THE HONORABLE GEORGE E. MACKINNON

Oral History Project
The Historical Society of the District of Columbia Circuit

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United States Courts
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THE HONORABLE GEORGE E. MACKINNON

U.S. Court of Appeals for the District of Columbia Circuit

Interview conducted by:
Michael P. Socarras, Esquire

February 18, 1994

NOTE

The following pages record an interview conducted on the date indicated. The interview was electronically recorded, and the transcription was subsequently reviewed and edited by the interviewee.

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PREFACE

The goal of the Oral History Project of the Historical Society of the District of Columbia Circuit is to preserve the recollections of the judges who sat on the U.S. Courts of the District of Columbia Circuit, and judges' spouses, lawyers and court staff who played important roles in the history of the Circuit. The Project began in 1991. Most interviews were conducted by volunteers who are members of the Bar of the District of Columbia.

Copies of the transcripts of these and additional documents as available – some of which may have been prepared in conjunction with the oral history – are housed in the Judges' Library in the E. Barrett Prettyman United States Courthouse, 333 Constitution Avenue, N.W., Washington, D.C. Inquiries may be made of the Circuit Librarian as to whether the transcripts are available at other locations.

Such original audio tapes of the interviews as exist, as well as the original 3.5" diskettes of the transcripts (in WordPerfect format) are in the custody of the Circuit Executive of the U. S. Courts for the District of Columbia Circuit.

INTERVIEW WITH SENIOR JUDGE GEORGE MACKINNON
CONDUCTED BY MICHAEL P. SOCARRAS
FEBRUARY 18, 1994

Q: This is the interview of Judge George MacKinnon by Michael Socarras for the D.C. Circuit Oral History Project. I am in the chambers of Judge MacKinnon. Judge MacKinnon, why don't we begin by asking you to tell us about your background, your family, where you were born and grew up, and we can pick up the conversation from there.

MACKINNON: I was born in St. Paul, Minnesota on April 22, 1906. My father was working on the Great Northern Railroad then, and he eventually became an official. I started school in Wilmar, Minnesota, where we lived through the 4th grade -- until 1914 -- then we moved to Sioux City. I went to high school in Sioux City until 1920. Then we moved to Grand Junction, Colorado, where I went to high school with a six-month interval during the winter living in Glenwood Springs when we couldn't get a house in Grand Junction. I graduated from high school in Grand Junction in 1923 and in the fall went to the University of Colorado at Boulder and stayed there one year. The next year, I went to the University of Minnesota in Minneapolis and continued there through law school. At that time two years of preliminary higher education was all that was necessary before you were eligible for the law school. I served on the law review and graduated in 1929 and was awarded the Western Conference Medal for scholastic and athletic achievement. I had earned seven letters in football, basketball and track. I was sworn in to

the Minnesota Bar on the day the market broke in 1929. While practicing law from 1929 on I served as assistant football coach at the University for five years.

After the 1929 football season ended I started as assistant to counsel with a firm known as Investors Syndicate, which was then a small corporation of $29 million, doing an investment business nationwide and all over Canada. I went to work for them on December 1, 1929 and for the next 13 years did all the corporate legal work. I also served in the Minnesota House of Representatives from 1934 to 1942. As Chairman of Judiciary in 1939 I drafted Governor Stassen's principal legislation in his first term. I continued with Investors Syndicate (later IDS) until World War II started in December 1941.

Early in April, 1942 I went into the Navy and served for four years. I was classified as an Operations Officer in Naval Aviation. I went in as a Lieutenant, Junior Grade, and was a Commander when I left in 1946.

When I came out of the Navy I started practicing law in Minneapolis and also ran for Congress and was elected in 1946. I served a two-year term from the Third Congressional District in Minnesota. The District was recognized as a Farmer-Labor district. I was the only Republican ever to get a majority of votes in that district. I was defeated for reelection in 1948 and then resumed practicing law and doing some primary legal work in 1952 on the presidential campaign

for Harold Stassen and later Richard Nixon and General Eisenhower. Stassen had been a candidate for the Presidency in 1948, and generally, was considered to be certain of nomination when opposition by Thomas Dewey developed in the Oregon primary, the last primary campaign in the nation. The newspapers played up Dewey's close Oregon victory as determinative, and Dewey was nominated -- and defeated by Truman.

When the 1952 campaign came around, Stassen was running again for President. He had been in my law school class and was a close friend. I had not been able to do much for Stassen in his governor campaigns or in his 1948 presidential campaign, because I had my own campaigns for Congress and the legislature. I had a job to carry on in addition to making a living. Stassen had lost the nomination in 1948 and things weren't looking good for him in 1952. So in 1952, I decided I should give him some help and I started helping him campaign as much as I could. Along with Amos Peasley, one of the great international lawyers of the world, I filed the Stassen delegates in Ohio, against Senator Taft. After that I individually filed the delegates for Stassen in New Jersey.

When we filed a complete slate of Stassen delegates in New Jersey, Governor Driscoll, who had filed a slate of 27, with himself as the controlling vote under the unit rule applicable, thought that Stassen might come out for Eisenhower and win the New

Jersey delegation. He was scared to death of losing

party control, so Driscoll declared for General Eisenhower. His own group of delegates had been divided 13 to 13, 13 for Taft and 13 for Eisenhower, but operating under the unit rule Driscoll undeclared controlled the 27 votes. When he declared for Eisenhower that carried his entire slate and Taft made a vicious statement: "I've been double crossed." Taft then pulled all his New Jersey delegates out of the primary campaign. In my opinion, and I was very close to public opinion at that time, that withdrawal by Taft was the solitary act that eventually cost Taft the nomination and led to General Eisenhower's nomination. Eisenhower only won initially by 17 votes at the national convention, and those votes were delivered by Minnesota and Harold Stassen. We were all ostensibly working for Stassen. We were doing that because Eisenhower was not running in any primary campaign. He never campaigned and somebody had to take on Taft. Otherwise, the score in every state would have mounted up for Taft and other delegates, following like sheep, would have gone with him. But Stassen carried on a very astute campaign in every state and held off the ability of Taft to claim that he was a cinch for the nomination because Eisenhower had no delegates. The nominating convention came on, in Chicago, and Eisenhower was nominated, with Nixon as Vice President.

I had served in Congress with Nixon. We were both on the Labor Committee. He sat next to me and Congressman Charlie Kersten from Wisconsin sat

on the other side. It ended up the three of us were the actual drafting committee for what became the Hartley Bill. When that Bill came to the Senate, of course, it became known as the Taft-Hartley Bill. That became the basis of labor regulation in the United States forever afterwards. The primary object of that bill was to promote collective bargaining and to require, as Stassen had required in Minnesota, a waiting period between a declaration of a strike and the actual strike itself. That continues to this day.

The Hiss Case

Also while I was serving in Congress on the Labor Committee Congressman Nixon, who was my seatmate and also served on the House Un-American Activities Committee, became interested in the Hiss Case. He took the laboring oar to develop the facts in that sensational case. As a result of his skillful cross-examination, and a great deal of national publicity on the matter, the case was submitted to the grand jury in New York City. The case had carried front-page national publicity for months. The allegations involved an accusation by a former Communist, Whitaker Chambers, that he had received secret State Department documents from Alger Hiss for transmission to the Soviet Union. Hiss vehemently denied the charge. However, the secret papers, subsequently known as the "Pumpkin Papers," which apparently had been typed on a Hiss typewriter, belied his denial. While the matter was being

investigated by the New York grand jury considerable delay developed.

During that time I went home to my district during a short recess and the treasurer of my congressional campaign committee asked me why this Congressman Nixon was making those charges against this nice fellow Alger Hiss. My treasurer said that he had been a classmate of Hiss' at Harvard and he was an exceptional person. I said well Nixon sits next to me on the Labor Committee and I will inquire of him as to the Hiss matter.

When I returned to Washington, our labor hearings were still continuing, I asked Nixon how the Hiss case was coming. He replied:

> They know the papers were typed on the Hiss typewriters but there has been this great delay in the grand jury because they have no evidentiary proof that the Hiss typewriters were in the possession of the Hisses at the time the copies of the secret documents were typed.

I immediately thought of a potential way that it might be proved and I told Nixon I might have a suggestion for him. That was on a Friday. On Saturday morning, banks were still open on Saturdays at that time, I called my treasurer in Minneapolis at his bank where he was vice-president and asked him to what organizations Hiss belonged. He mentioned the Harvard Law Alumni Association was all that he knew.

So on Monday I looked for Nixon on the House floor but he was not there. The next day, Tuesday, I saw him on the floor and suggested that he have the files of the Harvard Law Alumni

Association checked, and also all the insurance companies of America, to find out if they had any letters that had been written by the Hisses on that typewriter during the critical period. From my work at IDS, where we had hundreds of thousands of individual accounts, I knew that matters like insurance and investments are frequently the subject of letters typed at home regarding change of address, beneficiaries, status of account, etc. The companies keep such letters which are most frequently dated and signed. My suggestion was that he search for such files at Hiss' Harvard Law Alumni Association. Nixon gave the suggestion to the FBI on late Tuesday; and the FBI broadened it to include Priscilla's Alumni Association files at Goucher College. On Wednesday the FBI turned up two letters during the critical time period -- dated and signed by the Hisses. One was a Priscilla Hiss letter to her Alumni Association at Goucher College and the other was a New York life insurance company letter by Hiss. The next day, Thursday, the FBI took those letters to the United States Attorney investigating the case before the grand jury in New York. Those letters caused the United States Attorney to change an indictment he had drafted charging Whitaker Chambers with perjury and to replace it with an indictment charging Alger Hiss with perjury. The letter evidence and the indictment were presented to the grand jury on Friday and on Saturday morning Alger Hiss was indicted for perjury. Incidentally, Saturday was

the last day that grand jury was authorized to sit. It was a close call. The evidence of Priscilla Hiss' letter to Goucher College was presented to the grand jury and, of course, was sufficient to indict. The other letter from the life insurance company was not used because they didn't want to raise an issue as to privacy.

When I saw Dick Nixon the next Monday on the House floor he told me:

> Is the FBI's face ever red. They had been looking unsuccessfully for some such critical evidence for almost a year and they almost blew the entire case.

The letter evidence led to Hiss' conviction.

During the 1952 Eisenhower-Nixon election campaign, at his request, I served as Research Director for Nixon as Vice President. The slate was elected in November and I went back to practice law. I had no interest in staying in Washington in the administration.

I was offered the job of Solicitor General to the Post Office Department. Charlie Halleck, who had been the majority leader in the Republican House when Republicans had control in the 1947-1948 session, was in back of that offer. He suggested that I take that job. I told him that I did not want any temporary jobs in Washington. What developed in Minnesota thereafter was not at my bidding or at my request, but it was really suggested very strongly that I take on the job of United States Attorney. Harold Stassen and Senator Edward Thye, particularly Stassen who had been a fine prosecutor as County Attorney, saw me

as a United States attorney. Stassen suggested that I take on that task in Minnesota. I did, and was the first United States Attorney to take office during the Eisenhower administration. I served for six years and in 1958 was pulled out late in the campaign to run for governor against Orville Freeman running for his third term. I lost that election.

The Hoffa Case

Then I received a telephone call late in 1959 from the Attorney General, William Rogers. He requested that I come to see him in Washington. At that time Attorney General William Rogers offered me appointments as Assistant Attorney General in the Civil Rights Division or in the Internal Security Division. I told him that I was not interested in either one of those positions. Well, he said:

> The real problem we have around here is the Hoffa matter, everybody has been holding hearings on the Hill for years, unsuccessfully trying to uncover some crime against Hoffa, everybody in the Justice Department has been trying to get him, but nobody's been able to come up with any case against Jimmy Hoffa.

As stated I had been one of the drafting authors of the Hartley Bill, and before that I had been active in the labor law matters when Governor Stassen passed his labor legislation in 1939. This was really the fore-runner of our modern method of dealing with labor strikes. And I had followed labor matters since 1939 -- we had a lot of strikes in Minnesota. I had been chair-man of the House Judiciary Committee: . . . and one day

we would have the AF of L, and the next day, some person from the CIO testifying on labor matters. So I told Mr. Rogers that I wouldn't mind taking on Hoffa for a year. So he said, "Come on down." So I came to Washington, but I ostensibly continued my practice.

I spent the year 1960 on Hoffa and came up with two cases. One was the Test Fleet case, and the other was the Everglades Hotel Pension Fraud cases in Miami, Florida. This was after Congress, investigators in the Labor Department and the Justice Department had not been able for years to come up with any case on Hoffa. The Test Fleet case was a laydown case against Hoffa, absolutely and fifteen years old. As it developed, the Everglades Hotel one was too, but it had not received the primary attention that the Test Fleet case received. People on the Hill had been investigating Test Fleet at all their public hearings for years. They didn't realize what they had. They didn't know enough labor law to know what they had. Hoffa was prosecuted in Nashville, Tennessee under the Labor Bribery Statute which I had drafted in 1947. Incidentally, the day after that statute became law, the trucking industry incorporated "Test Fleet" in Tennessee in the name of Hoffa's and Brennan's wives, as a cover for the cash bribes they had been paying Hoffa and Brennan for years for breaking a Teamsters' strike.

I finished off that one year in Washington at the time of Kennedy's Inaugural. The Kennedys had been most vocal in seeking a case against Hoffa. I

had indicted Hoffa's bag man, Ben Dranow, in Minneapolis in connection with a case I had dug up out there. This case had come to me in my research of the Senator McClellan hearings on which Jack Kennedy was serving as a member and Robert Kennedy was General Counsel. In the turnover of the administration, the Attorney General, Robert Kennedy, sent a young lawyer named Jim Neal to watch what I was doing in the Dranow case. He is now considered to be one of the best prosecution and defense counsels in America. I stayed over into the Kennedy Administration to give them the Test Fleet and the Everglades Hotel cases. Then Robert Kennedy asked me to stay on and try Hoffa. But I told him I was broke from my year in Washington and I had a job coming up that made it necessary for me to take.

I then became General Counsel of the Investor's Mutual Funds, which at that time were the largest mutual funds in the world. I had helped develop these funds in 1939 before the war. IDS means Investors Diversified Services. The way mutual funds operate, they have a manager for investments, they submit their recommendations to the mutual fund, and IDS also sells the shares of the mutual fund. The mutual funds themselves are separate and distinct from their manager and their distributor.

I continued as General Counsel of the Investors Mutual Funds until 1969, when one day I received a telephone call from the Attorney General. He said:

> Your friend the President wants me to find out if you would be willing to serve on the United States Court of Appeals for the District of Columbia Circuit.

I responded, "I will call you back tomorrow." As a judge on the Court of Appeals at that time, the salary was exactly half of what I was making as General Counsel for the Funds -- $95,000 as against $47,500. So I thought the offer over. I'd been active in the legislature, law, football, and all athletics and some politics. I had run for Congress, been elected, run for governor, and served eight years in the Legislature in 1958 and coupled with my activity in football, there wasn't a town in the State where I didn't know many people. I could walk down the main street of practically any town and bump into many people that I knew, and I figured that I'd just about received everything that was available in Minnesota that was in any way interesting.

Everything was pretty much a repeat of prior experiences and problems. I'd been over the legal problems on the Funds from the time I went I helped organize them in 1939 and on IDS since I went there in 1929, and our last child just finished high school. Two of them were in college. So Betty and I talked it over and decided that we'd go down to Washington on a permanent basis. I called the Attorney General back the next day and told him that I'd take the assignment. So we moved to Washington in 1969.

Judge Lumbard in the Second Circuit in New York and I were the first two Circuit Judges to take office in the Nixon administration. The way Dick Kleindienst, who was Deputy Attorney General, explained my appointment to me, was that the minute the Nixon cabinet was sworn in, Dick turned to him and fingered him over and said, "Dick, I want you to see if you can get MacKinnon to serve on the D.C. Circuit." So that's the way it developed. I've been here ever since.

I was not interested in anything else. I might have been interested in Attorney General, but I think I was better on the court than as Attorney General.

As I think it over, my General Counsel, W. I. Norton, when I was working for IDS, was very astute and widely experienced in the law. He had been very active in politics and knew a great deal about government. He'd run the state legislature there for a number of years before he became General Counsel for IDS. He told me one day in the late '30s: "Mac, you ought to be on the Court, but you need some private practice." And he said, "You should start practicing, and you can build up a practice." And he said, "you have the qualifications for serving on the Court." So this wasn't the only individual who had thought about the Court. Harold Stassen had previously made the same suggestion to me in 1946.

I knew what the work on the D.C. court involved. My roommate in college had, for 10 or 12 years, been on the Federal District Court in

Washington and I was very attuned to what was going on down here. I considered the appellate court needed somebody with my views of criminal law.

I was referring principally to the decisions of Judges Bazelon and Wright. They were masticating the criminal law, and I had a reverence for the criminal law from my service as United States Attorney. We eventually turned the court around after I became a judge with Roger Robb and Malcolm Wilkey and Ed Tamm and finally Judges Leventhal and McGowan. For instance the great opinion by Bazelon known as the Durham case was overruled.

District Judge Leonard P. Walsh was my great friend. He served until he developed a blindness that was hereditary in their family, and he couldn't read the instructions. He was home for a number of years, then fell down the stairs one night and was killed. But he and I were very close, we'd been close together in college. We played football together. He started football practice at the University of Minnesota in the fall of 1924. I was the first man on the field as a freshman, and he was the second one.

Q: Judge, before turning to your years on the Court, I'd like to refer to some references I found in tributes you wrote in honor of Judge Tamm and Chief Justice Burger concerning the value of upbringing for a judge. I'd like to read them to you and then ask you to comment. In your tribute to Judge Tamm in the 74th volume of the Georgetown

Law Journal, you referred to "the sound common sense that he brought from his Montana upbringing." In the 100th volume of the Harvard Law Review, you referred to Chief Justice Warren Burger's "down to earth common sense derived from the experiences of a lifetime spent among the rugged, industrious and productive citizens of America's prairie heartland, where hard work and common sense are considered prime virtues." I'd like to ask your personal views on the role of upbringing in discharging the duties of a judge, the impact of particularly a midwestern origin -- this idea of common sense to which you referred in both tributes. Could you elaborate on that, sir?

MACKINNON: Well, there isn't any question but what people that have experience and knowledge in the entire field of the nation realize that midwestern common sense is a given.

Q: Did you adopt campaign positions that were designed to help attract that Farmer-Labor vote, at least some elements of it?

MACKINNON: Never. I had opposed the Farmer-Labor party in the legislature. We had actually driven them out of office. After I was elected to Congress, we had seven out of eight Congressmen who were Republicans, two Republican Senators, and a Republican Governor. We made a sweep of the Farmer-Labor Party at that time. That had begun in the '37 Session, which is the one I worked the hardest on and the one where we were the most successful in killing the socialist program of the

Farmer-Labor Party, pointing out that it was socialist.

Q: Why were you opposed to socialism?

MACKINNON: Any person who had any brains knew it didn't work. That's where you get into common sense.

Q: Your parents came from Canada. Did you have any distinguishable ethnic background in that, oh, intermixture that was Minneapolis-St. Paul at the time? A religious background, something that made you identifiable like some of these other groups?

MACKINNON: Episcopalian, which here again was not disliked by the Catholics. They would take that sooner than they would a Lutheran.

Q: A lot closer.

MACKINNON: Yeah.

Q: Let me take one last swing at this topic. I do believe it fits into your biography, to understand a man's thinking to the extent that one can. Nowadays there is discussion in the judiciary, very little in the law schools, but some in the judiciary, judging by panels, symposia, and the like, concerning something called strict constructionism. It's a label that goes back to at least the Nixon days and has had different forms. The Justice Department in the last Republican administration sometimes referred to the judicial philosophy of original intention of the framers of the law. According to that view, it really doesn't matter what the viewpoint, background, or origins of the judge might be. All

you do is you read the law and you apply it. Does that make any sense to you?

MACKINNON: I think it does. You're talking about statutory interpretation.

Q: As well as constitutional interpretation.

MACKINNON: Well, it's the same thing. I have probably interpreted more statutes than any person you will ever run into. When I was with IDS, I interpreted every statute in America and Canada relating to corporations -- financial corporations, insurance companies, banks, savings and loan, investment companies, mortgages, at one time or another -- and drew opinions, drew draft briefs, on the interpretation of such statutes in every state, practically, and what they meant.

I don't think that you can turn this around and say that some particular rule applies. The rule that applies is the intent behind the statute. You can develop that in 1,000 ways, and each way in every case might be different. It depends on the background of the statute, what it says, what has been said about it by the people that wrote it and the people that enacted it, or the people that applied it, how it came to be enacted, and what the law said -- what it says. What it says is very, very important. You start with what it provides. You may have a problem, and you may not have a problem. If you're trying to make a certain point, you might have a problem on any statute, but if you're reading the substance of it

-- what it means -- you might not have any problem.

I don't buy all these contentions about there being a great deal of difficulty in interpreting statutes. One statute provided that a man who was indicted could not get his attorneys fees. This is the independent counsel statute. This man was indicted.

Q: You're talking about Lyn Nofziger?

MACKINNON: Yeah. Everybody that commented on it said that the fact that he was indicted meant he couldn't get his attorneys fees. He was indicted yet met that requirement. We didn't give him his attorneys fees in the end because he didn't comply with another part of the statute, but so far as that particular requirement was concerned, he met it, because the indictment was not valid. It seems highly implausible, even under a strict construction of that language, that such provision intended an invalid indictment to defeat an award the same as a valid indictment. The indictment on appeal was held to be invalid. The question then becomes whether an invalid indictment bars an award of attorneys fees under the no indictment requirement. The Court held that it does not. So there you are. In this situation, the letter of the law killed it. In the statutory interpretation it is a given the statute must be construed reasonably so as to avoid absurdities. Manifest intent prevails over the law, citing Justice Brewer in the Holy Trinity case. It is a

familiar rule that something may be within the letter of the statute and not within the statute because it is not within the spirit, not within the intention of its makers. If an overly literal interpretation of the words be absurd, the act must be construed as to avoid the absurdity.

But we went on to hold that he couldn't get his attorneys fees because he didn't satisfy the "but for" requirement. He had been prosecuted the same as everybody else would have, whether he was an official or not.

Q: You are referring to In re Franklyn C. Nofziger. This was a decision of the Special Division for the Purpose of Appointing Independent Counsels, and it's published at 925 F.2d 428. It was decided February 5, 1991, before Judges MacKinnon, Butzner and Pell.

MACKINNON: That was the case that the Senate Committee in their report on the reenactment of a statute said "We agree that the interpretation of Nofziger is in accordance with Congressional intent." I've cited Holy Trinity 100 times when I was writing briefs back through the last 50 years on statutory interpretations. Holy Trinity Church v. United States, 143 U.S. 457, 459, 460 (1893), is one of the most cited cases in America on that particular subject. 1893, by Brewer, one of the great jurists of all time, from Kansas. I cite many cases to the same effect. All you have to do is read them. All the great jurists will tell you. Judge Learned Hand said, "There is no surer way to

misread any document than to read it literally." Decision by Learned Hand in Giuseppi v. Walling, 144 F.2d 608, 624 (2d Cir. 1944). Now, one might dig up some other case where another principle will apply and strict construction would apply.

Q: In INS v. Chadha, Chief Justice Burger made the point that although the legislative veto might solve a great many administrative and legislative problems, and might be a practical solution to a great many policy difficulties, nonetheless more than 100 statutes containing legislative vetoes at that time are unconstitutional. That is another example.

MACKINNON: Warren Burger comes from that same school of interpretation. You don't have one rule for the interpretation of statutes. You've got a thousand rules, and the question is the reasonableness of the interpretation, whether they get to the intent of the drafters.

Q: Doesn't that open up the door for what you referred to earlier as the "masticating" of the law, such as you saw occur in this circuit in the criminal area about the time you arrived at the court?

MACKINNON: No. I read hundreds of their decisions. The mistakes they made were in alleging that words didn't mean what they said. It put some unreasonable twist on the word, created an ambiguity that a reasonable person would not do.

Q: Is that just dishonesty?

MACKINNON: Well, some of them are just built that way. You know, a lot of people pick up a statute and they don't want to read through it, and the first thing they do is to go to the committee reports and the debates in Congress. Well, the first thing they should do is to read the statute, read it inside out, figure it out, what were they trying to do, where did it come from? That's the way to interpret a statute, not try to develop something by unreasonable construction of words.

Q: Turning to the more practical, but still related to this same subject, I imagine that the masticating of the law, the criminal law, that you referred to had a very real practical impact upon crime in the city. Maybe I'm wrong, you will correct me. But what was it about the mentality of the time, what was it about the country, what was it about the judiciary that led many judges to interpret the law that way in favor of criminal rights, notwithstanding that common sense would suggest it would have an adverse effect on law-abiding citizens?

MACKINNON: Well, the Durham rule was never applied by any other court except the courts in this district. No other court ever adopted it, and the Supreme Court never took jurisdiction on it because no other court created a conflict. There was never any other court that took it up. Justice Tom Clark told me that the Supreme Court never did anything with the Durham rule because nobody else favored it.

Q: It wasn't just the Durham rule.

MACKINNON: No it wasn't. There were a lot of other decisions attempting to have the law interpreted against the interests of society.

Q: Do you know why some of the judiciary took that turn?

MACKINNON: I don't think they did. A lot of our cases here did. They got some support from the news media because it was viewed as a change -- they called it a development -- particularly the Washington Post.

Here is a great development. A soldier on leave in the afternoon leaves a place where he'd been having some beer and a hot dog or something, and a fellow comes out and puts a gun to him, takes his money and starts to run and a policeman sees him do it. They run him down and catch him. And he is indicted and convicted. Those are the actual facts, no question about it. And that came up on appeal to a panel involving Judges Bazelon and Wright. Later it was en banc. I refused to write the en banc decision.

Q: Which decision is it?

MACKINNON: It's U.S. v. Decoster, Jr., filed July 10, 1979. A black judge, Joe Waddy, one of the best we've ever had here, presided over the conviction in that case, yet Judges Bazelon and Wright, for no reason at all, sent the case back to him to hold a hearing to determine whether Decoster's rights had been adequately represented by defense counsel.

Waddy had a tremendous hearing that lasted several days and concluded that Decoster had received all rights.

I wrote a dissenting opinion against their actions. They had absolutely no reason to send it back. There wasn't anything to show that there was anything wrong in the case. Judges Bazelon and Wright were just trying to dredge up a new theory. And they sent it back again, and Joe Waddy, I told you how reasonable he was, held another extensive hearing, and he concluded that Decoster had received all of the rights to which he was entitled. That was July 10, 1979. U.S. v. Decoster, Jr., filed October 19, 1976, and the panel was Bazelon, Wright and MacKinnon. Read that, if you want to know what they were trying to do. The two judges were just trying to do something they thought for criminal defendants. He thought that these people who were defending accused criminals weren't giving them all of their rights, and there wasn't any point to that. There wasn't anything wrong. Once he sent the case back, let me tell you what he did. It came back with this long hearing by Waddy, who went into everything, and is as favorable to the black defendant as any person could possibly ever be. Bazelon and Wright still were contrary. And that is the case here, where I dissented. And we went to en banc after . . . now this was at the stage, the developing stage, where the influence of Bazelon and Wright on the Court was waning, and there were attacks on a lot of their decisions.

And this is the one that indicates we were getting some place, because it went en banc. And, of course, they wanted me to write the opinion. I knew that if I wrote that opinion, people thinking like Bazelon or favoring Bazelon or something like that would say, "Well, that's a MacKinnon opinion," and so I provided the argument and got Leventhal to write the opinion. We got Leventhal and McGowan, and of course Tamm. Tamm was always reasonable on criminal matters. There's the en banc decision, if you would like to read the decision. Bazelon, Robinson, and Wright, with Leventhal, McGowan, Tamm, Wilkey and MacKinnon opposite. I didn't want to get involved in the en banc decision because I wanted the reversal to stand and make a target for a changed majority. There was nothing to begin with that needed the case to be remanded twice. It was a waste of time.

Q: It's a huge slip opinion you have there.

MACKINNON: This one's en banc.

Q: It's about an inch thick.

MACKINNON: That's the kind of useless contentions we were running into. That is symbolic of the opinions they had been writing when we came aboard. It was one of the primary reasons for me to come on the Court. They had been knocking down the common law. At that, they lost out. The Decoster case was about the last attempt. From that time on, it was more or less subdued because they realized the rest of the Court had changed. After that, we

repealed the Durham law backed by Leventhal, McGowan, and Tamm. There wasn't anything worse than having a reversal by your own colleagues.

Q: Judge MacKinnon, let's discuss briefly, if we can, the legal profession at the time that you first started practicing law. Now, did you start practicing law right out of law school?

MACKINNON: I did. I went to work right away as assistant counsel for Investors' Syndicate.

Q: There's a lot of discussion in the bar today about lawyers having a bad public reputation. Is that something new, or has that always been the case in your experience?

MACKINNON: That's new.

Q: What was the reputation of the legal profession back when you were starting?

MACKINNON: Excellent. Lawyers were looked upon as honest, law-abiding citizens of high stature.

Q: What has happened?

MACKINNON: Well, they've gotten too many lawyers. They haven't applied the rule of admission and the ethics have become more loose pertinent only as to advertising. They're getting better. When I was U.S. Attorney, I had a defense lawyer in a white slave case, and we'd held the defendant to a $1,000 bond. The defense lawyer came in -- at noon while my staff were eating in a restaurant, and requested that the bond be reduced from $1,000. I agreed to a reduction to $500. I estimated that the defendant was not going to run

away. The lawyer requested a substantial fee for reducing the bail and said that he had to pay off MacKinnon and his assistant. I reported that to the grievance committee of the bar association, and they would not do anything about it. The next case that came along was a fellow named Siegel. He got dismissal of a white slave case after conviction by having the prostitute testify that she went to Chicago to work for Spiegel Department Store. He was convicted but the judge set that aside because he believed that testimony. So I started looking into whether we could prove whether she did not go to Spiegel's for that reason. Of course, we didn't know that was going to be the defense until the trial. Spiegel's reported that the record didn't show that the victim had applied. This girl's name was Mary Kay Johnson and her pimp was Bobby Banner. To give you a good idea of what a white slave case is, she was the most popular girl in North High School and one of the most beautiful. Graduation night, along with several other people in a crowd, they went to a Black and Tan place and were dancing.

Q: What's black and tan?

MACKINNON: That's a colored place. That's what they used to call it in those days. While she's there dancing, on the sidelines, here's this Bobby Banner, a nice tall, slender, slick-haired moderately colored individual, trying to cut in, and Mary's date wouldn't let him. They left the party about 1:00 or 2:00. When she got home, she found that Banner

had picked up her name from someone in her crowd and about 2:30 a.m. she received a telephone call from Banner to go out with her. She turned him down cold, and she turned him down for three solid weeks. He called her every day, not once but many times. Finally, she agreed to a date and in two weeks time, he had her on the train for Fort Dodge, Iowa to work as a prostitute for him in a house of prostitution. That's the way the white slave traffic worked.

After Banner was acquitted, a couple of months later, a young girl in prostitution who is known as an "outlaw" because she didn't have a pimp, was arrested and told the FBI agent in charge of that kind of case, that Siegel, who was representing her as a lawyer, had tried to get her to testify that she went down to Chicago to go work at Spiegel's, but couldn't get a job. She said, "Well, I didn't." Well, Siegel said, "Don't worry about that. I got Mary Kay Johnson to testify that way, and we got her man off. You do the same thing, and we'll get you off." We indicted Siegel. I didn't take it to the grievance committee. Because of the results of my previous complaint, I just went ahead and indicted him, and they sent him to prison. In those days, the grievance committee said that they wouldn't take the word of a prostitute against the denial of the lawyer. In every white slave case, you're taking the word of a prostitute. Juries rely on their testimony. We never lost a jury, we never lost a white slave, and we used to try more white slave

cases than any federal court in America. The situation has changed since then.

Before that, bar committees were slow to enforce the good moral character requirement. I recall a lawyer named Ray Peterson who served in the legislature. He would never pass a moral standard, in my judgment. He represented some female school teachers, in his home town of Anoka, and he got them a small award. He put in a bill for them, and he said that he had to buy straw hats for the committee. He hadn't done that, of course. He was known ever afterwards as "Straw Hat Peterson".

I had him later when I was U.S. Attorney and disbarred him on another matter. The lack of moral standing of Peterson was apparent on the surface. That's a hard thing to stop a person, to say, "Oh, I predict a problem" and to let him get in, and there are a lot of them in. Those ethical standards are seldom applied. I moved Peterson's disbarment in federal court because he misrepresented to clients that he had been included in an indictment when he had not, and that he could "fix" the indictment. He forgot that the indictment he drafted was a monstrosity.

Q: Were you ever in Washington in the 1930s?

MACKINNON: Yes, I came down here in 1933 to try to stop building dormitories at the University of Minnesota because the rooming houses around there were empty. I was representing the rooming house people. Actually, that's the way I got into

politics. I came down here representing them. Of course, I didn't get anyplace. The householders wanted me to come, and I did.

Q: Was that your first time in Washington?

MACKINNON: I had been in Washington in December of 1928, coming back from the Olympics. I came down here to see my roommate, Leonard Walsh, who was then working as a United States Marshal in the U.S. District Court.

Q: What was your impression of Washington in those early days?

MACKINNON: It seemed to be smaller. Mr. March, who was the head of the Federal Trade Commission, was from Litchfield, Minnesota. He had plenty of time to see me. I could go in to see him anytime I wanted. Congressmen were very receptive, they lived here. At the time I came down, Ernie Lundeen, who was in the House at that time, was leaving over the weekend. He had a room all paid up, and he asked me to use it. I said, "No, I don't want to do that." He says, "Well, I want to do something for you, you never can tell how far a kid will go." He was very friendly and was later a United States Senator. I found him to be very receptive.

Q: Did you have sufficient exposure to the legal profession in the city to form an opinion?

MACKINNON: No, I did not.

Q: Well, I was going to ask you about the concept of a Washington lawyer. You've been here a long time

since then. Does the concept of a Washington lawyer as a unique type of practice, a unique set of skills, really make sense to you?

MACKINNON: Yes it does.

Q: How would you describe a Washington lawyer?

MACKINNON: Well, a person who's very knowledgeable in a lot of fields -- knowledgeable on the Hill, knowledgeable about the personnel, knowledgeable about the departments, how they work, how they operate.

Q: Is it more a lobbying practice?

MACKINNON: I don't call that lobbying when you've got a case in some department and a lawyer represents a client. Lobbying is up on the Hill where you're trying to get them to pass laws. People down here, for instance from the Federal Communications Commission, are experts in the application of that statute, and if one has a problem there and you don't have some person who knows about it, he just might forget it. And it's the same thing with the SEC. I think the SEC is one of the finest departments we have, and I've followed that from the day the bill was introduced in 1933. Of course, with my company, we were always at the SEC. Not always, but eventually. Originally, we were like an insurance company, and eventually we came under the Investment Company Act, which we helped to draft because the SEC was not then familiar with such companies.

Q: Has the number of public interest organizations litigating in court increased in the time you've been on the Court?

MACKINNON: I think it has since about 1937 when local criminal cases were transferred to the D.C. courts.

Q: There's been a debate in the Court, judging from the Court's decisions the last 10 years or so, on the question of standing, particularly the standing of public interest organizations, to bring various challenges against agency action. Have you developed any strong views on the legitimacy of the role of public interest organizations having access to the court to press their views as to what the nation's public policy should be?

MACKINNON: I'm in favor of people who have a legitimate interest in the problem having a right to present their case. How that might develop with some particular public interest group, I don't know.

Q: We've been discussing largely your background in getting up to the Court, except for some discussion of your views of the law that led us to some of your cases. Why don't we turn now, more squarely, to the time you've served on the Court? What was your experience like when you first joined the Court, in terms of getting used to its work? Did you find it particularly difficult, or an easy transition from your work as a general counsel?

MACKINNON: I did not find it difficult. I found it an easy transition. I had written scores of briefs all my life on substantive legal problems involving every state in the Union and all the provinces of Canada, and interpreted statutes -- which is a large part of the cases that lie here -- and I didn't have any particular difficulty handling this litigation.

Q: One of the unusual features of this circuit is that all of the judges are in the same building all the time. Have you found whether that facilitates collegiality?

MACKINNON: What do you mean by collegiality?

Q: Well, it is a word very widely used. By that I mean the ability to drop into someone's chambers and converse freely about a case the way you wouldn't be able to do if the circuit was spread around hundreds of miles.

MACKINNON: I don't think anybody does that around here. You and many others do not understand what collegiality really means and how it operates.

Q: Does it make any difference that the court is all in one building ultimately?

MACKINNON: I don't think so. Judges don't run from one chamber to another trying to sell an idea. I think Justice Scalia thought that was probably the way it was going to work on the Supreme Court, but he found out it was different. Conferences are between judges who have thoroughly reviewed the record briefs and heard the arguments, and they

note their decisions. You draft your opinion separately. The only discussion we usually have is the short conference following oral argument.

Q: Another aspect is that the District Court, the only district court in the entire circuit, sits right below. So you see in the halls, perhaps in the cafeteria, the judges whose opinions sometimes you have to reverse. Did you find that difficult in the beginning?

MACKINNON: Not in the beginning or any other time.

Q: How do you deal with it?

MACKINNON: Just apply the law in all cases.

Q: Do you find that it affected the ability to have personal relations if you wanted to?

MACKINNON: Not in the least. I have lunch every day with the sitting judges on the district court and have had for the last 25 years. I reverse them and we turn to another subject of conversation. Incidentally, from the time I started practicing law, I have always had lunch every day with a group of lawyers and judges. All my life, as a practicing lawyer in Minneapolis. The juries used to come in at noon for lunch, and, of course, the lawyers that were trying cases would come in and sit down with our table. When the lawyers trying the case followed them to the courthouse -- others went to their offices. Thus, all my life I've been around practicing lawyers. I've had lunch with lawyers and judges who are active in the trial of cases. When I tried my first criminal

case, which was when I was U.S. Attorney, I just walked right in there with no hesitancy whatsoever, even though I hadn't had a lot of court practice. That is the way that the judges learn in England. They have tables, you know, they have a lunch for all the lawyers in the court and all the judges. Roughly, all five judges and 40 or 50 lawyers, all having lunch together. I think that collegiality is misunderstood by the lawyers and the media. It has an indefinite definition.

Q: Sort of like common sense, isn't it?

MACKINNON: Yeah, like common sense. For my line of thinking, it refers to a person who's ordinary, you can talk to them about something that's reasonable, and they'll listen to you. I've never had any problem with anything like that.

Q: Let's discuss some of your decisions on the court. We have already discussed a few. I recall earlier in the interview you referred to the role of newspapers in describing Harold Stassen's loss in the Oregon primaries as a great loss. The press has always played an important part in this town. One of your better known decisions is Washington Post v. Tavoulareas. The holding of the panel decision of MacKinnon and Scalia, Starr dissenting, was that the jury could hear evidence that the editor involved in the case, the Washington Post editor, Bob Woodward, had a policy of encouraging his reporters to be aggressive, and the objection was made that that would penalize a

newspaper for being aggressive, if you allowed a jury to hear that evidence.

MACKINNON: I believe that most of the Tavoulareas decision is misunderstood. I do not think aggressiveness played any material part in the original decision. The district judge had overstepped his grounds in reversing the jury's decision. Adverse media comments weren't dealing with the guts of the case.

Q: What are some of the cases that you particularly enjoyed or found interesting in your time on the Court?

MACKINNON: I've been sitting for 24 years on D.C. Transit.

Q: Is that still kicking around?

MACKINNON: Still kicking around. New problems develop all the time. Now we have a tax problem. Prior lawyers who are handling the case didn't take care of it.

In the course of my active participation on the panels, I used to write many opinions, Leventhal and I used to take turns at the top of the producing judges. In addition to that, I had to write numerous dissents. I forget the exact number. I think it's more than 25 of my dissents that have been sustained by the Supreme Court. I believe that's a record. Many of them were more based on common sense than anything else.

Q: Are there particular cases among your decisions that stick out in your mind that you would wish to comment on?

MACKINNON: I wouldn't comment on them other than what I've said in the opinions. Details of them are not sufficiently fresh in my mind for me to comment on them.

Q: Very well. Let's turn the page then to another aspect of your work on the Court, your seven year service as Chief Judge on the Special Division of Independent Counsels. As I understand it, one of the statutorily defined jobs of the Division was to select and appoint independent counsels when asked to do so by the Attorney General.

MACKINNON: Yes.

Q: You came to Washington to be a judge in the Nixon administration, and your law practice before then was primarily in Minnesota. How did you come about to select particular individuals out of either the Washington bar or elsewhere, to be independent counsels? Did you draw upon knowledge of the profession in the city, for instance, that you developed during your tenure here, or did you consult others? Just in general, how did you come to select particular people, without naming names?

MACKINNON: I prosecuted every case of major importance when I was U.S. Attorney, personally. I had great reverence for criminal law, and I developed a knowledge of good prosecutors around the country, from media and our annual meetings. And I practiced law in every state in the union, so I knew the standing of every law firm of any major importance, and all the outstanding lawyers in the country. I knew a great many judges. In

appointing independent counsel, you have a unique problem. Every case is different. You have to get a person who fits in with that case. That requires a lot of inquiry. With my knowledge of lawyers, prosecutors, and judges around the country, and in Washington, and on our courts, I would call various people and say, "What do you think of so-and-so?". And, of course, a few people would suggest names, but we never happened to appoint any personal friends.

Q: Was that a disqualification?

MACKINNON: No, it wasn't. Who I know now about the Iran-Contra matter, I am sure we would make the same appointment. At the same time, there was never any person that we ever approached who didn't want to take the job if they could. Nobody ever turned us down. Conflict of interest was the principal problem to overcome.

Q: I was going to ask you about that. When the Department of Justice changed its policy and decided to apply its professional responsibility standards across the board to independent counsels, did it not affect your ability to appoint people after that point?

MACKINNON: No. Many people ask how do you select them. Do you have a list? We don't have a list. Every case is different. You determine what kind of case you have. I've selected some of the great prosecutors in the country. Dan Webb, from Chicago, for instance. He went on to convict Poindexter for Judge Walsh in Iran-Contra. He was

the prosecutor who personally tried all the Graylord cases in Chicago and many other cases of similar import and importance. A great prosecutor. I don't know where I came on Dan Webb. I had followed his Graylord convictions. I would think that Judge Frank McGarr, who was United States Attorney in Chicago in the Eisenhower administration and later Chief Judge of the U.S. District Court in the Northern District of Illinois, with whom I had experience when I was U.S. Attorney in Minnesota was called on by me for his evaluation. One of the questions I asked him was, "Did he ever get into any big problems with the media?". He says, "Absolutely none." I haven't heard of any since. He's one fine lawyer. I also inquired of another lawyer in Chicago, Mitch Reiger, who was handling the criminal division for the Eisenhower administration. He knows every lawyer in town. He had wonderful information on people like that. And then, of course, I always checked the FBI report. Generally, we always find good prosecutors.

The appointment of former judge Arlen Adams was the result of a possible conflict of interest problem that the Congress said might come up. It seemed that every legal firm of any consequence in the country had had cases that might raise a possible conflict of interest. We went through 45 lawyers until we found Judge Adams. He of course wasn't an original prospect at all because he was never a prosecutor. However, we decided that he would be able to handle that conflict of interest

problem. He has done a great job -- 16 convictions to date.

Q: You were discussing the appointment of independent counsels.

MACKINNON: I talked to lawyers that I considered to be highly ethical lawyers in New York, Philadelphia, Baltimore, Washington, Chicago, San Francisco, Los Angeles and other places, about people whose names somebody might have suggested or whom I might have considered. We'd get an FBI report on them re their ability to handle this particular type of case. Some person that's a whale of a prosecutor, storming up and down and raising a lot of hell, wasn't exactly the kind of a prosecutor that we want. I wanted some person who was going to try to represent the Government on an even keel and be a tribute to the court and who is very successful in that respect.

Q: There is a debate about whether to have a statute for independent counsels.

MACKINNON: There is no debate about that. That's going to pass overwhelmingly.

Q: You believe so?

MACKINNON: Yes, sir.

Q: You're in favor of it?

MACKINNON: Very much so.

Q: Why?

MACKINNON: It is an absolute necessity. In <u>every case</u> where a high government official appears to have committed some criminal offense, the Department of

Justice has a conflict of interest. Every case. No mistake about it. You just can't let the Department of Justice handle that particular case.

Q: I served for a brief time at the Justice Department, in the Civil Rights Division. I did not sense that the civil service career staff were as subservient to the wishes of the political appointees as, for example, junior lawyers are in a law firm by far. It was sometimes very difficult to get the civil servants to carry out administration policy in a controversial area. It seemed to me that a career civil servant in the Justice Department does have a sense of independence which, if protected from the reach of political appointees, might permit the career staff to carry out a prosecution even against the interests of the President.

MACKINNON: Yeah, but that is immaterial as to cabinet officials and there is not assurance.

Q: Also, a possible criticism is the independent counsels may be independent of the executive, but dependent on a special division.

MACKINNON: Absolutely not dependent in any way on a special division. What do you mean?

Q: The independent counsel may desire to conduct the case in a particular manner but receive objections from the special division. . . .

MACKINNON: We have no authority to do that. You do not understand the statute.

Q: . . . by expanding the scope of the investigation.

MACKINNON: We have more authority . . . by expanding it?

Q: Debates about the . . .

MACKINNON: Wait a minute, wait a minute. We don't do that. That comes from the Attorney General. The Attorney General is the one to expand it, we act on his request. We don't do it ourselves. We never do. You've got the statute all wrong.

Q: There's always a question of interpretation of the mandate. We found it in Iran Contra.

MACKINNON: No, no. A question of a mandate? Never had a question of its mandate. To the extent that it was raised with the Court in Iran Contra, Judge Gesell held against it just like that. The widest mandate ever given any independent counsel was originally given by the Special Division at the request of Attorney General Meese and President Reagan, and it was never changed. Attorney General Meese received exactly what he requested.

Q: It was very broad.

MACKINNON: Well, you couldn't get any broader. Anybody that ever had anything to do with North and everybody else that had anything to do with him. Yet that was the jurisdiction then requested, and when Judge Walsh tried to carry that out, they began to criticize him and raked him over the coals because he convicted a couple of high ranking Republicans.

Q: There were some press reports that independent counsel Walsh's final report was going to be released but the special division desired

responses from some of the targets of the special investigation included in that report.

MACKINNON: That is required by standard statutory procedure. Newspapers wrote it up as something unusual, but it's usual and required by statute. The Special Division always asks for comments and printed everything exactly as it was submitted. The Special Division has no right to comment in the report on any comment. Read the statute. You can't rely on the newspapers in many of their comments.

Q: It seems as though a close relationship, an unusually close relationship, exists between a court and the prosecutor that the court has itself appointed.

MACKINNON: Absolutely not. There isn't any relationship. They said that Ed Walsh was taking orders from the Special Division. In the first two years, I never even saw him once. Finally, I was coming back from lunch one day and I ran into him in the hall. There's no relationship. The independent counsel just starts out on his own. He doesn't come back. Once in a while they come back for some procedural matter or something of that character. They want to broaden their request, their authority like they did in the HUD investigation. That was expanded twice at the request of the Attorney General. We don't, we never turn a hand to even come close to an independent counsel and how he's running his case.

Q: The country went along for a great many decades without an independent counsel statute. It's a recent invention, yet you feel strongly about its necessity. Does what you see as an inherent conflict of interest in the Department of Justice, investigating wrongdoing in the executive branch, suggest to you a flaw in the Constitution, an oversight, something that should have been corrected at the beginning?

MACKINNON: No. I think the Constitution provides for how it could be corrected exactly the way they're doing it. It says that the courts of law or one of the people, heads of departments, may appoint inferior officers, and, well they've had cases like this. Look at the Teapot Dome case. Congress directed the President to get into that. The Executive Department held that case off for two years until after the election. Teapot Dome came up, but the Justice Department never did anything about it until after the election. Then Congress directed -- they didn't ask, they didn't request -- that the President appoint a prosecutor, I think to be confirmed by the Senate. And he appointed Owen Roberts and a defeated Democratic Senator from Ohio (C. Parmalee). The statute was mandatory. Calvin Coolidge was a very straight shooter, but he held off on Teapot Dome until the election was over. Though I'll tell you, and I told Janet Reno this, I told the present Attorney General, "Janet, whenever you have a high government official charged with a major crime, you have a conflict of

interest." There are so many ways for a prosecutor to cover up a piece of evidence, critical evidence. So many ways to get rid of cases without trying them.

Q: Maybe this is a good time to cover one last issue. At the Justice Department I had a brief stint as a prosecutor. I had one experience involving sentencing which I think leads us to the work you did as a member of the U.S. Sentencing Commission. It was in the Eastern District of Virginia. Albert V. Bryan, Jr. was the judge, one of the great judges in the area, and the case involved a young man who . . .

MACKINNON: Are you talking about his father?

Q: Jr.

MACKINNON: Talking about Jr.

Q: The case involved a young man who had been convicted of essentially helping to serve as what they call a "mule" to carry crack cocaine from New York down to Washington. He was arrested, prosecuted and convicted. He did not have prior convictions, but as a result of the nature of the substance, once the sentencing report was presented to the court, the judge felt obliged and had no choice but to impose a lengthy sentence of several years. I believe it was in excess of 10 years, although I don't remember the exact number. I could tell that the judge was stricken at having to do this to this young man who had apparently been caught up in this one instance.

MACKINNON: Actually, he'd been caught in one instance.

Q: Yes, yes. And that's all we have to go on. We have to ignore the possibility of other instances.

MACKINNON: Well, you could look around and see how he's making his living. Go ahead.

Q: We have to ignore that. We have to assume that the man is innocent in everything else.

MACKINNON: Well, you could prove that he was living off the sale of cocaine.

Q: There's been some criticism of the work of the U.S. Sentencing Commission, particularly the sentencing guidelines as being too strict. Have you ever felt that perhaps the Commission, perhaps in an effort to derive predictable rules for sentencing, for diminished discretion, may have used it as an opportunity to substantively produce a different policy on sentencing, namely a policy of harsher sentences?

MACKINNON: Never. What you're talking about, and what you're worried about but don't mention, is that Congress has provided a minimum sentence for that particular offense, and we, of course, were required to follow the recommended sentences.

We had to follow the statute. You can't go against a mandatory sentence that Congress has imposed by legislation. On that issue, the Commission wrote a report and told Congress to cut down the maximum amount of sentences that they were requiring. They haven't done it yet. That leaves the Commission's hands tied. Why should the

Commission be criticized for following Congress' mandatory statute?

Q: The Commission had an important task.

MACKINNON: They didn't have authority to violate a statute on sentencing

Q: No, but to develop guidelines that would in turn be used in implementing the statute.

MACKINNON: Sure, and they had to follow the statute.

Q: The statute certainly gave the Sentencing Commission potential discretion.

MACKINNON: No, it did not.

Q: Then what was the work of the Commission?

MACKINNON: Read the guidelines and see. The minimum mandatory sentences only applied to drug and gun offenses. Not on minimum mandatory sentences. There was no discretion in the judge, the jury, or the Sentencing Commission. You must follow the statute. Everybody has to follow the statute. We put out a report on this, told them to cut down their maximum minimums. The minute they started going in, I knew they were too high. There wasn't anything that we could do about it. I figured that somewhere down the line, somebody would say, "Well, we've just been too damned high here" and pass a general amnesty statute, to a certain extent. I think that's the way the thing probably will work out in years to come. But against the statute, you can't do anything. They have to follow the statute, even though some judges don't think they have to. It's not an easy job.

Q: How long did you serve on the Commission?

MACKINNON: Six years. A full six years. Until November 1992.

Q: As a member of the Commission, you may have had as much or even more influence on criminal law than as a member of this Court, don't you think?

MACKINNON: Oh yes. Actually, in writing statutes in Congress or in the legislature. I always knew that when I was picking up that pen to write a statute, that I was reaching broader than frankly any court decision ever reached. You're writing for humanity when you're writing statutes. That's in effect what we were doing on the Criminal Law Commission.

Q: Writing statutes?

MACKINNON: In effect, writing statutes. Delegated legislative authority, that's what it was held to have been. The authority to do just what they did.

Q: And the Commission did not exercise its discretion in favor . . .

MACKINNON: They don't have any discretion on a mandatory minimum statute involving drug and gun offenses.

Q: Well, that was not all that the Commission was involved in.

MACKINNON: Yes it was, as far as mandatory minimum sentences for drug and gun offenses were concerned.

Q: We were just talking about the implementation of the statute by the Commission over an extended period of time.

MACKINNON: That doesn't . . . anything that affects a mandatory minimum sentence. You're talking loosely, like some criminal lawyers do at times, to try to get a judge to do something. No, that doesn't exist, as far as the Sentencing Commission is concerned, on mandatory minimum sentences. We wrote a wonderful report, trying to get Congress to cut down their mandatory minimum sentences. They haven't done it. They believe that these crimes were crimes. They believe that the statute provides for the sentencing of crimes, not criminals. Any person who commits that crime is supposed to be subject to that sentence, and that's the same as the mandatory statute in England. They have them over there. They're not as heavy as ours, but they have mandatory sentences. I can show you many of them.

Q: Well, judge, I think that we've covered a lot of ground today. We have ranged very far and wide. We have stopped where we needed to stop and gone further when we've needed to go further.

MACKINNON: O.K.

Q: Before concluding, Judge, let's discuss the chapter in your life involving your daughter, Catharine MacKinnon.

MACKINNON: Well, she stands on her own. What she's done is entirely her own, her own ideas, and I've never

had any part of it. I was running the circuit conference one year, in Hershey, Pennsylvania, and Kitty was in law school. One of the subjects I chose for one day's explanation was discrimination. I'd heard around the grapevine, that there were a number of discrimination cases building up in the departments. On my service in the legislature in Congress over the years, seeing how statutes turn out little and grow and grow and grow, I knew how this particular statute might grow.

Q: Which statute is that?

MACKINNON: Discrimination, the discrimination statute.

Q: The Civil Rights Act of 1964?

MACKINNON: It was the statute in which Congressman Smith inserted the word "sex." And I knew how these statutes develop, and I knew that there were some discrimination cases building up down in the departments. And I chose to put in one day on discussion of those cases. Mr. Powers of Steptoe and Johnson had already obtained a $12 million verdict against the telephone company, I can't remember whether he was the plaintiff or the defendant, against the Bell Telephone Company for their discrimination against women. So I felt this case would be worthy of attention because there were so many cases in the department, they had built up. I outlined a program for one day, and I had the Assistant Attorney General, who was Thornburgh at the time, and the official in charge of EEOC, the lawyer who was defending the cases in

the Department. I had the Vice President of General Motors who was defending their discrimination cases. I put this on one day, and I heard the comments from the Washington lawyers saying, "What the hell's the importance of this thing?" That was just what I expected. They were mostly uninformed as to what was to come. But I thought they ought to be informed a little on what was potentially a very large, swelling scope of litigation. That was the reason I put on the program. Now, Kitty was a junior in Yale Law School at that time, and I invited her down just because I was running the conference. Of course she heard this discussion on discrimination and apparently got interested in it. She didn't say anything to me about it. The next thing, come Christmas time, she came down from Yale, and she came in at noon on the last day before Christmas vacation. She was going to stay with us for the holidays. And as she came in, I had just walked out of a conference on Barnes v. Costle, which is a sex discrimination case, and we hadn't really settled on the case at the conference. The panel involved Judge Robinson, myself, and Dave Bazelon. I told Kitty the kind of case we were sitting on, and without saying anything to me, she went down to see Judge Charles Richey, who had had the case, and asked for the briefs and transcript. She asked for our copy, so I gave her a copy. The next thing, I heard later, was that she had reviewed every case in the United States on sexual discrimination. Every case in America held that

sex discrimination was not gender based. It had to be forced in connection with sex. She had written all this up, and I never read it until later. I didn't know what her work involved, but she had concluded that sex discrimination was gender based, against every court in the country. When the Yale faculty read her work, they told her she had to make a book out of it. So she stayed up there during the summertime and wrote Sexual Harassment of Working Women. Of course, Kitty's book was published by the Yale Press and was then accepted world-wide. In the interim, prior to publication, Judge Robinson had come to the same conclusion and we followed his draft. Recently, she's been taking the world on on pornography and making progress slowly; but I think she's making progress. The Canadian Supreme Court recently held that "pornography harms women", which is the guts of the attack.

Q: I did have an item in my notes about a conference on sexual harassment in 1977. It may be the same one you're referring to concerning Barnes v. Costle.

MACKINNON: That was our court.

Q: I believe you said, "Sexual advances may not be intrinsically offensive, and no policy can be derived from the equal opportunity employment laws to discourage them." And you went on, "It is the abuse of the practice rather than the practice itself that causes alarm." Is that the part of the issue that you are referring to?

MACKINNON: I don't believe so. I was 100 percent for the Barnes opinion and for Kitty's analysis. In the Barnes case, because of my long association with business, where we hired women, that there should be some recognized way so they can nail down their evidence and not in every case just be one man's word against the girl's, or something like that. They ought to provide for regular reporting if things develop, and not simply report at some later date that they were sexually harassed by some person. That's the gist of my comment on that, except in our case, I was strongly for a conclusion that employers should provide for some methods of reporting.

Q: Thank you very much, Judge.

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