrote them, and, in all things, common sense.

On the first point, respect for the Constitution's allocation of powers, Judge MacKinnon's opinions insist that one branch not traverse the bounds set for it by the Constitution, but also that each be allowed the full freedom to operate within its intended sphere. In words written for generations to follow, Judge

MacKinnon warns in dissent, in *Goldwater v. Carter*, 617 F.2d 697 (D.C.Cir.1979), where the President had abridged the role of Congress, in unilaterally renouncing a treaty,

The appetite of the presidential office will be whetted by the court's decision today. In future years, a voracious President and Department of State may easily use this grant of absolute power to the President to develop other excuses to feed upon congressional prerogatives that a Congress lacking in vigilance allows to lapse into desuetude.⁵

From an attempt by the President to abridge congressional power, I turn to a congressional attempt to impede presidential authority.

In *Clark v. Valeo*, 559 F.2d 642 (D. C. Cir. 1977), Judge MacKinnon warns, "*Congress cannot establish 'rules of law' by a legislative scheme which by-passes the constitutional role of the President in law making. . . . [T]he unconstitutionality at the core of the one-house veto device [is its] . . . subversion of the constitutional legislative process.*"⁶

This court well knows that six years after *Clark v. Valeo*, the Supreme Court of the United States vindicated precisely this view of the legislative veto in *I.N.S. v. Chadha*, 462 U.S. 919, 103 S. Ct. 2764, 77 L.Ed.2d 317 (1983).

And turning to the judicial branch, itself, Judge MacKinnon's insistence on respect for the constitutional scheme of powers is once again made clear—in opinion after opinion, whether dissent

⁵ *Goldwater v. Carter*, 617 F.2d 697, 739 (D. C. Cir. 1979) (MacKinnon, J., dissenting).

⁶ *Clark v. Valeo*, 559 F.2d 642, 690 (D. C. Cir. 1977) (MacKinnon, J., dissenting).

or majority, insisting upon deference to the jury as the ultimate finder of fact—whose determinations, within our constitutional scheme, bolstered specifically by the Seventh Amendment, are to be jealously respected.

The role of the grand jury is also of critical importance to Judge MacKinnon — so critical that, if a prosecutor’s proof varies from what the grand jury charged, reversal is required. It was the prosecutor’s duty to assist the grand jury in drafting its indictments properly.

Here, I think, the former United States Attorney MacKinnon influenced the Circuit Judge MacKinnon. A MacKinnon clerk early learned that the Judge would ask for a copy of the indictment in any criminal case — so, you may as well go get it at the start — and, upon giving it to the Judge, would frequently hear, “If we could draft them properly in Minnesota, why they can in Washington, too!”

There follows from this first tenet of Judge MacKinnon’s jurisprudence, respect for the constitutional allocation of powers, a second tenet, as well: that the laws written by Congress are to receive their full effect according to their language and intent — but no more.

How often have all of us who served as clerks heard, upon unearthing some fragment of legislative history, some comment in a hearing, some language in an earlier draft of a bill, Judge MacKinnon’s simple question, “But is the language of the statute unclear?”

The first, best, and often last evidence of what was intended is what was written. Here, I think, the former Congressman dominated, as well as the legal scholar who could quote from

memory *Sutherland Statutory Construction*, including mystical Latin phrases such as “*ejusdem generic*.”

No area of law reflected this approach more than Judge MacKinnon’s opinions involving the Labor Act. To mention just one case, in his opinion for the court in *Western Addition Community Organization v. National Labor Relations Board* (Emporium Capwell), 485 F 2d 917 (D. C. Cir. 1973), Judge MacKinnon masterfully reconciled the National Labor Relations Act and Title VII of the Civil Rights Act, to uphold the right of minority-race employees to protection for their protest, when they found no protection within their union.

This case serves well to introduce my last point concerning the MacKinnon jurisprudence — common sense. The common sense of the black workers’ dilemma at Emporium Capwell was that their union had done nothing to assist them in their claim of unfair treatment at the hands of the employer, and to remit them to the union grievance procedure made no sense. The court so held.

The common sense approach dominates, as well, in *Smith v. Pro Football, Inc.*, 593 F.2d 1173 (D.C. Cir. 1978), where Judge MacKinnon, in dissent,⁷ anticipated by six years the Supreme Court’s own common sense approach to antitrust in the sports area in NCAA.⁸ Competition means something different in an industry

⁷ *Smith v. Pro Football, Inc.*, 593 F.2d 1173, 1191 (D. C. Cir. 1976) (MacKinnon, J., concurring in part and dissenting in part).

⁸ *National Collegiate Athletic Association v. Board of Regents of the University of Oklahoma and University of Georgia Athletic Association*, — U.S. —, 104 S. Ct. 2948, 82 L.Ed.2d 70 (1984).

where the objective is a close contest between equally matched teams, rather than dominance by one successful firm.

Of course, here, we see the influence of the center for the University of Minnesota Football Team, and, if I can be permitted one mild critique, perhaps this influence overcame the more traditionally MacKinnon-esque deference to fact-findings by the trial court, which had made the well-nigh constitutional error of equating a free safety with a corner-back. *Smith, supra*, 593 F.2d at 1218.

But it was the common sense attitude that won out — “As a guide to close cases or novel environments, construe the statute or the regulations to make sense.”

Judge MacKinnon seemed always to have in mind the poem, “Extempore In The Court of Session,” written by that Scottish legal scholar, Robert Burns, where the poet describes the advocate caught in that uniquely dreadful moment when his mind had gone blank. “He gaped for’t, he graped for’t/ He fad it was awa, man;/ But when his common sense came short/ He eked out wi’ law, man.”⁹

As a clerk, I confess to this court that citing deeply shrouded precedent and learned law review articles to Judge MacKinnon was never acceptable, if the common sense of your view came up short.

And this introduces my concluding topic. What personal lessons did we take away from our years with Judge MacKinnon? The answer is, a treasure. Two aspects of many will I describe today, thoroughness and honesty.

⁹ *Poems and Songs of Robert Burns* 419 (Collins edition, 1977).

Thoroughness — whatever the issue, the instruction was the same:—find all the law.

A difficult question concerning the rate base of a public utility was encountered in one case.¹⁰ Judge MacKinnon's majority opinion cites how every one of the 50 states dealt with that same issue.¹¹

The treaty case, earlier described, required some analysis of other treaties that had been abrogated. Judge MacKinnon's opinion analyzes them all.¹²

What wiser lesson for a young lawyer to learn than to be exhaustive in research. How else but thoroughly prepared can you honestly face your clients or your students?

And what more inspiring a lesson for a young lawyer than to observe intellectual honesty, the second and even more important personal lesson that the Judge taught each of us.

Every case involves facts that don't help you. Confront them; do not ignore them, not because if you don't your adversary will, but because your personal honesty compels that you do. That is what Judge MacKinnon taught to each of us.

That is the lesson worth more than a decade of law schooling, a lesson not preached in the abstract but demonstrated daily in the minutiae of facts and the detail of precedent in everything the Judge did.

¹⁰ *Communications Satellite Corp. v. FCC*, 611 F.2d 883 (D.C. Cir. 1977).

¹¹ *Communications Satellite Corp.*, *supra*, 611 F.2d at 904-5 & n. 35-61.

¹² *Goldwater*, *supra*, 617 F.2d at 723-734 (MacKinnon, J., dissenting in part and concurring in part).

Every law clerk to Judge MacKinnon has learned and will remember to his or her last this lesson of honesty. If we keep to it, in matters about which the Judge will never know, it is still the Judge we honor; if we slip from it, it is him we disserve.

Three people have the privilege of Judge MacKinnon for a father. His law clerks claim him as almost the same. When I read the poet's words today and whenever I will read them to the last of my days of a father's words to his son, it is of Judge MacKinnon that I think and the example he gave.

"If you can trust yourself when all men doubt you/ But make allowance for their doubting too;/ If you can wait and not be tired by waiting,/ Or being lied about, don't deal in lies, . . . If you can fill the unforgiving minute/ With sixty seconds' worth of distance run,/ Yours is the Earth and everything that's in it,/ And—which is more — you'll be a Man, my son! " ¹³

To your clerks, Judge MacKinnon, you are and always will be that man. (applause)

CHIEF JUDGE ROBINSON: Thank you, Professor Campbell. And now it is my privilege to present to you the Chief Justice of the United States.

CHIEF JUSTICE BURGER: Thank you, Chief Judge Robinson. Mrs. MacKinnon, members of the MacKinnon family, and friends and my colleagues of the bench and bar. You have heard an extraordinary story today about an extraordinary man.

¹³ R. Kipling, "If—," *A Choice of Kipling's Verse* 273 (Faber & Faber edition, 1983).

And while some parts of his career have been mentioned with great eloquence, I was thinking as each of you were speaking of all the factors that go into producing the person whose portrait has now been drawn in words as in painting by this splendid artist.

One thing has been touched on but perhaps not emphasized enough. This is the extraordinary dedication of this man. With Governor Stassen, I have known him, not quite 57 years but, I can confess 50, at least, and we have worked together on many enterprises, and we became close friends.

In one of them, he and I spent a great deal of time and effort in a program to try to save this Republic but the stubborn Republic refused to be saved, and we finally let them go on and elect other people as President of the United States.

In that process, he and I learned a great deal from each other, I hope, and from our friend, Governor Stassen, and all of the others that worked in that group of young men and women out in Minnesota.

I look at George MacKinnon's career starting in the practice as soon as he left the law school, and very soon after that going into the Minnesota Legislature, where he became a very significant member. Meanwhile he carried on a full load of practice; and later in the Congress. Of the United States, as United States Attorney, Assistant Attorney General of the United States, and then, finally, a distinguished career in the private sector to look to economic security. Having given so much of his life and his, talents to public service, George MacKinnon became General, Counsel and Vice President of the world's largest mutual funds, sponsored by Investors Diversified Services.

One of the significant things that has not been touched on is that the judges present today, particularly, can well imagine that the compensation of the General Counsel and Vice President of that great corporation was something more than the compensation of a United States judge. Yet, without hesitation, when the opportunity came, he left that enterprise 16 years ago, to become a member of this court, where we served as colleagues on the same bench for a time.

What has made the extraordinary man that his associates and former law clerks have described is the great range of experience in private practice, in legislative work, in the Executive Branch of the Government, is a breadth of experience shared by few people and even by fewer members of the judiciary.

So I can heartily join with all of those who have spoken, that here is, indeed, a splendid judge. The terms in which we have been speaking would leave some hint of a terminal point in a career, but his judicial career is by no means terminated. As a senior judge, he carries a full load of work and I am sure will do so for many years. For the good of our system of justice and the good of our country I hope those years will be very, very long. (applause)

CHIEF JUDGE ROBINSON: Thank you, Mr. Chief Justice. And now it is my pleasure to present to you Judge MacKinnon.

JUDGE MacKINNON: Chief Judge Robinson, Chief Justice Burger, my former law clerks, Mr. George Augusta, and distinguished guests, whether lawyers, judges or friends.

There is a time for everything, and this is a time for friends. On this most delightful occasion in my life, I want to tell all my law clerks, who alone have made this presentation possible, that my heart-felt gratitude for what they have accomplished is

unbounded. Through the years I have enjoyed working with them. I have greatly admired their ability and industry and, most of all, I treasure the years of close association and the memories of those days.

I also gather intense satisfaction daily from reports I receive of their accomplishments as lawyers and citizens of this great nation.

I was particularly pleased when the Governor of Massachusetts appointed Jim McHugh as a justice with life tenure to the Massachusetts Superior Court.

And I am overjoyed at the recognition that John Wheeler is receiving as chairman of the Vietnam Veterans group that built the Vietnam Memorial, which is now recognized as the most moving war memorial in the world.

Time does not permit a recital of the progress of others in the world of affairs, but they are significant and I am sure will become even more notable in the years ahead.

Many of my former law clerks have come from far away to be here today. And at this time I would ask all of my clerks to rise.
(Clerks standing, applause.)

JUDGE MacKINNON: My great friend in this life, the highly-revered Leonard P. Walsh, and I roomed together in college; played football next to each other in the line for three years at Minnesota. He was best man at our wedding, and our younger son is named after him. He served as United States District Judge here for many years, and I am deeply moved by the presence here today of his widow, Bronia; her son, and a number of his former law clerks. The overly-kind remarks of those who have spoken, all

of whom have traveled considerable distances, are most sincerely appreciated.

The work of Appellate Judges ordinarily receives very little commendation or attention. That is as it should be. Our work is tedious and best performed as servants of the law in a vast, isolated silence. We should not seek to attract public attention or acclaim. I have tried to follow that course. I feel that an Appellate Judge should talk to the bar and to the public through his opinions. The principal role of a judge, as I see it, is to recognize truth. Justice is truth in action. That is the objective a judge seeks in his judgments, which may be permanent, but judges are not.

So, when I approached what I formerly considered was old age, I thought I would move over a bit and let some other judge share the burden. I prefer people to ask, "Why did he take senior status?" rather than, "Why didn't he?"

At this time, I also want to tell you what my close friends know. That I value and appreciate the many beautiful qualities of my wife, Betty, more than I can express. A little while ago, when I was being investigated for some top secret, additional judicial duty, an FBI agent, in interviewing a lady of our acquaintance, whom war and upheaval had forced from her native land, asked her, "How about his wife?" The lady replied, "She's the best I have seen in America." (applause)

JUDGE MacKINNON: I liked that. To my mind, she is the finest wife and mother that any person could ever have.

This is also a proper occasion to talk about the legal profession. It is said that one man, in his life, plays many parts. That has certainly been true with my life in law.

Through my 56 years as a lawyer, I have worked, at one time or another, with thousands of lawyers in all of our states, all the Provinces of Canada, and some foreign countries. I, thus, feel competent to express an opinion on lawyers, generally. Lawyers are a breed apart. They are trained in a highly-intellectual profession and practice in the troublesome field of human conflict. Difficult problems in that area are a lawyer's everyday fare. Find a complex problem that confronts people anywhere and you will find some lawyers working to solve it.

They advise, advocate, prosecute, judge, settle and serve the interests of the public, their clients, and the law in a common objective — to achieve justice. In doing so, sharp differences are bound to arise with other lawyers, and I might add, between some judges, too. Yet, most lawyers and judges generally develop a regard for each other that permeates the profession and is profound and far-reaching.

This has been true down through the ages. Shakespeare observed 400 years ago, that "adversaries in law strive mightily but eat and drink as friends."

It is this deep-seated, mutual respect for the law and for their adversaries that binds the profession into a great fraternity.

Now, the Scots have been credited with many accomplishments — golf, the steam engine, Scotch whiskey, curling, marmalade, thrift, the kilt, tartans and bagpipes, to name a few, but one of the most remarkable products to come out of the "Bonnie Land," as the English describe Scotland, is not one of the foregoing but a song of fellowship that has been translated into more languages than any song ever written.

So, on this special occasion, I would like to make a unique request, that you all join Betty's brother, Robert Davis, and close this happy event by rising and singing, for that great fraternity of those who follow the law, Robert Burns' famous song of universal friendship, "Auld Lang Syne."

Should auld acquaintance be forgot,
And never brought to mind?
Should auld acquaintance be forgot,
And days of auld lang syne!
For auld lang syne, my 'dear,
For auld lang syne;
We'll tak 'a cup o' kindness yet
For auld lang syne! (applause)

JUDGE MacKINNON: Thank you all for coming.

CHIEF JUDGE ROBINSON: Thank you, Judge MacKinnon. The audience is invited to come to the well of the courtroom and view Judge MacKinnon's portrait after we adjourn. A reception for invited guests will follow immediately in the Judge's Dining Room on this floor of the building. The Marshal will now adjourn this session

THE MARSHAL: Stand, please; This Honorable Court now stands adjourned until Monday morning at 9:30.

(Whereupon, the session was adjourned at 4:45 p.m.) ■

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