

The Common Law of Judge Luther Boyd Eubanks

by Haven Tobias¹

There was nothing pretentious about Judge Eubanks. He had no self-important swagger, either physically or mentally. If anything, he was rather self-deprecating, sometimes humbly, sometimes purposefully.

He would often say he was no legal scholar, and that he could not fathom why Congress was so persistently occupied with adding to the United States Code, when all any person needed was common sense and the common law of Cotton County. Pouring over all those books was the business of law clerks, not judges, he believed.

Characterizing himself as no legal scholar was, most of the time, honest humility. But sometimes his spoken self-assessment was a ruse, as more than a few pretentious and self-important attorneys came ruefully to learn.

¹ I was Judge Eubanks' law clerk from September of 1974 to September of 1978. This remembrance is intentionally anecdotal. I have interviewed dozens of people: judges, magistrates, former United States Attorneys, lawyers who appeared before Judge Eubanks. The number of persons who have been interviewed for this article precludes individual acknowledgement, but I would like to thank, for contributions of generous valuable time, Judges Lee West and David Russell, attorneys Burck Bailey and David Kline (a former United States Attorney and former Bankruptcy Judge), and statesman and professor, Fred Harris.

Giving a stellar portrayal of the hayseed, Judge Eubanks would remark to such lawyers in chambers during pretrials or motion hearings that he was having difficulty grasping the argument, and would they mind repeating what had been said differently, and hopefully more simply. He might ask them to reword something more than once. Judge Eubanks would appear to be trying very hard to listen and comprehend. There would be no court reporter during these in-chambers proceedings.

Judge Eubanks had a prodigious memory. Perhaps the pompous lawyer's comeuppance would not be served that day. But later in the proceedings, if there was the slightest inclination on the part of that lawyer to waiver or waffle, his or her words would be repeated by Judge Eubanks with unnerving precision, and he would ask: did you just not mean it then, or do you just not mean it now?

Usually, however, proceedings in chambers were informal and gracious. Judge Eubanks liked lawyers, and believed that his job as judge was to be their facilitator, and otherwise mostly stay out of the way. In discovery disputes, for example, he would admonish all involved to disagree without being disagreeable. Sometimes he would advise them to keep in mind that the definition of prejudicial evidence was evidence that all lawyers feared was persuasive and would lead the jury to find for the

other side. Judge Eubanks then gave the lawyers great latitude to try on their own to agree without being disagreeable.

If civility alone could not get the matter resolved, he would ask if there were a way he could draft an order that would compel the recalcitrant party without getting that party's attorney in trouble with his client. He would say: I want you to be able to go to your client and tell him, it's not your fault, it's not my fault, it's this idiot judge's fault...

It came to pass during his tenure that magistrates began to deal with most discovery disputes, but Judge Eubanks' skill during the time he handled them was a measure of the man, and of the judge. Even more so was his attitude, conduct and demeanor in the courtroom, which was truly his bailiwick.

He may have said humbly that he was no legal scholar, but he never said he wasn't a good judge. In fact, Judge Eubanks was a very good judge, and in part this was a consequence of two rare characteristics of his.

He never forgot that behind the lawyer was a client. He had an instinct for justice, especially for the misused or victimized, and he believed strongly that his job as judge was to facilitate justice, and promptly. He said on many occasions that justice delayed was, for "the

little guy” who was being shoved around or hurt, justice denied, because the little guy just couldn’t hold out or hold on that long.

His other characteristic was an uncanny ability to relate to a jury. Any lawyer who practiced before him with some regularity and any person who was on his staff has a story about Judge Eubanks predicting a jury verdict for defendant or for plaintiff, and if for plaintiff, to the penny. He could “read” a jury, and he also could communicate with a jury. He didn’t talk down to them from on high, and he didn’t talk “at” them. He spoke with them.

Both of these characteristics relate to his lack of self-importance, but they also bespeak the populist. Judge Eubanks never forgot he was a poor country boy from hardscrabble land, although there was nothing self-pitying about that awareness.² He just knew first-hand what it was like to be “the little guy” and could relate. As his colleague and good friend, Judge Lee West, said in his eulogy at Judge Eubanks’ funeral, “he was a man of the earth” and while his origins were “humble,” he realized from them a treasure-trove of values: “honesty, sincerity, loyalty, integrity and

² He didn’t often speak of his own personal experiences, not even his military service. I did not know until after I was his law clerk that he served in the European theater in World War II. I did know that his brother Oral was killed in action in Germany and his brother Dewey was disabled in action on Iwo Jima.

hard work.”³

He was quite open about his affection for the Democratic Party.⁴ However, that allegiance never compromised his impartiality. Both United States District Judge David Russell and Oklahoma City Municipal Counselor Bill Burkett state emphatically that during their terms as Republican-appointed United States Attorneys, when they appeared in Judge Eubanks’ court, he “let them try their cases.”

Indeed, that is what all attorneys say about Judge Eubanks, whether appearing in civil matters, or criminal. He let them try their cases. It goes back to his conviction that he was a facilitator, not a despot. David Kline, former First Assistant United States Attorney and former Bankruptcy Judge, said it well: “Judge Eubanks moderated rather than dictated.”

Then United States Senator Fred Harris knew that about Judge Eubanks when he recommended him for appointment. In an e-mail to this author, Professor Harris stated:

I practiced law for ten years at Lawton before going to the U. S. Senate. And in that time I had the opportunity to appear before

³ I – and many, many people -- attended Judge Eubanks’ funeral, and we enjoyed a beautiful remembrance, with fine eulogies. I am grateful to Judge West and to David Kline for providing me with copies of the eulogies they delivered.

⁴ Judge Eubanks was a Democratic legislator in the Oklahoma House of Representatives from 1949 until 1953.

Okla. District Judge Luther Eubanks and to try cases in his court. He was honest, fair, firm, fully knowledgeable of the law, and wholly judicial in his temperament and demeanor. That's why, in addition to my loyalty to him as a friend, I first recommended him for appointment by Governor Raymond Gary as a state district judge⁵ and, then, recommended him for appointment by President Lyndon Johnson as a federal district judge. In both positions, I think he did an outstanding job.⁶

Professor Harris mentions also his sense of loyalty to Luther Boyd Eubanks, and their friendship reveals the personal character of the man who would be judge. Fred Harris decided in high school he would become a lawyer, but he knew he would have to go to college first. He had no idea of how one went about accomplishing that feat. He went to speak with the school superintendent, who recommended that he go visit with the county attorney, Luther Eubanks.

Luther Eubanks not only counseled the young Fred Harris, but when Harris had successfully enrolled, Judge Eubanks personally drove him "in his old 1938 Plymouth" to Norman, where he introduced him to the Dean of the Journalism School, who was able to offer interim housing in his own home before the dormitories opened for the semester, and who also provided the new student with employment as a printer on the campus

⁵ Judge Eubanks was a district judge in Comanche County, in southwestern Oklahoma, for nine years prior to his appointment to the federal bench.

⁶ E-mail from Professor Harris to the author, October 27, 2005.

daily newspaper.⁷ Professor Harris concludes from that experience:

Today, students sometimes ask me how one plans a career so as to become a federal district judge, and I am tempted to say: 'Pick out some young person very early who you think has a good chance to become a U. S. Senator and help him or her like crazy.' It worked for Luther Eubanks. And he made a fine judge, too, as I believed he would.⁸

It was during Judge Eubanks' tenure as chief judge, that the Western District was obliged to shoulder the onerous burden of a burgeoning caseload. In the early 1980's several significant developments led to that caseload. Then United States Attorney, now-Judge, David Russell filed criminal charges in the Western District on 200 indictments against county commissioners in the State of Oklahoma and material suppliers in the largest public corruption case ever filed in the United States. Some two years later the legal consequences of the troubled oil and gas exploration and development industry and its ramifications in the banking industry began to surface in the Western District, and would be immense.⁹

⁷ Excerpt from *Contemporary Authors* "Autobiographies" sent by e-mail from Professor Harris to the author, October 19, 2005.

⁸ Id.

⁹ An excellent account of these developments appears in *Law and Laughter: The Life of Lee West*, by Bob Burke & David Russell, Oklahoma Heritage Association, 2002, chapter entitled "Scandals Galore", pages 236-242.

As a consequence, in 1982, according to Mr. Robert Dennis, Court Clerk for the Western District, that Court had the second heaviest caseload of “weighted filings”¹⁰ in the United States, and the first in the Tenth Circuit. That was also true in 1984. In 1983 and 1985, the Western District was number one not only in the Circuit, but in the entire nation.

That is a dubious “number one” distinction. Judge Eubanks preferred for the University of Oklahoma’s football team to be “Number One”!¹¹ It was a particularly dubious distinction in the Western District because at that time, the only active judges were Luther Eubanks, Ralph Thompson, Lee West and David Russell.¹²

What this meant in stark numbers was that, in 1983 for example,

¹⁰ There was a formula for identifying “weighted filings”, which included cases deemed to be more time-consuming and difficult, and excluded cases which could usually be readily resolved.

¹¹ Judge Eubanks’ love for Oklahoma football was legendary. When I clerked for him from 1974 through 1978, he had never missed a game. I mean he had never missed an away game, much less a home game. He often went to games with Ray Parr, a sports writer for the Daily Oklahoman. One can still find articles in the paper’s on-line archives where Ray Parr refers to “my chauffeur to the Cotton Bowl, Judge Luther Eubanks.”

¹² Judge Daugherty took senior status in 1981. Judge Russell was appointed to succeed him as an active judge in 1982. In 1985 Judge Wayne Alley was appointed to a newly created position. Judge Bohanon was on senior status during this period, but no longer handled a large docket.

each judge had pending on his docket 809 “weighted filings”. Each judge that year completed an astounding 70 trials. (In comparison, in 2004, each judge completed 17 trials.) Judge Lee West reports trying two cases a day.¹³

These circumstances compelled Judge Eubanks, as Chief, to look for alternative procedures to dispose of cases. He turned to his trusted colleague and good friend, Judge West. Judges Eubanks, West and Tom Brett of the Northern District devised and implemented the judicial settlement conference. The procedure used the services of a Magistrate Judge, and the first to fill those shoes was retiring Oklahoma Supreme Court Justice Pat Irwin. The Western District also implemented the summary jury trial. Its success with these alternative dispute resolution procedures gained the Western District national recognition.¹⁴

When I would run into Judge Eubanks during those days the sparkle in his eyes had dimmed a little. He didn’t particularly relish being an administrator and missed the old days when lawyers and judges were not always rushed by the clock and jury trials were part and parcel of a

¹³ *Law and Laughter*, page 227.

¹⁴ The number of cases tried per judge, according to statistical tables provided by Mr. Dennis, dropped from 89 in 1982, to 70 in 1983, to 48 in 1984, to 33 in 1985.

profound democratic experience. Although when asked what it took to be a good judge, and would joke, “just a strong back,” he knew that what it took to be a good judge was to give one’s attention to the prompt and fair resolution of cases rather than just “counting dispositions.” “The fun,” he remarked to me more than once, “has gone out of it.” And so he took senior status in 1986, and retired in 1987.

He died in 1996, still with a “strong back.” Judges Lee West and David Russell have related to me that they visited with him about a week before he died, at a time when he was in pain and knew he was dying. When it came time for Judges West and Russell to leave, Luther Eubanks said he would walk them to the door. They demurred, but he would have none of it, and indeed, escorted them to the door.

He could be stubborn when he knew he was right, and stubborn even when he only hoped he was right. He told me once he drew inspiration from the example of Judge Luther Bohanon’s wife. During the fever pitch over Judge Bohanon’s desegregation rulings, their home phone rang and rang and rang with irate persons shouting obscenities and even threats. Mrs. Bohanon never failed to answer the phone, but she kept a coach’s whistle nearby just in case some rude caller had to be told in no uncertain terms: “time out!”

As Judge West said in his eulogy, Judge Eubanks

admired people who made courageous decisions, even while knowing they would be criticized for doing so. His idea of a poor judge was one who would allow criticism by the news media to influence his decisions on the law. He often remarked: 'If the Daily Disappointment brags on you, you had better re-examine your decision'.

Judge Eubanks knew that judges don't get the cases they "want," they get the cases they get, and their job is to do the best they can. Judge Eubanks is remembered with affection and respect for doing the best he could.

In 1965, Senator Fred Harris had many candidates for the position on the Western District bench from whom to choose.¹⁵ In a letter to Senator Harris dated April 24, 1965, the day after having been told that he was Harris' choice, Judge Eubanks wrote that he was "still on the clouds," but was enclosing "background facts" for Senator Harris' press release "to allow your choice to appear to be justified."

He noted that he was a member of the Order of the Arrow in the Boy Scouts, and had been awarded the highest honor a local council can

¹⁵ The Carl Albert Congressional Research and Studies Center Archives, a collection housed in the old law school, in Monnett Hall, on the OU Norman main campus, is a treasure trove of information on many topics, including files on applications to Senator Fred Harris for judicial appointments, letters of support for different candidates from various people, and the Senator's responses.

bestow upon an adult volunteer, that he had been given an honorary lifetime membership in the Future Farmers of America, and that he had twice served as president of the Lawton Council of Camp Fire Girls. He listed numerous other civic and professional activities and honors.¹⁶

However, what a reader might find most striking is his third-party account of his early years, because under the circumstances of his beginnings, it took character to become an educated adult, much less to become a United States District Court Judge:

[His] parents were pioneers in the Oklahoma Indian Territory, settling first near Courtney, I.T., now Jefferson County, long before statehood. They later moved into the Big Pasture near Taylor Store, then in 1915 moved onto a new claim near Caprock, Lea County, New Mexico, where Luther was born in a half-dugout on July 31, 1917. Drought and a severe blizzard drove the family (then consisting of eight children) back to Oklahoma in a covered wagon, where they again settled near Wardville in 1918, on a hilly 160-acre farm. In 1924 the family (now 10 children) moved to a rented farm near Devol, in Cotton County. Luther walked 4 and ½ miles each day to Cedric rural grade school, where he graduated in 1932 after riding a horse 14 miles to Rabbit Creek Rural School to take the examination. He next enrolled in Devol High School, where he graduated in 1936.

With \$41.00 from bundle pitching, he enrolled in the University of Oklahoma where he washed dishes, cleaned rooms, made beds, spaded gardens, and clerked in a bookstore to earn his way to a BA degree in 1940. He then

¹⁶ Carl Albert Center Archives, The Hon. Fred Harris Collection, Box 20, Folder 42.

enrolled in Law School at O.U., where he was a senior when World War II erupted. Luther, like most of his classmates, went into the Armed Forces where he served in France, Germany and Austria with the 808th Tank Destroyer Bn.¹⁷

A strong back indeed. It can fairly be said they just don't make 'em like Luther Boyd Eubanks anymore.

¹⁷ Id.