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The Implications of COVID-19 for Incarcerated Individuals Seeking Legal Redress

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Hon. Graham C. Mullen

Senior U.S. District Court Judge, Western District of North Carolina

by J.P. Davis and Jennifer Braccia



J.P. Davis is the first assistant federal public defender for the Western District of North Carolina. He served as a law clerk to Judge Mullen from 2005–2006. Jennifer Braccia is a staff attorney at Moore & Van Allen, where she assists the firm and its clients in navigating the intricacies of federal court civil practice and procedure. She served as a law clerk to Judge Mullen from 2012–2013 and part time from 2009–2012. She was pro se law clerk in the Western District of North Carolina from 2005–2012. She also served as a law clerk to Magistrate Judge Ruben B. Brooks in the Southern District of California from 1995–1997 and as an assistant U.S. attorney in the Southern District of California from 1998–1999. ©2021 J.P. Davis and Jennifer Braccia. All rights reserved.

“I thought this might help you,” Judge Mullen says, handing us a printed sheet of paper. At first glance, it looks like a standard bio, the type any speaker or writer might use, but for a few odd blanks—and the ominous word at the top. “It’s a draft obituary I wrote for myself,” he explains, giving voice to it as though it were the most normal thing in the world.

He shrugs, and we all laugh. Judge Mullen’s autobiographical obituary is much like its subject: modest, infinitely pragmatic, wryly fatalistic, and with a wickedly dry sense of humor. It seems less like a catalogue of his accomplishments than an effort to avoid having them catalogued; less an attempt to write his own legacy than to save someone else the trouble of writing anything for him at all. The main mention of his more than 30 years of judicial service is a simple note at the bottom, allowing that “if” one of an elect group of respected friends and colleagues “think some appropriate remarks about judicial service are indicated, they go here.”

Graham Calder Mullen was born in 1940, the oldest of four boys in a family with roots in the Western District of North Carolina going back before the Civil War. His father was a prominent lawyer in Gastonia, N.C. His mother “was a saint,” in his words, in no small part for putting up with young Graham Mullen’s brief foray into raising rabbits in their backyard.

Judge Mullen grew up in Gastonia and attended public schools. In high school, a former Sunday School teacher, Ms. Underwood, gave him information about a Navy scholarship that could pay his way through college. She encouraged him to apply, but after looking it over, the teenage Judge Mullen came back and told her he wasn’t eligible. He had asthma, which he had read was a disqualifier for naval service.

Ms. Underwood would not have it: “You make them tell you no.” Mullen took that advice to heart. He applied for the scholarship and got it.

“That was the only serious argument I ever had with my father,” Judge Mullen says. The elder Mullen had served in World War II, and his experience was apparently “less than sanguine.” Nevertheless, Judge Mullen prevailed. He took the scholarship and went to Duke University.



“It was a shock,” he recalls of his first semester at Duke. It went poorly; he “almost flunked out,” as he tells it. “Fortunately, my grades got better.”

They improved quite significantly, in fact, because at the end of his undergraduate years, he applied and was admitted to Duke University School of Law, which he deferred for his naval service. He then went on to serve as communications, combat information center, and operations officer on the USS Hawkins from 1962 until 1965, including during the Cuban Missile Crisis.

“After a year and a half, I discovered I had made a bad choice,” he laughs about his naval service. Nevertheless, he made good from it, including meeting the love of his life, his wife Judy. The two recently celebrated their 55th anniversary. They have two daughters, Kate and Jennifer, as well as two grandchildren, Kass and Harrison.

In 1966, Judge Mullen finished his active service and returned to Duke to complete law school. Apparently, the standards had changed during his deferment; he recalls an assistant dean of admissions looking at his records and remarking “how the hell did you get into this law school? We wouldn’t let you darken the door today!”

He would go on to graduate Order of the Coif and seventh in his class, but this is the type of story Judge

Mullen is most likely to tell about himself: the ones that are self-deprecating. More often, he does not speak about himself at all. Instead, he lights up when discussing his cases, legal arcana, or politics as well as his goings-on with friends, colleagues, former law clerks, and family.

“For a man of his many gifts, he is very modest,” notes U.S. Magistrate Judge David C. Keesler, who was first appointed under then-Chief Judge Mullen in 2004. “In a time in our society when we are surrounded by people who always think it’s about them, Judge Mullen never thinks it’s about him. He takes the work seriously, but not himself.”

This comes across in how Judge Mullen describes his path to the bench. “We were local counsel for Duke Power Company, and I got to know the head of litigation,” he recalls. “They were happy with our work,” and when a judgeship came open in the district, “I got a call saying they wanted to put my name in. I said ‘if you want to waste your time, go ahead.’” After interviewing with then-Senator Jesse Helms (“He said ‘At least with your hair, you look like a judge,’” Mullen laughs), his name made the final list to be passed up to President George H.W. Bush.

“There were three names I would have picked over me,” Judge Mullen opines. One of those names was Brent McKnight, who later became a federal magistrate judge and ultimately did become a district court judge and a colleague on the same bench as Judge Mullen. “I personally thought the only reason I was on the list was to placate the organized bar. Well, next I know, I’m nominated.”

Judge Mullen’s modesty is genuine, but it conceals a shrewd legal mind. Any of his approximately 36 former law clerks—or his career clerk, Debbie Coble—can recite a litany of stories where they wrestled with thorny legal problems for hours or days before bringing it Judge Mullen, only to have him give them an answer off the cuff that almost invariably was the right one.

“Judge Mullen is very smart,” offers friend and former colleague Carl Horn III, a retired U.S. magistrate judge who worked with Judge Mullen for nearly two decades. “His intelligence and business acumen allow him to get to the heart of the matter quickly in his more complex civil cases. I’ve always admired him for that, and have tried to follow his example.”

Fresh out of law school, Judge Mullen interviewed with several firms but got the same answer. “They all knew my dad, and they all said, ‘we know you’re going to go work with him.’” And that was exactly what happened; Judge Mullen practiced with his father, James Mullen, at the firm of Mullen, Holland & Harrell in Gastonia.

“My dad was one of the smartest men I ever knew, and one hell of a trial lawyer,” Judge Mullen says. His admiration for his father is clear, and it is just as clear that he is haunted by his father’s ultimate decline with Alzheimer’s. “It was painful to watch.” He leaves it at that.

In his first year of practice, Judge Mullen himself became very ill. He lost all energy and suffered brutal



Judge Mullen in front of his wall of law clerk pictures in his chambers.

headaches, and his tall frame wasted down to just 150 lbs. After an extensive workup, he was diagnosed with Graves’ disease. At the time, the major treatment was to take radioactive iodine. It stopped the disease but in the process disabled the thyroid entirely, leaving him dependent on thyroid medication for the rest of his life.

Fortunately, this early setback was only a speed bump in his legal career. He went on to make a mark for himself, representing landowners, corporations like Duke Power and AT&T, hospitals, even the railroads. He was part of a breed of generalists that are increasingly scarce in today’s market of legal specialization.

“We practiced the kind of law that does not exist in small town America anymore,” Judge Mullen reflects. “We took anything that came in the front door where we thought we could get paid and not commit malpractice.”

As a small-town attorney, Judge Mullen pioneered

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litigation techniques that created new ways for his clients to do business. These included now-common practices that were unheard of at the time, such as deposing landowners about the value of their property in right-of-way cases or instructing his client in how to avoid those cases in the first place by simply buying the land where it needed the right-of-way and reselling it with the right-of-way established.

He is most proud of his work with the reorganization of Gaston Memorial Hospital (now CaroMont Regional Medical Center), where he navigated a complex web of regulations to have it declared North Carolina's largest independent hospital, something state legislators proclaimed at the time couldn't be done. This change laid

the groundwork for CaroMont's continued independence and success today.

His work for the hospital paid off in his nomination process as well. A "blue slip" hold was placed on his nomination, part of routine political games played with judgeships at the time. At one point, Judge Mullen spoke to David Hoyle, the former president of the hospital, about it. He recalls Hoyle getting on the phone right then with the office of the senator who had placed the hold.

"He was insulting and profane," Judge Mullen says calmly. "The next day, the blue slip came off." All told, Judge Mullen's nomination process took 11 months from start to finish. Finally, in October 1990, he was confirmed to replace Judge James B. McMillan on the bench of the Western District of North Carolina.

"The first thing you get is a name transplant—your first name becomes 'Judge,'" Mullen says. "But you do not have to be ugly to people."

Judge Mullen lives this philosophy, building up the people around him even as he eschews the spotlight himself. Magistrate Judge Keesler recalls a game-changing conversation shortly after his own appointment, when he shared with Judge Mullen his fears about ensuring that decisions get made promptly and correctly. "Look, we picked you because you're really good," Judge Mullen told him. "Use your best judgment, we trust you." Those words meant the world to Keesler. "I admire him a lot," he says. "He's been big for me; he is important to me. He is so much more than a colleague to me."

Likewise, Frank Johns, who has served as clerk of court in the Western District of North Carolina since 1994, thinks of Judge Mullen as a friend and mentor.

Early in his tenure, Johns recalls then-Chief Judge Mullen telling him "'There is no mistake you can make that I can't fix with an Order—so relax and do your job.' That was so empowering." Indeed, this mantra made such an impact on Johns that he uses it himself to this day, with every new staff member who joins his office.

On the bench, "Judge Mullen has a deep passion for fairness and justice," Keesler relates. "Is this decision right? Is it fair to all the parties? Is this the right and just thing to do in this case? Judge Mullen has always shown courage in doing his job. Whether stating thoughtfully his heartfelt concerns over federal sentencing or making the tough calls in both civil and criminal cases, this has always been his way."

Horn agrees. "In his criminal cases, Judge Mullen has demonstrated reasonable concern about the Government's balance and the increasing severity of federal criminal punishment—concerns that I certainly share."

Judge Mullen's most memorable cases include the 1991 resentencing of renowned televangelist Jim Bakker and presiding over the first-in-the-U.S. trial for material support of terrorism in 2002. The latter involved illegal cigarette smuggling used to raise money for the Lebanese terrorist organization Hezbollah. In an interesting twist, the lead prosecutor in that case, Kenneth Bell, would ultimately join Mullen on the WDNC bench in 2019.

"That was a fascinating, fascinating case," Mullen recalls. It also required significant extra security for the presiding judge. "My neighbors weren't happy with me, because the [U.S.] Marshals were picking me up every morning. It had snipers on the roof and all that other good stuff."

In December 2005, Judge Mullen took senior status. Almost immediately, he stopped taking criminal cases. "I just became tired of doing them," he explains. He takes a breath. "If you want to say I was hardly a fan of the [U.S.] Sentencing Guidelines, that would be a true statement."

As a jurist, Judge Mullen is known for his efficiency and pragmatism. "Try not to BS me and get to the point," he advises lawyers appearing in front of him. "If you're doing cross examination and you start to repeat yourself, quit. If you know you are winning, graciously proceed." (This last bit is a more genial rephrasing of advice he has given one of us in the past: "If you're winning, sit down.") Advising both prudence and tenacity in litigation, he quotes Mark Twain: "A man who carries a cat by its tail learns something he can learn no other way."

Off the bench, Judge Mullen appreciates good food, wine, and cooking. He enjoys reading military history, entertaining friends, and traveling, which he greatly looks forward to doing again soon. In the meantime, he and Judy are enjoying their new puppy, Jojo.

On and off the bench, Judge Mullen is gracious about everyone around him. He calls his judicial colleagues "a very good bench. Very collegial group of people," and adds, "We all get along." He refers to the federal magis-

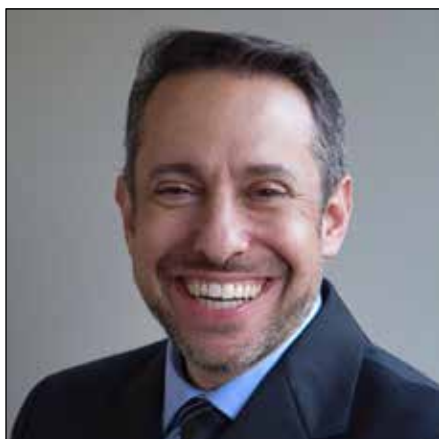
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trates as “terrific and hard-working.” And of his staff, he says, “I’ve enjoyed *all* of the people who have worked for me. I’m very fortunate with the people who have signed on to work as a law clerk with me. I know that whatever success I’ve had, the law clerks have been a major part of it.”

The love and respect he feels for his law clerks is mutual. Judge Mullen’s former clerks have gone down numerous career paths after their clerkships, to all parts of the bar and beyond, locally, nationally, and even

internationally. Every one of us, though, would agree that working with him was a highlight of our legal careers. We all stay in touch with Judge Mullen, and those who can, gather in person every few years to spend time with him.

Although he might not want his legacy written, it already has been. The mark Judge Mullen has left on the people he encounters and the institution he loves is indelible; it will not fade. And we are all so much richer for it. ☺



Russell Turkel Federal Sentencing Consultant and Criminal Defense Attorney

RUSSELL@SCOTTPALMERLAW.COM
214-987-4100

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