

JUDGE ALLYSON K. DUNCAN (RET.)
U.S. COURT OF APPEALS FOR THE FOURTH CIRCUIT



*Quietly
tenacious,
fiercely
committed*

BY JAMES ANDREW WYNN

When asked to write this tribute to my esteemed friend and longtime colleague Judge Allyson Duncan, I eagerly embraced the opportunity. My connection with Judge Duncan spans decades, encompassing roles as fellow North Carolinians, colleagues on the bench, even onetime political rivals. Throughout this journey, she has epitomized the essence of an exemplary judge — a person driven by a fervent commitment to fairness and doing the right thing. And she has continued to exhibit these qualities in the years since stepping down from the bench.

Judge Duncan does nothing by half measure — that is, she approaches everything with unwavering dedication. After finishing first in her class from Hampton University as an undergraduate, and then becoming one of the first African American women to graduate from Duke Law School, she pursued a multifaceted legal career as a professor, utilities commissioner, law firm partner, bar association president, and, of course, judge. Confirmed unanimously by the Senate for a seat on the U.S. Court of Appeals for the Fourth Circuit,¹ her achievements extend beyond the courtroom to global contributions, including promoting the rule of law internationally and even having a hybrid cattleya orchid named after her.²

Judge Duncan credits the quietly tenacious spirit that has led to these accomplishments to her upbringing as the only child of, on the one hand, a mother who pushed her to be her best, and on the other, a father who “simply adored” her.³ (It was “nice to have one of each,” she has said.⁴) Born in Durham, North Carolina, Judge Duncan was shaped by her broader African American community — that of North

ABOVE: JUDGE DUNCAN WITH HER PORTRAIT, WHICH WAS INSTALLED AT DUKE LAW SCHOOL IN 2018 AND WAS PAINTED BY GALE FULTON ROSS. ROSS EARLIER PAINTED ONE OF DUNCAN'S MOTHER, ANNE, THE LONGTIME LAW LIBRARIAN AT NORTH CAROLINA CENTRAL UNIVERSITY LAW SCHOOL. (PHOTO BY KEN HUTH)

Carolina Central University, an historically Black university in Durham where her parents both worked, and her local Catholic church.⁵ She was introduced to the law early, through her mother's job as a law librarian and professor of legal research and writing,⁶ and becoming a lawyer was always her goal.⁷ After law school, she went on to clerk for District of Columbia Court of Appeals Judge Julia Cooper Mack, who was the first woman of color to serve on any court of last resort in the United States⁸ and a pivotal figure in Judge Duncan's legal journey.

Like Judge Mack, Judge Duncan has amassed an impressive list of "firsts." As noted, she was one of the initial five African American women to graduate from Duke Law School.⁹ In 1990, she became the first African American woman to serve on the North Carolina Court of Appeals after her appointment by Governor James Martin. Losing her reelection campaign (to me — I think she has forgiven me) did nothing to deter her. She went on to serve as a commissioner of the North Carolina Utilities Commission, a partner at Kilpatrick Stockton, and the first African American president of the North Carolina Bar Association.¹⁰

Her nomination by President George W. Bush to the United States Court of Appeals for the Fourth Circuit marked an additional milestone, solidifying her position as the first woman from North Carolina, first African American woman, and first African American individual from North Carolina to serve on the Fourth Circuit. (On the latter point, she beat me to the punch by seven years almost to the day — I have forgiven her.) She later became president of the Federal Judges Association and made a name for herself in the international arena, including serving as vice president of the International Association

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of Judges, working with the Open World leadership program, and accepting an appointment by Chief Justice John Roberts to chair the International Judicial Relations Committee of the U.S. Judicial Conference.¹¹

Judge Duncan's humility, soft-spoken nature, and courteous demeanor are integral to her character. Despite her extraordinarily impressive résumé and the determination it has required to achieve, she remains approachable and respectful. But she is no shrinking violet. Rather, like the orchid that bears her name, she bides her time but will put her view forward when the moment is right. In one memorable recollection early in her tenure on the Fourth Circuit, Judge Duncan was sitting on a panel in open court with two more senior colleagues who unendingly hammered the attorneys with questions. Sitting quietly and patiently, Judge Duncan calmly raised her hand to be recognized by her colleagues and said words to the effect of, "If the

two of you should have a break in your questioning, I would like to ask a question, too." Of course, that accomplished her desired effect — using equanimity to express her views with the combination of assertiveness and politeness that sets her apart. These qualities not only contributed to the highly collegial atmosphere on the Fourth Circuit but also facilitated her success in diverse roles, connecting different legal communities.

I had the privilege of serving with Judge Duncan on the Fourth Circuit for nearly a decade before her retirement in 2019. Her astute analysis, drawing on her breadth of legal experience, benefited our court greatly.

In *Francis v. Booz Allen & Hamilton Inc.*,¹² for example, Judge Duncan authored an opinion discussing the protections afforded to veterans and service members by the Uniformed Services Employment and Reemployment Rights Act (USERRA). She concluded that the "reemployment" rights guaranteed by Section 4312 of USERRA applied only at the instant of rehire by the service member or veteran's former employer and that other portions of the Act operated to provide protections past the instant of reemployment. This reading of the section, Judge Duncan found, ensured that other provisions of USERRA were not rendered superfluous. Thus, she emphasized that, while USERRA's provisions together provide comprehensive protection to veterans and service members, each provision is functionally discrete.

In *Balas v. Huntington Ingalls Industries*,¹³ a case for which I also sat on the panel, Judge Duncan drew on her eight years at the Equal Employment Opportunity Commission (EEOC), where she worked after clerking for Judge Mack.¹⁴ *Balas* involved whether ►

the court could review a plaintiff's claims of employment discrimination if such claims were presented only in letters from the plaintiff to the EEOC and not included in the EEOC charge itself. Emphasizing that the purpose of the requirement that plaintiffs file with the EEOC before presenting their claims to the court is to provide notice to the charged party, Judge Duncan's opinion rejected the plaintiff's argument that allegations included only in private letters were sufficient to satisfy Title VII's administrative-exhaustion requirement.

Similarly notable are Judge Duncan's opinions that were later taken up by the Supreme Court. In *Jackson v. Home Depot U.S.A. Inc.*, Judge Duncan considered whether the Class Action Fairness Act allowed a third-party counterclaim defendant to remove the counterclaim against it.¹⁵ Judge Duncan concluded that it did not, reasoning that the Act's provisions allowing any defendant to remove the action applied only to those parties against whom the original complaint was asserted, not to parties brought in only by counterclaim. The Supreme Court affirmed.¹⁶

The Supreme Court also affirmed Judge Duncan's opinion in *Booking.com B.V. v. United States Patent & Trademark Office (USPTO)*,¹⁷ which was filed shortly before her retirement from our court. That trademark case considered whether adding the top-level domain ".com" to a generic second-level domain rendered the mark distinctive and thus protectable. Judge Duncan concluded that the mark at issue, "Booking.com," was protectable because there was insufficient evidence that the public understood the mark to refer generally to hotel-booking websites as opposed to a particular brand. In doing so, Judge Duncan rejected the USPTO's

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proposed rule that, because the mark was created by merely adding ".com" to a generic term, it was rendered necessarily generic.

The throughline in these opinions is crisp analysis, which homes in on the legal issue and resolves it efficiently, narrowly, and with the utmost respect for the parties and for any dissents — such as mine in the *Booking.com* case. In her own dissents, too, Judge Duncan exhibited these same traits, typically keeping her dissent brief and focused on the point of disagreement. For example, in a one-paragraph dissent from my opinion in *United States v. Lanning*,¹⁸ Judge Duncan first highlighted the ways in which we agreed before briefly noting that her dissent arose from a different view of the level of deference our court owed to the magistrate judge's findings of fact. Our exchanges in *Booking.com* and *Lanning* exemplify how, while Judge Duncan and I didn't always agree, we greatly respected and valued each other's perspectives.

Judge Duncan's facility to assert her view while remaining unflinchingly polite is one that stood out even on

the Fourth Circuit, with its reputation for collegiality. And it is one that has served her well off the bench, too. She has a real knack for meeting people where they are, and this translates into a remarkable ability to connect disparate communities. I imagine it is this same skill that has benefited the international work she has undertaken, both before her retirement from the Fourth Circuit and since, such as "advising foreign judiciaries in places like Yalta, and conducting human rights training in Tunisia."¹⁹

Since retiring from our court in 2019, Judge Duncan could have chosen a lot of ways to spend her time. But she has opted to spend it working to improve the judiciary and the world, and to promote the public's confidence in our judicial system. During a recent presentation at a roundtable on judicial independence, the transcript of which was published as an article in *Judicature*, Judge Duncan spoke about threats to judicial independence both internationally and at home, demonstrating her knowledge of and passion for this topic.²⁰ She also coauthored an article on this matter, pointing in particular to Poland as "a cautionary tale" and noting recent examples of politicization of the American federal judiciary as concerning for the rule of law.²¹

Additionally, in 2021, Governor Roy Cooper appointed Judge Duncan and three other attorneys to a newly formed North Carolina Juvenile Sentence Review Board, which was created on the recommendation of the Governor's Task Force for Racial Equity in Criminal Justice as one response to the 2020 protests for racial justice after George Floyd's murder in Minneapolis.²² In that role, Judge Duncan reviews petitions from those who were incarcerated for crimes committed as juveniles and provides

recommendations to the governor for commutations or pardons.²³ These recommendations are meant to incorporate new scientific understanding about juvenile crime as well as to promote racial justice and healing, given that more than 80 percent of people imprisoned in North Carolina for crimes they committed as juveniles are people of color.²⁴

Judge Duncan has also served on several advisory boards, including those for Duke Law School’s Wilson Center for Science and Justice²⁵ and the Bolch Judicial Institute (which publishes *Judicature*).²⁶ And she continues her remarkable work in the international arena.

While speaking about her global efforts at Duke Law’s 2019 convocation ceremony, Judge Duncan told graduates that “[t]he experience of traveling

around the world, interacting with judges and prosecutors facing unimaginable challenges in situations more daunting than any we will know, has been life-altering.”²⁷ When the government of Afghanistan collapsed in 2021, Judge Duncan received correspondence via her position with the International Association of Judges from women judges in Kabul fearing for their lives.²⁸ She helped coordinate the relocation of some of these brave judges through her various contacts.²⁹

All of this work, Judge Duncan suggested at that convocation, is at least in part motivated by “paying it forward” — knowing that she is “in a position of privilege” and has “an obligation to use that knowledge to give back to” the law school that launched her career as well as other communities that have paved the way for her to have taken on

the many hats she has worn over the course of her career.³⁰

In my view, Judge Duncan has more than “paid it forward.” She continues to stand as an inspiration to me and so many others — including, I hope, anyone who reads these words. For writing this article is but a small way in which I can “pay forward” the friendship she has given me over the years.



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¹ 149 Cong. Rec. S9585 (Executive Nominations Confirmed by the Senate July 17, 2003).
² Liza Roberts, *A judge for all seasons: Allyson Duncan*, WALTER MAGAZINE (Feb. 28, 2014), <https://waltermagazine.com/community/people/a-judge-for-all-seasons-allyson-duncan/>.
³ *Id.*
⁴ *Id.*
⁵ *Id.*
⁶ *Id.*
⁷ *Duke Law celebrates retiring Fourth Circuit Judge Allyson K. Duncan ’75, unveils portrait*, DUKE UNIV. SCH. OF L. (Nov. 2, 2018), <https://law.duke.edu/news/duke-law-celebrates-retiring-fourth-circuit-judge-allyson-k-duncan-75-unveils-portrait/>.
⁸ See Roberts, *supra* note 2; Matt Schudel, *Julia Cooper Mack, D.C. appellate judge, dies at 93*, WASH. POST, Jan. 30, 2014 (available at https://www.washingtonpost.com/local/obituaries/julia-cooper-mack-dc-appellate-judge-dies-at-93/2014/01/30/873b027c-8932-11e3-a5bd-844629433ba3_story.html).
⁹ *Convocation 2019: Duncan ’75 tells grads to value “serendipity,” seize opportunities that come their way*, DUKE UNIV. SCH. OF L. (May 13, 2019), <https://law.duke.edu/news/convocation-2019-duncan-75-tells-grads-value-serendipity-seize-opportunities-come-their-way/>.
¹⁰ *Allyson Duncan ’75 Confirmed for 4th Circuit*, DUKE UNIV. SCH. OF L. (2003), <https://law.duke.edu/news/features/duncan/>.
¹¹ *Supra* note 7; *Hon. Allyson K. Duncan (Ret.)*, JAMS ADR, <https://www.jamsadr.com/duncan/Excerpts-from-the-2019-Bolch-Prize-for-the-Rule-of-Law-ceremony>, 103 JUDICATURE 11 (available at [*from-the-bolch-prize-for-the-rule-of-law-award-ceremony/*\).
¹² *Francis v. Booz, Allen & Hamilton, Inc.*, 452 F.3d 299 \(4th Cir. 2006\).
¹³ *Balas v. Huntington Ingalls Indus.*, 711 F.3d 401 \(4th Cir. 2013\).
¹⁴ See JAMS ADR, *supra* note 11.
¹⁵ *Jackson v. Home Depot U.S.A. Inc.*, 880 F.3d 165, 167 \(4th Cir. 2018\).
¹⁶ *Home Depot U.S.A., Inc. v. Jackson*, 139 S. Ct. 1743 \(2019\).
¹⁷ *Booking.com B.V. v. U.S. Patent & Trademark Office*, 915 F.3d 171 \(4th Cir. 2019\), *aff’d*, 140 S. Ct. 2298 \(2020\).
¹⁸ *United States v. Lanning*, 723 F.3d 476 \(4th Cir. 2013\).
¹⁹ See Roberts, *supra* note 2.
²⁰ Nathan Hecht, David F. Levi, Rodney Acker, Suzanne Spaulding, and Allyson K. Duncan, *Judicial Independence: Threats Foreign and Domestic*, 105 JUDICATURE 12, 18 \(2021\) \(available at <https://judicature.duke.edu/articles/judicial-independence-threats-foreign-and-domestic/>\).
²¹ John Macy and Allyson K. Duncan, *The Collapse of Judicial Independence in Poland: A Cautionary Tale*, 104 JUDICATURE 41 \(2020-21\) \(available at <https://judicature.duke.edu/articles/the-collapse-of-judicial-independence-in-poland-a-cautionary-tale/>\).
²² Press Release, Gov. Roy Cooper, Governor Cooper Announces Formation of North Carolina Juvenile Sentence Review Board \(Apr. 8, 2021\) \(available at <https://governor.nc.gov/news/press-releases/2021/04/08/governor-cooper-announces-formation-north-carolina-juvenile-sentence-review-board>\).
²³ Press Release, Gov. Roy Cooper, Governor Cooper Grants Clemency to 3 People who were](https://judicature.duke.edu/articles/excerpts-</p>
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²⁴ See Press Release, Gov. Roy Cooper, *supra* note 23.
²⁵ Advisory Board, WILSON CTR. FOR SCI. AND JUST., DUKE UNIV. SCH. OF L. (available at <https://wcsj.law.duke.edu/advisory-board/>).
²⁶ Advisory Board, BOLCH JUD. INST., DUKE UNIV. SCH. OF L. (available at <https://judicialstudies.duke.edu/about/advisory-board/>).
²⁷ *Supra* note 9.
²⁸ David F. Levi, Zohal Noori Rahiq, Susan Glazebrook, Tayeba Parsa, David Rivkin, Mark Ellis, Helena Kennedy, Allyson K. Duncan and Patricia Whalen, *Leaving Afghanistan*, 105 JUDICATURE 30 (2021) (available at <https://judicature.duke.edu/articles/leaving-afghanistan/>).
²⁹ *Id.*
³⁰ *Supra* note 9.