

Judicial Remembrance

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Hon. Robinson O. Everett Senior Judge, U.S. Court of Appeals for the Armed Forces

ON JUNE 12, 2009, Judge Robinson O. Everett died peacefully in his sleep at the age of 81. He was one of the nation's most respected experts on military justice and one of the longest serving law professors at Duke University, where he served on the faculty for more than 50 years. He remained active as a senior judge on the Court of Appeals for the Armed Forces and was preparing for oral arguments the week he died. Friends, colleagues, students, and members of the bar recall him as a generous, gregarious, and brilliant scholar. He was a fair and impartial judge, a beloved professor, and a mentor and friend to many.



It may have been fated that Judge Everett would become a lawyer. As the only child of two successful North Carolina attorneys, he was raised with a commitment to public service, along with his parents' example of hard work and professionalism. His mother, Kathrine Robinson Everett, was a pioneer for women in the legal profession. After the University of Virginia refused to admit her because she was a woman, she graduated first in her law class from the University of North Carolina in 1920—the same year that women won the right to vote. She argued—and won—her first case before the North Carolina Supreme Court only three months after graduating from law school. Judge Everett's mother practiced law until she was 97 years old.

Judge Everett fully expected that he would return to North Carolina after graduating from Harvard University Law School in 1950; he intended to join his parents' law practice. However, as is often the case, life had a way of interfering with Judge Everett's best laid plans. On his graduation day, North Korea invaded South Korea, and military service suddenly became a distinct possibility. "I was of draft age," Judge Everett recalled in an interview with this author shortly before his death. "My first concern was passing the bar exam, but on the second day of the exam, I saw in the newspaper that draft notices had been mailed.

I wanted to enter the JAG [Judge Advocate General] reserve program so my mother found an Air Force recruiter to swear me in during the exam lunch break."

Judge Everett enlisted in the Air Force and simultaneously applied to the Air Force JAG. Again, in one of those strange twists of fate, Paul W. Brosman, who later would serve as a judge on the U.S. Court of Military Appeals (now the U.S. Court of Appeals for the Armed Forces) was responsible for processing Judge Everett's JAG application. After being sworn in as a first lieutenant in the Air Force in April 1951, Judge Everett reported for a two-year tour of duty in Amarillo, Texas.

Just before his tour of duty ended in summer 1953, Judge Everett found opportunity in another accident of timing. He was on a one-week leave from the military in preparation for his intended return to civilian law practice in Durham, N.C., when a friend convinced him to travel to Washington, D.C., to attend the funeral of Sen. Robert Taft. While in Washington, Judge Everett arranged to be admitted to practice before the newly created Court of Military Appeals. The swearing-in procedure was an informal affair held in the chambers of one of the three new judges, Judge Paul W. Brosman. After the ceremony, Judge Brosman asked young Robbie Everett if he would like to serve as his commissioner at the court instead of returning

to North Carolina. When Judge Everett asked the clerk of the court to describe the position, the clerk explained that a commissioner was like being between a major and a colonel, which, Judge Everett laughingly recalled, “sounded like a big promotion to me.” Judge Everett took the job and spent the next two years as Judge Brosman’s senior staff attorney.

Judge Everett eventually returned to Durham in fall 1955. He taught at Duke University Law School and practiced law with his parents. Working under the name Everett, Everett and Everett, Judge Everett liked to refer to the firm as “Mother, Dad and Me.” The family made history together when all three Everetts were sworn into the Bar of the U.S. Supreme Court on the same day. Judge Everett later returned to the U.S. Supreme Court, arguing—and winning—the landmark racial gerrymandering case *Shaw v. Reno*, a case that involved congressional redistricting in North Carolina.

In the 1960s, Judge Everett became fully engaged in his lifelong work on the subject of military justice and the protection of the rights of service members. As was so often the case in his life, a combination of prescience and personal contacts brought him to the U.S. Senate Judiciary Committee’s Subcommittee on Constitutional Rights, chaired by Sen. Sam Ervin (D-N.C.). Judge Everett knew Sen. Ervin through his North Carolina roots—he had dated the senator’s daughter on occasion and knew the senator’s son at Harvard Law School. After overhearing a joke at a dinner party about the need to investigate the constitutional rights of service members, Judge Everett later suggested this in earnest to Sen. Ervin. The senator took the young Duke law professor seriously, appointing Everett as assistant counsel to the Subcommittee on Constitutional Rights, on which Everett served from 1961 until 1964.

At that time, the concept of military justice was an evolving one. The experience of World War II had introduced millions of young Americans to rules based on 18th- and 19th-century military penal codes. Until the creation of the Uniform Code of Military Justice (UCMJ) in 1950, service members accused of crimes often faced trials without lawyers or judges. Judicial review of courts-martial was rare. The new code was a major step forward and reflected the need for a modern code that would cover all the armed services—Army, Navy, Marine Corps, Air Force, and Coast Guard. The Subcommittee on Constitutional Rights continued the process of reform and improvement to the UCMJ, conducting extensive hearings and preparing detailed reports on the constitutional rights of military personnel with respect to military justice.

Judge Everett brought his experience as an Air Force judge advocate to his work on the subcommittee. He passionately believed in the concept of fairness for the individual. He also understood the great power exercised by commanders in the military justice system, and he recognized the need in those years for

significant reforms to that system. As Congress sought to balance the military’s need for good order and discipline with the rights of service members accused of a crime, Judge Everett provided a steady, experienced hand for the subcommittee examining this issue. The subcommittee conducted hearings into the issue of unlawful command influence; investigated the treatment of African-American soldiers stationed at Southern military installations; heard testimony about the creation of a civilian oversight court; and considered the rights of service members, dependents, and civilians accused of crimes while stationed overseas.

Judge Everett’s work in the Senate contributed to the historic passage of the Military Justice Act of 1968—the first major amendment to the Uniform Code of Military Justice since its creation in 1950. The new law brought about significant improvements for service members under the UCMJ, expanding the concept of fairness by establishing the modern military judiciary. The new law authorized a military judge at general and special courts-martial, expanded the right to free military counsel at various levels of courts-martial, and created intermediate appellate courts with appointed judges. In an interview earlier this year, Judge Everett recalled how both political parties worked together in a bipartisan fashion to bring about the passage of the Military Justice Act of 1968. He remarked at the absence of controversy attending passage of the bill, surmising that in the 1960s the Senate was a more congenial place than it is today, and the media played less of a role during legislative deliberations in those days.

In 1980, President Jimmy Carter appointed Judge Everett to serve as chief judge of the U.S. Court of Military Appeals. “The court was in need of leadership when Judge Everett arrived,” recalled Scott Silliman, executive director of the Center on Law, Ethics and National Security at Duke University School of Law. “He made it his mission to raise the stature of the court and improve the administration of justice. He worked hard to renew favorable relationships with the service JAGs and he brought management to the court.”

In particular, Judge Everett worked tirelessly to educate the public about the military justice system and the role of the court. He firmly believed that a better understanding of military justice would inspire greater confidence in the system. He knew that the court was not well-understood outside of military circles, as he was reminded one day in a conversation with the U.S. solicitor general. The two men were at a luncheon when Judge Everett mentioned that he would like to attend the Supreme Court argument in the case of *Solorio v. United States*, 483 U.S. 435 (1987). Judge Everett had written the opinion when the case was before the Court of Military Appeals. The solicitor general told Judge Everett that he was always welcome at the Supreme Court and to “please wear your uniform.” In fact, the civilian judges at the court wear the same

black robes as federal judges everywhere.

Judge Everett was very proud of the military justice system and sought every opportunity to highlight the business of the Court of Appeals for the Armed Forces. Under his leadership, the court began Project Outreach, which involved judges traveling to law schools across the country for oral arguments throughout the year. The court conducted oral arguments on aircraft carriers on two occasions, which allowed the sailors serving onboard to observe the court at work. Judge Everett received many invitations to speak at conferences and legal functions because of his warm, engaging personality and his natural affinity for people. He loved playing the role of chief spokesperson for the court, and he invited everyone he met on those trips to visit the court. Many people accepted these offers, including a young private who arrived at the security desk one day and asked to speak with the chief judge; she had been his driver at a military installation he had visited. Judge Everett was delighted to give the soldier a tour of the historic courthouse and take her to lunch with his staff. He relished every opportunity to connect with people like the young driver and to share the workings of the court.

Judge Everett passionately loved his work at the court, and he was particularly suited to the demands of the job. He had a brilliant mind and an incredible ability to retain and recall the details of each case he heard. Former FBA President Bob Mueller, who was Judge Everett's commissioner for 12 years, recalled how focused he was on each case that came before him: "Despite the thousands of petitions that required Judge Everett's attention, nothing received a cursory review. He was thorough with each case, and he would engage counsel during oral argument about specific details from the record of trial. He could assimilate volumes of information and he never forgot anything, whether in a conversation or a passage from a brief."

Judge Walter T. Cox III, a senior judge at the court, recalls that "Judge Everett was a scholar who wanted to see a trial done properly. If he saw an error, he was inclined to return the case so that it could be tried again. He was not soft on crime, but he felt strongly about the integrity of the system. Judge Everett was also very supportive of the military judges. He worked hard to increase the stature of military judges and he was very protective of their independence."

Brig. Gen. (Ret.) John S. Cooke, deputy director of the Federal Judicial Center, explained how the court's decisions during Judge Everett's tenure contributed to the development of the military justice system. "In five significant areas, Judge Everett authored opinions that brought clarity to the court's jurisprudence: (1) the scope of courts-martial jurisdiction, (2) the limits of search and seizure, (3) the right against self-incrimination, (4) extraordinary writs, and (5) the issue of



Photos courtesy of Duke Law School.

unlawful command influence."

With respect to the first issue, courts-martial jurisdiction once depended on a "service connection test," whereby crimes committed by military members had to relate to their military service. During Judge Everett's early years as chief judge, the court expanded that jurisdictional concept by finding a "service connection" in cases where service members committed crimes outside of a military installation. These opinions led to the landmark Supreme Court ruling in *Solorio*, in which the Court held that the jurisdiction of a court-martial depends solely on the status of the accused as a member of the armed forces, thereby overruling the old "service connection" test.

"In the areas of search and seizure and the right against self-incrimination, the Court of Appeals for the Armed Forces grounded its opinions in constitutional doctrine and opened the door to the military's urinalysis programs," according to Cooke. "Judge Everett also was very open to using the court's power and supervisory authority under the All Writs Act. *United States Navy-Marine Corps Court of Military Review v. Carlucci*, 26 M.J. 328 (1988) was a significant case in which the Court asserted the independence and integrity of its military judges against efforts by the Department of Defense to investigate allegations of judicial misconduct involving a lower court."

Finally, Judge Everett wrote the seminal opinion in *United States v. Thomas*, 22 M.J. 388 (1988), in which the court addressed allegations of a military commander's attempt to influence the outcome of a court-martial. On the subject of unlawful command influence, Judge Everett wrote the following: "Command influence is the mortal enemy of military jus-

tice. ... One of the most sacred duties of a commander is to administer fairly the military justice system for those under his command.”

After 12 years of active service on the court, Judge Everett took senior status and returned to North Carolina, where he founded the Center on Law, Ethics and National Security at Duke Law School, which is funded by a trust established in his mother’s will. The center offers seminars and sponsors conferences, which bring together policy-makers, scholars, and practitioners to focus on national security law and policy issues.

Throughout his long career, Judge Everett made support for bar activities a priority. He liked to tell the story about how his parents first met in 1924 as they embarked on the *S.S. Laconia* on its journey to London for the annual meeting of the American Bar Association. He recalled the emphasis his parents had placed on bar participation, taking him to the annual meetings of the American Law Institute in Washington, D.C., every year when he was a child. Judge Everett loved to host bar events at the court and he sat on numerous

committees for the Federal Bar Association, the American Bar Association, and the North Carolina Bar Association. Several years ago, when Judge Everett received the North Carolina Bar Association’s highest award, the former president of the North Carolina Bar Association, Norfleet Pruden, explained that the acid test for the award was whether, when the name of the recipient was announced, everyone’s reaction was, “Oh, but of course!” Judge Everett, as an educator, judge, public servant, bar leader, and private practitioner, surpassed that test.

Judge Everett’s legacy is strong. His big smile, warm laughter, and booming voice will be missed, but his example lives on in the lives he touched. **TFL**

Eleanor Magers Vuono served as a captain in the U.S. Army Judge Advocate General’s Corps until 2001 and was a law clerk in the chambers of Judge Andrew Effron, chief judge of the U.S. Court of Appeals for the Armed Forces, from 2006 to 2008.